



WORLD TRADE  
ORGANIZATION

WT/DS475/R

19 August 2016

(16-4447)

Page: 1/381

Original: English

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**RUSSIAN FEDERATION - MEASURES ON THE IMPORTATION OF LIVE  
PIGS, PORK AND OTHER PIG PRODUCTS FROM THE EUROPEAN UNION**

REPORT OF THE PANEL

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**TABLE OF CONTENTS**

<b>1</b>	<b>INTRODUCTION .....</b>	<b>32</b>
1.1	Complaint by the European Union .....	32
1.2	Panel establishment and composition .....	32
1.3	Panel proceedings .....	33
1.3.1	General .....	33
1.3.2	Working procedures concerning Strictly Confidential Information (SCI) .....	33
1.3.3	Arrangements for language interpretation .....	33
1.3.4	Consultation with experts and relevant international organizations .....	34
<b>2</b>	<b>FACTUAL ASPECTS .....</b>	<b>37</b>
2.1	The relevant disease: African swine fever .....	37
2.2	The measures at issue .....	38
2.3	Products at issue .....	39
2.4	Relevant international standards, guidelines, and recommendations .....	39
2.4.1	The OIE and its mandate .....	39
2.4.2	The OIE Terrestrial Animal Health Code (Terrestrial Code) .....	40
2.4.3	Relevant standards, guidelines or recommendations invoked by the parties .....	41
2.5	The parties' domestic ASF situations .....	41
2.5.1	The European Union .....	41
2.5.2	Russia .....	41
<b>3</b>	<b>PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS.....</b>	<b>41</b>
<b>4</b>	<b>ARGUMENTS OF THE PARTIES.....</b>	<b>42</b>
<b>5</b>	<b>ARGUMENTS OF THE THIRD PARTIES.....</b>	<b>42</b>
<b>6</b>	<b>INTERIM REVIEW.....</b>	<b>42</b>
6.1	Introduction .....	42
6.2	The purpose and scope of the interim review.....	43
6.3	Introduction of new evidence on the record at the interim review stage.....	43
6.4	Whether the measures in respect of the imports from Latvia and Estonia fall within the Panel's terms of reference.....	45
6.5	Temporal framework for the Panel's assessment.....	46
6.6	Claims under Articles 6.1, 6.2, and 6.3 of the SPS Agreement (relating to the EU-wide ban) .....	46
6.7	Claims under Articles 2.2, 5.1, 5.2, and 5.7 of the SPS Agreement (relating to the EU-wide ban) .....	47
6.8	Claims under Articles 6.1, 6.2, and 6.3 of the SPS Agreement (relating to the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland).....	47
6.9	Whether Russia's measures are inconsistent with Article 2.3 of the SPS Agreement .....	50
6.10	Panel's conclusions and recommendations .....	50

6.11	Appendix 1 to the Panel Report.....	51
<b>7</b>	<b>FINDINGS</b> .....	<b>51</b>
7.1	Procedural issues .....	51
7.1.1	Arrangements for simultaneous interpretation .....	51
7.1.2	Industry representative in a Member's delegation .....	54
7.2	Order of analysis .....	55
7.2.1	Main arguments of the parties .....	55
7.2.2	Main arguments of the third parties.....	56
7.2.3	Analysis by the Panel .....	56
7.2.4	Conclusion .....	56
7.3	Preliminary issues .....	57
7.3.1	Introduction .....	57
7.3.2	Whether the alleged EU-wide ban is a measure susceptible to challenge under the WTO dispute settlement mechanism .....	59
7.3.3	Whether Russia's terms of accession limit the Panel's assessment of the European Union's claims in respect of the alleged EU-wide ban.....	67
7.3.4	Whether the measures in respect of the imports from Latvia and Estonia fall within the Panel's terms of reference.....	75
7.3.5	Summary of the measures at issue in this dispute.....	85
7.3.6	Temporal framework for the Panel's assessment.....	86
7.4	Whether Russia's measures are within the scope of the SPS Agreement .....	88
7.4.1	Introduction .....	88
7.4.2	Main arguments of the parties .....	89
7.4.3	Main arguments of the third parties.....	90
7.4.4	Analysis by the Panel .....	90
7.4.5	Conclusion .....	99
7.5	Claims relating to the EU-wide ban .....	100
7.5.1	Whether the EU-wide ban is "based on" relevant international standards (Claims under Articles 3.1 of the SPS Agreement) .....	100
7.5.2	Claims under Articles 6.1, 6.2, and 6.3 of the SPS Agreement .....	123
7.5.3	Claims under Articles 3.1 of the SPS Agreement (continued) .....	159
7.5.4	Claims under Article 8 and Annex C of the SPS Agreement.....	160
7.5.5	Claims under Articles 2.2, 5.1, 5.2, and 5.7 of the SPS Agreement .....	182
7.5.6	Claims under Articles 5.3, 5.4, 5.6, and 2.2 of the SPS Agreement .....	207
7.6	Claims relating to the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.....	228
7.6.1	Claims under Articles 3.1 and 3.2 of the SPS Agreement.....	228
7.6.2	Claims under Articles 6.1, 6.2, and 6.3 of the SPS Agreement .....	243
7.6.3	Whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are "based on" the relevant international standards under Article 3.1 of the SPS Agreement (continued) .....	271
7.6.4	Claims under Article 8 and Annex C of the SPS Agreement.....	272
7.6.5	Claims under Articles 2.2, 5.1, 5.2, and 5.7 of the SPS Agreement .....	286

---

7.6.6	Claims under Articles 5.3, 5.4, 5.6, and 2.2 of the SPS Agreement .....	301
7.7	Claims under Articles 2.3 and 5.5 of the SPS Agreement.....	310
7.7.1	Introduction .....	310
7.7.2	Relationship between Articles 2.3 and 5.5 of the SPS Agreement and order of analysis .....	311
7.7.3	Whether Russia's measures are inconsistent with Article 2.3 of the SPS Agreement .....	312
7.7.4	European Union's claim pursuant to Article 5.5 of the SPS Agreement .....	333
7.8	Claims under Article 7 and Annex B of the SPS Agreement.....	336
7.8.1	Main arguments of the parties .....	336
7.8.2	Analysis by the Panel .....	337
7.8.3	Summary of conclusions in respect of the challenged measures .....	343
<b>8</b>	<b>CONCLUSIONS AND RECOMMENDATIONS .....</b>	<b>343</b>
<b>9</b>	<b>APPENDIX 1 CHRONOLOGY OF EXCHANGES OF INFORMATION BETWEEN THE EUROPEAN UNION AND RUSSIA FROM 24 JANUARY 2014 .....</b>	<b>348</b>
<b>10</b>	<b>APPENDIX 2 DESCRIPTION OF COUNCIL DIRECTIVE 2002/60/EC.....</b>	<b>376</b>

**LIST OF ANNEXES****ANNEX A****WORKING PROCEDURES OF THE PANEL**

<b>Contents</b>		<b>Page</b>
Annex A-1	Working Procedures of the Panel	A-2
Annex A-2	Additional Working Procedures concerning strictly confidential information (SCI)	A-7
Annex A-3	Additional Working Procedures for Panel's expert consultation	A-9

**ANNEX B****ARGUMENTS OF THE PARTIES***EUROPEAN UNION*

<b>Contents</b>		<b>Page</b>
Annex B-1	First part of integrated executive summary of the arguments of the European Union	B-2
Annex B-2	Second part of the integrated executive summary of the arguments of the European Union	B-17

*RUSSIAN FEDERATION*

<b>Contents</b>		<b>Page</b>
Annex B-3	First part of the integrated executive summary of the arguments of the Russian Federation	B-33
Annex B-4	Second part of the integrated executive summary of the arguments of the Russian Federation	B-44

**ANNEX C****ARGUMENTS OF THE THIRD PARTIES**

<b>Contents</b>		<b>Page</b>
Annex C-1	Integrated executive summary of the arguments of Australia	C-2
Annex C-2	Integrated executive summary of the arguments of Brazil	C-4
Annex C-3	Integrated executive summary of the arguments of India	C-8
Annex C-4	Integrated executive summary of the arguments of Japan	C-11
Annex C-5	Integrated executive summary of the arguments of Norway	C-13
Annex C-6	Integrated executive summary of the arguments of the United States	C-17

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Short Title	Full Case Title and Citation
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Thailand – H-Beams	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , <a href="#">WT/DS122/R</a> , adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
Turkey – Textiles	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , <a href="#">WT/DS34/AB/R</a> , adopted 19 November 1999, DSR 1999:VI, p. 2345
US – 1916 Act (Japan)	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by Japan</i> , <a href="#">WT/DS162/R</a> and Add.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4831
US – Animals	Panel Report, <i>United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina</i> , <a href="#">WT/DS447/R</a> and Add.1, adopted 31 August 2015
US – Anti-Dumping and Countervailing Duties (China)	Panel Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , <a href="#">WT/DS379/R</a> , adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
US – Carbon Steel	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , <a href="#">WT/DS213/AB/R</a> and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Clove Cigarettes	Panel Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , <a href="#">WT/DS406/R</a> , adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012: XI, p. 5865
US – Continued Suspension	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , <a href="#">WT/DS320/AB/R</a> , adopted 14 November 2008, DSR 2008:X, p. 3507
US – Continued Suspension	Panel Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , <a href="#">WT/DS320/R</a> and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R, DSR 2008:XI, p. 3891
US – COOL	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , <a href="#">WT/DS384/R</a> / <a href="#">WT/DS386/R</a> , adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , <a href="#">WT/DS244/AB/R</a> , adopted 9 January 2004, DSR 2004:I, p. 3

Short Title	Full Case Title and Citation
US – Cotton Yarn	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , <a href="#">WT/DS192/AB/R</a> , adopted 5 November 2001, DSR 2001:XII, p. 6027
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , <a href="#">WT/DS449/AB/R</a> and Corr.1, adopted 22 July 2014
US – Gambling	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , <a href="#">WT/DS285/AB/R</a> , adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Gasoline	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , <a href="#">WT/DS2/AB/R</a> , adopted 20 May 1996, DSR 1996:I, p. 3
US – Hot-Rolled Steel	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , <a href="#">WT/DS184/AB/R</a> , adopted 23 August 2001, DSR 2001:X, p. 4697
US – Poultry (China)	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , <a href="#">WT/DS392/R</a> , adopted 25 October 2010, DSR 2010:V, p. 1909
US – Shrimp	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , <a href="#">WT/DS58/AB/R</a> , adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Shrimp II (Viet Nam)	Panel Report, <i>United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam</i> , <a href="#">WT/DS429/R</a> and Add.1, adopted 22 April 2015, upheld by Appellate Body Report <a href="#">WT/DS429/AB/R</a>
US – Upland Cotton	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , <a href="#">WT/DS267/AB/R</a> , adopted 21 March 2005, DSR 2005:I, p. 3
US – Wool Shirts and Blouses	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , <a href="#">WT/DS33/AB/R</a> , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (EC)	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , <a href="#">WT/DS294/AB/R</a> , adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417

**TABLE OF EXHIBITS CITED IN THIS REPORT\***

No.	Full Title	Short Title (for frequently cited exhibits, where applicable)
EU-1	OIE Terrestrial Code, 23rd edition, introductory note.	Terrestrial Code
EU-2	User's Guide, OIE Terrestrial Code	Terrestrial Code User Guide
EU-3	Chapter 15.1., African Swine Fever, OIE Terrestrial Code	
EU-5	Chapter 2.8.1., African Swine Fever, OIE Terrestrial Manual	
EU-6	G/SPS/N/RUS/46 (Ukraine)	G/SPS/N/RUS/46
EU-7	G/SPS/N/RUS/48 (Lithuania)	G/SPS/N/RUS/48
EU-8	G/SPS/N/RUS/48/Add.1 (Lithuania)	G/SPS/N/RUS/48/Add.1
EU-9	G/SPS/N/RUS/49 (Poland)	G/SPS/N/RUS/49
EU-10	G/SPS/N/RUS/48/Add.2 (Lithuania)	G/SPS/N/RUS/48/Add.2
EU-11	G/SPS/N/RUS/49/Add.1 (Poland)	G/SPS/N/RUS/49/Add.1
EU-12	G/SPS/N/RUS/64 (Latvia)	G/SPS/N/RUS/64
EU-13	G/SPS/N/RUS/76 (Estonia)	G/SPS/N/RUS/76
EU-14.a.	a. (RU) Letter from Russia to the EU of 29 January 2014, FS-SA-8/1277	Russia's letter to the European Union of 29 January 2014, FS-SA-8/1277
EU-14.b.	b. (EN) translation	
EU-15.a.	a. (RU) Letter from Russia to the EU of 14 February 2014, HΦ-12-26/1650	Russia's letter to the European Union of 14 February 2014, FS- HΦ-12-26/1650
EU-15.b.	b. (EN) translation	
EU-16.a.	a. (RU) FSVPS announcement of 6 February 2014 ( <a href="http://fsvps.ru/fsvps/news/8935.html">http://fsvps.ru/fsvps/news/8935.html</a> )	Russian FSVPS announcement of 6 February 2014
EU-16.b.	b. (EN) translation	
EU-17.a.	a. (RU) List of returned consignments, Annex 2 to the Letter from Russia to the EU of 6 August 2014, FS-EN-7/14507 (irrelevant or confidential information has been redacted)	List of returned consignments
EU-17.b.	b. (EN) translation	
EU-18.a.	a. (RU) Instructions on Measures for the Prevention and Eradication of African Swine Fever, approved by the Chief Directorate of Veterinary Medicine at the USSR Ministry of Agriculture on 21 November 1980	Russian ASF prevention and eradication measures of 21 November 1980
EU-18.b.	b. (EN) translation	
EU-21	African Swine Fever from 2007 to 2014, compilation by the European Commission of maps from OIE	
EU-23	African Swine Fever spread in the Russian Federation and the risk for the region, FAO, December 2009	
EU-24	Scientific Opinion on African Swine Fever, EFSA Panel on Animal Health and Welfare (AHAW), EFSA Journal 2010 8(3)1556	EFSA Scientific Opinion on ASF, EFSA Journal 2010 8(3)1556
EU-25	Scientific Report of EFSA, Evaluation of possible mitigation measures to prevent introduction and spread of African swine fever virus through wild boar, EFSA Journal 2014 12(3)3616	Scientific Report of EFSA on ASF, EFSA Journal 2014 12(3)3616
EU-26	Scientific Opinion on African Swine Fever, EFSA Panel on Animal Health and Welfare (AHAW), EFSA Journal 2014 12(4): 3628	EFSA Scientific Opinion on African Swine Fever, EFSA Journal 2014 12(4): 3628

\* Exhibits cited in Appendices 1 and 2 below are not included in this table.

No.	Full Title	Short Title (for frequently cited exhibits, where applicable)
EU-27	ASF diagnosis and molecular characterization Lithuania, EURL-ASF, CISA-INIA, 1317, 28/10/2014	
EU-28	ASF diagnosis and molecular characterization Poland, EURL-ASF, CISA-INIA, 1145, 30/09/2014	ASF diagnosis and molecular characterization Poland, EURL-ASF, CISA-INIA, 1145, 30/09/2014
EU-29	ASF diagnosis and molecular characterization Latvia, EURL-ASF, CISA-INIA, 1232, 17/10/2014	ASF diagnosis and molecular characterization Latvia, EURL-ASF, CISA-INIA, 1232, 17/10/2014
EU-30	ASF diagnosis and molecular characterization Estonia, EURL-ASF, CISA-INIA, 1375, 7/11/2014	ASF diagnosis and molecular characterization Estonia, EURL-ASF, CISA-INIA, 1375, 7/11/2014
EU-31	Council Directive 2002/60/EC of 27 June 2002 laying down specific provisions for the control of African swine fever and amending Directive 92/119/EEC as regards Teschen disease and African swine fever, OJ L 192, p.27	Council Directive of 27 June 2002, 2002/60/EC
EU-32	Commission Decision 2003/422/EC of 26 May 2003 approving an African swine fever diagnostic manual, OJ L 143, p.35	
EU-33	Commission Implementing Decision 2014/43/EU of 27 January 2014 concerning certain interim protective measures relating to African swine fever in Lithuania, OJ L 26, p.44	
EU-34	Commission Implementing Decision 2014/93/EU of 14 February 2014 concerning certain protective measures relating to African swine fever in Lithuania, OJ L 46, p.20	
EU-35	Commission Implementing Decision 2014/100/EU of 18 February 2014 concerning certain interim protective measures relating to African swine fever in Poland, OJ L 50, p.35	
EU-36	Commission Implementing Decision 2014/134/EU of 12 March 2014 concerning certain protective measures relating to African swine fever in Poland, OJ L 74, p.63	
EU-37	Commission Implementing Decision 2014/178/EU of 27 March 2014 concerning animal health control measures relating to African swine fever in certain Member States, OJ L 95, p.47	Commission Implementing Decision of 27 March 2014, 2014/178/EU
EU-38	Commission Implementing Decision 2014/417/EU of 27 June 2014 concerning certain interim protective measures relating to African swine fever in Latvia, OJ L 192, p.66	
EU-39	Commission Implementing Decision 2014/448/EU of 8 July 2014 amending Implementing Decision 2014/178/EU as regards African swine fever in Latvia, OJ L 201, p.31	Commission Implementing Decision of 8 July 2014, 2014/448/EU
EU-40	Commission Implementing Decision 2014/502/EU of 24 July 2014 concerning certain interim protective measures relating to African swine fever in Lithuania, OJ L 222, p.20	Commission Implementing Decision of 24 July 2014, 2014/502/EU
EU-41	Commission Implementing Decision 2014/513/EU of 31 July 2014 amending the annex to Implementing Decision 2014/178/EU as regards the areas in Lithuania, Latvia and Estonia under restriction for African swine fever, OJ L 231, p.7	
EU-42	Commission Implementing Decision 2014/530/EU of 13 August 2014 concerning certain interim protective measures relating to African swine fever in Latvia, OJ L 242, p.31	

No.	Full Title	Short Title (for frequently cited exhibits, where applicable)
EU-43	Commission Implementing Decision 2014/637/EU of 28 August 2014 amending the Annex to Implementing Decision 2014/178/EU as regards the areas under restriction for African swine fever in certain Member States, OJ L 259, p.23	
EU-44	Commission Implementing Decision 2014/709/EU of 9 October 2014 concerning animal health control measures relating to African swine fever in certain Member States and repealing Implementing Decision 2014/178/EU, OJ L 295, p.63	
EU-50	Commission Implementing Decision 2014/442/EU of 7 July 2014 approving the plans for the eradication of African swine fever in feral pigs in certain areas of Lithuania and Poland, OJ L 200, p. 21	
EU-51	Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Committee on Sanitary and Phytosanitary Measures, G/SPS/48	SPS Committee Guidelines on the Implementation of Article 6
EU-52	Veterinary certificate for piglets for fattening, being exported from the EU into the Russian Federation, 11/08/2006	Veterinary certificate for piglets for fattening, 11/08/2006
EU-53	Veterinary certificate for pigs for breeding, exported from the EU into the Russian Federation, 11/08/2006	Veterinary certificate for pigs for breeding, 11/08/2006
EU-54	Veterinary certificate for pork meat and raw meat preparations, exported from the EU into the Russian Federation, 11/08/2006	Veterinary certificate for pork meat and raw meat preparations, 11/08/2006
EU-55	Veterinary certificate for slaughter pigs, exported from the EU to the Russian Federation, 16/12/2009	Veterinary certificate for slaughter pigs, 16/12/2009
EU-56	Veterinary certificate for finished food products, containing raw material of animal origin, exported from the EU to the Russian Federation, 24/05/2011	Veterinary certificate for finished food products, containing raw material of animal origin, 24/05/2011
EU-57	Veterinary certificate for canned meat, salamis and other ready for consumption meat products, exported from the EU to the Russian Federation, 24/05/2011	Veterinary certificate for canned meat, salamis and other ready for consumption meat products, 24/05/2011
EU-61	Memorandum 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 compartmentalization in the veterinary field of 4 April 2006	European Union-Russia Memorandum of 4 April 2006 concerning principles of zoning and compartmentalization in the veterinary field
EU-62	Letter of 29 January 2014 from the EU to Russia and its Annex (pp. 1-5), ARES(2014)209377, SANCO G7/RF/mh(2014)219959	European Union's letter to Russia of 29 January 2014, ARES(2014)209377, SANCO G7/RF/mh(2014)219959
EU-63	Excel spreadsheet on Poland, Annex to the Letter of 29 January 2014 (pp. 6-8)	
EU-64	Letter of 31 January 2014 from the EU to Russia, ARES(2014)226547, SANCO G7/JP/mh(2014)241111, including (1) Annex to the Veterinary certificate for pork meat and raw meat preparations, exported from the EU into the Russian Federation, (2) Annex to the Veterinary certificate for piglets for fattening, exported from the EU into the Russian Federation, (3) Annex to the Veterinary certificate for pigs for breeding, exported from the EU into the Russian Federation and (4) Annex to the Veterinary certificate for slaughter pigs, exported from the EU into the Russian Federation	European Union's letter to Russia of 31 January 2014, ARES(2014)226547, SANCO G7/JP/mh(2014)241111

No.	Full Title	Short Title (for frequently cited exhibits, where applicable)
EU-65	Letter of 7 February 2014 from the EU to Russia, and its Annexes I-IV, ARES(2014)304571, SANCO/G7/DP/tb(2014)328578	European Union's letter to Russia of 7 February 2014, ARES(2014)304571, SANCO/G7/DP/tb(2014)328578
EU-66	African swine fever in Lithuania, presentation by the State Food and Veterinary Service of Lithuania, 6–7 February 2014	
EU-67	Protective measures introduced in Poland against the African swine fever threat, General Veterinary Inspectorate of Poland, 6–7 February 2014	
EU-68	Protective measures against African swine fever in Latvia, 6 February 2014	
EU-69	Information on the implementation of protective measures against African swine fever in Estonia, 7 February 2014	
EU-70.a.	a. (LT) Order concerning Order No B1-31 of 20 January 2014 of the Director of the State Food and Veterinary Service on Measures to Prevent the spread of African Swine Fever No B1-48 of 24 January 2014	
EU-70.b.	b. (EN) translation	
EU-71.a.	a. (LT) Order on Measures to Control African Swine Fever No B1-49 of 24 January 2014	
EU-71.b.	b. (EN) translation	
EU-72.a.	a. (LT) Order on the Slaughter of Pigs as Part of the Measures to Prevent the Spread of African Swine Fever, 30 January 2014, No B1-60	
EU-72.b.	b. (EN) translation	
EU-74.a.	a. (LT) Contingency Plan for Classical Swine Fever (CSF) and African Swine Fever (ASF) of Lithuania, 30 December 2011	
EU-74.b.	b. (EN) translation	
EU-75.a.	a. (PL) Polish Veterinary African Swine Fever Contingency Plan, January 2014	
EU-75.b.	b. (EN) translation	
EU-76.a.	a. (LV) Plan for Combating Very Dangerous Infectious Animal Diseases of the Republic of Latvia, 28 February 2013	
EU-76.b.	b. (EN) translation	
EU-77.a.	a. (EE) Code of Conduct for Control of African Swine Fever of Estonia, 11 April 2013	
EU-77.b.	b. (EN) translation	
EU-79	Final Report of an Audit carried out in Lithuania from 27 February to 2 March 2012 in order to Evaluate the Actions Taken during Recent Outbreaks of Classical Swine Fever and to Assess Contingency Planning of Epizootic Disease, SANCO 2012-6386;	
EU-80	Final Report of an Audit carried out in Latvia from 4 to 8 March 2013 in order to Evaluate the Implementation of Contingency Plans in relation to Animal Health, including provisions on the Protection of Animals during Depopulation for Disease Control, SANCO 2013-6777	
EU-81	Final Report of a Specific Audit carried out in Latvia from 15 to 19 June 2009 in order to Evaluate the Contingency Plans for Epizootic Diseases and the Eradication Programme for Rabies in the context of a General Audit, SANCO 2009-8259	

No.	Full Title	Short Title (for frequently cited exhibits, where applicable)
EU-82	Final Report of an Audit carried out in Estonia from 15 to 19 April 2013 in order to Evaluate the Implementation of Contingency Plans in relation to Animal Health, including provisions on the Protection of Animals during Depopulation for Disease Control, SANCO 2013- 6781	
EU-83	Final Report of a Specific Audit carried out in Poland from 7 to 16 April 2008 in order to Evaluate the Contingency Plans for Epizootic Diseases (in particular Foot and Mouth Disease and Classical Swine Fever) and to Follow-up Surveillance Activities for Bluetongue, SANCO 2008-7789	
EU-84.a.	a. (RU) Letter of 5 February 2014 from Russia to the EU, FS-SD 8/1640	Russia's letter to the European Union of 5 February 2014, FS-SD 8/1640
EU-84.b.	b. (EN) translation	
EU-85	Letter of 14 February 2014 from the EU to Russia, ARES(2014)398065, SANCO/G7/PD(2014)428299	
EU-86	Letter of 6 March 2014 from the EU to Russia, ARES(2014)601346, SANCO/G7/PD/mh/(2014)630598	European Union's letter to Russia of 6 March 2014, ARES(2014)601346, SANCO/G7/PD/mh/(2014)630598
EU-87	Letter of 6 March 2014 from the EU to Russia, ARES(2014)605187, SANCO G7/PD/mh (2014)640752	
EU-88	Working Document on EU preventive measures for ASF, Annex to the Letter ARES(2014)605187	European Union Working Document on ASF, ARES(2014)605187
EU-89	Protocol of the technical meeting-consultation between the EU and the FGBI ARRIAH, FGBI VGNKI experts as well as Rosselkhoznadzor representatives which was held at the FGBI Federal Center for Animal Health, Vladimir, 7 March 2014	Protocol of technical meeting between the European Union and Russia of 7 March 2014
EU-90.a.	a. (RU) Letter of 12 March 2014 from Russia to the EU, FS-SD-4/3620	Russia's letter to the European Union of 12 March 2014, FS-SD-4/3620
EU-90.b.	b. (EN) translation	
EU-91	Letter of 13 March 2014 from the EU to Russia, including a table with the EU replies the topics mentioned in the letter FS-SD-4/3620 from Russia, ARES(2014)709435, SANCO/G7/PD/mh(2014)745829	European Union's letter to Russia of 13 March 2014, ARES(2014)709435, SANCO/G7/PD/mh(2014)745829
EU-92	Letter of 21 May 2014 from the EU to Russia, including its 6 Annexes answering specific questions, ARES(2014)1658269, SANCO/G6/AB(2014)1782253	European Union's letter to Russia of 21 May 2014, ARES(2014)1658269, SANCO/G6/AB(2014)1782253
EU-93.a.	a. (RU) Letter dated 16 May 2014 from Russia to the EU (received on 4 June 2014), FS-EN-8/7999	Russia's letter to the European Union of 16 May 2014, FS-EN-8/7999
EU-93.b.	b. (EN) translation	
EU-94	Letter of 13 June 2014 from the EU to Russia, ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505	European Union's letter to Russia of 13 June 2014, ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505
EU-95	African swine fever in Lithuania, State Food and Veterinary Service, Lithuania, 21 August 2014	
EU-96	African swine fever in Poland, Update on epidemiological situation and implemented actions, Brussels, 3-4 November 2014	
EU-97	African swine fever in Latvia, Standing Committee on Plants, Animals, Food and Feed meeting, Brussels, 3-4 November 2014	
EU-98	African swine fever in Estonia, Standing Committee on Plants, Animals, Food and Feed, Brussels, 3-4 November 2014	

No.	Full Title	Short Title (for frequently cited exhibits, where applicable)
EU-100	Letter of 27 January 2014 lifting the ASF related restrictions with respect to the Mogilev Oblast, Belarus, FR-EN-8/1093	
EU-101	Eradication plan of African swine fever in feral pigs in certain areas of Lithuania (communicated to Russia on 24 March 2015)	
EU-102	Eradication plan of African swine fever in feral pigs in certain areas of Poland (communicated to Russia on 24 March 2015)	
EU-103	Commission Implementing Decision (EU) 2015/570 of 7 April 2015 approving the plans for the eradication of African swine fever in feral pigs in certain areas of Estonia and Latvia, OJ L93, p.80	
EU-104	Eurostat, trade statistics on exports of meat of swine, fresh, chilled or frozen from Poland to US and Canada	
EU-107	Commission Implementing Decision 2014/236/EU of 24 April 2014 concerning a Union financial contribution towards surveillance and other emergency measures implemented in Estonia, Latvia, Lithuania and Poland against African swine fever, OJ L125, p.86	
EU-108	Standing Group of Experts on African swine fever in the Baltic and Eastern Europe region under the GF-TADs umbrella, First meeting (SGE1), Minsk, Belarus, December 1- 2 2014	
EU-109	EU Veterinary Emergency Team, Vilnius, 8 – 10 October 2014	
EU-114	State Food and Veterinary Service, Lithuania, Protective measures against ASF in Lithuania, Brussels, 07.10.2013	
EU-115	Sistemas de Circulación Ecológica (SICIREC), definitions, corridors	
EU-116	Eradication plan for African swine fever in wild boar in Latvia	
EU-117	Plan for the eradication of African swine fever from feral pig population in Estonia	
EU-118	Detailed account of the outbreaks in domestic pigs and notification of cases in wild boar in the EU, as notified to the OIE	ASF cases in the European Union notified to the OIE
EU-119	Chronological maps of cases and outbreaks	
EU-120	Map with the three clusters of outbreaks outside the areas considered infected	
EU-121	Non-exhaustive statistics of exports from non-affected areas in Poland to other countries	
EU-125	Better Training For Safer Food, contingency planning	
EU-126	Audit of the Lithuanian contingency planning system	
EU-129	Letter of 4 November 2014, Ref. Ares(2014)3660850	
EU-130	Rosell, C., Navàs, F. & Romero, S., 2012. Reproduction of wild boar in a cropland and coastal wetland area: implications for management. Animal Biodiversity and Conservation, 35.2: 209–217	
EU-132	Communication of 24 January 2014: African swine fever (ASF) in two wild boars in Lithuania, in Salcininkai and Varena Regions, at the border with Belarus	
EU-133	Communication of 27 January 2014: African swine fever (ASF) in Lithuania. Interim protective measures	



No.	Full Title	Short Title (for frequently cited exhibits, where applicable)
EU-134	Communication of 30 January 2014: African swine fever (ASF) in Lithuania. Interim protective measures (adoption of implementing decision)	
EU-135	Communication of 6 February 2014: African swine fever (ASF) in Lithuania. Commission Implementing Decision concerning certain protective measures relating to African swine fever in Lithuania (Committee approval of implementing decision)	
EU-136	Communication of 17 February 2014: African swine fever (ASF) confirmed in Poland in a wild boar found 900 meters from the border with Belarus	
EU-137	Communication of 18 February 2014: African swine fever (ASF) in Lithuania (adoption of implementing decision)	
EU-138	Communication of 18 February 2014: African swine fever (ASF) in Poland – Information on infected area	
EU-139	Communication of 18 February 2014: African swine fever (ASF) in Poland. Interim protective measures	
EU-140	Communication of 18 February 2014: African swine fever (ASF) in Poland. Adoption of Interim protective measures	
EU-141	Communication of 20 February 2014: African swine fever (ASF) in Poland (adoption of implementing decision)	
EU-142	Communication of 26 February 2014: African swine fever (ASF) in Poland. Measures put in place in the infected area	
EU-143	Communication of 5 March 2014: African swine fever (ASF) in Lithuania and Poland – Presentations on the situation	
EU-144	Communication of 5 March 2014: African swine fever (ASF) in Poland (Committee approval of implementing decision)	
EU-145	Communication of 17 March 2014: African swine fever (ASF) in Poland (Publication of implementing decision)	
EU-146	Communication of 27 March 2014: Adoption of control measures relating to African swine fever in certain Member States	
EU-147	Communication of 26 June 2014: African swine fever (ASF) detection in Latvia	
EU-148	Communication of 27 June 2014: African swine fever (ASF) in Latvia – Adoption of interim protective measures	
EU-149	Commission Regulation (EU) No 142/2011 of 25 February 2011 implementing Regulation (EC) No 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive, OJ L 54, p.1	
EU-150	Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation), OJ L 300, p.1	

No.	Full Title	Short Title (for frequently cited exhibits, where applicable)
EU-151	Maps with respect to domestic pigs in the EU	
EU-152	Follow-up report No.6, Reference OIE: 15045, Report Date: 31/03/2014, Country: Poland	
EU-153	Follow-up report No.34, Reference OIE: 17579, Report Date: 22/04/2015, Country: Latvia	
EU-154	Follow-up report No.41, Reference OIE : 17590, Report Date: 24/04/2015, Country : Lithuania	
EU-155	Follow-up report No.43, Reference OIE : 17604, Report Date: 28/04/2015, Country: Estonia	
EU-156	Follow-up report No.48, Reference OIE : 17628, Report Date: 29/04/2015, Country: Poland	
EU-157	Veterinary certificate for the export of beef meat with bones from the EU to the Russian Federation in force in 2011	
EU-158.a.	a. (RU) Russian instruction FS-EN-2/11554 of 5 September 2011	
EU-158.b.	b. (EN) translation	
EU-159	Certificate for the export of live poultry and hatching eggs from Canada to the Russian Federation	
EU-160.a.	a. (RU) Russian instruction FS-EN-8/6139 of 15 April 2015	
EU-160.b.	b. (EN) translation	
EU-161.a.	a. (RU) Instructions of Rosselkhoznadzor N° FS-SA-7/1275, of 29 January 2014	Russia's instructions of 29 January 2014, FS-SA-7/1275
EU-161.b.	b. (EN) translation	
EU-162.a.	a. (RU) Letter of 5 February 2014 FS-EN-8/1642	Russia's letter to the European Union of 5 February 2014, FS-EN-8/1642
EU-162.b.	b. (EN) translation	
EU-165	Press release, Russian Federal Service for Veterinary Supervision, 2 August 2012 ( <a href="http://www.fsvps.ru/fsvps/news/5049.html">http://www.fsvps.ru/fsvps/news/5049.html</a> )	
EU-167.a.	a. (RU) Letter of 18 February 2015 from Russia to the EU	
EU-167.b.	b. (EN) translation	
EU-168.a.	a. (RU) Letter of the Russian Federal Service for Veterinary and Phytosanitary Supervision No. FS-EN-8/5081, of 2 April 2014	Russia's letter of instruction of 2 April 2014, FS-EN-8/5081
EU-168.b.	b. (EN) translation	
EU-169.a.	a. (RU) Letter of the Russian Federal Service for Veterinary and Phytosanitary Supervision No. FS-NF-8/11315, of 27 June 2014	Russia's letter of instruction of 27 June 2014, FS-NF-8/11315
EU-169.b.	b. (EN) translation	
EU-171.a.	a. (RU) Letter from the Russian Federation to the European Union FS-EN-7/14507, of 6 August 2014	Russia's letter to the European Union of 6 August 2014, FS-EN-7/14507
EU-171.b.	b. (EN) translation	
EU-172	Letter of 27 January 2014 from DG SANCO to the authorities of the Russian Federation, Ref. Ares(2014)188318	

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EU-173	Letter of DG SANCO of 10 March 2014 (ref SANCO/G7/PD/mh(2014)6591200)	
EU-175	Letter of DG SANCO of 20 February 2014 (ref. SANCO/G7/PD/mh (2014) 450287)	
EU-177	Letter of DG SANCO of 26 September 2014, Ares (2014) 3176148	
EU-186	Communication of 7 July 2014: African swine fever (ASF) in wild boar in Poland in the restricted area listed in Part II of the Annex to Decision 2014/178/EU	
EU-187	Communication of 22 July 2014: African Swine Fever in Latvia	
EU-203	ASF epidemiological situation in Estonia– update, Standing Committee on Plants, Animals, Food and Feed, Brussels, 9-10 September 2015	
EU-206	Communication of 1 July 2014: African Swine fever (ASF) in domestic pigs and in wild boar in Latvia Commission Implementing Decision 2014/417/EU of 27 June 2014	
EU-207	Communication of 8 July 2014: Adoption of Commission Implementing Decision amending Decision 2014/178/EU as regards African swine fever in Latvia	
EU-208	Communication of 8 July 2014: African swine fever (ASF) in wild boar in Poland in the restricted area listed in Part II of the Annex to Decision 2014/178/EU	
EU-209	Communication of 9 July 2014: Epidemiological update and map displaying regionalisation set out in Decision 2014/178/EU, as last amended, as regards African swine fever	
EU-210	Communication of 10 July 2014: Publication of Decision amending Commission Implementing Decision 2014/178/EU as regards African swine fever regionalisation	
EU-211	Communication of 11 July 2014: African swine fever (ASF) in wild boar in Poland in the restricted area listed in Part II of the Annex to Decision 2014/178/EU	
EU-212	Communication of 14 July 2014: African swine fever (ASF) in Latvia in the restricted area listed in Part II of the Annex to Decision 2014/178/EU	
EU-214	Annotated annex to the letter of 7 February 2014, with references to the EU exhibit numbers corresponding to each document	
EU-215	Pigs statistics in the EU	
EU-217	Summary of FVO webpages concerning audits in Finland, Portugal, the Netherlands and Estonia	
EU-218	Final report of an audit carried out in Finland, 3-7 September 2012	
EU-219	Competent Authority Comments received on 17 January 2013 (Finland)	
EU-220	Action plan received 17 January 2013 (Finland)	
EU-221	Annex 2, Summary of legal requirements related to contingency planning for epizootic disease (Finland)	
EU-222	Final report of an audit carried out in Portugal, 24-28 September 2012	
EU-	a. (PR) Competent Authority Comments received on	

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223.a	16 January 2013 (Portugal)	
EU-223.b	b. (EN) Translation	
EU-224	Action plan received on 16 January 2013 (Portugal)	
EU-225	Annex 2 Summary of legal requirements to contingency planning for epizootic disease (Portugal)	
EU-226	Final report of an audit carried out in the Netherlands, 28 January-6 February 2013	
EU-227	Annex 2: Summary of Legal Requirements for Contingency Plans for Epizootic Disease Control (the Netherlands)	
EU-228	Competent Authority comments received on 16 April 2013 (the Netherlands)	
EU-229	Response of the competent authorities of the Netherlands to the recommendations of draft report (DG SANCO 2013-6775), Action plan received on 16 April 2013	
EU-230	Corrigendum to the English version of the report reference number: DG(SANCO)/2013-6775 - FVO audit in the Netherlands carried out from 28 January to 6 February 2013	
EU-231	Final report of an audit carried out in Estonia, 15-19 April 2013	
EU-232.a	a. (EE) Competent Authority comments - Received on 16 August 2013 (Estonia)	
EU-232.b	b. (EN) Translation	
EU-233.a	a. (EE) Annex, Response of the Competent Authorities of Estonia to the recommendations of Report ref. DG(SANCO)/2013-6781-MR of an audit carried out from 15 to 19 April 2013	
EU-233.b	b. (EN) Translation	
EU-234	Annex, Response of the Competent Authorities of Lithuania to the recommendations of Report ref. DG(SANCO)/2012-6386-MR of an audit carried out from 27 February to 02 March 2012, Updated Action plan received on 9 October 2012	
EU-235	Response of the Competent Authorities of Lithuania to the recommendations of Report ref. DG(SANCO)/2012-6386-MR of an audit carried out from 27 February to 02 March 2012, Action plan received on 14 May 2012	
EU-236	Workshop, FVO Audits on Contingency Planning, 25-26 September 2013	
EU-237	Veterinary Control Programme on African swine fever Poland in 2014, 2013	
EU-238	Veterinary Control Programme on African swine fever early detection in Lithuania and Belarus in 2014, 2013	
EU-239	Veterinary Programme on African swine fever early detection in Latvia in 2014, 2013	
EU-240	Program of additional veterinary supervision measures in connection with the outbreaks of African swine fever in Russia and Belorussia in 2014 in Estonia, approved for 2013	

No.	Full Title	Short Title (for frequently cited exhibits, where applicable)
EU-241	Liste des ateliers de découpe de viandes d'animaux de boucherie agréés CE / Meat of domestic ungulates cutting plant, France	
EU-242	Liste des abattoirs d'ongulés domestiques agréés CE / Meat of domestic ungulates slaughterhouse, France	
EU-243	Presentation about swine, Committee for the Common Organisation of the Agricultural Markets, 23 January 2014	
EU-244	EU Pig Population, 2014	
EU-245	EU Pig Production, 2014	
EU-248.a	a. (LT) Lithuanian CA comments on Russia's inspection report, 2014	
EU-248.b	b. (EN) Translation	
EU-249.a	a. (PL) Polish CA comments on Russia's inspection report, 2014	
EU-249.b	b. (EN) Translation	
EU-250	Council Directive 2008/71/EC of 15 July 2008 on the identification and registration of pigs, OJ L 213, p. 31	
EU-253	Communication of 31 July 2014: African swine fever – modification of regionalisation through amendment of the Annex to Commission Implementing Decision 2014/178/EU	
EU-254	Communication of 4 August 2014: African swine fever – modification of regionalisation through amendment of Annex of Commission Implementing Decision 2014/178/EU – published in Official Journal	
EU-255	Communication of 7 August 2014: Update on African swine fever situation in Latvia - ASF FAX 047/2014	
EU-256	Communication of 7 August 2014: New update on African swine fever situation in Latvia - ASF FAX 048/2014	
EU-257	Communication of 12 August 2014: African Swine fever in wild boar in Latvia - Adoption of urgent interim protective measures - ASF FAX 052/2014	
EU-258	Communication of 13 August 2014: African swine fever in wild boar in Latvia - Urgent interim protective measures adopted - ASF FAX 055/2014	
EU-259	Communication of 14 August 2014: African swine fever in wild boar in Latvia - Urgent interim protective measures published - ASF FAX 056/2014	
EU-260	Communication of 22 August 2014: Commission Implementing Decision amending Decision 2014/178/EU as regards African swine fever regionalisation - ASF FAX 058/2014	
EU-261	Communication of 28 August 2014: Correction on date of publication - African swine fever – modification of regionalisation through amendment of Annex to Commission Implementing Decision 2014/178/EU - ASF FAX 060/2014	
EU-262	Communication of 1 September 2014: African swine fever (ASF) – Publication of revised regionalisation through amendment of Annex to Commission Implementing Decision 2014/178/EU - ASF FAX 062/2014	
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RUS-3	FAO, "African swine fever in the Russian Federation: risk factors for Europe and beyond", EMPRES Watch Vol. 28 (May 2013)	
RUS-4	OIE General Disease Information Sheets: African Swine Fever	
RUS-5	B.V. Boev et al., "The wild boar. Modelling and prognosis for cylvatic African swine fever"	
RUS-7	European Commission, "ASF: Biosecurity in the pig breeding sector", presentation by Mary Louise Penrith (30 October 2014)	
RUS-8	The IUCN Red List of Threatened Species, "Sus Scrofa"	
RUS-13	Plan of the measures to prevent spreading and eradicate a virus of African swine fever (ASF) in the territory of the Russian Federation, approved by the Chairman of the Interdepartmental Commission, Ministry of Agriculture of the Russian Federation, 25 September 2012	
RUS-15.a	a. (RU) Russian Federal Law on Veterinary Medicine, No. 4979-I, 14 May 1993	
RUS-15.b	b. (EN) Translation	
RUS-16.a	a. (RU) Russian Federal Decree on State Veterinary Supervision, No. 476, 5 June 2013	Russian Federal Decree on State Veterinary Supervision No. 476
RUS-16.b	b. (EN) Translation	
RUS-17.a	a. (RU) Russian Federal Government Decree on State Program for Agricultural Development and Regulation of Agricultural Commodities Markets for 2013-2020 , No. 717, 14 July 2012.	
RUS-17.b	b. (EN) Translation	
RUS-18.a	a. (RU) Order by the Russian Federal Ministry of Agriculture on the Confirmation of the List of Contagious Animal Diseases That Require Containment Measures, No. 476, 19 December 2011	
RUS-18.b	b. (EN) Translation	
RUS-19.a	a. (RU) Order by the Russian Federal Ministry of Agriculture on the Confirmation of the Rules for Veterinary Transport Certificates and the Order of Issuance of Veterinary Transport Certificates, No. 281, 17 July 2014	
RUS-19.b	b. (EN) Translation	
RUS-19.a (revised)	Order 281 of the Ministry of Agriculture of Russia, of July 17, 2014 "On approval of the Regulations for arrangement of work associated with electronic drawing up of accompanying veterinary documents" (registered at the RF Ministry of Justice on July 18, 2014, Reference 33161) (Exhibit RUS-19.a)	
RUS-20.a	a. (RU) Russian Federal Ministry of Natural Resources, Plan regarding the organizational and specific measures of monitoring, depopulation and reduction of migration activities of wild boar in the territory of the RF, including specially protected natural areas of regional and federal importance, 21 November 2013.	
RUS-20.b	b. (EN) Translation	

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RUS-21.b	b. (EN) Translation	
RUS-22.a	a. (RU) Order by the Russian Federal Ministry of Agriculture on Approval of Guidelines to Determine Animal Health Status of Pig Holdings and Organizations Involved in Pig Slaughter, Pork Product Processing and Storage, No. 258, 23 July 2010	Russian Federal Ministry of Agriculture Order No. 258
RUS-22.b	b. (EN) Translation	
RUS-25.a	a. (RU) Decision by the Customs Union Commission on the Use of Veterinary-Sanitary Measures in the Customs Union, No. 317, 18 June 2010	Customs Union Decision No. 317
RUS-25.b	b. (EN) Translation	
RUS-27	OIE WAHIS Interface, Follow-up report No. 31 – Report reference: 1, Reference OIE: 17147, Report Date: 06/02/2015, Country: Lithuania	
RUS-28.a	a. (RU) Letter from the Russian Veterinary Service to DG SANCO, FS-EN-8/1023, 25 January 2014	Russia's letter to the European Union of 25 January 2014, FS-EN-8/1023
RUS-28.b	b. (EN) Translation	
RUS-29.a	a. (RU) Letter from Russian Veterinary Service, FS-NV-8/2972, 27 February 2014	Letter from Russian Veterinary Service, FS-NV-8/2972, 27 February 2014
RUS-29.b	b. (EN) Translation	
RUS-30.a	a. (RU) Letter from DG SANCO to the Russian Veterinary Service, SANCO/G7/PD/mh(2014)542957, 26 February 2014	
RUS-30.b	b. (EN) Translation	
RUS-31	Assignment Report, S.A. Dankvert , Head of Russian Veterinary Service, in the city of Madrid (Spain) from 13 to 16 March 2014	
RUS-32	Glossary, OIE Terrestrial Code	Terrestrial Code Glossary
RUS-33	OIE WAHIS Interface, Follow-up report No. 38 – Reference OIE: 17218, Report Date: 18/02/2015, Country: Poland	
RUS-34	OIE WAHIS Interface, Follow-up report No. 27 – Reference OIE: 17211, Report Date: 17/02/2015, Country: Latvia	
RUS-35	OIE WAHIS Interface, Follow-up report No. 33 – Reference OIE: 17202, Report Date: 16/02/2015, Country: Estonia	
RUS-36	Commission Implementing Decision of 13 February 2015 (EU) 2015/251, OJ L 41, 17.2.2015, pp. 46-51	
RUS-37.a	a. (RU) Letter from the Russian Veterinary Service to DG SANCO, FS-NV-8/17431, 11 September 2014	Russia's letter to the European Union of 11 September 2014, FS-NV-8/17431
RUS-37.b	b. (EN) Translation	
RUS-39.a	a. (RU) Letter from the Russian Veterinary Service to DG SANCO, FS-EN-8/19574, 13 October 2014	
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RUS-41	Declaration of Lebedev	
RUS-42	Letter from the Russian Veterinary Service to Belarusian Veterinary Service, FS-EN-8/1089, 27 January 2014	
RUS-43	Letter from the Russian Veterinary Service to Belarusian Veterinary Service, FS-EN-8/1093, 27 January 2014	
RUS-53.a	a. (RU) Letter from the Russian Veterinary Service to DG SANCO, FS-EN-8/5095, 2 April 2014	Russia's letter to the European Union of 2 April 2014, FS-EN-8/5095
RUS-53.b	b. (EN) Translation	
RUS-54.a	a. (RU) Letter from the Russian Veterinary Service to DG SANCO, FS-EN-8/5084, 2 April 2014	Russia's letter to the European Union of 2 April 2014, FS-EN-8/5084
RUS-54.b	b. (EN) Translation	
RUS-55	Letter from DG SANCO to the Russian Veterinary Service, SANCO/G&/PD/mh (2014) 1114118, 4 April 2014	
RUS-56.a	a. (RU) Letter from DG SANCO to the Russian Veterinary Service, SANCO/G7/PD/mh (2014) 1055360, 4 April 2014	
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RUS-69	European Commission, Final Report of an Audit Carried out in Lithuania from 14 to 16 April 2014 in order to evaluate the implementation of animal health controls in relation to African Swine Fever (2014 EU Veterinary Audit Report for Lithuania, 14-16 April 2014)	
RUS-71.a	a. (RU) Russian Veterinary Service, Report of Deputy Director, E.A. Nepoklonov on the visit to the Republic of Lithuania (Vilnius) on 10-12 February 2014	
RUS-71.b	b. (EN) Translation	
RUS-73	OIE WAHIS Interface, ASF Poland, Follow-up report No. 1 (24/02/2014)	
RUS-78	OIE presentation on "The OIE International standards on CSF and ASF – recent developments", TAIEX Workshop on CSF and ASF, Vilnius, Lithuania, 3-4 September 2013	
RUS-84	Chapter 3.1, Veterinary Services, OIE Terrestrial Code	
RUS-85	Rosselkhoznadzor News, "New Meat Product Smuggling Channel from the EU Detected by Rosselkhoznadzor", 16 January 2014	
RUS-86	Pig Progress, "Russia: Measures needed to stop 'pork fraud'", 5 December 2014	
RUS-87	Rosselkhoznadzor News, "Working meeting between Head of Rosselkhoznadzor Sergey Dankvert and heads of national veterinary Services and Industrial Associations from Denmark, France, the Netherlands and Italy", 20 November 2014	
RUS-88	The Pig Site, "European Vets Support Swill Feeding Ban to Control African Swine Fever", 25 February 2014	
RUS-89	European Commission, Working Document SANCO/G2/SB (14.01.2014), "Guidelines on surveillance and control of African swine fever in feral pigs and preventative measures for pig	



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RUS-99	Morelle et al., "Towards understanding wild boar <i>Sus scrofa</i> movement: a synthetic movement ecology approach", <i>Mammal Review</i> , (2014)	
RUS-104	OIE WAHIS Interface, Estonia follow-up report No. 32 (9 February 2015)	
RUS-105	OIE WAHIS Interface, Lithuania follow-up report No. 33 (20 February 2015)	
RUS-106	OIE WAHIS Interface, Latvia follow-up report No. 26 (10 February 2015)	
RUS-107	OIE WAHIS Interface, Poland follow-up report No. 2 (6 March 2014)	
RUS-108.a	a. (RU) Report by Voronezh Veterinary Service, No. 1418, 22 July 2014	
RUS-108.b	b. (EN) Translation	
RUS-109.a	a. (RU) Decree by the Governor of Voronezh region of the Russian Federation on the Imposition of ASF-related Quarantine on the Territory of Anninsky municipal district of Voronezh region, No. 237-y, 17 July 2014	
RUS-109.b	b. (EN) Translation	
RUS-110.a	a. (RU) Report by Voronezh Veterinary Service, No. 1443, 25 July 2014	
RUS-110.b	b. (EN) Translation	
RUS-111.a	a. (RU) Order by the Governor of Voronezh Region on Compensation, No. 236, 17 July 2014	
RUS-111.b	b. (EN) Translation	
RUS-112.a	a. (RU) Rosselkhoznadzor News, "To continue controlling of ASF, Voronezh Administration of Rosselkhoznadzor arrested a pork consignment from Ukraine" 23 January 2015	
RUS-112.b	b. (EN) Translation	
RUS-113	G. A. Dzhalilidi, R.A. Krivonos, A.A. Shevchenko, O. Yu. Chernykh, Measures for prevention and eradication of African Swine Fever in Krasnodar Territory	
RUS-114.a	a. (RU) Resolution of the Head of Krasnodar Territory Administration (Governor), 16 August 2012	
RUS-114.b	b. (EN) Translation	
RUS-115	Pig Progress, "Russian Vet service: More African Swine Fever in Krasnodar region", 30 July 2012	
RUS-116.a	a. (RU) Declaration of Dzhalilidi, 24 February 2015	
RUS-116.b	b. (EN) Translation	
RUS-117.a	a. (RU) Letter from Anisimov to Vlasov report (Measures Belgorod), No. 06/1613, 10 June 2014	
RUS-117.b	b. (EN) Translation	
RUS-118	Pig Progress, "New ASF outbreak in Belgorod Oblast, Russia", 11 June 2014	

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RUS-119.b	b. (EN) Translation	
RUS-120.a	a. (RU) Resolution of Governor of Belgorod Oblast to Eliminate and Prevent Further Spread of African Swine Fever within the Infected Area, i.e. Grafskiy Les Stow of Agrotekhgarant "Alekseevsky" OOO Hunting Farm in Alekseevksy District of Belgorod Oblast, 4 June 2014, No. 56.	
RUS-120.b	b. (EN) Translation	
RUS-121.a	a. (RU) Resolution of the Government of Belgorod Oblast on Implementing the "Preventing the Introduction and Spread of the African Swine Fever (ASF) virus in Belgorod Oblast for 2014-2016" long term target program, 5 May 2014, No. 173-nn.	
RUS-121.b	b. (EN) Translation	
RUS-122.a	a. (RU) Letter from Anisimov to Vlasov (Measures in Belgorod), 27 August 2014	
RUS-122.b	b. (EN) Translation	
RUS-127	Russian Veterinary Service, Guidelines for prevention of distribution of African swine fever among wild boars	
RUS-130.a	a. (RU) Letter from the Russian Veterinary Service to DG SANCO, FS-SD-8/4168, 19 March 2014	Russia's letter to the European Union of 19 March 2014, FS-SD-8/4168
RUS-130.b	b. (EN) Translation	
RUS-131.a	a. (RU) Letter from the Russian Veterinary Service to DG SANCO, No. FS-AS-8/23743, 1 December 2014	
RUS-131.b	b. (EN) Translation	
RUS-132	Letter from DG SANCO to the Russian Veterinary Service, SANCO/G7/PD/mh (2014) 4703183, 23 December 2014	
RUS-133	Letter from DG SANCO to the Russian Veterinary Service, Ref. Ares (2014)2495649, 28 July 2014	
RUS-135.a	a. (RU) Letter from the Russian Veterinary Service to DG SANCO, FS-SD-4/3620, 12 March 2014	Russia's letter to the European Union of 12 March 2014, FS-SD-4/3620
RUS-135.b	b. (EN) Translation	
RUS-137.a	a. (RU) Letter from the Russian Veterinary Service to DG SANCO, FS-SD-8/3196, 3 March 2014	
RUS-137.b	b. (EN) Translation	
RUS-138.a	a. (RU) Letter from the Russian Veterinary Service to DG SANCO, FS-AS-8/6360, 18 April 2014	
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RUS-138.b (revised)	Letter from the Russian Veterinary Service to DG SANCO, FS-AS-8/6360, 18 April 2014	
RUS-140	Finnish veterinary authority (EVIRA) Research Report on "Possible routes of entry into the country for African swine fever – Risk profile", published on September 2011	

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RUS-145	OIE WAHIS Interface, ASF Poland, Immediate notification (17/02/2014)	
RUS-148	Declaration by Vladimir Maslow on the ASF Outbreak that occurred at One of the Enterprises of the AGOECO group in the Voronezh Region of the Russian Federation	
RUS-149	The Polish plan of measures in order to eradicate African Swine Fever in wild boar in infected area and buffer zone developed on the basis of Article 16 of the Council Directive 2002/60/EC. Ref. Areas (2015) 1284836 – 24/03/2015	
RUS-151	Commission Implementing Decision of 1 April 2015 (EU) 2015/558, OJ L 92, 8.4.2015	
RUS-152	Data from OIE WAHIS Interface – ASF Outbreaks and Cases per Month for Lithuania, Poland, Latvia and Estonia, January 2014 to March 2015	
RUS-153	Letter from Russian Veterinary Service to the European Union Veterinary Service, FS-EN-8/4220, 19 March 2015	
RUS-154	Letter of 24 March 2015 from the EU to Russia, Ref. Ares(2015)1284836	
RUS-156	ASF Eradication plan for African swine Fever in wild boars in the Southern part of Lithuania, June 2014	
RUS-157	Letter from Russia to EU, EH-8/14006, 31 July 2014	Russia's letter to the European Union of 31 July 2014, EH-8/14006
RUS-159	Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70 & WT/MIN(11)/2, circulated 17 November 2011, paras. 893 and 1450	
RUS-160	Protocol of Accession of the Russian Federation, WT/MIN(11)/24 & WT/L/839	Russia's Accession Protocol
RUS-164	Data from OIE WAHIS Interface – ASF Cases for Lithuania, Poland, Latvia and Estonia, January 2014 to March 2015	
RUS-167	Letter from DG SANTE to FSVPS Ref. Ares(2015)1284836 – 24/03/2015; EU's replies to the questionnaire sent by FSVPS with the letter FS-AS-8/23743 dated 1 December 2014	
RUS-168	OIE WAHIS interface	OIE WAHIS interface
RUS-171	OIE Disease Information Sheet, African Swine Fever.	
RUS-172	C. Gallardo et al, "Experimental Infection of Domestic Pigs with African Swine Fever Virus Lithuania 2014 Genotype II Field Isolate, in Transboundary and Emerging Diseases (2015)	
RUS-175	Mur L, Igolkin A, Varentsova A, Pershin A, Remyga S, Shevchenko I, Zhukov I, Sánchez-Vizcaíno JM. Detection of African Swine Fever Antibodies in Experimental and Field Samples from the Russian Federation: Implications for Control. Transbound Emerg. Dis. 2014 Nov 30. Doi: 10.1111/tbed.12304	
RUS-177	OIE-Listed diseases, infections and infestations in force in 2015	
RUS-185.a	a. (RU) Letter from DG SANCO, G7/PD/(2014)312766 dated February 6, 2014	
RUS-185.b	b. (EN) Translation	

No.	Full Title	Short Title (for frequently cited exhibits, where applicable)
RUS-186	OIE, ASF Technical Disease Card	
RUS-191	Letter from the EU veterinary service to the Russian veterinary service, Ref. Ares (2014) 3176148 – 26/09/2014, 26 September 2014	
RUS-194	Data from OIE WAHIS Interface and EUR-Lex, as at 30 April 2015	
RUS-205	OIE presentation on "The OIE International standards on CSF and ASF – recent developments", TAIEX Workshop on CSF and ASF, Vilnius, Lithuania, 3-4 September 2013	
RUS-209.a	a. (RU) Letter from Russian Veterinary Service, EC-AC-8/3671, 13 March 2014	
RUS-209.b	b. (EN) Translation	
RUS-217	Letter from DG SANCO to the Russian Veterinary Service, SANCO/G7/PD/mh(2014) 450287, 20 February 2014	
RUS-218	Certificate chronology – negotiations between Russia and the EU with respect to amending the language in the veterinary certificate(s)	
RUS-224	Letter from the EU Veterinary Service to the Russian Veterinary Service, 27 January 2014, SANCO G7/JP/mh(2014)197026	
RUS-231	Letter from the Russian Veterinary Service to the French Veterinary Service, 27 February 2014, ΦC-HB-8/2964	
RUS-234	Roselkhoznadzor news, "Negotiations between Sergey Dankvert, Head of Roselkhoznadzor, and Alex Van Meeuwen, Ambassador of the Kingdom of Belgium," 4 March 2014	
RUS-240	Letter from the Russian Veterinary Service to the Polish Veterinary Service, 10 April 2014, FS-NV-8/5827	Russia's letter to Poland of 10 April 2014, FS-NV-8/5827
RUS-250	Letter from the Russian Veterinary Service to the EU Veterinary Service, 30 June 2014, ΦC-CD-8/11415	
RUS-251	Roselkhoznadzor news, "Negotiations between Dankvert and DG SANCO," 6 July 2014	
RUS-263	Letter from Russian Veterinary Service to the European Union Veterinary Service, 29 July 2014, Ref C-EH-8/13771	Russia's letter to the European Union of 29 July 2014, C-EH-8/13771
RUS-268	Commission Implementing Decision of 22 May 2015 (EU) 2015/820, OJ L 129, 27.5.2015	
RUS-275	Data from OIE WAHIS Interface and EUR-Lex, as at 5 June 2015	
RUS-277	D. Gavier-Widen et al., "African Swine Fever in Wild Boar in Europe: a notable challenge," Veterinary Record, 23 February 2015	
RUS-291	Friedrich-Loeffler-Institut, "Qualitative Risikobewertung zur Einschleppung der Afrikanischen Schweinepest nach Deutschland aus Osteuropa," 2 April 2014	
RUS-291.b	b. (EN) Translation	
RUS-292	Society for Applied Microbiology (SfAM), "Restrictions In Place As African Swine Fever Hits Lithuania," 31 January 2014	
RUS-296	Data from OIE WAHIS Interface, as at 31 August	

No.	Full Title	Short Title (for frequently cited exhibits, where applicable)
RUS-296 (revised)	Data from OIE WAHIS Interface, as at 31 August	
RUS-297 (revised)	Overview of updated outbreaks, zone changes, and outbreaks out of zone, as of 31 August	
RUS-298	Commission Implementing Decision of 14 July 2015 (EU) 2015/1169, OJ L 188, 16.7.2015, pp. 45–54	
RUS-299	Commission Implementing Decision of 29 July 2015 (EU) 2015/1318, OJ L 203, 31.7.2015, pp. 14–24	
RUS-300	Commission Implementing Decision (EU) of 7 August 2015 (EU) 2015/1372, OJ L 211, 8.8.2015, pp. 34–44	
RUS-301	Commission Implementing Decision (EU) of 18 August 2015 (EU) 2015/1405, OJ L 218, 19.9.2015, pp. 16-26	
RUS-302	Commission Implementing Decision (EU) of 25 August 2015 (EU) 2015/1432, OJ L 224, 27.08.2015, pp. 39-49	
RUS-307.a	a. (RU) Declaration by Georgy Djailidi, 12 September 2015	
RUS-307.b	Declaration by Georgy Djailidi, 12 September 2015	
RUS-308.a	a. (RU) Declaration by Tatyana Ausheva, 12 September 2015	
RUS-308.b	b. (EN) Translation	
RUS-309	Declaration by Konstantin Gruzdev, 12 September 2015.	
RUS-319	Letter from the European Union Veterinary Service to the Russian Federation Veterinary Service, Ref. Ares (2015)2518258. 16 January 2015.	
RUS-323	Letter from the Russian Veterinary Service to Heads of Veterinary authorities in the RF'entities, FS-EN-8/1644, 5 February 2014	
RUS-324	Letter from the Russian Veterinary Service to Heads of Rosselkhoznadzor' Territorial administrations, FS-AS-8/4443, 25 March 2014	
RUS-325	Letter from the Russian Veterinary Service to Chief Veterinary Inspector of the Republic of Belarus, FS-EN-8/13779, 29 July 2014	
RUS-326	Fax, SANCO/G2/FR/is (2014) 2721683, 24 July 2014	
RUS-327	Fax, SANCO/G2/FB/is (2014) 2728623, 24 July 2014	
RUS-328	Fax, SANCO/G2/FB/is (2014) 2729207, 24 July 2014	
RUS-329	Letter from the Russian Veterinary Service, FS-NV-8/5906, 10 April 2015	
RUS-330	Fax, SANCO/G2/MP/kh (2014) 2759647, 28 July 2014	
RUS-331	Letter from the Russian Veterinary Service to Director Bernard Van Goethem, FS-EN-8/2029, 12 February 2014	
RUS-333	Table 41, Excerpts of list of goods subject to veterinary control. Working Party Report	
RUS-349	Commission Implementing Decision "On measures to prevent the introduction into the Union of the African swine fever virus from certain third countries or parts of the territory of third countries in which the presence of that disease is confirmed and repealing Decision 2011/78/EU (2013/426/EU)	

No.	Full Title	Short Title (for frequently cited exhibits, where applicable)
RUS-351	Letter from Rosselkhoznadzor to Russia's regional offices, 2 March 2012, FS-EN-7/2793	
RUS-352	RF Government's Decree 327 of June 30, 2004 "Approval of the Regulation of the Federal Service for Veterinary and Phytosanitary Surveillance (Rosselkhoznadzor)", par. 1, Rossiyskaya Gazeta // URL: <a href="http://www.rg.ru/2004/07/15/veterinar-dok.html">http://www.rg.ru/2004/07/15/veterinar-dok.html</a> .	Russian Government Decree No. 327
RUS-355	Letter from the Russian Veterinary Service to the Director of the State Food and Veterinary Service of the republic of Lithuania, FS-NV-8/9668, 5 June 2014	
RUS-359	Report on visit to Poland, Gruzdev, Pantuhov, 28 February 2014	
RUS-379	Letter from the Russian Veterinary Service to the Director of Veterinary and International Affairs, European Commission, HB-8/25328, 19 December 2014	
RUS-380	European Commission, ARES (2014) 2495649, 28 July 2014	
RUS-386	Regulation on the Common Procedure of Veterinary Control at the Customs Border of the Customs Union and the Customs Territory of the Customs Union, approved by the Decision of the Customs Union No. 317, 18 June 2010	Veterinary Control in Customs Union Decision No. 317

**ABBREVIATIONS USED IN THIS REPORT**

<b>Abbreviation</b>	<b>Description</b>
ASF	African swine fever
ASFV	African swine fever virus
CU	Customs Union
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FAO	Food and Agriculture Organization of the United Nations
FSVPS	Russian Federal Service for Veterinary and Phytosanitary Supervision
GATT 1994	General Agreement on Tariffs and Trade 1994
OIE	World Organization for Animal Health
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969
Russia's accession protocol	Protocol on the accession of the Russian Federation
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
Terrestrial Code	OIE Terrestrial Animal Health Code
WTO	World Trade Organization

## 1 INTRODUCTION

### 1.1 Complaint by the European Union

1.1. On 8 April 2014, the European Union requested consultations with the Russian Federation (Russia) pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.<sup>1</sup>

1.2. Consultations were held on 30 April and 1 May 2014. Those consultations were unsuccessful in resolving this dispute.<sup>2</sup>

### 1.2 Panel establishment and composition

1.3. On 27 June 2014, the European Union requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference as set out in Article 7.1 of the DSU.<sup>3</sup> At its meeting on 22 July 2014, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the European Union in document WT/DS475/2, in accordance with Article 6 of the DSU.<sup>4</sup>

1.4. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS475/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>5</sup>

1.5. On 13 October 2014, the European Union requested the Director-General to determine the composition of the panel pursuant to Article 8.7 of the DSU.

1.6. On 23 October 2014, the Director-General accordingly composed the Panel as follows<sup>6</sup>:

Chairperson: Mr Mohammad Saeed

Members: Mr Juan Antonio Dorantes  
Mr Ulrich Kihm

1.7. On 30 October 2014, Mr Ulrich Kihm resigned from the Panel. Pursuant to a request from the European Union of 3 November 2014, the Director-General appointed Mr Steve Hathaway as Panel member on 6 November 2014.<sup>7</sup> On 26 November 2014, Mr Steve Hathaway resigned from the Panel. Pursuant to a request from the European Union of 28 November 2014, the Director-General appointed Ms Delilah Cabb Ayala as Panel member on 4 December 2014. Accordingly, the composition of the Panel is as follows:<sup>8</sup>

Chairperson: Mr Mohammad Saeed

Members: Ms Delilah Cabb Ayala  
Mr Juan Antonio Dorantes

1.8. Australia, Brazil, China, India, Japan, the Republic of Korea, Norway, South Africa, Chinese Taipei, and the United States reserved their rights to participate in the Panel proceedings as third parties.

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<sup>1</sup> European Union's request for consultations (WT/DS475/1).

<sup>2</sup> European Union's request for the establishment of a panel (WT/DS475/2).

<sup>3</sup> European Union's request for the establishment of a panel.

<sup>4</sup> See WT/DSB/M/348.

<sup>5</sup> Constitution of the Panel, para. 2. (WT/DS475/3)

<sup>6</sup> Constitution of the Panel, para. 4.

<sup>7</sup> Replacement of a Member of the Panel (WT/DS475/4).

<sup>8</sup> Replacement of a Member of the Panel (WT/DS475/5).



### 1.3 Panel proceedings

#### 1.3.1 General

1.9. On 8 December 2014, after consultation with the parties, the Panel adopted its Working Procedures<sup>9</sup> and timetable. Following the Panel's decision to consult with the World Organization for Animal Health (OIE) and individual scientific experts, and after consultation with the parties, the Panel adopted its revised timetable and additional Working Procedures for the Panel's Expert Consultation on 2 June 2015.<sup>10</sup>

1.10. The Panel held a first substantive meeting with the parties on 20 and 23 April 2015. A session with the third parties took place on 21 April 2015. The Panel held a meeting with the experts and the parties on 14 and 15 September 2015. The Panel held a second substantive meeting with the parties on 16 and 17 September 2015.

1.11. On 19 November 2015, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 11 February 2016. The Panel issued its Final Report to the parties on 7 April 2016.

#### 1.3.2 Working procedures concerning Strictly Confidential Information (SCI)

1.12. At Russia's request and after consultation with both parties, the Panel adopted, on 8 December 2014, additional working procedures concerning SCI.<sup>11</sup>

#### 1.3.3 Arrangements for language interpretation

1.13. On 16 April 2015, just before the first substantive meeting, Russia requested the Panel to authorize simultaneous English-to-Russian and Russian-to-English interpretation during the first substantive meeting. Following exchanges with the parties, and after listening to the parties' views in the course of the first substantive meeting, the Panel informed the parties, that for the purposes of the first substantive meeting with the parties (i) interpreters could be present at the meeting, provided that Russia included their names in its delegation list and that the interpreters were provided and financed by Russia; (ii) the interpreters could use the interpretation booths to provide only English-to-Russian simultaneous interpretation for the benefit of Russia's delegation; (iii) Russia's delegation must make statements and submissions to the Panel and other parties only in English; and (iv) for the purpose of the proceedings, only statements and submissions made in English must form part of the record.

1.14. At the beginning of the third-party session, after listening to the third parties' views, the Panel authorized simultaneous English-to-Russian interpretation for the third-party session with the same conditions as those for the first substantive meeting with the parties.

1.15. On 1 June 2015, well before the second substantive meeting with the parties, Russia renewed its request for simultaneous English-to-Russian and Russian-to-English interpretation, in particular, in respect of the Panel's meeting with the experts. On 13 August 2015, following exchanges with the parties, and after consultation with the third parties<sup>12</sup>, the Panel informed the parties that it would authorize simultaneous English-to-Russian and simultaneous Russian-to-English interpretation during the Panel's meeting with the experts, and simultaneous English-to-Russian interpretation during the second substantive meeting with the parties (replicating the arrangements at the first substantive meeting with the parties). The Panel also confirmed that the

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<sup>9</sup> See the Panel's Working Procedures in Annex A-1.

<sup>10</sup> See the Panel's additional Working Procedures for Panel's Expert Consultation in Annex A-3.

<sup>11</sup> See the Panel's additional Working Procedures concerning Strictly Confidential Information in Annex A-2.

<sup>12</sup> The Panel did not receive any requests for enhanced third-party rights from any third party. However, through a communication dated 19 June 2015, the European Union invited the Panel to seek, due to the systemic interests involved, the third parties' views on Russia's request for interpretation during the second substantive meeting and the meeting with the experts. After consulting with the parties and pursuant to paragraph 12 of the Panel's Working Procedures, the Panel decided to ask the third parties to provide their views on the use of interpretation in any subsequent meeting of the Panel.

interpreters could use the interpretation booths, as available, in the rooms booked for the meeting with the experts and for the second substantive meeting with the parties.

1.16. Furthermore, the Panel emphasized that the arrangements for interpretation were conditioned on the following: (i) the interpretation was conducted only by the interpreters included in Russia's delegation; (ii) the cost of the interpretation was covered exclusively by Russia; (iii) only statements made in English would form part of the official record of the proceedings; and (iv) the interpreters' statements, when interpreting what a member of Russia's delegation said in a language other than English, would be considered the only statements forming part of the record.

1.17. The arrangements communicated to the parties by the Panel on 13 August 2015 were followed in the course of the meeting with the experts and of the second substantive meeting.

### **1.3.4 Consultation with experts and relevant international organizations**

#### **1.3.4.1 Panel's decision to consult with experts**

1.18. At the organizational meeting of the Panel with the parties held on 21 November 2014, the European Union indicated that at that point in time, it did not see the need for the Panel to consult with experts. Russia suggested that the Panel's decision on whether to consult with experts should be made after the first substantive meeting. The Panel decided to postpone deciding on the matter until after the first substantive meeting.

1.19. On 28 April 2015, after the first substantive meeting, the Panel asked the parties to identify issues that the parties considered would benefit from inputs from experts and international organizations, in the hypothetical event the Panel were to consult experts and/or international organizations pursuant to Article 11.2 of the SPS Agreement. The Panel also asked for the parties' views on (i) the profiles of experts that would be most valuable for the Panel to consult in this dispute; (ii) whether the Panel should conduct written consultations, oral consultations, or both; (iii) whether the Panel should consult other relevant organizations – either international or regional; and (iv) a revised timetable and additional working procedures.<sup>13</sup>

1.20. On 19 May 2015, the European Union and Russia expressed their views on these matters.

1.21. On 26 May 2015, the Panel informed the parties of its decision to consult the OIE as well as individual experts. The Panel also requested the parties to submit the following: (i) the parties' agreed list of names of individual experts; (ii) a list of potential questions for the experts; and (iii) comments on the revised timetable and additional working procedures incorporating the expert consultation process. On 1 June 2015, the parties submitted their comments on the revised timetable and additional working procedures.

1.22. On 2 June 2015, the Panel adopted the revised timetable and Additional Working Procedures for the Panel's consultation with experts.

#### **1.3.4.2 Expert selection**

1.23. On 28 May 2015, the Panel requested the Food and Agriculture Organization of the United Nations (FAO) and the OIE to provide names and contact details of possible individual experts who could assist the Panel in five areas related to African swine fever: epidemiology, virology, wild boar behavioural ecology, monitoring and surveillance, and control and biosecurity. The Panel received lists of names from the OIE and FAO on 8 and 11 June 2015, respectively.

1.24. On 12 June 2015, in accordance with the timetable, the parties submitted their suggested questions for the OIE and the individual experts. The parties did not submit any agreed list of names of individual experts. Russia, however, sent its own list of suggested names of experts. Except for one, the names submitted by Russia were already included in the lists of names submitted by the OIE and the FAO on 8 and 11 June 2015, respectively.

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<sup>13</sup> Panel question No. 1 following the first substantive meeting.

1.25. On the same day, the Panel sent to the parties a communication noting the list of experts' names suggested by Russia and requesting the European Union to comment on whether the Panel should contact the expert suggested by Russia but not included in the lists submitted by the FAO and the OIE.

1.26. On 15 June 2015, the European Union expressed its preference for the Panel to contact only the persons on the list of potential experts who were suggested by the FAO and OIE. On the same day, the Panel sent preliminary communications to the experts suggested by the FAO and OIE. On 17 June 2015, Russia sent additional comments.

1.27. On 18 June 2015, the Panel informed the parties that it had contacted the experts suggested by the FAO and the OIE.

1.28. On 29 June 2015, the Panel sent to the parties a consolidated list of names of experts, along with the available relevant accompanying documentation.<sup>14</sup> In addition, the Panel requested the parties to comment on whether the Panel should contact two additional experts whose names were suggested by one of the experts from the list submitted by the OIE and the expert suggested by Russia but not included in the lists submitted by the FAO and the OIE. On 3 July 2015, the parties provided their comments. The European Union considered that the experts already contacted by the Panel provided sufficient basis for the next steps in the procedure. Russia considered that it was not appropriate to contact either of the experts suggested by the expert proposed by the OIE while supporting contacting the expert Russia had previously identified.

1.29. On 8 July 2015, following reception of the response from one of the experts recommended by the OIE, the Panel sent to the Parties an updated consolidated list of names of experts and requested the parties to comment on the list. On 15 July 2015, the parties submitted their comments. The European Union welcomed the amount of expertise available in the experts contacted by the Panel and requested the Panel not to consider retaining one of the potential experts due to potential conflict of interests. Russia expressed its preference for the Panel to choose as its experts Professor Penrith, Dr Thomson, and Dr Thiermann.

1.30. On 21 July 2015, the Panel informed the parties that it had selected the following experts to assist the Panel: (i) Dr Gideon Brückner<sup>15</sup>; (ii) Professor Mary Louise Penrith<sup>16</sup>; (iii) Dr Alejandro Thiermann<sup>17</sup>; and (iv) Dr Gavin Thomson.<sup>18</sup>

#### **1.3.4.3 Panel's questions to the OIE and to the individual experts**

1.31. On 24 July 2015, the Panel sent written questions to the individual experts and to the OIE. On 13 August 2015, the Panel received written responses from Dr Thiermann. On 19 August 2015, the Panel received written responses from Professor Penrith. On 21 August 2015, the Panel received written responses from Drs Brückner and Thomson.

1.32. In light of the responses submitted by the experts, on 24 August 2015, the Panel requested the OIE to provide an official electronic copy of the 23<sup>rd</sup> edition of the Terrestrial Code.<sup>19</sup> The Panel

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<sup>14</sup> This documentation included, where available for each candidate: (i) CV, (ii) list of publications, (iii) declaration of potential conflicts of interest, and (iv) response received from the expert to the Panel's communication requesting availability and interest to serve as expert to the Panel.

<sup>15</sup> Dr Brückner is President of the OIE Scientific Commission for Animal Diseases and a former National Director of Veterinary Services of South Africa, former Head of the OIE Scientific and Technical Department and former Deputy Director General of the OIE.

<sup>16</sup> Professor Penrith is a veterinary consultant and professor at the University of Pretoria in South Africa, former Assistant Director, Onderstepoort Veterinary Institute and Vice Chairperson of the Education Committee of the South African Veterinary Association.

<sup>17</sup> Dr Thiermann is Senior International Organization Coordinator for the Animal and Plant Health Inspection Services of the US Department of Agriculture, based at the OIE, and former President of the OIE Terrestrial Animal Health Standards Commission.

<sup>18</sup> Dr Thomson is Co-director of TAD Scientific CC, a registered consulting company in South Africa, and formerly employed by the FAO as the principal Epidemiologist of the Pan-African Programme for the Control of Epizootics, and former Director of the Onderstepoort Veterinary Institute.

further requested the OIE to clarify whether any changes were made to Chapter 15.1 (African swine fever) of the 22<sup>nd</sup> edition of the Code that were reflected in the 23<sup>rd</sup> edition.

1.33. On 25 August 2015, the Panel received an electronic copy of the 23<sup>rd</sup> edition of the Terrestrial Code from the OIE. The OIE indicated that in its view, no material changes were made to Chapter 15.1 (African swine fever) from the 22<sup>nd</sup> to the 23<sup>rd</sup> editions of the Terrestrial Code. On 26 August 2015, the OIE further opined that any perceptible changes in the text of Chapter 15.1 as reflected in the 23<sup>rd</sup> edition of the Terrestrial Code were purely editorial. The Panel provided the parties with a copy of the OIE correspondence.

1.34. On 24 August 2015, the Panel requested the experts to confirm whether and to what extent their responses to the Panel's questions would materially differ in light of the changes in Chapter 15.1 (African swine fever) from the 22<sup>nd</sup> to the 23<sup>rd</sup> editions of the Terrestrial Code. None of the individual experts indicated that the editorial changes would have any material impact on the responses they had submitted to the Panel's questions.

1.35. On 28 August 2015, the Panel received written responses from the OIE to its questions.

1.36. On 7 September 2015, the parties submitted comments on the responses provided by the OIE and the individual experts.

1.37. On 23 September 2015, the Panel sent additional questions to the OIE. On 25 September 2015, the Panel received the OIE's written responses to the additional questions. The Panel requested the parties to comment on OIE's responses. The European Union directed the Panel to its response to Panel question No. 241; Russia did not submit any comments on the OIE's responses.

#### **1.3.4.4 Panel's meeting with the experts and the parties**

1.38. In preparation for the Panel's meeting with the experts and the parties, on 7 September 2015, the parties submitted advance questions to the experts.

1.39. The Panel held a meeting with the experts and the parties on 14 and 15 September 2015.

1.40. On 1 October 2015, the Panel sent a transcript of the meeting to the individual experts and to the parties, with a request for them to verify that the transcript accurately reflected their interventions. Following receipt of comments on the transcript, and having made certain corrections requested by the experts and the parties, the Panel sent a final version of the transcript to the experts and the parties on 19 November 2015.<sup>20</sup>

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<sup>19</sup> One of the experts brought to the attention of the Panel the fact that Exhibit EU-3, entitled "Chapter 15.1 of the 23<sup>rd</sup> edition of the Terrestrial Code", appears to correspond to the 22<sup>nd</sup> edition of the Terrestrial Code.

<sup>20</sup> Pursuant to paragraph 1.13 of the additional Working Procedures for Panel's Expert Consultation, this transcript will not be annexed to the Panel report. On 8 October 2015, the Panel received Russia's comments to the transcript. Russia requested the Panel to change, among other things, a word in the intervention made by Ms. Ausheva, a member of Russia's delegation during the meeting with the experts consulted by the Panel. The Panel did not change that particular word in the final version of the transcript sent to the parties and to the experts on 19 November 2015. On 3 December 2015, Russia, in its comments to the draft descriptive part, requested the Panel to introduce the change of that word. The Panel does not accept this request. As we note in para. 1.16 above, the Panel would authorise simultaneous English-to-Russian and simultaneous Russian-to-English interpretation during the Panel's meeting with the experts, on the understanding that the interpreters' statements, when interpreting what a member of Russia's delegation said in a language other than English, would be considered the only statements forming part of the record. After listening again to the recording of the meeting, it is clear that the word Russia requested to modify was clear in the recording of what was said by the interpreter addressing the Panel in English. In light of these considerations, the Panel will not modify the final transcript on record. Moreover we note that in the context of the evidence on record, the change requested by Russia would not have materially affected our findings below.

## 2 FACTUAL ASPECTS

### 2.1 The relevant disease: African swine fever

2.1. African swine fever (ASF) is a highly contagious haemorrhagic disease of pigs, warthogs, European wild boar, and American wild pigs, equally susceptible to both genders and all age groups. The organism which causes ASF is the African swine fever virus (ASFV), a DNA virus in the *Asfarviridae* family; genus *Asfivirus*. Virulence of ASFV isolates vary greatly.<sup>21</sup> Severe cases of ASF disease are characterized by high fever, loss of appetite, respiratory distress, diarrhoea, haemorrhages in the skin and internal organs, and death in 2-10 days on average. Mortality rates may be as high as 100%.<sup>22</sup>

2.2. ASF is a disease covered by Chapter 15.1 of the Terrestrial Code and must be reported to the OIE.<sup>23</sup> Chapter 15.1 of the Terrestrial Code distinguishes between:

- a. domestic pigs (including permanently captive and farmed free-range pigs) and wild pigs (including feral pigs and wild boars); and
- b. *Sus scrofa* and African pig species (e.g. warthogs).<sup>24</sup>

2.3. ASF occurs through transmission cycles involving domestic pigs, wild boars, wild African swine, and soft ticks. African wild swine species, such as warthogs (*Phacochoerus aethiopicus*), bush pigs and giant forest hogs (*Hylochoerus meinertzhageni*) are usually inapparently infected and act as reservoir hosts of ASFV in Africa. However, domestic pigs (*Sus domestica*), European wild boar, American wild pigs, and *Sus scrofa* are hosts that manifest the disease. Ticks of the genus *Ornithodoros* are considered the natural arthropod host and there is some speculation that ASFV is a virus of arthropods, and that mammalian species, such as domestic swine, represent "accidental hosts".<sup>25</sup>

2.4. Direct transmission of ASFV can occur through contact between sick and healthy animals. As ASFV can remain infectious for 3-6 months in uncooked pork products, indirect transmission can occur through feeding on garbage containing infected meat. Other indirect means of transmission include through biological vectors (soft ticks of the genus *Ornithodoros*), and fomites, such as premises, vehicles, implements and clothes.<sup>26</sup>

2.5. The virus is found in blood, tissues, secretions and excretions of sick and dead animals, as well as soft ticks of the genus *Ornithodoros*. Animals that have recovered from either acute or chronic infections may become persistently infected, acting as virus carriers, especially in African wild swine, and in domestic pigs in enzootic areas. The incubation period of ASFV in nature is usually 4-19 days or 3-4 days in acute form. For the purpose of the Terrestrial Code, the incubation period in *Sus scrofa* is indicated as 15 days.<sup>27</sup>

2.6. According to the OIE, ASFV remains viable for long periods in blood, faeces and tissues, especially infected uncooked or undercooked pork products. ASFV also has the ability to multiply in vectors (*Ornithodoros sp.*). The OIE's Technical Disease Card indicates that ASFV is highly resistant to low temperatures but can be heat-inactivated at 56°C for 70 minutes or 60°C for 20

<sup>21</sup> OIE General Disease Information Sheets: African Swine Fever (ASF Disease Information Sheet) (Exhibits RUS-4 and RUS-171).  
[http://www.oie.int/fileadmin/Home/eng/Media\\_Center/docs/pdf/Disease\\_cards/ASF-EN.pdf](http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/ASF-EN.pdf) (last accessed 23 October 2015).

<sup>22</sup> ASF Disease Information Sheet (Exhibits RUS-4 and RUS-171).

<sup>23</sup> OIE website, *Listed diseases, infections and infestations in force in 2015* (Exhibit RUS-177).

<sup>24</sup> See Article 15.1.1 (first paragraph) of the 23<sup>rd</sup> edition of the Terrestrial Code. OIE, *Terrestrial Animal Health Code 23<sup>rd</sup> edn* (2014), Vol. II, p. 649.

<sup>25</sup> OIE Technical Disease Card: African Swine Fever (ASF Technical Disease Card)  
[http://www.oie.int/fileadmin/Home/eng/Animal\\_Health\\_in\\_the\\_World/docs/pdf/Disease\\_cards/AFRICAN\\_SWINE\\_FEVER.pdf](http://www.oie.int/fileadmin/Home/eng/Animal_Health_in_the_World/docs/pdf/Disease_cards/AFRICAN_SWINE_FEVER.pdf) (last updated April 2013; last accessed 23 October 2015). See OIE ASF Technical Disease Card (Exhibit RUS-186).

<sup>26</sup> ASF Technical Disease Card (Exhibit RUS-186).

<sup>27</sup> ASF Technical Disease Card (Exhibit RUS-186). See also Article 15.1.1 (General provisions) of the Terrestrial Code. OIE, *Terrestrial Animal Health Code 23<sup>rd</sup> edn* (2014), Vol. II, p. 649.

minutes.<sup>28</sup> The OIE's Technical Disease Card further indicates that ASFV is also inactivated at a pH less than 3.9, or greater than 11.5 in a serum-free medium; it is also susceptible to chemicals and disinfectants such as ether and chloroform.<sup>29</sup>

2.7. As indicated in the OIE's Technical Disease Card (last updated in April 2013), ASF is enzootic in most countries of Sub-Saharan Africa including Madagascar. In Europe, it has been reported and successfully eradicated from the Iberian Peninsula but continues to be found in Sardinia. In the 1970s, ASF was present in the Caribbean (Haiti and the Dominican Republic), and in one country in South America (Brazil), but was successfully eradicated. Most recently, it has appeared in the Caucasus (Georgia, Azerbaijan, and Armenia) and Russia.<sup>30</sup> The situation as of the time of this Panel proceeding will be further examined below.<sup>31</sup>

## 2.2 The measures at issue

2.8. 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".<sup>32</sup>

2.9. In its panel request, the European Union enumerates the specific measures at issue as follows:

A ban on imports from Lithuania as described in the administrative notice from the Russian Federal Service for Veterinary and Phytosanitary Supervision of 25 January 2014 (FS-EN-8/1023). This notice announced a temporary restriction on imports of "live pigs and its genetic material; pork products (which were not heat treated no less than 72°C for at least 30 minutes); products from slaughter of wild boars; horn-hoofed and leather, intestinal materials; bristles; feed for pigs; hunting trophies, which were not subjected to full taxidermy treatment; previously used equipment for maintenance, transportation, slaughter and cutting of pigs" from Lithuania as of 25 January 2014. This measure was notified to the WTO on 10 February 2014 (G/SPS/N/RUS/48);

A ban on imports from Poland as described in the administrative notice from the Russian Federal Service for Veterinary and Phytosanitary Supervision of 27 February 2014 (FS-NV-8/2972) announcing a temporary restriction on imports of "live pigs and its genetic material; pork products (which were not heat treated no less than 80°C for at least 30 minutes); products from slaughter of wild boars; horn-hoofed and leather, intestinal materials; bristles; feed for pigs; hunting trophies, which were not subjected to full taxidermy treatment; previously used equipment for maintenance, transportation, slaughter and cutting of pigs" from Poland as of 27 February 2014. This measure was notified to the WTO on 4 March 2014 (G/SPS/N/RUS/49);

A ban on imports from Lithuania and Poland as described in the administrative notice of the Russian Federal Service for Veterinary and Phytosanitary Supervision of 2 April 2014 (FS-EN-8/5081). This notice announced the extension of the import restrictions in force to processed products containing pork excluding ready-to-use feed for cats and dogs which underwent thermal treatment (temperature not lower than 70°C, duration of treatment not less than 20 minutes), from Lithuania and Poland as of 7 April 2014. These measures were notified to the WTO on 4 April 2014 as updates to the original WTO notifications (G/SPS/N/RUS/48/Add.2 and G/SPS/N/RUS/49/Add.1);

The refusal by Russia to accept imports of the products at issue from the entire EU, amounting to an EU-wide ban. The EU identifies this specific measure at issue both as

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<sup>28</sup> ASF Technical Disease Card (Exhibit RUS-186).

<sup>29</sup> ASF Technical Disease Card (Exhibit RUS-186).

<sup>30</sup> ASF Technical Disease Card (Exhibit RUS-186).

<sup>31</sup> See paras. 2.22. to 2.23 below. See also Appendix 1 and para. 7.208 below.

<sup>32</sup> European Union's panel request, p. 1.

an action (an import ban or restriction) and, in the alternative, as an omission (failure to accept imports from the EU). The EU seeks review of this specific measure at issue as such and as applied, *de jure* and *de facto* (that is, based on all the relevant facts). The EU also seeks review of this specific measure at issue both insofar as it is written, and insofar as it is unwritten. The EU notes the letter sent to the EU dated 29 January 2014 (FS-SA-8/1277) from the Russian Federal Service for Veterinary and Phytosanitary Supervision referring to certain export certificates previously used for certain exports from the EU to Russia, and notably the phrase "healthy animals grown in farms and/or administrative territories officially free from contiguous animal diseases, including African Swine Fever during 3 years in the whole territory of the EU except Sardinia." In this respect, the Russian authorities made the following statement: "veterinary doctors in the EU Member-States must stop certification of the abovementioned 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."<sup>33</sup>

### 2.3 Products at issue

2.10. The products at issue comprise live pigs and their genetic material, pork and certain other pig products.<sup>34</sup>

### 2.4 Relevant international standards, guidelines, and recommendations

#### 2.4.1 The OIE and its mandate

2.11. The OIE is an intergovernmental organization created through an international agreement signed on 25 January 1924 as a response to the need to fight animal diseases at a global level. In May 2003, the OIE changed its name from *Office International des Epizooties* to World Organization for Animal Health, but kept its historical acronym.<sup>35</sup> One of the OIE's stated objectives is "sanitary safety" for "international trade in animals and animal products".<sup>36</sup> The OIE's activities in this field focus on the development of normative documents relating to rules that OIE members "can use to protect themselves from the introduction of diseases and pathogens, without setting up unjustified sanitary barriers".<sup>37</sup>

2.12. As of September 2015, the OIE had 180 members<sup>38</sup> whose national delegates constitute a World Assembly of Delegates.<sup>39</sup> The European Union member States and Russia are OIE members, as are the third parties to this dispute.<sup>40</sup> In addition to its headquarters in Paris, the OIE has regional and sub-regional offices on every continent.<sup>41</sup>

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<sup>33</sup> European Union's panel request, pp. 1-2. In its first written submission, the European Union also challenged the import restrictions that Russia imposed on Estonia and Latvia after the ASF outbreaks on their territories (European Union's first written submission, paras. 86–87). The inclusion of this footnote in this section is without prejudice to the Panel's ruling on whether the measures concerning Estonia and Latvia fall within the Panel's terms of reference.

<sup>34</sup> European Union's panel request, p. 1. See also Table 1 below.

<sup>35</sup> OIE website, *About us*, <http://www.oie.int/about-us/> (last accessed 21 September 2015).

<sup>36</sup> OIE website, *Objectives*, <http://www.oie.int/index.php?id=53#c201> (last accessed 21 September 2015).

<sup>37</sup> OIE website, *Objectives*, <http://www.oie.int/index.php?id=53#c201> (last accessed 21 September 2015).

<sup>38</sup> OIE website, *The 180 OIE Members*, <http://www.oie.int/about-us/our-members/member-countries/> (last accessed 21 September 2015).

<sup>39</sup> OIE website, *The World Assembly of Delegates*, <http://www.oie.int/about-us/wo/world-assembly/> (last accessed 21 September 2015).

<sup>40</sup> OIE website <http://www.oie.int/about-us/our-members/member-countries/> (last accessed 21 September 2015). In its response to Panel questions Nos. 27 and 28, the OIE clarified that EU member States operate as individual countries within the OIE and have the same rights and obligations as all the other members of the OIE. The European Union *per se*, is neither a member nor an observer of the OIE.

<sup>41</sup> OIE website, *OIE Regional Representations*, <http://www.oie.int/en/about-us/wo/regional-representations/> (last accessed 21 September 2015).

## 2.4.2 The OIE Terrestrial Animal Health Code (Terrestrial Code)

2.13. The SPS Agreement explicitly recognizes the standards, guidelines and recommendations developed under the auspices of the OIE as international standards, guidelines and recommendations for animal health and zoonosis.<sup>42</sup> The OIE has developed international standards relating to international trade in terrestrial animals (mammals, birds and bees) and their products. These standards are currently set out in the Terrestrial Code.<sup>43</sup>

2.14. The Terrestrial Code was first published in 1968 and is updated annually. The version relevant for the purposes of this dispute is the one that was in force on the date of the establishment of the Panel.<sup>44</sup> The Panel was established on 22 July 2014 and therefore the 23<sup>rd</sup> edition of the Terrestrial Code, adopted at the 82<sup>nd</sup> OIE General Session in May 2014, is the relevant version for the purposes of this dispute.

2.15. The OIE has a voluntary procedure for the official recognition of disease status, which is currently applied to six diseases. ASF is not one of these diseases.<sup>45</sup>

### 2.4.2.1 Objectives and structure of the Terrestrial Code

2.16. The aim of the Terrestrial Code is to set international "standards for the improvement of terrestrial animal health and welfare and veterinary public health worldwide, including through standards for safe international trade in terrestrial animals (mammals, birds and bees) and their products".<sup>46</sup> According to the Terrestrial Code, these standards consist of health measures based on the latest available scientific evidence and "should be used" by the veterinary authorities of importing and exporting countries to, *inter alia*, prevent the transfer of agents pathogenic to terrestrial animals and/or humans via international trade in terrestrial animals and terrestrial animal products, while avoiding unjustified sanitary barriers to trade.<sup>47</sup> In sum, the Terrestrial Code aspires to assure sanitary safety of international trade in terrestrial animals while avoiding unjustified sanitary barriers to trade.<sup>48</sup>

2.17. The Terrestrial Code is divided into two volumes. Volume I, entitled "General provisions", contains horizontal standards that apply to a wide range of species, production sectors and diseases, organized into seven sections. For instance, this volume includes rules on animal disease diagnosis, surveillance and notification (section 1), risk analysis (section 2), quality of veterinary services (section 3), disease prevention and control (section 4), trade measures, import/export procedures and veterinary certification (section 5).

2.18. Volume II, entitled "Recommendations applicable to OIE listed diseases and other diseases of importance to international trade", in turn, contains standards, guidelines and recommendations applicable to specific diseases, including the recommendations regarding disease surveillance, risk assessment, and zoning and compartmentalization. In the case of ASF, Chapter 15.1 specifically outlines the factors to consider in the determination of the ASF status of a country, zone or compartment. In addition, it provides for factors to consider for the recovery of ASF-free status and recommendations for importation of specific products from ASF-free and ASF-infected countries, zones or compartments.

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<sup>42</sup> Annex A(3)(b) of the SPS Agreement. The Terrestrial Code Glossary defines *zoonosis* as "any *disease* or *infection* which is naturally transmissible from *animals* to humans". Terrestrial Code Glossary, p. x (Exhibit RUS-32).

<sup>43</sup> OIE website, *Terrestrial Animal Health Code* <http://www.oie.int/international-standard-setting/terrestrial-code/> (last accessed 21 September 2015).

<sup>44</sup> In this respect, we follow the approach of previous panels (Panel Report, *US – Animals*, para. 2.24; Panel Report, *India – Agricultural Products*, paras. 7.211-7.213). Furthermore, we note that the parties agree that the relevant version of the Terrestrial Code is its 23<sup>rd</sup> edition (European Union's first written submission, para. 118; and Russia's first written submission, fn 119).

<sup>45</sup> OIE website, *Official Diseases Status* <http://www.oie.int/en/animal-health-in-the-world/official-disease-status/> (last accessed 22 September 2015).

<sup>46</sup> OIE, *Terrestrial Animal Health Code* 23<sup>rd</sup> edn (2014), Vol. I, p. v.

<sup>47</sup> OIE, *Terrestrial Animal Health Code* 23<sup>rd</sup> edn (2014), Vol. I, p. v.

<sup>48</sup> OIE, *Terrestrial Animal Health Code* 23<sup>rd</sup> edn (2014), Vol. I, p. v.



2.19. In the OIE context, the term "sanitary measure" means "a measure, such as those described in various chapters of the Terrestrial Code, destined to protect animal or human health or life within the territory of the Member Country from risks arising from the entry, establishment and/or spread of a hazard".<sup>49</sup> According to the Terrestrial Code, "risk" refers to the likelihood of the occurrence and the likely magnitude of the biological and economic consequences of an adverse event or effect to animal or human health.<sup>50</sup> "Risk analysis" means the process composed of hazard identification, risk assessment, risk management, and risk communication, while "risk assessment" means the scientific evaluation of the likelihood and the biological and economic consequences of entry, establishment and spread of a hazard within the territory of an importing country.<sup>51</sup>

#### 2.4.3 Relevant standards, guidelines or recommendations invoked by the parties

2.20. According to the European Union, the relevant applicable standards for the respective measures are mainly to be found in Chapter 15.1 (African swine fever) of the Terrestrial Code, which deals with trade in the products at issue, in conjunction with Chapter 4.3, which deals with regionalization.<sup>52</sup> The European Union argues that Russia's measures are contrary to Articles 15.1.5, 15.1.8, 15.1.10, 15.1.12, 15.1.13, 15.1.14, and 15.1.16 of the Terrestrial Code.<sup>53</sup>

2.21. According to Russia, the most pertinent provisions for ASF are set out in Terrestrial Code Articles 1.4.6, 1.6.1, Chapters 3.1 and 3.2, Chapter 4.3 (especially Articles 4.3.3.1, 4.3.3.5 and 4.3.3.6), 5.3 (especially Articles 5.3.1 and 5.3.7), and 15.1.<sup>54</sup> Initially, Russia also identified Chapter 4.4 as relevant.<sup>55</sup>

### 2.5 The parties' domestic ASF situations

#### 2.5.1 The European Union

2.22. As of the beginning of 2014, ASF was not present in the European Union, with the exception of the island of Sardinia.<sup>56</sup> This situation changed with the outbreak in Lithuania on 24 January 2014. In addition to Lithuania, ASF is currently present in Estonia, Latvia and Poland.<sup>57</sup>

#### 2.5.2 Russia

2.23. ASF was introduced in Russia in November-December 2007, when five cases in wild boar were reported to the OIE.<sup>58</sup> ASF is currently present in certain areas of the territory of Russia.<sup>59</sup>

### 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The European Union requests the Panel to find that Russia's measures at issue are inconsistent with Russia's obligations under Articles 2.2, 2.3, 3.1, 3.2, 3.3, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 6.1, 6.2, 6.3, 7, 8, Annex B(1), (2), (5), (6), and Annex C(1)(a), (b), (c) of the SPS Agreement.<sup>60</sup> In its panel request, the European Union included claims under Articles I:1, III:4, and XI:1 of the GATT 1994.<sup>61</sup> However, in response to Panel questioning at the first

<sup>49</sup> OIE, *Terrestrial Animal Health Code* 23<sup>rd</sup> edn (2014), Vol. I, p. xviii.

<sup>50</sup> OIE, *Terrestrial Animal Health Code* 23<sup>rd</sup> edn (2014), Vol. I, p. xvii.

<sup>51</sup> OIE, *Terrestrial Animal Health Code* 23<sup>rd</sup> edn (2014), Vol. I, p. xviii.

<sup>52</sup> European Union's first written submission, para. 122.

<sup>53</sup> European Union's first written submission, para. 139.

<sup>54</sup> Russia's second written submission, para. 21; response to Panel question No. 101, para. 146.

<sup>55</sup> Russia subsequently indicated that provisions relating to compartmentalization were not relevant in light of the European Union's clarification that it had not sought to establish compartments. See, e.g. Russia's response to Panel question No. 258 and Comments to Expert Responses to Panel question No. 31.

<sup>56</sup> European Union's first written submission, para. 60 (referring to EFSA Scientific Opinion on ASF, EFSA Journal 2010 8(3)1556 (2010 EFSA Scientific Opinion) (Exhibit EU-24), p. 9).

<sup>57</sup> Russia's first written submission, para. 42.

<sup>58</sup> European Union's first written submission, para. 47 (referring to African Swine Fever spread in the Russian Federation and the risk for the region, FAO, December 2009 (Exhibit EU-23), p. 3).

<sup>59</sup> See Russia's first written submission, para. 23.

<sup>60</sup> European Union's first written submission, para. 358.

<sup>61</sup> European Union's panel request, p. 6.

substantive meeting with the parties, the European Union confirmed that it was not pursuing the claims under the GATT 1994.<sup>62</sup>

3.2. The European Union further requests the Panel to recommend that the DSB request Russia to bring the contested measures into conformity with its obligations under the SPS Agreement.<sup>63</sup>

3.3. Russia requests the Panel to find that the European Union has failed to sustain any of the claims raised in these proceedings, and that Russia's measures are not inconsistent with the obligations of Russia under the relevant WTO agreements.<sup>64</sup>

#### 4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3 and B-4).<sup>65</sup>

#### 5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, India, Japan, Norway, and the United States are reflected in their executive summaries, provided in accordance with paragraph 21 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, and C-6).<sup>66</sup> China, the Republic of Korea, South Africa, and Chinese Taipei, did not submit written or oral arguments to the Panel.

#### 6 INTERIM REVIEW

##### 6.1 Introduction

6.1. On 11 February 2016, the Panel issued its Interim Report to the parties. On 25 February 2016, the European Union and Russia each submitted written requests for review of the Interim Report. Russia did not request an interim review meeting. However, the European Union requested a meeting with the Panel where Russia would have full opportunity to further comment on certain points and documents served by the European Union, unless Russia and the Panel considered that unnecessary.

6.2. In light of the parties' comments to the Interim Report, on 4 March 2016 the Panel informed the parties that it had decided to have an interim review meeting, which took place on 10 March 2016. The Panel Chairman, Mr Mohammad Saeed, presided the meeting, whilst Ms Delilah Cabb Ayala and Mr Juan Antonio Dorantes participated by videoconference. The Panel decided that the meeting would deal only with issues raised by the European Union with respect to paragraphs 7.991 and 7.993 of the Interim Report. On 10 March 2016, the parties also submitted comments on the other's request for review of other "precise aspects" of the Interim Report. On 15 March 2016, the parties submitted responses to questions from the Panel after the interim review meeting. On 21 March 2016, the parties submitted comments to the other's responses to questions from the Panel after the interim review meeting.

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<sup>62</sup> European Union's response to Panel question No. 80, para. 155; and second written submission, para. 194.

<sup>63</sup> European Union's first written submission, para. 359; and second written submission, para. 194.

<sup>64</sup> Russia's first written submission, para. 447; and second written submission, para. 195.

<sup>65</sup> On 2 June 2015 the Panel received the parties' first executive summaries. Russia submitted an executive summary of its first written submission, its opening statement and its closing statement, which in total exceeded the 15 page limit set forth in paragraph 20 of the Working Procedures. On 1 July 2015, after consulting with the parties, the Panel requested Russia to submit an integrated version of its first executive summary that did not exceed 15 pages. On 30 July 2015, Russia submitted its integrated first executive summary, which is attached hereto as Annex B-3.

<sup>66</sup> The Panel recalls the importance of observing deadlines in the panel proceedings. In this respect, we note that Australia and India did not provide their executive summaries within the time-frame indicated in the timetable adopted by the Panel. Therefore, on 20 October 2015, the Panel requested both third parties to clarify whether their written or oral statements should be considered as their executive summaries. On 21 October 2015, India confirmed that its oral statement would serve as the executive summary of its arguments. On 30 October 2015, Australia provided its third-party executive summary.

6.3. In accordance with Article 15.3 of the DSU, this section of the Report addresses the parties' requests for review of precise aspects of the Report made at the interim review stage. We discuss the parties' requests for substantive modifications below, generally in sequence according to the paragraph or section to which the requests pertain. In addition to the requests discussed below, corrections were made for typographical and other non-substantive aspects of the Report, including those identified by the parties.

6.4. The numbering of some of the paragraphs and footnotes in the Final Report has changed from the numbering in the Interim Report. The discussion below refers to the numbering in the Interim Report and, where it differs, includes the corresponding numbering in the Final Report.

## 6.2 The purpose and scope of the interim review

6.5. Before addressing the parties' individual requests for the review of our Interim Report, the Panel notes that a number of Russia's requests are addressed either at challenging the Panel's assessment of the evidence on record or the Panel's assessment of the European Union's claims. The European Union has individually challenged, on various grounds, some of these comments made by Russia.

6.6. The Panel observes that Article 15.2 of the DSU, and paragraph 22 of the Panel's Working Procedures, provide parties with an opportunity to request the Panel "to review precise aspects of the interim report". Previous panels have declined to expand the scope of interim review beyond that provided for in Article 15.2 and have accordingly circumscribed their review to address only those comments related to "precise aspects" of the interim report.<sup>67</sup> Previous panels have also noted that it is not appropriate to re-open (re-argue), at the interim review stage, arguments already put before a panel.<sup>68</sup>

6.7. Pursuant to our understanding of Article 15.2 of the DSU and consistent with the approach adopted by previous panels, we will review our Interim Report only in light of the comments made by the parties which relate to "precise aspects" of the Interim Report. In addition, when we identify a particular request as amounting to a party relitigating arguments already put before us, we will reject such request.

## 6.3 Introduction of new evidence on the record at the interim review stage

6.8. In the context of its comments to paragraph 7.991 and 7.993, the European Union requests the Panel to accept ten new exhibits (EU-253 to EU-262). According to the European Union, these communications support its request for the Panel to review precise aspects of paragraph 7.991 and delete paragraph 7.993 to provide factual accuracy to the Panel Report. The European Union asked for a meeting with the Panel, in which Russia would have full opportunity to further comment (in addition to the written comments to the European Union's comments to the Interim Report) on the points and documents served by the European Union, unless Russia and the Panel considered that unnecessary.

6.9. As indicated in paragraph 6.2 above, the Panel decided to have an interim review meeting limited to discussing the issues raised by the European Union in pages 5 and 6 of its communication dated 25 February 2016, specifically pertaining to paragraphs 7.991 and 7.993 of the Interim Report.

6.10. The European Union's main reason to request the Panel's acceptance of the new evidence is that the European Union could not have anticipated, and the Panel did not indicate at any moment during the proceedings, that the relevant date it would take into account with regard to Latvia would be a date subsequent to that of the Panel's establishment. The European Union considers that the Panel should take into account relevant evidence not previously considered on due

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<sup>67</sup> Panel Reports, *Japan – Alcoholic Beverages II*, para. 5.2; *Australia – Salmon*, para. 7.3; *Japan – Apples (Article 21.5 – US)*, para. 7.21; *India – Quantitative Restrictions*, para. 4.2; *Canada – Continued Suspension*, paras. 6.16-6.17; *US – Continued Suspension*, paras. 6.17-6.18; and *India – Agricultural Products*, para. 6.5.

<sup>68</sup> Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; and *India – Agricultural Products*, para. 6.5.

process grounds. The European Union argues that accepting the new evidence would not go against the previous case law, because of the particular circumstances in this dispute, including Russia having had access to those exhibits before they were submitted to the Panel.<sup>69</sup> Moreover, the European Union argues that its request amounts to requesting the Panel to review a "precise aspect" of the Interim Report, falling within the realm of Article 15.2 of the DSU.<sup>70</sup>

6.11. Russia objects to the Panel accepting the new evidence submitted by the European Union. Russia's main reason for this objection is that there is a well-established principle in WTO dispute settlement procedural jurisprudence according to which new evidence is not acceptable during the interim review stage.<sup>71</sup>

6.12. The Panel is cognizant of the limited scope of the interim review stage, as described in section 6.2 above. The Panel is also cognizant of the importance that due process has in the context of WTO dispute settlement proceedings.<sup>72</sup> In this connection, we recall that the Appellate Body has indicated that due process is "intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish facts in the context of the proceedings conducted in a balanced and orderly manner, according to the established rules."<sup>73</sup>

6.13. Previous panels and the Appellate Body have been faced with a similar question of whether a Panel may accept new evidence submitted by a party at the interim review stage.

6.14. In *EC – Sardines*, the Appellate Body explained that the interim review stage is not an appropriate time to introduce new evidence:

We also reject the European Communities' contention relating to the letters it submitted at the interim review stage. The interim review stage is not an appropriate time to introduce new evidence. We recall that Article 15 of the DSU governs the interim review. Article 15 permits parties, during that stage of the proceedings, to submit comments on the draft report issued by the panel, and to make requests 'for the panel to review precise aspects of the interim report'. At that time, the panel process is all but completed; it is only—in the words of Article 15—'precise aspects' of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence. Therefore, we are of the view that the Panel acted properly in refusing to take into account the new evidence during the interim review, and did not thereby act inconsistently with Article 11 of the DSU.<sup>74</sup>

6.15. In *EC – Selected Customs Matters*, the Panel considered that "the terms of Article 15.2 preclude us from taking into consideration evidence which is not reflected in the Interim Report", and therefore declined to consider certain new evidence submitted by the European Communities.<sup>75</sup> On appeal, the Appellate Body found that the Panel did not err:

With respect to Exhibits EC-167, EC-168, and EC-169 (which relate to the adoption of EC Regulation 2171/2005 and its consequences), we are of the view that the Panel did

<sup>69</sup> European Union's opening statement at the interim review meeting of the Panel, paras. 3-5. See also responses to Panel question No. 331.

<sup>70</sup> European Union's opening statement at the interim review meeting of the Panel, paras. 2-3. See also responses to Panel question No. 331.

<sup>71</sup> Russia's opening statement at the interim review meeting of the Panel, para. 5 (referring to Appellate Body Reports, *EC – Sardines*, para. 301; *EC – Selected Customs Matters*, para. 6.6; and Panel Reports, *EC – Seal Products*, paras. 6.53-6.55; *EC – IT Products*, paras. 6.47-6.48; *EC – Bananas III (Article 21.5 – US)*, paras. 6.5-6.18; *EC and certain member States – Large Civil Aircraft*, para. 6.311; and *EC – Approval and Marketing of Biotech Products*, paras. 6.134 and 6.162-6.164). See also responses to Panel question No. 331.

<sup>72</sup> See Appellate Body Reports, *EC – Hormones*, fn 138 to para. 152; *India – Patents (US)*, para. 95; *Argentina – Textiles and Apparel*, fn 68 to para. 79; *EC – Computer Equipment*, para. 70; *US – FSC*, para. 166; *Australia – Salmon*, paras. 272 and 278; *US – Continued Suspension / Canada – Continued Suspension*, para. 433; and *Thailand – Cigarettes (Philippines)*, para. 147.

<sup>73</sup> Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.

<sup>74</sup> Appellate Body Report, *EC – Sardines*, para. 301.

<sup>75</sup> Panel Report, *EC – Selected Customs Matters*, para. 6.6 .

not err in declining to consider these pieces of evidence.<sup>76</sup> As the Appellate Body stated in *EC – Sardines*, “[t]he interim review stage is not an appropriate time to introduce new evidence.”<sup>77</sup> The Panel’s decision to decline to consider Exhibits EC-167, EC-168, and EC-169 appears to us to be in line with the Appellate Body’s statement in *EC – Sardines* that “only ... ‘precise aspects’ of the [interim] report ... must be verified during the interim review ... [a]nd this ... cannot properly include an assessment of new and unanswered evidence.”<sup>78</sup> In any event, although Exhibits EC-167, EC-168, and EC-169 might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how these exhibits showed uniform administration at the time of the establishment of the Panel.<sup>79</sup>

6.16. Mindful of this guidance, the Panel considers that the interim review phase cannot (and should not) be used to adduce “new and unanswered” evidence.<sup>80</sup>

6.17. In our view, contrary to what the European Union claims, the European Union had sufficient opportunity to submit the evidence related to Latvia during the previous stages of the proceeding. In fact, the European Union served exhibits which post-date the date of the Panel’s establishment from early on in these proceedings. For example, Exhibits EU-40 to EU-44 and EU-95 to EU-98, which were submitted together with the European Union’s first written submission, are all dated after 22 July 2014.

6.18. In addition, the fact that the information served by the European Union to the Panel through exhibits EU-253 to EU-262 was publicly available as of the second part of 2014 does not mean that such information was brought to the Panel’s attention by the complainant. The European Union argues that the Panel did not ask for this evidence, however it is the complainant who bears the burden of making a *prima facie* case.<sup>81</sup>

6.19. Lastly, we do not see cogent reasons in the present dispute that would justify that we depart from what previous panels have done in respect of rejecting new evidence submitted during the interim review stage.

6.20. Based on the foregoing, we find that the exhibits served by the European Union together with its comments to the Interim Report (Exhibits EU-253 and EU-262) are not admissible and we shall not take them into account when examining the European Union’s request for the Panel to review paragraphs 7.991 and 7.993 of the Interim Report.

6.21. We now turn to the individual comments made by the parties to the Interim Report.

#### **6.4 Whether the measures in respect of the imports from Latvia and Estonia fall within the Panel’s terms of reference**

6.22. Regarding Table 1 below paragraph 7.144, the European Union suggests adding “pork” and “raw pork products” under the description of the product coverage of the measures applied to the imports of the products at issue from Lithuania and from Poland. Russia did not comment on this request; however, Russia requests the Panel to add “pork” to the same table in the description of the product coverage of the measures applied to the imports of the products at issue from both

<sup>76</sup> (footnote original) See Panel Report, para. 6.6.

<sup>77</sup> (footnote original) Appellate Body Report, *EC – Sardines*, para. 301.

<sup>78</sup> (footnote original) *Ibid.*

<sup>79</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 259.

<sup>80</sup> Appellate Body Report, *EC – Sardines*, para. 301; Appellate Body Report, *EC – Customs Matters*, para. 259. This approach was applied by the panels in *EC – Biotech*, *EC – Bananas (Article 21.5 – US)*, and *EC – IT Products*. See Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 6.162–6.164, *EC – Bananas (Article 21.5 – US)*, paras. 6.5–6.18; and Panel Report, *EC – IT Products*, paras. 6.47–6.48. In *China – Auto Parts*, the Panel also applied this reasoning but noted that the evidence in question would have nevertheless left the Panel’s view unchanged. See Panel Report, *China – Auto Parts*, para. 6.24–6.37. It is also noted that the Panel in *Dominican Republic – Safeguards* permitted new evidence after the interim report had been issued, though it changed only a date that was recorded in the factual section of the report. See Panel Report, *Dominican Republic – Safeguards*, para. 6.3.

<sup>81</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 122.

Lithuania and Poland. In respect of this request from Russia, the European Union considers that it would be more accurate to refer to "raw pork products". In light of the parties' comments and the evidence on record, the Panel has added "pork" and "raw pork products" to the description of the product coverage of the measures at issue applied to the imports from Lithuania and Poland in Table 1 below paragraph 7.144.

## 6.5 Temporal framework for the Panel's assessment

6.23. Regarding paragraph 7.173, Russia requests the Panel to also reflect its argumentation in response to Panel question No. 311, where Russia requests the Panel to examine all evidence submitted by the parties. In connection with Russia's comment to paragraph 7.173, the European Union observed that it would suggest modifying the phrase "as of" for "as at" when the Panel is making reference to a specific point in time, to avoid ambiguities with respect to the time-frame referred to by the Panel. We find Russia's request acceptable and have included the requested changes to paragraph 7.173. We also find acceptable the European Union's request to replace "as of" with "as at" when the Panel is referring to a specific point in time. We have introduced this change in the following paragraphs 7.430, 7.435, 7.444, 7.449, 7.451, 7.673, 7.935, 7.965, 7.974, 7.976, 7.977, 7.982, 7.985, 7.986, 7.995, 7.1001, 7.1003, 7.1004, 7.1015, 7.1016, 7.1017, 7.1018, 7.1030, 7.1151, 8.1.e.vii, and 8.1.e.viii.

6.24. In light of the parties' comments, especially to paragraphs 7.991 and 7.993, the Panel has decided to make editorial changes to paragraph 7.176 to provide a clearer explanation of the analytical time-frame used by the Panel. These changes are addressed so as to explain the Panel having examined the measures in respect of Lithuania, Poland and Latvia up to the date of the Panel's establishment (22 July 2014), and having reviewed the evidence up to 11 September 2014, in order to further support its analysis up to 22 July 2014. In that sense, in our view, the European Union's comments with respect to the Panel's analytical time-frame in connection with paragraphs 7.991 and 7.993 provided in the course of the interim review meeting and in response to Panel questions following the interim review meeting misrepresent the Panel's analytical time-frame. As just noted, the Panel examined the measures applied to the imports of the products at issue from Lithuania, Poland, and Latvia as existing up to 22 July 2014 and went up to 11 September 2014 in light of the measure on the imports from Estonia being within the Panel's terms of reference. In the Panel's view, this is acceptable based on the Panel's terms of reference and the Appellate Body's guidance as to a panel's discretion to examine and weigh all the evidence on record that pre-dates and post-dates a panel's establishment.<sup>82</sup>

## 6.6 Claims under Articles 6.1, 6.2, and 6.3 of the SPS Agreement (relating to the EU-wide ban)

6.25. Regarding paragraph 7.410, Russia requests the Panel to make a number of factual findings in respect of the efficacy and capacity of the veterinary services in each of the four affected EU member States. The European Union considers that the Panel should reject Russia's request, and that should the Panel decide to include references to exhibits such as RUS-359, the European Union considers that the Panel should also include references to exhibits such as EU-248 and EU-249. In order to sufficiently reflect Russia's arguments and views, the Panel has adjusted paragraph 7.410; however, the Panel has not modified its factual findings as reflected in this paragraph.

6.26. Regarding paragraph 7.432, Russia requests the Panel to add a sentence qualifying the evidentiary value of Exhibits EU-237, EU-238 and EU-239 to which the Panel refers in that paragraph. The European Union objects to Russia's request. In our view, Russia's comments in respect of the evidence referred to by the Panel in paragraph 7.432 are unnecessary. The Panel already observes the limited evidentiary value of those exhibits and the Panel clearly indicates what it considers that those exhibits illustrate in terms of the control measures of the EU member States referred to therein. Thus, we reject Russia's request.

6.27. Regarding paragraph 7.447, Russia requests the Panel to make factual findings in respect of the evidentiary value of the letter of 13 June 2014, the scope of the additional information contained in Poland's and Lithuania's ASF eradication plans, and the spread of ASF beyond the

<sup>82</sup> See section 7.3.6 below.

originally established infection zones. The European Union rejects Russia's requests and refers to a number of documents that the European Union provided to Russia in this respect. In our view, Russia is attempting to reargue and challenge the manner in which the Panel assessed the evidence on record. Moreover, Russia's challenge to the evidentiary value of the letter of 13 June 2014 is out of context, as the findings in paragraph 7.447 take into account the Panel's factual findings in the previous paragraphs. The Panel rejects Russia's request and considers it unnecessary to provide further references to the parties' submissions. Moreover, in our view, in paragraph 7.967, we have described the spread of ASF occurring beyond the originally established infected zones, thus making it unnecessary to also refer to that situation in this paragraph. As explained in paragraph 6.35 below, we have added references to the parties' submissions and to certain exhibits on record in paragraph 7.967.

#### **6.7 Claims under Articles 2.2, 5.1, 5.2, and 5.7 of the SPS Agreement (relating to the EU-wide ban)**

6.28. Regarding paragraph 7.730, the European Union suggests reformulating the reference that the Panel included to the European Union's description of the most probable vector for the spread of ASF to the European Union in 2014, by including a reference that this occurred via Belarus. The Panel finds this suggestion acceptable and has reflected it in paragraph 7.730. Moreover, the Panel considers it appropriate to complement the reference in footnote 1015 to paragraph 7.730 in order to better reflect the source of the European Union's views on this matter.

#### **6.8 Claims under Articles 6.1, 6.2, and 6.3 of the SPS Agreement (relating to the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland)**

6.29. In light of the parties' comments, especially to paragraphs 7.991 and 7.993, the Panel has decided to make editorial changes to paragraph 7.941 to provide a clearer explanation of the analytical approach followed by the Panel in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.

6.30. Regarding paragraph 7.945, Russia requests the Panel to include a number of factual findings relative to the content and differences in the 2010, 2014 and 2015 EFSA scientific reports. The European Union did not provide any specific comment to this request. In our view, Russia's request seems off point in respect of the content of paragraph 7.945, because that request does not clarify the manner in which the 2010 EFSA report contains geographic information of the presence of ASF in the region and potential spread of the disease, as referred to in the respective paragraph. We therefore reject Russia's request.

6.31. Regarding paragraph 7.948, Russia requests the Panel to include a number of factual findings pertaining to the alleged deficiencies of the information provided by the European Union in respect of the scientific basis for the limits of the new zones. The European Union reminds the Panel of the relevant communications and exhibits through which the European Union provided to Russia explanations as to how the zones were being established. We consider that the alleged deficiencies highlighted by Russia, as well as the relevant communications from the European Union to Russia, are referred to in Appendix 1 to the Panel Report. Moreover, in our view, Russia's request to include certain factual findings is closer in nature to rearguing its claims, as it challenges the manner in which the Panel assessed the evidence on record. As we have explained in section 6.2 it is not acceptable for parties to reargue their case during the interim review stage. Based on the foregoing, we reject Russia's requests in respect of paragraph 7.948.

6.32. Regarding paragraph 7.949, Russia requests the Panel to include certain factual findings related to the Panel's assessment of the European Union's ASF monitoring and surveillance measures. Russia also requests the Panel to identify and explain the additional information on monitoring and investigations that was provided by the European Union through the letters of 6 March, 13 March, and 13 June 2014. The European Union considers that this request should be dismissed because the Panel has made an objective assessment of the evidence before it and in doing so the Panel enjoys a certain margin of appreciation. In our view, Russia's request to include certain factual findings is closer in nature to rearguing its claims, as it challenges the manner in which the Panel assessed the evidence on record. As we have explained in section 6.2 it is not acceptable for parties to reargue their case during the interim review stage. Based on the foregoing, we reject Russia's requests in respect of paragraph 7.949. Moreover, we have added

some references to Russia's arguments in paragraph 7.929 to further reflect some of the points that Russia requests the Panel to introduce as factual findings.

6.33. Regarding paragraph 7.951, Russia requests the Panel to add references to its argumentation reflecting the full extent of Russia's reservations about the ASF contingency plans. The European Union did not provide specific comments with respect to this request. The Panel considers that Russia's request is acceptable and has introduced the respective changes to paragraph 7.951.

6.34. Regarding paragraph 7.952, Russia requests the Panel to provide a more comprehensive summary of its arguments in respect of the inadequacy of the European Union's ASF control measures. The European Union did not provide specific comments with respect to this request. The Panel considers that Russia's request is acceptable and has introduced the respective changes to paragraph 7.952.

6.35. In light of Russia's comments with respect to the need to include references indicating the expansions of the infected and buffer zones initially established in January 2014 by the European Union, we have added references to the relevant exhibits at the end of the first sentence in paragraph 7.967, where we refer to the constantly shifting situation and expansion of the protection and surveillance zones. Moreover, in paragraph 7.967 we have further explained that in the EU legislation (Council Directive 2002/60/EC)<sup>83</sup> infected zones are called protection zones, and buffer zones are called surveillance zones. Throughout the report we refer to: infected zones, as those areas where there have been ASF outbreaks and have been identified by the EU legislation as protection zones; to buffer zones, as those areas referred to in the EU legislation as surveillance zones; and to ASF-free areas, as those areas where ASF has not been reported, excluding both infected and buffer zones.

6.36. Regarding paragraph 7.972, Russia requests the Panel to include certain factual findings regarding the type of information contained in Lithuania's ASF eradication plan. The European Union did not provide specific comments with respect to this request. We consider that Russia's request to include certain factual findings is closer in nature to rearguing its claims, as it challenges the manner in which the Panel assessed the evidence on record. As we have explained in section 6.2 it is not acceptable for parties to reargue their case during the interim review stage. Based on the foregoing, we reject Russia's requests in respect of paragraph 7.972. Moreover, we have added some references to Russia's arguments in paragraph 7.967 to further reflect some of the points that Russia requests the Panel to introduce as factual findings.

6.37. Regarding paragraphs 7.975 and 7.976, Russia requests the Panel to include a number of factual findings with respect to the ASF outbreaks that occurred in Lithuania in 2014 as well as to the experts' responses regarding the consequences of outbreaks occurring outside infected zones. The European Union did not provide specific comments with respect to these requests. In light of Russia's requests we have adjusted the text of paragraphs 7.975 and 7.976 and the references provided therein. We have also introduced additional text in paragraph 7.411, explaining the possible origin of discrepancies in the manner in which an OIE member reports the occurrence of notifiable diseases.

6.38. Regarding paragraph 7.980, Russia requests the Panel to include certain factual findings regarding the type of information contained in Poland's ASF eradication plan. The European Union did not provide specific comments with respect to this request. We consider that Russia's request to include certain factual findings is closer in nature to rearguing its claims, as it challenges the manner in which the Panel assessed the evidence on record. As we have explained in section 6.2 it is not acceptable for parties to reargue their case during the interim review stage. Based on the foregoing, we reject Russia's requests in respect of paragraph 7.980. Moreover, we have added some references to Russia's arguments in paragraph 7.967 to further reflect some of the points that Russia requests the Panel to introduce as factual findings.

6.39. Also regarding paragraph 7.984, Russia requests the Panel to introduce a factual finding that Poland's infected zone underwent three expansions between January 2014 and September 2014, each time reducing the ASF free-area. Russia refers to Exhibit RUS-297 (revised)

<sup>83</sup> See Art. 9 of Council Directive 2002/60/EC (Exhibit EU-31). See also Appendix 2 below.



in support of this request. The European Union did not provide specific comments to this request. In our view, in paragraph 7.967, we have described the factual situation which Russia requests to be included in paragraph 7.984, and thus we reject Russia's request. As indicated in paragraph 6.35 above, we have added references to certain exhibits on record in paragraph 7.967.

6.40. Regarding paragraphs 7.991 and 7.993, the European Union requests the Panel accepting ten new exhibits (Exhibits EU-253 to EU-262), based on which the European Union requests the Panel to provide factual accuracy in respect of the assertions made in those paragraphs. In particular, the European Union requests the Panel to indicate in paragraph 7.991 that the European Union promptly provided to Russia significant information on revised and updated control measures in Latvia, following the first outbreak in that EU member State, until September 2014. Russia commented extensively with respect to this request in its statements at the interim review meeting and in its responses to the questions from the Panel after the interim review meeting. Russia's main contention is that new evidence cannot be presented at the interim review stage and that as such the European Union's request for review of paragraphs 7.991 and 7.993, based on the new evidence submitted as Exhibits EU-253 through EU-262, should be rejected. Russia's supports its views on a number of previous panel and Appellate Body reports.<sup>84</sup>

6.41. In section 6.3 above, we have explained why, in our view, the ten new exhibits (exhibits EU-253 to EU-262) are inadmissible at this stage of the proceedings. Based on this finding, we reject the European Union's request for review of paragraphs 7.991 and 7.993. However, we have adjusted the wording of paragraphs 7.991 and 7.993 to more accurately reflect the Panel's appraisal of the argumentation and evidence on record.

6.42. Also regarding paragraph 7.991, in connection with paragraph 7.1017, Russia requests the Panel to introduce a factual finding that Latvia's infected zone underwent four expansions between June 2014 and August 2014, each time reducing the ASF free-area. Russia refers to Exhibit RUS-297 (revised) in support of this request. The European Union makes reference to its comments to paragraph 7.991, as well as to the new exhibits indicating that Russia was immediately and consistently, informed about the ASF situation in Latvia. In our view, in paragraph 7.967, we have described the factual situation which Russia requests to be included in paragraphs 7.991 or 7.1017, and thus we reject Russia's request. As indicated in paragraph 6.35 above, we have added references to certain exhibits on record in paragraph 7.967.

6.43. Also regarding paragraph 7.993, Russia requests the Panel to introduce factual findings that there is some information in Latvia's ASF eradication plan that was not previously provided by the European Union to Russia SPS officials and that Latvia's ASF eradication plan highlights the risk of further spread of ASF through backyard farms. The European Union refers to its comments to paragraph 7.993 as well as to the new exhibits indicating that Russia was immediately, and consistently, informed about the ASF situation in Latvia. The Panel has addressed Russia's views on the new information provided through Latvia's ASF eradication plan by means of a footnote to paragraph 7.993. However, the Panel considers that Russia's requests to introduce these comments as new factual findings amount to rearguing Russia's claims rather than requesting the review of precise aspects of the Interim Report. Based on our explanation of the scope of the interim review stage in section 6.2 above, we reject Russia's requests with respect to paragraph 7.993.

6.44. Regarding paragraphs 7.1015 and 7.1017, Russia asks the Panel to provide more details of what is referred to as the "most updated geographical information on the record". The European Union did not provide comments to this request. At the end of the sentence of paragraph 7.1015 to which Russia refers, the Panel included a footnote that refers to Exhibits EU-119 and RUS-297 (revised). It is to the information contained in those exhibits that the Panel refers to as the most updated geographical information on the record. The Panel has clarified this issue in the footnote which appears in paragraph 7.1015. This reference also appears, and has been adjusted, in paragraphs 7.1016, 7.1017 and 7.1018.

6.45. Regarding paragraph 7.1018, Russia requests the Panel to introduce a factual finding that Estonia's infected zone underwent six expansions, each time reducing the ASF free-area, and as of 7 August 2015, all of mainland Estonia was considered and notified as ASF-infected. Russia refers

<sup>84</sup> See Russia's opening statement at the interim review meeting of the Panel, para. 5.

to Exhibit RUS-297 (revised) in support of this request. Russia also requests the Panel to find that up until 7 August 2015, three outbreaks took place within ASF-free areas and 18 occurred in the buffer zones. The European Union did not provide specific comments to these requests. In our view, in paragraph 7.967, we have described the first factual situation which Russia requests to be included in paragraph 7.1018, and thus we reject Russia's request. As indicated in paragraph 6.35 above, we have added references to certain exhibits on record in paragraph 7.967. Regarding the second request, in our view, Russia's request is closer in nature to rearguing its claims, as it challenges the manner in which the Panel assessed the evidence on record. As we have explained in section 6.2 it is not acceptable for parties to reargue their case during the interim review stage. Based on the foregoing, we reject Russia's requests in respect of paragraph 7.1018.

#### **6.9 Whether Russia's measures are inconsistent with Article 2.3 of the SPS Agreement**

6.46. Regarding paragraph 7.1279, Russia requests the Panel to include Russia's argumentation that no arbitrary or unjustifiable discrimination exists because measures that are structured or operate differently can reflect the same ALOP. The European Union did not provide specific comments with respect to this request. The Panel considers that Russia's request is acceptable and has introduced the respective changes to paragraph 7.1279.

6.47. Regarding paragraph 7.1300, Russia requests the Panel to either refer explicitly to its decision to dismiss the European Union's discrimination claim with respect to Belarus, or to refer explicitly to the fact that the European Union has withdrawn such claim. The European Union considers that the Panel does not need to make changes to paragraph 7.1300, and notes that the Panel referred to the European Union's arguments with respect to the discriminatory treatment, vis-à-vis Belarus, in paragraph 7.1398. We observe that paragraph 7.1300 portrays the parties' arguments in respect of the claims under the first sentence of Article 2.3 of the SPS Agreement, whilst the European Union's arguments in respect of Belarus are only pertinent pursuant to the second sentence of Article 2.3. As noted by the European Union, the Panel addresses the European Union's arguments with respect to Belarus later in the report. Based on the foregoing, the Panel rejects Russia's request.

6.48. Regarding paragraph 7.1353, Russia requests the Panel to include certain factual findings with respect to the effectiveness of ASF control measures applied in certain regions of Russia. The European Union did not provide comments in this respect. The Panel introduced additional references in paragraph 7.1353 to reflect the evidence referred to by Russia.

6.49. Regarding paragraph 7.1383, in connection with paragraph 8.1.f.i, Russia requests the Panel to make an explicit finding that the European Union failed to establish that Russia discriminated vis-à-vis the Ukraine. The European Union disagrees that the Panel needs to introduce any changes to paragraph 7.1383, because the Panel has made the necessary findings to secure a positive solution to the dispute before it. In the Panel's view, Russia's request is closer in nature to rearguing its claims, as it challenges the manner in which the Panel exercised its discretion in assessing the European Union's claims. As we have explained in section 6.2 it is not acceptable for parties to reargue their case during the interim review stage. Based on the foregoing, we reject Russia's requests in respect of paragraphs 7.1383 and 8.1.f.i.

#### **6.10 Panel's conclusions and recommendations**

6.50. Regarding paragraphs 8.1.d.viii, 8.1.e.xii and 8.6, Russia brings to the Panel's attention that the Panel should amend the language in these paragraphs to reflect the Panel's findings in paragraphs 7.783 and 7.1208. In our view, paragraphs 8.1.d.vii, 8.1.e.xii and 8.6 correctly reflect the Panel's findings in paragraphs 7.783 and 7.1208.

6.51. Regarding paragraphs 8.1.d.ix and 8.1.e.xiv, Russia refers to its argumentation in respect of Article 2.2 of the SPS Agreement and requests the Panel to delete the reference to Russia's lack of arguments or evidence to rebut the presumption of inconsistency with Article 2.2 raised by a finding of inconsistency with Article 5.6 of the SPS Agreement. The European Union considers that these two paragraphs are correct and that the Panel should not change them. The Panel has made small changes to paragraphs 7.846, 7.1254, 8.1.d.ix, and 8.1.e.xiv.

## 6.11 Appendix 1 to the Panel Report

6.52. Regarding Appendix 1 to the Panel Report, Russia requests the Panel to include a number of communications, press notes, reports and other documents on record. The European Union considers that the chronology provided by Russia cannot serve in any way as evidence of Russia acting in accordance with its WTO obligations. The purpose of Appendix 1 was to provide an account of the communications sent by the European Union to Russia and by Russia to the European Union in order to support the Panel's assessment of the evidence that the European Union had submitted to Russia in connection with the ASF outbreaks in Estonia, Latvia, Lithuania, and Poland. Those documents are referred to chronologically. Appendix 1 excludes press releases, unilateral reports of bilateral meetings or recollection of phone calls. Based on the objective of Appendix 1, we have accepted a limited number of the documents that Russia requests the Panel to include in Appendix 1.

## 7 FINDINGS

### 7.1 Procedural issues

#### 7.1.1 Arrangements for simultaneous interpretation

7.1. As indicated in section 1.3.3 above, in response to requests from Russia, the Panel made particular arrangements concerning the use of simultaneous interpretation during the first substantive meeting with the parties, the meeting with the third parties, the meeting with the experts, and the second substantive meeting. In this section, the Panel explains the underlying rationale in support of the arrangements mentioned in paragraphs 1.13 to 1.16 above.

7.2. We recall that on 16 April 2015 — shortly before the first substantive meeting with the parties, scheduled for Monday 20 April 2015 — Russia requested the Panel to authorize the use of simultaneous English-to-Russian and Russian-to-English interpretation. Russia explained that it would provide the interpreters and bear all the associated costs. On 17 April 2015, in response to the Panel's invitation, the European Union provided a communication regarding Russia's request. The European Union indicated that it could not provide its final views on such short notice.

7.3. On 17 April 2015, Russia reiterated its request to which the European Union responded on 20 April 2015. Russia argued that its due process rights would not be ensured if the Panel were to decline its request, whereas the European Union was of the view that such request raised systemic considerations by *inter alia* opening the possibility for Russian to become a *de facto* working language in WTO dispute settlement. At the beginning of the meeting on 20 April 2015, Russia and the European Union exchanged oral comments, reiterating their divergent views.

7.4. As explained in paragraph 1.13 above, following exchanges with the parties, and after listening to the parties' views in the course of the first substantive meeting, the Panel informed the parties that, for the purposes of the first substantive meeting with the parties (i) interpreters could be present at the meeting, provided that Russia included their names in its delegation list and that the interpreters were provided and financed by Russia; (ii) the interpreters could use the interpretation booths to provide only English-to-Russian simultaneous interpretation for the benefit of Russia's delegation; (iii) Russia's delegation must make statements and submissions to the Panel and other parties only in English; and (iv) for the purpose of the proceedings, only statements and submissions made in English must form part of the record.

7.5. During the third-party session on 21 April 2015, several third parties provided their views on the use of simultaneous interpretation in the proceedings. Japan, Norway and the United States took the floor and noted that they did not have any objections to the arrangements the Panel had made regarding Russia's request in the session with the parties to the dispute. As indicated in paragraph 1.14 above, the Panel authorized simultaneous English-to-Russian interpretation for the third-party session on the same conditions as those for the first substantive meeting with the parties.

7.6. On 1 June 2015, well before the second substantive meeting, Russia renewed its request for simultaneous English-to-Russian and Russian-to-English interpretation. According to Russia, the Panel's ruling at the first meeting with the parties to allow only simultaneous English-to-Russian

interpretation created a significant burden on Russia's ability to participate actively in the hearing. In particular, Russia noted that during the first meeting, knowledgeable Russian SPS officials were not able to easily respond to comments made by the European Union or to respond to Panel questions. In its communication of 12 June 2015, the European Union opposed Russia's renewed request, elaborating on the views reflected in its communication of 20 April 2015.

7.7. On 19 June 2015, Russia responded to the European Union's comments expressed in the communication of 12 June 2015. Russia opined that "the right balance" not to violate the due process right of either one of the disputing parties would be struck if its request for "simultaneous interpretation during the Expert Panel" was accepted by the Panel.

7.8. On 2 and 3 July 2015, in response to a question posed by the Panel, Brazil, Japan, Norway and the United States communicated their views on the use of language interpretation during the Panel's subsequent meetings.

7.9. On 15 July 2015, Russia clarified the scope of its second request for language interpretation. Russia explained that its most recent request for simultaneous Russian-to-English interpretation was limited to the Panel's meeting with the experts. Russia emphasized the importance of such interpretation due to the scientific and technical nature of the Panel's meeting with the experts while expressing its appreciation for the simultaneous English-to-Russian interpretation authorised by the Panel at the first substantive meeting.

7.10. As indicated in paragraphs 1.15 and 1.16 above, on 13 August 2015 the Panel informed the parties of the arrangements for simultaneous interpretation during the meeting with the experts and the second substantive meeting. The Panel informed the parties that it would authorise simultaneous English-to-Russian and simultaneous Russian-to-English interpretation during the Panel's meeting with the experts, and simultaneous English-to-Russian interpretation during the second substantive meeting with the parties (replicating the arrangements at the first substantive meeting with the parties). The Panel also confirmed that the interpreters could use the interpretation booths, as available, in the rooms booked for the meeting with the experts and for the second substantive meeting with the parties.

7.11. Furthermore, the Panel emphasized that the arrangements for interpretation were conditioned on the following: (i) the interpretation was conducted only by the interpreters included in Russia's delegation; (ii) the cost of the interpretation was covered exclusively by Russia; (iii) only statements made in English would form part of the official record of the proceedings; and (iv) the interpreters' statements, when interpreting what a member of Russia's delegation said in a language other than English, would be considered the only statements forming part of the record.

7.12. Turning to the rationale underlying the interpretation arrangements we made, the Panel first notes that Article XVI of the Marrakesh Agreement Establishing the World Trade Organization provides that it was concluded in three authentic languages: English, French and Spanish. These three languages are also the working languages of the WTO.<sup>85</sup>

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<sup>85</sup> The working languages of the WTO have been identified in the rules of procedure of most of the WTO bodies. See: Rule 30 of the Rules of Procedure for Sessions of the Ministerial Conference and Rule 35 of the Rules of Procedure for Meetings of the General Council (WT/L/161); rule 1 of the Rules of Procedure for Meetings of the Dispute Settlement Body (WT/DSB/9); para. 1 of the Rules of Procedure for Meetings of the Council for TRIPS (IP/C/1); para. 1 of the Rules of Procedure for Meetings of the Council for Trade in Services (S/L/15); rule 1 of the Rules of Procedure for Meetings of the Trade Policy Review Body (WT/TPR/6/Rev.3); para. 1 of the Rules of Procedure for Meetings of the Committee on Trade and Development (WT/COMTD/6); para. 1 of the Rules of Procedure for Meetings of the Committee on Regional Trade Agreements (WT/REG/1); rule 1 of the Rules of Procedure for Meetings of the Committee on Balance-of-Payments Restrictions (WT/BOP/10); para. 1 of the Rules of Procedure for Meetings of the Committee on Market Access (G/L/148); para. 1 of the Rules of Procedure for Meetings of the Committee on Agriculture (G/L/142); para. 1 of the Rules of Procedure for Meetings of the Committee on Sanitary and Phytosanitary Measures (G/L/170); rule 35 of the Rules of Procedure for Meetings of the Committee on Technical Barriers to Trade (G/L/150); rule 35 of the Rules of Procedure for Meetings of the Committee on Anti-Dumping Practices (G/L/143); para. 1 of the Rules of Procedure for Meetings of the Committee on Rules of Origin (G/L/149); para. 1 of the Rules of Procedure for Meetings of the Committee on Import Licensing (G/L/147); para. 1 of the Rules of Procedure for Meetings of the Committee on Trade-Related Investment Measures (G/L/151); rule 35 of the Rules of Procedure for

7.13. Second, the Panel acknowledges that each WTO Member has an exclusive right to determine the composition of its delegation in dispute settlement proceedings.<sup>86</sup> The Panel also notes that parties to dispute settlement proceedings have the corresponding obligation to ensure that the confidentiality of WTO dispute settlement proceedings is fully respected.<sup>87</sup> Russia's prerogative to determine the composition of its delegation would allow them to include interpreters as part of their delegation. Pursuant to paragraph 5 of our Working Procedures, Russia must ensure that each member of Russia's delegation acts in accordance with the DSU and the Panel's Working Procedures, particularly with regard to the confidentiality of the proceedings.<sup>88</sup> From the moment that Russia included the interpreters within its delegation, Russia assumed this obligation in respect of these interpreters. In our view, the interpretation arrangements adopted in these proceedings ensured that the confidentiality of the proceedings was fully respected.

7.14. Third, we observe that the Appellate Body has noted that the DSU accords a panel "ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts".<sup>89</sup> This broad authority and discretion to undertake and control the conduct of panel proceedings may be exercised within the limits of the DSU and due process.<sup>90</sup> We are also mindful of our obligation under Article 11 of the DSU to assess objectively the matter before us, including by making an objective assessment of the facts of this case. Moreover, Article 12 of the DSU requires panels to provide sufficient flexibility so as to ensure high quality panel reports while not unduly delaying the process. The Panel is also cognisant of Article 13 of the DSU, which provides for the right of panels to seek information, and Article 11.2 of the SPS Agreement, which deals with panels seeking advice from experts in disputes involving scientific or technical issues and consulting with relevant international organizations.

7.15. We are of the view that the interpretation arrangements adopted by the Panel did not unduly delay the process nor undermine due process, and neither party has suggested anything to the contrary.

7.16. In terms of avoiding potential delays, the interpretation arrangements allowed the Panel to make the best use of the limited time that it had available with the experts and the parties during the meeting with the experts. Moreover, allowing for English to Russian interpretation for the benefit of Russia's delegation allowed both the meetings with the parties and the third parties<sup>91</sup> to run smoothly and avoided any potential delays in the Panel's timetable that might have been required to provide time for translations in connection with the Panel's meetings.

7.17. In terms of due process, the Panel provided the parties and third parties an opportunity to explain their concerns in respect of interpretation arrangements, so the Panel could accommodate and take them into account. Furthermore, keeping the official record of Panel proceedings in English and ensuring that statements by the interpreters, when interpreting what a member of Russia's delegation said in a language other than English, would be considered the only statements forming part of the record, did not change or have a material detrimental impact on the way that the complainant participated in the Panel proceedings.

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Meetings of the Committee on Safeguards (G/L/145); para. 1 of the Rules of Procedure for Meetings of the Committee of Participants on the Expansion of Trade in Information Technology Products (G/IT/3); para. 1 of the Draft Rules of Procedure for Meetings of the Committee on Customs Valuation (G/VAL/W/2); rule 35 of the Draft Rules of Procedure for Meetings of the Committee on Trade and Environment (WT/CTE/W/13/Rev.1).

<sup>86</sup> Appellate Body Report, *EC – Bananas III*, paras. 10-12; and Panel Reports, *Korea – Alcoholic Beverages*, para. 10.31; and, *Indonesia – Autos*, para. 14.2. See also Panel's Working Procedures, para. 5.

<sup>87</sup> See Appellate Body Report, *Canada – Aircraft*, para. 145. This was acknowledged by the European Union in its communications of 17 and 20 April 2015.

<sup>88</sup> This rule in the Panel's Working Procedures is in line with the Appellate Body finding that Members have an obligation to extend their obligation to maintain the confidentiality of appellate proceedings to individuals whom they select to act as its representatives, counsel and consultants. Appellate Body Report, *Canada – Aircraft*, para. 141.

<sup>89</sup> Appellate Body Report, *US – Shrimp*, para. 106.

<sup>90</sup> Appellate Body Reports, *India – Patents (US)*, para. 92; and, *EC – Hormones*, para. 154.

<sup>91</sup> We note that in its communication of 17 April 2015, the European Union referred to the "quite normal practice" of members of a delegation conferring with interpreters who are part of the delegation of that Member.

7.18. We are confident that the interpretation arrangements enabled the Panel to receive, on a timely basis, vital scientific and technical expertise, which assisted the Panel to meet its obligations under Article 11 of the DSU to make an objective assessment of the facts of the case and under Article 11.2 of the SPS Agreement to seek expert advice. We are presented in this dispute with complex scientific and technical issues. We determined that we would benefit from the input of relevant experts, including those relied upon by both parties. In our view, given the highly technical nature of the issues before us and the limited ability of Russia's scientific experts to contribute effectively in any language other than Russian, we determined that unless we made the interpretation arrangements we did, it would not have been possible for Russia to respond to the Panel's questions in a timely fashion or to present relevant evidence and be in a position to defend itself in this case. We are also persuaded that we would not have been in a position to properly assess the arguments and evidence in this case in as timely and effective a manner and hence would not have been able to carry out as effectively our obligations set forth in the DSU.

7.19. We are mindful of the limited resources and infrastructure available at the Panel's disposal, which was consistently underlined also by the European Union and some of the third parties. We note that the interpretation arrangements authorized by the Panel did not entail any costs to the WTO. The Panel emphasizes that these arrangements were addressed in the context of these Panel proceedings and, as such, take into account the particular nature of and circumstances present in this dispute. Any similar request would need to be assessed on case-by-case basis taking into account the feasibility of accepting arrangements for simultaneous interpretation. We make no assessment of the potential relevance, utility or otherwise of similar arrangements for other proceedings.

#### **7.1.2 Industry representative in a Member's delegation**

7.20. At our first substantive meeting with the parties, the European Union observed that Russia's delegation included a representative of the Russian pig industry, who had been identified as chairman of the Board of the AGROECO Group. In the European Union's view, it would be inappropriate for that person to participate in the part of the meeting where the Panel would pose questions to the parties. Referring to paragraph 3 of the Panel's Working Procedures on Strictly Confidential Information<sup>92</sup>, the European Union noted that certain people, including the person concerned from the Russian pig industry, should not have access to strictly confidential information. In response, Russia noted that Russia considered it important for that person to attend the session because he could be well suited to answer some of the Panel's questions. Russia added that this person was included in their delegation and that Russia was responsible for ensuring that the delegate respected the confidentiality of information disclosed in the course of the meeting. Russia noted that the European Union had not labelled any information as "strictly confidential" and that all the information that would be discussed came from publicly available sources. The European Union replied that it would accept an arrangement by which that person would leave the room in case the European Union considered it would disclose strictly confidential information as part of an answer to a question from the Panel. Russia agreed to this arrangement.

7.21. Having listened to the parties' views, we decided not to grant the European Union's request to exclude the member of Russia's delegation. We observed that, as provided in paragraph 5 of our Working Procedures, Russia was entitled to determine the composition of its delegation in these proceedings. We also stated that, in accordance with Article 18.2 of the DSU and paragraph 5 of our Working Procedures<sup>93</sup>, Russia assumed responsibility for its delegation, including respect

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<sup>92</sup> Paragraph 3 of our additional Working Procedures Concerning Strictly Confidential Information provides:

As required by paragraph 3 of the Working Procedures of the Panel, the deliberations of the Panel and the documents submitted to it shall be kept confidential. Further, as required by Article 18.2 of the DSU a party or third party having access to information designated as SCI submitted in these Panel proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these additional working procedures. Each party and third party is responsible for ensuring that its employees, outside advisers and experts comply with these additional Working Procedures to protect SCI. An outside advisor is not permitted access to SCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that are subject of this dispute.

<sup>93</sup> Paragraph 5 of our Working Procedures provides:

for confidentiality of information exchanged in the course of the first substantive meeting.<sup>94</sup> We also noted the parties' agreement that in case the European Union were to present information designated as strictly confidential, the member of Russia's delegation in question would excuse himself from the meeting.

7.22. We are cognisant of the need to protect sensitive information in WTO dispute settlement proceedings, and, in particular, of the importance of protecting information labelled by the parties as strictly confidential when a panel has adopted working procedures for the protection of such information. We note that at the time we made our decision on this issue, the European Union had not identified any specific information for which it sought strictly confidential treatment. Rather, the European Union sought to exclude a member of Russia's delegation from the part of the first substantive meeting of the parties with the Panel devoted to the answers to questions from the Panel, as well as from subsequent meetings. In the course of the first substantive meeting and in the course of these proceedings, neither party identified any specific information as strictly confidential. Moreover, Russia subsequently indicated that the person whose presence was challenged by the European Union would not form part of their delegation for the rest of the first substantive meeting, and was not included as part of Russia's delegation in any subsequent meeting of the Panel with the parties, the third parties or the experts.

## 7.2 Order of analysis

7.23. Before addressing certain preliminary issues and commencing the analysis of the European Union's claims, we first consider the order in which we will address such claims.

7.24. In this dispute, the European Union requests the Panel to find that Russia's measures at issue are inconsistent with Russia's obligations under Articles 2.2, 2.3, 3.1, 3.2, 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 6.1, 6.2, 6.3, 7 (and Annex B paragraphs 1, 2, 5 and 6) and 8 (and Annex C.1(a), (b) and (c)) of the SPS Agreement.<sup>95</sup> Moreover, in responding to the European Union's claims under the SPS Agreement, Russia invokes Articles 3.1, 3.2, 5.7 and 6.3 of that Agreement.

7.25. The Panel must decide the order in which it will examine the claims under the SPS Agreement.

### 7.2.1 Main arguments of the parties

7.26. The European Union points out that the panel in *India – Agricultural Products* agreed with the respondent on the order of analysis and started its assessment under the harmonization provisions of the SPS Agreement, proceeding only afterwards with the analysis of the claims related to the lack of a risk assessment. The European Union emphasizes that were that panel to have found that India's avian influenza measures "conform to" international standards, then they would have been presumed to be consistent with the relevant provisions of the SPS Agreement.

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Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

<sup>94</sup> The panel in *Korea – Certain Paper* ruled on a similar request by Korea regarding the presence of representatives of the Indonesian paper industry in the Indonesian delegation. See Panel Report, *Korea – Certain Paper*, paras. 7.10-7.12. See also Appellate Body Report, *Canada – Aircraft*, para. 141 (regarding the Members' obligation to extend their obligation to maintain the confidentiality of appellate proceedings to individuals whom they select to act as its representatives, counsel and consultants); and Panel Reports, *Thailand – H Beams*, para. 5.3 (referring to the importance of maintaining confidentiality of information and the Members' obligation to do so pursuant to Article 18.2 of the DSU); *Brazil – Aircraft (Article 21.5 – Canada II)*, paras. 3.5-3.10 (regarding a request from Brazil that the panel consider that Canada breached the panel's working procedures by disclosing confidential information to persons that were not part of Canada's delegation); and *Indonesia – Autos*, para. 14.1 (regarding the participation of two private lawyers in Indonesia's delegation during the first substantive meeting).

<sup>95</sup> Although the European Union's panel request initially included claims under the GATT 1994 (Articles I:1, XI:1 and III:4) in addition to its claims under the provisions of the SPS Agreement, the European Union subsequently clarified that it would no longer pursue these claims. Accordingly, we proceed directly to an examination of the European Union's claims under the SPS Agreement. See European Union's response to Panel question No. 80, para. 155.

The European Union, referring to the foregoing reasoning, presents its claims starting with its claims relating to Article 3 of the SPS Agreement.<sup>96</sup>

7.27. Russia does not argue on the particular order the Panel should examine the European Union's claims.

## 7.2.2 Main arguments of the third parties

### 7.2.2.1 Australia

7.28. Australia highlights that the Panel needs to determine, as a matter of fact, whether Russia's measures conform to, or are based on, the Terrestrial Code, noting that only measures which conform to international standards enjoy the presumption of consistency with the SPS Agreement. Australia also notes that that presumption is rebuttable. Australia argues that in the context of the foregoing, it would be appropriate for the Panel to commence its analysis with the claims under Article 3, followed by a consideration, if necessary, of the subsequent claims under Articles 5 and 6 of the SPS Agreement.<sup>97</sup>

### 7.2.3 Analysis by the Panel

7.29. A panel is generally free to determine in which order it examines the claims brought by the complaining party. Like the panel in *US – Animals*, we understand from the Appellate Body report in *US – Zeroing (EC) (Article 21.5 – EC)* that, in fulfilling its duties under Article 11 of the DSU, a panel may "depart from the sequential order suggested by the complaining party, in particular, when this is required by the correct interpretation or application of the legal provisions at issue".<sup>98</sup> Indeed, the Appellate Body has stated that, as a general rule, panels are free to structure the order of their analysis as they see fit<sup>99</sup>, provided that their analysis is consistent with the "structure and logic" of the provisions at issue in each dispute.<sup>100</sup> There may be situations where a particular order is compelled by principles of valid interpretative methodology, which, if not followed, might constitute errors of law.<sup>101</sup> In addition, panels dealing with claims under provisions of the SPS Agreement have considered the particular circumstances of the dispute and the implications of their findings in the subsequent claims that they need to examine when deciding in which order to examine the complainant's claims.<sup>102</sup>

7.30. Given the particular circumstances of this dispute and the nature of the parties' argumentation before this Panel, the issue of whether Russia's measures "conform to" or are "based on" the relevant international standards embodied in the Terrestrial Code under Articles 3.2 and 3.1 of the SPS Agreement is of central relevance. This is so, in particular, due to the eventual impact of the Panel's findings under those provisions with respect to the European Union's other claims, and their close relationship to other issues arising in this case, such as those pertaining to regionalization arising under Article 6 of the SPS Agreement.

### 7.2.4 Conclusion

7.31. Accordingly, with respect to the order of analysis of the European Union's claims under the SPS Agreement, the Panel will begin by determining which measures fall within its terms of reference to ensure that the Panel has the jurisdiction and mandate to examine them. In addressing this issue, the Panel will examine Russia's arguments with respect to the attribution of the alleged EU-wide ban to Russia and to limitations that Russia's terms of accession to the WTO may create on the Panel's jurisdiction. Once we have confirmed the parameters of our terms of reference, we will determine whether Russia's measures at issue are SPS measures within the

<sup>96</sup> European Union's first written submission, paras. 108-109.

<sup>97</sup> Australia's third-party submission, paras. 8-9.

<sup>98</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277. See Panel Report, *US – Animals*, para. 7.13.

<sup>99</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 126-129.

<sup>100</sup> Appellate Body Reports, *Canada – Autos*, para. 151; and *Canada – Wheat Exports and Grain Imports*, para. 109.

<sup>101</sup> Panel Report, *India – Autos*, para. 7.154.

<sup>102</sup> Panel Report, *US – Animals*, paras. 7.7-7.20.



scope of the SPS Agreement. If they are, we will proceed to examine the claims and arguments in respect of the remaining provisions of the SPS Agreement invoked by the European Union. For the purposes of clarity, the Panel will separately address the claims and arguments raised by the parties in respect of the alleged EU-wide ban; and the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, in that particular order.

7.32. In addressing such claims and arguments, the Panel will begin with its examination of the issue of harmonization under Articles 3.1 and 3.2 of the SPS Agreement, addressing, as relevant, the extent to which Russia's challenged measures "conform to" and/or are "based on" the relevant international standards. In this particular case, we deem it appropriate to evaluate the parties' claims pertaining to regionalization under Articles 6.1, 6.2 and 6.3 of the SPS Agreement in the course of our assessment under Article 3.

7.33. Once we have concluded our analysis with respect to harmonization and regionalization the Panel will turn to the parties' remaining claims in the following sequence:

- a. Claims under Article 8 and Annex C of the SPS Agreement;
- b. Claims under Articles 2.2, 5.1, 5.2 and 5.7 of the SPS Agreement;
- c. Claims under Articles 5.3, 5.4 and 5.6 of the SPS Agreement;

7.34. The Panel will then assess in respect of both sets of the challenged measures the parties' arguments with respect to:

- a. Claims under Articles 2.3 and 5.5 of the SPS Agreement; and
- b. Claims under Article 7 and Annex B of the SPS Agreement.

7.35. Before addressing each of European Union's claims, the Panel will address a number of preliminary issues related to its terms of reference.

### 7.3 Preliminary issues

#### 7.3.1 Introduction

7.36. As indicated in section 2.2 above, in its panel request, the European Union states that it challenges "certain Russian measures adopting, maintaining or applying an import ban or import restrictions, which prevent the importation of the products at issue [live pigs and their genetic material, pork and certain other pig products] from the EU into Russia".<sup>103</sup>

7.37. The European Union identifies, as the specific measures at issue in this dispute, two sets of measures:

- the "refusal by Russia to accept imports for the products at issue from the entire EU", characterizing it as an "EU-wide ban"<sup>104</sup>; and
- individual import bans on live pigs and pig products from Estonia, Latvia, Lithuania, and Poland.<sup>105</sup> The bans on imports of the products at issue from Lithuania and Poland are explicitly referred to in the panel request.<sup>106</sup> Those in respect of imports from Estonia and Latvia are not, because the former was adopted on the same date on which the European

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<sup>103</sup> European Union's panel request, p. 1.

<sup>104</sup> Referred to in this Report as the "alleged EU-wide ban" or the "EU-wide ban".

<sup>105</sup> European Union's panel request, pp. 1-2; first written submission, paras. 82-97; opening statement at the first meeting of the Panel, paras. 24-27; and response to Panel question No. 57, para. 135. In its first written submission, the European Union refers to the four EU member States subject to the specific import bans, in the chronological order in which the measures were adopted with respect to each. However, for ease of reference, we list these four EU member States in alphabetical order.

<sup>106</sup> See para. 2.9 above.

Union submitted the panel request (27 June 2014)<sup>107</sup>, whereas the latter was adopted on 11 September 2014.<sup>108</sup> However, the European Union included these two measures among the measures at issue challenged in its first written submission.<sup>109</sup>

7.38. Russia argues that the alleged EU-wide ban is not a measure attributable to Russia. Rather, it is a consequence of the European Union's veterinary officials' inability to certify compliance of the products at issue for export with the conditions set out in the form of veterinary certificates bilaterally agreed by Russia and the European Union for trade of the products at issue. Hence, Russia claims that the European Union has failed to demonstrate that the alleged EU-wide ban is a measure within the definition of Article 1 and Annex A of the SPS Agreement.<sup>110</sup>

7.39. According to Russia, the validity of the veterinary certificates is itself a term of Russia's accession to the WTO. Thus, Russia's commitment to maintain the application of the bilateral certificates negates the European Union's claims, derived directly or indirectly from the application of the bilateral certificates, pursuant to the provisions of the SPS Agreement.<sup>111</sup>

7.40. The European Union rejects Russia's arguments regarding the consequences of the validity of the veterinary certificates. In the European Union's view, the reference to the veterinary certificates in Russia's accession documents should be understood in the context of Russia's continuing obligation to adapt its measures to regional SPS characteristics.<sup>112</sup> The European Union adds that the terms of Russia's accession to the WTO cannot be construed as preventing the adaptation of bilateral certificates to the ASF regionalization measures in the European Union.<sup>113</sup>

7.41. In addition, Russia has not raised any objection in respect of the country-wide measures concerning Latvia and Estonia being within the Panel's terms of reference. Russia only commented on this matter in response to Panel questions addressing the fact that those measures are not mentioned explicitly in the panel request.<sup>114</sup> Russia also added, "both Parties have agreed that it is appropriate for the Panel to consider the European Union claims as including a challenge to the Latvian and Estonian import bans ... which were not included in the Panel request".<sup>115</sup>

7.42. The Panel first needs to determine whether the alleged EU-wide ban is a measure susceptible to challenge under the WTO dispute settlement mechanism. Then, the Panel needs to examine whether Russia's terms of accession, in respect of the validity of certain bilateral veterinary export certificates, limits the Panel's assessment of the European Union's claims in respect of the alleged EU-wide ban. Then, independent of the parties' views on the matter, it is incumbent upon the Panel to determine whether the measures regarding imports from Latvia and Estonia are within its terms of reference. The Panel will address each of these issues in turn.

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<sup>107</sup> Russia's notification to the SPS Committee: G/SPS/N/RUS/64 (SPS notification on imports from Latvia) (Exhibit EU-12); and Letter of the Russian Federal Service for Veterinary and Phytosanitary Supervision No. FS-NF-8/11315, of 27 June 2014 (Measure on imports from Latvia) (Exhibit EU-169).

<sup>108</sup> Russia's notification to the SPS Committee: G/SPS/N/RUS/76 (SPS notification on imports from Estonia) (Exhibit EU-13); and Letter from the Russian Veterinary Service to DG SANCO, FS-NV-8/17431, 11 September 2014 (Measure on imports from Estonia) (Exhibit RUS-37).

<sup>109</sup> European Union's first written submission, paras. 4 and 86-87.

<sup>110</sup> Russia's response to Panel question No. 72, para. 108; second written submission, paras. 3 and 171-174; opening statement at the second meeting of the Panel, paras. 50-60; and response to Panel question No. 275, para. 111.

<sup>111</sup> Russia's response to Panel question No. 274, paras. 104-110. See also response to Panel question No. 75, paras. 110-118; and second written submission, paras. 177-184.

<sup>112</sup> European Union's second written submission, para. 27 (referring to Article 6.1 of the SPS Agreement and Appellate Body Report, *India – Agricultural Products*, para. 5.154).

<sup>113</sup> European Union's comments on Russia's response to Panel question No. 254, para. 12.

<sup>114</sup> Russia's response to Panel question No. 74, paras. 119-123. In para. 123, Russia noted that even if the Panel were to find that the measures on imports from Estonia and Latvia do not fall within its terms of reference they are nevertheless relevant to the dispute as evidence, even if these measures post-date the date of the panel request.

<sup>115</sup> Russia's response to Panel question No. 279, para. 122.

### 7.3.2 Whether the alleged EU-wide ban is a measure susceptible to challenge under the WTO dispute settlement mechanism

#### 7.3.2.1 Introduction

7.43. We begin our examination of the preliminary matters related to the measures at issue with the question of whether the alleged EU-wide ban is a measure susceptible to challenge under the WTO dispute settlement mechanism. As part of Russia's challenge in respect of the characterization of the alleged EU-wide ban as an SPS measure, it posits that the alleged EU-wide ban is not attributable to Russia.<sup>116</sup> In order to provide a coherent and comprehensive assessment of the preliminary questions before us related to the measures at issue, we will first focus on Russia's argument that the alleged EU-wide ban is not a measure attributable to Russia.

7.44. In our view, Russia's argument that the alleged EU-wide ban is not attributable to Russia touches upon the question of whether Russia has in fact put in place a measure and whether such measure is susceptible to challenge under the WTO dispute settlement mechanism. Therefore, after reviewing the parties' argument in this respect, the Panel will address that question.

#### 7.3.2.2 Main arguments of the parties

7.45. Live pigs and their genetic material, pork and certain other pig products ("the products at issue") from the European Union have been exported to Russia on the basis of bilaterally agreed veterinary certificates which, among other things, attest to the ASF-status of the European Union.<sup>117</sup> Following the ASF outbreaks that were confirmed in Lithuania on 24 January 2014<sup>118</sup>, Russia stopped accepting the imports of the products at issue subject to those bilateral veterinary certificates from all EU member States. This decision was adopted because the epizootic situation in the European Union regarding ASF did not match the requirements set out in those certificates.<sup>119</sup>

7.46. While the European Union describes Russia's measure as an "EU-wide ban", Russia insists that this measure is properly characterized as its "provisional compliance" with the current bilateral veterinary certificates, reiterating that, in light of the ASF outbreaks, it is the European Union that is unable to comply with the requirements in the certificates.<sup>120</sup>

<sup>116</sup> The question of whether the EU-wide ban is an SPS measure is examined in section 7.4.4.2.1 below.

<sup>117</sup> Russia's first written submission, paras. 343-344; and response to Panel question No. 69, para. 100; see also European Union's first written submission, fn 82 (referring to the Veterinary certificate for piglets for fattening, being exported from the EU into Russia, 11/08/2006) (Veterinary certificate for piglets for fattening) (Exhibit EU-52); the Veterinary certificate for pigs for breeding, exported from the EU into Russia, 11/08/2006 (Veterinary certificate for pigs for breeding) (Exhibit EU-53); the Veterinary certificate for pork meat and raw meat preparations, exported from the EU into Russia, 11/08/2006 (Veterinary certificate for pork meat and raw meat preparations) (Exhibit EU-54); the Veterinary certificate for slaughter pigs, exported from the EU to Russia, 16/12/2009 (Veterinary certificate for slaughter pigs) (Exhibit EU-55); the Veterinary certificate for finished food products, containing raw material of animal origin, exported from the EU to Russia, 24/05/2011 (Veterinary certificate for finished food products) (Exhibit EU-56); the Veterinary certificate for canned meat, salamis and other ready for consumption meat products, exported from the EU to Russia, 24/05/2011 (Veterinary certificate for canned meat, salamis and other ready for consumption meat products) (Exhibit EU-57)).

<sup>118</sup> OIE WAHIS Interface, Follow-up report No. 31 – Report reference: 1, Reference OIE: 17147, Report Date: 06/02/2015, Country: Lithuania (Exhibit RUS-27).

<sup>119</sup> Letter of the Russian Federal Service for Veterinary and Phytosanitary Supervision to the European Union dated 29 January 2014 Ref. FS-SA-8/1277 (Letter of FSVPS of 29 January 2014 – FS-SA-8/1277) (Exhibit EU-14), para. 3; the announcement on the website of Rosselkhoznadzor of 6 February 2014 (announcement of FSVPS) (Exhibit EU-16); List of returned consignments of pig products (Exhibit EU-17); see also European Union's first written submission, paras. 88-97; and Russia's first written submission, paras. 343-344 and 346-347.

<sup>120</sup> European Union's panel request, p. 2; first written submission, para. 88; opening statement at the first meeting of the Panel, para. 24; response to Panel question No. 57, para. 135; and second written submission, para. 21. Russia's first written submission, paras. 344 and 347; and opening statement at the first meeting of the Panel, para. 47.

### 7.3.2.2.1 European Union

7.47. In the panel request, the European Union identifies 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".<sup>121</sup> The European Union refers to this alleged measure:

[A]s an action (an import ban or restriction) and, in the alternative, as an omission (failure to accept imports from the EU). The EU seeks review of this specific measure at issue as such and as applied, *de jure* and *de facto* (that is, based on all the relevant facts). The EU also seeks review of this specific measure at issue both insofar as it is written, and insofar as it is unwritten.<sup>122</sup>

7.48. In support of the existence of the alleged EU-wide ban the European Union explains in the panel request as follows:

The EU notes the letter sent to the EU dated 29 January 2014 (FS-SA-8/1277) from the Russian Federal Service for Veterinary and Phytosanitary Supervision referring to certain export certificates previously used for certain exports from the EU to Russia, and notably the phrase "healthy animals grown in farms and/or administrative territories officially free from contiguous animal diseases, including African Swine Fever during 3 years in the whole territory of the EU except Sardinia." In this respect, the Russian authorities made the following statement: "veterinary doctors in the EU Member-States must stop certification of the abovementioned 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."<sup>123</sup>

7.49. In the panel request, the European Union also refers to the following statement from the letter of 14 February 2014 (HF-12- 26/1650) from Russia's Ministry of Agriculture: "this incident considerably changes the epizootic status not only of Lithuania, but of the whole EU".<sup>124</sup> Additionally, the European Union finds support for its contention of the alleged EU-wide ban in the official announcement of Russia's Federal Service for Veterinary and Phytosanitary Supervision (FSVPS)<sup>125</sup> from 6 February 2014, according to which the importation of pork products (frozen heads and hearts) of Austrian and German origin was banned in the Tver and Pskov regions because of alleged ASF risks in the whole European Union.<sup>126</sup> Finally, the European Union refers to the rejection by Russia of a frozen pork meat consignment because the export certificate would not correctly certify the situation on ASF as regards ASF outbreaks in the territory of Lithuania.<sup>127</sup>

7.50. The European Union further explains that it understands that "following the instruction FS-SA-7/1275 of 29 January 2014<sup>128</sup>, Russia stopped issuing import permits for the products at issue from the European Union. In addition, exporters were informed of the letter of 29 January 2014 FS-SA-8/1277 according to which Russia stopped accepting imports.<sup>129</sup><sup>130</sup> As a result, there were no more instances of rejected consignments, because "evidently, no operator was going to incur the ruinous costs of consigning shipments to the Russian border in the knowledge that they would

<sup>121</sup> European Union's panel request, p.2.

<sup>122</sup> European Union's panel request, p. 2. See also first written submission, para. 88.

<sup>123</sup> European Union's panel request, p. 2.

<sup>124</sup> European Union's panel request, p. 2, referring to the letter of 14 February 2014 (Ref. HF -12-26/1650) from Russia to the European Union (Letter of 14 February 2014 – HF-12-26/1650) (Exhibit EU-15).

<sup>125</sup> FSVPS is also the English abbreviation of Rosselkhozadzor (the Russian abbreviation).

<sup>126</sup> European Union's panel request, p. 2 (referring to: <http://fsvps.ru/fsvps/news/8935.html>).

<sup>127</sup> European Union's panel request, p. 2. See also first written submission, paras. 89-96.

<sup>128</sup> (footnote original) Russia's instructions of 29 January 2014, FS-SA-7/1275 (Exhibit EU-161).

<sup>129</sup> (footnote original) Russia's letter to the European Union of 14 January 2014, FS-SA-8/1277 (Exhibit EU-14).

<sup>130</sup> European Union's response to Panel question No. 56, para. 133 and second written submission, para. 23.

be refused entry."<sup>131</sup> According to the European Union, it has provided sufficient evidence to demonstrate that the alleged EU-wide ban is attributable to Russia.<sup>132</sup>

7.51. The European Union considers that "the Parties in fact agree on the existence of the measure at issue. What the EU calls the EU-wide ban is referred to by Russia as 'provisional compliance with the terms of the veterinary certificates'.<sup>133</sup>"<sup>134</sup>

7.52. In addition, the European Union rejects Russia's argument that the alleged EU-wide ban is not attributable to Russia because it may be somehow also attributable to the European Union. The European Union posits that even if the current situation was somehow attributable to the European Union that would not lead to the conclusion that it is not also attributable to Russia. The European Union further adds that it has not relinquished its rights to challenge Russia's measures under the DSU.<sup>135</sup>

### 7.3.2.2.2 Russia

7.53. Russia disagrees with the European Union's characterization of the measure at issue as the alleged EU-wide ban. Rather, Russia considers the alleged EU-wide ban to be the consequence of the European Union's failure to "meet the ASF-related requirements contained in the veterinary certificates agreed to by the European Union and the Russian Federation".<sup>136</sup> Russia further notes that the alleged EU-wide ban "is actually the Russian Federation's continuing efforts to follow the agreed European Union-Russian Federation ASF-related requirements of the veterinary certificates, which do not permit the importation of uncertified pigs and pork products."<sup>137</sup> Therefore, the inability of products to enter Russia "is not directly attributable to the Russian Federation".<sup>138</sup>

7.54. Russia explains that the veterinary certificates bilaterally agreed by the European Union and Russia require that the entire European Union has been free from ASF during the previous three years in order for live pigs and pork products to be exported to Russia.<sup>139</sup> Russia thus maintains that in its letters of 29 January 2014 and of 14 February 2014 to the European Union, Russia simply acknowledges the fact that, due to the ASF outbreak in the European Union, the veterinary officials of the EU member States are unable, pursuant to the terms of the veterinary certificates and consistent with Chapter 5.1 of the Terrestrial Code, to certify that the territory of the European Union, excluding Sardinia, has been free from ASF during the previous three years.<sup>140</sup>

7.55. According to Russia, the European Union has not demonstrated that implementing the conditions in the veterinary certificates, which is an act carried out by the European Union's veterinary authorities, is an act attributable to Russia.<sup>141</sup> Russia argues that "the inability to accept imports from the European Union is not directly attributable to the Russian Federation. It is the European Union's – not the Russian Federation's veterinary officials who are not able to certify

<sup>131</sup> European Union's response to Panel question No. 56, para. 134 and second written submission, para. 24.

<sup>132</sup> European Union's second written submission, para. 22.

<sup>133</sup> (footnote original) Russia's first written submission, section H.2.

<sup>134</sup> European Union's second written submission, para. 23.

<sup>135</sup> European Union's response to Panel question No. 21, para. 89. See also second written submission, para. 25.

<sup>136</sup> Russia's first written submission, para. 343.

<sup>137</sup> Russia's first written submission, para. 345; and response to Panel question No. 78, para. 129. See also response to Panel question No. 84, para. 138.

<sup>138</sup> Russia's response to Panel question No. 72, para. 108. See also second written submission, para. 3.

<sup>139</sup> Russia's first written submission, paras. 347, 351 and 343 (referring to Veterinary Certificates for piglets for fattening (Exhibit EU-52), Veterinary Certificates for pigs for breeding (Exhibit EU-53), Veterinary Certificates for pork meat and raw meat preparations (Exhibit EU-54)).

<sup>140</sup> Russia's first written submission, para. 344. The reference to the letter of 29 January 2014 FS-SA-8/1277 is understood as the reference to Letter of FSVPS of 29 January 2014 – FS-SA-8/1277 (Exhibit EU-14) and the reference to the letter of 14 February 2014 is the reference to Letter of 14 February 2014 – HF-12-26/1650 (Exhibit EU-15).

<sup>141</sup> Russia's second written submission, para. 171.

compliance of the products at issue for exports based on the conditions set out in the form of certificate that was agreed bilaterally by the Russian Federation and the European Union."<sup>142</sup>

### 7.3.2.3 Analysis by the Panel

7.56. The Appellate Body has stated, in respect of the scope of Article 3.3 of the DSU, 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."<sup>143</sup>

7.57. To determine whether the alleged EU-wide ban is susceptible to challenge under the WTO Agreement, we need to examine whether the alleged EU-wide ban is an act or omission attributable to Russia. In our view, this examination requires two steps. First, we need to understand what act or omission the European Union is referring to, that is, what is the content and extent of the alleged EU-wide ban. Second, we need to verify whether that act or omission is attributable to Russia.

#### 7.3.2.3.1 Whether the European Union has provided arguments and evidence of the content and import of the alleged EU-wide ban

7.58. The Appellate Body has referred in different contexts to the burden a complainant must meet in respect of demonstrating the particular content of the measures it challenges. In *US – Gambling*, when referring to the evidence and arguments underlying a *prima facie* case, the Appellate Body stated that they include the identification of the challenged measure and its basic import.<sup>144</sup>

7.59. In light of this guidance, we consider that in the present case the European Union has the burden of demonstrating the content and the basic import of the alleged EU-wide ban. Therefore, we need to examine the arguments and evidence that the European Union has submitted in this respect.

7.60. The European Union has provided the following evidence in support of the content and import of the alleged EU-wide ban:

- letter dated 29 January 2014 (FS-SA-8/1277)<sup>145</sup> from the FSVPS to DG SANCO<sup>146</sup>;
- instructions dated 29 January 2014 of FSVPS (FS-SA-7/1275)<sup>147</sup> to its Heads of Territorial Departments<sup>148</sup>;
- letter of 14 February 2014 (HF-12-26/1650)<sup>149</sup> from the Ministry of Agriculture of Russia<sup>150</sup>;

<sup>142</sup> Russia's second written submission, para. 173. See also response to Panel question No. 275, para. 111.

<sup>143</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

<sup>144</sup> Appellate Body Report, *US – Gambling*, para. 141.

<sup>145</sup> Letter of FSVPS of 29 January 2014 – FS-SA-8/1277 (Exhibit EU-14). In its first written submission, the European Union notes that this letter refers to the following veterinary certificates: Veterinary certificate for piglets for fattening (Exhibit EU-52); the Veterinary certificate for pigs for breeding (Exhibit EU-53); the Veterinary certificate for pork meat and raw meat preparations (Exhibit EU-54); the Veterinary certificate for slaughter pigs (Exhibit EU-55); the Veterinary certificate for finished food products (Exhibit EU-56); the Veterinary certificate for canned meat, salamis and other ready for consumption meat products (Exhibit EU-57) (European Union's first written submission, para. 89, fn 82).

<sup>146</sup> European Union's first written submission, para. 89.

<sup>147</sup> Letter of the Russian Federal Service for Veterinary and Phytosanitary Supervision (Rosselkhoz nadzor) to the Heads of Territorial Departments of Rosselkhoz nadzor FS-SA-7/1275 of 29 January 2014 (FSVPS instructions to its Territorial Departments of 29 January 2014) (Exhibit EU-161).

<sup>148</sup> European Union's response to Panel question No. 56, para. 133; and second written submission, para. 23.

<sup>149</sup> Letter of 14 February 2014, HF-12-26/1650 (Exhibit EU-15).

<sup>150</sup> European Union's first written submission, para. 91.

- announcement of the FSVPS from 6 February 2014 for the ban on the importation 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 whole EU<sup>151</sup>;
- instances of not allowing the importation into Russia of consignments of pork products from the European Union member States after 25 January 2014 because the ASF epizootic situation was not correctly represented in item 4.3 of the veterinary certificate or because of problems related with the date of issuance of the veterinary certificate.<sup>152</sup>

7.61. We move on to examine in more detail each of these pieces of evidence referred to by the European Union.

#### **7.3.2.3.1.1 Letter of 29 January 2014 (FS-SA-8/1277) from the FSVPS to DG SANCO**

7.62. The letter of 29 January 2014 FS-SA-8/1277, says:

Despite the mutual understanding and close cooperation inherent in the relations between Rosselkhoznador and DG SANCO, any approaches aimed at simplifying the situation due to the detection of the African Swine Fever (ASF) in the EU territory, seem unproductive.

Until now live pigs, pork and raw pork products from the EU to Russia have been exported on the basis of the veterinary certificates of 11.08.2006 and presently, upon mutual agreement, their validity covers the whole territory of the Customs Union of Belarus, Kazakhstan and Russia. In line with these certificates, these products must originate from "healthy animals grown in farms and/or administrative territories officially free from contiguous animal diseases, including the ASF during 3 years in the whole territory of the EU except Sardinia". In this regard and in line with the requirements of Items 4.3 and 4.1 of the existing certificates, 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.*<sup>153</sup> (emphasis added)

7.63. This letter provides a clear reference to the fact that, as a consequence of the detection of ASF in the European Union's territory, and in light of the unproductive results of approaches aimed at simplifying that situation, 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.

#### **7.3.2.3.1.2 Instructions of 29 January 2014 of FSVPS (FS-SA-7/1275) to its Heads of Territorial Departments**

7.64. Through the instructions FS-SA-7/1275 of 29 January 2014, the FSVPS informed its Heads of Territorial Departments that "due to the African swine fever (ASF) in the Republic of Lithuania *it is necessary to pay special attention to the fulfilment of the requirements in Item 4.3 of the agreed veterinary certificate for exports from the European Union to the Russian Federation of pork and raw pork products, Item 4.1 of the agreed veterinary certificate for exports from the European Union to the Russian Federation for breeding pigs.*"<sup>154</sup> Those requirements are precisely related to the absence of ASF, for the last three years, in the entire territory of the European Union, with the exception of Sardinia.

<sup>151</sup> European Union's first written submission, para. 93; and announcement of FSVPS (Exhibit EU-16).

<sup>152</sup> List of returned consignments (Exhibit EU-17); and European Union's first written submission, paras. 94-96.

<sup>153</sup> Letter of FSVPS of 29 January 2014- FS-SA-8/1277 (Exhibit EU-14), para 3. See also Russia's letter to the European Union of 2 April 2014, FS-EN-8/5095 (Exhibit RUS-53), paras. 3-4.

<sup>154</sup> FSVPS instructions to its Territorial Departments of 29 January 2014 (Exhibit EU-161). (emphasis added)

7.65. Furthermore, through this letter, the FSVPS alerted its Heads of Territorial Departments that "[w]hen taking a decision concerning the above mentioned products going from the other countries of the European Union with the mentioned veterinary certificates issued after 27.01.2014 with violations of the requirements of Items 4.3 and 4.1, be governed by the legislation of the Customs Union and the Russian Federation in the veterinary field."<sup>155</sup>

7.66. As explained by Russia in response to a Panel question, the legislation to which the FSVPS refers includes Customs Union Decision No. 317 (which authorizes refusal of consignments of products when not accompanied by veterinary certificates conforming to the content of Common Veterinary requirements).<sup>156</sup>

#### **7.3.2.3.1.3 Letter of 14 February 2014 from the Ministry of Agriculture of Russia**

7.67. The letter of 14 February 2014 confirms Russia's view that the two detected cases of ASF in wild boar in Lithuania had an effect on the epizootic situation in the entire European Union. In particular, Russia's Minister of Agriculture noted, through this letter, that the occurrence of the two outbreaks of ASF "considerably changes the epizootic status not only of Lithuania, but of the whole EU".<sup>157</sup>

7.68. This letter also confirmed that "in order to avoid a complete halt of trade in pork products with the EU, Rosselkhoznadzor agreed upon the imports of safe finished deep heated products."<sup>158</sup>

#### **7.3.2.3.1.4 Announcement of the FSVPS from 6 February 2014**

7.69. The instructions and communications from FSVPS led to instances where border agents in Russia banned or rejected consignments of the products at issue. In particular, the European Union adduces evidence in respect of an FSVPS announcement, dated 6 February 2014. Through a press clipping in its webpage, FSVPS announced the ban on the importation 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.<sup>159</sup>

#### **7.3.2.3.1.5 Instances of not allowing the importation into Russia of consignments of pork products from the European Union Member States after 25 January 2014**

7.70. Furthermore, the European Union has adduced evidence that 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.<sup>160</sup> Russia admits 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".<sup>161</sup>

<sup>155</sup> FSVPS instructions to its Territorial Departments of 29 January 2014 (Exhibit EU-161).

<sup>156</sup> Russia's response to Panel question No. 278, para. 116. See Articles 3.14 and 3.15 of Veterinary Control in Customs Union Decision No. 317 (Exhibit RUS-386).

<sup>157</sup> Letter of 14 February 2014 – HF-12-26/1650 (Exhibit EU-15).

<sup>158</sup> Letter of 14 February 2014 – HF-12-26/1650 (Exhibit EU-15). See also para. 7.143 below, referring to the product coverage of the alleged EU-wide ban.

<sup>159</sup> European Union's first written submission, para. 93; and announcement of FSVPS (Exhibit EU-16).

<sup>160</sup> List of returned consignments of pig products (Exhibit EU-17) attached as Annex 2 to the Letter from FSVPS to the European Union (DG SANCO) Ref. FS-EN-7/14507 dated 6 August 2014 (Letter of FSVPS of 6 August 2014 - FS-EN-7/14507) (Exhibit EU-171). Besides the reasons stated in the right-hand side of the list of the returned consignments, the text of the letter of FSVPS of 6 August 2014 - FS-EN-7/14507 (Exhibit EU-171) confirms that one of the reasons for the rejection of the consignments was the "receipt of supervised products with veterinary certificates not guaranteeing the fulfilment of veterinary and sanitary requirements and norms of the Customs Union". See also announcement of FSVPS (Exhibit EU-16). The existence of the facts mentioned in this announcement appears to be confirmed by Russia (Russia's response to Panel question No.61, para. 88).

<sup>161</sup> Russia's response to Panel question No. 25, para. 10. In its responses to Panel question Nos. 68 and 69 in relation to whether there was any possibility for entry of the products at issue other than by means of the veterinary certificate, Russia indicated that generally, it requires, for the importation of pigs and pork products, the procurement of a veterinary certificate agreed to by the European Union and Russia. The only products to



### 7.3.2.3.1.6 Other supporting evidence

7.71. The letter of FSVPS of 2 April 2014 to DG SANCO, recognizes the existence of the import restrictions of the products at issue into Russia, by stating:

Rosselkhoznadzor has restricted imports of pigs and pork products from all parts of Lithuania and Poland but has not restricted imports from the entire EU. The imposed restrictions have been specified in the EU-Russia pork product certificates initiated in 2006. The EU has requested the validity of these certificates be extended until an agreement is reached on new veterinary certificates that include requirements different from those of the Customs Union.

The EU pork products cannot be *de facto* certified. However, the European Commission has not yet initiated any discussion or drafting of veterinary certificates for trade between the European Union and the Customs Union.<sup>162</sup>

7.72. According to the European Union this also confirms "the existence of an EU-wide ban, under the guise of an alleged administrative problem relating to supposed compliance with the wording of the veterinary certificates, in light of the change in the epidemiological situation regarding ASF".<sup>163</sup>

7.73. The European Union further explains that the instruction FS-SA-7/1275 of 29 January and the letter of 29 January 2014 FS-SA-8/1277 led to the practical absence of new attempts by exporters to ship the products at issue to the Russian border due to the cost associated with Russia's refusal of entry for these products.<sup>164</sup>

### 7.3.2.3.1.7 Preliminary conclusion

7.74. In our view, the evidence reviewed in this section — which comprises the letter from FSVPS to DG SANCO, the instructions from FSVPS to its Heads of territorial Departments, the letter from the Ministry of Agriculture, Russia's rejection of consignments of the products at issue from the European Union, and the ensuing chilling effect on exports from the European Union to Russia — supports the European Union's assertion that certain actions undertaken by Russia amount to an import ban applied to the importation of certain pig products from the entire European Union. We now turn to the question of whether the actions that amount to this import ban are attributable to Russia.

### 7.3.2.3.2 Whether the alleged EU-wide ban is a measure attributable to Russia

7.75. The Appellate Body, when considering the issue of which measures of a Member are subject to WTO dispute settlement, stated that "[t]he acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch."<sup>165</sup>

7.76. According to the evidence examined in paragraphs 7.60 to 7.70 above, the ban on the importation of the products at issue from the European Union was triggered on 25 January 2014, and effective from 29 January 2014, following three particular events: (i) an outbreak of ASF in wild boar in Lithuania on 24 January 2014; (ii) the issuance of FSVPS instructions to its Heads of

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enter after the triggering date were those "that were already in the process of being transported or quarantined."

<sup>162</sup> Letter of FSVPS of 2 April 2014 –FS-EN-8/5095 (Exhibit RUS-53).

<sup>163</sup> European Union's opening statement at the first meeting of the Panel, para. 30.

<sup>164</sup> European Union's Response to Panel Question No. 56, paras. 133-134; second written submission, paras. 23 – 24. FSVPS instructions to its Territorial Departments of 29 January 2014 (Exhibit EU-161) and Letter of FSVPS of 29 January 2014 – FS-SA-8/1277 (Exhibit EU-14).

<sup>165</sup> Appellate Body Report, *US – Corrosion- Resistant Steel Sunset Review*, para. 81. See also Appellate Body Reports, *Australia – Apples*, para. 171; *US – Shrimp*, para. 173; and Panel Reports, *Canada – Renewable Energy / Feed-In Tariff Program*, fn 37; and *Australia – Salmon (Article 21.5 – Canada)*, para. 7.12 and fn 146.

Territorial Departments on 29 January 2014<sup>166</sup>; and (iii) a letter dated 29 January 2014 of FSVPS to DG SANCO.<sup>167</sup>

7.77. As we observed in the previous section, the evidence submitted by the European Union indicates that Russia was in fact undertaking specific actions that rendered it impossible to import products at issue from the European Union into Russia. Those actions consisted of (i) instructions from the FSVPS dated 29 January 2014 to its Heads of Territorial Departments to pay special attention to compliance with the veterinary requirements in items 4.1 and 4.3 of the agreed veterinary certificates applicable to the products at issue<sup>168</sup>; (ii) refusal of imports of the products at issue between 25 January 2014 and 11 February 2014<sup>169</sup>; and (iii) informing the European Union that if veterinary doctors in the EU member States did not stop certification of the products at issue these products would not be allowed into the territory of the member States of the Customs Union and would be subject to returns.<sup>170</sup>

7.78. These actions are further complemented by Russia's confirmation through the Letter from FSVPS to DG SANCO dated 6 August 2014 that the FSVPS departments in the Tver and Pskov regions, the St Petersburg and the Leningradskaya regions, the Bryansk and Smolensk regions, Moscow, the Moscow and Tula regions, the Kaliningrad region, the Primorsky Krai and the Sakhalin region detected violations in some consignments of pig products and issued return declarations.<sup>171</sup> The evidence we have examined, taken together, demonstrates the refusal of imports of certain products at issue from the European Union by the territorial departments of FSVPS.

7.79. Paragraph 1 of Russia's Government Decree 327 provides that FSVPS "is the federal executive authority exercising supervision and surveillance functions in the field of veterinary medicine."<sup>172</sup> Russia clarifies that, as set out in Decree 327, "different territorial departments are obliged to follow the directions from the Federal Government".<sup>173</sup> Therefore we understand that FSVPS and its territorial departments are organs of Russia's government. Consistent with the rule of attribution outlined in paragraph 7.75 above, FSVPS's actions, and those of the heads of its territorial departments, are attributable to Russia.<sup>174</sup>

7.80. It is true 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. Nevertheless, it is Russia, rather than the European Union, that takes the action that gives effect to the import ban. We also note 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. In this respect, we recall that the SPS Agreement acknowledges the role played by veterinary certificates in international trade. This idea is enshrined in recital 3 of the preamble of the SPS Agreement, according to which "sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols".

<sup>166</sup> FSVPS instructions to its Territorial Departments of 29 January 2014 (Exhibit EU-161).

<sup>167</sup> Letter of FSVPS of 29 January 2014 – FS-SA-8/1277 (Exhibit EU-14).

<sup>168</sup> FSVPS instructions to its Territorial Departments of 29 January 2014 (Exhibit EU-161). See also Russia's response to Panel question 278, para. 116, where Russia refers to the scope of application of those instructions.

<sup>169</sup> Announcement of FSVPS (Exhibit EU-16); and List of returned consignments (Exhibit EU-17).

<sup>170</sup> Letter of FSVPS of 29 January 2014 – FS-SA-8/1277 (Exhibit EU-14), para 3. See also Letter of FSVPS of 2 April 2014 –FS-EN-8/5095 (Exhibit RUS-53), paras. 3-4.

<sup>171</sup> Letter of FSVPS of 6 August 2014 - FS-EN-7/14507 (Exhibit EU-171); List of returned consignments of pig products (EU-17) attached as Annex 2 to this letter.

<sup>172</sup> RF Government's Decree 327 of June 30, 2004 "Approval of the Regulation of the Federal Service for Veterinary and Phytosanitary Surveillance (Rosselkhoznadzor)", para. 1 (Exhibit RUS-352). See also Regulations on the State Veterinary Supervision Approved by Decree 476 of the Government of Russia of June 5, 2013 (rev. 24.03.2014) (Exhibit RUS-16), paras. 1 and 4(a); and Russia's response to Panel question No. 276, para. 112.

<sup>173</sup> Russia's response to Panel question No. 276, para. 113, referring to RF Government's Decree 327 of June 30, 2004 "Approval of the Regulation of the Federal Service for Veterinary and Phytosanitary Surveillance (Rosselkhoznadzor)", para. 4 (Exhibit RUS-352).

<sup>174</sup> This rule has been applied in the following WTO disputes: Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81; Panel Reports, *US – 1916 Act (Japan)*, para. 5.10; and *US – Countervailing and Anti-dumping Duties (China)*, para. 7.250.

7.81. This is further confirmed by the manner in which Russia more broadly regulates the importation of the products at issue. Pursuant to sections 3.7, 6.1 and 6.3 of Customs Union Decision No. 317, imports of the products at issue into Russia require a veterinary certificate issued by the authorities of the exporting country as well as an import permit issued by the importing country.<sup>175</sup> Similarly, pursuant to section 6.2 of the Customs Union Decision No. 317, Russia also requires that imports of certain products at issue come from enterprises including abattoirs/processing plants registered in Russia's Third country Establishment Register. In the process of approving registration of such enterprises, Russian officials may undertake inspection of the premises of those enterprises, including the farms that supply them with raw materials.<sup>176</sup>

7.82. As described in section 6.3 of the Customs Union Decision No. 317, the requirements mentioned in the previous paragraph, together with the presence of a valid veterinary certificate, form the basis for the veterinary inspectors to decide to permit, suspend transportation, prohibit import, or return the respective products at issue.<sup>177</sup> In our view, this means that imports of the products at issue into Russia require not only the presentation of the veterinary certificates, but also compliance with a number of requirements under the control of Russia's authorities.

7.83. Based on the evidence on the record, we find that following an outbreak of ASF in wild boar in Lithuania on 24 January 2014, Russia refused to accept imports of the products at issue from the entire European Union. This refusal is grounded on the inability of the European Union's veterinarians to certify that those products meet the requirement set out in the bilaterally agreed veterinary certificates. According to this requirement, the entire European Union, except for Sardinia, has to be ASF-free for three years for the products at issue to be imported into Russia. Russia's authorities actively enforce this requirement by rejecting consignments of the products at issue that fail to satisfy this requirement. These 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. It is this measure that we will assess for its conformity with the relevant provisions of the SPS Agreement.

#### **7.3.2.4 Preliminary conclusion**

7.84. In our view, 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 general requirement contained in the template veterinary certificates negotiated with the European Union. According to this general requirement, the whole of the European Union's territory, except for Sardinia, has to be ASF-free 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 general requirement. Therefore, the actions by Russia to apply this general requirement to the current situation in the European Union results in an EU-wide ban of the products at issue attributable to Russia.

### **7.3.3 Whether Russia's terms of accession limit the Panel's assessment of the European Union's claims in respect of the alleged EU-wide ban**

#### **7.3.3.1 Introduction**

7.85. The parties disagree on the extent to which the EU-wide ban is part of Russia's terms of accession; and, if it is part of Russia's terms of accession, on what the consequences of this would be. In this section the Panel will examine the parties' arguments in this respect and determine whether Russia's terms of accession limit in any way our assessment of the European Union's claims in respect of the EU-wide ban.

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<sup>175</sup> Sections 3.7, 6.1 and 6.3 of Veterinary Control in Customs Union Decision No. 317 (Exhibit RUS-386). See also Russia's response to Panel question No. 260, paras. 24-25.

<sup>176</sup> Russia's response to Panel question No. 260, paras. 26-30. See also Table 41, Excerpts of list of goods subject to veterinary control. Working Party Report (Exhibit RUS-333).

<sup>177</sup> Pursuant to section 3.15 of the Customs Union Decision No. 317, those are the four decisions that a control official may take in respect of the controlled goods. Veterinary Control in Customs Union Decision No. 317 (Exhibit RUS-386).

### 7.3.3.2 Main arguments of the parties

#### 7.3.3.2.1 European Union

7.86. The European Union points to the fact that several of the mentioned certificates contain a footnote which 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".<sup>178</sup> Thus the European Union maintains that Russia "could have easily avoided trade disruptions by applying the OIE principles with regard to zoning and regionalization".<sup>179</sup>

7.87. The European Union rejects Russia's arguments regarding the consequences of the validity of the veterinary certificates. In the European Union's view, the reference to the veterinary certificates in Russia's accession documents should be understood in the context of Russia's continuing obligation to adapt its measures to regional SPS characteristics.<sup>180</sup> The European Union thus emphasizes that "[t]he fact that the veterinary certificates remain in use after Russia's accession is a distinct element from the fact that the terms of such certificates should be continuously adapted to the SPS characteristics of specific regions in particular cases".<sup>181</sup>

7.88. The European Union adds that paragraphs 892 and 893 of the Working Party Report on the Accession of Russia "cannot by any means be construed as preventing the adaptation of the bilateral certificates to the ASF regionalisation measures in the EU".<sup>182</sup> The European Union notes that those paragraphs of the Working Party Report reflect the concern expressed by Members on the mandatory requirement to use common Customs Union Veterinary Certificates for the imports of certain products. In that context, those paragraphs reflect Russia's "commitment *not* to make mandatory such CU Veterinary Certificates, maintaining the existing bilateral certificates (such as those between the EU and Russia), as well as their subsequent amendments".<sup>183</sup>

#### 7.3.3.2.2 Russia

7.89. Russia states that the validity of the EU-Russian veterinary certificates is "a term" of Russia's WTO membership.<sup>184</sup> In Russia's view, "the recognition of the validity of these certificates implies the consistency of such certificates with the Russian Federation's obligations under the WTO Agreements, including the SPS Agreement."<sup>185</sup> According to Russia, the validity and WTO consistency of such certificates, including their subsequent bilaterally agreed amendments, was a "term" of Russia's WTO membership by the interplay of paragraph 893 and paragraph 1450 of the Working Party Report on the Accession of Russia, which refers to Protocol on the Accession of the Russian Federation (Russia's Accession Protocol).<sup>186</sup>

7.90. Russia posits that, by adopting Russia's Accession Protocol and the commitments to which it is referring (e.g., veterinary certificates), the European Union agreed that the form of veterinary certificates concluded between the European Union and Russia shall remain valid until the new certificates between the Customs Union and the European Union are agreed. Such validity also

<sup>178</sup> European Union's second written submission, para. 28; and response to Panel question No. 79, para. 153.

<sup>179</sup> European Union's second written submission, para. 28; and response to Panel question No. 79, para. 153.

<sup>180</sup> European Union's second written submission, para. 27, (referring to Article 6.1 of the SPS Agreement and Appellate Body Report, *India – Agricultural Products*, para. 5.154).

<sup>181</sup> European Union's second written submission, para. 27.

<sup>182</sup> European Union's comments on Russia's response to Panel question No. 254, para. 12.

<sup>183</sup> European Union's comments on Russia's response to Panel question No. 254, para. 13.

<sup>184</sup> Russia's opening statement at the first meeting of the Panel, para. 50; response to Panel questions Nos. 72, 73 and 82, paras. 109, 112, 113 and 135; and second written submission, para. 178.

<sup>185</sup> Russia's response to Panel question No. 73, para. 111

<sup>186</sup> Russia's opening statement, para. 50; second written submission, paras. 177-178; Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70 & WT/MIN(11)/2, circulated 17 November 2011 (Exhibit RUS-159), para. 893; Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70 & WT/MIN(11)/2, circulated 17 November 2011, para. 1450, incorporated by reference (Exhibit RUS-159), Protocol of Accession of the Russian Federation, WT/MIN(11)/24 & WT/L/839 (Exhibit RUS-160), para. 3; Russia refers to Appellate Body Reports, *China – Rare Earths*, para. 5.27 (interpreting Article XII:1 of the Marrakesh Agreement and noting that "the 'terms' of accession . . . are not defined".)

implies that the rejection of consignments on the basis of these veterinary certificates is consistent with the disciplines of the SPS Agreement.<sup>187</sup>

7.91. Russia argues that because up to the end of January 2014 there had been no agreement to introduce veterinary certificates at the Customs Union level, it was under the obligation, pursuant to the terms of its WTO accession, to apply the certificates bilaterally agreed with the European Union.<sup>188</sup>

7.92. In Russia's view, the Panel could follow the analytical framework developed by the Appellate Body in *China – Rare Earths* to determine the relationship between Russia's Accession Protocol and Russia's commitments under the SPS Agreement. Russia considers that the consequence of such an analysis would be a finding that Russia's specific commitments to maintain the application of the bilateral certificates, as a term of its WTO accession, "negates *all* the claims advanced by the European Union"<sup>189</sup> under the SPS Agreement in respect of the EU-wide ban. This is because all of those claims are derived, directly or indirectly, from the application of Russia's terms of accession.<sup>190</sup>

7.93. Based on these arguments, Russia requests the Panel to find that the continued validity of the certificates is a term of Russia's WTO membership, and that the European Union's claims derived from them should fail.<sup>191</sup> Russia considers that if the Panel were to decide otherwise, its recommendations and rulings on this matter would lack sufficient legal basis.<sup>192</sup>

### 7.3.3.3 Analysis by the Panel

7.94. The Panel is called upon to examine the relationship between the terms of Russia's accession to the WTO and the European Union's claims in respect of the EU-wide ban. In order to assess this relationship, we will first review any guidance available in prior panel and Appellate Body findings in respect of the relationship between a Member's Accession Protocol and that Member's rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. We will then examine the terms of Russia's accession as they are relevant to this dispute. Lastly, we will assess whether the terms of Russia's accession to the WTO limit in any way our evaluation of the European Union's claims in respect of the EU-wide ban.

#### 7.3.3.3.1 Relationship between a Member's Accession Protocol and its obligations under a particular covered agreement

7.95. Article XII of the Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement), titled "Accession", provides:

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.
3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

<sup>187</sup> Russia's response to Panel question No. 73, para. 118; and second written submission, paras. 177 and 179.

<sup>188</sup> Russia's response to Panel question No. 274, para. 102.

<sup>189</sup> Russia's response to Panel question No. 274, para. 109.

<sup>190</sup> Russia's response to Panel question No. 274, para. 109. See also, paras. 105-108.

<sup>191</sup> Russia's response to Panel question No. 274, para. 110. See also second written submission, para. 183.

<sup>192</sup> Russia's response to Panel question No. 274, para. 110.

7.96. Pursuant to this provision, on 16 December 2011 the Ministerial Conference decided that "the Russian Federation may accede to the WTO Agreement on the terms and conditions set out in the Protocol annexed to this Decision".<sup>193</sup> Paragraph 1.2 of Russia's Accession Protocol, which is analogous to the corresponding paragraph in the Accession Protocol of other Members<sup>194</sup>, provides that:

The WTO Agreement to which the Russian Federation accedes shall be the WTO Agreement, including the Explanatory Notes to that Agreement, as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of entry into force of this Protocol. This 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.

7.97. Previous panels and the Appellate Body have examined the relationship of a Member's Accession Protocol with certain provisions of the Multilateral Trade Agreements annexed to the Marrakesh Agreement.<sup>195</sup> The latest decision in this line of cases came in the Appellate Body reports in *China – Rare Earths*. In that dispute, China appealed the panel's findings in respect of the relationship between Paragraph 1.2 of China's Accession Protocol and the Marrakesh Agreement and the Multilateral Trade Agreements. China argued that Paragraph 1.2 of its Accession Protocol and Article XII:1 of the Marrakesh Agreement meant that a specific provision in China's Accession Protocol is an integral part of the Marrakesh Agreement or one of the Multilateral Trade Agreements to which it intrinsically relates.<sup>196</sup> The Appellate Body rejected China's interpretation and stated that:

In our view, Paragraph 1.2 of China's Accession Protocol serves to build a bridge between the package of Protocol provisions and the package of existing rights and obligations under the WTO legal framework. Nonetheless, neither obligations nor rights may be automatically transposed from one part of this legal framework into another. The fact that Paragraph 1.2 builds such a bridge is only the starting point, and does not in itself answer the questions of whether there is an objective link between *an individual provision* in China's Accession Protocol and existing obligations under the Marrakesh Agreements and the Multilateral Trade Agreements, and whether China may rely on an exception provided for in those agreements to justify a breach of such Protocol provision. *Such questions must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute. The analysis must start with the text of the relevant provision in China's Accession Protocol and take into account its context, including that provided by the Protocol itself and by relevant provisions of the Accession Working Party Report, and by the agreements in the WTO legal framework.* The analysis must also take into account the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretative elements, and must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation.<sup>197</sup> (emphasis added)

7.98. The issue we are dealing with here is clearly not identical to the issue addressed in *China – Rare Earths*: we are not addressing whether a Member may rely on an exception provided for in the Marrakesh Agreement and the Multilateral Trade Agreements to justify a breach of an

<sup>193</sup> Protocol of Accession of the Russian Federation, WT/MIN(11)/24 & WT/L/839 (Exhibit RUS-160). See WT/MIN(11)/24-WT/L/839.

<sup>194</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.40. For instance, paragraph 1.2 of China's Accession Protocol provides:

2. The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.

<sup>195</sup> Appellate Body Reports, *China – Rare Earths*, paras. 5.1-5.74; *China – Raw Materials*, paras. 270-307; *China – Publications and Audiovisual Products*, paras. 205-233; Panel Reports, - *US – Shrimp II (Viet Nam)*, paras. 7.173-7.193; *China – Rare Earths*, paras. 7.73-7.99; *China – Raw Materials*, paras. 7.116-7.160; *China – Publications and Audiovisual Products*, para. 7.281.

<sup>196</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.73.

<sup>197</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.74.

Accession Protocol provision. Rather, we are asked to examine 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. Nevertheless, taking into consideration the similarities in the text of Paragraph 1.2 in China's Accession Protocol with the text of paragraph 1.2 of Russia's Accession Protocol quoted above, we consider the Appellate Body's guidance appropriate in undertaking an examination of Russia's Accession Protocol. In that respect, we first turn to review the terms of Russia's Accession Protocol invoked by Russia in support of its argument that the application of the bilateral veterinary export certificates is covered by the terms of its accession to the WTO.

7.99. After reviewing the text of the relevant provisions of Russia's Accession Protocol, we will then examine the parties' views on their efforts to amend the bilaterally agreed veterinary export certificates. With that context, we will move on to assess the merits of Russia's argument in respect of the validity of the bilateral veterinary export certificates and whether our findings have any implications for the European Union's claims in respect of the EU-wide ban.

### **7.3.3.3.2 Terms of Russia's accession to the WTO in respect of the application of bilateral veterinary export certificates**

7.100. In support of its argument, Russia refers to paragraphs 2 and 3 of its Accession Protocol, as well as to paragraphs 893 and 1450 of the Working Party Report on the Accession of Russia. In response to Russia's arguments, the European Union also refers to paragraph 892 of the Working Party Report.<sup>198</sup>

7.101. The first three paragraphs of Russia's Accession Protocol<sup>199</sup> provide:

#### **PART I - GENERAL**

1. Upon entry into force of this Protocol pursuant to paragraph 8, the Russian Federation accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO.
2. The WTO Agreement to which the Russian Federation accedes shall be the WTO Agreement, including the Explanatory Notes to that Agreement, as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of entry into force of this Protocol. This 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.
3. Except as otherwise provided for in paragraph 1450 of the Working Party Report, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with the entry into force of that Agreement shall be implemented by the Russian Federation as if it had accepted that Agreement on the date of its entry into force.

7.102. Paragraphs 892, 893 and 1450 of the Working Party Report on the Accession of Russia<sup>200</sup> provide:

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

<sup>198</sup> See paras. 7.88, 7.89, and 7.92 above.

<sup>199</sup> Protocol of Accession of the Russian Federation, WT/MIN(11)/24 & WT/L/839 (Exhibit RUS-160).

<sup>200</sup> Report of the Working Party on the Accession of the Russian Federation, WT/ACC/RUS/70 & WT/MIN(11)/2, circulated 17 November 2011 (Exhibit RUS-159).

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.

...

1450. The Working Party took note of the explanations and statements of the Russian Federation concerning its foreign trade regime, as reflected in this Report. The Working Party took note of the commitments by the Russian Federation in relation to certain specific matters which are reproduced in paragraphs ... 893 ... The Working Party took note that these commitments had been incorporated in paragraph 2 of the Protocol of Accession of the Russian Federation to the WTO. (emphasis added)

7.103. We first note that according to the highlighted text of paragraph 893 of the Working Party Report: "[b]ilateral 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." (emphasis added)

7.104. Russia argues that according to this language, as informed by paragraph 892, "the Russian Federation is not allowed to require veterinary certificates issued other than agreed bilaterally if there is a bilaterally agreed certificate with any Member."<sup>201</sup> Russia also states that paragraph 893 "neither permits nor precludes the amendment of certificates while maintaining their validity".<sup>202</sup>

7.105. We recall the Appellate Body considered in *China – Rare Earths* that questions surrounding the relationship between the rights and obligations in China's Accession Protocol and those arising from the Multilateral Trade Agreements "must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute."<sup>203</sup> Bearing that in mind, in our view, Russia's interpretation does not accord with the text of paragraph 893 of the Working Party Report. Although the text of paragraph 893, as read in conjunction with paragraph 892, refers to the validity of bilateral export certificates

<sup>201</sup> Russia's response to Panel question No. 274, para. 105.

<sup>202</sup> Russia's response to Panel question No. 274, para. 103.

<sup>203</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.74.



initialled before 1 July 2010, it also refers to the validity of subsequent amendments to those certificates. In addition, the expression "would remain valid" refers to a particular purpose, that is, "for exports". This 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 Members into Russia.

7.106. In *EC – Bananas III*, the Appellate Body examined the scope of application of the Lomé Waiver.<sup>204</sup> Among the legal questions the Appellate Body addressed was whether such a waiver waived compliance with the obligations pursuant to Articles I:1 and XIII of the GATT 1994. When answering this question, the Appellate Body noted that

The wording of the Lomé Waiver is clear and unambiguous. By its precise terms, it waives only "the provisions of paragraph 1 of Article I of the *General Agreement* ... to the extent necessary" to do what is "required" by the relevant provisions of the Lomé Convention. The Lomé Waiver does not refer to, or mention in any way, any other provision of the GATT 1994 or any other covered agreement. Neither the circumstances surrounding the negotiation of the Lomé Waiver, nor the need to interpret it so as to permit it to achieve its objectives, allow us to disregard this clear and plain wording of the Lomé Waiver by extending its scope to include a waiver from the obligations under Article XIII.<sup>205</sup>

7.107. In *EC – Bananas III (Article 21.5 – Ecuador II)/(Article 21.5 – US)* the Appellate Body further explained the nature and function of waivers within the context of the WTO:

In our view, the function of a waiver is to relieve a Member, for a specified period of time, from a particular obligation provided for in the covered agreements, subject to the terms, conditions, justifying exceptional circumstances or policy objectives described in the waiver decision. Its purpose is not to modify existing provisions in the agreements, let alone create new law or add to or amend the obligations under a covered agreement or Schedule. Therefore, waivers are exceptional in nature, subject to strict disciplines and should be interpreted with great care.<sup>206</sup>

7.108. In our view, this Appellate Body reasoning is useful in informing our assessment of Russia's arguments in respect of its Protocol of Accession. In particular, we consider that if a Member claims that a provision within its Protocol of Accession allows that Member to depart from other obligations enshrined in the Multilateral Trade Agreements, the text of such a provision should at least have clear and unambiguous language to that effect. We thus consider that for a provision in Russia's Accession Protocol to serve as a basis to excuse Russia from complying with any of its substantive obligations under the Multilateral Trade Agreements, it would at least be necessary for such a provision to have clear and unambiguous language to this effect.

7.109. The text of paragraph 893 does not refer in any way to Russia's substantive obligations under the SPS Agreement. Contrary to what Russia seems to imply, the text and context of paragraph 893 do not provide that the direct or indirect application of the veterinary requirements contained in the bilateral veterinary export certificates, in any situation, is automatically consistent with Russia's rights and obligations under the SPS Agreement. Furthermore, we do not find any textual or contextual interpretative support for Russia's suggested interpretation of paragraph 893, nor can this be inferred from the language used in that paragraph.

7.110. We recall that paragraphs 1.2 and 1.3 of Russia's Accession Protocol each make explicit reference to paragraph 1450 of the Working Party Report. By virtue of Paragraph 1.2, Russia's Protocol of Accession, "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 1.3 points to the exceptional nature of the contents of paragraph 1450, beginning with the phrase: "Except as otherwise provided for in paragraph 1450 of the Working Party Report...". We note that paragraph 1450 contains an explicit reference to paragraph 893. We have found that paragraph 893 does not contain any clear and unambiguous language that would have the effect of shielding the

<sup>204</sup> Appellate Body Report, *EC – Bananas III*, paras. 164-166.

<sup>205</sup> Appellate Body Report, *EC – Bananas III*, para. 183.

<sup>206</sup> Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)/(Article 21.5 – US)*, para. 382.

measure at issue from further scrutiny under the DSU and the SPS Agreement. Accordingly, the explicit reference to paragraph 893 in paragraph 1450 does not lead us to consider that paragraph 1450 "provides otherwise" or has any exceptional effect in respect of the application of the veterinary requirements contained in the bilateral veterinary export certificates.

7.111. We are therefore 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.

#### **7.3.3.3.3 Parties' efforts to re-negotiate the content of the bilaterally agreed veterinary certificates**

7.112. The parties have extensively explained to the Panel the various efforts they have undertaken to review the requirement of the bilaterally agreed veterinary certificates.<sup>207</sup> It is clear to us that both parties have attempted to adjust the text of the bilateral veterinary export certificates for the products at issue in light of the ASF situation in the European Union since 24 January 2014. The Panel welcomes those efforts and agrees with the sentiment Dr Thiermann expressed during the expert hearing, regarding the importance of trust between trading partners in order to find alternatives that would allow the resumption of safe trade.<sup>208</sup> However, the Panel considers that the parties' negotiating efforts to negotiate or their lack thereof are not dispositive of its task to undertake an objective assessment of the matter before it, as required by Article 11 of the DSU.

#### **7.3.3.3.4 Whether the terms of Russia's accession to the WTO limit the Panel's assessment of the European Union's claims in respect of the EU-wide ban**

7.113. In the light of Russia's argument regarding the validity of the bilateral veterinary export certificates, we need to determine if our conclusions in respect of the terms of Russia's accession limits, in any way, our analysis of the European Union's claims in respect of the EU-wide ban.

7.114. In section 7.3.3.3.2 above we explained why we are not persuaded by Russia's argument that the continued validity of the bilateral veterinary export certificates is a term of Russia's WTO membership, and that the European Union's claims derived from them should fail.<sup>209</sup> It is clear to us that paragraph 893 of the Working Party Report, read in conjunction with Russia's Accession Protocol, does not refer to the consistency of measures adopted, directly or indirectly, in respect of the bilateral veterinary export certificates with Russia's obligations under the SPS Agreement.

7.115. In addition, those provisions are silent in respect of any potential implications of the continued validity of the veterinary certificates in WTO dispute settlement. We therefore find no limit in Russia's terms of accession to assessing the merits of the European Union's claims brought in respect of the EU-wide ban.

#### **7.3.3.4 Conclusion**

7.116. Based on the foregoing, the Panel finds, in Russia's terms of accession, no limitation to assessing the merits of the European Union claims brought in respect of the EU-wide ban.

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<sup>207</sup> European Union's responses to Panel question Nos. 21, 54, 184, 185, 186, and 231; and Russia's responses to Panel question Nos. 39, 40, 54, 73, 184, 185 and 186; and comments to the European Union's response to Panel question No. 231. See also EU-Russian Certificate Negotiations Chronology (Exhibit RUS-218).

<sup>208</sup> Dr Thiermann, Transcript, paras. 1.275, 1.368 and 1.454.

<sup>209</sup> Russia's response to Panel question No. 274, para. 110. See also second written submission, para. 183.

### 7.3.4 Whether the measures in respect of the imports from Latvia and Estonia fall within the Panel's terms of reference

#### 7.3.4.1 Introduction

7.117. As mentioned in section 2.2 above, in its panel request (dated 27 June 2014 and circulated 30 June 2014), the European Union refers to restrictions on imports from Lithuania and from Poland.<sup>210</sup> The European Union's first written submission also refers to restrictions on imports from Latvia (adopted on 27 June 2014) and from Estonia (adopted on 11 September 2014), neither of which were mentioned in the European Union's panel request.

7.118. Russia does not challenge the restrictions on imports from Latvia and from Estonia being within the Panel's terms of reference. On the contrary, Russia stated that "both Parties have agreed that it is appropriate for the Panel to consider the European Union claims as including a challenge to the Latvian and Estonian import bans ..., which were not included in the Panel request".<sup>211</sup>

7.119. Despite the parties' agreement, it is incumbent on the Panel to determine whether the restrictions on imports from Latvia and Estonia are properly within its terms of reference. The Panel's terms of reference, as set out in the panel request, delimit the Panel's jurisdiction.<sup>212</sup> As established by the Appellate Body, it is a panel's own responsibility, even if not raised by the parties, to examine issues that go to the root of its jurisdiction.<sup>213</sup> Thus, even though Russia has not raised any direct objection to the measures regarding Estonia and Latvia being within the Panel's terms of reference, the Panel will consider this question on its own initiative.

#### 7.3.4.2 Main arguments of the parties

##### 7.3.4.2.1 European Union

7.120. The European Union explains that the measures in respect of the imports of products from Estonia, Latvia, Lithuania, and Poland are "distinct but closely linked".<sup>214</sup> According to the European Union, the individual import bans with respect to Estonia and Latvia extend the product coverage of the EU-wide ban and are thus an extension that falls within the scope of the panel request, when read in its totality.<sup>215</sup>

7.121. In response to Panel questioning concerning the lack of explicit reference in the panel request to the measures pertaining to Estonia and Latvia, the European Union maintains that the measures regarding Estonia and Latvia fall within the category of "amendments, supplements, extensions and implementing measures" referred to in its panel request.<sup>216</sup> According to the European Union, these measures constitute an extension of the product coverage of the EU-wide ban<sup>217</sup> and are therefore within the Panel's terms of reference.<sup>218</sup>

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<sup>210</sup> European Union's panel request, pp. 1-2. See para. 2.9 above.

<sup>211</sup> Russia's response to Panel question No. 279, para. 122.

<sup>212</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.12.

<sup>213</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36 and 53.

<sup>214</sup> European Union's opening statement at the first meeting of the Panel, para. 24; and response to Panel question No. 57, para. 135.

<sup>215</sup> European Union's opening statement at the first meeting of the Panel, paras. 26-27; and second written submission, paras. 17-20.

<sup>216</sup> European Union's opening statement at the first meeting of the Panel, para. 26-27; response to Panel question No. 55, para. 129; and second written submission, paras. 17-18.

<sup>217</sup> European Union's opening statement at the first meeting of the Panel, para. 26; response to Panel question No. 55, para. 128; and second written submission, paras. 17.

<sup>218</sup> European Union's opening statement at the first meeting of the Panel, para. 27; response to Panel question No. 55, para. 131; and second written submission, paras. 18.

### 7.3.4.2.2 Russia

7.122. Russia has not explicitly challenged the European Union's argument that the measures regarding Estonia and Latvia are within the Panel's terms of reference.<sup>219</sup> Russia stated that "both Parties have agreed that it is appropriate for the Panel to consider the European Union claims as including a challenge to the Latvian and Estonian import bans ... which were not included in the Panel request".<sup>220</sup>

### 7.3.4.3 Analysis by the Panel

7.123. Pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the panel request, unless the parties agree otherwise.<sup>221</sup> As the Appellate Body has found "Under Article 6.2, the request for the establishment of a panel must identify the 'specific measure at issue', which together with the 'legal basis of the complaint', constitutes the 'matter referred to the DSB' that forms the basis of the panel's terms of reference."<sup>222</sup> In other words, a panel request, including the measures identified therein, will determine the scope of the Panel's jurisdiction.<sup>223</sup>

7.124. Article 6.2 of the DSU requires that the panel request (i) is made in writing; (ii) indicates whether consultations were held; (iii) identifies the specific measures at issue; and (iv) provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly.<sup>224</sup>

7.125. The European Union's panel request, which was made in writing, indicated that on 30 April and 1 May 2014 consultations were held between the European Union and Russia.<sup>225</sup> Thus, the first two requirements under Article 6.2 are satisfied by the European Union's panel request.

7.126. In respect of the third requirement under Article 6.2, the identification of the specific measures at issue, the Panel recalls that the European Union's panel request clearly identifies the import restrictions on the products at issue from Lithuania and Poland. The European Union's panel request refers to the measure regarding Lithuania as "[a] ban on imports from Lithuania as described in the administrative notice from the Russian Federal Service for Veterinary and Phytosanitary Supervision of 25 January 2014 (FS-EN-8/1023)", while it refers to the measure regarding Poland as "[a] ban on imports from Poland as described in the administrative notice from the Russian Federal Service for Veterinary and Phytosanitary Supervision of 27 February 2014 (FS-NV-8/2972)". The European Union also refers to an amendment of these import restrictions through administrative notice from the Russian Service for Veterinary and Phytosanitary Supervision of 2 April 2014 (FS-EN-8/5081).<sup>226</sup>

7.127. In respect of the fourth requirement under Article 6.2, the European Union's panel request connects the EU-wide ban and the measures on the imports of the products at issue from Lithuania and Poland with the provisions of the covered agreements it claims to have been violated. The European Union expressly mentions the provisions of the SPS Agreement that in its view are infringed by the measures at issue. Although this part of the panel request does not refer to each of the measures separately (with the exception of the measures alleged to violate Article 7 and Annex B), the explanation included by the European Union in respect of each of its claims indicates why and how, in its view, the measures at issue, including the EU-wide ban, breach certain

<sup>219</sup> However, it set out the conditions under which a measure that post-dates the panel request could be deemed within the Panel's terms of reference. Russia's response to Panel question No. 74, paras. 119-123.

<sup>220</sup> Russia's response to Panel question No. 279, para. 122.

<sup>221</sup> Appellate Body Report, *US – Carbon Steel*, paras. 124. See also, Appellate Body Reports, *Argentina – Import Measures*, para. 5.11.

<sup>222</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.11.

<sup>223</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.12. See also Appellate Body Report, *Guatemala – Cement I*, para. 72.

<sup>224</sup> Appellate Body Report, *Korea – Dairy*, para. 120. See also Panel Report, *China – Intellectual Property Rights*, para. 7.4. For an appraisal of how a Panel should examine the satisfaction of these requirements in any given case, see Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.8-4.9; *Argentina – Import Measures*, paras. 5.40-5.42; and *China – Raw Materials*, para. 220.

<sup>225</sup> European Union's panel request, p. 1.

<sup>226</sup> European Union's panel request, pp. 1-2.

provisions of the SPS Agreement.<sup>227</sup> In our view, this summary complies with the fourth requirement under Article 6.2.

7.128. The main issue before us here flows from the third requirement of Article 6.2 in respect of the import restrictions of the products at issue from Latvia and Estonia. We consider this now.

7.129. With regard to the identification of the specific measures at issue (the third requirement under Article 6.2), the Appellate Body has observed that "the determination of whether a panel request is 'sufficiently precise' requires scrutiny of the panel request 'as a whole, and on the basis of the language used'."<sup>228</sup> Such a determination, which is done on a case-by-case basis, may depend "on the particular context in which those measures exist and operate, and may require examining the extent to which those measures are capable of being precisely identified".<sup>229</sup>

7.130. In previous cases, panels and the Appellate Body have examined whether a measure not explicitly mentioned in a panel request can still constitute a measure at issue in a particular dispute.<sup>230</sup> The Appellate Body has clarified that, generally, "measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."<sup>231</sup> The Appellate Body has also found that, exceptionally, "a panel has the authority to examine a legal instrument enacted after the establishment of the panel that amends a measure identified in the panel request, provided that the amendment does not change the essence of the identified measure."<sup>232</sup> For this exception to apply, the panel request should be broad enough to include amendments to a measure.<sup>233</sup>

7.131. Previous panels have also stated that a measure not expressly identified in a panel request may satisfy the requirements of Article 6.2 when it has a clear and close relationship to a measure described in the panel request so that the responding party can reasonably be found to have received adequate notice of the claims asserted by the complaining party.<sup>234</sup> The panel in *Japan – Film* noted that: "only if a 'measure' is subsidiary or closely related to a specifically identified 'measure' will notice be adequate".<sup>235</sup>

7.132. Further guidance concerning a panel's review of closely linked measures that postdate a panel request can be found in *EC – Fasteners (China)*. In that case, the panel examined whether an EC Council Regulation repealing and replacing the earlier EC Council Regulation identified by China in its panel request fell within its terms of reference. China's panel request did not include any broad reference to measures amending or subsequent to those identified therein. Also, the subsequent EC Council Regulation contained – in almost identical terms and in identical substance – the same provision as the Council Regulation identified in China's panel request. The *EC – Fasteners (China)* panel found that even though China's panel request did not refer to amending or

<sup>227</sup> European Union's panel request, pp. 2-6.

<sup>228</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.41 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641). See also Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 562).

<sup>229</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.41 (quoting Appellate Body Reports, *China – Raw Materials*, para. 220).

<sup>230</sup> See Appellate Body Report, *Chile – Price Band System*, paras. 143-144. See also Panel Reports, *Argentina – Financial Services*, paras. 7.26-7.33; *India – Agricultural Products*, para. 7.77, *EC – IT Products*, para. 7.140; and *Japan – Film*, para. 10.8; and Panel Preliminary Ruling, *Australia – Tobacco Plain Packaging (Dominican Republic)*, fn 139 to para. 5.16.

<sup>231</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 184 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 156).

<sup>232</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 184 (quoting Appellate Body Report, *Chile – Price Band System*, para. 139).

<sup>233</sup> Appellate Body Report, *Chile – Price Band System*, para. 144. See also Panel Report, *EC – IT Products*, para. 7.140.

<sup>234</sup> See Panel Report, *India – Agricultural Products*, para. 7.78-7.80, Panel Report, *Japan-Film*, paras. 10.8-10.9; Panel Report, *US-Carbon Steel*, para. 8.11; Panel Report, *Australia-Salmon (Article 21.5-Canada)*, para. 7.10, subpara. 27.

<sup>235</sup> Panel Report, *Japan – Film*, para. 10.8.

subsequent measures the new Council Regulation was within its terms of reference as it was "substantively identical" to the Council Regulation identified in China's panel request.<sup>236</sup>

7.133. Like other prior panels, the panel in *EC – Fasteners (China)* also underlined the importance of a "close relationship" and "adequate notice", observing:

It is now well established that a measure which is not identified in the complainant's panel request may nonetheless fall within a panel's terms of reference if it is sufficiently closely related to the measure identified in the panel request, such that the respondent can be found to have had adequate notice of the nature of the claims that the complainant might raise during the panel proceedings.<sup>237</sup>

7.134. While the panel recognised the importance of a panel request's meeting the requirements of Article 6.2 by informing the respondent of the measure at issue and the nature of the claims raised, it held that "[t]o require China in such circumstances to restart the dispute settlement process, potentially requiring a new request for consultations, would defeat the purpose of the DSU to provide for the 'prompt settlement of situations in which a Member considers that benefits accruing to it' under a covered Agreement are being impaired by another Member's measure, as provided for in Article 3.3 of the DSU."<sup>238</sup> The panel thus balanced the respondent's ability to defend itself, as derived from the complainant's obligations under Article 6.2 of the DSU, and the objective of prompt dispute settlement pursuant to Article 3.3 of the DSU.

7.135. Similarly, in the present dispute the Panel is called upon to determine whether despite not being referred to specifically in the European Union's panel request, the restrictions on the imports of the products at issue from Latvia and Estonia fall within its terms of reference. In order to address this question, the Panel will first examine the European Union's argument that the measures on the imports from Estonia and Latvia constitute an amendment (or supplement, or extension) of a measure referred to specifically in the European Union's panel request (i.e. the EU-wide ban or the measures regarding Lithuania and Poland) in a manner that does not modify its essence.

#### **7.3.4.3.1 Whether the import restrictions on the products at issue from Estonia and Latvia constitute amendments, supplements, extensions, replacement measures, renewal measures or implementing measures that do not modify the essence of those identified in the European Union's panel request**

7.136. The European Union argues that the measures regarding Estonia and Latvia are within the Panel's terms of reference because the two individual measures had the practical effect of extending the product coverage of the EU-wide ban to heat-treated and matured pig products.<sup>239</sup> The European Union's link between these measures and the panel request is based on the following statement in its panel request:

This request relates to the measures at issue and to any amendments, supplements, extensions, replacement measures, renewal measures and implementing measures.<sup>240</sup>

7.137. According to the European Union, although at the time of the panel request there were no individual bans on Estonia and Latvia, most of the products at issue "were already covered by the EU-wide ban imposed by Russia since the first case in Lithuania".<sup>241</sup> The European Union adds that "[i]n practice, the two individual measures extended the ban to heat treated and matured pig products: 'ready to eat products, containing pork, except for cats and dog feed (which were heat

<sup>236</sup> Panel Report, *EC – Fasteners (China)*, para. 7.38 (referring to Appellate Body Reports: *Chile – Price Band System*, para. 135; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 113; and Panel Report, *Japan – Film*, para. 10.8).

<sup>237</sup> Panel Report, *EC – Fasteners (China)*, para. 7.38 (referring to Appellate Body Reports: *Chile – Price Band System*, para. 135; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 113; and Panel Report, *Japan – Film*, para. 10.8).

<sup>238</sup> Panel Report, *EC – Fasteners (China)*, para. 7.34 (footnotes omitted).

<sup>239</sup> European Union's response to Panel question No. 55, para. 128.

<sup>240</sup> European Union's panel request, p. 6.

<sup>241</sup> European Union's opening statement at the first meeting of the Panel, para. 26; response to Panel question No. 55, para. 128; and second written submission, para. 17.

treated no less than 70°C for at least 20 minutes)' and 'sausages and similar products of meat, canned meat'.<sup>242</sup> The European Union maintains that these measures constitute an extension of the product coverage of the EU-wide ban.<sup>243</sup> On this basis, the European Union claims that "[t]he individual Russian bans with respect to Latvia and Estonia fall within the category of amendments, supplements, extensions and implementing measures and are thus clearly covered by the panel request."<sup>244</sup> The European Union further asserts that the measures regarding Estonia and Latvia "do not change the essence of the identified measures".<sup>245</sup>

7.138. Russia emphasizes that the European Union must demonstrate to the Panel that Russia's measures post-dating the date of the Panel request, particularly the import restrictions on live pigs, pig and pork products from Latvia and Estonia, can be considered "amendments". Russia considers that this depends on whether these later measures reflect different legal implications than the measures for Lithuania and Poland, and whether the consideration of those measures is necessary to secure a positive resolution to the dispute.<sup>246</sup>

7.139. The Panel first notes that the European Union's panel request is formulated broadly. In order to determine whether the measures regarding Estonia and Latvia are covered by the broad formulation of the panel request, as argued by the European Union, the Panel will assess (i) whether the measures regarding Estonia and Latvia constitute amendments, supplements, extensions, replacement measures, renewal measures and implementing measures; and (ii) whether the measures regarding Estonia and Latvia change the essence of the measures identified explicitly in the panel request.

7.140. To address these matters, the Panel has prepared Table 1 below, which shows the product coverage of the import restrictions on Estonia, Latvia, Lithuania, and Poland as well as of the EU-wide ban. Table 1 below also indicates which products are excluded from the product coverage of the measures at issue.<sup>247</sup>

7.141. According to the European Union, the EU-wide ban applies to the following products exported from the European Union to Russia which are subject to the veterinary certificates bilaterally agreed: piglets for fattening; pigs for breeding; slaughter pigs; pork meat and raw meat preparations.<sup>248</sup>

<sup>242</sup> European Union's opening statement at the first meeting of the Panel, para. 26; response to Panel question No. 55, para. 128; and second written submission, para. 17.

<sup>243</sup> European Union's opening statement at the first meeting of the Panel, para. 26; response to Panel question No. 55, para. 128; and second written submission, para. 17.

<sup>244</sup> European Union's second written submission, para. 18.

<sup>245</sup> European Union's second written submission, para. 20.

<sup>246</sup> Russia's response to Panel question No. 74, para. 120.

<sup>247</sup> The parties have referred in their arguments to a distinction between heat-treated and non-heat treated products. We recall that pursuant to Letter from the Russian Veterinary Service to Heads of Veterinary authorities in Russia, FS-EN-8/1644, 5 February 2014 (Exhibit RUS-323), three categories of treated products are not subject to the EU-wide ban and were not subject to the bans on imports from Lithuania and Poland from 6 February 2014 until 7 April 2014. Those categories include products subject to: thermal treatment, fermentation and maturation. We therefore refer to these as "treated products".

<sup>248</sup> European Union's response to Panel question No. 77, para. 147 (referring to Exhibits Veterinary certificate for piglets for fattening (EU-52), Veterinary certificate for pigs for breeding (EU-53), Veterinary certificate for pork meat and raw meat preparations (EU-54) and Veterinary certificate for slaughter pigs (EU-55). In fn 82 of the European Union's first written submission, there is additional reference to the Veterinary certificate for finished food products (Exhibit EU-56); the Veterinary certificate for canned meat, salamis and other ready for consumption meat products (Exhibit EU-57) ((European Union's first written submission, para. 89, fn 82). This conclusion also appears to be confirmed by announcement of FSVPS (Exhibit EU-16) and List of returned consignments of pig products (Exhibit EU-17) detailing the products the entry of which was denied by Russia: pork head meat frozen; frozen pig hearts; frozen pork; frozen pork skin; fat bacon; pork offal products (heart), frozen; Pork meat (from heads), frozen; pork meat. The European Union explains that the certified heat treated products covered by the veterinary certificates, the copies of which were provided by the European Union as Exhibit EU-56 and EU-57, are not subject to the EU-wide ban. European Union's response to Panel question No. 77, paras. 148 – 151. The products covered by the veterinary certificate provided by the European Union as Exhibit EU-56 are finished food products, containing raw material of animal origin; the products covered by the veterinary certificate provided by the European Union as Exhibit EU-57 are canned meat, salamis and other ready for consumption meat products.

7.142. Russia does not contest the European Union's identification of the products at issue covered by the EU-wide ban, clarifying that the Russia-European Union veterinary certificates on which its provisional compliance is based "concern piglets for fattening,<sup>249</sup> pigs for breeding,<sup>250</sup> and pork meat and raw meat preparation<sup>251</sup>."<sup>252</sup> It is clear from the evidence submitted by the parties that the EU-wide ban applies to the following products, which are subject to the veterinary certificates bilaterally agreed on 11 August 2006: piglets for fattening and pigs for breeding (live pigs), and pork meat and raw meat preparations.<sup>253</sup> Russia acknowledges that the terms of the veterinary certificates are enforced in respect of pigs for slaughter; however, Russia clarifies that pigs for slaughter have not been allowed into its territory because of measures applied in respect of classical swine fever.<sup>254</sup>

7.143. In addition, both parties agree that products subject to thermal treatment, fermentation and maturation are not subject to the EU-wide ban.<sup>255</sup>

7.144. As indicated in Table 1, the EU-wide ban does not apply to certain finished goods containing pork that have been subject to particular forms of treatment. Nonetheless, the restrictions on imports from Estonia and Latvia cover most products in the category of heat-treated finished pork products and the category of heat treated canned pork meat, sausages and other ready for consumption meat products, except for certain feedstuffs and feed additives for animals.

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<sup>249</sup> (footnote original) Veterinary certificate for piglets for fattening, being exported from the EU into Russia, 11/08/2006 (Exhibit EU-52)

<sup>250</sup> (footnote original) Veterinary certificate for pigs for breeding, exported from the EU into Russia, 11/08/2006 (Exhibit EU-53)

<sup>251</sup> (footnote original) Veterinary certificate for pork meat and raw meat preparations, exported from the EU into Russia, 11/08/2006 (Exhibit EU-54).

<sup>252</sup> Russia's response to Panel question No. 77, para. 127.

<sup>253</sup> Letter of FSVPS of 29 January 2014 – FS-SA-8/1277 (Exhibit EU-14), para. 3; Letter of 14 February 2014 – HF-12-26/1650 (Exhibit EU-15), p. 2; FSVPS instructions to its Territorial Departments of 29 January 2014 (Exhibit-EU-161), para. 1; Letter Ref. FS-EN-8/5095 from the Russian Federal Service for Veterinary and Phytosanitary Supervision to the European Union dated 2 April 2014 (Letter of FSVPS of 2 April 2014 –FS-EN-8/5095 )(Exhibit RUS-53), para. 3. This conclusion also appears to be confirmed by announcement of FSVPS (Exhibit EU-16) and List of returned consignments of pig products (EU-17) detailing the products the entry of which was denied by Russia: pork head meat frozen; frozen pig hearts; frozen pork; frozen pork skin; fat bacon; pork offal products (heart), frozen; Pork meat (from heads), frozen; pork meat.

<sup>254</sup> Russia's response to Panel question No. 267, paras. 57-60. See also Letter from Rosselkhoznadzor to Russia's regional offices, 2 March 2012, FS-EN-7/2793 (Exhibit RUS-351).

<sup>255</sup> Letter from the Russian Veterinary Service to Heads of Veterinary authorities in Russia, FS-EN-8/1644, 5 February 2014 (Exhibit RUS-323); and Russia's letter to the European Union of 5 February 2014, FS-EN-8/1642 (Exhibit EU-162). See also European Union's comments to Russia's response to Panel question No. 256, paras. 21-25; and Russia's response to Panel question No. 256, paras. 14-16.



Table 1 Product coverage of the measures at issue<sup>256</sup>

EU-wide <sup>257</sup>	Lithuania <sup>258</sup>	Poland <sup>259</sup>	Latvia <sup>260</sup>	Estonia <sup>261</sup>
live pigs	live pigs its genetic material	live pigs its genetic material	live pigs	live pigs pig genetic material
	finished products containing pork	finished products containing pork	finished products containing pork	end products containing pork
	products from slaughter of wild boar	products from slaughter of wild boar		meat of wild boar
pork meat	pork	pork	pork	pork
raw meat preparations	raw pork products	raw pork products	raw pork products	raw pork products
	horn-hoofed materials leather intestinal materials	horn-hoofed materials leather intestinal materials		horn-hoofed materials leather intestinal materials
	bristles	bristles		hair coat
	feed for pigs	feed for pigs		all types of feed stuffs and feed additives for pigs
	hunting trophies not subjected to full taxidermy treatment	hunting trophies not subjected to full taxidermy treatment		hunter's trophies derived from sensible animal species without full taxidermy treatment
	equipment previously used for keeping, transportation, slaughter and cutting of pigs	equipment previously used for keeping, transportation, slaughter and cutting of pigs		equipment previously used for keeping, slaughter and cutting of pigs
<u>Excluded</u> : treated (either through thermal treatment, fermentation or maturation): finished products, containing raw materials of animal origin (pork) and canned meat; sausages and other ready-to-eat meat products (made of pork) intended for the production of pet food and food for fur animals.	<u>Excluded</u> : cats and dogs' feeds which are thermally treated (temperature not lower than 70°C for not less than 20 minutes).  Note: This exclusion was introduced as of 7 April 2014. Before that time, these import restrictions were not applied to the categories of products excluded from the EU-wide ban, as described in this table.		<u>Excluded</u> : cats' and dogs' feeds which are thermally treated (temperature not lower than 70°C for not less than 20 minutes).	<u>Excluded</u> : feed additives resulted from chemical or microbiological synthesis and heat-treated ready-made feedstuffs (minimum temperature: 70 degrees in Celsius, minimum treatment time: 20 minutes).

<sup>256</sup> The Panel prepared this table on the basis of the following exhibits: Exhibits EU-7, EU-8, EU-10, EU-11, EU-168 and RUS-28 (regarding the measures in respect of Lithuania); Exhibits EU-9, EU-10, EU-11, EU-168 and RUS-29 (regarding the measures in respect of Poland); Exhibits EU-12 and EU-169 (regarding the measures in respect of Latvia); and Exhibits EU-13 and RUS-37 (regarding the measures in respect of Estonia). The parties provided comments on this Table in response to Panel question No. 271. See European Union's response to Panel question No. 271, paras. 83-89; and Russia's response to Panel question No. 271, paras. 95-98.

<sup>257</sup> European Union's response to Panel question No. 77, paras. 148 – 151 and response to Panel question No. 271, paras. 85-86. See also Russia's response to Panel question No. 77, para. 127 and response to Panel question No. 271, para. 97. See also Russia's letter to the European Union of 5 February 2014, FS-EN-8/1642 (Exhibit EU-162).

<sup>258</sup> See Exhibits EU-7, EU-8, EU-10, EU-11, EU-168, and RUS-28.

<sup>259</sup> See Exhibits EU-9, EU-10, EU-11, EU-168, and RUS-29.

<sup>260</sup> See Exhibits EU-12 and EU-169.

<sup>261</sup> See Exhibits EU-13 and RUS-37.

7.145. It thus follows that the European Union's assertion that the measures regarding Estonia and Latvia extend the product coverage of the EU-wide ban is supported by the evidence on the record. However, if the EU-wide ban coexists with the measures regarding Latvia and Estonia, it seems as if the extension of the product coverage would only be applicable to the imports of the products at issue from those two countries, and not the imports from the rest of the EU member States. Furthermore, such an extension would apply to Estonia and Latvia on the specific terms of the bans for each country.

7.146. At the same time, the European Union's conclusion only refers to the overlap between the product coverage of the EU-wide ban and the measures regarding Estonia and Latvia. By doing this, the European Union's rationale leaves unaddressed the link between the aspects of the measures on imports from Latvia and Estonia unrelated to the product coverage.

7.147. This circumstance would have a significant impact on the Panel's further assessment of whether or not such extension of product coverage changes the essence of the EU-wide ban, regardless of its classification as an amendment, supplement, extension, replacement measure, renewal measure or implementing measure. Following the European Union's argument would entail considering the EU-wide ban as a measure modified by the measures regarding Estonia and Latvia to the extent its product coverage is broadened. However, the measures regarding those two EU member States contain other elements that would not be included into an amended version of the EU-wide ban.

7.148. If, on the other hand, all other aspects of the measures regarding Estonia and Latvia were included in such modification, they could change the essence of the EU-wide ban. As indicated by the evidence on the record, the EU-wide ban and the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are distinct, even though related, sets of measures. These measures exist in parallel. The adoption or revocation of the bans applied to imports from Estonia, Latvia, Lithuania, or Poland does not affect the existence of the EU-wide ban and vice versa.

7.149. The application of the EU-wide ban and the measures regarding Estonia and Latvia may overlap, for instance when both the EU-wide ban and the measures regarding Estonia and Latvia apply to the products at issue originating from Estonia and Latvia. It is in this context that the European Union argues that the measures regarding Estonia and Latvia extend the product coverage of the EU-wide ban. However, the fact that such *de facto* extension may take place as the result of the concurrent application of the measures regarding Estonia and Latvia and the EU-wide ban, does not bring all aspects of these measures regarding Estonia and Latvia under the umbrella of the EU-wide ban. The two continue to exist separately.

7.150. For these reasons, the European Union's argument on how to bring all aspects of the measures regarding Estonia and Latvia within the panel's terms of reference by pointing to their *de facto* extension of the product coverage of the EU-wide ban does not seem persuasive.

7.151. In addition, the consequence of accepting the European Union's argument is that the Panel would be barred from making separate findings on the measures regarding the imports from Estonia and Latvia. This is because the Panel would only be able to consider under its jurisdiction the amended EU-wide ban, including the modifications inserted through the import restrictions on the products at issue from Estonia and Latvia, rather than each of those measures (i.e. the EU-wide ban and the bans on Estonia and Latvia) considered individually. This would not allow us to make findings in such a manner that would satisfy the objective of prompt dispute settlement pursuant to Article 3.3 of the DSU and the aim of the dispute settlement mechanism to secure a positive solution to this dispute, as indicated in Article 3.7 of the DSU.

7.152. Because we are not persuaded by the European Union's argument that the import restrictions on the products at issue from Estonia and Latvia constitute amendments, supplements,

extensions, replacement measures, renewal measures and implementing measures of the EU-wide ban, the Panel will examine below this matter pursuant to its own reasoning.<sup>262</sup>

7.153. In order for the Panel to be able to fulfil its obligation to make an objective assessment of the matter before it and prevent the possibility that the procedural requirements of WTO dispute settlement result in a situation where measures could completely evade a review, we will pursue our own reasoning on the basis of the evidence submitted by the parties.<sup>263</sup> This reasoning entails examining whether the measures regarding Estonia and Latvia satisfy the legal standard for close link and adequate notice, as explained in paragraph 7.131 above.

#### **7.3.4.3.2 Whether the import restrictions on the products at issue from Estonia and Latvia are closely linked to the measures explicitly identified in the European Union's panel request**

7.154. As indicated in paragraph 7.123 above, for a measure to fall within a panel's terms of reference it has to satisfy the requirements of Article 7 of the DSU as informed by Article 6.2 of the DSU.<sup>264</sup> When analysing those requirements, panels and the Appellate Body have found that there can be circumstances where a measure not explicitly included in the panel request could still fall within a panel's terms of reference. In this vein, the Appellate Body has stated that compliance with the Article 6.2 requirements must be determined on the merits of each case, having considered the panel request as a whole, and in light of the attendant circumstances.<sup>265</sup> In this regard, the Panel notes that the European Union refers to the EU-wide ban and the import restrictions on the products at issue from Estonia, Latvia, Lithuania, and Poland as "distinct but closely linked".<sup>266</sup>

7.155. Based on the existing guidance in the jurisprudence, as described in paragraphs 7.130 to 7.134 above, the Panel will examine whether the measures regarding Estonia and Latvia are closely related to the measures mentioned explicitly in the European Union's panel request, in such a manner that Russia has had adequate notice of the nature of the claims that the European Union might have raised during the Panel proceedings. In assessing this matter, we will take into account the rationale of the DSU to provide for the "prompt settlement of situations in which a Member considers that benefits accruing to it" under a covered Agreement are being impaired by another Member's measure, as provided for in Article 3.3 of the DSU, and the objective of securing a positive solution to the dispute as provided in Article 3.7 of the DSU.

7.156. On this basis, the central question we will address is whether the import restrictions on the products at issue from Estonia and Latvia are closely related to the EU-wide ban and/or to the import restrictions on the products at issue from Lithuania and Poland. The Panel notes that both the measures on imports from Estonia, Latvia, Lithuania, and Poland and the EU-wide ban appear to be adopted in pursuit of the same regulatory purpose: protecting Russia's territory from entry and further spread of ASF.<sup>267</sup> Those import restrictions also appear similar in their design (including their product coverage as described in Table 1 above), structure (including the legal instruments through which they are applied) and impact, leading to the application of restrictions on the importation of the products at issue from the European Union or its member States.

7.157. The two sets of measures are implemented by means of similar legal instruments. Russia explained that temporary restrictions on the products at issue from Estonia, Latvia, Lithuania, and

<sup>262</sup> See e.g. Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.215 ("While a panel cannot make the case for a complainant, it has the competence 'freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration.") (quoting Appellate Body Report, *EC – Hormones*, para. 156).

<sup>263</sup> See Panel Report, *US – Animals*, paras. 7.444-7.447.

<sup>264</sup> Appellate Body Report, *US – Carbon Steel*, paras. 124. See also, Appellate Body Reports, *Argentina – Import Measures*, para. 5.11.

<sup>265</sup> Appellate Body Report, *US – Carbon Steel*, para. 127.

<sup>266</sup> European Union's opening statement at the first meeting of the Panel, para. 24.

<sup>267</sup> See Exhibits EU-13 and RUS-37 (regarding Estonia); EU-12 and EU-169 (regarding Latvia); EU-9, EU-10, EU-11, EU-168 and RUS-29 (regarding Poland); EU-7, EU-8, EU-10, EU-11, EU-168 and RUS-28 (regarding Lithuania); and EU-14 and EU-161 (regarding the EU-wide ban). See also Russia's second written submission, para. 143; and response to Panel question No. 297, para. 165.

Poland were imposed based on FSVPS's "Directions which constitute the departmental enactments applicable throughout the Russian Federation".<sup>268</sup> In addition, Russia explains that as set out in Decree 327, "different territorial departments are obliged to follow the directions from the Federal Government, including instructions with respect to import restrictions from the four ASF-infected EU Member States".<sup>269</sup> Similarly, as described in paras. 7.77 to 7.79 above, the EU-wide ban is enforced through actions of Russia's federal and territorial departments.

7.158. Moreover, there is a geographic overlap between the EU-wide measure and the measures in respect of imports from Latvia and Estonia. As the European Union has explained, since the end of January 2014 imports of the products at issue (with the exception of heat treated, fermented or matured finished products) are no longer accepted from any EU member States, including Estonia and Latvia.<sup>270</sup> Months later, when the measures in respect of imports from Latvia (27 June 2014)<sup>271</sup> and Estonia (11 September 2014)<sup>272</sup> were put in place, geographical areas covered by the EU-wide ban were subject to import restrictions on the products at issue from those two specific EU member States.

7.159. In addition, the measures are proximate in time, in both absolute and relative terms, to the measures identified in the panel request, to the panel request itself and to the date of establishment of the Panel. We note that the measures regarding Estonia and Latvia were adopted at an early stage of the proceedings. The ban on Latvia was adopted the same day on which the panel request was presented (27 June 2014), while the measure on Estonia was adopted on 11 September 2014. Both these measures were adopted prior to the composition of the panel (which took place on 23 October 2014), the organizational meeting (which took place on 21 November 2014) and the parties' deadline for the presentation of their first written submission (14 January 2015 for the European Union and 25 February 2015 for Russia).<sup>273</sup>

7.160. Based on the foregoing, the Panel finds that there is (i) an identity of the regulatory purpose; (ii) proximity of design, structure and impact; and (iii) close geographic and temporal relation of the import restrictions on the products at issue from Estonia and Latvia with those of the import restrictions of the products at issue from Lithuania and Poland as well as from the rest of the European Union. We consider these factual findings to strongly support the preliminary conclusion that the import restrictions on the products at issue from Estonia and Latvia are closely related to the measures explicitly described in the European Union's panel request.

7.161. We move on to address whether Russia has had adequate notice of the nature of the claims that the European Union might have raised during the Panel proceedings. This enquiry is necessary to ensure that the due process rights of Russia are not violated. The Panel recalls that our examination of adequate notice flows from the close relationship between the unnamed measures and those included in the panel request.<sup>274</sup> To determine whether Russia's ability to defend itself would be prejudiced if the import restrictions on the products at issue from Estonia and Latvia were found to be within the Panel's terms of reference, we need to determine whether the measures regarding Estonia and Latvia are sufficiently closely related to the measures explicitly identified in the panel request, such that Russia could reasonably anticipate these measures to be challenged in these Panel proceedings.

7.162. We also consider it relevant to underscore the factual circumstances of the present dispute. ASF outbreaks began at the end of January 2014 in Lithuania. As the evidence on record

<sup>268</sup> Russia's response to Panel question No. 276, para. 112.

<sup>269</sup> Russia's response to Panel question No. 276, para. 113, referring to RF Government's Decree 327 of June 30, 2004 "Approval of the Regulation of the Federal Service for Veterinary and Phytosanitary Surveillance (Rosselkhozadzor)", para. 4 (Exhibit RUS-352).

<sup>270</sup> European Union's first written submission, para. 92.

<sup>271</sup> G/SPS/N/RUS/64 (Exhibit EU-12) and Russia's letter of instruction of 27 June 2014, FS-NF-8/11315 (Exhibit EU-169).

<sup>272</sup> G/SPS/N/RUS/76 (Exhibit EU-13) and Russia's letter to the European Union of 11 September 2014, FS-NV-8/17431 (Exhibit RUS-37).

<sup>273</sup> See para. 1.6 above.

<sup>274</sup> Panel Report, *Japan – Film*, para. 10.8.

demonstrates<sup>275</sup>, the situation of the spread of the disease has shifted in the months following the initial outbreaks and continues to evolve. This led to new outbreaks in Poland, Latvia and Estonia during the course of 2014. These particular circumstances further confirm the close relationship between the measures imposed on the imports of the products at issue from Estonia and Latvia with those imposed on imports from Lithuania and Poland as well from the rest of the European Union. In this context, this statement from Russia comes as no surprise: "both Parties have agreed that it is appropriate for the Panel to consider the European Union claims as including a challenge to the Latvian and Estonian import bans ..., which were not included in the Panel request".<sup>276</sup>

7.163. It also seems clear from the European Union's arguments in the course of the proceedings, that the European Union would have provided the same arguments for the inconsistency of the measures regarding Estonia and Latvia with the covered agreements as those of the measures regarding Lithuania and Poland. This also means that Russia's defence of the measures regarding Estonia and Latvia would have likely been the same as that for the measures regarding Lithuania and Poland. This is, in fact, confirmed by Russia's arguments as provided in its submissions.

7.164. Based on the foregoing, the Panel finds that Russia could reasonably anticipate that the European Union would challenge the measures regarding Estonia and Latvia.

7.165. The Panel's review of the measures at issue regarding Estonia and Latvia as distinct measures would be in line with the objectives of prompt dispute settlement and securing the positive resolution of the dispute. The Panel would be able to make individual findings concerning the conformity of these measures with the covered agreements, thus examining and making findings in respect of all the measures, and their particular features, related to the way in which Russia is handling the importation of the products at issue from the European Union. The Panel considers that not making a finding with respect to the import restrictions on the products at issue from Estonia and Latvia would neither be in line with the objective of prompt settlement of disputes nor that of securing a positive solution to a dispute within the meaning of the DSU, in as much as the European Union would have to challenge these measures in separate proceedings.

7.166. We consider that, given the particular facts and circumstances of this dispute, and in light of our findings in paragraph 7.126 above, our findings concerning the measures regarding Estonia and Latvia also establish the required connection between the challenged measures and the provisions of the covered agreements claimed to have been violated for the purposes of providing a brief summary of the legal basis of the complaint sufficient to present the problem clearly in satisfaction of the fourth requirement of Article 6.2.

#### **7.3.4.4 Conclusion**

7.167. Based on the foregoing and in light of the particular circumstances of the present dispute, the Panel finds that the import restrictions on the products at issue from Estonia and Latvia are within its terms of reference.

#### **7.3.5 Summary of the measures at issue in this dispute**

7.168. As indicated in paragraph 7.84 above, we find that the EU-wide ban is a measure attributable to Russia. In addition, as indicated in paragraph 7.116 above, we find that the terms of Russia's accession to the WTO does not impose any limit to our assessment of the European Union's claims in respect of the EU-wide ban.

7.169. As indicated in paragraph 7.167 above, we find that the import restrictions on the products at issue from Estonia and Latvia are within our terms of reference.

7.170. Based on our previous findings, Table 2 below summarizes the measures at issue in this dispute, with an indication of the product coverage of each of the measures under examination.

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<sup>275</sup> Detailed account of the outbreaks in domestic pigs and notification of cases in wild boar in the EU, as notified to the OIE (Exhibit EU-118). See also Data from OIE WAHIS Interface, as of 31 August (RUS-296 revised).

<sup>276</sup> Russia's response to Panel question No. 279, para. 122.

Table 2 Measures at issue

Measure	Legal Instrument	Date of imposition	Date of Application	WTO Notification	Date of notification
Restrictions on imports from <b>Lithuania</b> of certain non-heat treated pig products. <sup>277</sup>	Letter from FSVPS of 25 January 2014 (FS-EN-8/1023).	25 January 2014	25 January 2014	G/SPS/N/RUS/48	10 February 2014
<b>EU-wide ban</b> of certain non-heat treated pig products.	Constructed <sup>278</sup>	N/A	29 January 2014 <sup>279</sup>	Unnotified	N/A
Restrictions on imports from <b>Poland</b> of certain non-heat treated pig products. <sup>280</sup>	Letter from FSVPS of 27 February 2014 (FS-NV-8/2972)	27 February 2014	27 February 2014	G/SPS/N/RUS/49	4 March 2014
Extension of the coverage of import restrictions from <b>Lithuania and Poland</b> to certain heat treated pig products. <sup>281</sup>	Letter from FSVPS of 2 April 2014 (FS-EN-8/5081).	2 April 2014	7 April 2014	G/SPS/N/RUS/48/Add.2 G/SPS/N/RUS/49/Add.1	4 April 2014
Restrictions on imports from <b>Latvia</b> of certain heated treated and non-heat treated pig products. <sup>282</sup>	Letter from the FSVPS of 27 June 2014 (FS-NF-8/11315).	27 June 2014	28 June 2014	G/SPS/N/RUS/64	16 July 2014
Restrictions on imports from <b>Estonia</b> of certain heat treated and non-heat treated pig products. <sup>283</sup>	Letter from FSVPS of 11 September 2014 (FS-NV-8/17431).	11 September 2014	11 September 2014	G/SPS/N/RUS/76	16 September 2014

### 7.3.6 Temporal framework for the Panel's assessment

#### 7.3.6.1 Introduction

7.171. In light of the ongoing nature of the ASF outbreaks associated with the imposition of the measures at issue, the Panel asked the parties to express their views on the appropriate time-

<sup>277</sup> See G/SPS/N/RUS/48 (Exhibit EU-7), G/SPS/N/RUS/48/Add.1 (Exhibit EU-8) and Russia's letter to the European Union of 25 January 2014, FS-EN-8/1023 (Exhibit RUS-28).

<sup>278</sup> See section 7.3.2.3.1 above.

<sup>279</sup> European Union's first written submission, paras. 94–95 (referring to the List of returned consignments of pig products (Exhibit EU-17), Items 7, 8, 9, 13, 14, 15 and 16).

<sup>280</sup> See Exhibits EU-9 and RUS-29.

<sup>281</sup> See Exhibits EU-10, EU-11 and EU-168.

<sup>282</sup> See Exhibits EU-12 and EU-169.

<sup>283</sup> See Exhibit EU-13 and RUS-37.

frame for the Panel's assessment of the European Union's claims.<sup>284</sup> Without prejudice to additional considerations regarding our substantive assessment, this section reflects our views regarding the temporal dimension of the evidence and events that we will consider in our assessment of the European Union's claims.

### 7.3.6.2 Main arguments of the Parties

#### 7.3.6.2.1 European Union

7.172. The European Union considers the relevant moment in time for assessing Russia's compliance with the provisions of the SPS Agreement to be the date of the panel establishment (22 July 2014). For the European Union, symmetrically, the same moment in time should apply with respect to the evidence the European Union submitted to Russia in order to allow it to perform a risk assessment.<sup>285</sup> However, the European Union also made clear that at any point in time the European Union's ASF regionalization measures were properly adapted to the evolution of the disease. Subsequent developments, after the date of the panel establishment, can only confirm the robustness of the European Union's regionalization measures and, at the same time, the unnecessary and arbitrary character of Russia's measures at issue. The European Union asserts that more than 20 months after the first ASF cases in January 2014, Russia still has not provided to the Panel and to the European Union any risk assessment.<sup>286</sup>

#### 7.3.6.2.2 Russia

7.173. Russia submits that it would be appropriate for the Panel to assess the compliance of the measures at issue with the cited provisions of the SPS Agreement at the time of panel establishment, as well as after the date of panel establishment, up to and including developments until August 2015. According to Russia, this would enable the Panel to take into account the evolution of ASF infections and ASF-free and infected zones in the four affected EU member States.<sup>287</sup> Russia asserts that the relevant jurisprudence supports a choice of the end of August 2015 as the proper temporal benchmark.<sup>288</sup> Russia's allegations differ according to the time-frame that the Panel selects in its examination of the European Union's claims in this dispute. For example, Russia submits that if the Panel determines that the date of panel establishment is the relevant date for its enquiry, it would invoke Article 5.7 with respect to the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.<sup>289</sup> Moreover, Russia submits that, based on relevant jurisprudence, the Panel should consider all of the evidence before it, including that dated after the establishment of the Panel.<sup>290</sup>

#### 7.3.6.3 Analysis by the Panel

7.174. The Appellate Body in *EC – Selected Customs Matters* addressed the distinction between measures at issue and the evidence in support of the manner in which those measures are administered, for the purposes of Article X:3(a) of the GATT 1994. The Appellate Body reasoned that it is important to distinguish between measures and pieces of evidence; and added that

While there are temporal limitations on the measures that may be within a panel's terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel. A panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or

<sup>284</sup> European Union's responses to Panel question Nos. 279, 309, and 311; and Russia's responses to Panel questions No. 279, 309, and 311; and comments to European Union's responses to Panel question No. 236.

<sup>285</sup> European Union's response to Panel question No. 311, paras. 171-173.

<sup>286</sup> European Union's opening statement at the second meeting of the Panel, para. 60.

<sup>287</sup> Russia also points out the appropriateness of considering developments in the first and second quarters of 2015, taking into account the European Union's submission of the eradication plans for the four affected EU member States. Russia's response to Panel question No. 279, paras. 117-139.

<sup>288</sup> Russia's response to Panel question No. 279, para. 131.

<sup>289</sup> See Russia's response to Panel question no. 279, paras. 133-134; response to Panel question No. 293, para. 148; and response to Panel question No. 294, para. 150.

<sup>290</sup> Russia's response to Panel question No. 311, paras. 269-272.

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post-dates its establishment. ... A panel enjoys a certain discretion to determine the relevance and probative value of a piece of evidence that pre-dates or post-dates its establishment."<sup>291</sup>

7.175. We are mindful of our mandate and duty under the DSU to make an objective assessment of the matter referred to us by the DSB in accordance with our terms of reference, by virtue of Articles 6.2, 7 and 11 of the DSU. As explained above, it is well established that the Panel request frames a panel's terms of reference. However, as observed by the Appellate Body, there is a difference in the temporal limitations applicable to the measures at issue and those to the evidence considered in support of claims assessed by a panel. We are also mindful of the aim of the WTO dispute settlement mechanism to secure a positive solution to a dispute, as enshrined in Article 3.7 of the DSU.

#### 7.3.6.4 Conclusion

7.176. We recall our finding in paragraph 7.167 above that the bans on imports of the products at issue from Latvia and Estonia fall within our terms of reference although they correspond with, or post-date, the date of the panel request. We recall that this finding takes into account, and is in line with, the agreed view of the parties that these measures fall within the Panel's terms of reference. In our view, our terms of reference, together with the date of the Panel's establishment, shed light on the appropriate time frame for our examination of the matter before us. Given the particular facts and circumstances of this case, we consider it appropriate to examine the matter referred to us up to and including the date of Russia's adoption of the measure in respect of Estonia, that is, up to and including 11 September 2014. At the same time, we note that our identification of this particular time frame for this purpose would not materially affect our findings in respect of the bans on imports of the products at issue from Lithuania, Poland, and Latvia, except to the extent that they would further support our findings in respect of these measures, as well as in respect of the EU-wide ban, and the situation in existence at the date of panel establishment. In summary, the Panel has examined the evidence on record pre-dating and post-dating the Panel's establishment, with a special focus on the factual situation as at 22 July 2014, for the measures in existence at that date, and as at 11 September 2014, for the measures at issue.

7.177. The Appellate Body has found that a panel may weigh and determine the probative value of evidence that pre-dates or post-dates its establishment.<sup>292</sup> Following this guidance, we will weigh and consider any relevant evidence on record that pre-dates and post-dates the Panel establishment. This includes evidence and argumentation that post-dates the European Union's panel request.

7.178. Temporal considerations play a role in the assessment of many of the European Union's claims under the SPS Agreement, given the need to examine the state of sufficiency of scientific evidence, available pertinent information, the adaptation of measures on an "ongoing basis" in cases involving regionalization under Article 6 and the existence of a "reasonable period of time" or any undue delays in respect of certain procedures. Each of these inquiries imposes particular demands.<sup>293</sup> In respect of the assessment of the measures at issue before this Panel regarding Estonia, Latvia, Lithuania, and Poland and the EU-wide ban, we have adopted a case and provision-specific approach, taking into account the particular facts and circumstances of this dispute in light of the argumentation and evidence submitted by the parties.

## 7.4 Whether Russia's measures are within the scope of the SPS Agreement

### 7.4.1 Introduction

7.179. As we detailed in section 2.2 above, the European Union raises claims, in respect of the measures at issue, under the SPS Agreement. A threshold issue in our examination of these claims

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<sup>291</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

<sup>292</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

<sup>293</sup> For example, a general rule for the purposes of the Panel's determination of the timeline for assessment of "sufficiency" of relevant scientific evidence is the date of the adoption of the SPS measure in question. Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.3253.



is whether Russia's measures are SPS measures subject to the disciplines of the SPS Agreement.<sup>294</sup>

7.180. At the outset we note that neither party has challenged that the restrictions on imports from Estonia, Latvia, Lithuania, and Poland are SPS measures subject to the disciplines set out in the SPS Agreement.<sup>295</sup> However, they disagree on whether the EU-wide ban is an SPS measure. Given our duty, pursuant to Article 11 of the DSU, to make an objective assessment of the applicability of the relevant covered agreements<sup>296</sup>, we will examine the parties' arguments in respect of this threshold issue.

## 7.4.2 Main arguments of the parties

### 7.4.2.1 European Union

7.181. The European Union argues that "[t]he Russian ban is enacted through 'relevant laws, decrees, regulations, requirements and procedures', consisting of the four administrative notices concerning the individual EU Member States and the requirements and procedures related to the EU-wide ban."<sup>297</sup> The European Union thus claims that the EU-wide ban and the ban on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland constitute SPS measures that fall within the definitions of Annex A(1)(a) and (b) of the SPS Agreement, ASF being a disease in the context of Annex A(1)(a) and the ASF virus being a disease-causing organism within the scope of Annex A(1)(b).<sup>298</sup> According to the European Union, these measures also directly affect international trade within the meaning of Article 1.1 of the SPS Agreement.<sup>299</sup> Therefore, according to the European Union, the SPS Agreement applies to the measures at issue.<sup>300</sup>

7.182. The European Union adds that the parties do not dispute that the "four individual bans with respect to Lithuania, Poland, Latvia, and Estonia are SPS measures within the meaning of Annex 1(a) of the SPS Agreement."<sup>301</sup>

### 7.4.2.2 Russia

7.183. Russia claims that the European Union has failed to demonstrate that the EU-wide ban is a measure attributable to it. Thus, such measure is not subject to the provisions of the SPS Agreement.<sup>302</sup>

7.184. In addition, Russia argues that the EU-wide ban is not a requirement or procedure within the meaning of Annex A(1) of the SPS Agreement and therefore does not constitute an SPS measure.<sup>303</sup> In this context, Russia posits that the present case is similar to *EC – Approval and Marketing of Biotech Products* insofar as the EU-wide ban is not a requirement or procedure itself, i.e. not the veterinary certificate, but the application of the requirements or procedures

<sup>294</sup> Panel Report, *India – Agricultural Products*, para. 7.132. See also Panel Report, *US – Animals*, para. 7.30.

<sup>295</sup> The Panel notes that Russia has not raised any challenge to the import restrictions on the products at issue from Estonia, Latvia, Lithuania, and Poland being SPS measures. See Russia's response to Panel question No. 84, para. 138. In addition, Russia grounds its defence of the import restrictions on the products at issue from Estonia, Latvia, Lithuania, and Poland on the assumption that they are subject to the application of the SPS Agreement. See Russia's first written submission, para. 7. See also European Union's second written submission, para. 15.

<sup>296</sup> Panel Reports, *US – Animals*, para. 7.30; and *India – Agricultural Products*, para. 7.133.

<sup>297</sup> European Union's first written submission, para 103.

<sup>298</sup> European Union's first written submission, paras. 101 and 106.

<sup>299</sup> European Union's first written submission, paras. 104 -106.

<sup>300</sup> European Union's first written submission, para.106.

<sup>301</sup> European Union's second written submission, para. 15.

<sup>302</sup> Russia's opening statement at the second substantive meeting, para. 50; and response to Panel question No. 275, para. 111. See also Russia's arguments in section 7.3.2.2.2 above claiming non-attribution of the alleged EU wide ban to Russia.

<sup>303</sup> Russia's opening statement at the first meeting of the Panel, para. 49; and second written submission, para. 172 (referring to European Union's first written submission, para. 103).

which are set out in such veterinary certificates.<sup>304</sup> On the basis of the refusal of the panel in *EC – Approval and Marketing of Biotech Products* to hold that a general moratorium on approving the marketing of genetically modified organisms was an SPS measure, because that moratorium concerned only the application or operation of such procedures and not the procedures themselves, Russia claims that the EU-wide ban is not an SPS measure within the meaning of Annex A(1) of the SPS Agreement.<sup>305</sup>

7.185. Russia further suggests that because the European Union did not allege in its panel request or its submissions to the Panel that the underlying bilaterally negotiated EU-Russian veterinary certificates are WTO-inconsistent, "the Panel should not make any findings with respect to the consistency of these certificates with the SPS Agreement".<sup>306</sup>

7.186. As mentioned above<sup>307</sup>, Russia has not challenged the restrictions on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland constituting SPS measures.<sup>308</sup>

### 7.4.3 Main arguments of the third parties

#### 7.4.3.1 Brazil

7.187. In its responses to Panel questions Brazil referred to the scope of Annex A(1) of the SPS Agreement and the finding of the panel in *EC - Approval and Marketing of Biotech Products* that the *de facto* moratorium challenged in that case did not take the form of an SPS measure. Brazil then concluded that in the present case, the characterization of the measures as an SPS measure in the context of Annex A(1) seems to be undisputable.<sup>309</sup>

#### 7.4.3.2 United States

7.188. In its responses to Panel questions the United States referred to the purported objectives of the challenged measures and the text of Annex A(1)(a) of the SPS Agreement, and noted that in its view the measures at issue constitute SPS measures.<sup>310</sup>

### 7.4.4 Analysis by the Panel

#### 7.4.4.1 Relevant legal provisions

7.189. Article 1 of the SPS Agreement provides in its relevant part:

1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.
2. For the purposes of this Agreement, the definitions provided in Annex A shall apply.

7.190. Annex A(1) provides as follows:

1. Sanitary or phytosanitary measure - Any measure applied:
  - (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of

<sup>304</sup> Russia's opening statement at the first meeting of the Panel, para. 49; and second written submission, para. 172 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1395, 7.1407, 7.1421, 7.1441, 7.1448 and 7.1465).

<sup>305</sup> Russia's opening statement at the first meeting of the Panel, paras. 48-49; second written submission, paras. 172 and 174; and response to Panel question No. 72, para. 107.

<sup>306</sup> Russia's response to Panel question No. 72, para 109.

<sup>307</sup> See e.g. para. 7.180 above.

<sup>308</sup> See also Russia's response to Panel question No. 84, para. 138.

<sup>309</sup> Brazil' third-party response to Panel question No. 5.

<sup>310</sup> United States' third-party response to Panel question No. 5.

pests, diseases, disease-carrying organisms or disease-causing organisms;

(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

7.191. We agree with previous panels that based on these provisions, for the SPS Agreement to apply, the measures at issue must (i) be an SPS measure within the meaning of Article 1 and Annex A(1) of the SPS Agreement that (ii) may, directly or indirectly, affect international trade.<sup>311</sup> We therefore move to examine each of these requirements.

#### 7.4.4.2 Whether Russia's measures are SPS measures within the meaning of Annex A(1)

7.192. Pursuant to Article 1.1 and Annex A(1) of the SPS Agreement, SPS measures are those falling within one or more of the definitions provided in letters (a) through (d) of Annex A(1) of the SPS Agreement. A measure will fall within one or more definitions provided in Annex A(1) if it is applied to protect at least one of the listed interests or to prevent or limit specified damage.<sup>312</sup> In addition, "the determination of whether a measure is an SPS measure requires an inquiry into whether the measure is of the type that may fall within the definition of an SPS measure and whether it exhibits an appropriate nexus to one of the specified purposes in subparagraphs (a) through (d)".<sup>313</sup>

7.193. The Appellate Body in *Australia – Apples* considered that a fundamental element for determining the applicability of the SPS Agreement to the measures at issue is their purpose, that is, their application to protect the interest(s) listed in Annex A(1) or to prevent or limit the damage specified therein.<sup>314</sup> With respect to this element, the Appellate Body has observed that the "word 'to' in adverbial relation with the infinitive verb 'protect' indicates a purpose or intention."<sup>315</sup> Thus, it establishes a required link between the measure and the protected interest".<sup>316</sup> The Appellate Body added that the "word 'applied' points to the application of the measure and, thus, suggests that the relationship of the measure and one of the objectives listed in Annex A(1) must be manifest in the measure itself or otherwise evident from the circumstances related to the application of the

<sup>311</sup> Panel Reports, *US – Animals*, para. 7.30 (referring to Panel Reports, *EC – Hormones (Canada)*, para. 8.39; and *EC – Hormones (US)*, para. 8.36); and *India – Agricultural Products*, para. 7.136 (referring to Panel Reports, *EC – Hormones (Canada)*, para. 8.39; *EC – Hormones (US)*, para. 8.36; *EC – Approval and Marketing of Biotech Products*, para. 7.2554; and *US – Poultry (China)*, para. 7.82).

<sup>312</sup> Appellate Body Report, *Australia – Apples*, para. 172.

<sup>313</sup> Panel Report, *US – Animals*, para. 7.33.

<sup>314</sup> Appellate Body Report, *Australia – Apples*, para. 172.

<sup>315</sup> (footnote original) *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3280.

<sup>316</sup> Appellate Body Report, *Australia – Apples*, para. 172.

measure. This suggests that the purpose of a measure is to be ascertained on the basis of objective considerations<sup>317</sup>,<sup>318</sup>

7.194. Following the Appellate Body's guidance, a determination whether a measure is applied to protect one of the interests listed in Annex A(1), or to prevent or limit the damage specified therein, must be ascertained not only from the objectives of the measure as expressed by the responding party. It must also be derived from the text and structure of the relevant measure, its surrounding regulatory context, and the way in which it is designed and applied. For any given measure to fall within the scope of one of the subparagraphs of Annex A(1), scrutiny of such circumstances must reveal "a clear and objective relationship" between that measure and the specific purpose enumerated in one of the subparagraphs of Annex A(1).<sup>319</sup>

7.195. The Appellate Body has explained that the first part of the second paragraph of Annex A(1) of the SPS Agreement provides an illustrative and expansive list of legal instruments through which SPS measures may be adopted (relevant laws, decrees, regulations, requirements and procedures).<sup>320</sup> On this basis, the panel in *US – Animals* understood its task in respect of this requirement as an inquiry into whether the measure is of the type that may fall within the definition of an SPS measure, rather than being a measure that perfectly fits within one of the categories explicitly listed.<sup>321</sup>

7.196. In this respect, we agree with the panel in *US – Poultry (China)* that the distinction drawn by the panel in *EC – Approval and Marketing of Biotech Products* between the legal form and the nature of an SPS measure is not the most appropriate approach to examine the second paragraph of Annex A(1).<sup>322</sup> We agree that legal form may intrinsically determine the nature of a measure for the purposes of determining whether a measure is of the type listed in the second paragraph of Annex A(1).<sup>323</sup>

7.197. Following this guidance, we will examine first whether the EU-wide ban is an SPS measure within the meaning of Annex A(1). We will then move on to assess whether each of the import restrictions on the products at issue from Estonia, Latvia, Lithuania, and Poland are SPS measures within the meaning of Annex A(1).

#### **7.4.4.2.1 Whether the EU-wide ban is an SPS measure within the meaning of Annex A(1)**

##### **7.4.4.2.1.1 Whether the EU-wide ban falls within subparagraphs (a) through d) of Annex A(1) of the SPS Agreement**

7.198. We begin our examination by addressing the question of whether the EU-wide ban falls within subparagraphs (a) to (d) of Annex A(1) of the SPS Agreement.

7.199. We have referred to the FSVPS letter to DG SANCO of 29 January 2014 and to the instructions of FSVPS to its heads of territorial departments of the same date as evidence of the EU-wide ban. In our view, those documents, together with certain elements of the regulatory framework on veterinary health applicable in Russia<sup>324</sup>, set out the normative context which we need to examine in order to assess the objectives of the EU-wide ban.

<sup>317</sup> (footnote original) See, to similar effect, Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.2558.

<sup>318</sup> Appellate Body Report, *Australia – Apples*, para. 172.

<sup>319</sup> Appellate Body Report, *Australia – Apples*, para. 173.

<sup>320</sup> Appellate Body Report, *Australia – Apples*, para. 175.

<sup>321</sup> Panel Report, *US – Animals*, paras. 7.32-7.33.

<sup>322</sup> Panel Report, *US – Poultry (China)*, paras. 7.85-7.86 and 7.100-7.101. See also Panel Report, *Australia – Apples*, paras. 7.150-7.153 (referring to the close connection between the elements that determine legal form and nature in the second paragraph of Annex A(1) of the SPS Agreement).

<sup>323</sup> Panel Report, *US – Poultry (China)*, para. 7.118.

<sup>324</sup> See Veterinary Control in Customs Union Decision No. 317 (Exhibit RUS-386); RF Government's Decree 327 of June 30, 2004 "Approval of the Regulation of the Federal Service for Veterinary and Phytosanitary Surveillance (Rosselkhoznadzor)", para. 1, Rossiyskaya Gazeta // URL: <http://www.rg.ru/2004/07/15/veterinar-dok.html>. (Exhibit RUS-352). See also Regulations on the State

7.200. We note that both the letter from FSVPS to DG SANCO and the FSVPS instructions to its heads of territorial departments of 29 January 2014 refer to the ASF situation in the European Union, particularly in Lithuania. In addition, both documents refer to sections 4.1 and 4.3 of the agreed veterinary certificates for exports from the European Union to Russia for a number of the products at issue (see Table 1 above for a list of the products subject to the EU-wide ban).<sup>325</sup> The relevant sections of the veterinary certificates generally refer to the veterinary requirement for the exported products to originate "from premises and/or administrative territory of the EU Member State that are officially free from the following contagious diseases:<sup>326</sup> African swine fever – during the last 3 years in the territory of the EU excluding Sardinia".<sup>327</sup>

7.201. In addition, the rest of the evidence adduced by the European Union in support of the existence and content of the EU-wide ban<sup>328</sup> refers to the rejection of imports of products at issue on grounds related to the ASF situation in the European Union. In particular, certain evidence refers to the lack of reliability in the representation of the ASF situation in the European Union, as described in certain veterinary certificates attached to products at issue.<sup>329</sup>

7.202. We consider that the EU-wide ban was adopted in light of the ASF situation in the territory of the European Union. As noted in section 7.3.2.3.1 above, it was adopted as a response to an ASF outbreak in wild boar in Lithuania at the end of January 2014.

7.203. Certain elements of Russia's legal framework on veterinary health further clarify the objectives of the EU-wide ban in respect of ASF. Paragraph 1 of Russia's Government Decree 327 provides that FSVPS "is the federal executive authority exercising supervision and surveillance functions in the field of veterinary medicine".<sup>330</sup> Such surveillance functions include oversight of compliance with veterinary requirements.<sup>331</sup>

7.204. Customs Union Decision No. 317 states that one of its objectives is "to ensure protection of the customs territory of the Customs Union against the import and spread of contagious animal disease pathogens, including diseases common to both animals and humans, and goods which do not comply with the Common Veterinary Requirements".<sup>332</sup> This Customs Union Decision comprises chapters containing veterinary requirements applicable to imports of a number of goods into the Customs Union territory. Those goods include the following, which are part of the products at issue: breeding and utility pigs (Chapter 7); semen from boars (Chapter 8); pigs for slaughter (Chapter 9); meat and other edible meat raw materials (Chapter 22); meat of wild animals (Chapter 28); raw materials consisting of leather, horns and hooves, intestinal raw materials, fur, hair and bristle (Chapter 33); feed and feed additives of animal origin (Chapter 35); feed additives for cats and dogs, and prepared feed for cats and dogs which has been subjected to thermal

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Veterinary Supervision Approved by Decree 476 of the Government of Russia of June 5, 2013 (rev. 24.03.2014) (Exhibit RUS-16), paras. 1 and 4(a); and Russia's response to Panel question No. 276, para. 112.

<sup>325</sup> Letter of FSVPS of 29 January 2014 – FS-SA-8/1277 (Exhibit EU-14) and FSVPS instructions to its Territorial Departments of 29 January 2014 (Exhibit EU-161).

<sup>326</sup> (footnote original) Administrative territories, zones and time periods may be modified by mutual agreement on the basis of the Memorandum of 4 April 2006 on zoning and regionalization.

<sup>327</sup> This is the sample text of the Veterinary certificate for piglets for fattening (Exhibit EU-52). In its first written submission, the European Union notes that the letter from FSVPS to DG SANCO of 29 January 2014 (Exhibit EU-14) refers to the following veterinary certificates: Veterinary certificate for piglets for fattening (Exhibit EU-52); the Veterinary certificate for pigs for breeding (Exhibit EU-53); the Veterinary certificate for pork meat and raw meat preparations (Exhibit EU-54); the Veterinary certificate for slaughter pigs (Exhibit EU-55); the Veterinary certificate for finished food products (Exhibit EU-56); the Veterinary certificate for canned meat, salamis and other ready for consumption meat products (Exhibit EU-57) (European Union's first written submission, para. 89, fn 82). The instructions from FSVPS to its heads of territorial departments of 29 January 2014 refers to item 4.3 of the veterinary certificates for exports of pork and raw pork products, and to item 4.1 of the Veterinary certificate for pigs for breeding (Exhibit EU-53).

<sup>328</sup> See para. 7.60 above.

<sup>329</sup> List of returned consignments (Exhibit EU-17). See also European Union's first written submission, paras. 94-96.

<sup>330</sup> RF Government's Decree 327 of June 30, 2004 "Approval of the Regulation of the Federal Service for Veterinary and Phytosanitary Surveillance (Rosselkhoz nadzor)", para. 1 (Exhibit RUS-352). See also Regulations on the State Veterinary Supervision Approved by Decree 476 of the Government of Russia of June 5, 2013 (rev. 24.03.2014) (Exhibit RUS-16), paras. 1 and 4(a).

<sup>331</sup> Russian Government's Decree 327 of June 30, 2004 "Approval of the Regulation of the Federal Service for Veterinary and Phytosanitary Surveillance (Rosselkhoz nadzor)", para. 5 (Exhibit RUS-352).

<sup>332</sup> Preamble to Customs Union Decision No. 317 (Exhibit RUS-25).

treatment (Chapter 37); and hunting trophies (Chapter 38). All the chapters referring to these goods include reference to the ASF situation necessary for accepting imports of the respective products.<sup>333</sup> The formulation of this requirement differs for each good as portrayed in Table 3 below.

**Table 3 ASF veterinary requirements of Customs Union Decision No. 317<sup>334</sup>**

Products	ASF veterinary requirement relative to the place of origin of the animals or processing facilities from which the product comes
breeding and utility pigs; semen from boars; wild, zoo and circus animals; meat and other edible meat raw materials; raw materials consisting of leather, horns and hooves, intestinal raw materials, fur, hair and bristle; and hunting trophies	during the last 36 months in the territory of the country or administrative territory in accordance with regionalization
pigs for slaughter	during the last 36 months in the territory of the country or administrative territory in accordance with regionalization or during the last 12 months subject to confirmation of certain epizootic and entomological monitoring
meat of wild animals	in the territory of the country or administrative territory in accordance with recommendations of the Terrestrial Code
feed and feed additives of animal origin	in the territory of the country or administrative territory in accordance with regionalization during a three-year period
feed additives for cats and dogs, and prepared feed for cats and dogs which has been subjected to thermal treatment	during the last 12 months in the administrative territory in accordance with regionalization

7.205. As shown in Table 3, the veterinary requirements for imports of the products at issue into Russia are similar to those used in the text of the veterinary certificates which serve as a basis for Russia's refusal of the imports of the products at issue. Both the provisions of Customs Union Decision No. 317 and the veterinary certificates refer to the ASF situation in the place of origin of the products at issue being imported to Russia.

7.206. In addition, pursuant to paragraph 4 of the Final and Transitional Provisions of the Customs Union Decision No. 317, Russia continues to apply the veterinary certificates for the exportation of live pigs and pig products bilaterally agreed with the European Union.<sup>335</sup>

7.207. Measures taken pursuant to Annex A(1)(a) are taken with the objective of addressing risks to animal life or health "arising from the entry, establishment or spread" of pests, diseases,

<sup>333</sup> Customs Union Decision No. 317 (Exhibit RUS-25). We note that Customs Union Decision No. 317 also refers to wild, zoo and circus animals (Chapter 16).

<sup>334</sup> Table prepared by the Panel based on the information available in Customs Union Decision No. 317 (Exhibit RUS-25).

<sup>335</sup> Para. 4 of Customs Union Decision No. 317 reads as follows:

Until 1 January 2013, in mutual trade between the Parties and third countries, the import of goods subject to inspection shall be permitted using veterinary certificates valid as of 1 July 2010 initialled by one of the Parties with the exporting countries, as well as any subsequent amendments thereto, agreed by the Party and the exporting country on the basis of a position agreed with other Parties. In the absence of initialled veterinary certificates, goods subject to inspection must be accompanied by veterinary certificates ensuring compliance with the common veterinary (veterinary and health) requirements of the Customs Union (as amended by Decisions of the Customs Union Commission No 455 of 18 November 2010 and No 726 of 15 July 2011).

Russia explained that by subsequent agreement between the European Union and Federation prolonged the validity of bilateral veterinary certificates beyond 1 January 2013 (Russia's response to Panel question No. 177, para. 314).

disease-carrying organisms or disease-causing organisms. ASF is a highly contagious haemorrhagic disease of pigs and European wild boar. The organism which causes ASF is the African swine fever virus (ASFV), a DNA virus in the *Asfarviridae* family; genus *Asfivirus*<sup>336</sup>, and as confirmed by the experts and the OIE, the ASFV is a disease-causing organism that can be transmitted either directly animal-to-animal or via the consumption of ASFV-contaminated food consumed by pigs. The risk to animal health resulting from the presence of a disease-causing organism in a food or feedstuff falls within the scope of Annex A(1)(b).

7.208. With respect to risks arising from the "entry, establishment or spread" of ASF, we are aware that ASF was already present in certain areas of Russia at the time it adopted the EU-wide ban<sup>337</sup> and that the movement of infected wild boar from Russia (and Belarus) into the territory of the European Union was the likely means of introduction of the virus into the European Union. The risks associated with the "entry, spread or establishment" of a disease within a country where the disease already exists are often considerably different than the comparable risks to a country with no history of the disease and with no regulatory structure and experience in dealing with the disease.<sup>338</sup>

7.209. At the same time, we recognize that Russia has put in place a number of measures directed to achieve control and eradication of ASF within its territory.<sup>339</sup> Based on the evidence on record, we find that ASF has been present in some areas of Russia's territory since the initial outbreaks of ASF in wild boar in Lithuania. However, there have been areas of Russia that remain free of ASF, areas where ASF has been eradicated, and still other areas where the level of prevalence of ASF has decreased in terms of fewer outbreaks taking place in the most recent months.<sup>340</sup> We recall that the preamble of the SPS Agreement states "Desiring to improve the ...animal health ... situation in all Members". We therefore do not believe it would be reasonable to expect a Member to accept risks that could worsen its current SPS status, especially when they are taking measures to control a particular disease.

7.210. Bearing this situation in mind, as part of its responses to Panel questions, Russia notes that "[g]iven that the European Union has failed to demonstrate that its alleged ASF-free areas are and will remain ASF-free, there exists a non-negligible risk that presently uninfected areas of the Russian Federation will become infected through unsafe imports from the European Union and that the ASF disease situation will aggravate within those areas of the Russian Federation that are currently battling ASF."<sup>341</sup>

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<sup>336</sup> OIE General Disease Information Sheets: African swine fever (ASF Disease Information Sheet) (Exhibits RUS-4 and RUS-171).  
[http://www.oie.int/fileadmin/Home/eng/Media\\_Center/docs/pdf/Disease\\_cards/ASF-EN.pdf](http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/ASF-EN.pdf) (last accessed 15 December 2015).

<sup>337</sup> Russia's first written submission, para. 23 (referring to OIE WAHIS Interface, Event summary Reports, African swine fever, Russia (2007-2014). (Exhibit RUS-144)); second written submission, paras. 146-147.

<sup>338</sup> See Dr Thomson, Transcript, para. 2.128.

<sup>339</sup> Russia's first written submission, paras. 26-35 (where Russia refers to the following exhibits: ASF Instructions (Exhibit EU-18); Russian Federal Law on Veterinary Medicine, No. 4979-I, 14 May 1993 (Exhibit RUS-15); 2012 Plan (Exhibit RUS-13); Russian Federal Decree on State Veterinary Supervision, No. 476, 5 June 2013 (Exhibit RUS-16); Russian Federal Government Decree on State Program for Agricultural Development and Regulation of Agricultural Commodities Markets for 2013-2020, No. 717, 14 July 2012 (Exhibit RUS-17); Order by the Russian Federal Ministry of Agriculture on the Confirmation of the List of Contagious Animal Diseases That Require Containment Measures, No. 476, 19 December 2011 (Exhibit RUS-18); Order by the Russian Federal Ministry of Agriculture on the Confirmation of the Rules for Veterinary Transport Certificates and the Order of Issuance of Veterinary Transport Certificates, No. 281, 17 July 2014 (Exhibit RUS-19); Russian Federal Ministry of Natural Resources, Plan regarding the organizational and specific measures of monitoring, depopulation and reduction of migration activities of wild boar in the territory of the RF, including specially protected natural areas of regional and federal importance, 21 November 2013 (Exhibit RUS-20); Russian Federal Government Decree on the Seizure of Animals and Animal Products in case of Eradication of Highly Dangerous Animal Disease Outbreaks, No. 310, 26 May 2006 (Exhibit RUS-21); and Order by the Russian Federal Ministry of Agriculture on Approval of Guidelines to Determine Animal Health Status of Pig Holdings and Organizations Involved in Pig Slaughter, Pork Product Processing and Storage, No. 258, 23 July 2010 (Exhibit RUS-22)) and paras. 251-273 (and exhibits cited therein); responses to Panel questions No. 29 and 30 (and exhibits cited therein).

<sup>340</sup> Russia's response to Panel question No. 143, paras. 263-264.

<sup>341</sup> Russia's response to Panel question No. 143, para. 264.

7.211. This confirms that one of the objectives of the EU-wide ban is the protection of animal life or health within Russia's territory from risks arising from the entry (or re-entry) and further spread of a disease and a disease-causing organism already present in parts of Russia's territory; and a disease-causing organism in feedstuffs, already present in parts of Russia's territory. Thus, the EU-wide ban, read in the context of Russia's legal framework on veterinary surveillance and the situation in respect of the presence of ASF in Russia's territory, evidences a clear and objective relationship with the purposes set forth in Annex A(1) (a) and (b) of the SPS Agreement.

#### 7.4.4.2.1.2 Whether the EU-wide ban is of the type mentioned in part one of the second paragraph of Annex A(1) of the SPS Agreement

7.212. Russia alleges that the EU-wide ban cannot be considered an SPS measure because it is not a measure attributable to it.<sup>342</sup> We found in paragraph 7.84 above that the European Union demonstrated the existence of the 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, and that the EU-wide ban is a measure attributable to Russia. Based on that finding, we now turn to examine whether such measure, as described in paragraph 7.84 above, is of the type mentioned in part one of the second paragraph of Annex A(1).

7.213. Russia also argues that the EU-wide ban is not a requirement or procedure within the meaning of Annex A(1) of the SPS Agreement and therefore does not constitute an SPS measure.<sup>343</sup> Russia relies on the fact that the European Union did not challenge the WTO-consistency of the bilaterally negotiated EU-Russian veterinary certificates, focusing instead on the application of the requirements or procedures which are set out in such veterinary certificates.<sup>344</sup> Distinguishing between the requirement or procedure itself and the application of such requirement or procedure, Russia concludes that the EU-wide ban does not fall within Annex A(1) of the SPS Agreement.<sup>345</sup>

7.214. In *Australia – Apples*, the Appellate Body unequivocally stated that the list of legal instruments in part one of paragraph 2 of Annex A(1) of the SPS Agreement is both illustrative and expansive.<sup>346</sup> The panel in *US – Animals* elaborated on this interpretation, stating that measures of a type not expressly listed in part one of paragraph 2 of Annex A(1) may nevertheless constitute SPS measures when they are relevant, that is, when they are applied for a purpose that corresponds to one of those listed in subparagraphs (a) through (d).<sup>347</sup>

7.215. We note that the text of Annex A(1) limits the scope of "laws, decrees, regulations, requirements and procedures" only by qualifying that they should be "relevant", which was interpreted by the Appellate Body to mean that they are "applied" for a purpose that corresponds to one of those listed in subparagraphs (a) through (d).<sup>348</sup>

7.216. We recall that the EU-wide ban is a composite measure, applied on the basis of mandatory instructions issued by FSVPS and enforced through the actions of veterinary control officers at Russia's borders.<sup>349</sup> The result of that measure is the effective ban on some of the products at issue from the European Union. Pursuant to the terms of the ban, the products at issue subject to the ban would only be accepted into Russia's territory when they originate from areas that have been free from ASF during the three years prior to their importation.

<sup>342</sup> Russia's second written submission paras. 171 and 173.

<sup>343</sup> Russia's opening statement at the first meeting of the Panel, para. 49; and second written submission, para. 172 (referring to European Union's first written submission, para. 103).

<sup>344</sup> Russia's response to Panel question No. 72, para 109.

<sup>345</sup> Russia's opening statement at the first meeting of the Panel, para. 49; and second written submission, para. 172 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1395, 7.1407, 7.1421, 7.1441, 7.1448 and 7.1465).

<sup>346</sup> Appellate Body Report, *Australia – Apples*, para. 175.

<sup>347</sup> Panel Report, *US – Animals*, para.7.32. See also Panel Report, *Australia – Apples*, para. 7.169.

<sup>348</sup> Appellate Body Report, *Australia – Apples*, paras. 175-176.

<sup>349</sup> See section 7.84 above.



7.217. The EU-wide ban can be understood as a requirement<sup>350</sup> formulated in the negative form.<sup>351</sup> Such negative requirement consists of Russia's refusal to accept imports of the products at issue from the European Union that do not meet the current wording of the veterinary certificates agreed between them in 2006. While the general substantive conditions of entry for the products at issue from the European Union into Russia are described in the veterinary certificates agreed by the parties, it is Russia's enforcement of the current wording of these certificates that constitutes a requirement within the meaning of the second paragraph of Annex A(1) of the SPS Agreement.

7.218. Furthermore, the EU-wide ban could be construed as a procedure. The panel in *EC – Approval and Marketing of Biotech Products* considered that although an approval procedure is not defined in Annex A(1), it is a concept further developed in Annex C(1). After examining the wording of both provisions, that panel concluded: "[o]n the basis of these elements, the term 'approval procedures' can be understood as encompassing procedures applied to check and ensure the fulfilment of one or more substantive SPS requirements the satisfaction of which is a prerequisite for the approval to place a product on the market."<sup>352</sup> Following this definition, we consider that Russia's enforcement of the current wording of the veterinary certificates is the part of the procedure applied to check and ensure the fulfilment of the substantive SPS requirements set out in these veterinary certificates. Thus, we consider the EU-wide ban to fall within the scope of an approval procedure within the meaning of the second paragraph of Annex A(1) of the SPS Agreement.

7.219. In light of these considerations, we conclude that the EU-wide ban falls under the indicative list of measures, "laws, decrees, regulations, requirements and procedures", provided in paragraph 2 of Annex A(1).

#### **7.4.4.2.1.3 Preliminary conclusion**

7.220. Based on the foregoing we find that the EU-wide ban is an SPS measure within the meaning of Annex A(1) of the SPS Agreement.

7.221. We move on to examine whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are also SPS measures within the meaning of Annex A(1) of the SPS Agreement.

#### **7.4.4.2.2 Whether the bans on imports from Estonia, Latvia, Lithuania, and Poland are SPS measures within the meaning of Annex A(1) of the SPS Agreement**

##### **7.4.4.2.2.1 Whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland fall within subparagraphs (a) through (d) of Annex A(1) of the SPS Agreement**

7.222. We begin our examination by addressing the question of whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland fall within subparagraphs (a)-(d) of Annex A(1) of the SPS Agreement. The measures regarding Estonia, Latvia, Lithuania, and Poland constitute restrictions on the importation of the products at issue from these countries to Russia. These restrictions were imposed by instructions of FSVPS with the purpose of addressing the ASF outbreaks taking place in the territory of each of those EU member States. In our view, those documents, together with certain elements of the regulatory framework on sanitary health applicable in Russia<sup>353</sup>, set out the normative context which we need to examine to assess the

<sup>350</sup> As the panel in *Australia – Apples* noted: "the dictionary definition of the word 'requirements' is 'something called for or demanded; a condition which must be complied with'." Panel Report, *Australia – Apples*, para. 7.160 (referring to *The New Shorter Oxford English Dictionary*, Ed. Brown, L., Clarendon Press, Oxford, Vol. 2, p. 2557).

<sup>351</sup> The panel in *EC – Approval and Marketing of Biotech Products*, when referring to the ban of the marketing of a particular product, stated that, as the reference to requirements in Annex A(1) is broad and unqualified, such a ban could "constitute a negative requirement". Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.2597.

<sup>352</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.424.

<sup>353</sup> See para. 7.733 below.

objectives of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. As we have already noted in our analysis of the objectives pursued by the EU-wide ban, we consider that the presence of ASF in certain areas of Russia at the time it adopted the EU-wide ban<sup>354</sup> can inform our understanding of the risks that Russia was seeking to address through the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.

7.223. As explained in paragraph 7.79 above, FSVPS is the federal authority in charge of supervision and surveillance in the field of veterinary medicine. In exercise of its authority, FSVPS issued instructions to the heads of its territorial departments imposing the specified import restrictions which explicitly refer to the ASF outbreaks in the respective EU member States.<sup>355</sup> One of the instructions also expressly refers to the purpose of preventing the introduction of ASF into Russia from the respective EU member State.<sup>356</sup> All instructions refer to the specific heat treatment of pig products, while some explicitly state that such treatment is necessary for the destruction of ASFV.<sup>357</sup>

7.224. In addition, as mentioned in the context of our examination of the objectives pursued by the EU-wide ban, we consider that Russia's legal framework in the field of veterinary health further confirms that the instructions issued by FSVPS are related to the protection of animal health from ASF.

7.225. Another element in support of this view are Russia's notifications of the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland to the SPS Committee. In each of those notifications, Russia declared food safety and animal health as the objectives of each of the measures.<sup>358</sup>

7.226. Based on the foregoing we consider that one of the objectives of each of the measures in respect of Estonia, Latvia, Lithuania, and Poland is to ensure protection of Russia's territory from the (re-)entry and further spread of ASF and ASFV.

7.227. As mentioned in paragraph 7.207 above, according to the OIE ASF is a disease affecting pigs, and ASFV is the viral organism which causes ASF.

7.228. Considering the factors mentioned above, we find that the import restrictions on the products at issue from Estonia, Latvia, Lithuania, and Poland are applied by Russia with the purpose of protecting animal life or health within its territory from risks arising from the re-entry and further spread of a disease and a disease-causing organism already present in parts of Russia's territory; and of protecting animal life or health from a disease-causing organism in foods and feedstuffs. We therefore conclude that each of the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, read in the context of Russia's legal framework on veterinary surveillance and the situation in respect of the presence of ASF in Russia's territory, pursue the objectives laid out in subparagraphs (a) and (b) of Annex A(1) of the SPS Agreement.

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<sup>354</sup> See paras. 7.207- 7.209 above.

<sup>355</sup> See Letter from the Russian Veterinary Service to DG SANCO, FS-EN-8/1023, 25 January 2015 (Exhibit RUS-28), Letter from Russian Veterinary Service, FS-NV-8/2972, 27 February 2014 (Exhibit RUS-29), Russia's letter of instruction of 2 April 2014, FS-EN-8/5081 (Exhibit EU-168), and Russia's letter of instruction of 27 June 2014, FS-NF-8/11315 (Exhibit EU-169) and Letter from the Russian Veterinary Service to DG SANCO, FS-NV-8/17431, 11 September 2014 (Exhibit RUS-37).

<sup>356</sup> Instructions of FSVPS to the heads of its territorial departments as of 25 January 2014 Ref. FS-EN-8/1023 (Exhibit RUS-28), para. 2.

<sup>357</sup> Instructions of FSVPS to the heads of its territorial departments as of 25 January 2014 Ref. FS-EN-8/1023 (Exhibit RUS-28), para. 1; Instructions of FSVPS to the heads of its territorial departments as of 27 February 2014 Ref. FS-NV-8/2972 (Exhibit RUS-29), para. 1.

<sup>358</sup> Exhibits EU-7, EU-8, EU-9, EU-10, EU-12, EU-13. We note that in its notifications of the measures regarding Estonia and Latvia Russia stated, as their objective, human health. However, both parties in the proceedings confirmed that ASF does not pose risk to human health (European Union's first written submission, para. 100; Russia's response to Panel question No. 24, para. 9). This was further confirmed by the OIE (see OIE's response to Panel question No. 10).

#### **7.4.4.2.2 Whether the bans on imports from Estonia, Latvia, Lithuania, and Poland are of the type mentioned in part one of paragraph 2 of Annex A(1)**

7.229. The import restrictions on the products at issue from Estonia, Latvia, Lithuania, and Poland are applied by Russia pursuant to the instructions of FSVPS to the heads of its territorial departments.<sup>359</sup> As clarified by Russia, pursuant to Decree 327 "different territorial departments are obliged to follow the directions from the Federal Government".<sup>360</sup>

7.230. Based on Russia's explanation of the mandatory nature of directions provided by FSVPS to the heads of its territorial departments, we consider those instructions to fall under the indicative list of measures, "laws, decrees, regulations, requirements and procedures", provided in paragraph 2 of Annex A(1) of the SPS Agreement.

#### **7.4.4.2.2.3 Preliminary conclusion**

7.231. Based on the foregoing we find that the import restrictions on the products at issue from Estonia, Latvia, Lithuania, and Poland are SPS measures within the meaning of Annex A(1) of the SPS Agreement.

7.232. We turn to examine the second requirement for a measure to be deemed an SPS measure for the purposes of Article 1 of the SPS Agreement. This is, whether the measures at issue may, directly or indirectly, affect international trade.

#### **7.4.4.2.3 Whether the measures at issue may, directly or indirectly, affect international trade**

7.233. As noted by previous panels, even if a measure falls within the definition of an SPS measure in Annex A(1) of the SPS Agreement, further to Article 1.1 of the SPS Agreement, such measure still needs to be a measure that directly or indirectly affect[s] international trade to be covered by the disciplines of the SPS Agreement.<sup>361</sup> We agree with a previous panel that it is not necessary to demonstrate that an SPS measure has an actual effect on trade. Article 1.1 merely requires that an SPS measure "may, directly or indirectly, affect international trade".<sup>362</sup>

7.234. The panels in *US – Animals*, *India – Agricultural Products*, and *EC – Hormones* considered that an import ban affects international trade.<sup>363</sup> In the words of the panel in *India – Agricultural Products*: "[i]ndeed, an import ban is, by its very nature, intended to affect international trade."<sup>364</sup>

7.235. As we have explained above, the EU-wide ban prohibits the importation of the products at issue from the European Union, whereas each of the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland prohibits the importation of the products at issue from each of those EU member States.

7.236. Thus, consistent with the understanding of previous panels, we conclude that the measures at issue directly or indirectly affect international trade.

#### **7.4.5 Conclusion**

7.237. Based on the foregoing we find that the measures at issue are SPS measures pursuant to Article 1 and Annex A(1) of the SPS Agreement. Therefore, the measures at issue in this dispute are subject to the provisions of the SPS Agreement.

<sup>359</sup> Exhibits RUS-28, RUS-29, EU-168, EU-169 and RUS-37.

<sup>360</sup> Russia's response to Panel question No. 276, para. 113, referring to RF Government's Decree 327 of June 30, 2004 "Approval of the Regulation of the Federal Service for Veterinary and Phytosanitary Surveillance (Rosselkhozadzor)", para. 4 (Exhibit RUS-352).

<sup>361</sup> Panel Report, *US – Poultry (China)*, para. 7.87.

<sup>362</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.434-7.435.

<sup>363</sup> Panel Reports, *US – Animals*, para. 7.44; *India – Agricultural Products*, para. 7.157; *EC – Hormones (Canada)*, para. 8.26; and *EC – Hormones (US)*, para. 8.23.

<sup>364</sup> Panel Report, *India – Agricultural Products*, para. 7.157.

7.238. As we explained in paragraph 7.31 above, we will now undertake an examination of the European Union's claims in respect of the EU-wide ban and the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.

## 7.5 Claims relating to the EU-wide ban

### 7.5.1 Whether the EU-wide ban is "based on" relevant international standards (Claims under Articles 3.1 of the SPS Agreement)

#### 7.5.1.1 Main arguments of the parties

##### 7.5.1.1.1 European Union

7.239. The European Union asserts that the EU-wide ban does not "conform to" and is not "based on" any relevant international standards within the meaning of Articles 3.2 and 3.1 of the SPS Agreement, respectively. According to the European Union, the EU-wide ban rather goes against the relevant international standards.<sup>365</sup>

7.240. The European Union posits that a measure that actually contradicts the international standards cannot be said to be based on the respective standards.<sup>366</sup>

7.241. The European Union argues that while the relevant international standards recommend trade from ASF-free areas in several products at issue, or trade in products which have been treated so as to ensure the destruction of the ASFV, Russia does exactly the contrary and bans trade from ASF-free areas in the EU.<sup>367</sup>

##### 7.5.1.1.2 Russia

7.242. Russia argues that the European Union has failed to make a *prima facie* case with respect to the existence of an EU-wide ban because it has not provided evidence and arguments sufficient to identify an EU-wide ban.<sup>368</sup> Russia argues that "what the European Union claims to be an 'EU-wide ban' is actually the Russian Federation's continuing efforts to follow the agreed European Union-Russian Federation ASF-related requirements of the veterinary certificates, which do not permit the importation of uncertified pigs and pork products".<sup>369</sup>

7.243. Russia further stresses that the European Union "has not met its burden to make a *prima facie* case that the so-called 'EU-Wide Ban' is a measure under the SPS Agreement".<sup>370</sup>

7.244. As an alternative to its argument that the EU-wide ban does not exist, Russia asserts that the EU-wide ban is "based on the OIE standard to the extent possible".<sup>371</sup>

#### 7.5.1.2 Main arguments of the third parties

##### 7.5.1.2.1 Australia

7.245. Australia argues that in light of Article 3.2 of the SPS Agreement, the Panel will have to determine, as a matter of fact, whether Russia's measures conform to, or are based on, the Terrestrial Code, noting that only measures which conform to international standards enjoy the presumption of consistency with the SPS Agreement.<sup>372</sup>

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<sup>365</sup> European Union's first written submission, paras. 113 and 122.

<sup>366</sup> European Union's oral statement at the second substantive meeting, para. 56.

<sup>367</sup> European Union's oral statement at the second substantive meeting, para. 57.

<sup>368</sup> Russia's first written submission, para. 339.

<sup>369</sup> Russia's first written submission, para. 345.

<sup>370</sup> Russia's second written submission, para. 171.

<sup>371</sup> Russia's first written submission, para. 385.

<sup>372</sup> Australia's third-party submission, para. 7.

7.246. Australia asserts that with the foregoing supposition in mind, it would be appropriate for the Panel to commence its analysis with the claims under Article 3, followed by consideration, if necessary, of the subsequent claims under Articles 5 and 6 of the SPS Agreement.<sup>373</sup>

#### **7.5.1.2.2 Brazil**

7.247. Brazil emphasizes that while Members are allowed to deviate from the use of international standards and to adopt a higher level of protection than those recognized by the OIE, Articles 3.2 and 3.3, together with Articles 5.1 and 6 of the SPS Agreement, require that such a higher level of protection in the context of the principle of regionalization should only be adopted based upon a risk assessment.

7.248. Brazil stresses that the Terrestrial Code also establishes recommendations for importation from countries or zones considered infected with ASF and that consequently, if a Member decides to deviate from these standards and/or recommendations, then such decision should be based on scientific evidence, consubstantiated in a risk assessment.<sup>374</sup>

#### **7.5.1.3 Analysis by the Panel**

##### **7.5.1.3.1 Introduction**

7.249. We recall that the Panel has already found that the alleged EU-wide ban exists and that it is an SPS measure that the Panel may properly look into.<sup>375</sup>

7.250. We thus begin our analysis by examining the legal provisions at issue in order to ascertain the applicable legal test.

##### **7.5.1.3.2 Relevant legal provisions**

7.251. Article 3 of the SPS Agreement is entitled "Harmonization". It states, in relevant part:

*Article 3*

*Harmonization*

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.
2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.
3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.<sup>1</sup> Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

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<sup>373</sup> Australia's third-party submission, para. 9.

<sup>374</sup> Brazil's third-party submission, paras. 12 and 14.

<sup>375</sup> See paras. 7.84, 7.220, and 7.237 above.

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<sup>1</sup> For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

7.252. The Appellate Body has indicated that Article 3 of the SPS Agreement encourages the harmonization of SPS measures on the basis of international standards, while at the same time recognizing the right of WTO Members to determine their appropriate level of protection.<sup>376</sup> In this connection, the Appellate Body recalled that "[t]he preamble of the SPS Agreement states that one of its objectives is 'to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including ... the International Office of Epizootics'".<sup>377</sup>

7.253. The first three paragraphs of Article 3 of the SPS Agreement set out the obligation of Members to harmonize<sup>378</sup> their SPS measures by either basing them on or conforming them to international standards, while leaving open some margin, or leeway,<sup>379</sup> for departing from those standards, subject to consistency with the remainder of the SPS Agreement. The parties' evidence and argumentation have focused on the issue of whether the EU-wide ban is "based on" the relevant international standard within the meaning of Articles 3.1 of the SPS Agreement, and we focus our analysis on that provision.

7.254. We note that Article 3.1 of the SPS Agreement establishes that Members shall base their SPS measures on international standards, guidelines, or recommendations, where they exist. In *EC – Hormones*, the Appellate Body stated that "[a] thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter".<sup>380</sup> The Appellate Body considered that, to be "based on" an international standard, a measure "may adopt some, not necessarily all, of the elements of the international standard".<sup>381</sup> The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2. At the same time, however, the Member is not penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant Article of the SPS Agreement or of the GATT 1994. That is, the burden of proof would still lie on a complainant to make a *prima facie* case of violation of Article 3.1.<sup>382</sup> In *EC – Sardines*, the Appellate Body remarked that "there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other".<sup>383</sup> The Appellate Body thus stated that, where a technical regulation and the relevant international standard contradict each other, it cannot properly be concluded that the international

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<sup>376</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.76.

<sup>377</sup> Appellate Body Report, *India – Agricultural Products*, footnote 396 to para. 5.76.

<sup>378</sup> In *EC – Hormones*, the Appellate Body explained that:

In generalized terms, the object and purpose of Article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people. The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both 'necessary to protect' human life or health and 'based on scientific principles', and without requiring them to change their appropriate level of protection.

Appellate Body Report, *EC – Hormones*, para. 177.

<sup>379</sup> See Panel Report, *India – Agricultural Products*, para. 7.196.

<sup>380</sup> Appellate Body Report, *EC – Hormones*, para. 163.

<sup>381</sup> Appellate Body Report, *EC – Hormones*, para. 171.

<sup>382</sup> The Appellate Body has clarified that there is no "general rule – exception" relationship between the three relevant paragraphs of Article 3. Accordingly, these three alternative scenarios are equally available to WTO Members. The Appellate Body explained that "this right of a Member to establish its own level of sanitary protection under Article 3.3 of the *SPS Agreement* is an autonomous right and *not* an 'exception' from a 'general obligation' under Article 3.1". (emphasis original) Appellate Body Report, *EC – Hormones*, para. 172.

<sup>383</sup> Appellate Body Report, *EC – Sardines*, para. 245.

standard has been used "as a basis for" the technical regulation.<sup>384</sup> As the Appellate Body recognized in *EC – Sardines*, the term "as a basis for" in Article 2.4 of the TBT Agreement is similar to the language used in Article 3.1 of the SPS Agreement.<sup>385</sup> Furthermore, the panel in *India – Agricultural Products* concluded that a fundamental departure from the relevant international standard amounts to a contradiction of such a standard.<sup>386</sup>

7.255. In *EC – Hormones*, the Appellate Body defined the terms "based on" and "conform to" as forming concentric circles. It found that "[a] measure that 'conforms to' and incorporates a ... standard is, of course, 'based on' that standard".<sup>387</sup> A measure that is "based on" a standard may not necessarily "conform to" that same standard, as some elements of the standard may not be present in the measure at issue. Indeed, while it may be sufficient to adopt only *some* of the elements of an international standard for the measure to be "based on" such standard, Article 3.2 requires that an SPS measure embodies the standard completely to be said to "conform to" it. Hence, the language in Article 3.1 whereby an SPS measure may be "based on" an international standard establishes a less rigorous threshold than that contemplated in Article 3.2 ("conform to").<sup>388</sup>

7.256. This guidance is constructive in our consideration of the issues before us in the present case, and we understand that the Appellate Body's guidance, in particular, should be read in light of the specific facts and circumstances of a given dispute. We consider that there may be situations where a departure or deviation of one element of a measure from a certain aspect of a standard may not necessarily constitute an outright contradiction of that aspect of the standard. Moreover, even if the deviation amounts to a contradiction, this may not necessarily lead to the conclusion that other elements of the measure cannot possibly be "based on" other aspects of that standard. For example, in cases where a standard applies for a particular set or subset of products, part of a measure pertaining to one product may be based on the international standard while another part of the measure pertaining to a different product, may not be *based* on the international standard. Furthermore, distinctions may exist between standards. There may be standards that are conditional on the exporting Member undertaking particular actions, whether on a one-off basis or as part of an ongoing, continuous and dynamic SPS situation that may introduce temporal considerations or may require additional action.

7.257. In this case, the parties have agreed that the products that are subject to the EU-wide ban include: live pigs (piglets for fattening and pigs for breeding), pork meat, and raw meat preparations. Both parties have confirmed that the EU-wide ban does not apply to finished products that have been subject to a treatment that ensures destruction of ASFV and have remained silent on whether it applies to pig genetic material.<sup>389</sup>

7.258. In the light of its product coverage, the EU-wide ban triggers different Terrestrial Code Chapter 15.1 recommendations for the import of the following: live pigs (both domestic and wild); fresh meat (of domestic and wild pigs); meat products of pigs (either domestic or wild); and products of animal origin (from fresh meat of pigs) intended for use in animal feeding, for agricultural or industrial use, or for pharmaceutical or surgical use; all of which have not been subject to treatment. Each of the different Articles (15.1.5 – 15.1.17) of Chapter 15.1 are tailored to a particular subset of the relevant products. Some of those recommendations refer to imports from ASF-free countries, zones or compartments, and others from countries or zones considered infected with ASF. Some of the mentioned Articles also provide for trade of products that have been processed so as to ensure destruction of the ASFV, if the necessary protections were taken after processing<sup>390</sup> to avoid contact of the product with any source of ASFV. Likewise, as the experts confirmed, numerous horizontal Terrestrial Code provisions including, but not limited to,

<sup>384</sup> Appellate Body Report, *EC – Sardines*, para. 248.

<sup>385</sup> Appellate Body Report, *EC – Sardines*, para. 242. The panel in *India – Agricultural Products* referred to this Appellate Body jurisprudence at paragraphs 7.265-7.269 of its report when determining when an SPS measure could be "based on" an international standard.

<sup>386</sup> Panel Report, *India – Agricultural Products*, para. 7.271.

<sup>387</sup> Appellate Body Report, *EC – Hormones*, para. 163.

<sup>388</sup> Panel report, *India – Agricultural Products*, para. 7.202.

<sup>389</sup> See paras. 7.142 - 7.143, and Table 1 above.

<sup>390</sup> As indicated in fn 247 above, we refer to products that are processed so as to ensure destruction of the ASFV as "treated products".

Chapter 4.3 and Article 5.3.7, are relevant in determining whether the exporting country has established an OIE-consistent ASF-free zone.<sup>391</sup>

7.259. The parties do not disagree that one element of a measure may be based on the international standard even if a different element of the measure is not.<sup>392</sup> Given the range of standards and recommendations involved, we are mindful in our examination that a challenged measure may be "based on" the international standard with respect to one element, but not with respect to another element.

7.260. We note that, on the one hand, certain provisions of the Terrestrial Code contain clear proscriptive standards, which are more conducive to a clear-cut determination of what is "based on" those standards. On the other hand, other Terrestrial Code provisions contain standards that provide for options and allow considerable flexibility as to the means by which Members may base their measures on those standards. These more flexible standards recognize the inherent discretion of Members to exercise judgment in a particular set of circumstances, and a panel's review must take into account the particular nature of the provision of the relevant international standard at issue, in light of the specific facts and circumstances of the dispute.<sup>393</sup> Moreover, standards calling for interactive processes, where certain steps may be contingent upon the satisfaction of other steps, may require a Panel to examine the actions of both the importing and exporting Members. The extent to which an importing Member's obligation to adhere to the international standard, guideline, or recommendation is excused or limited by the exporting Member's actions or inactions must be determined on a case-by-case basis.

7.261. With this approach in mind, we proceed to examine whether the EU-wide ban is "based on" the relevant international standards in the Terrestrial Code. In this examination, the normal WTO burden of proof applies in respect of the complainant's establishment of a *prima facie* case. In *EC – Hormones*, the Appellate Body opined that if a measure enacted by a Member is based on (but does not conform to) an international standard, the complaining Member is not exempted from "the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant Article of the *SPS Agreement* or of the *GATT 1994*".<sup>394</sup>

7.262. Having ascertained the precise measure at issue and the applicable legal test, in our analysis under Article 3 of the *SPS Agreement* we will proceed as follows: (i) identifying the relevant international standards; (ii) discerning the meaning of such international standards; and (iii) assessing the measures at issue in light of these international standards in order to determine whether the measures are "based on" the standards.

### 7.5.1.3.3 Identifying the relevant international standards

7.263. The panels in *EC – Hormones* and *India – Agricultural Products* observed that in examining whether a Member bases its SPS measure on international standards in accordance with Article 3.1, a panel need only determine whether such standard exists. Therefore, a panel would not need to consider the levels of protection or types of SPS measures recommended by the standard, the consensus behind it, or its adoption process.<sup>395</sup> We concur with such an approach, which we will follow in our examination.

7.264. In *India – Agricultural Products*, the Appellate Body observed that "the relevant international standards, guidelines or recommendations referred to in Article 3 are those established by or developed under the auspices of the international organizations referred to in

<sup>391</sup> See experts' responses to Panel questions Nos. 33, 34, and 35.

<sup>392</sup> See European Union's response to Panel question No. 306, paras. 149-152; and Russia's response to Panel question No. 306, paras. 227-259.

<sup>393</sup> For example, Article 5.1.1 of the Terrestrial Code provides that "[b]ecause of differences between countries in their animal health situations, various options are offered by the *Terrestrial Code*." (OIE, *Terrestrial Animal Health Code 23<sup>rd</sup> edn* (2014), Vol. I, p. 171) Article 4.3.1 of the Terrestrial Code provides that "[i]n most cases, the import regulations developed will rely in part on judgments made about the effectiveness of sanitary procedures undertaken by the *exporting country*, both at its borders and within its territory." (OIE, *Terrestrial Animal Health Code 23<sup>rd</sup> edn* (2014), Vol. I, p. 116)

<sup>394</sup> Appellate Body Report, *EC – Hormones*, para. 171.

<sup>395</sup> Panel Reports, *India – Agricultural Products*, para. 7.205; *EC – Hormones (Canada)*, para. 8.72; and *EC – Hormones (US)*, para. 8.69.



Annex A(3) to the SPS Agreement".<sup>396</sup> This Annex includes the OIE as the relevant standard-setting organization for matters of animal health and zoonosis.<sup>397</sup> The OIE is, therefore, the relevant standard-setting organization for matters of animal health.<sup>398</sup> One such set of standards, which includes recommendations relating to ASF (a highly contagious haemorrhagic disease which affects animal health)<sup>399</sup>, is embodied in the Terrestrial Code. The parties agree that the relevant international standard for the purposes of this dispute is the Terrestrial Code.<sup>400</sup> We endorse the parties' shared view that the relevant international standards for the purpose of this dispute are articulated in the Terrestrial Code.

7.265. Furthermore, the parties agree that the relevant version of the Terrestrial Code for the present dispute is the version in force at the date of establishment of this Panel, i.e. the 23<sup>rd</sup> edition, adopted in May 2014.<sup>401</sup> We recall that the establishment of this Panel took place on 22 July 2014. We concur with the agreed view of the parties that the relevant version of the Terrestrial Code is the one in force on the date of establishment of the Panel: the 23<sup>rd</sup> edition of the Terrestrial Code. We note that the identification of the version of the Terrestrial Code in force on the date of establishment of the Panel concurs with the approach of the *India – Agricultural Products* and *US – Animals* panels.<sup>402</sup> Keeping in mind the importance of reviewing SPS measures in light of the latest available scientific evidence, we must also bear in mind that the most appropriate prism through which the defendant's measures should be assessed cannot possibly be a moving target. Rather, the dictates of due process demand certainty and predictability with regard to the standard against which the measures at issue will be assessed in this Panel proceeding. We consider that the version of the Terrestrial Code in force at the date of the panel establishment fulfils the due process requirement, noting that was also the version in force at the time of Russia's adoption of the measures in respect of Latvia and Estonia, and did not contain

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<sup>396</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.78. Annex A(3) to the SPS Agreement provides:

3. *International standards, guidelines and recommendations*

- (a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;
- (b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;
- (c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and
- (d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.

<sup>397</sup> Annex A(3)(b) of the SPS Agreement. The Terrestrial Code Glossary defines *zoonosis* as "any disease or infection which is naturally transmissible from *animals* to humans". Terrestrial Code Glossary, p. x (Exhibit RUS-32).

<sup>398</sup> The parties agree that ASF does not pose a risk to human health. European Union's first written submission, para. 100; Russia's response to Panel question No. 24, para. 9. The OIE does not consider ASF to be a zoonosis. Chapter 2.8.1 of the OIE Manual of Diagnostic Tests and Vaccines for Terrestrial Animals states: "ASF is not a zoonotic disease and does not affect public health". Chapter 2.8.1., African Swine Fever, OIE Terrestrial Manual (Exhibit EU-5). See OIE response to Panel Question 10 to the OIE. The experts concurred, in response to Panel Question 11: Dr Brückner: "All available literature on ASF categorically state that the disease is not infective to humans"; Professor Penrith: "No case of human infection with ASFV has ever been reported. The question of whether this can be scientifically confirmed is that it might be possible to provide strong evidence for inability to infect people by serological testing of people who have worked with pigs during outbreaks, but to the best of my knowledge nobody has considered this worthwhile because no sign of illness among them has been reported...."; Dr Thomson: "There is no scientific or credible circumstantial evidence I am aware of to indicate that ASF virus can either infect or cause disease in humans. The risk to humans is consequently negligible."

<sup>399</sup> See para. 7.207 above.

<sup>400</sup> European Union's first written submission, para. 115; and Russia's response to Panel question No. 105, para. 170.

<sup>401</sup> European Union's first written submission, paras. 116-118. Russia's first written submission, fn 110.

<sup>402</sup> Panel Reports, *India – Agricultural Products*, paras. 7.211-7.213; and *US – Animals*, para. 7.225, fn 681.

material changes<sup>403</sup> from the version in force at the time of Russia's adoption of the measures in respect of Lithuania and Poland.

7.266. While the parties agree that the Terrestrial Code contains the relevant international standard, the parties have differing views on the precise provisions of the Terrestrial Code that are relevant in this dispute, and in particular the hierarchy and interrelationships between and among the Terrestrial Code's zoning and regionalization (Chapters 4.3, 4.4 and 5.4) provisions and its ASF-specific provisions (Chapter 15.1).

7.267. According to the European Union, the "correct" applicable standards for the respective measures are mainly to be found in Chapter 15.1 (African swine fever) of the Terrestrial Code, which deals with trade in the products at issue, in conjunction with Chapter 4.3, which deals with regionalization.<sup>404</sup> The European Union posits that it has established neither containment zones nor compartments as these terms are referred to in the Terrestrial Code; rather, it has established areas considered to be infected with ASF and ASF-free zones. According to the European Union, such an approach is an option permitted under Article 4.3.3.3 (zoning and compartmentalization).<sup>405</sup> The European Union alleges that the EU-wide ban and the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are inconsistent with the product-specific provisions of Chapter 15.1 of the Terrestrial Code.<sup>406</sup>

7.268. In the course of these proceedings Russia has shifted its view as to which provisions in the Terrestrial Code are the most pertinent. At the outset, Russia identified as the most pertinent provisions for ASF those set out in Terrestrial Code Chapters 4.3 (zoning and compartmentalization), 4.4 (compartmentalization), 5.3 (procedures relevant for the application of the SPS Agreement), and 15.1 (African swine fever). Russia also indicated that the interrelationship between these chapters is sequential rather than linear.<sup>407</sup> At a later stage in the proceedings, Russia dropped its references to Chapter 4.4 and focused on the provisions of Chapter 4.3 pertaining to regionalization (especially Articles 4.3.3.1, 4.3.3.5, and 4.3.3.6), focused its references to particular provisions in Chapter 5.3 (especially Articles 5.3.1 and 5.3.7), and added references to Articles 1.4.6 (surveillance to demonstrate freedom from disease or infection), 1.6.1 (self-declaration of disease-free country, zones or compartments), Chapters 3.1 (veterinary services) and 3.2 (evaluation of veterinary services).

7.269. In particular, Russia asserts that the ASF-specific provisions on *non-treated products* in Chapter 15.1 are triggered only when the exporting country has objectively demonstrated its establishment of OIE-consistent zones – corresponding to the principles for defining and establishing zones or compartments in Article 4.3.3 – to the importing country.<sup>408</sup> Chapter 5.3 of the Terrestrial Code sets out guidelines to follow for a zone or compartment to be recognized for international trade purposes. Russia maintains that an exporting country's failure to properly establish zones allows the importing country to apply country-wide import restrictions on non-heat treated products.<sup>409</sup> Russia asserts that it is willing and able to accept products from ASF-affected countries that meet OIE-consistent regionalization, compartmentalization and/or heat-treated standards.<sup>410</sup>

7.270. The Terrestrial Code comprises a number of chapters. Those in "Volume I" relate to general (so-called "horizontal") matters, while those in "Volume II" relate to recommendations applicable to specific diseases (OIE-listed diseases and other diseases important to international trade) and the adoption of measures relating to them. Chapter 15.1 specifically relates to ASF. We focus on the ASF-relevant international standards set out in the Terrestrial Code, in particular, Chapter 15.1. We observe that each of the different Articles (15.1.5–15.1.17) of Chapter 15.1 are tailored to a particular subset of products. Some of those recommendations refer to imports from

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<sup>403</sup> Following a question from the Panel, the OIE confirmed that there had been no material changes in Chapter 15.1 (African swine fever) from the 22<sup>nd</sup> to the 23<sup>rd</sup> edition of the Terrestrial Code. See para. 1.33 above.

<sup>404</sup> European Union's first written submission, para. 122.

<sup>405</sup> European Union's second written submission, paras. 37 - 40.

<sup>406</sup> European Union's first written submission, para. 139.

<sup>407</sup> Russia's second written submission, para. 21; and response to Panel question No. 101, para. 146.

<sup>408</sup> Russia's second written submission, para. 33.

<sup>409</sup> Russia's opening statement at the first meeting of the Panel, para. 17.

<sup>410</sup> Russia's response to Panel question No. 115, para. 206.

ASF-free countries, zones or compartments, and from countries or zones considered infected with ASF. These Articles in turn refer to and should be analysed in respect of numerous horizontal Terrestrial Code provisions including Chapter 4.3 and Article 5.3.7.<sup>411</sup> Some of the mentioned Articles of Chapter 15.1 also provide for trade of products that have been processed so as to ensure destruction of the ASFV, and that the necessary protections were taken after processing to avoid contact of the product with any source of ASFV.

7.271. In our view, the difference in the situations covered by the provisions of Chapter 15.1 (i.e. those related to goods originating in ASF-free countries zones or compartments and processed products to ensure destruction of ASFV) warrants an independent examination of the standards applicable to the categories of products subject to each situation. In other words, we consider that the structure of Chapter 15.1 provides a clear identification of two sets of standards on which a measure could be based on. Those categories include standards for: (i) trade in pig products originating from ASF-free countries, zones or compartments; and (ii) trade in pig products subject to processing to ensure destruction of ASFV.

7.272. In light of the parties' comments and the structure of the recommendations in Chapter 15.1 of the Terrestrial Code, we will focus our analysis of what is the meaning of the relevant international standards for the trade in the products subject to the EU-wide ban. That is, in this section we will only examine the meaning of those provisions in the Terrestrial Code that refer to trade in non-treated products. We now turn to that examination.

#### **7.5.1.3.4 Discerning the meaning of the relevant international standards**

7.273. The Panel's identification of the relevant international standards for the purposes of Article 3 of the SPS Agreement is intrinsically interlinked with the meaning of the Terrestrial Code provisions identified by the parties in this dispute. Before embarking upon our examination to discern the meaning of the identified provisions, we recall certain guiding considerations.

##### **7.5.1.3.4.1 Preliminary observations**

7.274. In *India – Agricultural Products*, the Appellate Body upheld the panel's finding that India's measures were not "based on" the relevant international standards within the meaning of Article 3.1 of the SPS Agreement, and did not "conform to" the relevant international standards within the meaning of Article 3.2 of the SPS Agreement. In so doing, the Appellate Body offered an "overview" of Article 3, which sheds light on how a panel may go about discerning the meaning of the relevant international standard. In relation to a panel's examination of a Member's measure under Article 3 and in light of the relevant international standard, in *India – Agricultural Products*, the Appellate Body observed:

The provisions of Article 3 establish a Member's obligations concerning harmonization with relevant international standards.<sup>412</sup> In determining whether a particular SPS measure is based on, conforms to, or results in a higher level of protection than a relevant international standard, a panel must engage in a comparative assessment between the challenged measure and that international standard. In this respect, because the international standard serves as the benchmark against which a Member's compliance under Article 3 is to be assessed, it is incumbent on a panel to discern the meaning of that standard. In conducting such an assessment, panels have various means available to them. A panel may be guided by any relevant interpretative principles, including relevant customary rules of interpretation of public international law. In addition, a panel may find additional sources to be useful in discerning the meaning of the international standard. For example, panels may wish to have recourse to the views of the relevant standard-setting body, as referred to in Annex A(3) to the SPS Agreement, through evidence on the panel record or through

<sup>411</sup> See paras. 2.17-2.18 above.

<sup>412</sup> (footnote original) Although the provisions of Article 3 and Annex A refer to "international standards, guidelines or recommendations", we will, for ease of reference, hereinafter use the terms "international standard" or "international standards".

direct consultation with that body, or with other experts in the relevant fields, pursuant to Article 11.2 of the SPS Agreement and Article 13 of the DSU.<sup>413</sup>

7.275. In conducting our comparative assessment between the challenged measures and the international standards, we have benefited from various sources available to us.

7.276. In particular, we have been guided by interpretative principles, including customary rules of interpretation of public international law. We recall that, in its consideration of the panel's reasoning and findings concerning the meaning of the Terrestrial Code in *India – Agricultural Products*, the Appellate Body bemoaned the vagueness of India's allegations concerning interpretative glitches in the panel's approach. The Appellate Body opined that India had not demonstrated why or how that panel's analysis departed from a proper application of the customary rules of treaty interpretation or how, if properly applied, such rules would have produced a different outcome regarding the meaning of the Terrestrial Code. In this dispute, the European Union asserts that the Terrestrial Code is not an international agreement (treaty), but that it is a document adopted by the World Assembly of Delegates of the OIE.<sup>414</sup> The European Union agrees that in interpreting the Code the WTO adjudicating bodies may seek guidance in the relevant customary rules of treaty interpretation, including in the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>415</sup> Russia also believes that the Panel may apply customary rules of treaty interpretation to determine the meaning of the Terrestrial Code and the relevant international standards.<sup>416</sup>

7.277. Article 3.2 of the DSU refers to the customary rules of treaty interpretation. It is well established that these are articulated in the Vienna Convention, calling for examination of text, context, object and purpose in the interpretation of international treaties. Pursuant to Article 2.1(a) of the Vienna Convention, for the purposes of that Convention, a treaty is an international agreement concluded between states in written form and governed by international law. The customary rules of treaty interpretation in the Vienna Convention are clearly to be applied to our interpretation of the provisions of a "treaty" (i.e. the SPS Agreement as part of the WTO Agreement).

7.278. By contrast, the Terrestrial Code is a set of international standards, rather than a treaty. Therefore, the rules of interpretation in the Vienna Convention would not be directly applicable to the interpretation of the international standards set out in the Terrestrial Code in the same manner as they would to a treaty. Nevertheless, we consider that they may serve as useful guidance in our examination of the provisions of the Terrestrial Code.

7.279. Furthermore, we have had recourse to the views of the OIE, as the relevant standard-setting body referred to in Annex A(3) to the SPS Agreement, through direct written consultation with that body. We have also benefitted from oral and written consultation with experts in the relevant fields pursuant to Article 11.2 of the SPS Agreement and Article 13 of the DSU.

7.280. We find support in the Appellate Body's decision in *India – Agricultural Products* for this Panel's written consultation process with the OIE, and the questions to the OIE relating to the meaning of, and interrelationships between the relevant provisions of the Terrestrial Code. In that case, the Appellate Body recalled the comprehensive nature of the discretionary authority of a panel to "seek" information and technical advice from "any individual or body" it may consider appropriate, or from "any relevant source" under Article 13 of the DSU, underlining that it is particularly within the province and the authority of a panel to determine the need for information

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<sup>413</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.79. We note that the Appellate Body's approach in respect of how to refer to international standards concurs with the approach of the panel in *US – Animals*, para. 7.231. Annex A does not set forth a specific definition of any of the terms "standards", "guidelines", or "recommendations". No panel has yet been faced with determining the meaning of these terms in the context of the SPS Agreement. The SPS Agreement does not require a fine distinction between the three terms for its proper application. The OIE seems to use the terms interchangeably, labelling the Terrestrial Code as part of its standard-setting activities, while individual ASF-related product-specific provisions ("Articles") within the Terrestrial Code are entitled "recommendations" (see OIE's responses to Panel questions).

<sup>414</sup> European Union's response to Panel question No. 117, para. 235.

<sup>415</sup> European Union's response to Panel question No. 117, para. 235. (referring to the Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331).

<sup>416</sup> Russia's response to Panel question 117, para. 212.

and advice in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received.<sup>417</sup>

7.281. The Appellate Body then observed that, under the special or additional rules set forth in Article 11.2 of the SPS Agreement<sup>418</sup>, while a panel may generally be expected to consult with experts in SPS cases, the panel still retains discretion regarding which experts it wishes to consult, and how it wishes to structure such consultations. The Appellate Body further underlined the comprehensive nature of a panel's fact-finding powers and the broad permissible scope of expert consultations conducted by a panel, encompassing consultations on the meaning of the Terrestrial Code.<sup>419</sup>

7.282. Moreover, the Appellate Body's decision in *India – Agricultural Products* provided guidance for this Panel pertaining to the process of consultation with the experts and the conduct of the expert meeting. In essence, in connection with our own assessment of the meaning of the Terrestrial Code, this Panel has remained vigilant in terms of how it has treated the responses received from the OIE and how it has undertaken its assessment of the meaning of the Terrestrial Code. In this respect, the Panel has remained mindful of the reasoning of the Appellate Body in *India – Quantitative Restrictions* that a panel may not delegate its judicial function to an international organization that it consults, but must instead critically assess the views of that international organization.<sup>420</sup> The Appellate Body's findings in *India – Agricultural Products* reaffirm that the Panel must make its own assessment of the meaning of the Terrestrial Code and not simply rely on the views of the OIE regarding the meaning of the Terrestrial Code. A Panel may, in respect of each of the interpretative issues it addresses, refer to and accord weight to the OIE's responses to its questions; however, a Panel must indicate, in each instance, that its conclusions are also based on its own examination of the wording or text of the relevant recommendations of the Terrestrial Code.<sup>421</sup>

7.283. Mindful of these considerations, we proceed to examine the relevant provisions of the Terrestrial Code as they correlate with the measures at issue in this dispute.

#### 7.5.1.3.4.2 Relevant provisions of the Terrestrial Code

7.284. We note that the Terrestrial Code foreword indicates that the Code sets out standards for the improvement of terrestrial animal health and welfare and veterinary public health worldwide, including through standards for safe international trade in terrestrial animals. As stated in Part A point 2 of the User's Guide to the Terrestrial Code:

Veterinary Authorities should use the standards in the *Terrestrial Code* to set up measures providing for early detection, internal reporting, notification and control of pathogenic agents ... and preventing their spread via international trade in animals and animal products, while avoiding unjustified sanitary barriers to trade.<sup>422</sup>

7.285. Part B point 10 of the User's Guide further provides that:

The standards in each of the chapters of Sections 8 to 15 are designed to prevent the aetiological agents of OIE listed diseases, infections or infestations from being introduced into an importing country. The standards take into account the nature of

<sup>417</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.86 (quoting Appellate Body Report, *US – Shrimp*, para. 104).

<sup>418</sup> Article 1.2 of the DSU states that the provisions of the DSU apply subject to special or additional rules and procedures identified in Appendix 2 thereto. Appendix 2 lists Article 11.2 of the SPS Agreement. Article 1.2 of the DSU further provides: "To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail."

<sup>419</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.87-5.89.

<sup>420</sup> Appellate Body Report, *India – Quantitative Restrictions*, para. 149.

<sup>421</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.93-5.94.

<sup>422</sup> Terrestrial Code User Guide (Exhibit EU-2), p. i. See also OIE response to Panel question No. 19.

the traded commodity, the animal health status of the exporting country, zone or compartment, and the risk reduction measures applicable to each commodity.<sup>423</sup>

7.286. As noted above, the Terrestrial Code comprises a number of chapters. Those in Volume I relate to general (so-called horizontal) matters, while those in Volume II relate to recommendations applicable to specific diseases (OIE-listed diseases and other diseases important to international trade) and the adoption of measures relating to them. Chapter 15.1 is the Chapter specifically relating to ASF. We focus on the ASF-relevant international standards set out in the Terrestrial Code, in particular, Chapter 15.1. Together with other applicable, relevant provisions, Chapter 15.1 of the Terrestrial Code serves as the overarching benchmark against which the EU-wide ban must be compared in order to determine whether it is based on that standard. Accordingly, in keeping with the guidance outlined above, it is incumbent on the Panel to discern the meaning of relevant provisions of Chapter 15.1 and other relevant provisions of the Terrestrial Code and to conduct the requisite comparative assessment of the EU-wide ban with these standards in order to determine whether the EU-wide ban satisfies the elements of Article 3.1.<sup>424</sup>

7.287. Article 15.1.1 contains general provisions. Articles 15.1.2-15.1.4 deal with the ASF status of a country, zone or compartment (Article 15.1.2 sets out considerations to guide the determination of the ASF status of a country, zone or compartment; Article 15.1.3 sets forth considerations relating to historically ASF-free status and free status as a result of an eradication programme; and Article 15.1.4 addresses the recovery of ASF-free status). Articles 15.1.5-15.1.16<sup>425</sup> contain product-specific recommendations on how to safely import ASF-susceptible pigs or pork products, or products derived from them depending upon the ASF-status of the exporting country, zone or compartment. Articles 15.1.14-15.1.16 also provide for the situation where the products concerned have been processed in an approved establishment so as to ensure the destruction of ASFV. According to the OIE, all the various combinations of testing, treatment and certification identified in Chapter 15.1 provide for safe trade of animals and animal products.<sup>426</sup>

7.288. Turning to the specific text of the provisions concerned, we note that Article 15.1.1, entitled "General provisions", reads as follows:

#### **Article 15.1.1 General provisions**

The pig and its close relatives are the only natural hosts for African swine fever virus (ASFV). These include all varieties of *Sus scrofa*, both domestic and *wild*, warthogs (*Phacochoerus* spp.), bushpigs (*Potamochoerus* spp.) and giant forest hog (*Hylochoerus meinertzhageni*). For the purposes of this chapter, a distinction is made between domestic pigs (permanently captive and farmed free-range pigs) and *wild* pigs (including *feral* pigs and *wild* boar) as well as between *Sus scrofa* and African pig species.

All varieties of *Sus scrofa* are susceptible to the pathogenic effects of ASFV, while the African *wild* pigs are not and act as reservoirs of the *infection*. Ticks of the genus *Ornithodoros* are natural hosts of the virus and act as biological *vectors* of the *infection*.

For the purpose of the *Terrestrial Code*, the *incubation period* in *Sus scrofa* is 15 days.

Standards for diagnostic tests are described in the *Terrestrial Manual*.

<sup>423</sup> Terrestrial Code User Guide (Exhibit EU-2), p. ii. See also OIE response to Panel question No. 19.

<sup>424</sup> We analyse the relevant Terrestrial Code provisions concerning regionalization below (see paras. 7.292-7.325 below). At this point in our analysis, we recall that Chapter 4.3 on "zoning and compartmentalization" states: "[t]his Chapter is to assist Member Countries wishing to establish and maintain different subpopulations within their territory using the principles of compartmentalization and zoning. *These principles should be applied in accordance with the measures in the relevant disease chapter(s)*. This Chapter also outlines a process through which trading partners may recognize such subpopulations. This process is best implemented by trading partners through establishing parameters and gaining agreement on the necessary measures prior to outbreaks of disease." (emphasis added).

<sup>425</sup> Article 15.1.17, not invoked in this dispute, contains recommendations for the importation of litter and manure (from pigs).

<sup>426</sup> OIE responses to Panel's questions No. 19.

7.289. The provisions for a country or zone to be considered free from ASF are contained in Articles 15.1.2 and 15.1.3:

**Article 15.1.2 Determination of the ASF status of a country, zone or compartment**

The African swine fever (ASF) status of a country, *zone* or *compartment* can only be determined after considering the following criteria in domestic and *wild* pigs, as applicable:

- 1) ASF is be [*sic*] notifiable in the whole country, and all clinical signs suggestive of ASF are subjected to appropriate field and *laboratory* investigations;
- 2) an ongoing awareness programme is in place to encourage reporting of all cases suggestive of ASF;
- 3) the *Veterinary Authority* has current knowledge of, and authority over, all domestic pigs in the country, *zone* or *compartment*;
- 4) the *Veterinary Authority* has current knowledge about the species, population and habitat of *wild* pigs in the country or *zone*.

**Article 15.1.3 ASF-free country, zone or compartment**

1. Historically free status

A country or *zone* may be considered free from ASF without formally applying a specific *surveillance* programme if the provisions of Article 1.4.6. are complied with.

2. Free status as a result of an eradication programme

A country or *zone* which does not meet the conditions of point 1 above or a *compartment* may be considered free from ASF when:

- a) there has been no *outbreak* of ASF during the past three years; this period can be reduced to 12 months when there is no evidence of tick involvement in the epidemiology of the *infection*;
- b) no evidence of ASFV *infection* has been found during the past 12 months;
- c) *surveillance* has been in place in domestic pigs for the past 12 months;
- d) imported domestic pigs comply with the requirements in Article 15.1.5. or Article 15.1.6.

AND

Based on *surveillance*, ASF *infection* has been demonstrated not to be present in any *wild* pig population in the country or *zone*, and:

- e) there has been no clinical evidence, nor virological evidence of ASF in *wild* pigs during the past 12 months;
- f) no seropositive *wild* pigs have been detected in the age class 6–12 months during the past 12 months;
- g) imported *wild* pigs comply with the requirements in Article 15.1.7.

7.290. The regaining of free status after an ASF outbreak is covered in Article 15.1.4.:

#### Article 15.1.4 Recovery of free status

Should an ASF *outbreak* occur in a free country, *zone* or *compartment*, the free status may be restored where *surveillance* has been carried out with negative results, either:

- 1) three months after the last *case* where a *stamping-out policy* is practised and in the case where ticks are suspected to be involved in the epidemiology of the *infection*, followed by acaricide treatment and the use of sentinel pigs; or
- 2) where a *stamping-out policy* is not practised, the provisions of point 2 of Article 15.1.3. should be followed.

AND

Based on *surveillance*, ASF *infection* has been demonstrated not to be present in any *wild* pig population in the country or *zone*.

7.291. Following these provisions relating to the ASF-status of a country, zone or compartment, the remainder of Chapter 15.1 sets out product-specific recommendations. We recall that the EU-wide ban does not apply to products that have been subject to certain forms of treatment that would ensure destruction of ASFV.<sup>427</sup> With this in mind, Table 4 below sets out the product-specific provisions in Chapter 15.1 of the Terrestrial Code that pertain to the products at issue pursuant to the EU-wide ban.

**Table 4 Product-specific provisions of Chapter 15.1 of the Terrestrial Code<sup>428</sup>**

EU-wide <sup>429</sup>	Relevant international standard (relevant product-specific provisions of Chapter 15.1 of the Terrestrial Code)
live pigs	<p><u>Article 15.1.5.</u>  <b>Recommendations for importation from ASF-free countries, zones or compartments</b>            For domestic pigs  <i>Veterinary Authorities</i> should require the presentation of an <i>international veterinary certificate</i> attesting that the <i>animals</i>:            1) showed no clinical sign of ASF on the day of shipment;            2) were kept in an ASF-free country, <i>zone</i> or <i>compartment</i> since birth or for at least the past 40 days.</p>
pork meat	<p><u>Article 15.1.12.</u>  <b>Recommendations for importation from ASF-free countries, zones or compartments</b>            For fresh meat of domestic pigs  <i>Veterinary Authorities</i> should require the presentation of an <i>international veterinary certificate</i> attesting that the entire consignment of <i>fresh meat</i> comes from <i>animals</i> which:            1) have been kept in an ASF-free country, <i>zone</i> or <i>compartment</i> since birth or for at least the past 40 days, or which have been imported in accordance with Article 15.1.5. or Article 15.1.6.;            2) have been slaughtered in an approved <i>abattoir</i>, have been subjected to ante- and post-mortem inspections in accordance with Chapter 6.2., and have been found free of any sign suggestive of ASF.</p>
raw meat preparations	Articles 15.1.12 and 15.1.14 (we reproduce the text of Article 15.1.13 to provide an indication of the conditions to which Article 15.1.14 refers)

<sup>427</sup> See para. 7.143 above.

<sup>428</sup> This Table contains the relevant product-specific provisions in Chapter 15.1 of Terrestrial Code and the products as identified in Russia's measures. Russia submitted that Article 15.1.6 was relevant for "piglets for fattening"/pigs for breeding for the EU-wide ban (e.g., Russia's response to Panel question No. 272, para. 119). As the European Union does not practice "compartmentalization", and has not sought to rely on this concept in its argumentation under Article 3 of the SPS Agreement, Article 15.1.6 and other compartment-specific provisions are excluded from Table 4.

<sup>429</sup> European Union's response to Panel question No. 77, paras. 148 – 151; and response to Panel question No. 271, paras. 85-89. See also Russia's response to Panel question No. 77, para. 127; and response to Panel question No. 271, paras. 97-98.



EU-wide <sup>429</sup>	Relevant international standard (relevant product-specific provisions of Chapter 15.1 of the Terrestrial Code)
	<p><b>Article 15.1.13</b>  <b>Recommendations for importation from ASF-free countries or zones</b>  <b>From fresh meat of wild pigs</b>  <i>Veterinary Authorities</i> should require the presentation of an <i>international veterinary certificate</i> attesting that:</p> <p>1) the entire consignment of <i>fresh meat</i> comes from <i>animals</i> which:</p> <p>a) have been killed in an ASF-free country or zone;</p> <p>b) have been subjected to a post-mortem inspection in accordance with Chapter 6.2. in an approved examination centre, and have been found free of any sign suggestive of ASF;</p> <p>and, if the <i>zone</i> where the <i>animal</i> has been killed is adjacent to a <i>zone</i> with <i>infection in wild pigs</i>:</p> <p>2) a sample has been collected from every <i>animal</i> killed and has been subjected to a virological test and a serological test for ASF, with negative results.</p> <p><b>Article 15.1.14</b>  <b>Recommendations for the importation of meat products of pigs (either domestic or wild), or for products of animal origin (from fresh meat of pigs) intended for use in animal feeding, for agricultural or industrial use, or for pharmaceutical or surgical use, or for trophies derived from wild pigs</b>  <i>Veterinary Authorities</i> should require the presentation of an <i>international veterinary certificate</i> attesting that the products:</p> <p>1) have been prepared:</p> <p>a) exclusively from <i>fresh meat</i> meeting the conditions laid down in Articles 15.1.12. or 15.1.13., as relevant;</p> <p>b) in a processing establishment:</p> <p>i) approved by the <i>Veterinary Authority</i> for export purposes;</p> <p>ii) processing only <i>meat</i> meeting the conditions laid down in Articles 15.1.12. or 15.1.13., as relevant;</p> <p>OR</p> <p>2) have been processed in an establishment approved by the <i>Veterinary Authority</i> for export purposes so as to ensure the destruction of the ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV.</p>

7.292. According to the European Union, the correct applicable standards for the respective measures are mainly to be found in Chapter 15.1 (African swine fever) of the Terrestrial Code, which deals with trade in the products at issue, in conjunction with Chapter 4.3, which deals with regionalization.<sup>430</sup> The European Union posits that it has neither established containment zones nor compartments as these terms are referred to in the Terrestrial Code; rather, it has established areas considered to be infected with ASF and ASF-free zones. According to the European Union, such an approach is an option permitted under Article 4.3.3.3 (zoning and compartmentalization).<sup>431</sup> Russia asserts that the ASF-specific provisions on non-treated products in Chapter 15.1 are triggered only when the exporting country has objectively demonstrated to the importing country that it has established OIE-consistent zones – corresponding to the principles for defining and establishing zones or compartments in Article 4.3.3.<sup>432</sup> In light of the parties' views, we will focus on ascertaining the manner in which, according to the Terrestrial Code, an ASF-free country or zone could be determined, and will not refer to the establishment of compartments.

7.293. In this dispute, the reference in the pertinent Terrestrial Code provisions not only to the idea of an ASF-free "country", but also to an ASF-free "zone", is particularly significant. We need to have a firm understanding of the concept of "zoning" and of any and all interrelationship(s) between the Terrestrial Code's disease-specific chapter (Chapter 15.1) and the "horizontal" chapters (Chapters 4.3, 4.4 and 5.3) pertaining to "zoning and regionalization" as this will have a material impact on our examination of the parties' argumentation and evidence submitted in support.

<sup>430</sup> European Union's first written submission, para. 122.

<sup>431</sup> European Union's second written submission, paras. 37-40.

<sup>432</sup> Russia's second written submission, para. 33.

7.294. One of the Panel's experts has confirmed that "Chapter 15.1 of the Terrestrial Code do[es] make provision for the imports from ASF infected countries provided the prescribed risk mitigation measures are applied to render the products 'safe' ...".<sup>433</sup> For countries with confirmed ASF outbreaks, Chapter 15.1 of the Terrestrial Code permits exports of certain products from ASF-free zones and compartments. Thus, a country with a confirmed ASF outbreak may establish a free zone, in accordance with the OIE provisions, from which the specified products (e.g. live domestic pigs, pork meat from domestic pigs, and raw meat preparations from domestic pigs and wild pigs) may be imported according to the conditions described in Articles 15.1.5, 15.1.12 and 15.1.14 of the Terrestrial Code.

7.295. The acceptance of non-treated products covered by Articles 15.1.5 (live pigs), 15.1.12 (fresh meat of domestic pigs), and 15.1.14 (meat products of pigs) is contingent upon the determination that the products in question come from ASF free countries, zones, or compartments. The conditions that should be met for a country, zone or compartment to be considered free from ASF, are set out in Articles 15.1.2, 15.1.3, and 15.1.4, while the more general provisions regarding the establishment of disease free areas are contained in Article 1.4.6, and Chapters 4.3 and 5.3.

7.296. In particular, Article 15.1.2 of the Terrestrial Code lays out certain pre-conditions that need to be verified to determine the ASF status of a country, zone or compartment. These include: (i) that ASF is notifiable in the whole country; (ii) that all clinical signs suggestive of ASF are subjected to appropriate field and laboratory investigations; (iii) that an ongoing awareness programme is in place to encourage reporting of all cases suggestive of ASF; (iv) the Veterinary Authority<sup>434</sup> has current knowledge of, and authority over, all domestic pigs in the country, zone or compartment; and (v) the Veterinary Authority has current knowledge about the species, population and habitat of wild pigs in the country or zone.<sup>435</sup> In our view, these elements refer to animal traceability, as well as to epidemiological surveillance, which is a term used in Article 6.2 of the SPS Agreement when referring to the factors on which a Member should base its determination of disease-free areas.

7.297. Furthermore, Article 15.1.3 of the Terrestrial Code addresses the requirements for a country, zone or compartment to be considered free from ASF. This provision first addresses when a country or zone may be considered historically free from ASF. In that respect, the provision states that a "country or zone may be considered free from ASF without formally applying a specific surveillance programme if the provisions of Article 1.4.6 are complied with".

7.298. Article 1.4.6 of the Terrestrial Code is entitled "Surveillance to demonstrate freedom from disease or infection". It provides, in relevant part:

1. Requirements to declare a country or a zone free from disease or infection without pathogen specific surveillance

This article provides general principles for declaring a country or a zone free from disease or infection in relation to the time of last occurrence and in particular for the recognition of historical freedom.

The provisions of this article are based on Article 1.4.3. and the following premises:

- in the absence of disease and vaccination, the animal population would become susceptible over a period of time;
- the disease agents to which these provisions apply are likely to produce identifiable clinical signs in susceptible animals;

<sup>433</sup> Dr Brückner's response to Panel question No. 36, Compilation of the experts' responses, para. 4.42.

<sup>434</sup> According to the Glossary of the Terrestrial Code, Veterinary Authority "means the Governmental Authority of a Member Country, comprising veterinarians, other professionals and para-professionals, having the responsibility and competence for ensuring or supervising the implementation of animal health and welfare measures, international veterinary certification and other standards and recommendations in the Terrestrial Code in the whole territory." Glossary, Terrestrial Code, p. x (Exhibit RUS-32).

<sup>435</sup> Article 15.1.2, OIE, *Terrestrial Animal Health Code* 23rd edn (2014), Vol. II, p. 649.

– competent and effective Veterinary Services will be able to investigate, diagnose and report disease, if present;

– disease or infection can affect both domestic animals and wildlife;

– the absence of disease or infection over a long period of time in a susceptible population can be substantiated by effective disease investigation and reporting by a Member Country.

a) Historically free

Unless otherwise specified in the relevant disease chapter, a country or zone may be recognised as free from infection without formally applying a pathogen-specific surveillance programme when:

i) there has never been occurrence of disease, or

ii) eradication has been achieved or the disease or infection has ceased to occur for at least 25 years, provided that for at least the past 10 years:

iii) the disease has been a notifiable disease;

iv) an early detection system has been in place for all relevant species;

v) measures to prevent disease or infection introduction have been in place; no vaccination against the disease has been carried out unless otherwise provided for in the Terrestrial Code;

vi) infection is not known to be established in wildlife within the country or zone. A country or zone cannot apply for historical freedom if there is any evidence of infection in wildlife.

b) Last occurrence within the previous 25 years

Countries or zones that have achieved eradication (or in which the disease or infection has ceased to occur) within the previous 25 years, should follow the pathogen-specific surveillance requirements in the Terrestrial Code if they exist. In the absence of specific requirements, countries should follow the general recommendations on surveillance outlined in this chapter provided that for at least the past 10 years:

i) the disease has been a notifiable disease;

ii) an early detection system has been in place;

iii) measures to prevent the introduction of the disease or infection introduction have been in place;

iv) no vaccination against the disease has been carried out unless otherwise provided for in the Terrestrial Code;

v) infection is not known to be established in wildlife within the country or zone. A country or zone cannot apply for recognition of freedom if there is any evidence of infection in wildlife.

...

5. Demonstration of freedom from infection

A surveillance system to demonstrate freedom from infection should meet the following requirements in addition to the general requirements outlined in Article 1.4.3.

Freedom from infection implies the absence of the pathogenic agent in the country, zone or compartment. Scientific methods cannot provide absolute certainty of the absence of infection. Therefore, demonstrating freedom from infection involves providing sufficient evidence to demonstrate (to a level of confidence acceptable to Member Countries) that infection with a specified pathogen, if present, is present in less than a specified proportion of the population.

However, finding evidence of infection at any prevalence in the target population automatically invalidates any freedom from infection claim unless otherwise stated in the relevant disease chapter. The implications for the status of domestic animals of disease or infection present in wildlife in the same country or zone should be assessed in each situation, as indicated in the relevant chapter on each disease in the Terrestrial Code.

Evidence from targeted, random or non-random data sources, as stated before, may increase the level of confidence or be able to detect a lower level of prevalence with the same level of confidence compared to structured surveys.

7.299. Article 1.4.6 is part of Chapter 1.4, which refers to animal health surveillance. As indicated, this provision refers to the options available to determine the disease status of a country, zone or compartment. According to Article 1.4.6, a country or zone may be recognized as free from infection, ASF in this case, without formally applying a pathogen-specific surveillance programme, when (i) the disease has not occurred; or (ii) eradication has been achieved or the disease or infection has ceased to occur for at least 25 years. For the second situation to qualify as disease freedom, the following conditions must be satisfied for the past ten years: (i) the disease is a notifiable disease; (ii) an early detection system is in place for all relevant species; (iii) measures to prevent disease or infection introduction are in place; and (iv) infection is not known to be established in wildlife within the country or zone.

7.300. Furthermore, Article 1.4.6 of the Terrestrial Code provides that in cases where the last occurrence has taken place within the previous 25 years, the country or zone that has achieved eradication or where the disease has ceased to occur, should follow the pathogen-specific surveillance requirements in the Terrestrial Code if they exist.<sup>436</sup> In the absence of such requirements, the same conditions described for the second situation for historical freedom, in the previous paragraph, should have been satisfied for the past ten years.

7.301. In respect of these requirements for the determination of ASF-free status of a country or zone, the OIE explained that

The provisions in Article 1.4.6 provide an objective basis that can be used by trading partners to reach agreement on the health measures applied to trade. Consistent with OIE policy on the management of disease risks, there are various approaches, which should be used and adapted (within limits) according to the circumstances of the OIE Member Country. The first consideration is to conduct surveillance to ensure that the true situation with disease or infection is known, with an appropriate level of confidence. After this, the challenge is to provide evidence and a scientific rationale to convince trading partners. This second aspect is influenced by several considerations, including the nature of the relationship between countries and the credibility of the Veterinary Services of the exporting country. The OIE provides guidance on all aspects.<sup>437</sup>

7.302. Moreover, the OIE observed that

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<sup>436</sup> We recall that in its responses to Panel questions the OIE confirmed that Chapter 15.1 of the 23<sup>rd</sup> edition of the Terrestrial Code "does not contain detailed requirements on surveillance for African swine fever." OIE response to Panel question No. 4.

<sup>437</sup> OIE response to Panel question No. 4.

As already mentioned, the general recommendations in Chapter 1.4 *may be* refined by the specific approaches described in disease-specific chapters (ital. added for emphasis). The use of 'may be' reflects the fact that specific approaches are not provided in all such chapters, especially older ones that have not been revised for some years. Requirements for countries, zones or compartments to be considered free from African swine fever are found in Article 15.1.3. This article refers to Article 1.4.6 regarding requirements for 'historically free' status. The current Chapter 15.1 does not contain detailed requirements on surveillance for African swine fever.<sup>438</sup> (emphasis original)

7.303. In this context, we consider that Article 1.4.6 also addresses the recognition of disease-free areas in the territory of an OIE member based on the application of pathogen specific surveillance in accordance with the recommendations of Chapter 1.4 of the Terrestrial Code. ASFV is the specific pathogen for which surveillance should be set up in the context of this case.

7.304. Article 15.1.3 of the Terrestrial Code also refers to the disease-free status of countries, zones or compartments as a result of an eradication plan. According to this Article, when a country or zone cannot be considered historically free from ASF, it can still be considered as ASF-free when (i) there have been no ASF outbreaks during the last three years, or 12 months if there is no evidence of tick involvement; (ii) there is no evidence of ASF infection in the last 12 months; (iii) surveillance has been in place in domestic pigs for the last 12 months; and (iv) imported domestic pigs show no clinical signs of ASF on the day of shipment and have been kept in an ASF-free country, zone or compartment since birth or for the last 40 days (see Articles 15.1.5 and 15.1.6 of the Terrestrial Code). In addition to these elements, for the country or zone to be considered ASF-free Article 15.1.3 requires that (i) there has been no clinical nor virological evidence of ASF in wild pigs during the last 12 months; (ii) no seropositive wild pigs have been detected in the age class 6-12 months during the last 12 months; and (iii) imported wild pigs have shown no clinical sign of ASF on the day of shipment, have been captured in an ASF-free country or zone, and in case such zone is adjacent to a zone with an ASF infection in wild pigs, the animals were kept in a quarantine station for 40 days prior to shipment, and were subjected to a virological test and a serological test performed at least 21 days after entry into the quarantine station, with negative results (see Article 15.1.7 of the Terrestrial Code).

7.305. Pursuant to the terms of Article 15.1.4, when an ASF outbreak has occurred in a free country, zone, or compartment, the free status may be restored when certain conditions are met.<sup>439</sup>

7.306. In summary, a country or zone may be historically free of ASF (when the conditions set out in Article 15.1.3.1 are satisfied – including those provided in Article 1.4.6); may be considered to be ASF-free as a result of an eradication programme (when the conditions set out in Article 15.1.3.2 are satisfied); or its ASF-free status may be restored after an outbreak has occurred (when the conditions set out in Article 15.1.4 are satisfied). Furthermore, the determination of the ASF status of a country, zone or compartment is contingent upon the consideration of certain factors related to epidemiological surveillance.

7.307. We note that the provisions of the Terrestrial Code relating to ASF status provide for recognition of ASF-free countries, zones, and compartments. More specifically, Articles 15.1.2, 15.1.3 and 15.1.4 each make reference to an ASF-free "country", "zone" or "compartment" on an equal footing,<sup>440</sup> without imposing any sequence, preference or hierarchy amongst the three terms.

7.308. In addition to an examination of the ASF specific provisions in Chapter 15.1, we also need to take into consideration the relevant provisions in Chapters 4.3 (zoning and compartmentalization) and Article 5.3.7 (sequence of steps to be taken in establishing a zone/compartment and having it recognised for international trade purposes). Before examining the meaning of these two provisions, we will first consider the key question of the interrelationship between horizontal and specific provisions in the Terrestrial Code.

<sup>438</sup> OIE response to Panel question No. 4.

<sup>439</sup> See para. 7.290 above.

<sup>440</sup> See paras. 7.311-7.316 below.

7.309. In addition to questioning the parties on the "horizontal" concept of zoning and its interrelationship with the ASF-specific provisions of the Terrestrial Code, the Panel posed a series of related questions to the OIE and to the experts. Particular questions were formulated to better understand the interaction between the horizontal chapters in Volume I and the disease-specific chapters in Volume II.

7.310. The OIE explained that the texts in Volume I, such as Chapter 1.4 on animal health surveillance and Chapter 4.3 on zoning and regionalization, establish a basic framework that can be applied to all diseases and host species. The goal is to establish a systematic approach to the prevention and control of disease, based on science and a series of key principles. In the disease-specific chapters contained in Volume II, such as Chapter 15.1 (African swine fever), the recommendations are tailored to the specific epidemiological characteristics of infectious agents. The role of wild animals in the epidemiology of a disease is an important risk factor for some diseases and not for others. The significance of disease in wildlife is mentioned as a factor to be considered in general when designing surveillance programmes. Specific provisions are contained in Volume II, but only for those diseases where it is necessary to address infection in wild animals in order to control the disease in domestic animals.<sup>441</sup> The OIE further explained that some points are covered in Volume II and not in Volume I, e.g. in Article 4.3.1:

to regain free status following a *disease outbreak* in a *zone* or *compartment*, Member Countries should follow the recommendations in the relevant *disease* chapter in the *Terrestrial Code*.<sup>442</sup>

7.311. The Terrestrial Code provisions on zoning and compartmentalization promote the goal of the Terrestrial Code, which is to provide for safe trade while avoiding unjustified sanitary barriers to trade.<sup>443</sup> Article 4.3.1 states that zoning and compartmentalization are procedures implemented by an OIE member with a view to defining subpopulations of distinct health status within its territory for the purpose of disease control and/or international trade. The purpose of establishing zones is to maintain separation in terms of the health status of distinct sub-populations of animals so that the appropriate health measures can be targeted to the appropriate population. Zoning and compartmentalization accomplish this goal by recognizing that disease status may not be country-wide and that the application of import measures should be tailored to the status of the exporting area. This general principle is embodied in Articles 4.3.2 and 4.3.3. Article 4.3.2 provides that the importing country should recognize the existence of a zone or compartment: (i) when the appropriate measures recommended in the Terrestrial Code are applied; and (ii) the Veterinary Authority of the exporting country certifies that this is the case. Furthermore, Article 4.3.3 sets forth principles for defining and establishing a zone or compartment.<sup>444</sup>

7.312. According to the OIE, no attempt is made to differentiate the levels of protection provided by the provisions of the disease chapters or the horizontal chapters (for example, to say that compartmentalization provides a higher or lower level of protection than zoning).<sup>445</sup> The approach taken in Chapter 4.3 and, for ASF in Chapter 15.1, is consistent with the approach to other diseases. Various risk management options are provided. Measures are recommended with reference to the ASF-free status at the level of a country, zone or compartment (e.g. Articles 15.1.5, 15.1.7, 15.1.8, 15.1.10, 15.1.12 and 15.1.13) and with reference to the ASF infected status of a country or zone (Articles 15.1.6, 15.1.9, and 15.1.11). For the importation of processed products, the ASF status of the exporting country, zone or compartment may be free or infected (Articles 15.1.14 to 15.1.17 inclusive).

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<sup>441</sup> OIE response to Panel question No. 6.

<sup>442</sup> OIE response to Panel question No. 6 (quoting OIE, *Terrestrial Animal Health Code* 23rd edn (2014), Vol. I, p. 116. (emphasis in the original)).

<sup>443</sup> See OIE response to Panel question No. 19, page 35 of OIE Responses to Questions from the Panel, where it states that "[all] the various combinations of testing, treatment and certification identified in Chapter 15.1 provide for safe trade of animals and animal products". Moreover, paragraph 3 of the introduction of the Terrestrial Code User's Guide provides that "the OIE standards are based on the most recent scientific and technical information. Correctly applied, they protect animal health and welfare and veterinary public health during production and trade in animals and animal products." Terrestrial Code User Guide (Exhibit EU-2), p. i.

<sup>444</sup> OIE, *Terrestrial Animal Health Code* 23rd edn (2014), Vol. I, pp. 116-119.

<sup>445</sup> OIE responses to Panel question No. 19.

7.313. The Terrestrial Code Glossary indicates that a "zone/region" means a clearly defined part of a territory containing an animal subpopulation with a distinct health status with respect to a specific disease for which required surveillance, control and biosecurity measures have been applied for the purpose of international trade. Zoning/regionalization is the act of establishing a zone/region. The OIE does not differentiate between zoning and regionalization.<sup>446</sup> The terms zone and zoning are generally used in the Terrestrial Code. Compartmentalization is linked to zoning. All applications of zoning and compartmentalization are based on the definition of a subpopulation of animals that has a different health status to that of the population in the rest of the national territory. As stated in Article 4.3.1 of the Terrestrial Code, "[w]hile zoning applies to an animal subpopulation defined primarily on a geographical basis (using natural, artificial or legal boundaries), compartmentalization applies to an animal subpopulation defined primarily by management and husbandry practices related to biosecurity. In practice, spatial considerations and good management including biosecurity plans play important roles in the application of both concepts."<sup>447</sup>

7.314. As noted above, the provisions of Chapter 15.1 refer to the concepts of ASF-free zones and ASF-infected zones. The Terrestrial Code Glossary defines an infected zone as an area where a disease has been diagnosed.<sup>448</sup> A free zone "means a zone in which the absence of the disease under consideration has been demonstrated by the requirements specified in the Terrestrial Code for free status being met. Within the zone and at its borders, appropriate official veterinary control is effectively applied for animals and animal products, and their transportation".<sup>449</sup> The Terrestrial Code Glossary additionally contains definitions of two kinds of zones, namely, "containment zones" and "protection zones":

A containment zone means a defined zone around and including suspected or infected establishments, taking into account the epidemiological factors and results of investigations, where control measures to prevent the spread of the infection are applied.

A protection zone means a zone established to protect the health status of animals in a free country or free zone, from those in a country or zone of a different animal health status.<sup>450</sup>

7.315. The OIE explained that both containment and protection zones are implemented using measures based on the epidemiology of the disease of interest to prevent the spread of the causative pathogen. These measures may include vaccination, movement control, animal identification, biosecurity and disease surveillance. The OIE further explained that the main distinction between the two zones relates to the circumstances in which they are used. A containment zone is implemented in response to a limited outbreak of disease in a free country or zone. Its purpose is to contain the outbreak i.e. limit it to a defined area, partly for the purposes of disease control but also for the purpose of limiting impact on trade. In contrast, a protection zone is implemented to protect the health status of animals in a country or zone that is free from a given disease against the risk of infection from adjacent countries or zones of different (lower) animal health status.<sup>451</sup>

7.316. According to the OIE, these zones are defined with sufficient precision, based on their objectives and the requirements for implementing them. The OIE allows for the possibility that countries will use different terminology (for example, based on the terminology used in the national veterinary legislation). However, this should not hinder the recognition of the equivalence of animal health safeguards. The OIE encourages harmonized approaches (if not the use of the same terms) to facilitate recognition of zones established and agreement on the requirements for the certification of commodities.<sup>452</sup>

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<sup>446</sup> OIE responses to Panel question No. 16.

<sup>447</sup> OIE, *Terrestrial Animal Health Code* 23rd edn (2014), Vol. I, pp. 116.

<sup>448</sup> Glossary, *Terrestrial Code*, p. v (Exhibit RUS-32).

<sup>449</sup> Glossary, *Terrestrial Code*, p. iv (Exhibit RUS-32).

<sup>450</sup> Glossary, *Terrestrial Code*, pp. ii and vii (Exhibit RUS-32).

<sup>451</sup> OIE responses to Panel question No. 17.

<sup>452</sup> OIE responses to Panel question No. 16.

7.317. We consider that the concept of "zone" in the Terrestrial Code is broad. It includes, but is not exhausted by the concepts of "protection" and "containment" zones. The OIE's opinion lends support to our view.<sup>453</sup> The OIE also opines that the concept also includes infected zones, zones that are free of disease with or without vaccination, zones that are officially recognised by the OIE, and seasonally free zones, and that various applications of the zoning concept are found in the disease-specific chapters as appropriate to the epidemiology of each disease.<sup>454</sup>

7.318. According to Russia, in order for it to be able to implement the recommendations set out in certain provisions of Chapter 15.1 of the Terrestrial Code (African swine fever) the European Union first has to demonstrate that it has established effective zones or compartments consistent with the principles set out in Article 4.3.3 and 5.3.7 of the Terrestrial Code. Russia argues that the Terrestrial Code envisages country-wide import restrictions when exporting countries have failed to effectively establish zones after an ASF outbreak.<sup>455</sup> The European Union asserts that, the Terrestrial Code disease-specific provisions "prevail over" the horizontal ones, at least whenever the disease-specific chapter is more specific or restricts options that are described in the horizontal chapters. The European Union asserts that it is not correct to go directly to Chapters 4.3 and 5.7 while ignoring Articles 15.1.2 and 15.1.3 (which refer to the determination of ASF status of a country or zone and to historically free status of zones and the regaining of free status as a result of an eradication programme).<sup>456</sup>

7.319. With respect to the assertion by the European Union that "the disease specific chapters of the Terrestrial Code (Volume II) prevail over the horizontal chapters (Volume I), at least whenever the disease specific chapter is more specific or restricts options that are described in the horizontal chapters"<sup>457</sup>, we recall the OIE's clarification that it considered the European Union's statement to be "generally correct".<sup>458</sup> The OIE also agreed with the European Union's statement that: "it is not correct to extract some provisions of Chapters 4.3 and 5.7 ignoring Articles 15.1.2 and 15.1.3 ...".<sup>459</sup> According to the OIE, in practice, it is usually the case that the provisions in Volume I and II apply in a complementary manner. There is rarely, if ever, conflict between the provisions because those in Volume I are general and those in Volume II are specific and only apply to the disease that is the subject of the chapter. Hence it is not usually necessary for one provision to "prevail over" another.<sup>460</sup> The OIE drew our attention to Article 1.4.1.1 on animal health surveillance, which, it asserted, helps to explain the relationship between the provisions in Volumes I and II.

#### Article 1.4.1.1.

The following recommendations may be applied to all diseases or infections and all susceptible species (including wildlife). The general recommendations in this chapter *may be refined by the specific approaches* described in the disease chapters (ital. added for emphasis). Where detailed disease or infection-specific information is not available, suitable approaches should be based on the recommendations in this chapter. (emphasis added)

7.320. In a similar vein, Article 4.3.1 of the Terrestrial Code states:

This chapter is to assist Member Countries wishing to establish and maintain different subpopulations within their territory using the principles of compartmentalisation and zoning. These principles should be applied *in accordance with the measures recommended in the relevant disease chapter(s)*. (emphasis added)

7.321. The OIE indicated that the phrase "wishing to establish" indicates that the use of zoning and compartmentalization is optional.<sup>461</sup> In a country affected by an outbreak of ASF the

<sup>453</sup> OIE responses to Panel question No. 16.

<sup>454</sup> OIE responses to Panel question No. 16.

<sup>455</sup> See e.g. Russia's first written submission, para. 60; and second written submission, para. 40.

<sup>456</sup> European Union's response to Panel question No. 20, paras. 83-86.

<sup>457</sup> European Union's response to Panel question No. 20, para. 85.

<sup>458</sup> OIE responses to Panel question No. 6, referring to European Union's responses to Panel question No. 20, paras. 84-85.

<sup>459</sup> OIE responses to Panel question No. 6.

<sup>460</sup> OIE responses to Panel question No. 6.

<sup>461</sup> OIE responses to Panel question No. 26.



veterinary authority is responsible for deciding whether to use these approaches or not. We agree with this view, which is reinforced with the text of Article 4.3.1, which also states:

Before trade in animals or their products may occur, an importing country needs to be satisfied that its animal health status will be appropriately protected. In most cases, the import regulations developed will rely in part on judgements made about the effectiveness of sanitary procedures undertaken by the exporting country, both at its borders and within its territory.

7.322. Furthermore, Article 4.3.2 states:

The exporting country should be able to demonstrate, through detailed documentation provided to the importing country, that it has implemented the recommendations in the Terrestrial Code for establishing and maintaining such a zone or compartment.

An importing country should recognise the existence of this zone or compartment when the appropriate measures recommended in the Terrestrial Code are applied and the Veterinary Authority of the exporting country certifies that this is the case.

7.323. In response to a Panel question pertaining to zoning under the Terrestrial Code, the OIE explained as follows:

An importing country may choose to take measures only on a country-wide basis, or only on a zone basis, or only on a compartment basis, subject to the recommendations in the Terrestrial Code....

Article 5.1.2 sets out the responsibilities of an importing country in relation to international trade. Point 1 advises that import requirements ... should assure that commodities introduced into the importing country *comply with the standards of the OIE* (ital. added for emphasis).<sup>462</sup>

7.324. We recall Dr Thiermann's statement that "[w]hatever zoning approach is used, the sequence of steps to be taken in establishing a zone/compartment and having it recognized for international trade purposes is as outlined in Article 5.3.7 of the Terrestrial Code."<sup>463</sup>

7.325. Article 5.3.7 deals with the establishment of specific subpopulations (zone or compartment) and their recognition for the purpose of international trade.<sup>464</sup> Article 5.3.7 spells out an approach to the obtaining of recognition of specific subpopulations from trading partners. If it does not prove possible to reach agreement, Article 5.3.8 contains a process to resolve differences between countries, such as the refusal to recognise a zone. We observe, however, that Article 5.3.7 itself clearly states:

There is no single sequence of steps which should be followed in establishing a *zone* or a *compartment*. The steps that the *Veterinary Services* of the *importing country* and the *exporting country* choose and implement will generally depend on the circumstances existing within the countries and at their borders, and their trading history. (emphasis original)

7.326. Recognizing the optional<sup>465</sup> nature of the establishment of disease-free zones and their form under the Terrestrial Code, and the further clarification in Article 5.3.7 that different

<sup>462</sup> OIE response to Panel question No. 26. (emphasis original)

<sup>463</sup> Dr Thiermann's response to Panel question No. 34, para. 4.35.

<sup>464</sup> As the OIE explained: "The article does not provide explicit guidance on how to *establish* the subpopulation. Rather, it refers the reader to other parts of the Code, e.g:

In Article 5.3.7.1(b): 'The exporting country describes in the biosecurity plan for the zone the measures which are being, or will be, applied to distinguish such an area epidemiologically from other parts of its territory, *in accordance with the recommendations in the Terrestrial Code.*' (ital. added for emphasis)" OIE responses to Panel question No. 6 (emphasis original).

<sup>465</sup> See also Dr Thomson's response to Panel question No. 31, para. 4.19 of the Compilation of the experts' responses, where he opines that "how a country manages risk associated with ASF need not concern

processes may be used for the recognition of such zones between trading partners, we examine whether Russia's measures amount to a "fundamental departure" from, that is, they contradict, the regionalization and trade provisions of the Terrestrial Code. This will be the basis to reach a conclusion as to whether or not the measures are "based on" the relevant international standard within the meaning of Article 3.1.

#### **7.5.1.3.5 Whether the EU-wide ban is "based on" the standards contained in the Terrestrial Code in respect of non-treated products**

7.327. With these considerations in mind, we read the provisions in Volumes I and II of the Terrestrial Code together. In our view, the text of Chapter 15.1, read in conjunction with the general obligations on zoning and compartmentalization in Article 4.3.2, and the sequence of steps set out in Article 5.3.7, indicates that the import recommendations contained therein are not only intended for country-wide purposes, but are intended to apply to zones and compartments. The application by an importing Member of the product-specific recommendations to zones or compartments presupposes that the exporting Member has established such zones or compartments within its territory according to the Terrestrial Code (in this case, Articles 4.3.3 and 15.1.2-4).<sup>466</sup> If an exporting country does so, Chapter 15.1 envisages that the importing Member will allow the importation from that zone or compartment subject to the specific recommendations therein. This means that the Terrestrial Code envisages that importing Members, when applying measures to address the risk of entry, establishment or spread of ASF, will recognize that if an exporting Member is not entirely free of ASF, it may have zones or compartments that are ASF-free where these have been properly established by the exporting Member.

7.328. In our view, the particular structure and nature of the relevant international standard applicable to trade in non-treated pork and pig products, as enshrined in the provisions of the Terrestrial Code already examined, have clear parallels with the substantive obligations Members have in the context of Article 6 of the SPS Agreement. The Appellate Body has observed that Article 6 establishes, through its three paragraphs, a series of obligations regarding the adaptation of SPS measures to regional conditions.<sup>467</sup> Among the characteristics to which a Member has the obligation to adapt its SPS measures are "pest-or disease-free areas". This is clearly indicated in the title of Article 6 (Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence) and in the text of Articles 6.2 and 6.3, which refer to "disease-free areas". Furthermore, according to Annex A(6) of the SPS Agreement a disease-free area is an "area, whether all of a country, part of a country, or all parts of several countries, as identified by the competent authorities, in which a specific ... disease does not occur". The Glossary of the Terrestrial Code defines a free zone as one in "which the absence of the disease under consideration has been demonstrated by the requirements specified in the Terrestrial Code for free status being met. Within the zone and at its borders, appropriate official veterinary control is effectively applied for animals and animal products, and their transportation."<sup>468</sup> In our view, both definitions refer to the same substantial question, whether a disease is present in a particular area.

7.329. We recall that Russia's alternative defence that the EU-wide ban is "based on the OIE standard to the extent possible" is largely grounded on Russia's argument that it "objectively decided not to recognise"<sup>469</sup> the ASF-free zones identified by the European Union. In our view, this clearly touches upon the parties' arguments in respect of Article 6.3 of the SPS Agreement.

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an importer as long as the overall risk is effectively managed and the exporting country certifies that the TAHG standards for the commodity or product in question have been fulfilled".

<sup>466</sup> We find support for this approach in Panel Report, *US – Animals*, para. 7.249 ("[t]he application by an importing Member of the product-specific recommendations to zones or compartments presupposes that the exporting Member has established such zones or compartments within its territory according to the Terrestrial Code (in this case Articles 4.3.3 and 8.5.4)"); and in Panel Report, *India – Agricultural Products*, para. 7.262 ("the application by an importing country of the product-specific recommendations to zones or compartments presupposes that the exporting country has established such zones or compartments within its territory according to the Terrestrial Code.").

<sup>467</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.131.

<sup>468</sup> Glossary, Terrestrial Code, p. iv (Exhibit RUS-32).

<sup>469</sup> See e.g. Russia's second written submission, section II.A.3.

7.330. We have examined the meaning of the relevant international standards applicable to non-treated products in the light of the parties' arguments and the circumstances in this dispute. We conclude that before comparing the EU-wide ban with those standards for the purposes of determining whether that measure is "based on" them, it is appropriate and instructive for us to turn to our examination of the European Union's claims under Article 6 of the SPS Agreement.

7.331. We note that this approach is appropriate in the circumstances of the present case, where our conclusions under Article 3.1 of the SPS Agreement will have no impact on the complainant's burden of proof in respect of claims brought under other provisions of the SPS Agreement (i.e. Article 6). That would not be the case when a panel is faced with examining a justification that the challenged measures "conform to" the relevant international standard pursuant to Article 3.2, because an affirmative finding of such justification would raise a presumption of consistency with the relevant provisions of the SPS Agreement and of the GATT 1994.<sup>470</sup>

7.332. Therefore, we will suspend our analysis of the parties' claims under Article 3 in respect of the EU-wide ban to examine such measure under Article 6. Following our analysis of the consistency of the EU-wide ban with Article 6 we will resume our analysis of whether that measure is "based on" the relevant international standard and provide our findings in that respect. We now turn to examine the European Union's claims under Article 6 in respect of the EU-wide ban.

## 7.5.2 Claims under Articles 6.1, 6.2, and 6.3 of the SPS Agreement

### 7.5.2.1 Main arguments of the parties

#### 7.5.2.1.1 European Union

7.333. The European Union argues that instead of "provisionally" complying with the terms of the veterinary certificates, as Russia contends it is doing, Russia was under an obligation to *adapt* its measures to the sanitary characteristics from which the products at issue originate and to which they are destined.<sup>471</sup>

7.334. The European Union claims that the EU-wide ban is inconsistent with Articles 6.1 and 6.2 of the SPS Agreement, because Russia has not ensured, and does not ensure, that the EU-wide ban is adapted to the sanitary characteristics of the area from which the products at issue originate and to which they are destined. The European Union further contends that the EU-wide ban failed to take into account, *inter alia*, the level of prevalence or absence of ASF, the existence of eradication and control programs in the affected EU member States (immediately implemented in accordance with international standards laid down by the OIE), and appropriate criteria or guidelines developed by the relevant international organizations.<sup>472</sup>

7.335. Regarding the first sentence of Article 6.2, the European Union argues that Russia failed to recognize the concepts of disease-free areas with respect to ASF in the European Union.<sup>473</sup> The European Union claims that this is evidenced by Russia's application of an indiscriminate EU-wide ban.<sup>474</sup> Regarding the second sentence of Article 6.2, the European Union further argues that these bans were applied without taking into account relevant factors such as geography, ecosystems, epidemiological surveillance and the effectiveness of sanitary controls.<sup>475</sup> The European Union claims that given its large geographical territory, the geographical factor must be taken into account and highlights its control measures in this regard. The European Union outlines the various steps taken to control ASF in live pigs and wild boars.<sup>476</sup>

7.336. The European Union submits that with respect to Article 6.3, it has provided Russia with information beyond what is necessary for objectively demonstrating that disease-free areas or

<sup>470</sup> See Appellate Body Report, *EC – Hormones*, paras. 102 and 170.

<sup>471</sup> European Union's second written submission, para. 95.

<sup>472</sup> European Union's first written submission, para. 216.

<sup>473</sup> European Union's first written submission, para. 215.

<sup>474</sup> European Union's first written submission, para. 210.

<sup>475</sup> European Union's first written submission, para. 210.

<sup>476</sup> European Union's first written submission, paras. 211-214.

areas of low disease prevalence are and are likely to remain disease-free areas or areas of low disease prevalence, respectively.<sup>477</sup>

#### 7.5.2.1.2 Russia

7.337. Russia argues that, taking into consideration the very factors listed in Article 6.1 of the SPS Agreement, it objectively and reasonably did not accept the European Union's zones.<sup>478</sup> Russia asserts that in evaluating whether there is an objective basis for Russia's decision not to recognize the proposed ASF-free zones in conformity with the applicable Terrestrial Code standards and consistent with Article 6 of the SPS Agreement, the Panel must determine whether Russia's decision regarding the various European Union zones was "objectively justifiable". Russia stresses that in conducting that review, the Panel must not substitute its own judgement of the weight to be given to certain evidence for that given by the importing country. Rather, it must determine whether the totality of the circumstances and evidence (or lack thereof) was sufficient to support the objectivity of Russia's decision in light of the relevant provisions of the Terrestrial Code and SPS Agreement Article 6 criteria and the available information.<sup>479</sup> Russia further argues that if the Panel finds that Russia was objectively justified in not accepting the EU zones in conformity with the Terrestrial Code zoning/regionalization standards, recommendations, and guideline benchmarks, it should also find that it acted consistently with Article 6 of the SPS Agreement.<sup>480</sup>

7.338. Russia responds to the European Union's claim under the first sentence of Article 6.2 of the SPS Agreement by contending that the obligation contained therein to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence relates to an abstract idea and is not linked to specific areas of a given exporting Member.<sup>481</sup> Russia accordingly draws the attention of the Panel to existing Customs Union legislation - specifically, Customs Union Decision No. 317 - which, Russia asserts, recognizes the concept of disease-free areas in the abstract and explicitly recognizes the concept of disease-free areas as applied to ASF.<sup>482</sup> In addition, Russia refers to the 2006 Memorandum between the European Union and Russia which includes provisions aimed at applying the principles of zoning and regionalization in the international movement of animals and products of animal origin between EU member States and Russia.<sup>483</sup> On this basis, Russia argues that clearly, Russia recognizes the concept of disease-free areas not only in the abstract as required under Article 6.2 of the SPS Agreement, but also specifically as applied to ASF and as applied with respect to the European Union.<sup>484</sup> Russia further argues, specifically in respect of the EU-wide ban, that the language of the agreed veterinary certificates considers the concept of disease-free areas.<sup>485</sup>

7.339. Russia argues that the European Union has failed to objectively demonstrate to Russia that the alleged ASF-free areas in the four infected EU Member States "are, and are likely to remain, pest- or disease-free areas", in accordance with Article 6.3 of the SPS Agreement.<sup>486</sup> In Russia's view, the European Union has failed to effectively establish ASF containment zones in accordance with the OIE guidelines and therefore the entirety of the four infected EU member States should be considered ASF-infected.<sup>487</sup> Russia argues that the European Union failed to provide timely, comprehensive and accurate information relevant for assessing its zones and ASF-control measures inconsistently with Article 6.3 of the SPS Agreement and Terrestrial Code Article 5.3.7. Furthermore, the European Union withheld national eradication plans from Russia until March 2015 and May 2015 despite acknowledging that these reports contain highly relevant information.<sup>488</sup>

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<sup>477</sup> European Union's first written submission, para. 218.

<sup>478</sup> Russia's first written submission, para. 231.

<sup>479</sup> Russia's second written submission, para. 49. See also response to Panel question No. 113, paras. 190-196.

<sup>480</sup> Russia's second written submission, para. 56.

<sup>481</sup> Russia's first written submission, para. 222.

<sup>482</sup> Russia's first written submission, para. 223 and 224 (referring to Exhibit-RUS 25).

<sup>483</sup> Russia's first written submission, para. 225.

<sup>484</sup> Russia's first written submission, para. 225.

<sup>485</sup> Russia's first written submission, para. 411.

<sup>486</sup> Russia's first written submission, para. 236.

<sup>487</sup> Russia's first written submission, para. 237.

<sup>488</sup> See Russia's second written submission, paras. 58-77.

### 7.5.2.2 Main arguments of the third parties

#### 7.5.2.2.1 Australia

7.340. Australia asserts that it agrees with Russia that the first sentence of Article 6.2 of the SPS Agreement requires only the recognition of the *concept of* "pest- or disease-free areas and areas of low pest or disease prevalence". Australia however, also stresses that the Appellate Body in *India - Agricultural Products* held that "to comply with Article 6.2, SPS measures adopted by WTO Members must at a minimum not deny or contradict the recognition of the concepts of such areas when these concepts are relevant with respect to the disease at issue".<sup>489</sup>

7.341. Australia emphasizes that it will be necessary for the Panel to determine whether Russia's measures, notified or otherwise, operate in a manner such as to deny or contradict the recognition of such areas. Such a finding may be informed by the Panel's other findings under Article 3 and Article 5 of the SPS Agreement.<sup>490</sup>

#### 7.5.2.2.2 Brazil

7.342. Brazil argues that the main question under discussion in this topic is whether it is possible to rightfully impose an import prohibition (country and/or EU-wide ban) if the importing Member considers that the measures adopted by the exporting Member were not sufficient to establish disease- or pest-free zones or compartments.<sup>491</sup>

7.343. Brazil asserts that adaptation to regional conditions in the context of Article 6.1 of the SPS Agreement entails taking into account, *inter alia*, appropriate criteria or guidelines which may be developed by the relevant international organizations.<sup>492</sup>

7.344. Brazil argues that a Member has the right to consider that the measures adopted by another Member are not satisfactory for the determination of the containment zone, if (i) there was no conformity with the standard in the sense of Article 3.2 or (ii) the level of protection sought by the importing Member is higher than the one established by the standard. In Brazil's view, if an importing Member considers that the measures adopted by the exporting Member do not conform to the international standard in the sense that the measures adopted do not "embody the international standard completely", then there could be a basis for the establishment of an import prohibition. On the other hand, a Member may choose to adopt a higher level of protection and decide that the mechanism established by the exporting country is not sufficient according to its own appropriate level of protection. Brazil points out that if this is the case, a risk assessment to provide scientific justification must be elaborated to justify the SPS measure.<sup>493</sup>

#### 7.5.2.2.3 Norway

7.345. Norway argues that in examining the claims relating to regionalization, the Panel should first assess whether Russia properly has recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, and whether any determination of such areas is based on relevant factors, including geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary and phytosanitary control. Second, the panel should assess whether Russia has ensured that the measures at issue are adapted to the SPS characteristics of the affected area, as set out in Article 6.1. According to the second sentence of this provision, the Panel should consider whether Russia in its assessment of the SPS characteristics of a region, has taken into account relevant factors, such as the level of prevalence of ASF, the existence of eradication and control programmes, and appropriate criteria or guidelines developed by the relevant international organizations.

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<sup>489</sup> Australia's third-party submission, para. 19 (citing Panel Report, *India – Agricultural Products*, para. 7.698).

<sup>490</sup> Australia's third-party submission, para. 20.

<sup>491</sup> Brazil's third-party submission, para. 4.

<sup>492</sup> Brazil's third-party submission, para. 5.

<sup>493</sup> Brazil's third-party submission, paras. 7-9.

7.346. Norway emphasizes that that a finding that the respondent party has not recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, will lead to a finding that this party has not ensured that its measures are adapted to the SPS characteristics of those areas pursuant to the first sentence of Article 6.1, and that conversely, where there is a finding that the respondent party *has* recognised these concepts, a consideration must be undertaken, of whether this party has ensured that its measures are adapted to the SPS characteristics of the affected areas and whether it took into account relevant factors when assessing the SPS characteristics of a region, consistent with Article 6.1.<sup>494</sup>

#### 7.5.2.2.4 United States

7.347. The United States argues that the provisions of Article 6 contain separate but inter-related obligations that must be read together in context. The United States emphasizes that while the first sentence of Article 6.1 of the SPS Agreement imposes an obligation with respect to measures, the first sentence of Article 6.2 requires recognition of concepts, i.e. pest- or disease-free areas and areas of low pest or disease prevalence.<sup>495</sup>

7.348. The United States highlights that neither the obligations in the first sentence of Article 6.2 of the SPS Agreement, nor those in Article 6.1, arise only following a request under Article 6.3 to recognize a specific area as a pest- or disease-free area or area of low pest or disease prevalence.<sup>496</sup>

#### 7.5.2.3 Analysis by the Panel

##### 7.5.2.3.1 Introduction

7.349. The issues before the Panel are whether the EU-wide ban is consistent with Articles 6.1 and 6.2 of the SPS Agreement, and whether the European Union has satisfied the requirements of Article 6.3 of the SPS Agreement in respect of the EU-wide ban.

7.350. We now look at these legal provisions.

##### 7.5.2.3.2 The legal provisions at issue

7.351. Article 6 of the SPS Agreement states:

*Article 6*

*Adaptation to Regional Conditions, Including Pest- or Disease- Free Areas and Areas of Low Pest or Disease Prevalence*

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.

<sup>494</sup> Norway's third-party submission, paras. 27-30.

<sup>495</sup> United States' third-party submission, paras. 3-6.

<sup>496</sup> United States' third-party submission, paras. 7-11.

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.

7.352. Annex A(6) and A(7) of the SPS Agreement set forth the definitions of "pest- or disease-free areas" and "areas of low pest or disease prevalence", respectively, as:

6. Pest- or disease-free area – An 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.

NOTE: A pest- or disease-free area may surround, be surrounded by, or be adjacent to an area – whether within part of a country or in a geographic region which includes parts of or all of several countries – in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.

7. Area of low pest or disease prevalence – An 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.

7.353. The Appellate Body observed in *India – Agricultural Products* that Article 6 of the SPS Agreement establishes, through its three paragraphs, a series of obligations regarding the adaptation of SPS measures to regional conditions. The Appellate Body started by noting:

[B]oth the title of this provision and the first sentence of Article 6.1 refer to the requirement to "adapt" SPS measures to certain regional conditions. Whereas the title speaks more generally of "Adaptation to Regional Conditions", the first sentence of Article 6.1 imposes on WTO Members a specific obligation to 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. Moreover, we observe that, among the regional conditions in respect of which adaptation is envisaged, the title to Article 6 refers to "Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence". We see a link between this language and the second sentence of Article 6.1, which identifies the "level of prevalence of specific diseases or pests" as one of the relevant SPS characteristics of a region in respect of which adaptation is envisaged. Similarly, the reference to "Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence" in the title of Article 6 is also directly connected with the second and third paragraphs of this provision, which deal explicitly with these types of areas.<sup>497</sup>

7.354. The first sentence of Article 6.1 stipulates that "Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area ... from which the product originated and to which the product is destined." In relation to the text of the first sentence of Article 6.1, the Appellate Body observed:

The verb "ensure" is defined as to make certain the occurrence of a situation or outcome.<sup>498</sup> In turn, the term "adapt" means "fit, adjust, (to); make suitable (to or

<sup>497</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.131.

<sup>498</sup> (footnote original) Relevant definitions of the term "ensure" are "guarantee, warrant" and "make certain the occurrence of (an event, situation, outcome, etc.) (Foll. by *that*)". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 840)

for)".<sup>499</sup> Two areas are relevant to the obligation in the first sentence of Article 6.1: the area from which the product originated and the area to which the product is destined. Article 6.1 indicates that the term "area" encompasses "all of a country, part of a country, or all or parts of several countries". The "areas" that are relevant for purposes of Article 6.1 can therefore vary, and may entail a territory that can be smaller than, the same size as, or bigger than, a country. We observe that, pursuant to the first sentence of Article 6.1, a Member's obligation to ensure adaptation applies in respect of "SPS measures" in the plural, suggesting that it applies generally, as well as in connection with each specific SPS measure maintained by a Member. Furthermore, the use of the present tense "are adapted", and the absence of any language limiting the temporal scope of application of this obligation, suggest that the obligation in Article 6.1 does not apply only at one specific point in time (e.g. when an SPS measure is adopted), but is, instead, an ongoing one. Indeed, both the notion of "adaptation", as well as the fact that the relevant SPS characteristics of regions may fluctuate<sup>500</sup>, point to an obligation that is not static, but rather ongoing, requiring that SPS measures be adjusted over time so as to establish and maintain their continued suitability in respect of the relevant SPS characteristics of the relevant areas. We also see 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.<sup>501</sup>

7.355. In relation to the text of the first sentence of Article 6.2, the Appellate Body stated:

The first sentence of Article 6.2 establishes that "Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence."<sup>502</sup> We observe that the use of the words "in particular" in the first sentence of Article 6.2 underscores the link between Articles 6.1 and 6.2. Similarly, the title to Article 6, which refers to "Adaptation to Regional Conditions *Including* Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence"<sup>503</sup>, read together with the first sentence of Article 6.1, indicates that "pest- or disease-free areas" and "areas of low pest or disease prevalence" are a subset of all the SPS characteristics of an area that may call for the adaptation of an SPS measure. We read the words "in particular", together with the title to Article 6, as underlining the interlinkages between the first and second paragraphs of Article 6. More specifically, we consider that these elements point to 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. These considerations, in our view, indicate that, together, Articles 6.1 and 6.2 accord prominence to the content of Article 6.2 as one particular way through which a Member can ensure that its SPS measures are "adapted", as required by Article 6.1.<sup>504</sup>

7.356. The Appellate Body then went on to note that the structure of the first two paragraphs of Article 6 is similar in certain respects. Each has two sentences, and in each paragraph the nature of the obligation under the first sentence is more general than under the second sentence. The first sentence of Article 6.2 establishes the obligation to recognize "the concepts of pest- or

<sup>499</sup> (footnote original) *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 24.

<sup>500</sup> (footnote original) Thus, for example, a pest may be introduced into an area where it was not previously present, or there may be an outbreak of a disease in an area that was previously disease free. Alternatively, pests or diseases may be eradicated in specific areas.

<sup>501</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.132.

<sup>502</sup> (footnote original) Paragraph 6 of Annex A to the SPS Agreement defines the term "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." Paragraph 7 of Annex A, in turn, defines the term "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."

<sup>503</sup> (footnote original) Emphasis added.

<sup>504</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.133.



disease-free areas and areas of low pest or disease prevalence". Neither of the first sentences of Article 6.1 or Article 6.2 is explicitly linked to a specific assessment or determination. Rather, the first sentence of Article 6.1 speaks of an obligation to "ensure" adaptation in respect of SPS measures generally, and the first sentence of Article 6.2 refers to a general obligation to "recognize" the "concepts" listed therein.<sup>505</sup> The Appellate Body continued:

In turn, the second sentences of Articles 6.1 and 6.2 both identify how a specific action is to be taken. The second sentence of Article 6.1 specifies, in a non-exhaustive manner, the elements that Members must take into account in assessing the SPS characteristics of a region. These elements include: the level of prevalence of specific diseases or pests; the existence of eradication or control programmes; and appropriate criteria or guidelines that may be developed by the relevant international organizations. The second sentence of Article 6.2 indicates how the specific action of determining the existence of "such areas" (that is, pest- or disease-free areas and areas of low pest or disease prevalence) is to be taken. This sentence establishes that the following factors must be used as a basis for making such a determination: geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls. Thus, the second sentences of Article 6.1 and of Article 6.2, respectively, identify how a Member is required to "assess" the SPS characteristics of a region and "determine" pest- or disease-free areas and areas of low pest or disease prevalence.<sup>506</sup>

7.357. The Appellate Body emphasized the existence of important common elements throughout Article 6, which reveal the interlinkages that exist among the paragraphs of this provision. All three paragraphs of Article 6 are interconnected, addressing different aspects of the obligation to adapt SPS measures to regional conditions. The main and overarching obligation under Article 6 for a Member to ensure that its SPS measures are adapted to regional SPS characteristics is set out under the first sentence of Article 6.1. In turn, the remainder of Article 6 elaborates on the specific aspects of such obligation, notably, with respect to pest- or disease-free areas and areas of low pest or disease prevalence, as well as the respective duties that apply to importing and exporting Members in this connection.<sup>507</sup>

7.358. Article 6.3 refers to a situation that is distinct from those in Articles 6.1 and 6.2. It is not addressed to Members generally, as are the first two paragraphs of Article 6. Rather, Article 6.3 relates to the particular situation where an exporting Member is claiming that an area within its territory is a pest- or disease-free area or an area of low pest or disease prevalence. This provision specifies what must be objectively demonstrated by an exporting Member seeking recognition of a specific area within its territory as a pest- or disease-free area or an area of low pest or disease prevalence through the provision of the necessary evidence. The Appellate Body in *India – Agricultural Products* has indicated that, through the phrase "[f]or this purpose", Article 6.3 also stipulates, in its second sentence, that such Member must allow the importing Member adopting or maintaining an SPS measure to have access to its territory for the purpose of verifying such demonstration.<sup>508</sup> Like Article 6.2, Article 6.3 relates to pest- or disease-free areas and areas of low pest or disease prevalence, which are a subset of the SPS characteristics that are relevant under Article 6.1.

7.359. The Appellate Body has clarified, in respect of the relationship between Articles 6.1 and 6.3, that while it agreed that there was "no explicit conditional language linking Article 6.1 and Article 6.3", it emphasized the need for Article 6.1 and the remainder of Article 6 to be read together.<sup>509</sup> The Appellate Body has observed that, depending on the nature of the claims raised and the circumstances of the case, a panel may be called upon to scrutinize whether a Member has determined that a specific area is free of disease and adapted its SPS measures accordingly. While 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<sup>510</sup>, the

<sup>505</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.134.

<sup>506</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.135.

<sup>507</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.141.

<sup>508</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.140.

<sup>509</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.155.

<sup>510</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.157.

scrutiny by the panel may involve examining whether the importing Member received a request from an exporting Member to recognize an area within its territory as "disease-free". In such cases, an exporting Member may 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.<sup>511</sup> The Appellate Body indicated that

[A]n exporting Member claiming, for example, 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.

This is not to suggest, as India does, 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. Indeed, as noted above, 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. Moreover, as noted above, 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. We also observe that Article 6.1 expressly identifies "criteria or guidelines" developed by relevant organizations as relevant for the assessment of the SPS characteristics of regions, which suggests that, under certain circumstances, the adaptation of an SPS measure to regional SPS characteristics may be accomplished by taking into account relevant criteria and guidelines developed by such organizations, if any. Finally, we recall 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. All of these considerations reinforce 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. For these reasons, we agree with the Panel that "the obligations in Articles 6.1 and 6.2 are not triggered by an invocation of Article 6.3, as argued by India".<sup>512</sup>

7.360. The panel in *US – Animals* also found that once the importing Member determines that the area subject to the exporting Member's claim is pest- or disease-free or of low pest or disease prevalence, it is required to "adapt" its measure to the pest- or disease status of that area. In this regard, the importing Member "shall take into account", besides pest- or disease-prevalence, the other factors listed in the second sentence of Article 6.1.<sup>513</sup> While the panel in *US – Animals* also indicated that the obligations in Articles 6.1 and 6.2 are not necessarily contingent on the actions of the exporting Member under Article 6.3, the panel took the view that "in some circumstances the ability of the importing Member to adapt a measure under Article 6.1 is dependent on the exporting Member's compliance with Article 6.3".<sup>514</sup>

7.361. In respect of the exporting Member's obligation to comply with the specific provisions set out in Article 6.3 of the SPS Agreement, the panel in *US—Animals* stated:

Article 6.3 recognizes that, in certain cases, exporting Members are well if not best placed to gather information about the SPS conditions of geographical areas located within their territories, and that, without their cooperation, the "objective demonstration" of the pest- or disease status of the areas concerned to the importing

<sup>511</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.156.

<sup>512</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.156-5.157. (footnotes omitted)

<sup>513</sup> Panel Report, *US – Animals*, para. 7.661.

<sup>514</sup> Panel Report, *US – Animals*, para. 7.664.

Member may prove impossible. Furthermore, it would not be logical to expect an importing Member to necessarily adapt its measures to the disease statuses of any and all areas, regions or parts of countries the world over absent solicitation or provision of relevant information on the part of the exporting Members wishing to obtain market access.<sup>515</sup>

7.362. The panel in *US – Animals* also determined that in the case where an importing Member has an appropriate regulatory framework in place, the exporting Member may submit a claim that specific areas within its territory are pest- or disease-free or of low pest or disease prevalence. The panel determined that Article 6.3 "contemplates an exchange of information between the exporting and importing Members, whereby the former provides evidence concerning the pest or disease status of areas located within its territory, and the latter evaluates such information with a view to adapting its measure to the SPS characteristics of the areas concerned."<sup>516</sup> Furthermore, the panel in *US – Animals* highlighted the obligation of the exporting Member to not only objectively demonstrate that areas within its territory are pest- or disease-free or of low pest or disease prevalence at a given point in time, but also that such areas are "likely to remain" in the same pest- or disease-condition.<sup>517</sup>

#### 7.5.2.3.3 Order of analysis of claims under Article 6

7.363. We note that the panel in *India – Agricultural Products* found it appropriate to begin its analysis of the consistency of the respondent's measures with Article 6, by focusing on Article 6.2 and then Article 6.1 of the SPS Agreement. The panel further interpreted Article 6.2 such that a finding that a Member has failed to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence as required by the first sentence of Article 6.2, leads inevitably to a finding that such Member has also failed to determine those areas based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.<sup>518</sup> We consider that the factual pattern in that dispute is different from the one in this dispute. In particular, we note that in *India – Agricultural Products* the United States had not raised claims in respect of certain areas of its territory being free of avian influenza, rather it focused on the fact that India's measures precluded recognition of disease-free areas or areas of low disease prevalence.<sup>519</sup>

7.364. In the instant case, the European Union indicates that it formally requested Russia to recognize the ASF-disease-free status of regions other than where ASF outbreaks have occurred.<sup>520</sup> The evidence on record indicates that the European Union submitted a request for the recognition of a particular disease-free area(s) to Russia, and subsequently insisted that Russia accepts this request.<sup>521</sup> The European Union sent letters to the competent authorities in Russia, seeking acceptance of the sanitary status of the EU member States and their regions on 31 January 2014.<sup>522</sup> In its letter to Russia, the European Union indeed requested "the Competent Authorities of the Russian Federation to accept the ASF-free sanitary status of EU Member States (and their regions under the principle of regionalization) and the animal health standards for international trade in live pigs and pig products in line with the sanitary and trade standards and criteria of the OIE and the memorandum between the EC and the RF concerning the principles of zoning and regionalization in the veterinary field of 2006".<sup>523</sup> While Russia does not dispute that the European Union submitted such a request, it asserts that the European Union did not submit the "necessary evidence" to adequately or appropriately substantiate its request within the

<sup>515</sup> Panel Report, *US – Animals*, para. 7.664.

<sup>516</sup> Panel Report, *US – Animals*, para. 7.659.

<sup>517</sup> Panel Report, *US – Animals*, para. 7.649.

<sup>518</sup> Panel Report, *India – Agricultural Products*, para. 7.689.

<sup>519</sup> Panel Report, *India – Agricultural Products*, para. 7.693.

<sup>520</sup> European Union's response to Panel question No. 133, para. 279.

<sup>521</sup> European Union's opening statement at the first meeting of the Panel, para. 109 (referring to European Union's letter of 31 January 2014, ARES(2014)226547, SANCO G7/JP/mh(2014)241111 (Exhibit EU-64)). See also Exhibits EU-65, EU-85, EU-86, EU-173, EU-91, EU-92, EU-94, RUS-154, and RUS-319.

<sup>522</sup> European Union's letter of 31 January 2014, ARES(2014)226547, SANCO G7/JP/mh(2014)241111 (Exhibit EU-64).

<sup>523</sup> European Union's letter of 31 January 2014, ARES(2014)226547, SANCO G7/JP/mh(2014)241111 (Exhibit EU-64).

meaning of Article 6.3, and subsequent requests in light of subsequent outbreaks of the disease, and that, consequently, the European Union's claims under Articles 6.1 and 6.2 must fail.<sup>524</sup>

7.365. The Panel considers that it may be difficult indeed for any exporting country to seek recognition of a disease-free area in the absence of a regulatory scheme in the importing country that permits the recognition of such a concept. Therefore, the Panel first examines whether Russia recognizes the concept of disease-free areas within the meaning of Article 6.2 of the SPS Agreement. Should we find that Russia recognizes such a concept, we will proceed to examine whether the European Union provided the necessary evidence thereof 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 of the SPS Agreement. Informed by the Panel's findings on this issue, the Panel will continue by considering 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.

#### **7.5.2.3.4 Whether Russia recognizes the concept of pest – or disease-free areas and areas of low pest or disease prevalence pursuant to the first sentence of Article 6.2**

7.366. We turn to the European Union's claim that Russia acted inconsistently with the first sentence of Article 6.2 of the SPS Agreement by failing to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.<sup>525</sup>

7.367. Article 6 does not specify any particular manner in which a Member must "recognize" the concepts set out in Article 6.2.<sup>526</sup> The first sentence of Article 6.2 does not prescribe whether a Member's recognition of the relevant concepts must be done in writing through a formal governmental act, or whether it may be accomplished in some other manner.<sup>527</sup> From this, the Appellate Body surmised:

We consider that the fact that Article 6 does not prescribe the particular manner by which Members must "ensure" adaptation of their SPS measures or "recognize" the relevant concepts suggests that Members enjoy a degree of latitude in determining how to do so within their domestic SPS regime. Accordingly, assessing whether or not a Member has complied with the obligations in Articles 6.1 and 6.2 will necessarily be a function of the nature of the claims raised by the complainant and the circumstances of each case. This may involve scrutiny of the specific steps and acts that the Member has or has not taken in the light of the SPS characteristics of the relevant areas, which may include pest- or disease-free areas or areas of low pest or disease prevalence, as well as of broader aspects of the importing Member's regulatory regime, if any, governing SPS matters. The second sentence of Article 6.1 also points to the relevance of appropriate criteria and guidelines developed by relevant international organizations to the obligation set out in that paragraph. We note, in this regard, that the Panel appears rightly to have acknowledged that the fact that a relevant international organization has determined that the concepts of pest- or disease-free areas and areas of low pest or disease prevalence are, or are not, relevant with respect to a specific pest or disease may have a bearing on the assessment of a Member's compliance with Article 6 with respect to such pest or disease.<sup>528</sup> This, too, underscores the case-specific nature of assessing whether a Member has complied with its Article 6 obligations.

While the assessment of the consistency of a Member's SPS measure with Articles 6.1 and 6.2 will be a function of the claims brought by the complainant and the circumstances of each particular case, it is nevertheless clear that compliance with the obligations in Articles 6.1 and 6.2 will be facilitated in circumstances where WTO Members put in place a regulatory scheme or structure that accommodates adaptation

<sup>524</sup> Russia's second written submission, paras. 131-132.

<sup>525</sup> European Union's second written submission, paras. 89-93.

<sup>526</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.136.

<sup>527</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.136; and Panel Report, *India – Agricultural Products*, para. 7.698.

<sup>528</sup> (footnote original) Panel Report, fn 1217 to para. 7.698.

of SPS measures on an ongoing basis.<sup>529</sup> Furthermore, notwithstanding the circumstance-specific nature of the inquiries under Articles 6.1 and 6.2, we agree with the Panel's observation that SPS measures or regulatory schemes that explicitly foreclose the possibility of recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence cannot, when these concepts are relevant with respect to the diseases addressed by such SPS measures, be found to be consistent with Article 6.2.<sup>530</sup>

The interlinkages between Articles 6.1 and 6.2 of the SPS Agreement, in turn, illuminate the close nexus between a Member's satisfaction of the obligation to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence set out in Article 6.2, on the one hand, and its satisfaction of the obligation to ensure that its SPS measures are adapted to the relevant SPS characteristics within the meaning of Article 6.1, on the other hand. More specifically, in a situation where pest- or disease-free areas or areas of low pest or disease prevalence are relevant, a Member may be required to recognize the concepts of these areas not only by virtue of the express obligation in Article 6.2, but also so as to be in a position properly to "assess" the SPS characteristics of relevant areas under the second sentence of Article 6.1, and ultimately ensure, as required under the first sentence of Article 6.1, that its SPS measures are adapted accordingly.<sup>531</sup>

7.368. Mindful of these considerations, we recall that Russia responds to the European Union's claim under the first sentence of Article 6.2 of the SPS Agreement by contending that the obligation contained therein to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence relates to an abstract idea and is not linked to specific areas of a given exporting Member.<sup>532</sup> Russia accordingly draws the attention of the Panel to existing Customs Union legislation - specifically, Customs Union Decision No. 317 – which, Russia asserts, recognizes the concept of disease-free areas in the abstract and explicitly recognizes the concept of disease-free areas as applied to ASF.<sup>533</sup> In addition, Russia refers to the 2006 Memorandum between the European Union and Russia which includes provisions aimed at applying the principles of zoning and regionalization in the international movement of animals and products of animal origin between EU member States and Russia.<sup>534</sup> On this basis, Russia argues that clearly, Russia recognizes the concept of disease-free areas not only in the abstract as required under Article 6.2 of the SPS Agreement, but also specifically as applied to ASF and as applied with respect to the European Union.<sup>535</sup> Russia further argues, specifically in respect of the EU-wide ban, that the language of the agreed veterinary certificates considers the concept of disease-free areas.<sup>536</sup>

7.369. Turning to the evidence proffered by Russia in support of its contention that its SPS regulatory framework recognizes the concept of "regionalization" in the abstract, we note that Customs Union Decision No. 317 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"; and that "Regionalization is carried out in accordance with the recommendations of the World Organization for Animal Health (hereinafter referred to as 'OIE')(as amended by Decision of the Customs Union Commission No 830 of 18 October 2011)".<sup>537</sup>

<sup>529</sup> (footnote original) This would be the case, for example, where a Member has established a mechanism for recognition of specific pest- and disease-free areas and areas of low pest and disease prevalence upon a properly substantiated request being made by an exporting Member seeking such recognition and allowing verification of the same.

<sup>530</sup> (footnote original) Panel Report, para. 7.698.

<sup>531</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.137-5.139.

<sup>532</sup> Russia's first written submission, para. 222.

<sup>533</sup> Russia's first written submission, para. 223 and 224 (referring to Exhibit-RUS 25).

<sup>534</sup> Russia's first written submission, para. 225.

<sup>535</sup> Russia's first written submission, para. 225.

<sup>536</sup> Russia's first written submission, para. 411. See also second written submission, paras. 215-218.

<sup>537</sup> Section on "Terms used in the Common Veterinary (Veterinary and Health) Requirements" of Customs Union Decision No. 317 (Exhibit RUS-25), p. 1.

7.370. Moreover, Customs Union Decision No. 317 comprises chapters containing veterinary requirements applicable to imports of a number of goods into the Customs Union territory. For instance, 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."<sup>538</sup> All the chapters of Customs Union Decision No. 317 that refer to the products at issue include reference to the ASF situation necessary for accepting imports of the respective products.<sup>539</sup> For each of the products, the requirement clearly states "in the territory of the country or administrative territory." (emphasis added)

7.371. On the basis of the evidence on record, we find that Russia's SPS ASF-related regulatory framework set out in Customs Union Decision No. 317, did, and continues to, expressly recognize the concept of regionalization and the possibility for regionalization to be considered and carried out. Moreover, the 2006 Memorandum between the European Union and Russia includes provisions aimed at applying the principles of zoning and regionalization in the international movement of animals and products of animal origin between EU member States and Russia<sup>540</sup>, and the bilateral veterinary certificates also contain language recognizing the concept of regionalization in trade between Russia and the European Union.<sup>541</sup> In particular, most of the bilaterally agreed veterinary certificates, referring to the veterinary requirements contained in each certificate, provide that "[a]dministrative 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".<sup>542</sup> Furthermore, the bilaterally agreed veterinary certificates recognize the concept of regionalization, in that they require certification of the freedom of the entire territory of the EU from ASF "except Sardinia", thereby providing for a different treatment for this area of the European Union.<sup>543</sup>

7.372. We are therefore not in a situation like the one envisaged by the panel and Appellate Body in *India – Agricultural Products*<sup>544</sup> where the regulatory scheme of the importing Member explicitly

<sup>538</sup> Other relevant chapters include: Chapters 8, 9, 22, 28, 33, 35, 37 and 38. See para. 7.204 and Table 3.

<sup>539</sup> See e.g. Chapter 7 on "Veterinary Requirements for the import into the customs territory of the Customs Union and/or transfer between Parties of breeding and utility pigs" of Customs Union Decision No. 317 (Exhibit RUS-25).

<sup>540</sup> European Union-Russia Memorandum of 4 April 2006 concerning principles of zoning and compartmentalization in the veterinary field (Exhibit EU-61).

<sup>541</sup> See fn 248 above.

<sup>542</sup> For instance, see fn 1 of Veterinary certificate for piglets for fattening (Exhibit EU-52). See also fn 248 above.

<sup>543</sup> See fn 248 above.

<sup>544</sup> In *India - Agricultural Products*, the panel determined that according to its first sentence, Article 6.2 ("Members shall ... recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence") imposes the obligation to recognize the "concepts". The panel clarified that the term concept is defined as an "abstract idea" ((footnote original) The Oxford Dictionaries Online, accessed 10 April 2014, <<http://www.oxforddictionaries.com/definition/english/concept?q=concept>>.) or "an idea of a class of objects, a general notion or idea". ((footnote original) The Oxford English Dictionary, OED Online, Oxford University Press, accessed 10 April 2014, <<http://www.oed.com/view/Entry/38130?rskey=vaS8sT&result=1#eid>>.) The panel further explained that this means that Members are required to recognize the idea or notion of pest- or disease-free areas and areas of low pest or disease prevalence in the abstract; the obligation under the first sentence of Article 6.2, is not linked to specific areas of a given exporting Member. Panel Report, *India - Agricultural Products*, para. 7.695. The panel also recalled that the relevant implementing instrument prohibited the importation of the relevant products on a country-wide basis. The panel found nothing on the face of this instrument that allows for the recognition of disease-free areas and/or areas of low disease prevalence within a country that notifies NAI to the OIE. To the contrary, the panel considered that S.O. 1663(E) "reflects the opposite", Panel Report, *India – Agricultural Products*, para. 7.702, and that it does so in "clear and unequivocal language" Panel Report, *India – Agricultural Products*, para. 7.703. Therefore, the panel held that, "by imposing a prohibition on a country-wide basis, [S.O. 1663(E)] contradicts the requirement to recognize the concept of disease-free areas and areas of low disease prevalence". Panel Report, *India – Agricultural Products*, para. 7.702. The Appellate Body found that the panel did not err in its application of Article 6.2 by not relying solely on certain legislative provisions that were silent on the concepts of disease-free areas and areas of low-disease prevalence in assessing whether India recognized the concepts of disease-free areas and areas of low-disease prevalence. Appellate Body Report, *India – Agricultural Products*, paras. 5.173-5.175. Furthermore, the Appellate Body did not exclude the possibility that recognition of the concepts could be done through and upon adoption of the very SPS measure that is adapted to the SPS characteristics of the relevant areas. Appellate Body Report, *India – Agricultural Products*, para. 5.175.

forecloses the possibility of recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence such that it cannot be found to be consistent with Article 6.2.

7.373. Recalling that the acknowledgement of particular "abstract ideas" for the purposes of Article 6.2 is less stringent than the obligation of "ensuring" that a measure is "adapted" to the SPS characteristics of an area under Article 6.1, we find that Russia's legislative framework recognizes the concept of regionalization within the meaning of Article 6.2 of the SPS Agreement.<sup>545</sup>

7.374. However, the parties' arguments press us to further examine whether such recognition in a Member's legislative/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. The European Union posits that although Russia contends that its legislation recognizes the concept of disease-free areas in the abstract, this understanding of "recognition" contradicts the recent guidance from the Appellate Body in *India – Agricultural Products*. According to the European Union, 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."<sup>546</sup> The European Union refers to the existence of the EU-wide ban as evidence that Russia has failed to distinguish between ASF-free areas and areas considered infected with ASF.<sup>547</sup> Moreover, the European Union argues that Russia's recognition of regionalization is contradicted by the facts of this case.<sup>548</sup> For its part, with reference to the same Appellate Body ruling in *India – Agricultural Products*, Russia argues that there is considerable flexibility in the ways that Members can demonstrate that their recognition of the concept of regionalization is consistent with the SPS Agreement.<sup>549</sup> Russia distinguishes between the recognition of the concept of regionalization and the acceptance of specific regionalization measures in a particular case, contending that Article 6.2 of the SPS Agreement and the SPS Committee Guidelines on the Implementation of Article 6 do not impose an obligation on the importing country to actually recognize an exporting country's zone. Russia argues that instead, Article 6.2 merely requires the importing country to allow for the consideration of regionalization.<sup>550</sup>

7.375. We note that the European Union's reference to the Appellate Body report in *India – Agricultural Products* corresponds to the paragraphs where the Appellate Body examined the rationale on which the panel in that dispute grounded the relationship between Articles 6.1 and 6.2. In particular, the Appellate Body expressed disagreement with the panel's idea that "the obligation to ensure that a Member's SPS measures are 'adapted' within the meaning of Article 6.1 *always* presupposes that a Member must have recognized the concepts mentioned in Article 6.2".<sup>551</sup> In the context of such disagreement, the Appellate Body observed that "we question the Panel's statement to the extent that it may be read as excluding that recognition of the concepts could be done through and upon adoption of the very SPS measure that is adapted to the SPS characteristics of the relevant areas".<sup>552</sup> In our view, the Appellate Body's considerations were aimed at 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 a pre-existing regulatory framework that did so.

<sup>545</sup> We find support in the approach of the panel in *US – Animals*, which referred to the reasoning of the panel in *India – Agricultural Products* and concluded that "Members are required to accept the authority and validity of the general notions of 'pest- or disease-free areas and areas of low pest or disease prevalence' and to treat them as worthy of consideration in the adoption and application of their SPS measures." Panel Report, *US – Animals*, para. 7.647. In particular, the Panel referred to the "less exigent obligation" of the first sentence of Article 6.2, which "simply requires" acknowledgement of particular "abstract ideas", as compared to the obligations under Article 6.1 of "ensuring" that a measure is "adapted" to the SPS characteristics of an area under Article 6.1. Panel Report, *US – Animals*, para. 7.647.

<sup>546</sup> European Union's second written submission, para. 90. (emphasis original)

<sup>547</sup> European Union's second written submission, para. 91.

<sup>548</sup> European Union's second written submission, para. 92.

<sup>549</sup> Russia's second written submission, para. 133, citing Appellate Body Report, *India – Agricultural Products*, para. 5.137.

<sup>550</sup> Russia's second written submission, para. 135 (referring to SPS Committee Guidelines on the Implementation of Article 6 (Exhibit EU-51)).

<sup>551</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.143.

<sup>552</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.143.

7.376. However, in the current case, we are faced with a different situation. As we have described above, we are faced with a set of measures that were adopted in the context of a regulatory framework that, in our view, provides a general recognition of the concepts mentioned in the first sentence of Article 6.2 of the SPS Agreement. This was not the case in the context of the measures adopted by India and examined by the panel and the Appellate Body in *India – Agricultural Products*. In addition, in the current dispute, the measures at issue allegedly fail to accept the existence of any disease-free area within the territory of the European Union. As we have alluded to in paragraph 7.373 above, in our view, such a claim is best examined in the context of our analysis of a Member's obligation under Article 6.1, rather than under Article 6.2 of the SPS Agreement.

7.377. We consider this to be the best approach for the following reasons. The European Union's proposed interpretation of the concept "recognition" seems to rely on the assumption that the only manner in which a Member could satisfy its obligation under Article 6.2 is by granting the recognition of the concepts listed in the first sentence of Article 6.2 through the challenged SPS measure. In our view, this assumption does not always apply. It could be the case that the challenged SPS measure would be a means to determine whether a Member recognizes the relevant concepts of the first sentence of Article 6.2. However, as noted by the Appellate Body, the text of the first sentence of Article 6.2, does not refer to the manner in which a Member shall recognize those concepts.<sup>553</sup> As we have explained, we do not consider this to be a case where the challenged SPS measure is the most suitable way to determine compliance with Article 6.2.

7.378. Moreover, we consider that the European Union's proposed interpretation would lead the first sentence of Article 6.2 of the SPS Agreement to redundancy and inutility in the present case. If we accept the European Union's suggested interpretation, we would be examining a crucial element of our 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. In our view, the European Union's approach might lead to a situation where a panel faced with an SPS measure adopted by a Member which has in place a legal framework that recognizes the concepts described in the first sentence of Article 6.2, to still find an inconsistency of a challenged measure with the first sentence of Article 6.2. In our view, this could lead us to act against the principle of effective treaty interpretation (*ut res magis valeat quam pereat*), recognized by the Appellate Body as that which requires an interpreter to give meaning and effect to all the terms of the treaty, and precludes an interpreter from adopting a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.<sup>554</sup>

7.379. Based on the foregoing, we consider that Russia recognizes the concepts mentioned in the first sentence of Article 6.2 in respect of ASF and as a consequence, the EU-wide ban is not inconsistent with Russia's obligations under the first sentence of Article 6.2 of the SPS Agreement. Following this finding we turn to examine the European Union's compliance with the provisions of Article 6.3 in order to have findings that will inform our analysis of Russia's compliance with its obligations under Article 6.1.

#### **7.5.2.3.5 Whether the European Union objectively demonstrated that there are disease-free areas or areas of low disease prevalence outside the territory of Estonia, Latvia, Lithuania, and Poland, pursuant to Article 6.3 of the SPS Agreement**

##### **7.5.2.3.5.1 Introduction**

7.380. The European Union argues that since the detection of ASF in wild boar in Lithuania in January 2014, the European Union has provided Russia with information that it considers as beyond what is necessary for objectively demonstrating that disease-free areas or areas of low disease prevalence are and are likely to remain disease-free areas or areas of low disease prevalence, respectively.<sup>555</sup> The European Union contends that it has provided in a timely manner all the necessary information with respect to its ASF regionalization measures in Lithuania, Poland,

<sup>553</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.136.

<sup>554</sup> Appellate Body Report, *Korea – Dairy*, para. 80 (referring to Appellate Body Reports, *United States – Gasoline*, p. 23; *Japan – Alcoholic Beverages*, p. 12; *Canada – Dairy*, para. 133; and *Argentina – Footwear (EC)*, para. 88.)

<sup>555</sup> European Union's first written submission, paras. 218 and 219-232.



Latvia and Estonia, to objectively demonstrate to Russia that the areas in these EU member States and the rest of the European Union, except Sardinia, are and are likely to remain disease-free areas; and that reasonable access has been given to Russia for inspection, testing and other relevant procedures. The European Union asserts that Russia failed to conclude its recognition process without undue delays, in violation of its obligations under Article 6 of the SPS Agreement.<sup>556</sup>

7.381. The European Union opines that under Article 6.3 of the SPS Agreement, an importing Member is under no obligation to automatically accept a regionalization proposal from the exporting Member. However, its decision must take into account objective factors such as those enunciated in the second sentence of Article 6.2 of the SPS Agreement: geography, ecosystems, epidemiological surveillance and the effectiveness of sanitary controls. In case of disagreement between the importing and the exporting Members, the exporting Member can refer the dispute to the WTO adjudicating bodies. A panel presented with such a case has the duty to make an objective assessment of the matter before it according to Article 11 of the DSU.<sup>557</sup>

7.382. Russia argues that the European Union has failed to objectively demonstrate to Russia that the alleged ASF-free areas in the four infected EU Member States "are, and are likely to remain, pest- or disease-free areas", in accordance with Article 6.3 of the SPS Agreement.<sup>558</sup> In Russia's view, the European Union has failed to effectively establish ASF containment zones in accordance with the OIE guidelines and therefore the entirety of the four affected EU member States should be considered ASF-infected.<sup>559</sup> Russia argues that the European Union failed to provide timely, comprehensive and accurate information relevant for assessing its zones and ASF-control measures inconsistently with Article 6.3 of the SPS Agreement and Terrestrial Code Article 5.3.7. Furthermore, the European Union withheld national eradication plans from Russia until March 2015 and May 2015, despite acknowledging that these reports contain highly relevant information.<sup>560</sup>

#### 7.5.2.3.5.2 Legal test

7.383. Pursuant to Article 6.3 of the SPS Agreement, an exporting Member claiming that an area within its territory is pest – or disease-free or an area of low pest or disease prevalence shall provide the necessary evidence 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.

7.384. We consider that an assessment under Article 6.3 requires us to examine a number of aspects. We observe that the exporting Member must provide "evidence", and not merely "information", to support its claim of a disease-free area. Moreover, such evidence must not only "demonstrate", but must rather "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. With this in mind, first, we need to determine what is the "necessary evidence" that must be provided by the exporting Member. We also need to determine what is meant by "objectively demonstrating" the disease status of an area. In our view, the examination of these two elements needs to be done in relation to the disease status an exporting Member is claiming to exist, in the light of the circumstances of a particular dispute. In the instant case, the European Union claims that there are areas within the European Union that are ASF-free and are likely to remain so.<sup>561</sup> In our consideration of what is the "necessary evidence" the European Union should have provided to Russia, we will look at both areas being ASF-free and the likelihood of those areas remaining free of the disease. Similarly, we consider it appropriate for our analysis of the parties' claims in this dispute to articulate the standard of what is required to "objectively demonstrate" in respect of an area being ASF-free and also in respect of that area being likely to remain so. We turn to examine the meaning of "necessary evidence".

<sup>556</sup> European Union's first written submission, para. 236.

<sup>557</sup> European Union's response to Panel question No. 112, paras. 219-220.

<sup>558</sup> Russia's first written submission, para. 236.

<sup>559</sup> Russia's first written submission, para. 237.

<sup>560</sup> See Russia's second written submission, paras. 58-77.

<sup>561</sup> European Union's opening statement at the second meeting of the Panel, para. 46 (referring to first written submission, paras. 218-236; and second written submission, paras. 101-125).

7.385. The panels in *India – Agricultural Products* and *US – Animals* observed that Article 6.3 does not specify what evidence would be necessary for the exporting Member to provide to the importing Member to objectively demonstrate that an area within its territory is, and is likely to remain, pest- or disease-free or with low pest or disease prevalence.<sup>562</sup>

7.386. The panel in *India – Agricultural Products* acknowledged the potential link between the information required for the assessment of SPS characteristics envisaged by the second sentence of Article 6.1, and the obligation of an exporting Member to provide the "necessary evidence" under the first sentence of Article 6.3, that an area within its territory is pest- or disease-free or of low pest or disease prevalence. In this context, that panel observed that

Article 6.1, second sentence, provides a non-exhaustive list of factors that a Member could consider in assessing the SPS characteristics of the area in question. Thus although Article 6.1 may inform the inquiry that an importing Member may conduct in order to determine whether an exporting Member has 'objectively demonstrated' that there is an area within its territory that is pest- or disease-free or is an area of low pest or disease prevalence, there is nothing in the language of either provision that requires this particular approach.<sup>563</sup>

7.387. The panel in *US – Animals*, observed that the second sentence of Article 6.2 provides a non-exhaustive list of factors that the importing Member shall consider in reaching a conclusion concerning the disease status of an area. That panel observed that "if an exporting Member wishes to 'objectively demonstrate' the disease free status of an area the information submitted should address the factors listed in Article 6.2 in addition to any other information that would assist the importing Member in making its determination. The Article 6 Guidelines are also informative regarding the evidence that should be provided by the exporting Member, as well as the factors that should normally be considered by the importing Member in such a situation."<sup>564+565</sup>

7.388. We agree that the factors listed in the second sentence of Article 6.1 as well as the second sentence of Article 6.2 may form part of the "necessary evidence" that an exporting Member needs to provide to the importing Member in order to "objectively demonstrate" that an area within its territory is, and is likely to remain, pest- or disease-free or with low pest or disease prevalence. Furthermore, we also consider the SPS Committee Guidelines on the Implementation of Article 6 to be informative in this respect.<sup>566</sup>

7.389. In sum, an exporting Member seeking to "objectively demonstrate" the disease status of a particular area within its territory should provide among the supporting "necessary evidence", the following about the respective area, as relevant to the particular situation: (i) geography; (ii) ecosystems; (iii) epidemiological surveillance; (iv) effectiveness of sanitary or phytosanitary 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. We highlight that the categories and amount of evidence in respect of each has to be determined on a case-by-case basis, taking due account of the actual circumstances being analysed by a panel.

7.390. We recall that pursuant to Article 6.3 such evidence should amount to that which is "necessary" to "objectively demonstrate" the disease status of the particular area. In our view, an examination of the compliance of an exporting Member with this obligation requires a clear understanding of what such an objective demonstration entails. Neither previous panels nor the Appellate Body have ruled on the meaning of "objectively demonstrate" in the context of Article 6.3.

<sup>562</sup> Panel Reports, *India – Agricultural Products*, para. 7.676; and *US – Animals*, para. 7.660.

<sup>563</sup> Panel Report, *India – Agricultural Products*, para. 7.676.

<sup>564</sup> (footnote original) See Article 6 Guidelines, paras. 8-10.

<sup>565</sup> Panel Report, *US – Animals*, para. 7.660.

<sup>566</sup> We consider of special importance in this dispute the characteristics of the veterinary and phytosanitary infrastructure and authorities in the exporting Member, as relevant for the determination of epidemiological surveillance, the effectiveness of sanitary or phytosanitary controls, and the existence of eradication or control programmes. See Article 6 Guidelines, paras. 8-10.

7.391. The adverb "objectively" is defined in the dictionary as "without being influenced by personal feelings or opinions; in an impartial or detached manner."<sup>567</sup> The verb "demonstrate" is defined in the dictionary as "[t]o establish the truth of (a proposition, theory, claim, etc.) by reasoning or deduction or (in later use) by providing practical proof or evidence"; "to prove"; "[o]f a thing, fact, situation, etc.: to show the truth of"; "to be proof of or constitute evidence for (a claim, theory, etc.)"; and "[t]o establish the truth of something; to show that a proposition, conclusion, etc., is a necessary consequence of axioms or previously accepted statements."<sup>568</sup> It thus seems that "objectively demonstrate" means to prove something in an impartial manner. We consider thus that the exporting Member cannot merely provide general information in support of its claim, but rather sufficient relevant scientific and technical evidence, as relevant for the circumstances of the particular dispute, to prove in an impartial manner that an area within its territory is free of a disease and is likely to remain so.

7.392. We consider this conclusion to be in line with the manner in which the Appellate Body interpreted the meaning of a similar expression in Article 3.1 of the Anti-Dumping Agreement. Although this interpretation was made by the Appellate Body in the context of a different WTO Agreement, we consider this to be informative in the current dispute. Article 3.1 of the Anti-Dumping Agreement provides that a "determination of injury for the purposes of Article VI of the GATT 1994 shall be based on positive evidence and involve an objective examination of...". The Appellate Body has found that the term "objective examination" requires "that an investigating authority's examination 'conform to the dictates of the basic principles of good faith and fundamental fairness', and be conducted 'in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation'".<sup>569</sup> In essence, the term "objective" requires a standard of impartiality.

7.393. In our view, Article 6.3 requires an exporting Member to provide the "necessary evidence", which includes the categories described in paragraph 7.389 above, in order to "objectively demonstrate", that is, in order to prove in an impartial manner, the disease status of an area within its territory. The Panel underlines that this standard is not met with the provision of some information in respect of the relevant categories described above. Rather, it implies the provision to the importing Member of the necessary evidence to make the objective demonstration of the disease status in the territory of the exporting Member.

7.394. The disease status relevant for this dispute includes the existence of ASF-free areas as well as the likelihood of those areas remaining ASF-free. This requires examining, as relevant to the circumstances of the present dispute, the information that would constitute the "necessary evidence" that the European Union should have provided to Russia to objectively demonstrate that there are ASF-free areas within the European Union. We also need to examine separately what would constitute the "necessary evidence" that the European Union should have provided to Russia to objectively demonstrate that the alleged ASF-free areas are likely to remain so.

7.395. We have identified among the "necessary evidence" required to "objectively demonstrate" the disease status in a particular area, a Member should provide evidence of (i) geography; (ii) ecosystems; (iii) epidemiological surveillance; (iv) effectiveness of sanitary or phytosanitary 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. We note that this is an illustrative list, and that these elements are not cumulative. Furthermore, some of these elements are interrelated. For example, geography may not be a relevant factor in the spread of all pests or diseases, and control and eradication programmes are relevant only when a particular disease is known to exist within an area. At the same time, the level of prevalence of a specific disease can only be established through assessing the effectiveness of surveillance programmes.

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<sup>567</sup> *Online Oxford English Dictionary*, "objectively (adverb, entry 5)", <http://www.oed.com/view/Entry/129636?redirectedFrom=objectively#eid> (accessed 17 December 2015)

<sup>568</sup> *Online Oxford English Dictionary*, "demonstrate (verb, Entries 2.a, 2.b, and 2.c.)", <http://www.oed.com/view/Entry/49840?rskey=9X3Glf&result=2&isAdvanced=false#eid> (accessed 17 December 2015).

<sup>569</sup> Appellate Body Report, *China – GOES*, para. 126. See also Appellate Body Report, *US – Hot Rolled Steel*, para. 193.

7.396. In our view, the amount and type of evidence that a Member should present in support of the disease status of a particular area needs to be determined on a case-by-case basis. Therefore, we will review certain aspects relevant to this dispute that will enable us to identify in a more specific manner the categories of information the European Union should have provided Russia to objectively demonstrate that there are areas within its territory free of ASF.

7.397. Especially relevant in determining the categories of evidence germane to a particular dispute are the nature of the disease and the type of characteristics that an exporting Member is claiming to prevail within an area of its territory. As we have already indicated, the European Union claims that it has objectively demonstrated that an area within its territory is free of ASF and is likely to remain so.<sup>570</sup> We consider that the European Union's claim should be examined in light of the absence of ASF in most of its territory.

7.398. We recall the definition in the SPS Agreement of a pest- or disease-free area. Paragraph 6 of Annex A of the SPS Agreement provides

An 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.

NOTE: A pest- or disease-free area may surround, be surrounded by, or be adjacent to an area – whether within part of a country or in a geographic region which includes parts of or all of several countries – in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.

7.399. This definition provides useful elements to understand what a Member needs to prove to demonstrate the existence of a disease-free area. In particular, paragraph 6 of Annex A defines a disease-free area as one where the specific disease does not occur. Reading Article 6.3 in the context of paragraph 6 of Annex A leads us to consider that an exporting Member seeking to objectively demonstrate the existence of a disease-free area has to objectively demonstrate that the pertinent disease does not occur in the relevant area (i.e. all of a country, part of a country, or all or parts of several countries). Based on our interpretation of the terms "necessary evidence" in Article 6.3, we have already identified some categories of evidence that would be necessary to objectively demonstrate the disease status of an area. However, we consider it appropriate to further examine relevant scientific sources to have a more detailed understanding of what each of those categories of information refers to in the context of a specific disease.

7.400. We are aware that it is impossible for any Member to provide a laboratory-type scientific proof that a particular disease is not present in a certain area. What an exporting Member claiming that an area within its territory is disease free must objectively demonstrate depends on the specific disease and on the situation in that particular Member. This may include that evidence of the existence of the disease has been sought and not found, that monitoring, surveillance and reporting systems are in place to ensure that any evidence of the existence of the disease would be promptly reported, that measures to prevent the entry of the disease are in place, among other aspects. These elements are linked to the existence of a pathogen specific surveillance system, as applicable in the context of the international standards contained in Chapter 1.4 of the Terrestrial Code.<sup>571</sup>

7.401. We recall that Chapter 1.4 of the Terrestrial Code contains a number of provisions relevant for the type of surveillance that OIE members should follow in order to demonstrate the disease status of a particular area. Among the provisions of Chapter 1.4, Article 1.4.6 illustrates the type of evidence that should be provided by a Member exporting products subject to SPS measures because of the presence of a disease covered by the Terrestrial Code. This provision applies to ASF, as indicated in Article 15.1.3 of the Terrestrial Code. As we have explained above,

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<sup>570</sup> European Union's opening statement at the second meeting of the Panel, para. 46 (referring to first written submission, paras. 218-236; and second written submission, paras. 101-125).

<sup>571</sup> See para. 7.299 above.

Article 1.4.6 contemplates the possibility that ASF-free areas may be determined on the basis of pathogen specific surveillance.<sup>572</sup>

7.402. In connection with the OIE's explanation on the demonstration of disease-free areas pursuant to Article 1.4.6 of the Terrestrial Code<sup>573</sup>, during the Panel's meeting with the experts, the Panel asked the experts what type of evidence they consider an exporting member would need to provide to demonstrate the historically free status of a zone. In reply to this question, Dr Thiermann referred to the historic monitoring and surveillance of pathogens as documented in the OIE's WAHIS information system. Furthermore, Professor Penrith noted that it would be hard to imagine a situation where the infection would be present in domestic pigs and be completely undetected and not cause any disease in a certain percentage of the pig population.<sup>574</sup>

7.403. The elements described above as articulated in Article 1.4.6 of the Terrestrial Code and as explained by the OIE and the experts in respect of demonstration of the disease status of a country, zone or compartment illustrate how we can understand the scope of certain categories of the necessary evidence required, pursuant to Article 6.3, to objectively demonstrate the existence of ASF-free areas.

7.404. Based on the foregoing, we consider that the European Union should have provided to Russia 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. The information provided by the European Union to Russia in respect of these categories should objectively demonstrate that there are ASF-free areas within the European Union.

7.405. No previous panel has been required to examine pursuant to Article 6.3 what is the necessary evidence to objectively demonstrate that a disease-free area is likely to remain so. The terms "likely to remain" as contained in Article 6.3 of the SPS Agreement, seem to be close to the term "likelihood" in paragraph 4 of Annex A as referred to in the definition of a risk assessment. "Likely" is used as an adverb in the last sentence of Article 6.3. "Likelihood" is used as a noun in the context of the first sentence of paragraph 4 of Annex A. According to the dictionary definition, both "likely" and "likelihood" refer to "probability".<sup>575</sup> We recall that the Appellate Body has interpreted the term "likelihood" in the context of paragraph 4 of Annex A. In *Australia – Salmon*, the Appellate Body observed:

[W]e note that the first definition in paragraph 4 of Annex A speaks about the evaluation of "likelihood". In our report in *European Communities – Hormones*, we referred to the dictionary meaning of "probability" as "degrees of likelihood" and "a thing that is judged likely to be true", for the purpose of distinguishing the terms "potential" and "probability".<sup>576</sup> For the present purpose, we refer in the same manner to the ordinary meaning of "likelihood", and we consider that it has the same meaning as "probability".<sup>577</sup> On this basis, as well as on the basis of the definition of "risk" and "risk assessment" developed by the Office international des épizooties ("OIE") and the OIE *Guidelines for Risk Assessment*, we maintain that for a risk assessment to fall within the meaning of Article 5.1 and the first definition in paragraph 4 of Annex A, it is not sufficient that a risk assessment conclude that there is a *possibility* of entry, establishment or spread of diseases and associated biological and economic consequences. A proper risk assessment of this type must evaluate the "likelihood", i.e., the "probability", of entry, establishment or spread of disease and associated biological and economic consequences as well as the "likelihood", i.e., "probability", of

<sup>572</sup> See para. 7.303 above.

<sup>573</sup> OIE response to Panel question No. 4.

<sup>574</sup> Professor Penrith, Transcript, paras. 1.303 and 1.308

<sup>575</sup> See *Online Oxford English Dictionary*, "likely" (adj. and adv. - 2.a),

<http://www.oed.com/view/Entry/108315?rkey=cgzqFH&result=1&isAdvanced=false#eid> (accessed 2 February 2016) and *Online Oxford English Dictionary*, "likelihood" (noun - 2.a),

<http://www.oed.com/view/Entry/108313?redirectedFrom=likelihood#eid> (accessed 2 February 2016).

<sup>576</sup> (footnote original) Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 184.

<sup>577</sup> (footnote original) "Likelihood: probability", *The Concise Oxford Dictionary of Current English* (9<sup>th</sup> ed., Clarendon Press).

entry, establishment or spread of disease *according to the SPS measures which might be applied*.<sup>578</sup>

7.406. Based on this guidance, we consider that the objective demonstration of whether an area is likely to remain free of a disease requires the exporting Member to provide the necessary evidence to support that there is "probability" that the disease-free status will be maintained in the particular area. In respect of an exporting Member's qualitative assertion that a disease-free area is likely to remain so, we consider that the necessary evidence is also informed by the nature of the disease and the natural vectors that could spread the disease in the context of the effectiveness of the control measures that the exporting Member has in place for the particular disease.

7.407. As we have explained, ASF is a highly contagious haemorrhagic disease of pigs and European wild boar, caused by ASFV. Wild boars are hosts that manifest the disease.<sup>579</sup> It is therefore relevant for the determination of the probability of the spread of the disease to provide evidence in respect of the presence of the disease in wild boar and the exact location of where such presence has been identified. This will be of particular relevance in situations where the areas claimed to be free of ASF by the exporting Member are located in geographic proximity to areas where ASF is present in wild boars.

7.408. In our view, in addition to the evidence that we have already identified with respect to the demonstration of an area being disease-free, an exporting Member should provide evidence of the effectiveness of its control measures. We consider that this evidence should at least include evidence with respect to measures to prevent the entry and spread of the disease, the emergency actions adopted in case of an outbreak of the disease, and, when relevant, the eradication programmes of the disease in areas where it occurs.

7.409. Moreover, we consider that pursuant to the Terrestrial Code, the evaluation of veterinary services in the exporting Member is relevant in the context of the assessment of the effectiveness of the control measures applied by that exporting Member. The relevant provisions in this respect are found in Chapter 3 of the Terrestrial Code; specifically in Chapter 3.2. In our view, for an importing Member to feel confident about the assurances provided by the veterinary authorities of the exporting Member, it should have the necessary evidence that demonstrates that the exporting Member's veterinary authorities are capable.

7.410. In this case, the facts demonstrate that there has been a long trading history in animal products from the European Union to Russia, and that, until the first case of ASF in the European Union's territory, the trade in the products at issue in this dispute took place on the basis of veterinary certificates issued by the competent authorities in the EU member States. Thus, until the time of the first ASF case in the European Union, Russia apparently had confidence in the capacity and credibility of the EU member State veterinary services. We consider this to be the case despite Russia's alleged "reasonable doubts about the capacity of the veterinary authorities in the infected EU member States to effectively control ASF".<sup>580</sup> In our view, the instances of smuggling and fraudulent certificates to which Russia refers are by no means evidence that would support putting into question the capacity of the veterinary authorities in the European Union or in the affected EU member States.<sup>581</sup> There is no indication whatsoever that such capacity and

<sup>578</sup> Appellate Body Report, *Australia – Salmon*, para. 123 (some footnotes omitted) (emphasis original).

<sup>579</sup> OIE Technical Disease Card: African Swine Fever (ASF Technical Disease Card) [http://www.oie.int/fileadmin/Home/eng/Animal\\_Health\\_in\\_the\\_World/docs/pdf/Disease\\_cards/AFRICAN\\_SWINE\\_FEVER.pdf](http://www.oie.int/fileadmin/Home/eng/Animal_Health_in_the_World/docs/pdf/Disease_cards/AFRICAN_SWINE_FEVER.pdf) (last updated April 2013; last accessed 23 October 2015). See OIE ASF Technical Disease Card (Exhibit RUS-186).

<sup>580</sup> Russia's first written submission, paras. 160-175; and second written submission, paras. 122-124.

<sup>581</sup> Russia's first written submission, paras. 163-168 (referring to Declaration of Lebedev, paras. 30-33 (Exhibit RUS-41), Rosselkhoznadzor News, "New Meat Product Smuggling Channel from the EU Detected by Rosselkhoznadzor", 16 January 2014. (Exhibit RUS-85), Pig Progress, "Russia: Measures needed to stop pork fraud", 5 December 2014. (Exhibit RUS-86), Rosselkhoznadzor News, "On the working meeting between Sergey Dankvert, Head of Rosselkhoznadzor, and Senior Officials of State Veterinary Services and Heads of Industry Unions and Associations from Denmark, France, the Netherlands and Italy", 20 November 2014. (Exhibit RUS-87); and second written submission, para. 124 ((referring to instances of shortcomings related to certificates dating back to 2007, 2010 EFSA Scientific Opinion, p. 37 (Exhibit EU-24)).

credibility ceased to exist solely because of the incidence of ASF within the European Union territory. On the contrary, despite Russia's observations regarding the credibility and capacity of the relevant veterinary services<sup>582</sup>, in light of the volume and frequency of information provided by the European Union veterinary services to Russia regarding the ASF cases and outbreaks, the numerous bilateral exchanges and control visits that both parties have reported, it would appear that the capacity and credibility of the European Union veterinary services was confirmed by their actions in response to the ASF outbreaks.

7.411. One useful element for the assessment of the effectiveness of these control measures, to the extent it is available, is data regarding the actual spread of a disease within a given time frame. If such data is available to the exporting Member at the time it claims that disease-free areas within its territory are likely to remain free, this real world evidence could support – or undermine – its claims of the likelihood of a designated area remaining disease free. There may be situations when an exporting Member claims on several occasions that disease-free areas within its territory are likely to remain free. In that situation, the assessment of the real world evidence could include the most updated information available to an exporting Member. In this particular dispute, the EU member States provide information to the OIE that is then registered in the WAHIS database.<sup>583</sup> In response to a question from the Panel, both parties explained that there might be discrepancies in the information they have identified regarding the number of cases and of outbreaks, probably due to the use of different sources and to distinct readings of the information available in the WAHIS database.<sup>584</sup> These differences have raised some difficulties in identifying the specific time and location of some of the cases or outbreaks. However, the evidence on record has supported our understanding of the presence and spread of ASF in the territory of the four affected EU member States throughout 2014 and part of 2015.

7.412. In our view, it is of paramount importance to indicate whether the presence of the disease has occurred in wildlife or in domestic pigs. This is because, as the experts consulted by the Panel have explained, there is a difference in the risks associated with the spread of ASF disease through wild boar and through infection of live domestic pigs. Professor Penrith<sup>585</sup> and Dr Thomson<sup>586</sup> indicated that it is unlikely that wild boars will become the most important source of infection. While ASF may be difficult to eradicate in wild boar, controls on the movement of wild boar may be sufficient to reduce the risks of spread to and infection of large commercial pig holdings subject to biosecurity measures. It is primarily these large commercial pig holdings which provide the animals used in the production of products for export.

7.413. Based on the foregoing, we consider that to objectively demonstrate that ASF-free areas are likely to remain so the European Union should have provided to Russia the necessary evidence in respect of the effectiveness of its control measures on ASF (including information on their effectiveness in the real world). For this purpose, we will address the information provided on: (i) the surveillance programme; (ii) diagnostic analysis; (iii) measures for early detection and response, including movement control; and (iv) eradication of the disease.

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<sup>582</sup> Russia's first written submission, paras. 80-110 and opening oral statement in the second meeting of the Panel, para. 8 (regarding the appropriateness of the zones established in the four affected EU member States to control the spread of ASF); Exhibit RUS-297 (revised) (referring to the effectiveness of the ASF-infected zones set by each of the four affected EU member States after the first outbreak in the respective EU member State); Exhibits EU-15, EU-84, RUS-31, RUS-53, and RUS-263 (referring to certain aspects of the effectiveness of the ASF protection measures adopted by the European Union and the four affected EU member States); first written submission, paras. 117-130 (referring to the risks of ASF spreading arising from wild boar density and levels of establishments and holdings maintaining pigs in backyard farms in the four affected EU member States); Exhibits RUS-71, RUS-309, and RUS-359 (reports of Russian officials who visited certain areas in the affected EU member States in 2014). The Panel notes that there is evidence on record that Lithuanian and Polish veterinary authorities challenged some of the incidents reported by Russian veterinary officials who visited those EU member States in 2014; see Exhibits EU-248 (comments from Lithuanian veterinary authorities to the inspection report of the veterinary officials from the Customs Union) and EU-249 (comments from Polish veterinary authorities to the inspection report of veterinary officials from the Customs Union).

<sup>583</sup> See para. 7.425 below.

<sup>584</sup> See European Union's response to Panel question No. 52, paras. 118-120; and Russia' response to Panel question No. 52, paras. 75-76.

<sup>585</sup> Professor Penrith's response to Panel question No. 2.

<sup>586</sup> Dr Thomson's response to Panel question No. 2.

7.414. If we find that the European Union 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.

7.415. With these considerations in mind we will examine whether the European Union provided to Russia the necessary evidence to objectively demonstrate that there are areas in the European Union, outside Estonia, Latvia, Lithuania, and Poland, that are ASF-free and are likely to remain so.

7.416. Our task, then, is to make an objective assessment, pursuant to Article 11 of the DSU, of whether the European Union provided Russia with the necessary evidence to objectively demonstrate that areas within the European Union are, and are likely to remain, free of ASF. We will undertake our examination by assessing the parties' arguments and evidence. We will also support our analysis, as relevant, with the guidance we received through the responses from the experts. We recall that the following examination is focused on the geographical scope of the EU-wide ban, this is, those areas in the European Union outside the territories of Estonia, Latvia, Lithuania, and Poland. In section 7.6.2.3.2 below we pursue this same examination in respect of the allegedly disease-free areas within those territories.

7.417. We recall that the EU-wide ban was initially put in place on 29 January 2014. The European Union's first request for recognition of disease-free areas was addressed to Russia on 31 January 2014. At that time, the EU-wide ban included the entire territory of the European Union with the exception of Lithuania. This situation changed on 27 February 2014, when the ban on Poland was put in place, then again on 27 June 2014 when the ban on Latvia was put in place, and finally on 11 September 2014 when the ban on Estonia was put in place. In section 7.3.6 above, we have set out the general temporal framework that we will follow in our examination of the European Union's claims. Based on that general approach and the temporal considerations referred to above, we will examine the information provided by the European Union in the period between 29 January and 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 pursuant to its obligation under Article 6.3 of the SPS Agreement. We note that this approach is justified in the context of the present dispute and it may not be the case for other disputes where the situation in respect of the disease in question has different temporal circumstances.

7.418. In the following section, the Panel presents, according to the evidence on record, the information that the European Union provided to Russia from January 2014 until September 2015. This section will be followed by the Panel's examination of such evidence in light of the parties' arguments and the applicable legal test.

#### **7.5.2.3.5.3 Information provided by the European Union to Russia from January 2014**

7.419. From 24 January 2014, the European Union sent correspondence to Russia relating to the ASF outbreaks, first in Lithuania, then in Poland, Latvia, and Estonia. The European Union's correspondence can be divided into three broad categories.

7.420. The first category includes updates, at times daily, on the status of new ASF outbreaks in the affected EU member States. This information was normally addressed to Permanent Missions in Brussels, including Russia's, and provided through faxes. These faxes normally forwarded the report of the national veterinary authority of the EU member State where the outbreak had taken place, together with the Commission Implementing Decision<sup>587</sup> (Draft or Final) adopted in respect of identifying the protection and surveillance zones mandated in Council Directive 2002/60/EC in the territory where the outbreak had occurred.<sup>588</sup>

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<sup>587</sup> See Exhibits EU-33, EU-34, EU-35, EU-36, EU-37, EU-38, EU-39, EU-40, EU-41, EU-42, EU-43, EU-44, EU-103, EU-107, RUS-36, RUS-151, RUS-268, RUS-298, RUS. 299, RUS-300, RUS-301, and RUS-302.

<sup>588</sup> See Exhibits EU-132, EU-133, EU-134, EU-135, EU-136, EU-137, EU-138, EU-139, EU-140, EU-141, EU-142, RUS-30, EU-143, EU-144, EU-145, EU-146, EU-147, EU-148, EU-206, EU-186, EU-207, EU-208, EU-209, EU-210, EU-187, RUS-326, RUS-327, RUS-328, EU-177, EU-211, and EU-212.



7.421. The second category relates to communications sent by the European Union in connection with meetings that both parties planned in order to undertake consultations on the manner in which it would be best to address the situation.<sup>589</sup>

7.422. The third category are letters that the European Union sent to Russia with information in support of its claim that there are ASF-free areas, which are likely to remain so, in the European Union. Most of those communications were sent in response to information requests sent by Russia.<sup>590</sup> These letters are those sent by DG SANCO to FSVPS on 7 February<sup>591</sup>, 6 March<sup>592</sup>, 13 March<sup>593</sup>, 21 May<sup>594</sup> and 13 June<sup>595</sup> 2014 and by DG SANTE to FSVPS on 24 March 2015<sup>596</sup>, and on 16 June 2015.<sup>597</sup> These communications included information on, among other things, the applicable regulatory framework for ASF control, contingency planning for infectious diseases, audits of national contingency plans, examples of national legislation adopted in response to ASF outbreaks, pig population, pig holdings, and the pig industry.

7.423. The Panel has carefully examined the preceding evidence. In Appendix 1 of the report, the Panel provides a detailed chronology of the communications exchanged between the European Union and Russia, as available on record, together with an indication of the documents attached to those communications that have been submitted by either party in the record of these proceedings.

7.424. The European Union points out that, in addition to providing the above-described information to Russia, on several occasions it also invited Russia's authorities to send experts to join on-the-spot visits of the Community Veterinary Emergency Team to the affected EU member States as observers. Russian experts visited the affected areas on the following occasions: 28-31 January 2014 (Lithuania), 25-28 February 2014 (Poland) and 13-14 October 2014 (Estonia).<sup>598</sup>

7.425. We note that in addition to this information, the veterinary authorities of the EU member States have regularly notified ASF outbreaks on wild boar or domestic pigs to the OIE. We recall that the OIE explained that "EU member States operate as individual countries within the OIE" and that each EU member State is responsible for "reporting disease status information in the country, through the application in the respective country" of the Terrestrial Code.<sup>599</sup> Furthermore, the European Union explains that disease notification to the OIE is done entirely by each EU member State, without European Union's Commission coordination.<sup>600</sup> Both parties have submitted to the Panel's record exhibits that are based on or contain notification reports from the WAHIS database

<sup>589</sup> See Exhibits EU-62, EU-64, RUS-185, EU-175, RUS-217, EU-87, EU-89, EU-173, RUS-56, RUS-133, RUS-380, RUS-330, and RUS-132.

<sup>590</sup> Russia's information requests and observations on information provided by the European Union were made through the following communications: letter of 29 January 2014 (Exhibit EU-62); letter of 5 February 2014 (Exhibit EU-84); letter of 27 February 2014 (Exhibit RUS-231); letter of 3 March 2014 (Exhibit RUS-137); letter of 12 March 2014 (Exhibits EU-90/RUS-135); letter of 13 March 2014 (Exhibit RUS-209); letter of 19 March 2014 (Exhibit RUS-130); letter of 2 April 2014 (Exhibit RUS-54); letter of 2 April 2014 (Exhibit RUS-53); letter of 10 April 2014 (Exhibit RUS-240); letter of 16 May 2014 (Exhibit EU-93); letter of 30 June 2014 (Exhibit RUS-250); letter of 29 July 2014 (Exhibit RUS-263); letter of 31 July 2014 (Exhibit RUS-157); letter of 13 October 2014 (RUS-39); letter of 1 December 2014 (Exhibit RUS-131); letter of 19 December 2014 (Exhibit RUS-379); letter of 19 March 2015 (Exhibit RUS-153); and letter of 10 April 2015 (Exhibit RUS-329).

<sup>591</sup> European Union's letter to Russia of 7 February 2014, ARES(2014)304571, SANCO/G7/DP/tb(2014)328578 (Exhibit EU-65).

<sup>592</sup> European Union's letter to Russia of 6 March 2014, ARES(2014)601346, SANCO/G7/PD/mh/(2014)630598 (Exhibit EU-86).

<sup>593</sup> European Union's letter to Russia of 13 March 2014, ARES(2014)709435, SANCO/G7/PD/mh(2014)745829 (Exhibit EU-91).

<sup>594</sup> European Union's letter to Russia of 21 May 2014, ARES(2014)1658269, SANCO/G6/AB(2014)1782253 (Exhibit EU-92).

<sup>595</sup> European Union's letter to Russia of 13 June 2014, ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505 (Exhibit EU-94).

<sup>596</sup> European Union's answers to questions sent by Russia in the attachment to letter FS-AS-8/23743 dated 1 December 2014 (24 March 2015) (Exhibit RUS-167). See also Letter of 24 March 2015 from the EU to Russia, Ref. Ares(2015)1284836 (Exhibit RUS-154).

<sup>597</sup> Letter from the European Union Veterinary Service to the Russian Federation Veterinary Service, Ref. Ares (2015)2518258. 16 January 2015. (Exhibit RUS-319).

<sup>598</sup> European Union's response to Panel question No. 47, para. 106. See Appendix 1 below.

<sup>599</sup> OIE response to Panel question No. 28.

<sup>600</sup> European Union's response to Panel question No. 241, para. 47.

regarding the reports of ASF outbreaks and cases in the four affected EU member States.<sup>601</sup> The experts recognized the above-average notification rate with respect to the EU member States, particularly in the backyard sector.<sup>602</sup>

7.426. There is a final category of information that the European Union provided to Russia. That is, information that seems to have been provided only through the submissions and exhibits on record in these proceedings. Among such information are the compilations of maps on the ASF situation in the European Union between 2007 and 2014<sup>603</sup> and the eradication plans for Estonia and Latvia.<sup>604</sup>

#### **7.5.2.3.5.4 Panel's assessment of the evidence provided by the European Union to Russia**

7.427. In the previous section we explained that in the present dispute the European Union has the burden to demonstrate it provided to Russia the necessary evidence to objectively demonstrate two aspects of its ASF situation. The first, that there are ASF-free areas within the European Union, outside Estonia, Latvia, Lithuania, and Poland. The second, that those areas are likely to remain ASF-free. We will first address the issue with respect to the existence of ASF-free areas within the European Union and then move on to examine whether such areas are likely to remain so.

7.428. As we have explained in the preceding section, we consider that to objectively demonstrate that there are ASF-free areas in the European Union outside Estonia, Latvia, Lithuania, and Poland, the European Union's burden, pursuant to its obligation under Article 6.3 of the SPS Agreement, is to demonstrate that it provided 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. Moreover, this information should objectively demonstrate that ASF does not occur in the territory of the European Union outside the four affected EU member States.

7.429. In our view, the European Union has provided evidence in respect of each of the preceding categories. We turn to examine when such information was made available to Russia and to what extent it would suffice to substantiate the European Union's objective demonstration of the ASF-free status of those areas in the European Union outside Estonia, Latvia, Lithuania, and Poland.

7.430. We begin by considering first the requirement for evidence relating to the epidemiological surveillance of ASF. The first question we address in this respect is whether ASF is a notifiable disease in the European Union. The package of information attached to the letter sent by DG SANCO to FSVPS on 7 February 2014 included a website link to the text of

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<sup>601</sup> Those exhibits include: EU-118; RUS-27 (referred to in Russia's first written submission, regarding the ASF situation in Lithuania), RUS-33 (referred to in Russia's first written submission, regarding the ASF situation in Poland), RUS-34 (referred to in Russia's first written submission, regarding the ASF situation in Latvia), RUS-35 (referred to in Russia's first written submission, regarding the ASF situation in Estonia), RUS-73 (referred to in Russia's first written submission, regarding the ASF situation in Poland); RUS-104 (referred to in Russia's first written submission, para. 238, regarding the ASF situation in Estonia); RUS-105 (referred to in Russia's first written submission, para. 238, regarding the ASF situation in Lithuania), RUS-106 (referred to in Russia's first written submission, para. 238, regarding the ASF situation in Latvia), RUS-107 (referred to in Russia's first written submission, para. 238, regarding the ASF situation in Poland), RUS-145 (referred to in Russia's first written submission, regarding the ASF situation in Poland), RUS-152 (referred to in Russia's opening oral statement in the first meeting with the Panel, paras. 27-28, ASF Outbreaks and Cases per Month for Lithuania, Poland, Latvia and Estonia, January 2014 to March 2015), RUS-164 (referred to in Russia's opening oral statement in the first meeting with the Panel, para. 30), RUS-168 (referred to in para. 12 of Russia's closing statement at the first meeting of the Panel - referring to WAHIS interface), RUS-194 (Russia's response to Panel question No. 26, para. 14), RUS-275 (referred to in Russia's second written submission, para. 94), RUS-296 (referred to in Russia's comments to experts' responses to Panel question No. 52, para. 134) and RUS-296 revised (exhibited to Russia's opening statement in the second meeting with the Panel).

<sup>602</sup> See experts' responses to Panel question No. 50, Compilation of experts responses, paras. 4.124-4.129.

<sup>603</sup> African Swine Fever from 2007 to 2014, compilation by the European Commission of maps from OIE (Exhibit EU-21).

<sup>604</sup> See European Union's response to Panel question No. 19, para. 82. These were submitted as Exhibits EU-116 and EU-117. See also Exhibit EU-103.

Council Directive 2002/60/EC, laying down specific provisions for the control of ASF.<sup>605</sup> Through the letter from DG SANCO to FSVPS, the European Union explained that, pursuant to Council Directive 2002/60/EC, EU member States have the obligation to ensure that the presence or the suspected presence of ASF is compulsorily and immediately notified to the competent authority.<sup>606</sup> Indeed Article 3 of Council Directive 2002/60/EC, entitled "African swine fever notification", provides the obligation described by the European Union in its letter of 13 March 2014.<sup>607</sup> In our view, the European Union provided Russia at least as at 7 February 2014 with the necessary evidence to objectively demonstrate that ASF has been a notifiable disease in the European Union. In addition, we consider that the ASF notifications by the EU member States to the OIE, and the reliability of those notifications through the WAHIS information system to verify the ASF situation in the EU member States at any given point in time, further reinforces this finding.<sup>608</sup>

7.431. The second question in respect of epidemiological surveillance is whether the European Union has had in place appropriate monitoring and surveillance mechanisms for ASF. The package of information attached to the letter sent by DG SANCO to FSVPS on 7 February 2014 included, in addition to the already mentioned Council Directive 2002/60/EC, a website link to the text of Commission Decision 2003/422/EC, approving an ASF diagnostic manual.<sup>609</sup> In our view, these regulations provide a clear legal framework in respect of the monitoring and surveillance mechanisms for ASF in the European Union. Article 18 of Council Directive 2002/60/EC, entitled "Diagnostic procedures and bio-safety requirements" provides the general obligations that EU member States have in respect of a uniform approach to diagnostic procedures, sampling and laboratory testing to detect ASF. The detailed description of the diagnostic procedures is laid out in Commission Decision 2003/422/EC.

7.432. In this respect, the European Union also referred in its letter of 7 February 2014 to surveillance programmes approved for 2013 for Estonia, Latvia, Lithuania, and Poland. The European Union indicated that updated revisions of these programmes to be implemented in 2014 with European Union's financial support were under internal discussion.<sup>610</sup> We are mindful of the limited evidentiary value of these documents, which seem to be applications for financial resources submitted to the European Union. However, we find them to provide an indication of the type of surveillance that was put in place by some of the EU member States which were more at risk due to their proximity with areas in Belarus and Ukraine where there had been ASF outbreaks. These surveillance programmes included activities such as (i) laboratory testing of dead wild boar and domestic pigs; (ii) strengthening of biological security at road borders (including disinfection of trucks); (iii) regular inspections of pig holdings; (iv) information campaigns to raise awareness and sensitize the public and relevant stakeholders to the threat of an ASF outbreak; and (v) training for relevant stakeholders designed to convey knowledge of ASF.<sup>611</sup> Furthermore, these documents generally refer to domestic regulations that provide the conditions for the application of the surveillance obligations foreshadowed in Council Directive 2002/60/EC and in accordance with Commission Decision 2003/422/EC.

7.433. Also in respect of monitoring and surveillance mechanisms for ASF, the European Union explained in the letter from DG SANCO to FSVPS of 6 March 2014 that the Council Directive 2002/60/EC and the diagnostic manual for ASF had already been provided.<sup>612</sup> Moreover, through

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<sup>605</sup> European Union's letter to Russia of 7 February 2014, ARES(2014)304571, SANCO/G7/DP/tb(2014)328578 (Exhibit EU-65). The text of Council Directive 2002/60/EC is on record as Exhibit EU-31.

<sup>606</sup> European Union's letter to Russia of 13 March 2014, ARES(2014)709435, SANCO/G7/PD/mh(2014)745829 (Exhibit EU-91), p. 6.

<sup>607</sup> Council Directive of 27 June 2002, 2002/60/EC (Exhibit EU-31), p. L 192/28.

<sup>608</sup> See para. 7.425 above.

<sup>609</sup> European Union's letter to Russia of 7 February 2014, ARES(2014)304571, SANCO/G7/DP/tb(2014)328578 (Exhibit EU-65). The text of Commission Decision 2003/422/EC is on record as Exhibit EU-32.

<sup>610</sup> European Union's letter to Russia of 7 February 2014, ARES(2014)304571, SANCO/G7/DP/tb(2014)328578 (Exhibit EU-65), p. 5 of the Annex.

<sup>611</sup> See Veterinary Control Programme on African swine fever Poland in 2014, 2013 (Exhibit EU-237), Veterinary Control Programme on African swine fever early detection in Lithuania and Belarus in 2014, 2013 (Exhibit EU-238), and Veterinary Programme on African swine fever early detection in Latvia in 2014, 2013 (Exhibit EU-239).

<sup>612</sup> European Union's letter to Russia of 6 March 2014, ARES(2014)601346, SANCO/G7/PD/mh/(2014)630598 (Exhibit EU-86), p. 6.

the letter from DG SANCO to FSVPS of 13 March 2014, the European Union explained that "[s]urveillance demonstrating absence of ASF in the EU in not high risk territories not adjacent to infected areas is based on passive surveillance by means of structured non-random surveillance activities as described in Article 1.4.5. of the OIE Terrestrial Code".<sup>613</sup> The European Union further explained that such surveillance is based on the obligation of EU member States to ensure that the presence or the suspected presence of ASF is compulsorily and immediately notifiable to the competent authority, pursuant to Article 3 of Council Directive 2002/60/EC. The European Union also explained that active surveillance is applied in designated risk areas covering in 2014 four EU member States (Estonia, Latvia, Lithuania, and Poland), and that it would be expanded to other EU member States adjacent to high risk areas like Finland or Romania, e.g., areas bordering countries with active ASF outbreaks.<sup>614</sup>

7.434. Through the letter from DG SANCO to FSVPS of 21 May 2014, the European Union referred to the surveillance programmes approved for the four affected EU member States for 2013 that were provided with the letter of 7 February 2014. This letter of 21 May also provided updated versions of these programmes for the year 2014.<sup>615</sup> Lastly, through the letter from DG SANCO to FSVPS of 13 June 2014, the European Union reiterated its explanation of the type of surveillance programmes it applies contingent on the risk of ASF due to geographical proximity. In the European Union's words "[a]s a general rule, non-specific or passive surveillance is applied all over the EU. ASF -targeted (active) surveillance is applied where there is a differentiated risk, such as in the territories or countries that neighbour infected countries. In 2013, surveillance was implemented in Estonia, Latvia, Lithuania, and Poland. In 2014, as a result of the detected cases, surveillance in Estonia, Latvia, Lithuania, and Poland was further intensified. Such surveillance is also being intensified in other EU Member States countries who consider themselves to be at risk, due to their close proximity to the border with the Russian Federation, Belarus and/or Ukraine."<sup>616</sup>

7.435. In our view, the explanations and information provided by the European Union through the communications referred to in respect of epidemiological surveillance of ASF sufficiently demonstrate that the European Union has had in place appropriate monitoring and surveillance mechanisms for ASF. The European Union provided information to Russia regarding its ASF regulatory framework through its letter of 7 February 2014. Although some of the explanations that the European Union provided in this respect were made through the communications of 6 March and 21 May 2014, because such explanations are grounded on the legal framework that was already provided to Russia in the letter of 7 February 2014, we find that the European Union provided Russia at least as at 7 February 2014 with the necessary evidence to objectively demonstrate that the European Union has had in place appropriate monitoring and surveillance mechanisms for ASF.

7.436. The second cluster of evidence we will examine refers to the effectiveness of sanitary or phytosanitary controls in respect of ASF. Regarding this cluster of information we will examine whether the European Union has had in place measures to prevent introduction of ASF. We find the most useful guidance in this respect in the attachment to the letter of 13 March 2014 entitled "Working Document on EU preventive measures for ASF (SANCO/7037/2014 Rev 1)".<sup>617</sup> We consider this document to be indicative, on a scientific and technical level, of the ASF preventative measures the European Union has in place. Through this document, dated 6 March 2014, the European Union indicated six areas that summarize the measures in force in the European Union to prevent the introduction and spread of ASF. The first of these areas is called "Baseline measures for keeping and moving pigs in MSs" and refers to Directive 2008/71/EC in respect of identification, marking, and database registration of animals and to the regulations applicable to feeding of animal products to pigs, which prohibit feeding of swill and ensure only safe ingredients

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<sup>613</sup> European Union's letter to Russia of 13 March 2014, ARES(2014)709435, SANCO/G7/PD/mh(2014)745829 (Exhibit EU-91), p. 6.

<sup>614</sup> European Union's letter to Russia of 13 March 2014, ARES(2014)709435, SANCO/G7/PD/mh(2014)745829 (Exhibit EU-91), pp. 6-7.

<sup>615</sup> European Union's letter to Russia of 21 May 2014, ARES(2014)1658269, SANCO/G6/AB(2014)1782253(Exhibit EU-92), p. 9.

<sup>616</sup> European Union's letter to Russia of 13 June 2014, ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505 (Exhibit EU-94), p. 5.

<sup>617</sup> See European Union's letter to Russia of 13 March 2014, ARES(2014)709435, SANCO/G7/PD/mh(2014)745829 (Exhibit EU-91), p. 7 and European Union Working Document on ASF, ARES(2014)605187 (Exhibit EU-88).

can come into contact with pigs.<sup>618</sup> We have no clear evidence on record that the European Union provided Russia with copies of Directive 2008/71/EC<sup>619</sup> or the regulations applicable to feeding of animal products to pigs.<sup>620</sup>

7.437. The second area indicated by the European Union as part of the measures in force to prevent the introduction and spread of ASF refers to "Baseline measures for intra-EU trade in live pigs". In this respect, the European Union described the conditions applicable to new born pigs regarding where they should be kept for the first 30 days, the veterinary clinical inspections they should be subjected to, the conditions for issuance of veterinary certificates, their registration in the TRACES system once the consignment destination is defined, and conditions for transportation.<sup>621</sup>

7.438. The third area that the European Union identified as part of the measures in force to prevent introduction and spread of ASF is "Baseline measures on the introduction into the Union of personal consignments of products of animal origin". In this respect, the European Union explained that there are controls in place that aim at detecting the presence of personal consignments of products of animal origin, which are organized on the basis of a risk assessment and involve the use of scanners and dogs leading to seizure and destruction of personal consignments and penalties; the EU member States submit annual reports on this area to the Commission.<sup>622</sup>

7.439. The fourth area identified by the European Union as part of the measures in force to prevent introduction and spread of ASF is "Baselines measures in food hygiene". The European Union explained that this area covers veterinary ante-mortem and post-mortem inspection of all pigs; post-mortem inspection of wild game and initial examination by trained hunters; and official inspection of pigs slaughtered outside slaughterhouses for personal consumption.<sup>623</sup>

7.440. As a fifth area, the European Union refers to "Specific rules upon occurrence of ASF in Member States". The European Union explained that these rules consist of surveillance in all suspected and in-contact pig holdings, as well as all holdings included in the infected area; standstill of pigs around every outbreak in a farm as well as pig holdings in the infected area; creation of protection and surveillance zones in response to outbreaks in domestic pigs and creation of an infected area in cases of outbreaks in wild boars; movement restrictions on pig products; cleansing and disinfection of infected holdings; enhanced farmed bio-security; stamping out of all pigs in infected and in-contact holdings; and eradication programmes.<sup>624</sup> We note that these correspond to those enshrined in the relevant articles of Council Directive 2002/60/EC, which was provided by the European Union to Russia through the letter of 7 February 2014.<sup>625</sup> The European Union further explained that EU member States applied additional measures to ensure that certain pork products are not dispatched from their territory or from the part of the territory subject to restrictions for ASF.<sup>626</sup>

7.441. Lastly, the European Union refers to "Specific measures to mitigate risk of introducing ASF from neighbouring countries". These measures refer to requirement of proof of cleansing and disinfection of livestock vehicles on arrival from third countries; and requirement of cleansing and

<sup>618</sup> European Union Working Document on ASF, ARES(2014)605187 (Exhibit EU-88), p. 2.

<sup>619</sup> The European Union exhibited Directive 2008/71/EC as Exhibit EU-250, which the European Union quotes in its comments to Russia's response to Panel question No. 306, paras. 158-160.

<sup>620</sup> It is our understanding that the legal framework applicable to swill feeding are described in European Union's response to Panel question No 49, paras. 109-112, which refers to Commission Regulation (EU) No 142/2011 of 25 February 2011 implementing Regulation (EC) No 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive, OJ L 54, p.1 (Exhibit EU-149) and Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation), OJ L 300, p.1 (Exhibit EU-150).

<sup>621</sup> European Union Working Document on ASF, ARES(2014)605187 (Exhibit EU-88), p. 2.

<sup>622</sup> European Union Working Document on ASF, ARES(2014)605187 (Exhibit EU-88), p. 4.

<sup>623</sup> European Union Working Document on ASF, ARES(2014)605187 (Exhibit EU-88), p. 4.

<sup>624</sup> European Union Working Document on ASF, ARES(2014)605187 (Exhibit EU-88), pp. 4-5.

<sup>625</sup> See Appendix 1 below.

<sup>626</sup> European Union Working Document on ASF, ARES(2014)605187 (Exhibit EU-88), p. 5.

disinfection in case it has not been satisfactorily carried out on the incoming livestock vehicle.<sup>627</sup> Through the letter of 13 March 2014, the European Union provided Russia with Committee Implementing Decision 2013/426/EU, on measures to prevent the introduction into the Union of ASFV from certain third countries, which contains the above mentioned measures to mitigate risk of introducing ASF from neighbouring countries.<sup>628</sup> Furthermore, the ASF surveillance programmes of Estonia, Latvia, Lithuania, and Poland provided through the letter of 7 February 2014, refer to this type of activity.<sup>629</sup>

7.442. In addition to the "Working Document on EU preventive measures for ASF", the European Union provided Russia with information on the measures in place to prevent introduction of ASF. These include the guidelines for contingency planning for EU member States, the contingency plans of certain EU member States, and the audits of some of those contingency plans. This information was provided through the letter of 7 February 2014.<sup>630</sup> Russia objects to the use of this information, because in its view, the information does not reflect conditions and appropriate control measures that should be taken after an outbreak.<sup>631</sup> In our view, the documents provided by the European Union to Russia in respect of contingency planning, included general information on the type of emergency plans that would be carried out in case of an outbreak of an epidemic disease, further explaining what type of preventive measures were mandated to be in place pursuant to the European Union's legal framework applicable to the prevention of ASF.

7.443. We also note that the European Union has been keen to clarify and address situations that have caused Russia concern in respect of the prevention of ASF. In particular, we are referring to the letter of 4 April 2014 where the European Union explained and responded to Russia's enquiries in respect of the movement of pig products from ASF affected areas of the European Union and suspected violations on third country product transshipment.<sup>632</sup>

7.444. In our view, the European Union provided to Russia information pertaining to the measures in place to prevent introduction of ASF. Of particular relevance to us is the document that the European Union sent to Russia attached to the letter of 13 March 2014 entitled "Working Document on EU preventive measures for ASF (SANCO/7037/2014 Rev 1)".<sup>633</sup> As described in the preceding paragraphs, some of that information was already provided to Russia together with the European Union's letter of 7 February 2014. We note that the European Union's explanations presented in the above mentioned "Working Document on EU preventive measures for ASF" failed to identify the regulatory basis for some of the measures described therein. However we consider that despite these limitations, we find that the general information submitted by the European Union as at 7 February 2014 amounts to the necessary evidence to objectively demonstrate that the European Union has had in place measures to prevent the introduction of ASF.

7.445. The third category of evidence that we consider necessary for the European Union to objectively demonstrate that certain areas in the European Union are ASF-free refers to ecosystems. The first aspect that we will examine is whether there is knowledge of the establishment of ASF in wildlife in the areas claimed to be free of ASF. In paragraphs 7.430 to 7.435 we examine the fact that ASF is a notifiable disease and the monitoring and surveillance mechanisms that the European Union has in place for ASF. Based on those considerations, together with the manner in which individual EU member States provided updated and reliable notifications to the OIE to include in the WAHIS database, we find merit in the fact that ASF is not known to be established in wildlife outside the four affected EU member States (Estonia, Latvia, Lithuania, and Poland), with the exception of Sardinia.

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<sup>627</sup> European Union Working Document on ASF, ARES(2014)605187 (Exhibit EU-88), p. 5.

<sup>628</sup> Commission Implementing Decision "On measures to prevent the introduction into the Union of the African swine fever virus from certain third countries or parts of the territory of third countries in which the presence of that disease is confirmed and repealing Decision 2011/78/EU (2013/426/EU)" (Exhibit RUS-349)

<sup>629</sup> See para. 7.432 above.

<sup>630</sup> See section "Emergency response in case ASF in the EU member States/Contingency Plans" in Table A4 in Appendix 1 below.

<sup>631</sup> Russia's comments to the European Union's response to Panel question No. 322, para. 198.

<sup>632</sup> Letter from DG SANCO to the Russian Veterinary Service, SANCO/G7/PD/mh (2014) 1055360, 4 April 2014 (Exhibit RUS-56).

<sup>633</sup> European Union's letter to Russia of 13 March 2014, ARES(2014)709435, SANCO/G7/PD/mh(2014)745829 (Exhibit EU-91) p. 7. This document was exhibited as Exhibit EU-88.

7.446. Our view on this matter is further reinforced by the evidence provided by the European Union on behavioural ecology of wild boars. In this regard, attached to the letter of 7 February 2014, the European Union sent Russia the 2010 EFSA scientific opinion. That document explains that:

[W]ild boar do not migrate, at least according to the classic definition of migration. Some small seasonal movements are registered but always inside the usual individual home range that varies from 20-100 km<sup>2</sup>. Infections can spread between larger regions, however, where there is continuity in the geographical distribution of the wild boar, as observed for CSF (EFSA, 2009c). In this respect, the Ukraine (Crimea), Poland and Romania may be at risk due to the continuous distribution and the high density of wild boar. Possible corridors may also exist from the infected Russian areas into Lithuania or Latvia. Where wild boar are absent or natural/artificial barriers prevent direct contact between infected and susceptible populations, infections usually fade out spontaneously (Artois et al., 2002); for ASF, this pattern has been observed in Sardinia only (Firinù and Scarano, 1988).<sup>634</sup>

7.447. This was further confirmed through the explanation provided in the attachment to the letter sent by DG SANCO to FSVPS on 13 June 2014, where the European Union explained the criteria used to identify the borders of the infected/free/high risks zones in the territory of Poland and Lithuania.<sup>635</sup> The Panel's experts confirmed the scientific merit of this information.<sup>636</sup> In our view, this scientific justification demonstrates the negligible risk of ASF spreading through wild boar populations from the most eastern territories of the European Union to the central and western areas. Furthermore, the European Union's explanations of the measures adopted for the prevention of the spread of ASF support the objective demonstration that ASF-free areas within the European Union are likely to remain so.

7.448. The last category of evidence refers to the level of prevalence of ASF in the areas claimed to be free of ASF. As we observed earlier, evidence regarding the level of prevalence of ASF is directly related to the surveillance programmes. In this regard, we have already noted that the EU member States have provided updated and reliable notifications to the OIE for inclusion in the WAHIS database. This information clearly confirms that there is no presence of ASF and ASFV in the areas outside Estonia, Latvia, Lithuania, and Poland that the European Union claims to be free of ASF.

7.449. In our view, the examination of the preceding evidence supports a conclusion that the European Union provided to Russia, as at 7 February 2014, the necessary evidence to objectively demonstrate that the ASF-free areas within the European Union were ASF-free and were likely to remain so. However, we are mindful of the changing nature of the ASF situation in the eastern part of the European Union from that date and until 11 September 2014. We are also mindful that we are examining the EU-wide ban independent from the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. This means that we are examining the EU-wide ban as it was after 11 September 2014, following the adoption of the bans on the imports of the products at issue from Estonia. In light of these considerations, in section 7.6.2.3.3 below we will examine whether there are any changes in the necessary evidence that the European Union had to provide to Russia in order to objectively demonstrate the existence of ASF-free areas in Estonia, Latvia, Lithuania, and Poland. With this in mind, our preliminary conclusion based on examination of the preceding evidence is only applicable in respect of the ASF-free areas within European Union that are located outside Estonia, Latvia, Lithuania, and Poland.

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<sup>634</sup> 2010 EFSA Scientific Opinion (Exhibit EU-24).

<sup>635</sup> European Union's letter to Russia of 13 June 2014, ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505 (Exhibit EU-94), p. 4.

<sup>636</sup> See Professor Penrith's response to Panel question Nos. 9.d, 21.a, and 22.a; and Dr Thomson's response to Panel question No. 9d.

7.450. We recall that Russia has challenged the sufficiency of the information examined in support of the European Union's satisfaction of its obligation under Article 6.3. We have these objections in mind as we pursue our analysis.<sup>637</sup>

7.451. In addition to the evidence that we have referred to, the European Union provided explanations and additional information to complement the necessary evidence provided as at 7 February 2014. Among such information we highlight the explanations on the detailed emergency response action plan provided through the letter of 21 May 2014<sup>638</sup>; and the detailed information regarding monitoring/surveillance of wild boars in each EU member State, data regarding the role of wild boars in the spread of ASF in EU member States, the detailed information regarding the measures taken by each EU member State to prevent the trans-boundary spread of ASF in the European Union, the detailed information regarding the measures taken by each EU member State to prevent the trans-boundary spread of ASF through the movement of wild boars in the European Union, and the detailed information on measures intended to prevent the spread of ASF to/from small and average-sized farms and farms/facilities with low level protection (e.g., premises where pigs are not indoors) in each EU member State, all provided through the letter of 24 March 2015.<sup>639</sup>

7.452. Moreover, it is relevant to highlight that before the first ASF outbreak in Lithuania, Russia had viewed the entire territory of the European Union as free of ASF, with the exception of Sardinia. This was the case at least as of 2006, when the text of the bilateral veterinary certificates was agreed.<sup>640</sup> We recall that, pursuant to the 2006 Memorandum, the wording of the bilateral veterinary certificate that had been agreed between the European Union and Russia allows importation of the products concerned accompanied by an attestation that the products at issue "...originate from premises and/or administrative territory of the EU Member State that are officially free from the following contagious diseases: African swine fever - during the last 3 years in the territory of the EU excluding Sardinia..."<sup>641</sup>. Up to and until the first outbreak of ASF in Lithuania in January 2014, the entire European Union territory (with the exception of Sardinia) had been recognized by Russia as free of ASF for at least the "last 3 years". It was under that basis and mutual trust that the European Union was able to trade in pig products with Russia.<sup>642</sup>

7.453. In addition to the preceding analysis regarding the information provided by the European Union to Russia to objectively demonstrate that there are ASF-free areas within the European Union outside Estonia, Latvia, Lithuania, and Poland, we will examine the information provided by the European Union with respect to those ASF-free areas being likely to remain so.

7.454. In paragraph 7.406 above we explained that for an exporting Member to objectively demonstrate that a disease-free area is likely to remain so, it should provide to the importing Member the necessary evidence to support that there is "probability" that the disease-free status will be maintained in the particular area. We also observed that an objective demonstration of a disease-free area being likely to remain so requires, in addition to the information required to objectively demonstrate there are disease-free areas, the necessary evidence to support the effectiveness of the control measures.

7.455. We have provided a detailed examination with respect to the effectiveness of the control measures in place for the EU member States not affected with ASF.<sup>643</sup> We have identified evidence in support of our conclusion that the European Union provided to Russia the necessary evidence to objectively demonstrate that the European Union has had in place measures to prevent the introduction of ASF. In addition, we consider the fact at the time of the establishment of the Panel on 22 July 2014 and even at the time the parties provided the latest information on the spread of ASF in the European Union, on 22 October 2015, there had been no cases of ASF reported outside Estonia, Latvia, Lithuania, and Poland, as further "real world" evidence of the effectiveness of the

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<sup>637</sup> Russia's second written submission para. 131-132; comments to the expert's responses to Panel questions No. 12 and 13; and comments to European Union's response to Panel question No. 322.

<sup>638</sup> See Table A5 in Appendix 1 below.

<sup>639</sup> See Table A8 in Appendix 1 below.

<sup>640</sup> See fn 117 above.

<sup>641</sup> Veterinary certificate for piglets for fattening (Exhibit EU-52).

<sup>642</sup> See European Union's opening statement at the second panel meeting, para. 103.

<sup>643</sup> See paras. 7.436 - 7.444 above.



European Union's control measures for ASF.<sup>644</sup> We therefore conclude that the European Union provided to Russia the necessary evidence to objectively demonstrate that the ASF-free areas in the European Union, outside Estonia, Latvia, Lithuania, and Poland, are likely to remain ASF-free.

7.456. Based on the foregoing, we conclude that in the period between 7 February 2014 and 11 September 2014, the European Union objectively demonstrated to Russia that there are areas within the European Union territory, outside of Estonia, Latvia, Lithuania, and Poland, which are free of ASF and are likely to remain so. Furthermore the relevant evidence on record that the European Union has submitted to Russia subsequent to 11 September 2014 serves to confirm and support our finding.

### **7.5.2.3.6 Whether Russia, through the EU-wide ban, ensured adaptation to the SPS characteristics of the European Union and of Russia in respect of ASF, pursuant to Russia's obligations under Article 6.1 of the SPS Agreement**

#### **7.5.2.3.6.1 Introduction**

7.457. The European Union argues that Russia fails, through the EU-wide ban, to adapt its measures to the SPS characteristics of the European Union and of Russia in respect of ASF. This is because in assessing the sanitary characteristics of the affected area, Russia failed to take into account, *inter alia*, the level of prevalence or absence of ASF, the existence of eradication and control programmes (immediately implemented in accordance with international standards laid down by the OIE), and appropriate criteria or guidelines developed by the relevant international organizations.<sup>645</sup> The European Union further stresses that despite the implementation of appropriate regionalization measures within the European Union, Russia fails to recognize the EU territory, excluding the restricted areas, as disease-free areas.<sup>646</sup> The European Union also points out that Article 6.1 of the SPS Agreement requires that measures are adapted not only to the area from which a product originates, but also to the area to which it is destined. In this regard, the European Union highlights that there are regions in Russia where wild boars do not occur and that to the extent to which domestic pigs do not occur in those regions in Russia, the introduction of the products at issue would not present ASF-related sanitary risks, and importation to consumers in those regions should be allowed.<sup>647</sup>

7.458. Russia argues that taking into consideration the very factors listed in Article 6.1 of the SPS Agreement, it objectively and reasonably did not accept the European Union's zones.<sup>648</sup> Russia asserts that in evaluating whether there is an objective basis for Russia's decision not to recognize the proposed ASF-free zones in conformity with the applicable Terrestrial Code standards and consistent with Article 6 of the SPS Agreement, the Panel must determine whether Russia's decision regarding the various European Union zones was "objectively justifiable". Russia stresses that in conducting that review, the Panel must not substitute its own judgement of the weight to be given to certain evidence for that given by the importing country. Rather, it must determine whether the totality of the circumstances and evidence (or lack thereof) was sufficient to support the objectivity of Russia's decision in light of the relevant provisions of the Terrestrial Code and SPS Agreement Article 6 criteria and the available information.<sup>649</sup> Russia further posits that there exist considerable parallels between the more specific zoning provisions in Terrestrial Code Chapter 4.3 and Article 5.3.7 and the more general relevant factors listed in Articles 6.2 and 6.1 of the SPS Agreement.<sup>650</sup> In this regard Russia argues that first, Article 6.1 makes mandatory taking into account "the appropriate criteria and guidelines which may be developed by the relevant international organizations", meaning any objective assessment of an ASF-free zone consistent with Article 6.1 of the SPS Agreement would have to include the assessment of the zoning "principles" set out in Terrestrial Code Article 4.3.3 as well as the related Article 5.3.7.<sup>651</sup> Second, all of the general factors listed in SPS Agreement Articles 6.1 and 6.2 for importing countries to

<sup>644</sup> See Data from OIE WAHIS Interface, as of 31 August 2015 (Exhibit RUS-296 revised).

<sup>645</sup> European Union's first written submission, para. 215.

<sup>646</sup> European Union's first written submission, para. 215.

<sup>647</sup> European Union's second written submission, para. 128.

<sup>648</sup> Russia's first written submission, para. 231.

<sup>649</sup> Russia's second written submission, para. 49. See also Russia's response to Panel question No. 113, paras. 190-196.

<sup>650</sup> Russia's second written submission, para. 50.

<sup>651</sup> Russia's second written submission, para. 51.

take into account when deciding to accept regionalization are also included in the more specific provisions of Chapter 4.3 of the Terrestrial Code, and that regardless of whether the Terrestrial Code provisions in Articles 4.3.3 and 4.3.3.3 are binding on the European Union in seeking to establish an ASF-free zone, at a minimum, these provisions are relevant benchmarks for assessing the general criteria of Article 6 of the SPS Agreement.<sup>652</sup> Third, Article 6.3 of the SPS Agreement also overlaps considerably with Terrestrial Code Article 5.3.7, which addresses the "sequence of steps to be taken in establishing a zone/compartment and having it recognized for international trade purposes".<sup>653</sup> Russia concludes that the Terrestrial Code is a more detailed and elaborated version of the general provisions set out in Article 6 of the SPS Agreement. Accordingly, if the Panel finds that Russia was objectively justified in not accepting the EU zones in conformity with the Terrestrial Code zoning/regionalization standards, recommendations, and guideline benchmarks, it should also find that it acted consistently with Article 6 of the SPS Agreement.<sup>654</sup>

7.459. In light of the parties' arguments, the Panel is faced with the question of whether Russia, in applying the EU-wide ban, adapted its measures to the SPS characteristics of the European Union and of Russia in respect of ASF, pursuant to Russia's obligations under Article 6.1 of the SPS Agreement. In addressing this question, the Panel will first examine the applicable legal test, including a review of Russia's argument of the applicable standard of review.

#### 7.5.2.3.6.2 Legal test

7.460. The first sentence of Article 6.1 of the SPS Agreement stipulates that "Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area ... from which the product originated and to which the product is destined." Pursuant to the second sentence of Article 6.1, 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."

7.461. The Appellate Body in *India – Agricultural Products* observed, in respect of the first sentence of Article 6.1, that the "verb 'ensure' is defined as to make certain the occurrence of a situation or outcome."<sup>655</sup> In turn, the term "adapt" means 'fit, adjust, (to); make suitable (to or for)'.<sup>656</sup> The Appellate Body further noted that there are two relevant areas to the obligation in the first sentence of Article 6.1, the area from which the product originated and the one to which it is destined.<sup>658</sup> The Appellate Body indicated that the adaptation of an SPS measure does not only occur a single time; rather, the obligation to ensure that a Member's SPS measures are "adapted" to the relevant areas is "a continuing obligation".<sup>659</sup>

7.462. The panel in *US – Animals* stated that the obligation under Article 6.1 requires the "adaptation" of a measure, which, it explained, entails that the measure in question must be tailored or calibrated to the specific SPS characteristics of the area concerned.<sup>660</sup> It also highlighted that there was an inherent obligation for the regulating Member to adapt its measure not only to the area of origin, but also to the area of destination of a product.<sup>661</sup>

<sup>652</sup> Russia's second written submission, para. 52.

<sup>653</sup> Russia's second written submission, para. 53.

<sup>654</sup> Russia's second written submission, para. 56.

<sup>655</sup> (footnote original) Relevant definitions of the term "ensure" are "guarantee, warrant" and "make certain the occurrence of (an event, situation, outcome, etc.) (Foll. by *that*)". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 840)

<sup>656</sup> (footnote original) *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 24.

<sup>657</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.132. See also Panel Reports, *India – Agricultural Products*, para. 7.668; and *US – Animals*, para. 7.641.

<sup>658</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.132.

<sup>659</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.154.

<sup>660</sup> Panel Report, *US – Animals*, para. 7.642.

<sup>661</sup> Panel Report, *US – Animals*, para. 7.642.

7.463. Regarding the second sentence of Article 6.1, the Appellate Body in *India – Agricultural Products* observed that it "specifies, in a non-exhaustive manner, the elements that Members must take into account in assessing the SPS characteristics of a region. These elements include: the level of prevalence of specific diseases or pests; the existence of eradication or control programmes; and appropriate criteria or guidelines that may be developed by the relevant international organizations."<sup>662</sup>

7.464. The panel in *US – Animals* agreed with the panel in *India – Agricultural Products* that the second sentence of Article 6.1 "presupposes that Members undertake an assessment of the SPS characteristics of a region" and contains "a list of factors that shall be taken into account by Members in undertaking such assessment."<sup>663</sup>

7.465. The panel in *US – Animals* concluded that the two sentences of Article 6.1 provide a "logical progression" in that a Member must "assess" the SPS characteristics of a given area, taking into account, *inter alia*, the identified factors in the second sentence of Article 6.1. Once the SPS characteristics of the area have been assessed, the Member is required to "adapt" its SPS measure to such characteristics.<sup>664</sup>

7.466. The panel in *India – Agricultural Products* explained that if a determination is made that the concepts of disease-free areas and areas of low disease prevalence – as required by the first sentence of Article 6.2 – have not been recognized, then this will lead to a finding that the measures are not adapted to the SPS characteristics of the area from which products originate or to which they are destined, pursuant to the first sentence of Article 6.1.<sup>665</sup>

7.467. The panel in *India – Agricultural Products* further clarified that a Member's failure to ensure that its SPS measures are adapted to the SPS characteristics of an area for the purpose of the first sentence of Article 6.1 may warrant a concomitant finding that the Member has not taken into account the factors in the second sentence of Article 6.1, in assessing the SPS characteristics of a region. That panel indicated that the language of the first sentence of Article 6.1 is framed in the present tense ("are adapted"), which leads to the consideration that the adaptation of the measure to the SPS characteristics of the area is an element of the SPS measure *as such*, which the implementing Member must ensure.<sup>666</sup> The first sentence of Article 6.1 denotes that a Member must make certain of its measures' *suitability* (in this case, suitable for the SPS characteristics of the area).<sup>667</sup>

7.468. We agree with the panel in *US – Animals*, that

"[A]daptation" of a measure entails that the measure in question must be tailored or calibrated to the specific SPS characteristics of the area concerned. If, for instance, the area from which a product originates presents a lower level of risk than the rest of the territory of an exporting Member, an importing Member would be required to impose less stringent conditions on imports of products therefrom. The contrary may also be true. If, indeed, the area from which a product originates presents a higher level of risk than the rest of the exporting Member's territory, such an SPS characteristic may warrant the imposition of particularly stringent import restrictions targeting that specific area. We also note that the first sentence of Article 6.1 refers to both the area "from which the product originated" *and* the area "to which the product is destined". This indicates that the regulating Member is required to adapt its measure not only to the area of origin, but also to the area of destination of a product. If, for instance, a particular area within the territory of an importing Member has a similar SPS status as the area of origin of a product (e.g. has

<sup>662</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.135.

<sup>663</sup> Panel Report, *US – Animals*, para. 7.643.

<sup>664</sup> Panel Report, *US – Animals*, para. 7.646.

<sup>665</sup> Panel Report, *India – Agricultural Products*, para. 7.709.

<sup>666</sup> Panel Report, *India – Agricultural Products*, para. 7.675.

<sup>667</sup> Panel Report, *India – Agricultural Products*, para. 7.669.

the same level of prevalence of a given disease), that Member may be required to tailor its measure by relaxing the restrictions on imports into that area.<sup>668</sup>

7.469. In examining whether the United States adapted its measure to the SPS characteristics of Patagonia, the panel in *US – Animals* assessed whether the United States' omission to recognize Patagonia as separate from the rest of the Argentinian territory was justified by Argentina's failure to objectively demonstrate that, at the time of the panel's establishment, Patagonia was and was likely to remain FMD-free.<sup>669</sup> After being satisfied that Argentina had met its burden of providing the evidence necessary to "objectively demonstrate" that Patagonia as a whole was, and was likely to remain FMD-free, the panel concluded that the United States' failure to recognize Patagonia as FMD-free was a failure to adapt its general prohibition on imports of FMD-susceptible animals and animal products from Argentina to the specific SPS characteristics of the Patagonia region and is thus inconsistent with Article 6.1 of the SPS Agreement.<sup>670</sup>

7.470. In this dispute Russia posits that the Panel must not substitute its own judgement of the weight to be given to certain evidence for that given by the importing country. Rather, it must determine whether the totality of the circumstances and evidence (or lack thereof) was sufficient to support the objectivity of Russia's decision in light of the relevant provisions of the Terrestrial Code and SPS Agreement Article 6 criteria and the available information.<sup>671</sup>

7.471. In our view, the approach followed by the panel in *US – Animals* provides some clarity as to the type of assessment that should be made in the context of Article 6.1. The Panel needs to examine the evidentiary record and make an objective assessment, pursuant to its obligation under Article 11 of the DSU, of whether the challenged measure is adapted to the relevant ASF characteristics of the area where the products at issue originate and of the area to which they are destined. Such an objective assessment is framed in the broader context of panels' standard of review, which has been described by the Appellate Body in respect of fact-finding, "as neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of facts'"<sup>672</sup> and in respect of legal questions, Article 11 of the DSU requires a panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."<sup>673</sup>

7.472. Based on the foregoing, we turn to examine whether the EU-wide ban is adapted to certain areas within the European Union outside the territories of Estonia, Latvia, Lithuania, and Poland and to the SPS characteristics in Russia.

#### **7.5.2.3.6.3 Whether the EU-wide ban is adapted to the relevant SPS characteristics of areas within the European Union outside the territories of Estonia, Latvia, Lithuania, and Poland and to the SPS characteristics of Russia**

7.473. We recall that pursuant to Article 6.1 of the SPS Agreement Russia has the obligation to adapt its SPS measures to the sanitary and phytosanitary characteristics of the area from which the product originated and to which the product is destined. In this case, this means adaptation to the SPS characteristics of the European Union's territory outside Estonia, Latvia, Lithuania, and Poland and to the SPS characteristics of Russia.<sup>674</sup> In order to determine whether Russia has made such an adaptation, we will first examine the SPS characteristics in each of those areas and then analyse whether the EU-wide ban is indeed adapted to them.

<sup>668</sup> Panel Report, *US – Animals*, para. 7.642.

<sup>669</sup> Panel Report, *US – Animals*, para. 7.670.

<sup>670</sup> Panel Report, *US – Animals*, para. 7.674.

<sup>671</sup> Russia's second written submission, para. 49. See also Russia's response to Panel question No. 113, paras. 190-196.

<sup>672</sup> Appellate Body Report, *EC – Hormones*, para. 117.

<sup>673</sup> Appellate Body Report, *EC – Hormones*, para. 118.

<sup>674</sup> See also Professor Penrith's response to Panel question No. 13, para. 2.126 of the Compiled Individual Experts' Replies, where she opines that "[t]here are 27 states in the EU; all of these cannot be considered to pose an equal risk of ASF for Russia. For instance, at least in terms of spread by migrating wild boars, there would be little sense in UK and Ireland, as well as Malta, Cyprus and any other islands within the EU, including Sardinia in spite of not being free of ASF, needing to supply detailed information about wild boar populations and their movements...".

7.474. In section 7.5.2.3.5 above, we examine whether the European Union objectively demonstrated that there are disease-free areas, which are likely to remain so, outside the territory of Estonia, Latvia, Lithuania, and Poland, pursuant to Article 6.3 of the SPS Agreement. Our finding, after reviewing the evidence provided by the European Union to Russia, as indicated in paragraph 7.449 above, is in the affirmative.

7.475. An important element in support of this conclusion is the surveillance and control programmes that the European Union has in place for ASF. These programmes are contained in the overarching legal framework for ASF, Council Directive 2002/60/EC, which we describe in paragraph 7.433 above and in Appendix 2 below. Furthermore, the limited home-range of wild boars supports the conclusion that the ASF-free areas in the European Union are likely to remain so.<sup>675</sup>

7.476. Based on the foregoing, we conclude that the areas of the European Union outside Estonia, Latvia, Lithuania, and Poland are characterized as being free of ASF and likely to remain so. It is to that particular characteristic to which Russia has the obligation to adapt its measures.

7.477. In our view, imposing an outright ban on the non-treated products at issue, such as the one imposed by Russia through the EU-wide ban, and failing to recognize the existence of ASF-free areas within the European Union's territory amounts to not adapting the measure to the sanitary and phytosanitary characteristics of the European Union territory outside Estonia, Latvia, Lithuania, and Poland.

7.478. Moreover, we have observed that starting in 2007, there have been ASF outbreaks in Russia and that ASF has not been eradicated from Russia.<sup>676</sup> In our view, this forms part of the SPS characteristics of the territory to which the products at issue from the European Union are destined and to which Russia must also adapt its measure. The SPS experts consulted by the Panel stressed many times that it "needs to be remembered that the RF [Russia] is not an ASF-free country".<sup>677</sup>

7.479. The panel in *US – Animals* observed, "[i]f for instance, a particular area within the territory of an importing Member has a similar SPS status as the area of origin of a product (e.g. has the same level of prevalence of a given disease), that Member may be required to tailor its measure by relaxing the restrictions on imports into that area".<sup>678</sup> We agree with this statement, in the sense that the level of prevalence of a given disease in the territory of the importing Member is part and parcel of what that importing Member must adapt its SPS measures to. We recall also the comment by Dr Thomson that: "it seems to me that the problem under discussion is a regional one encompassing the Caucasus, Baltic States, the Russian Federation and eastern parts of the EU. As indicated elsewhere, from an ASF perspective, the whole region seems to be in roughly the same position. Most of the vast surface area of the EU lies outside this region ...".<sup>679</sup> This is not to say that a country in which a disease occurs cannot impose any import restrictions to prevent the further entry of the disease into regions in which control measures are in place, or its spread into areas of the importing country which are free of the disease. Rather, the fact that a disease already exists within the importing area and it is under official control, are factors to be considered in determining if a particular measure, applied to imported products, is adapted to the SPS characteristics of the region to which a product is destined.

7.480. In addition, pursuant to the second sentence of Article 6.1, in assessing the SPS characteristics of a region, Members shall take into account, among other things, the level of prevalence of the specific diseases, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations. In our view, because a Member needs to know what are the SPS characteristics to which its SPS measures need to be adapted, it would be difficult for a Member to act in accordance

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<sup>675</sup> See para. 7.446 above.

<sup>676</sup> See Russia's first written submission, para. 23 (referring to OIE WAHIS Interface, Event summary Reports, African swine fever, Russia (2007-2014). (Exhibit RUS-144)); response to Panel question No. 143, para. 264; and second written submission, paras. 146-147. See also paras. 4.22-4.24 above.

<sup>677</sup> Dr Thomson, response to Panel question 13, para. 2.128.

<sup>678</sup> Panel Report, *US – Animals*, para. 7.642.

<sup>679</sup> Dr Thomson's response to EU Question No.5, Transcript, para. 1.128.

with its obligations under Article 6.1 if it had not made an assessment of the areas from where the products at issue originate and to which they are destined.

7.481. We agree with the panel in *US – Animals* that "the obligation to 'take into account' the factors enumerated in the second sentence [of Article 6.1] is intrinsically connected to the obligations relating to the assessment of risks under Article 5 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' when assessing the risks as required by Article 5.1. Therefore, it is reasonable to conclude that the assessment of the SPS characteristics of an area, taking into account the factors listed in the second sentence of Article 6.1 could be conducted as part of a Member's risk assessment."<sup>680,681</sup>

7.482. It is undisputed that Russia did not base its EU-wide ban on a risk assessment. In section 7.5.5 below, we examine the justifications raised by Russia to excuse compliance with its obligation, pursuant to Article 5.1, to base its SPS measures on a risk assessment. Notwithstanding our examination in section 7.5.5 below, we consider it relevant to our analysis under Article 6.1 that Russia has not made an assessment of the risks arising from the imports of the products at issue from the territory of the European Union outside Estonia, Latvia, Lithuania, and Poland. In particular, we consider that the lack of risk assessment limits a Member's ability to assess the SPS characteristics from where the products in question originate.

7.483. In this case, we consider that rejecting the imports of goods from any of the areas of the European Union outside Estonia, Latvia, Lithuania, and Poland, that the European Union demonstrated to be free of ASF and are likely to remain so, and not tailoring the EU-wide ban in a manner that ensures adaptation to the presence of ASF in certain areas in Russia, constitute a breach of Russia's obligation under Article 6.1. This breach is further corroborated by Russia's failure to make a risk assessment as appropriate to the circumstances, which in this case entails an exhaustive examination, including the corresponding scientific justification, of the regionalization measures adopted by the European Union.

#### **7.5.2.3.6.4 Conclusion**

7.484. Based on the foregoing, we find that Russia did not adapt the EU-wide ban to the SPS characteristics related to ASF of the areas where the products subject to that measure originated nor to the SPS characteristics related to ASF in Russia. We therefore find that the EU-wide ban is inconsistent with Article 6.1 of the SPS Agreement.

#### **7.5.2.4 Conclusion in respect of the EU-wide ban consistency with Article 6 of the SPS Agreement**

7.485. In this section we find 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.<sup>682</sup>

7.486. We also find that in the period between 7 February and 11 September 2014, the European Union objectively demonstrated to Russia, pursuant to Article 6.3, that there are areas within the European Union territory, outside Estonia, Latvia, Lithuania, and Poland, which are free of ASF and are likely to remain so.<sup>683</sup>

7.487. Lastly we find that Russia did not adapt the EU-wide ban to the SPS characteristics related to ASF of 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.<sup>684</sup>

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<sup>680</sup> (footnote original) Our statement should not be read to preclude the possibility of other situations where Article 6.1 could be applied in the absence of a risk assessment.

<sup>681</sup> Panel Report, *US – Animals*, para. 7.644.

<sup>682</sup> See section 7.5.2.3.4 above.

<sup>683</sup> See section 7.5.2.3.5 above.

<sup>684</sup> See section 7.5.2.3.6 above.

### 7.5.3 Claims under Articles 3.1 of the SPS Agreement (continued)

#### 7.5.3.1 Assessing the EU-wide ban in light of the relevant international standard in order to determine whether it is "based on" such standard

7.488. In section 7.5.1.3.4 above we discerned the meaning of the relevant international standards in this dispute, articulated in the Terrestrial Code. At the end of that section we observed that as a result of our examination of the meaning of the relevant international standards applicable to non-treated products in the light of the parties' arguments and of the circumstances in this dispute, we concluded that before comparing the EU-wide ban with those standards for the purposes of determining whether that measure is "based on" them, we considered it appropriate and instructive for us to turn to our examination of the European Union's claims under Article 6 of the SPS Agreement.<sup>685</sup> After conducting our examination of the European Union's claims under Article 6 and reaching the respective findings, we now resume our examination of whether the EU-wide ban is based on the relevant provisions of the Terrestrial Code applicable to the non-treated products at issue.

7.489. In section 7.5.1.3.2 above we explained the applicable legal standard under Article 3.1 of the SPS Agreement. For a measure to be based on a relevant international standard it should be "founded", "built upon" or "supported by" such a standard. Moreover, if a measure is found to contradict, that is, fundamentally departs from the standard, it cannot be properly concluded that such an international standard has been used "as a basis for" the respective measure.<sup>686</sup> In light of these criteria, we now turn to examine the question of whether the EU-wide ban is "based on" the relevant provisions of the Terrestrial Code.

7.490. We recall that the provisions of the Terrestrial Code relating to ASF status provide for recognition of ASF-free countries, zones, and compartments. Thus, Articles 15.1.2, 15.1.3 and 15.1.4 each make reference to an ASF-free "country", "zone" or "compartment" on an equal footing, without imposing any sequence, preference or hierarchy amongst the three terms. Moreover, pursuant to Articles 15.1.5 (applicable to trade of live pigs), 15.1.12 (applicable to trade in pork meat and pork meat preparations) and 15.1.14 (applicable to pork meat preparations), trade of certain pig and pork products is safe when they originate from animals located in an ASF-free country or zone.<sup>687</sup>

7.491. In section 7.5.2.3.5 above we conclude that the European Union provided Russia with the necessary evidence to objectively demonstrate that areas in the European Union outside Estonia, Latvia, Lithuania, and Poland are free of ASF and are likely to remain so.<sup>688</sup>

7.492. We also recall that, pursuant to the 2006 Memorandum<sup>689</sup>, the wording of the bilateral veterinary certificate that had been agreed between the European Union and Russia allows importation of the products concerned accompanied by an attestation that the products at issue "...originate from premises and/or administrative territory of the EU Member State that are officially free from the following contagious diseases: African swine fever - during the last 3 years in the territory of the EU excluding Sardinia".<sup>690</sup> Up to and until the first outbreak of ASF in

<sup>685</sup> See para. 7.330 above.

<sup>686</sup> See para. 7.254 above.

<sup>687</sup> See section 7.5.1.3.4.2 above.

<sup>688</sup> See section 7.5.2.3.5.4 above.

<sup>689</sup> European Union-Russia Memorandum of 4 April 2006 concerning principles of zoning and compartmentalization in the veterinary field (Exhibit EU-61).

<sup>690</sup> Veterinary certificate for piglets for fattening (Exhibit EU-52). A similar language can be found in the following certificates: Veterinary certificate for pigs for breeding, exported from the EU into Russia, 11/08/2006 (Veterinary certificate for pigs for breeding) (Exhibit EU-53); the Veterinary certificate for pork meat and raw meat preparations, exported from the EU into Russia, 11/08/2006 (Veterinary certificate for pork meat and raw meat preparations) (Exhibit EU-54); the Veterinary certificate for slaughter pigs, exported from the EU to Russia, 16/12/2009 (Veterinary certificate for slaughter pigs) (Exhibit EU-55); the Veterinary certificate for finished food products, containing raw material of animal origin, exported from the EU to Russia, 24/05/2011 (Veterinary certificate for finished food products) (Exhibit EU-56); the Veterinary certificate for canned meat, salamis and other ready for consumption meat products, exported from the EU to Russia, 24/05/2011 (Veterinary certificate for canned meat, salamis and other ready for consumption meat products) (Exhibit EU-57).

Lithuania in January 2014, the entire European Union territory (with the exception of Sardinia) had been recognized by Russia as free of ASF for at least the "last 3 years". Following the outbreak of ASF in Lithuania, Russia banned certain products from all EU member States, even the other EU member States who had not experienced an outbreak of ASF. The Panel recalls that each of the EU member States is individually a member of the OIE.<sup>691</sup>

7.493. Given that the relevant provisions of the Terrestrial Code call upon OIE members to allow for the possibility of recognition of ASF-free status (whether historically or on the basis of eradication) on a country or "zone" basis, the failure of Russia to even allow for the possibility for imports from the unaffected EU member States since January 2014 amounts, in our view, to a "fundamental departure" from the provisions of the Terrestrial Code dealing with ASF-free status, in particular, Articles 15.1.2 through 15.1.4. Accordingly, we find that, in respect of non-treated products, the EU-wide ban contradicts the relevant international standards and therefore it cannot be considered to be "based on" that standard for the purposes of Article 3.1 of the SPS Agreement.

### 7.5.3.2 Conclusion

7.494. Based on the foregoing, we find that the EU-wide ban is not based on the Terrestrial Code and is consequently inconsistent with Russia's obligation to base its SPS measures on international standards, pursuant to Article 3.1 of the SPS Agreement.

## 7.5.4 Claims under Article 8 and Annex C of the SPS Agreement

### 7.5.4.1 Main arguments of the parties

#### 7.5.4.1.1 European Union

7.495. The European Union claims that Russia did and continues to fail to modify the measures at issue in order to permit the resumption of imports to Russia of the products at issue from non-affected areas in the European Union and/or with respect to appropriately treated or processed products. The European Union's claim under Article 8 and Annex C of the SPS Agreement refers to "the acceptance of EU regionalization measures".<sup>692</sup> The European Union argues that Russia failed to ensure that procedures for checking and ensuring the fulfilment of SPS measures were undertaken and completed without undue delays and in a manner no less favourable for imported products than for like domestic products under Annex C(1)(a). The European Union further contends that Russia failed to observe its obligations in the operation of approval procedures as embodied in Annex C(1)(b). The European Union also claims that Russia failed to ensure that information requirements are limited to what is necessary for appropriate control, inspection and approval procedures in Annex C(1)(c). In this respect, the European Union concludes that Russia's measures are in breach of Annex C(1)(a), (b) and (c) of the SPS Agreement and, consequently, of Article 8 of the SPS Agreement.

#### 7.5.4.1.2 Russia

7.496. Russia contends that the scope of control, inspection and approval procedures as set out in Article 8 and Annex C of the SPS Agreement do not cover the European Union's claims and the evidence presented. In addition, Russia submits that even if the scope of Annex C did cover the measures subject to the European Union's claims, the European Union has not put forward sufficient evidence and has not met its burden of proof to establish the *prima facie* case of a violation of Article 8 and Annex C(1)(a), (b) and (c) of the SPS Agreement. In respect of the EU-wide ban, Russia argues that the European Union failed to demonstrate that the "provisional" measures applied by Russia to the non-affected European Union areas are inconsistent with Article 8 and Annex C of the SPS Agreement. Russia asserts that it reviews its provisional measures on a regular basis, but the European Union's failure to provide sufficient information has resulted in the current delay. According to Russia, one or more of the Panel's experts has

<sup>691</sup> OIE responses to Panel question No. 27.

<sup>692</sup> European Union's second written submission, para. 161.



considered relevant a number of the questions asked by Russia with respect to all the EU member States.<sup>693</sup>

#### **7.5.4.2 Main arguments of the third parties**

##### **7.5.4.2.1 Brazil**

7.497. Brazil refers to Russia's argument that negotiations leading up to the adoption of a procedure fall outside of the purview of Article 8 and Annex C of the SPS Agreement. Brazil considers that the existence of negotiations involving certain procedures is not, in itself, a decisive criterion for the determination of the applicability of Article 8.<sup>694</sup> In addition, Brazil refers to the requirement to complete SPS procedures without undue delay, and highlights that the delay will be undue when it is unjustified, excessive, unwarranted or disproportionate.<sup>695</sup>

##### **7.5.4.2.2 United States**

7.498. The United States considers that the European Union's claim under Article 8 and Annex C of the SPS Agreement is based on the incorrect premise that the measures at issue fall under the purview of those provisions, because they are not control, inspection, nor approval procedures of an existing SPS measure, but rather a request for modifying the scope of such a measure.<sup>696</sup>

#### **7.5.4.3 Analysis by the Panel**

##### **7.5.4.3.1 Introduction**

7.499. The European Union presents its claims under the provisions of the SPS Agreement related to control, inspection and approval procedures, in the following order: (i) Annex C(1), with particular reference to (a), (b), and (c); and (ii) Article 8. The European Union argues that in light of its arguments presented under Annex C(1), Russia has breached the provisions of Annex C(1) (a), (b), and (c), and, consequently, Article 8.<sup>697</sup> Russia presents its arguments under both Article 8 and Annex C(1), including the relevant sub-provisions of Annex C(1)(a), (b), and (c).

7.500. The Panel is called upon to examine the scope of application of Article 8 and Annex C of the SPS Agreement, and to assess the claims of inconsistency raised by the European Union in respect of Annex C(1)(a), (b), and (c). Before turning to the corresponding assessment, we refer to the relevant legal provisions.

##### **7.5.4.3.2 Relevant legal provisions**

7.501. Article 8 of the SPS Agreement, entitled "Control, Inspection and Approval Procedures", provides:

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

7.502. Annex C of the SPS Agreement is entitled "Control, Inspection and Approval Procedures". An accompanying footnote is attached to the title of Annex C, which states that:

[7] Control, inspection and approval procedures include inter alia, procedures for sampling, testing and certification.

<sup>693</sup> Russia's Comment to the experts' responses to Panel Questions 12-13.

<sup>694</sup> Brazil's third-party submission, paras. 22-27

<sup>695</sup> Brazil's third-party submission, paras. 28-33.

<sup>696</sup> United States' third-party submission, paras. 12-18.

<sup>697</sup> European Union's first written submission, para. 344.

7.503. Annex C(1) provides, in relevant part, that:

1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

(a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;

(b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

(c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs;

7.504. Article 8 of the SPS Agreement requires Members to "observe the provisions of Annex C in the operation of control, inspection and approval procedures", thereby incorporating the disciplines of Annex C into the operative part of the SPS Agreement. This is consistent with the language of Article 1.3 of the SPS Agreement, which states that "[t]he annexes are an integral part of th[e] Agreement". Thus, the non-observance of the obligations in Annex C(1) "implies a violation of Article 8".<sup>698</sup> Accordingly, the Panel will first determine whether Russia has breached its obligations under Annex C(1)(a), (b), and (c). A ruling that Russia has breached obligations under Annex C will consequently mean that Article 8 has also been breached.

7.505. As Russia contests that the challenged actions of Russia fall within the scope of Article 8 and Annex C(1) of the SPS Agreement, the Panel will first address whether Article 8 and Annex C(1) of the SPS Agreement are applicable to Russia's actions. If we find that the challenged actions fall within the scope of these provisions, we will proceed to assess the European Union's claims of inconsistency with Annex C(1)(a) through (c), and, consequently, Article 8.

#### **7.5.4.3.3 Whether the challenged actions of Russia fall within the scope of Article 8 and Annex C(1) of the SPS Agreement**

##### **7.5.4.3.3.1 The European Union's complaint**

7.506. In its panel request, the European Union alleges that the measures at issue breach:

Article 8 and Annex C.1(a), (b) and (c) of the SPS Agreement, because Russia failed and fails to modify the measures at issue in order to permit the resumption of imports to Russia of the products at issue from non-affected areas in the EU and/or with respect to appropriately treated or processed products. The EU repeatedly approached Russia since early February 2014 in order to achieve an adaptation of the measures at issue to the regional conditions in the EU. Russia was provided with all requested information, in addition to further information, provided at the EU's own initiative.

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<sup>698</sup> Panel Report, *US – Poultry (China)*, para. 7.394. See also Panel Report, *US – Animals*, para. 7.62. The panel in *EC – Approval and Marketing of Biotech Products* found that failure to observe the provisions of Annex C of the SPS Agreement implies a consequential breach of Article 8. Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1569.

Furthermore, a series of bilateral meetings were held between the EU authorities and the Russian authorities between February and June 2014, at which further information and explanations were provided. The resulting undue delay is reflected, *inter alia*, in:

- the letter of the Russian Federal Service for Veterinary and Phytosanitary Supervision of 12 March 2014 (FS-SD-4/3620);
- the failure to reply to invitations by EU authorities of 31 January and 14 February 2014 for urgent meetings;
- the failure to reply to additional information and explanations provided by the EU, with letter of 21 May 2014;
- requesting answers to questions where the EU already provided exhaustive replies – with a letter dated 16 May 2014, which however reached the EU only on 4 June 2014 (FS-EN-8/7999);
- requesting answers to questions irrelevant to the case (e.g. information on establishments in unaffected areas graded by production volume and biosecurity);
- the belated provisions of invitations for visas for a technical meeting agreed on 21 February to take place 24-25 February 2014, which finally only took place on 7 March 2014. Accordingly, Russia failed to observe the provisions of Annex C of the SPS Agreement on the operation of control, inspection and approval procedures and otherwise failed to ensure that its procedures are not inconsistent with the provisions of the SPS Agreement, as required by Article 8 of the SPS Agreement.

Furthermore, Russia failed to ensure, with respect to its procedures for checking and ensuring the fulfilment of sanitary measures, that such procedures have been undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products, as required by Annex C.1(a) to the SPS Agreement.

With respect to Annex C.1(b) to the SPS Agreement, Russia failed to ensure that the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; that when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; that the competent body transmits, as soon as possible, the results of the procedure in a precise and complete manner to the applicant, so that corrective action may be taken if necessary; that even when the application has deficiencies, the competent body proceeds, as far as practicable, with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained.

Finally, as regards Annex C.1(c) to the SPS Agreement, Russia failed to ensure that information requirements are limited to what is necessary for appropriate control, inspection and approval procedures.<sup>699</sup>

7.507. In the course of the Panel proceedings the European Union posits, in respect of Article 8 and Annex C of the SPS Agreement, that the acceptance of the European Union's regionalization measures is not a negotiation between two Members, as argued by Russia, but instead an objective exchange of information requiring the decision of the importing Member.<sup>700</sup> The European Union enumerates a series of events, dating from early February 2014, which it argues constitutes undue delay encountered in the process, including (i) Russia's repeated request for

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<sup>699</sup> European Union's panel request, p. 5 (WT/DS475/2).

<sup>700</sup> European Union's second written submission, para. 162.

information previously provided; (ii) Russia's requests for irrelevant information; or (iii) Russia's failure to reply to additional information and explanations submitted by the European Union.<sup>701</sup>

7.508. Russia argues that the European Union, in its claim of Russia's undue delay in responding to communications/meeting requests, only provides some information on discussions and exchanges that have taken place between Russia and the European Union.<sup>702</sup> Russia argues that the evidence the European Union provided distorts the overall picture of the constant information exchange and intensive negotiations concerning regionalization, including the numerous explanations provided by Russia in relation to the insufficiency of submitted information. Russia concludes that the European Union has merely asserted a violation of Article 8 and Annex C(1)(a) by pointing to alleged delays in evaluating requests for regionalization without demonstrating that these delays were "undue". Russia submits that even if the scope of the procedures covered the measures subject to the European Union's claims the European Union has not put forward sufficient evidence and has not met its burden of proof to establish the *prima facie* case of a violation of Article 8 and Annex C(1)(a), (b) and (c) of the SPS Agreement.

7.509. To the extent that the European Union is challenging Russia's non-acceptance to date of the European Union's request for recognition of ASF-free areas, we see no obligation in Article 8 or Annex C(1)(a) through (c) that mandates a particular *outcome* in respect of the procedures they address.<sup>703</sup> We understand, nevertheless, that the European Union is challenging Russia's process of consideration of its request for recognition of ASF-free areas, in particular, relating to certain information requested by Russia.<sup>704</sup>

7.510. Accordingly, we first examine whether such a process falls within the scope of application of Article 8 and Annex C. In this examination, we will consider whether the identified actions of Russia, as the responding Member, constituted "any procedures" that fall within the scope of Article 8 and Annex C(1). If so, we will consider whether those procedures were aimed at "checking and ensuring the fulfilment of sanitary or phytosanitary measures."<sup>705</sup>

#### 7.5.4.3.3.2 Scope of control, inspection and approval procedures

##### "Any" procedure

7.511. The European Union highlights several provisions within the SPS Agreement to support its argument that Russia's challenged actions fall within the scope of Annex C(1) and Article 8, such as Article 6.3, footnote 7 to the SPS Agreement, Article 4.1, as well as making reference to the SPS Committee Guidelines on Article 6.<sup>706</sup> The European Union does not view the acceptance of the regionalization measures as a "negotiation" between two different Members. It is rather an objective exchange of information and the decision of the importing Member is to be taken with

<sup>701</sup> European Union's first written submission, para. 339; response to Panel question No. 194, paras. 383-384; and second written submission, paras. 161, and 167-183.

<sup>702</sup> Russia's first written submission, paras. 432-433. With regard to Article 8 and Annex C(1)(a), Russia highlights that the European Union in its claims refers to "non-affected areas in the EU", but does not identify what it means by this reference. Russia indicates that it presents its arguments on the assumption that the European Union refers to Estonia, Latvia, Lithuania, and Poland.

<sup>703</sup> We do not mean to say that there is no core obligation in these provisions to reach a decision (see Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1494). Rather, these provisions foresee a requirement to conduct a procedure and reach a final determination, whether it be positive or negative. See, for example, Panel Report, *US – Animals*, para. 7.112.

<sup>704</sup> Appellate Body Report, *Australia – Apples*, para. 420 ff. The Appellate Body report on *Australia – Apples* clarified that a complainant enjoys discretion in identifying the measures at issue and the panel should not conflate the requirement to identify the measures at issue with the requirement to identify the legal basis of the complaint. This clarification was given in the part of the report in which the Appellate Body determined whether the panel erred in finding that the claims under Annex C(1)(a) and Article 8 of the SPS Agreement were outside of its term of reference. Article 6.2 of the DSU does not impose any additional requirement, as the Panel's analysis implies, that a complainant must, in its request for establishment of a panel, demonstrate that the identified measure at issue causes the violation of, or can violate, the relevant obligation. The question of whether the measures identified in the panel request *can violate*, or *cause the violation of*, the obligation in Annex C(1)(a) and Article 8 is a substantive issue to be addressed and resolved on the merits. Appellate Body Report, *Australia – Apples*, para. 425.

<sup>705</sup> See, for example, Panel Report, *US – Animals*, para 7.71.

<sup>706</sup> European Union's second written submission, para. 155.

consideration of the objective and rational factors of the kind non-exhaustively enunciated in the second sentence of Article 6.2 of the SPS Agreement. It follows from the above that the European Union's claims pursuant to Annex C and Article 8 fall within the type of situations contemplated by those legal texts.<sup>707</sup>

7.512. Russia argues that the definition of control, inspection and approval procedures as set out in Article 8 and Annex C does not cover the European Union's claims and the evidence presented.<sup>708</sup> Russia submits that the scope of these procedures must be understood in light of Footnote 7 to Annex C which emphasizes procedural aspects of sampling, testing and certification. Russia also notes that the term "approval" procedure is conspicuously absent from the language of Article 6.3 of the SPS Agreement. In Russia's view, this provides additional support to the argument that "inspection, testing and other relevant procedures" mentioned in Article 6.3 should be read to include only procedures to check and ensure fulfilment of measures adopted in response to regionalization requests. Russia asserts that the provisions concern procedures of putting products on a market and not actions or events leading to adoption or revision of procedures.<sup>709</sup> Thus, Article 8 and Annex C do not apply to Russia because neither the text in Article 8 and Annex C of the SPS Agreement nor the case law suggests that the interpretation of the term "control, inspection and approval procedures" can be stretched to include negotiations between Members leading up to the adoption of a procedure.<sup>710</sup>

7.513. In addition, Russia endorses, in its response to the Panel's questions<sup>711</sup>, the argument of the United States in its third-party submission that "processes for modifying a measure" must be distinguished from "procedures to check and ensure fulfilment of that (unmodified) measure" and that Article 8 of the SPS Agreement covers the latter and not the former.<sup>712</sup> Russia also supports the United States' argument that Annex C applies to "products" and not "countries or regions of origin"<sup>713</sup>, stating that Annex C procedures concern products and not negotiations related to regionalization requests or revisions to a certification mechanism, as the European Union asserted in its first written submission.<sup>714</sup>

7.514. We consider that Article 8 and Annex C cover a broad range of procedures.<sup>715</sup> Apart from specifying that the procedures be aimed at "checking and ensuring the fulfilment of sanitary or phytosanitary measures"<sup>716</sup>, Annex C(1) does not specify or exclude any type of procedures from its application.<sup>717</sup> The use of the terms "including" (Article 8) and "include, *inter alia*" (footnote 7 to Annex C), in conjunction with the reference to "any procedure" (Annex C(1)) shows that the lists of measures contained in the provisions at issue are merely illustrative and not exhaustive.<sup>718</sup> In particular, we see nothing in Article 8 and Annex C(1) that would exclude procedures linked to the

<sup>707</sup> European Union's second written submission, para. 162. See also second written submission, paras. 158-162.

<sup>708</sup> Russia's first written submission, para. 418.

<sup>709</sup> Russia's first Written submission, para. 420.

<sup>710</sup> Russia's first written submission, para. 423.

<sup>711</sup> Russia's response to Panel question No. 200, paras. 383-385.

<sup>712</sup> Russia's response to Panel question No. 200, para. 383.

<sup>713</sup> United States' third-party submission, para. 17.

<sup>714</sup> Russia's response to Panel questions, para. 384.

<sup>715</sup> We find support for our approach in the panel report in *US – Animals*, where the panel agreed with the Appellate Body finding in *Australia – Apples* and the panel finding in *US – Poultry (China)* that Article 8 and Annex C cover a broad range of procedures (Panel Report, *US – Animals*, paras. 7.67-7.68). In particular, we agree with the view of the Panel in *US-Poultry (China)* that the application of Annex C(1) (and other SPS provisions) is not dictated by the title or the characterization given to a measure by the Member maintaining it. "...the Panel considers that the application of specific provisions of the SPS Agreement, such as Annex C(1), is by no means restricted to the title or the characterization of an SPS measure given to that measure by the WTO Member maintaining it". Panel Report, *US – Poultry (China)*, para. 7.372.

<sup>716</sup> Panel Report, *US - Animals*, para 7.71.

<sup>717</sup> Article 6.3 of the SPS Agreement refers to "inspection and...other relevant procedures". Annex C and Article 8 also refer to "inspection, control and approval procedures." The language used in Article 6.3 contains no express reference to "approval" procedures. However, the inclusive nature of its reference to "other relevant procedures" does not exclude the possibility that approval procedures could be covered in that provision (an issue which we do not need to decide here). Moreover, the context of the reference in Article 6.3 relates to access being granted by the exporting Member to the importing Member for such procedures, which is not an issue central to the parties' arguments in this case.

<sup>718</sup> Panel Report, *US - Animals*, para. 7.68 (referring to Appellate Body Report, *Australia – Apples*, para. 76 in the context of Annex A(1) of the SPS Agreement).

determinations of the disease status of certain geographic regions from their scope of application.<sup>719</sup>

7.515. Contrary to Russia's arguments, we see no basis in the language of these provisions that would support the view that the covered procedures are limited to those addressing products, and thus that the process of consideration/determinations of the disease-status of certain geographic regions would be excluded from the scope of Article 8 and Annex C. Contrary to Russia's arguments, and those of the United States as a third party in this dispute, the references in subparagraphs (a), (d), (f) and (h) of Annex C as referring to "products" and not "countries or regions of origin" does not preclude the possibility that the process of consideration of requests for regionalization may fall within the scope of Annex C(1).

7.516. We recall that the process at issue in this dispute is Russia's process of consideration of the European Union's request for the recognition of ASF-free areas within the European Union. While the immediate objective of such process concerns the recognition of ASF-free status of certain areas within the European Union, the ultimate effect of this process is to determine whether, and which, imports would be authorized from the European Union. We agree with the view of the panel in *US – Animals* that "[t]he ultimate effect of any procedure to designate a particular region with a 'disease status' is to determine what SPS measures should be applied to the *products* originating from that region."<sup>720</sup> We further agree with the determination of that panel that the impact of the challenged procedures on imports must be taken into account in determining whether such procedures are "any procedures" under the meaning of Article 8 and Annex C(1).<sup>721</sup>

7.517. As we have explained, Russia's SPS framework applicable to animal diseases refers in the case of ASF to accepting products that come from ASF-free areas.<sup>722</sup> In this respect, Russia's process of consideration of the European Union's request for recognition of ASF-free areas is interlinked with the imposition and perpetuation, as well as the geographical and product scope, of the EU-wide ban. It is therefore determinative for the placing of products from the European Union on Russia's market.

7.518. We therefore find that that Russia's challenged actions constitute "procedures" that fall within the scope of Article 8 and Annex C(1). Having reached this conclusion, we next turn to consider whether these procedures were "to check and ensure the fulfilment of sanitary and phytosanitary measures".

#### 7.5.4.3.3.3 To "check and ensure" the "fulfilment" of SPS measures

7.519. Article 8 and Annex C(1) apply to the procedures dealing with control, inspection and approval "which are aimed at checking and ensuring the fulfilment of SPS measures".<sup>723</sup> Annex A(1) defines "sanitary or phytosanitary measure" as any measure applied to achieve any of the objectives set out therein. We consider that the phrase "to check and ensure the fulfilment of an SPS measure" means that Article 8 and Annex C cover any procedure to make certain that a measure applied to achieve one of the objectives in Annex A(1) is fulfilled, that is, fully implemented.<sup>724</sup> The Appellate Body observed in this respect that "since the procedures referred to in Annex C(1) are those that check and ensure fulfilment of SPS measures, this suggests that such measures *exist* prior to the operation, undertaking, or completion of, the relevant procedures, as the latter seek and ensure fulfilment with the former".<sup>725</sup>

<sup>719</sup> Panel Report, *US – Animals*, para 7.71.

<sup>720</sup> Panel Report, *US – Animals*, paras. 7.69 (emphasis original).

<sup>721</sup> Panel Report, *US – Animals*, para. 7.70 (referring to Panel Report, *US – Poultry (China)*, para. 7.368). The panel explained that "[...] focusing solely on the immediate object of an importing Member's procedures, while losing sight of the ultimate effect of the completion of such procedures, might enable Members to avoid the application of Article 8 and Annex C by simply parsing their regulatory processes between regional determinations and approvals to import".

<sup>722</sup> See Customs Union Decision No. 317 (Exhibit RUS-25).

<sup>723</sup> Panel Report, *US – Poultry (China)*, para. 7.356.

<sup>724</sup> We find support for this approach in Panel Report, *US – Animals*, para 7.73.

<sup>725</sup> Appellate Body Report, *Australia – Apples*, para. 436.

7.520. We therefore examine whether Russia's procedure at issue checks and ensures the fulfilment of an SPS measure as defined in Annex A(1).

7.521. We recall our findings in paragraph 7.219 above that the EU-wide ban constitutes an SPS measure within the meaning of Annex A(1), and, our findings in paragraph 7.517 above, that the procedures at issue – Russia's process for considering the European Union's request for ASF regionalization – are interlinked with the imposition and perpetuation, as well as the geographical and product scope, of the EU-wide ban and the country-wide bans on imports of the products at issue into Russia. We therefore find that the procedures at issue are aimed at checking and ensuring fulfilment of an SPS measure and thus fall within the scope of Article 8 and Annex C(1).

7.522. Russia has insisted<sup>726</sup> that the EU-wide ban was adopted on the basis of the 2006 memorandum<sup>727</sup> and of the bilateral veterinary certificates<sup>728</sup>; both which were already in existence. Furthermore, the EU-wide ban was clearly adopted in connection with Russia's overarching SPS regulation on animal diseases, as contained in Customs Union Decision 317.<sup>729</sup> Against this backdrop, we consider that the procedure at issue (i.e. Russia's process of consideration of the European Union's request for the recognition of ASF-free areas within the European Union), is focused on determining whether the epizootic situation in the European Union warrants an adaptation of the veterinary certificates bilaterally agreed in 2006. In this vein, the procedure at issue concerns checking fulfilment of a measure that is already in existence covered by Article 8 and Annex C(1) of the SPS Agreement (rather than constituting "negotiations" concerning regionalization and revisions to certificates that would fall into the category of processes for modifying a measure).

7.523. We now turn to our examination of the consistency of the process at issue with paragraphs (a) through (c) of Annex C(1).

#### **7.5.4.3.4 Whether the procedure at issue was undertaken in accordance with Annex C(1)(a) through (c) of the SPS Agreement**

##### **7.5.4.3.4.1 Order of analysis**

7.524. We recall that the European Union has raised claims in respect of paragraphs (a) through (c) of Annex C(1) of the SPS Agreement. As we have already noted<sup>730</sup>, we are free to structure the order of our analysis of the European Union's claims taking into account the circumstances of the present case, in a manner that is consistent with the structure and logic of the provisions at issue.<sup>731</sup> Most of the European Union's arguments and evidence have focused on the fact that Russia has requested unnecessary evidence, which was not examined in a timely fashion, raising alleged violations of paragraphs (c) and (a) of Annex C(1). Furthermore, the European Union, in a summary fashion, addresses other potential violations concerning paragraph (b) of Annex C(1).

7.525. Based on the foregoing, we will continue our analysis with the formulation of the legal test in respect of paragraphs (a) through (c) of Annex C(1). Following the legal test we will examine whether the procedures at issue breach paragraph (c) of Annex C(1), followed by our corresponding examination in respect of paragraphs (a) and then (b) of Annex C(1).

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<sup>726</sup> Russia's first written submission, paras. 343 and 345; response to Panel question No. 78, para. 129; and second written submission, paras. 171-174.

<sup>727</sup> European Union-Russia Memorandum of 4 April 2006 concerning principles of zoning and compartmentalization in the veterinary field (Exhibit EU-61).

<sup>728</sup> See fn 117 above.

<sup>729</sup> Customs Union Decision No. 317 (Exhibit RUS-25).

<sup>730</sup> See para. 7.29 above.

<sup>731</sup> Appellate Body Reports, *Canada – Autos*, para. 151; and *Canada – Wheat Exports and Grain Imports*, para. 109. See also Panel Report, *US – Animals*, para. 7.13.

#### 7.5.4.3.4.2 Legal test

##### *Annex C(1)(a) of the SPS Agreement, first clause*

7.526. In this section we provide an overview of the legal test applicable to the first clause of subparagraph (a) of Annex C(1).

##### "Undertaken and completed"

7.527. The terms of Annex C(1)(a) require the Panel to ascertain whether the procedures at issue were "undertaken and completed without delay". The terms "undertaken" and "completed" are distinct, and the obligations flowing from these distinct terms are susceptible to being interpreted separately. The term "undertake" refers to the beginning<sup>732</sup> or commencement<sup>733</sup> of the approval procedure, while the term "complete" indicates that "approval procedures are not only to be undertaken, but are also to be finished, or concluded".<sup>734</sup> Accordingly, "undertaken and completed without undue delay" includes not only no undue delay in the commencement of the procedure and its completion, but also in the intervening process that leads from commencement to completion.<sup>735</sup> It is important to distinguish between the obligation to initiate, conduct and conclude a procedure (which is envisaged by this provision), and any requirement to come to a particular outcome (which is not envisaged by this provision): the requirement embodied in Annex C(1)(a) is simply to issue a final determination regardless of whether it be positive or negative.<sup>736</sup>

##### Without undue delay

7.528. Annex C(1)(a) requires that the procedures at issue are undertaken and completed "without undue delay". The analysis of an "undue delay" claim under Article 8 and Annex C(1)(a) requires two steps.

7.529. First, the complainant must establish that there has been a delay. We recall that the panel in *US – Animals* opined that "an inaction or an inability to proceed on the substance of the application would constitute something outside the normal course of the procedure and should be considered a delay within the meaning of Article 8 and Annex C(1)(a)."<sup>737</sup> The panel in *US – Animals* viewed Annex C(1)(a) as requiring competent authorities to actively engage with the applicant Member on the substance of the application. That panel further highlighted that a determination of "delay" must be made in light of the nature and complexity of the procedure to be undertaken and completed.<sup>738</sup> With these considerations in mind, in our examination of whether there have been delays, we consider whether there have been periods of inaction or inability to proceed on the substance of the application.

7.530. Second, the complainant must establish that the delay was undue.<sup>739</sup> The panel in *EC – Approval and Marketing of Biotech Products* found that based on its ordinary meaning the phrase "without undue delay" in Annex C(1)(a), first clause, requires that "approval procedures be undertaken with no unjustifiable loss of time".<sup>740</sup> The Appellate Body in *Australia – Apples* referred to the dictionary meanings of the words "undue" and "delay" in establishing the meaning of the phrase "without undue delay". The Appellate Body stated:

Annex C(1)(a) contains an obligation that relevant procedures be undertaken and completed "without undue delay". In this regard, the ordinary meaning of the word "delay" relates to "(a period of) time lost by inaction or inability to proceed". The term "undue" means something "that ought not to be or to be done, inappropriate,

<sup>732</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1494.

<sup>733</sup> Appellate Body Report, *Australia – Apples*, para. 438.

<sup>734</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1494.

<sup>735</sup> Panel Report, *US – Animals*, para 7.112.

<sup>736</sup> Panel Report, *US – Animals*, para 7.112.

<sup>737</sup> Panel Report, *US – Animals*, para 7.113.

<sup>738</sup> Panel Report, *US – Animals*, para 7.114.

<sup>739</sup> We find support for this approach in Panel Report, *US – Animals*, para 7.115.

<sup>740</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495. See Panel Reports, *US – Animals*, para. 7.115; and *US – Poultry (China)*, para. 7.354.



unsuitable, improper, unrightful, unjustifiable", or "going beyond what is warranted or natural; excessive, disproportionate". Thus, Annex C(1)(a) requires Members to ensure that relevant procedures are undertaken and completed with appropriate dispatch, that is, they do not involve periods of time that are unwarranted, or otherwise excessive, disproportionate or unjustifiable.<sup>741</sup>

7.531. In *Australia — Apples*, the Appellate Body concluded that "[w]hether a relevant procedure has been unduly delayed is therefore not an assessment that can be done in the abstract, but one which requires a case-by-case analysis as to the reasons for the alleged failure to act with appropriate dispatch, and whether such reasons are justifiable".<sup>742</sup>

7.532. The panel in *US — Animals* relied on the guidance provided by the panel in *EC — Approval and Marketing of Biotech Products* on the types of circumstances that might justify a delay.<sup>743</sup> First, delays attributable to action or inaction of an applicant cannot be held against the Member carrying out the procedure.<sup>744</sup> Second, delays which "are justified in their entirety" by the Members' need "to determine with adequate confidence whether their relevant SPS requirements are fulfilled" should not be considered undue.<sup>745</sup> Third, if "new or additional information becomes available at a late stage in an approval procedure" and that information may reasonably be considered to "have a potential impact on a Member's determination", it "might be justifiable for the Member concerned to delay the completion of the procedure" in order to assess the information.<sup>746</sup>

7.533. Moreover, the panel in *EC — Approval and Marketing of Biotech Products* noted that:

[A] Member which finds it appropriate to follow a prudent and precautionary approach in assessing and approving applications concerning GMOs or GMO-derived products, might, for instance, be justified in requesting for further information or clarification of an applicant in a situation where another Member considers that the information available is sufficient to carry out its assessment and reach a decision on an application.<sup>747</sup> Whether a particular request is a reflection of genuine caution and prudence or whether it is a pretext to delay the completion of a procedure would need to be determined in the light of all relevant facts and circumstances.<sup>748</sup>

7.534. The Panel in *EC — Approval and Marketing of Biotech Products* also referred to situations where the time to complete an approval procedure might entail an undue delay. A first example would be when a Member exceeds the time that is reasonably needed to check and ensure the fulfilment of its relevant SPS requirements, for instance because that Member did not proceed as expeditiously as could be expected in the circumstances.<sup>749</sup> A second situation would be when there are delays caused by measures which, absent other causes for delay (such as natural disasters or unexpected sharp increase in workload), are not based on scientific evidence.<sup>750</sup> In addition, the panel found that if a "Member causes undue delay at any stage in an approval procedure, this would constitute a breach of the provisions of Annex C(1)(a), first clause".<sup>751</sup> Where information requested is unnecessary or irrelevant, an applicant cannot be held responsible for any delays in relation to the gathering of such information.

<sup>741</sup> Appellate Body Report, *Australia — Apples*, para. 437.

<sup>742</sup> Appellate Body Report, *Australia — Apples*, para. 437.

<sup>743</sup> Panel Report, *US — Animals*, para. 7.116.

<sup>744</sup> Panel Reports, *EC — Approval and Marketing of Biotech Products*, para. 7.1497; and *US — Poultry (China)*, para. 7.354.

<sup>745</sup> Panel Reports, *EC — Approval and Marketing of Biotech Products*, para. 7.1498.

<sup>746</sup> Panel Reports, *EC — Approval and Marketing of Biotech Products*, para. 7.1498.

<sup>747</sup> (footnote original) We recall that pursuant to Annex C(1)(c) of the *SPS Agreement* information requirements must be limited to what is necessary for appropriate approval procedures.

<sup>748</sup> Panel Reports, *EC — Approval and Marketing of Biotech Products*, para. 7.1522.

<sup>749</sup> Panel Reports, *EC — Approval and Marketing of Biotech Products*, para. 7.1499.

<sup>750</sup> Panel Reports, *EC — Approval and Marketing of Biotech Products*, para. 7.1500.

<sup>751</sup> Panel Reports, *EC — Approval and Marketing of Biotech Products*, para. 7.1502.

7.535. Mindful of this guidance, we consider that a delay is undue if it is "unwarranted, or otherwise excessive, disproportionate or unjustifiable".<sup>752</sup> In considering whether the European Union's allegation of "delay" can be considered to be "undue delay", we will examine whether the delay is unwarranted, or otherwise excessive, disproportionate or unjustifiable.

7.536. The panel in *US – Animals* disagreed with the responding Member that the need to "re-confirm and update" pre-existing information constitutes, in and of itself, a justification for the delay in the completion of a control, inspection or approval procedure.<sup>753</sup> In its explanation, the panel in *US – Animals* referred to the panel report for *EC – Approval and Marketing of Biotech Products* which found that when "new or additional" relevant information becomes available, a Member may reasonably "delay the completion of the procedure" in order to assess it. However, the panel in *US – Animals* further explained that "taking time to assess *relevant* new or additional information is not the same as taking time to re-confirm and update information already received".<sup>754</sup> The panel further determined that "[i]t is inevitable that the situation in any Member or region will change and cannot remain static; the longer the evaluation process takes, the more likely the need to 're-confirm and update' the submitted information."<sup>755</sup> In that panel's view, to accept the respondent's argument as justifying the delay in that case "would seriously undermine the obligations in Annex C(1)(a), for if a WTO Member could indefinitely postpone the completion of a procedure by invoking the need to reconfirm information that had become outdated by virtue of its own inaction, this would create a dangerous loophole in the disciplines of that provision and would reward behaviour opposite to the diligence called for by Annex C(1)".<sup>756</sup>

#### **Distinction between undue delay and a refusal to take SPS action**

7.537. Although the Panel in *EC – Approval and Marketing of Biotech Product* declined to settle on a definitive meaning of what constitutes "undue delay", it did determine that Members cannot justify refusing to take substantive SPS decisions because of evolving science, scientific complexity, uncertainty, or limited available scientific information or data.<sup>757</sup> In *EC – Approval and Marketing of Biotech Products*, the panel acknowledged that, in cases where scientific discoveries are likely to occur in a given field, delays could allow decisions that take into account latest evidence or fill the existing gaps in the scientific justification of the measure. However, the Panel took the view that the SPS Agreement, in Articles 5.1 and 5.7, offers the possibility to grant time-limited approvals or refuse approvals at any stage of scientific knowledge, without occasioning undue delays.<sup>758</sup>

#### **Delay as a means of avoiding risk assessment**

7.538. Moreover, the panel in *EC – Approval and Marketing of Biotech Products* observed that a Member may deliberately use delays as an instrument to manage or control risks: the Member would postpone the adoption of a measure which is at odds with the present legal framework, awaiting occurrence of better legislative conditions. The panel commented that this attitude would be inconsistent with Annex C(1)(a) and the SPS provisions addressing the risk assessment regime.<sup>759</sup>

#### **Annex C(1)(a) of the SPS Agreement, second clause**

7.539. The second clause of Annex C(1)(a) requires that the procedures are undertaken and completed in no less favourable manner for imported products than for like domestic products. In order to establish an inconsistency with Annex C(1)(a) second clause, a complainant must establish that the imported products have been treated in a "less favourable manner" than

<sup>752</sup> Panel Report, *US – Animals*, para. 7.129. With reference to the Appellate Body Report, *Australia – Apples*, para. 437 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495).

<sup>753</sup> Panel Report, *US – Animals*, para. 7.143.

<sup>754</sup> Panel Report, *US – Animals*, para. 7.143 (emphasis original).

<sup>755</sup> Panel Report, *US – Animals*, para. 7.143.

<sup>756</sup> Panel Report, *US – Animals*, para. 7.143.

<sup>757</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1526.

<sup>758</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1527.

<sup>759</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1517.

domestic products with respect to the undertaking and completion of approval procedures.<sup>760</sup> As Annex C(1)(a) second clause sets out a "national treatment obligation", the panel in *EC — Approval and Marketing of Biotech Products* referred to the past panel and Appellate Body rulings on Article III:1 and Article III:4 of the GATT 1994. The panel concluded that differential treatment of like products does not by itself demonstrate less favourable treatment. Additionally, an unfavourable result for an application for placing an imported product on the market would not be sufficient to establish less favourable treatment.<sup>761</sup>

### ***Annex C(1)(b) of the SPS Agreement***

#### **Introduction**

7.540. Annex C(1)(b) sets out five separate, but related, procedural obligations to be observed by Members in the operation of their control, inspection and approval procedures:

- i. the publication or communication to applicants of the processing period of each procedure;
- ii. the examination of the completeness of the documentation and the communication to applicants of deficiencies;
- iii. the transmission of the results of the procedure;
- iv. the processing of applications which have deficiencies; and
- v. the provision of information about the stage of a procedure and the provision of an explanation of any delay.<sup>762</sup>

#### **Annex C(1)(b)(i): Publication or communication of processing period**

7.541. Annex C(1)(b)(i) requires that "the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request".<sup>763</sup> The words "upon request" indicate that the applicant must have formally asked the Member to communicate the information before a claim can be brought alleging the Member's breach of the provision.<sup>764</sup>

#### **Annex C(1)(b)(ii): Completeness of documentation**

7.542. Annex C(1)(b) also requires that the competent body of a Member, when receiving an application, promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies.

7.543. In *EC — Approval and Marketing of Biotech Products*, the United States argued that because of the general moratorium on approvals, the European Communities did not promptly examine the completeness of documentation and inform applicants of any deficiencies. The Panel

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<sup>760</sup> We find support for this approach in Panel Reports, *EC - Approval and Marketing of Biotech Products*, para. 7.2400. We note that that panel set out a two-step test, with the second element being that the products at issue and the domestic products are "like" in nature. In this dispute, the parties have not disagreed that the products at issue are "like". We proceed on the basis that the products at issue are "like" for the purposes of our analysis here.

<sup>761</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.2408.

<sup>762</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1574 and 7.1582. Similar to the panel's findings in *EC - Approval and Marketing of Biotech Products*, the panel in *US – Animals* confirmed that Annex C(1)(b) contains five procedural requirements to be observed by Members in carrying out control, inspection or approval procedures. Panel Report, *US – Animals*, para. 7.181.

<sup>763</sup> In *EC – Approval and Marketing of Biotech Products*, the United States argued that as a result of its general moratorium on approvals, the European Communities did not follow the standard processing periods which are published in its applicable approval legislation, the Panel ruled that the lack of publication was not a result of the measure at issue. Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1575-7.1576 and 7.1585-7.1590.

<sup>764</sup> We find support for this approach in Panel Report, *US – Animals*, paras. 7.188 and 7.193.

rejected this argument observing that the United States' challenge was not supported by evidence. The Panel concluded that the alleged lack of completed documentation was not the result of the measure at issue.<sup>765</sup>

#### **Annex C(1)(b)(iii): Transmission of results**

7.544. Annex C(1)(b) provides that the competent body of a Member transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary.

7.545. In *EC — Approval and Marketing of Biotech Products*, the United States raised the contention that under the measure at issue, the results of procedures were not promptly communicated to applicants so that corrective action could be taken. The Panel considered that the United States had failed to establish its claim under the third obligation contained in Annex C(1)(b) as it did not identify the results that were to be transmitted.<sup>766</sup>

#### **Annex C(1)(b)(iv): Processing of deficient applications**

7.546. Annex C(1)(b) also provides that in a situation where the application has deficiencies, the competent body of a Member is expected to proceed as far as practicable with the procedure if the applicant so requests.

7.547. In *EC — Approval and Marketing of Biotech Products*, the United States complained that under the general moratorium, the respondent in that dispute did not proceed as far as practicable in the approval process. The panel disagreed with this view and commented that the complainant did not provide evidence of the applicant making such request and had the applicant made such request, the European Communities failure to proceed with procedures would not be a result of the measure at issue.<sup>767</sup>

#### **Annex C(1)(b)(v): Explanation of delay**

7.548. Lastly, pursuant to Annex C(1)(b), upon request, the applicant is informed of the stage of the procedure, with any delay being explained.

7.549. The panel in *EC — Approval and Marketing of Biotech Products*, dismissed the United States' argument that the respondent did not comply with the fifth obligation under Annex C(1)(b). The panel found that the United States did not submit any evidence that it had made a request for an explanation of the delay.<sup>768</sup>

7.550. The panel in *US — Animals* carried out its analysis on the fifth obligation of the provision stating that the requirement of Annex C(1)(b) is qualified by the words "upon request", which indicate that the applicant must have formally asked the Member to communicate the information before a claim can be brought alleging the Member's breach of the provision.<sup>769</sup> In that dispute, the panel found that the complaining Member had contacted the responding Member repeatedly requesting explanations as to the state of progress of its import requests. On this basis, the panel in *US — Animals* determined that the responding Member was under an obligation to explain the delays in its approval processes in light of the inquiries by the complainant. In this regard, the panel concluded that the responding Member had violated Annex C(1)(b) by failing to inform the complainant of the precise stage of procedures or the reasons for the delays.<sup>770</sup>

#### **Annex C(1)(c) of the SPS Agreement**

7.551. Annex C(1)(c) necessitates that information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of

<sup>765</sup> Panel Reports, *EC — Approval and Marketing of Biotech Products*, para. 7.1592.

<sup>766</sup> Panel Reports, *EC — Approval and Marketing of Biotech Products*, para. 7.1595.

<sup>767</sup> Panel Reports, *EC — Approval and Marketing of Biotech Products*, para. 7.1598.

<sup>768</sup> Panel Reports, *EC — Approval and Marketing of Biotech Products*, para. 7.1601.

<sup>769</sup> Panel Report, *US — Animals*, paras. 7.188 and 7.193.

<sup>770</sup> Panel Report, *US — Animals*, para. 7.195.

additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs.<sup>771</sup>

#### 7.5.4.3.5 Whether the procedure at issue is consistent with Article 8 and Annex C(1)(a), C(1)(b) and C(1)(c)

##### 7.5.4.3.5.1 Introduction

7.552. As we have indicated, we consider that it is most appropriate for us to begin our examination of the European Union's claims under Article 8 and Annex C(1) with an assessment of the consistency of the procedure at issue with Annex C(1)(c). We thus begin with such assessment and then proceed with our examination pursuant to Annex C(1)(a) and C(1)(b).

##### 7.5.4.3.5.2 Whether the procedure at issue is inconsistent with Annex C(1)(c)

7.553. The European Union posits that Russia's information requirements were not limited to what was necessary for the assessment of the European Union's regionalization measures in respect of ASF, thus breaching Annex C(1)(c).<sup>772</sup> In support of this contention, the European Union referred to specific information requests that we examine below. Russia argues that the European Union did not make a *prima facie* case and failed to meet its burden of demonstrating that Russia violated Annex C(1)(c).<sup>773</sup>

7.554. In particular, the European Union claims that Russia made certain requests of unnecessary information. Such requests are reflected in the letters that FSVPS sent to DG SANCO on 5 February and 12 March 2014. Regarding the letter of 5 February 2014<sup>774</sup>, the European Union identifies the following information as unnecessary and irrelevant: (i) swine population in personal subsidiary farming with detailed density by region; (ii) production volume of different farms and factories; (iii) volumes of exported wild boar meat and trophies; and, (iv) detailed information about foreign hunters. In its arguments, the European Union claims that the aforementioned requests were unnecessary to assess the European Union's regionalization measures.<sup>775</sup> In addition, the European Union contests the relevance of Russia's requests for information, done through the letter of 5 February 2014, which pertains to (i) pig farms and meat processing factories, including information about the suppliers and production volumes; and (ii) rough estimation of enterprises attested to ship animal products, by level of zoosanitary condition.<sup>776</sup> The European Union argues that while this information might be relevant for compartmentalization, it is not relevant for regionalization. The European Union further claims that not only was Russia already in possession of the information with regard to attested pig farms and processing factories, but also that the requested information on the level of sanitary condition was also irrelevant for regionalization, as all farms in the free-regions are ASF-free.<sup>777</sup>

7.555. Regarding the letter of 12 March 2014<sup>778</sup>, the European Union considers that Russia requested the following unnecessary and irrelevant information: (i) absence of any proof of non-existence of ASF in the territory of other EU member States; and (ii) absence of any proof of

<sup>771</sup> Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.154–7.157. This is the only panel ruling to date on Annex C(1)(c). The panel in *Australia – Salmon (Article 21.5 – Canada)* ruled that only "procedures to check and ensure the fulfilment of sanitary or phytosanitary measures" fall under the scope of paragraph 1(c) of Annex C and not "substantive sanitary measures in their own right". Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.156.

<sup>772</sup> European Union's second written submission, para. 184.

<sup>773</sup> Russia's first written submission, para. 441.

<sup>774</sup> Russia's letter to the European Union of 5 February 2014, FS-SD 8/1640 (Exhibit EU-84).

<sup>775</sup> European Union's second written submission, paras. 168-169.

<sup>776</sup> European Union's second written submission, para. 172. See also first written submission, para. 339.

<sup>777</sup> European Union's second written submission, paras. 172 – 173. The European Union referred to similar information requests formulated through the letter of 16 May 2014, see second written submission, paras. 177-178 (referring to Russia's letter to the European Union of 16 May 2014, FS-EN-8/7999 (Exhibit EU-93)).

<sup>778</sup> Russia's letter to the European Union of 12 March 2014, FS-SD-4/3620 (Exhibit EU-90/RUS-135).

impossibility of getting meat of animals infected by ASF virus in the production cycle of pork from other EU member States.<sup>779</sup>

7.556. The European Union also claims that Russia, through the letter from FSVPS to DG SANCO dated 16 May 2014, requested answers to questions where the European Union had already provided exhaustive replies.<sup>780</sup> Furthermore, the European Union contends that this letter also requested unnecessary information, such as that referring to (i) zoo sanitary status of small farms (due to the big number of them in the territories of the infected/high risk zones with regard to ASF) and measure of their bio protection (possibility of free range, feed base, the regime of introducing the newly arrived animals in the herd, etc.); and (ii) cartographical visualization of the establishments attested to supply live pigs and swine products from the EU member States (Poland and Lithuania, in particular) to the Russia with indication of the raw material bases of these establishments.<sup>781</sup>

7.557. Moreover, the European Union argues that it has made clear to Russia that "no [infected] establishment is allowed to supply pig meat or pig meat products to the establishments authorised to export to the Russian Federation."<sup>782</sup> On this basis, the European Union posits that it has provided abundant evidence to substantiate its claims under Annex C and Article 8 of the SPS Agreement.<sup>783</sup>

7.558. In turn, Russia has argued that these information requests are justified. According to Russia, the experts have confirmed that there has been an objective basis for Russia's requests.<sup>784</sup>

7.559. Among the questions that the Panel addressed to the experts, the Panel asked them to comment on the relevance of the questions included in some of Russia's information requests for the purposes of assessing the relevant risks.<sup>785</sup> The communications to which the Panel's question referred are those sent by Russia to the European Union or certain EU member States, dated

<sup>779</sup> European Union's first written submission, para. 339; and second written submission, para. 176.

<sup>780</sup> European Union's first written submission, para. 339 (referring to Russia's letter to the European Union of 16 May 2014, FS-EN-8/7999 (Exhibit EU-93)).

<sup>781</sup> European Union's second written submission, paras. 177-181.

<sup>782</sup> European Union's second written submission, para. 182.

<sup>783</sup> In its response to Panel Question 194, the European Union identified information requested by Russia in March 2014 that had already been provided or which was not relevant for the purposes of Russia's assessment of the European Union's regionalization measures:

– proof that the historically ASF-free regions all over the EU are actually free, contrary to the provisions of the OIE Terrestrial Code;

– information about swine population in the industry sector and personal subsidiary farming with detailed density by region; detailed information about pig farms, pork processing factories and semi-finished products, graded by production volume; regulatory acts, providing for wild boar hunting and further utilization of killed animals (for food, as trophies); regulations on export of wild boar meat and trophies, number of killed animals and exported meat and trophies during 2013-2014; detailed information about foreign hunters, who entered the EU member States to hunt wild boar during the period 2013-2014, detailed by region (including information about the number and the country of origin); detailed information about pig farms and meat processing factories attested to ship animals and products to the territory of the Customs Union, including information about the suppliers (number, country, region) and production volumes, detailed by region; rough estimation of enterprises attested to ship animal products to the territory of the Customs Union, by level of zoonitary condition, equivalent to the previously conducted evaluation of the Russian and Belarusian enterprises, detailed by regions and graded by production volumes.

<sup>784</sup> Russia's closing statement at the second meeting with the Panel, para. 4. See also Russia's comments to the European Union's response to Panel question No. 322; and Russia's comments to the experts' responses to Panel questions Nos. 12 and 13.

<sup>785</sup> Panel question No. 13 to the experts.

5 February 2014<sup>786</sup>, 12 March 2014<sup>787</sup>, 10 April 2014<sup>788</sup>, 16 May 2014<sup>789</sup>, 31 July 2014<sup>790</sup>, and 1 December 2014.<sup>791</sup>

7.560. In his response to this question, Dr Brückner noted that the "intention and the magnitude of the information required is unclear." Dr Brückner further observed that

The information normally required from an exporting country would be restricted to the pathogen concerned and the potential hazards related to that pathogen and from the area under dispute (ASF affected area) and would in general require information that are not yet available from the exporting country (which in the case of exports from the EU to the Russian Federation would by default already be available for other animal and animal product exports). However, the information requested in Exhibit RUS-131, is in my opinion "an overkill" of which many of the questions are not relative or needed to conduct either a sensible quantitative or qualitative risk analysis.<sup>792</sup>

7.561. In her response to this question, Professor Penrith indicated that such information "appears to be the information that the EU might use to perform a very detailed risk assessment for spread of the virus in the EU".<sup>793</sup> Professor Penrith further explained that all of the EU member States "cannot be considered to pose an equal risk of ASF for Russia". Therefore, some information requested by Russia is irrelevant for certain areas in the European Union (i.e. wild boar populations and their movement in insular territories; and stamping out policies in territories which have never experienced ASF or haven't done so in more than 20 years).<sup>794</sup> Moreover, Professor Penrith indicated that the information required by Russia should be limited to a list of items she identified, and mentioned that more detail might be required from countries that have experienced outbreaks.<sup>795</sup> Professor Penrith concluded her response by indicating that the "great majority of the information required is not relevant or necessary for a risk assessment by Russia".

7.562. In respect of the letter dated 5 February 2014 (Exhibit EU-84), Dr Thomson noted that some of the questions contained in this exhibit are variations of other questions posed elsewhere by Russia, and indicated that for a country "that is not itself free of ASF this strikes me as an overkill and possibly an attempt to 'muddy the water'".<sup>796</sup> Regarding the letter dated 10 April 2014 (Exhibit RUS-240), Dr Thomson noted that the three questions posed are of doubtful relevance, partly because "it would be reasonable to ask the EU for the results and conclusions drawn from surveys conducted in its territory generally", not so asking for the surveys themselves from Poland.<sup>797</sup> Regarding the letter dated 16 May 2014 (Exhibit EU-93) Dr Thomson noted that, with the exception of the information regarding the presence of ASF vector in the EU member States,

<sup>786</sup> Russia's letter to the European Union of 5 February 2014, FS-SD 8/1640 (Exhibit EU-84).

<sup>787</sup> Russia's letter to the European Union of 12 March 2014, FS-SD-4/3620 (Exhibit EU-90/Exhibit RUS-135).

<sup>788</sup> Russia's letter to Poland of 10 April 2014, FS-NV-8/5827 (Exhibit RUS-240).

<sup>789</sup> Russia's letter to the European Union of 16 May 2014, FS-EN-8/7999 (Exhibit EU-93).

<sup>790</sup> Russia's letter to the European Union of 31 July 2014, EH-8/14006 (Exhibit RUS-157).

<sup>791</sup> Letter from the Russian Veterinary Service to DG SANCO, No. FS-AS-8/23743, 1 December 2015 (Exhibit RUS-131).

<sup>792</sup> Dr Brückner's response to Panel question No. 13, Compilation of the experts' responses, para. 2.123.

<sup>793</sup> Professor Penrith's response to Panel question No. 13, Compilation of the experts' responses, para. 2.125.

<sup>794</sup> Professor Penrith's response to Panel question No. 13, Compilation of the experts' responses, para. 2.125.

<sup>795</sup> Professor Penrith's response to Panel question No. 13, Compilation of the experts' responses, para. 2.125.

<sup>796</sup> Professor Penrith's response to Panel question No. 13, Compilation of the experts' responses, para. 2.125. The list of information Professor Penrith referred to was provided in her response to Panel question No. 12. Such list comprises the following information: (i) Whether the disease is notifiable throughout the country and what means are used to ensure that this is known; (ii) if diagnostic capacity for ASF is available in the country (veterinary personnel and pig value chain actor trained in field diagnosis and laboratory capacity for confirmation of a field diagnosis); (iii) legislation in place for prevention and management of serious disease outbreaks including ASF; (iv) veterinary knowledge of and authority over all domestic pigs in the country or zone; (v) veterinary knowledge of the species, population, distribution and habitat of wild pigs in the country or zone; (vi) the epidemiological basis for recognition of a zone including all relevant topographical features; and (vii) the scope and extent of active surveillance for ASF undertaken in the country or zone to support the contention that the country or zone is free of ASF. Professor Penrith's response to Panel question No. 12, Compilation of the experts' responses, para. 2.114.

<sup>796</sup> Dr Thomson's response to Panel question No. 13, Compilation of the experts' responses, para. 2.131.

<sup>797</sup> Dr Thomson's response to Panel question No. 13, Compilation of the experts' responses, para. 2.130.

the questions posed appear to be relevant.<sup>798</sup> Regarding the letter dated 31 July 2014 (Exhibit RUS-157) Dr Thomson indicated that this "request seems to me relevant and justified".<sup>799</sup> Lastly, in respect of the letter dated 1 December 2014 (Exhibit RUS-131), Dr Thomson indicated that he could find relevance and therefore justification for the questions pertaining to (i) ASF early detection and contingency plans for each EU member State; (ii) detailed information regarding monitoring and surveillance of wild boars in each EU member State; (iii) detailed information regarding the measures taken by each EU member State to prevent trans-boundary spread of ASF in the European Union (excluding data demonstrating their effectiveness); and (iv) information regarding the role of ticks in the spread of ASF in the EU member States. Dr Thomson added, referring to the other questions in that letter, that they "strike me either as repetition or as questions which few if any countries in the world, including the RF, would be able to provide satisfactory answers to. It needs to be remembered that Russia is not an ASF-free country".<sup>800</sup>

7.563. In our view, the expert's responses indicate that some of the information requested by Russia through its communication requests is excessive for what would be necessary for Russia to perform a risk analysis of the spread of ASF from the European Union into Russia. To our mind this links directly with the issue before us.

7.564. As we have described in paragraph 7.516 above, the immediate objective of the procedure at issue is to assess whether there are ASF-free areas in the territory of the European Union. In respect of the EU-wide ban, we examine this assessment as related to such areas in the European Union that are outside the territory of Estonia, Latvia, Lithuania, and Poland. We thus consider that the information requirements that would be necessary for the procedure at issue, are those directed at the verification of the ASF-free character of the territories under scrutiny.

7.565. We recall that in section 7.5.2.3.5 above we examined in detailed the necessary evidence that the European Union should provide to Russia to objectively demonstrate that there are ASF-free areas within its territory.

7.566. In our view, the type of information that the European Union was required to provide to Russia to objectively demonstrate the existence of ASF-free areas within the European Union, pursuant to Article 6.3 of the SPS Agreement, is aimed at demonstrating exactly what the procedure at issue seeks to verify.

7.567. Against this backdrop we consider that Russia's information requirements, in respect of the verification of the existence of ASF-free areas within the European Union outside Estonia, Latvia, Lithuania, and Poland should be limited to (i) ASF surveillance measures (including whether the disease was notifiable); (ii) measures adopted to prevent introduction and spread of ASF (i.e. control measures); (iii) measures foreseen in case there is an outbreak of ASF (i.e. contingency plans), and (iv) information on the domestic and wild pig population. In our view, the information requests made by Russia between February and July 2014 go beyond these areas. As indicated by the experts, some of the information requested by Russia seems unnecessary and unjustified.

7.568. In particular, excessive information requests were made through the letter of 5 February 2014 in respect of (i) detailed information about pig farms, pork processing factories and semi-finished products, graded by production volume; (ii) regulatory acts, providing for wild boar hunting and further utilization of killed animals (for food, as trophies); (iii) regulations on export of wild boar meat and trophies, number of killed animals and exported meat and trophies during 2013-2014 (for regions adjacent to the infected zone); (iv) detailed information about foreign hunters, who entered the country to hunt the wild boar during 2013-2014 (including information about the number and the country of origin), detailed by country and region; (v) detailed information about pig farms and meat processing factories approved to ship animals and products to the territory of the Customs Union (CU), including information about the suppliers (number, country, region) and production volumes, detailed by country and region; and (vi) rough estimation of enterprises approved to ship animal products to the territory of the CU, by level of zoosanitary condition, equivalent to the previously conducted evaluation of the Russian and Belarusian enterprises, detailed by regions and graded by production volume. Furthermore, the

<sup>798</sup> Dr Thomson's response to Panel question No. 13, Compilation of the experts' responses, para. 2.132.

<sup>799</sup> Dr Thomson's response to Panel question No. 13, Compilation of the experts' responses, para. 2.129.

<sup>800</sup> Dr Thomson's response to Panel question No. 13, Compilation of the experts' responses, para. 2.128.



degree of details requested in respect of certain other information seems to be excessive, in particular (i) detailed density by region of wild boar population; (ii) detailed density by region of swine population in the industry sector and subsidiary farming; and (iii) number of swine and wild boars monitoring researches carried out during 2013-2014, detailed by region.<sup>801</sup>

7.569. In addition, through the letter of 12 March 2014, Russia indicated that exchanges that had taken place up to that time had not yet provided information in respect of (i) absence of any proof of non-existence of ASF in the territory of other EU member States; and (ii) absence of any proof of impossibility of getting meat of animals infected by ASFV in the production cycle of pork from other EU member States.<sup>802</sup> Requesting information in this regard beyond that related to the surveillance and control programmes, which by that time had already been provided by the European Union to Russia seems excessive. The Panel notes, in particular, the virtual impossibility of "proving" the non-existence or impossibility of the potential occurrence of an event, however unlikely that occurrence may be.

7.570. Moreover, through the letter dated 16 May 2014, Russia requested the following information, which seems excessive in respect of the assessment of ASF-free areas in the European Union outside Estonia, Latvia, Lithuania, and Poland: (i) cartographical visualization of the establishments approved to supply live pigs and swine products from the EU member States (Poland and Lithuania, in particular) to Russia with indication of the raw material bases of these establishments; (ii) zoo sanitary status of small farms (due to the big number of them in the territories of the infected/high risk zones with regard to ASF) and measure of their bio protection (possibility of free range, feed base, the regime of introducing the newly arrived animals in the herd, etc.); (iii) data on internal evaluation by the veterinary services of the EU member States of resources (human, technical, financial ones) needed for the creation and maintenance of abovementioned ASF-free zones; (iv) data on functional isolation of sub-populations of domestic and wild animals in zones with the proofs of the absence of migration/seasonal movements of wild boars between the zones; and (v) data on the presence of the ASF vector in the EU member States.<sup>803</sup> We recall that some of this information is irrelevant in light of the particular geographical distance between the places where ASF outbreaks have occurred and other areas in the European Union.

7.571. Based on the foregoing, we consider that Russia formulated information requirements that were not limited to what was necessary for the procedure at issue, thus breaching Annex C(1)(c).

#### **7.5.4.3.5.3 Whether the procedure at issue is inconsistent with Annex C(1)(a)**

7.572. The European Union argues that through the request of unnecessary information, as well as through certain actions, Russia failed to undertake and complete the procedure at issue without undue delay.<sup>804</sup> Furthermore the European Union contends that, based on the discriminatory treatment provided by Russia to the products at issue imported from the European Union as compared with the like domestic products, Russia conducted the procedure with respect to the products at issue from the European Union in a less favourable manner than for the like domestic products.<sup>805</sup>

7.573. Russia refers to the panel report *in EC - Approval and Marketing of Biotech Products* which observed that "not every delay" caused by a Member is contrary to Annex C(1)(a), and that a Member is not liable for delays not attributable to it.<sup>806</sup> In addition, Russia highlighted that this panel found that the need for additional information does not amount to an undue delay, but that the determination of whether a procedure has been unduly delayed requires a case-by-case analysis taking into account all of the relevant facts and circumstances. On this basis, Russia argues that the evidence the European Union provided distorts the overall picture of the constant

<sup>801</sup> Russia's letter to the European Union of 5 February 2014, FS-SD 8/1640 (Exhibit EU-84).

<sup>802</sup> Russia's letter to the European Union of 12 March 2014, FS-SD-4/3620 (Exhibit EU-90/RUS-135).

<sup>803</sup> Russia's letter to the European Union of 16 May 2014, FS-EN-8/7999 (Exhibit EU-93).

<sup>804</sup> European Union's first written submission, paras. 338-339; and second written submission, paras.

185-186.

<sup>805</sup> European Union's second written submission, para. 186.

<sup>806</sup> Russia's first written submission, para. 434 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1495 and 7.1497).

information exchange and intensive negotiations concerning regionalization, including the numerous explanations provided by Russia in relation to the insufficiency of submitted information. Russia also argues that it made several offers to resume trade with the European Union on the condition that trade would be conducted in an ASF-free manner.<sup>807</sup> Russia concludes that the European Union has merely asserted a violation of Article 8 and Annex C(1)(a) by pointing to alleged delays in evaluating requests for regionalization without demonstrating that these delays were "undue". On the contrary, Russia argues that it has taken reasonable time to assess the European Union's regionalization requests, especially in light of the deteriorating ASF situation in the European Union.<sup>808</sup> In this regard, Russia contends that the European Union has not put forward sufficient evidence to make a *prima facie* case and failed to meet its burden of proof in demonstrating that Russia violated Article 8 and Annex C(1)(a).<sup>809</sup>

7.574. We recall that a determination of whether a delay in an approval, control or inspection procedure is undue, for the purposes of Annex C(1)(a) has to be examined in light of the circumstances of a particular case.<sup>810</sup> The Appellate Body has also indicated that:

[T]he obligation to ensure that relevant procedures are undertaken and completed without undue delay may be infringed through measures other than the control, inspection, and approval procedures themselves, such as actions that prohibit, prevent, or impede undertaking and completing such procedures "without undue delay", or omissions in the form of a failure to act "without undue delay".<sup>811</sup> Such measures, even when they are not, themselves, procedures, could equally give rise to a violation of Annex C(1)(a) and Article 8.<sup>812</sup>

7.575. In paragraph 7.535 above we noted that mindful of the guidance provided by previous panels and the Appellate Body, we consider that a delay is undue if it is "unwarranted, or otherwise excessive, disproportionate or unjustifiable."<sup>813</sup> In considering whether the European Union's allegation of "delay" can be considered to be "undue", we will examine whether the delay is unwarranted, or otherwise excessive, disproportionate or unjustifiable.

7.576. As part of this examination, we consider whether there were any periods of inaction or inability to proceed on the substance of the application which would constitute delays within the meaning of Annex C(1)(a).<sup>814</sup> This entails not only a consideration of the total period of time during which Russia, as the importing Member, conducts the procedure, but also requires an overall assessment of the facts and circumstances in this case. The absolute length of time required for a Member to evaluate a particular request – and the time needed for any interim series of steps required in order to ascertain the comprehensiveness, accuracy and pertinence of the information – will depend on the specific circumstances of the case.<sup>815</sup> We agree with the view of the panel in *US – Animals* on the importance of having a point of reference in order to gauge the reasonableness of the length of time of the review process, referring to such indicators like the

<sup>807</sup> Russia's first written submission, paras 435 – 436.

<sup>808</sup> Russia's first written submission, para 437.

<sup>809</sup> Russia's first written submission, para 438.

<sup>810</sup> Appellate Body Report, *Australia – Apples*, para. 437.

<sup>811</sup> (footnote original) We note that, in previous disputes involving claims under Annex C(1)(a) and Article 8, panels have been faced with measures other than *procedures*. In *EC – Approval and Marketing of Biotech Products*, the panel dealt with a general *de facto* moratorium consisting of the suspension of consideration of applications for approval, and a failure to consider specific applications for approval. (Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.47) In *US – Poultry (China)*, the measure at issue was a legislative provision prohibiting any use of funds to allow for the importation of poultry products from China that, thereby, impeded the undertaking and completion of a procedure that was "a prerequisite for the importation of [poultry] products". (Panel Report, *US – Poultry (China)*, paras. 7.92 and 7.152)

<sup>812</sup> Appellate Body Report, *Australia – Apples*, para. 438.

<sup>813</sup> Panel Report, *US – Animals*, para. 7.129. With reference to the Appellate Body Report, *Australia – Apples*, para. 437 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495).

<sup>814</sup> Using the order analysis by the panel in *US – Animals*, para. 7.127.

<sup>815</sup> Panel Report, *US – Animals*, para. 7.114. That panel observed that applicant Members present different SPS circumstances that "may also be affected by law, policy, governance, and veterinary infrastructures".

standard processing time reflected in the policy and practice of the Member carrying out the procedure, as well as guidelines provided by the OIE.<sup>816</sup>

7.577. Furthermore, we recall our observations in section 7.3.6 above on the importance of temporal considerations in this case. We note that the panel in *US – Animals* identified an end-date for the period of time it would take into account for the purpose of assessing the alleged undue delays in the conduct of the responding Member's procedures.<sup>817</sup> With reference to the Appellate Body ruling in *EC – Chicken Cuts* and the panel ruling in *EC – Approval and Marketing of Biotech Products*, the panel in *US – Animals* determined that the appropriate end-date for which to examine the complainant's claims would be the date of the establishment of the Panel.<sup>818</sup>

7.578. The European Union's request for recognition of ASF-free areas in the European Union was initially presented through the letter dated 31 January 2014.<sup>819</sup> At that time, there had only been two outbreaks in wild boars in Lithuania. The record shows that Russia only provided a negative response to this request through the letter dated 29 July 2014 (after the date of the establishment of the Panel), after the outbreaks in Poland and Latvia had already occurred. Russia's letter indicated that:

The worsening epizootic situation in the EU, *as well as the absence of conclusive evidence of efficient supervision and proper functioning of the determined zones*, complying with the provisions of Articles 1.4.6 and 4.3.3 of the OIE Terrestrial Animal Health Code (as amended 2013) currently preclude the Russian Federation from accepting the EU regionalization terms, proposed by the European Commission at the meeting held on 4 July 2014 in Moscow, as well as from pronouncing the entire EU territory free from AFS [ASF].<sup>820</sup> (emphasis added)

7.579. Russia sent another communication to the European Union in connection with this procedure on 1 December 2014. In that communication Russia indicated that the process of discussion of veterinary certificates and resumption of trade in breeding pigs and pork products is getting "protracted" due to the European Union's failure to provide sufficient information required for the objective assessment of risks associated with the spread of ASF in the EU member States. The letter also referred to the European Union's unwillingness to follow compartmentalization as provided in the Terrestrial Code. Moreover, the letter requested that the European Union provide detailed information in respect of a particular list of questions.<sup>821</sup>

7.580. The European Union replied to this letter on 23 December 2014. The letter refers to the communications sent by DG SANCO to FSVPS on 7 February, 6 and 13 March, 21 May, and 13 June of 2014. The letter observed the following in respect of the first three of these five communications, "I am confident that this information is more than sufficient to allow your services to conclude on the safety of pigs and their products, originating in unaffected areas of the EU". The letter concluded that it was surprising that Russia had submitted a new set of questions despite the fact that during the last five months they had not provided any feedback on the European Union's latest responses as requested by Russia, and that Russia was claiming once again that the European Commission had not provided all the information needed to carry out a risk assessment.<sup>822</sup>

7.581. Against this background, we need to determine whether the procedure at issue, aimed at the recognition of ASF-free areas in the European Union, was undertaken and completed without any undue delay.

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<sup>816</sup> Panel Report, *US – Animals*, para 7.117.

<sup>817</sup> Panel Report, *US – Animals*, para 7.118.

<sup>818</sup> Panel Report, *US – Animals*, para 7.118.

<sup>819</sup> European Union's letter to Russia of 31 January 2014, ARES(2014)226547, SANCO G7/JP/mh(2014)241111 (Exhibit EU-64).

<sup>820</sup> Russia's letter to the European Union of 29 July 2014, C-EH-8/13771 (Exhibit RUS-263).

<sup>821</sup> Letter from the Russian Veterinary Service to DG SANCO, No. FS-AS-8/23743, 1 December 2015 (Exhibit RUS-131).

<sup>822</sup> Letter from DG SANCO to the Russian Veterinary Service, SANCO/G7/PD/mh (2014) 4703183, 23 December 2014 (Exhibit RUS-132).

7.582. As we have indicated in our analysis of the European Union's claims pursuant to Annex C(1)(c), Russia made a number of information requests that went beyond the information that was necessary for the procedure at issue. We underline that this was the case in respect of those areas located in the EU member States not affected with ASF outbreaks.

7.583. In our view, 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, a Member would be acting in a manner that impedes undertaking and completing the respective procedures. In the instant case, Russia's excessive and unjustified information requests in respect of the surveillance and control measures in non-ASF affected EU member States amount to that situation. In light of the Appellate Body's guidance quoted above<sup>823</sup>, such situation may constitute an infringement of the obligation to undertake and complete a procedure without undue delay.

7.584. Based on the foregoing we conclude that the procedure at issue was undertaken and completed with undue delay, thus breaching Annex C(1)(a)'s first clause.

7.585. We now turn to the European Union's claim in respect of the second clause in Annex C(1)(a), this is, that the procedure at issue was undertaken and completed in a manner less favourable for imported products than for like domestic products.

7.586. Regarding this claim, the Panel will examine whether the European Union has established that the products at issue from the European Union have been treated in a "less favourable manner" than domestic products with respect to the undertaking and completion of the procedure at issue.

7.587. In response to the Panel's question inviting the European Union to elaborate on the less favourable treatment it alleged in the context of this provision, the European Union responded:

The EU has already explained [in the answer to question 194] that the Russian authorities repeatedly requested more information, including information already submitted or information irrelevant to the case.

This clearly results in a less favourable treatment of the imported products, which are subject to a ban, in comparison to the domestic products, which can freely circulate from non-affected areas of Russia. In order to reach a regionalization decision with regard to its own territory Russia clearly did not need more than one year and the type and quantity of evidence it required from the EU.<sup>824</sup>

7.588. We understand the rationale behind the European Union's argument to be that the unnecessary and excessive information requests addressed by Russia to the European Union in respect of the recognition of ASF-free areas within the European Union were not requested in respect of trade of the like products originating in ASF-free areas within Russia.

7.589. We recall that the Appellate Body has concluded that generally accepted canons of evidence (in civil law, common law, and, in fact, in most jurisdictions) apply in WTO dispute settlement, i.e. that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.<sup>825</sup> To make a *prima facie* case, a complaining party must present sufficient evidence that, "in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."<sup>826</sup> Pursuant to this understanding, it is the European Union who bears the burden of demonstrating that the procedure at issue provides less favourable treatment to imported products than for like domestic products.<sup>827</sup>

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<sup>823</sup> Appellate Body Report, *Australia – Apples*, para. 438.

<sup>824</sup> European Union response to Panel Question 196, paras. 386-387.

<sup>825</sup> Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66; see also Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323 at 335-337.

<sup>826</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>827</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

7.590. We address in detail the European Union's arguments in respect of its discrimination claims pursuant to Articles 2.3 and 5.5 of the SPS Agreement in section 7.7 below. In our view, the European Union has not provided sufficient evidence that would support its contention that this type of information is not required by Russia in order to determine which areas within Russia are ASF-free. In addition, the European Union has not clearly explained the internal process in Russia to determine the recognition of ASF-free areas in Russia, beyond stating that there is no ban on internal trade of the products at issue originating from ASF-free areas within Russia. The European Union only refers to the limited nature of bans of intra Russia trade.<sup>828</sup> Without further information, we are not in a position to ascertain whether Russia took more than one year or which type and quantity of evidence Russia required from its regional authorities to determine the existence of ASF-free areas in Russia. We consider therefore, as explained in the previous paragraph, that the European Union has not satisfied its burden of demonstrating that Russia's procedure does not comply with the second clause of Annex C(1)(a).

7.591. In light of our finding above with respect to the first clause of Annex C(1)(a), we find that to the extent Russia undertook and completed the procedure at issue with undue delay, the procedure at issue is inconsistent with Annex C(1)(a).

#### 7.5.4.3.5.4 Whether the procedure at issue is inconsistent with Annex C(1)(b)

7.592. The European Union contends that Russia violates all five of the obligations contained in Annex C(1)(b).<sup>829</sup> Russia argues that the European Union merely recites the obligations of the provisions, without explaining how the specific procedural obligations were breached.<sup>830</sup>

7.593. In the present dispute, the European Union contends that Russia did not publish or otherwise communicate to the European Union the standard processing period and did not comply with any of the other requirements in Annex C(1)(b) of the SPS Agreement.<sup>831</sup> The European Union further argues that despite the repeated requests from Russia for more evidence with regard to the European Union's regionalization measures, Russia never provided any information as to the anticipated period of time for the approval proceedings.<sup>832</sup> The Panel<sup>833</sup> requested the European Union to indicate whether it had requested information from Russia regarding the anticipated processing period of the European Union's regionalization request, and to indicate the relevant evidence in support of the presentation of such request. The European Union responded as follows:

The EU stressed on several occasions that the information provided should enable Russia to assess and accept the EU ASF regionalisation measures.<sup>834</sup>

Despite the unprecedented amount of information provided to Russia, it insisted on not having received sufficient information so as to enable it to perform a risk assessment.

Given Russia's refusal to acknowledge it received all relevant information, the EU's efforts were focused on the provision of the supplementary information requested.

<sup>828</sup> See European Union's first written submission, paras. 54-55. The Panel has identified the scope of the limits to intra Russia trade of the products at issue as foreseen in Article 5 of the 1980 Instructions, pp. 7-10 (Exhibit EU-18).

<sup>829</sup> In *US - Animals*, the panel first examined whether the challenged measures fell under its term of reference. Panel Report, *US - Animals*, paras. 7.188 and 7.190. The panel opined that in order for it to comply with Article 6.2 of the DSU, a complainant was required to specify in a sufficiently clear manner which of the five obligations in the provision it was challenging in its panel request. In this case, we consider that the European Union has indicated that it is challenging all five obligations in Annex C(1)(b). See European Union's panel request, p.5, cited above.

<sup>830</sup> Russia's first written submission, para. 439.

<sup>831</sup> European Union's second written submission, para. 187.

<sup>832</sup> European Union's response to Panel question No. 197, para. 388.

<sup>833</sup> Panel Question 289, seeking clarification of paragraph 342 of the European Union's first written submission.

<sup>834</sup> (footnote original) Letters of 20 February 2014 (Exhibit EU-175), 6 March 2014 (Exhibit EU-86) and of 13 March 2014 (Exhibit EU-91).

Under those circumstances a specific request on the anticipated processing period of the EU's request was not addressed to Russia.<sup>835</sup>

7.594. We therefore find that the European Union did not make a request within the meaning of this provision, and thus did not trigger an obligation on the part of Russia to communicate the anticipated processing period.<sup>836</sup>

7.595. Furthermore, we recall that a *prima facie* case "is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."<sup>837</sup>

7.596. The European Union has not attempted to provide any sort of argument or evidence in support of its claim that the procedure at issue is inconsistent with Annex C(1)(b) of the SPS Agreement. We therefore consider that the European Union has failed to make a *prima facie* case in respect of the alleged inconsistency of the procedure at issue with Annex C(1)(b).

#### 7.5.4.4 Conclusion

7.597. As explained in the previous sections, we find that Russia's process of consideration of the European Union's request for recognition of ASF-free areas within the European Union falls within the scope of Article 8 and Annex C(1) of the SPS Agreement. We also find that Russia formulated information requirements that were not limited to what is necessary for the procedure at issue, thus breaching Annex C(1)(c). Moreover we find that Russia undertook and completed the procedure at issue with undue delay, thus rendering the procedure at issue inconsistent with Annex C(1)(a). In light of these findings, we also find that the procedure at issue is inconsistent with Article 8 of the SPS Agreement. We consider that the European Union has failed to make a *prima facie* case in respect of the alleged inconsistency of the procedure at issue with Annex C(1)(b).

### 7.5.5 Claims under Articles 2.2, 5.1, 5.2, and 5.7 of the SPS Agreement

#### 7.5.5.1 Main arguments of the parties

##### 7.5.5.1.1 European Union

7.598. The European Union argues that because Russia's measures do not "conform to" and are not "based on" the OIE recommendations, it is necessary to establish whether there is a solid scientific basis for their imposition.<sup>838</sup>

7.599. The European Union highlights that an analysis under Article 5.1 of the SPS Agreement entails addressing two issues: whether there is a "risk assessment" within the meaning of the SPS Agreement and whether the SPS measures at issue are "based on" the mentioned risk assessment.<sup>839</sup>

7.600. The European Union argues that Russia did not provide any risk assessment in support of its EU-wide ban, although such a risk assessment was requested during the numerous contacts that took place between the Russian and the EU competent veterinary authorities.<sup>840</sup>

7.601. The European Union points out that Article 5.2 of the SPS Agreement contains a list of factors that have to be taken into account while performing a risk assessment.<sup>841</sup> The European

<sup>835</sup> European Union's response to Panel Question 289, paras. 135-137.

<sup>836</sup> We note that the panel in *EC – Approval and Marketing of Biotech Products* considered that the anticipated processing period is to be provided to applicants upon request and in that dispute, no evidence of applicants' requests was provided. Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1587–7.1589.

<sup>837</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>838</sup> European Union's first written submission, para. 153.

<sup>839</sup> European Union's first written submission, para. 154.

<sup>840</sup> European Union's first written submission, para. 165.

<sup>841</sup> European Union's first written submission, para. 168.

Union argues that in adopting, maintaining and/or applying the measures at issue, Russia did not and does not take into account those factors.<sup>842</sup>

7.602. The European Union posits that because Russia did not provide any risk assessment for the measures at issue, Russia therefore violates the provisions of Article 5.1 of the SPS Agreement, and that it follows that the provisions of Article 2.2 are also breached.<sup>843</sup>

7.603. The European Union points out that while solely Article 5.7 of the SPS Agreement may still shelter a Member's measure in such circumstances, Russia does not fulfil any of the requirements of such provision.<sup>844</sup>

#### 7.5.5.1.2 Russia

7.604. Russia argues that the European Union has failed to make a *prima facie* case with respect to the existence of an EU-wide ban because it has not provided evidence and arguments sufficient to identify an EU-wide ban.<sup>845</sup> Russia posits that there is no such EU-wide ban because the perceived restrictions on pigs and pork products are a result of the inability of the veterinary officials of the EU member States to deliver veterinary certificates to EU producers in accordance with the requirements previously agreed to by the parties.<sup>846</sup>

7.605. Russia argues that in the alternative, what it considers to be Russia's provisional compliance with the veterinary certificates, is justified under Article 5.7 of the SPS Agreement.<sup>847</sup> Russia argues there is insufficient scientific evidence to conduct a risk assessment regarding the entry of ASF into the Russian Federation from the importation of uncertified pigs and pork products from other EU Member States.<sup>848</sup> Russia also argues that its decision to provisionally comply with the terms of the veterinary certificates was based on available pertinent information.<sup>849</sup>

#### 7.5.5.2 Main arguments of the third parties

##### 7.5.5.2.1 Australia

7.606. Australia emphasizes that Russia does not appear to have conducted a risk assessment in relation to trade in relevant products from those areas affected by ASF, whether within the four affected EU member States or EU-wide.<sup>850</sup>

7.607. Australia highlights that it is necessary for the Panel to consider whether the level of scientific information was insufficient so as to justify Russia's provisional adoption of SPS measures not based on a risk assessment in accordance with Article 5.7 of the SPS Agreement.<sup>851</sup>

7.608. Australia stresses that the insufficiency of evidence must relate to information that is relevant to the risk assessment in question. Australia also notes that the reasonable period of time requirement has to be established on a case-by-case basis, and that, as in the present case, where, in its view, the apparent uncertainty relates to containment zones for ASF, the Panel may wish to take into account related rules and guidelines on regionalization.<sup>852</sup>

##### 7.5.5.2.2 Brazil

7.609. Brazil argues that there is no fixed or rigid reference for the determination of what means "sufficient scientific evidence" for the purpose of this provision, and the amount of scientific

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<sup>842</sup> European Union's first written submission, para. 170.

<sup>843</sup> European Union's first written submission, para. 176.

<sup>844</sup> European Union's second written submission, para. 68.

<sup>845</sup> Russia's first written submission, para. 339.

<sup>846</sup> Russia's first written submission, para. 346.

<sup>847</sup> Russia's second written submission, para. 185.

<sup>848</sup> Russia's second written submission, para. 186.

<sup>849</sup> Russia's second written submission, para. 197.

<sup>850</sup> Australia's third-party submission, para. 10.

<sup>851</sup> Australia's third-party submission, para. 11.

<sup>852</sup> Australia's third-party submission, para. 14.

evidence may vary according to the circumstances of the case. Brazil however highlights that while amount of scientific evidence considered sufficient to justify a provisional measure in the context of Article 5 may vary, the ruling by the Appellate Body in *Japan – Apples* where the Appellate Body considered that there was a large quantity of scientific evidence when it verified the existence "of scientific studies as well as practical experience having accumulated for the past 200 years", may serve as a reference.<sup>853</sup>

### 7.5.5.2.3 Norway

7.610. Norway highlights that while under Article 2.1 of the SPS Agreement, Members have the right to take SPS measures "necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with provision of the [...] Agreement", such right carries with it certain obligations, including those in Article 5 of the SPS Agreement.<sup>854</sup>

7.611. Norway asserts that Article 5.1 of the SPS Agreement is viewed as a "specific application" of the basic obligation set out in Article 2.2 of the SPS Agreement and that the Appellate Body has clarified that where a measure is not based on a risk assessment in accordance with Article 5.1, it will be presumed to be inconsistent with the second and third prongs of Article 2.2 of the SPS Agreement.<sup>855</sup>

7.612. Norway stresses that with respect to Article 5.7 of the SPS Agreement, the Appellate Body has identified four cumulative requirements that must be fulfilled for a Member to have recourse to Article 5.7: (i) it must be imposed in respect of a situation where "relevant scientific information is insufficient"; (ii) it must be adopted "on the basis of available pertinent information"; (iii) the Member must "seek to obtain the additional information necessary for a more objective assessment of risk"; and (iv) the Member must "review the [...] measure accordingly within a reasonable period of time".<sup>856</sup>

7.613. Norway emphasizes that the threshold condition for the application of Article 5.7 of the SPS Agreement is that evidence is insufficient, and that the main question will be whether the available scientific evidence permits, in quantitative or qualitative terms, an assessment of risks within the meaning of Article 5.1.<sup>857</sup>

7.614. Norway highlights that "insufficient" in the context of Article 5.7 of the SPS Agreement refers to both situations where there is not enough scientific evidence (in quantitative terms) and to situations where there is enough evidence, but it does not give reliable results (in qualitative terms).<sup>858</sup>

7.615. Norway posits that with respect to the second element, the "available pertinent information" must equate to "some evidence of a risk", even if it is not enough to perform a proper risk assessment. In addition, there must be a rational relationship between the evidentiary basis and the provisional measure, and that even if the rigorous standards of Article 5.1, together with Articles 5.2 and 5.3 and Annex A(4), do not apply under Article 5.7, those standards must be considered as relevant context, and thus indicate what types of information may be considered as "available pertinent information".<sup>859</sup>

7.616. With respect to the third element which is to "seek to obtain the additional information necessary for a more objective assessment of risk", Norway emphasizes that this reflects the temporary nature of the provisional measures within the meaning of Article 5.7 of the SPS Agreement, and that while the "the information sought must be germane to conducting 'a more objective assessment of the risk', i.e. the evaluation of the likelihood of entry, establishment or spread of, in casu, a pest, according to the SPS measures that might be applied", a Member "is

<sup>853</sup> Brazil's third-party submission, para. 21 (citing Appellate Body Report, *Japan – Apples*, paras. 180, 186, and 188).

<sup>854</sup> Norway's third-party submission, paras. 3-4.

<sup>855</sup> Norway's third-party submission, para. 5.

<sup>856</sup> Norway's third-party submission, para. 8.

<sup>857</sup> Norway's third-party submission, paras. 10-12.

<sup>858</sup> Norway's third-party submission, para. 14 (citing Appellate Body Report, *Japan – Apples*, para. 185).

<sup>859</sup> Norway's third-party submission, para. 19.



not expected to guarantee specific results [...] [n]or is it expected to predict the actual results of its efforts to collect additional information at the time when it adopts the SPS measure".<sup>860</sup>

7.617. With respect to the requirement of review within a reasonable period of time, Norway highlights that what constitutes a "reasonable period of time" should be conducted on a case-by-case basis, and that it will depend "upon the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review and the characteristics of the provisional SPS measure".<sup>861</sup>

### 7.5.5.3 Analysis by the Panel

#### 7.5.5.3.1 Introduction

7.618. The European Union framed its claims under Articles 2.2, 5.1, 5.2 and 5.7 of the SPS Agreement in the same manner for both the EU-wide ban and the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. The European Union argues that the measures at issue are not based on a risk assessment conducted in accordance with Articles 5.1 and 5.2.<sup>862</sup> Furthermore, the European Union contends that because it concludes that Russia violated Article 5.1 by not providing a risk assessment for the measures at issue, consequentially, Russia also violated Article 2.2.<sup>863</sup> In respect of Article 5.7, the European Union argues this is not a situation where scientific evidence is insufficient and that Russia has failed to comply with any of the conditions of Article 5.7.<sup>864</sup> According to the European Union, the sufficiency of scientific evidence should be assessed at the time of adoption of the measure. Furthermore, following the measure's adoption, the Member is obliged to seek to obtain the additional information necessary for a more objective assessment of risk. According to the European Union, the moment a Member asks for information that is not necessary for a more objective assessment of risk, including the type of information characterized by the individual experts in the present proceedings as an "overkill" or as an attempt to "muddy the water", that Member can no longer benefit from the provisional shelter of Article 5.7. Such information requests are a clear warning sign that the Member is not genuinely seeking to perform a more objective risk assessment (objective in the sense of being based on the pertinent information available). Russia has not performed and has not provided any risk assessment in support of the measures at issue.<sup>865</sup>

7.619. In respect of the EU-wide ban, Russia argues that, should the Panel find that the EU-wide ban exists<sup>866</sup>, it is justified under Article 5.7.<sup>867</sup>

7.620. In light of the parties' arguments, this section cites the relevant legal provisions and then addresses the relationship between Articles 5.1, 5.2, 2.2 and 5.7 with a view to determining the Panel's order of analysis. The Panel will then present the legal test that will guide its assessment under the respective provisions. Lastly, the Panel will address the application of the cited provisions to the EU-wide ban.

#### 7.5.5.3.2 Relevant legal provisions

7.621. Article 2.2 of the SPS Agreement provides:

#### *Article 2*

<sup>860</sup> Norway's third-party submission, para. 20 (citing Appellate Body Report, *Japan – Agricultural Products II*, para. 92).

<sup>861</sup> Norway's third-party submission, para. 21.

<sup>862</sup> European Union's first written submission, paras. 165 and 170.

<sup>863</sup> European Union's first written submission, para. 176. See also opening statement at the first meeting with the Panel, paras. 78-80; response to Panel question No. 122, paras. 255-257; and second written submission, para. 65.

<sup>864</sup> European Union's first written submission, para. 202; opening statement at the first meeting of the Panel, paras. 81-95; and second written submission, para. 68.

<sup>865</sup> See European response to Panel question No. 309, para. 161 and European Union's comments to Russia's response to Panel question No. 309, para. 172.

<sup>866</sup> Russia's first written submission, paras. 339-349. In its second written submission, paras. 171-174, the Russian Federation sustains that the EU-wide ban is not an SPS measure.

<sup>867</sup> Russia's first written submission, paras. 352-354; second written submission, paras. 185-203.

*Basic Rights and Obligations*

2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

7.622. The relevant paragraphs of Article 5 of the SPS Agreement provide:

*Article 5**Assessment of Risk and Determination of the Appropriate Level**of Sanitary or Phytosanitary Protection*

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

2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

...

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

7.623. Paragraph 4 of Annex A of the SPS Agreement provides the following definition of a risk assessment:

The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

**7.5.5.3.3 Relationship between Articles 5.1, 5.2, 2.2 and 5.7 and the order of analysis**

7.624. Articles 2.2, 5.1 and 5.2 of the SPS Agreement are "intimately related".<sup>868</sup> They deal with the scientific foundation of SPS measures.<sup>869</sup> This does not mean that they are identical provisions.<sup>870</sup> In its relevant part, Article 2.2 refers to scientific principles and sufficient scientific evidence. With respect to the specific obligation that SPS measures be based on scientific principles and not maintained without sufficient scientific evidence, Article 2.2 directly focuses on the necessary link that must exist between the SPS measure and the scientific principles and evidence, while Articles 5.1 and 5.2 concern the assessment of risk. Under Articles 5.1 and 5.2,

<sup>868</sup> Panel Report, *India – Agricultural Products*, paras. 7.281.

<sup>869</sup> Panel Report, *US – Poultry (China)*, para. 7.167.

<sup>870</sup> Panel Report, *Australia – Apples*, para. 7.214.

such link is still necessary, but it rests on the requirement for a risk assessment.<sup>871</sup> Prior panels have found that Articles 5.1 and 5.2 of the SPS Agreement directly inform each other because Article 5.2 sheds light on the elements that are of relevance in the assessment of risks as foreseen in Article 5.1.<sup>872</sup>

7.625. As for the relationship between Articles 2.2 and 5.1, the Appellate Body has explained that Article 5.1 constitutes "a specific application of the basic obligations contained in Article 2.2" of the SPS Agreement<sup>873</sup>, and that Article 2.2 informs Article 5.1 because "the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1".<sup>874</sup> Thus the Appellate Body stated that "Articles 2.2 and 5.1 should constantly be read together".<sup>875</sup>

7.626. Article 5.7 of the SPS Agreement allows Members to provisionally adopt SPS measures in cases where relevant scientific evidence does not allow performance of an adequate risk assessment.<sup>876</sup> Article 5.7 becomes applicable when the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in paragraph 4 of Annex A.<sup>877</sup> As the panel in *US – Animals* noted: "[t]he Appellate Body has explained that Article 5.7 operates as a 'qualified exemption' from the obligation under Article 2.2 'not to maintain SPS measures without sufficient scientific evidence'".<sup>878</sup> In turn, Article 5.1 is 'a specific application of the basic obligations contained in Article 2.2'.<sup>879</sup> Thus, if a measure meets all the requirements of Article 5.7, Articles 2.2 and 5.1 do not apply.<sup>880</sup>

7.627. The Appellate Body and past panels have found that where a measure is not based on a risk assessment pursuant to Article 5.1 of the SPS Agreement, it can be presumed not to be based on scientific principles or to be maintained without sufficient scientific evidence within the meaning of Article 2.2.<sup>881</sup> The Appellate Body has further clarified that such a presumption is rebuttable, since although a finding of violation of Articles 5.1 and 5.2 may give rise to a presumption of inconsistency with Article 2.2, it might not invariably lead to a finding of inconsistency with Article 2.2.<sup>882</sup> The Appellate Body has also observed that:

[E]ven though the presumption of inconsistency under Article 2.2 flowing from a violation of Articles 5.1 and 5.2 is rebuttable, establishing that there exists a rational or objective relationship between the SPS measure and the scientific evidence for purposes of Article 2.2 would, in most cases, be difficult without a Member demonstrating that such measure is based on an assessment of the risks, as appropriate to the circumstances.<sup>883</sup>

<sup>871</sup> Panel Report, *Australia – Apples*, para. 7.214.

<sup>872</sup> Panel Reports, *Japan – Apples*, para. 8.230; and *US – Poultry (China)*, para. 7.172.

<sup>873</sup> Appellate Body Reports, *EC – Hormones*, para. 180; and *Australia – Apples*, para. 209.

<sup>874</sup> Appellate Body Report, *EC – Hormones*, para. 180.

<sup>875</sup> Appellate Body Reports, *EC – Hormones*, para. 180; and *Australia – Apples*, para. 209.

<sup>876</sup> Appellate Body Report, *US/Canada – Continued Suspension*, para. 701.

<sup>877</sup> Appellate Body Report, *Japan – Apples*, para. 179.

<sup>878</sup> (footnote original) Appellate Body Report, *Japan – Agricultural Products II*, para. 80. We note that the panel in *EC – Approval and Marketing of Biotech Products* referred to it as a "qualified right". Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.2939, 7.2945, and 7.2969 (finding that Article 5.7 is a "right" to maintain a measure otherwise inconsistent with Article 2.2) and paras. 7.2996-7.2998 (finding that Article 5.7 is a right to maintain a measure otherwise inconsistent with Article 5.1), and para. 7.3004.

<sup>879</sup> (footnote original) Appellate Body Report, *EC – Hormones*, para. 180.

<sup>880</sup> Panel Report, *US – Animals*, para. 7.287.

<sup>881</sup> Appellate Body Report, *Australia – Salmon*, para. 138. The panel in *EC – Approval and Marketing of Biotech Products*, followed this approach. See Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.3396.

<sup>882</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.24.

<sup>883</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.29. In fn 305 to paragraph 5.29, the Appellate Body in *India – Agricultural Products* further added: "[i]n cases where an SPS measure is found to be inconsistent with Articles 5.1 and 5.2 for reasons relating to the scientific basis underlying the relevant risk assessment, it would be all the more difficult for a Member to establish that such a measure is nonetheless based on scientific principles and is not maintained without sufficient scientific evidence, within the meaning of Article 2.2."

7.628. This means that, having found a measure is inconsistent with Article 5.1 of the SPS Agreement, panels need to determine whether the presumption of inconsistency with Article 2.2 would arise in the particular case and whether such presumption has been rebutted by the respondent. Thus, a panel's finding of inconsistency with Article 2.2 cannot be solely based on the presumption arising from a finding of inconsistency with Articles 5.1 and 5.2.<sup>884</sup>

7.629. The Panel is faced with claims under both Articles 5.1 and 5.7 of the SPS Agreement. Accordingly, the Panel will first determine the applicability of Article 5.7.<sup>885</sup> As part of this examination, the Panel will assess the sufficiency of the scientific evidence.<sup>886</sup> Moreover, if Article 5.7 is found to be applicable, due to the insufficiency of scientific evidence, but any of its other three conditions, as enumerated 7.632 below, is not met, the Panel would need to further examine the consistency of the measure with Articles 5.1, 5.2 and 2.2.<sup>887</sup>

7.630. If the Panel finds Article 5.7 is inapplicable to the measure, the Panel would then examine whether the EU-wide ban is inconsistent with Article 5.1. The Panel would examine the measure's compliance with Article 5.2 in the context of its examination of the measure's consistency with Article 5.1.<sup>888</sup> If the Panel finds the measure to be inconsistent with Articles 5.1 and 5.2, the Panel would then need to determine whether Russia has rebutted the presumption of the measure's inconsistency with Article 2.2.

7.631. Bearing in mind that order of analysis the Panel proceeds to examine the legal test in respect of Articles 5.7, 5.1, 5.2 and 2.2 of the SPS Agreement.

### 7.5.5.3.3.1 Legal test

#### *Article 5.7 of the SPS Agreement*

7.632. Article 5.7 of the SPS Agreement sets out four cumulative requirements that must be met for a Member to justify its measure on the basis of this article: (i) it is imposed in respect of a situation where relevant scientific evidence is insufficient; (ii) it is provisionally adopted on the basis of available pertinent information; (iii) the Member maintaining the measure seeks to obtain the additional information necessary for a more objective assessment of risk; and (iv) the Member reviews the measure within a reasonable period of time.<sup>889</sup> The Appellate Body has explained that the first two requirements relate to the adoption of the measure while the latter two requirements "relate to the *maintenance* of a provisional SPS measure and highlight the *provisional* nature of measures adopted pursuant to Article 5.7."<sup>890</sup> As these four requirements are cumulative in nature and are equally important for the purpose of determining consistency with this provision, whenever *one* of these four requirements is not met, the measure at issue is inconsistent with Article 5.7.<sup>891</sup> However, following the logic for the application of Article 5.7, it is the first condition, namely the existence of a situation where relevant scientific evidence is insufficient, that initially triggers its applicability.<sup>892</sup>

#### *Articles 5.1 and 5.2 of the SPS Agreement*

7.633. Article 5.1 obliges Members to ensure that their SPS measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or

<sup>884</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.24, 5.37 and 5.39.

<sup>885</sup> Panel Report, *US – Animals*, para. 7.264 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.3005-7.3007).

<sup>886</sup> Panel Report, *US – Animals*, para. 7.264 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.3005-7.3007).

<sup>887</sup> Panel Report, *US – Animals*, para. 7.304.

<sup>888</sup> See Panel Reports, *US – Animals*, para. 7.320; *India – Agricultural Products*, paras. 7.307-7.308; *US – Poultry (China)*, para. 7.172; *Australia – Apples*, para. 7.211; and *Japan – Apples*, para. 8.230.

<sup>889</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 89. See also Appellate Body Report, *Japan – Apples*, para. 179, and Panel Report, *US – Animals*, para. 7.287.

<sup>890</sup> Appellate Body Report, *Japan – Apples*, fn 318 to para. 176 (emphasis original).

<sup>891</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 91. Panel Report, *US – Animals*, para. 7.290.

<sup>892</sup> Appellate Body Report, *Japan – Apples*, para. 184; and Panel Reports, *EC – Marketing and Approval of Biotech Products*, para. 7.2939.

health, taking into account risk assessment techniques developed by the relevant international organizations. Article 5.2 contains an illustrative list of elements to be taken into account in the assessment of risks: available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

7.634. Furthermore, Articles 5.1 and 5.2 are "inextricably interlinked".<sup>893</sup> These two provisions directly inform each other because Article 5.2 sheds light on the relevant elements in the assessment of risks as foreseen in Article 5.1.<sup>894</sup> As noted by the panel in *US – Animals*, the elements of Article 5.2 should be assessed when examining compliance with Article 5.1.<sup>895</sup>

7.635. The following steps need to be examined in order to determine whether SPS measures are consistent with Articles 5.1 and 5.2: (i) whether there is a risk assessment within the meaning of paragraph 4 of Annex A of the SPS Agreement; (ii) whether that risk assessment is appropriate to the circumstances; (iii) whether the science supports the conclusions in the risk assessment; and (iv) whether the measure is based on that risk assessment.<sup>896</sup>

7.636. Regarding the first step, and guided by previous panel and Appellate Body reports, we understand that a risk assessment is a scientific process aimed at establishing the scientific basis for a Member's sanitary measures, both based on laboratory methods as well as on the situation of the particular area where the risk is being assessed.<sup>897</sup>

7.637. Regarding the second step, that is, the appropriateness of a risk assessment to the circumstances, at least two considerations should be taken into account. The first is the type of risk assessment (as identified in paragraph 4 of Annex A)<sup>898</sup> that should be performed depending on what risks the measure is seeking to avoid (i.e. entry, establishment or spread of pest, diseases, etc. or arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs).<sup>899</sup> The second is whether the risk assessment was undertaken in line with the relevant elements set out in Articles 5.1 (i.e. taking into account risk assessment techniques developed by the relevant international organizations), 5.2 and 5.3. The Appellate Body has stated that the appropriate level of protection of the importing Member may affect the scope or method of the risk assessment.<sup>900</sup>

7.638. The third step entails assessing the quality of scientific information relied on by the Member imposing the SPS measure and whether that scientific information supports the conclusions in the risk assessment.<sup>901</sup> When evaluating the quality of scientific information used in the risk assessment, panels should review whether it constitutes "legitimate science according to the standards of the relevant scientific community".<sup>902</sup> Assessing the latter element, panels are

<sup>893</sup> Panel Report, *Australia – Apples*, para. 7.211. See also Panel Report, *US – Poultry (China)*, para. 7.172.

<sup>894</sup> Panel Reports, *Japan – Apples*, para. 8.230; and *US – Poultry (China)*, para. 7.172.

<sup>895</sup> Panel Report, *US – Animals*, para. 7.320 (referring to Panel Report, *Australia – Apples*, para. 7.211).

<sup>896</sup> Panel Report, *US – Animals*, para. 7.321.

<sup>897</sup> Appellate Body Report, *EC – Hormones*, para. 187. See also Appellate Body Reports, *Australia – Apples*, para. 207; *US/Canada – Continued Suspension*, paras. 527; and Panel Report, *India – Agricultural Products*, para. 7.311.

<sup>898</sup> The Appellate Body in *Australia – Salmon* found that, in respect of the two types of risk assessments contemplated in paragraph 4 of Annex A, while the first type of risk assessment demands an evaluation of the likelihood of entry, establishment or spread of a disease, and of the associated potential biological and economic consequences, the second requires only the evaluation of the potential adverse effects on human or animal health. Appellate Body Report, *Australia – Salmon*, para. 123 and fn 69.

<sup>899</sup> Panel Report, *US – Animals*, para. 7.322 (where the Panel considered that an element to be taken into account when determining if a risk assessment is appropriate to the circumstances is which type of risk assessment is required). See also Appellate Body Report, *Australia – Salmon*, fn 67.

<sup>900</sup> Appellate Body Report, *EC – Hormones*, para. 129 and Panel Report, *Australia – Salmon*, para. 8.57. See also Appellate Body Reports, *Australia – Salmon*, para. 130; *US/Canada – Continued Suspension*, para. 562 and *Australia – Apples*, paras. 237 and 244.

<sup>901</sup> Appellate Body Report, *Australia – Apples*, para. 215.

<sup>902</sup> Appellate Body Report, *Australia – Apples*, para. 215.

required to examine "whether the reasoning of the risk assessor is objective and coherent, that is, whether the conclusions find sufficient support in the scientific evidence relied upon."<sup>903</sup>

7.639. After examining the preceding three steps, a panel should then determine whether the specific SPS measure is based on that risk assessment. This entails verifying if there is a "rational or objective relationship that persists and is observable" between the SPS measure and the risk assessment.<sup>904</sup> In this context, "a measure that contradicts the conclusions of a risk assessment cannot be said to be based upon it."<sup>905</sup> In addition, the Appellate Body has clarified that Article 5.1 requires SPS measures be based on a risk assessment, which does not mean that they have to "conform to" that risk assessment.<sup>906</sup>

### **Article 2.2 of the SPS Agreement**

7.640. If a breach of Articles 5.1 and 5.2 is found, the presumption of a measure's inconsistency with the Article 2.2 obligation will arise. This obligation requires that measures are based on scientific principles and not maintained without sufficient scientific evidence. If this is the case, the Panel would have to further consider whether there are any arguments and evidence that would indicate that the importing Member has rebutted this presumption.

7.641. According to Article 2.2, an SPS measure must: (i) be applied only to the extent necessary to protect human, animal or plant life or health; (ii) be based on scientific principles; and (iii) not be maintained without sufficient scientific evidence, except as provided for in Article 5.7.<sup>907</sup> In assessing whether SPS measures are consistent with these requirements, panels must consider: the particular circumstances of the dispute, including the characteristics of the challenged measures and the quality and quantity of the scientific evidence<sup>908</sup>; and the relationship of that evidence to the specific risks against which the measures seek to protect.<sup>909</sup>

7.642. In assessing the parties' arguments relating to Article 2.2, the Panel derives guidance from the approach of the panel in *Japan – Apples* which found that the scientific evidence to be considered, "should be evidence gathered through scientific methods, excluding by the same token information not acquired through a scientific method." This "may include evidence that a particular risk may occur (e.g., the entry, establishment or spread of the bacteria that causes fire blight disease) as well as evidence that a particular requirement may reduce or eliminate that risk (e.g., the effectiveness of chlorine treatment in eliminating the bacteria)."<sup>910</sup> That panel also noted that "requiring 'scientific evidence' does not limit the field of scientific evidence available to Members to support their measures. 'Direct' or 'indirect' evidence may be equally considered. The only difference is not one of scientific quality, but one of probative value within the legal meaning of the term, since it is obvious that evidence which does not directly prove a fact might not have as much weight as evidence directly proving it, if it is available."<sup>911</sup>

### **7.5.5.3.4 Whether Article 5.7 applies to the EU-wide ban**

#### **7.5.5.3.4.1 Introduction**

7.643. In terms of the burden of proof, we recall that the panel in *EC – Approval and Marketing of Biotech Products*, operating under the premise that Article 5.7 is a "qualified right", concluded that because Article 5.1 is only applicable if Article 5.7 is not, "when a complaining party presents a

<sup>903</sup> Appellate Body Report, *Australia – Apples*, para. 215. See also Panel Report, *US – Animals*, para. 7.324 (referring to Appellate Body Report, *EC – Hormones*, paras. 193-194).

<sup>904</sup> Panel Report, *US – Animals*, para. 7.324 (quoting Appellate Body Reports, *Japan – Agricultural Products II*, para. 84 and *EC – Hormones*, para. 189). See also Appellate Body Report, *Japan – Apples*, paras. 162 – 163.

<sup>905</sup> Panel Report, *US – Animals*, para. 7.324.

<sup>906</sup> Panel Report, *US – Animals*, para. 7.324 (referring to Appellate Body Report, *US/Canada – Continued Suspension*, para. 528).

<sup>907</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1424.

<sup>908</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.26 (referring to Appellate Body Reports, *Japan – Agricultural Products II*, para. 84; and *Japan – Apples*, para. 164).

<sup>909</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.26.

<sup>910</sup> Panel Report, *Japan – Apples*, paras. 8.92-8.93.

<sup>911</sup> Panel Report, *Japan – Apples*, paras. 8.92-8.93 and 8.98.

claim of violation under Article 5.1, the burden is on the complaining party to establish a prima facie case of inconsistency with both Articles 5.1 and 5.7.<sup>912</sup> The panel in *US – Animals* observed that "nothing in the case law on Article 5.7 or other provisions which establish exemptions or provide the ability to derogate from certain WTO obligations supersedes the basic premise that the party asserting something bears the burden of proving it."<sup>913</sup><sup>914</sup> Accordingly, the Panel finds that the initial burden was on the European Union as part of its case under Article 5.1 to raise the inapplicability of Article 5.7 – which it did in its Panel request and first written submission.<sup>915</sup> As Russia has asserted that its EU-wide ban falls within the scope of Article 5.7, it carries the burden to prove that each of the four cumulative requirements has been satisfied.<sup>916</sup>

7.644. In this dispute, in respect of Article 5.7, the European Union argues that this is not a situation where scientific evidence is insufficient and that Russia has failed to comply with any of the conditions of Article 5.7.<sup>917</sup>

7.645. Russia maintains that the EU-wide ban (referred to as provisional compliance with the veterinary certificates) is justified under Article 5.7. Russia claims that the scientific information is insufficient for it to perform a risk assessment within the meaning of Article 5.1 and that it complies with all conditions of Article 5.7.<sup>918</sup>

7.646. The parties have addressed all four requirements in their arguments. The European Union's concerns relate both to the adoption and to the continued application, or maintenance, of the measure at issue. Most of the evidence cited by the European Union in support of its assertions under Article 5.7 relates to the period following adoption of the measure, including material that the European Union sent to Russia on its own initiative and in response to Russia's requests.<sup>919</sup> Therefore, the Panel finds it appropriate to begin by examining the sufficiency of scientific evidence. The Panel will then examine the extent to which the EU-wide ban is based on available pertinent information; followed by an assessment of whether Russia has sought to obtain additional information necessary for a more objective assessment of risk. Lastly, the Panel will assess whether Russia has reviewed the EU-wide ban accordingly within a reasonable period of time. As these requirements are cumulative, if we find that Russia has failed to comply with any of these four requirements Russia would be precluded from relying on Article 5.7 to exclude the applicability of other provisions of the SPS Agreement. We consider this approach to be appropriate in order to provide sufficient findings in respect of the parties' claims.

#### **7.5.5.3.4.2 Whether relevant scientific information was insufficient at the time the EU-wide ban was adopted**

7.647. The first condition for the application of Article 5.7 is insufficiency of scientific evidence. As we have noted, according to the Appellate Body in *Japan – Apples*, this is the case when the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance

<sup>912</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.3000. Like the Panel in *US – Animals*, para. 7.292, we note that the panel in *EC – Approval and Marketing of Biotech Products* based its reasoning on the Appellate Body decision in *EC – Tariff Preferences* on similar language in the Enabling Clause, which was issued later in time than the Appellate Body decision that discussed Article 5.7 of the SPS Agreement. The Appellate Body in *EC – Tariff Preferences* stated that where the permissive provision constitutes a right rather than an exception, "the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour." Appellate Body Report, *EC – Tariff Preferences*, para. 88.

<sup>913</sup> (footnote original) See e.g. Appellate Body Report, *Japan – Apples*, para. 157 ("the party that asserts a fact is responsible for providing proof thereof."). Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* (where the Appellate Body concluded that "the characterization of [a] provision as a derogation does not pre-determine the question as to which party bears the burden of proof with regard to the requirements stipulated in the provision".) (Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.56 (referring to Appellate Body Report, *China – Raw Materials*, para. 334)).

<sup>914</sup> Panel Report, *US – Animals*, para. 7.292.

<sup>915</sup> European Union's panel request (WT/DS475/2), p. 3; first written submission, paras. 177-202; and second written submission, paras. 66-83.

<sup>916</sup> We find additional support for this approach in Panel Report, *US – Animals*, para. 7.293.

<sup>917</sup> European Union's first written submission, para. 202; opening statement at the first meeting of the Panel, paras. 81-95; and second written submission, para. 68.

<sup>918</sup> Russia's first written submission, paras. 351, 352, 354, 374, 379, 381.

<sup>919</sup> For a detailed account of such exchanges see Appendix 1 below.

of an adequate assessment of risks as required under Article 5.1 and as defined in paragraph 4 of Annex A.<sup>920</sup> Russia has argued that the sufficiency of scientific evidence should be examined in an ongoing manner. Russia refers to the observation made by the panel in *Japan – Apples* regarding the time-frame for the examination of the sufficiency of scientific evidence under Article 5.7.<sup>921</sup> In *Japan – Apples*, the panel was faced with the question of whether the SPS measure was maintained without sufficient scientific evidence.<sup>922</sup> In this case, we are faced with a question that touches upon the sufficiency of scientific evidence in respect of the adoption of the measures and the maintenance of the challenged measures. We agree with the view expressed by the panel in *EC – Approval and Marketing of Biotech Products* that the (in)sufficiency of the relevant scientific evidence should be assessed with respect to the time when the SPS measure is adopted.<sup>923</sup> Accordingly, we will focus our examination on the date of adoption of the EU-wide ban in January 2014.

7.648. Paragraph 4 of Annex A defines a "risk assessment" as "[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs." Accordingly, we will examine whether there is (in)sufficient scientific evidence for Russia to adequately assess the risks of the likelihood of entry, establishment or spread of ASF within the territory of Russia, as the importing Member, according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences. We recall our earlier observations that ASF is already present in parts of Russia<sup>924</sup>, particularly in areas that border the territories of Estonia, Latvia and Belarus. The risks to be assessed in this case, therefore, are those of the potential re-entry or further spread of ASF into Russia, and especially into the ASF-free regions of Russia.

7.649. According to Russia, the type of risk assessment under Annex A, paragraph 4, relevant to the situation at hand is the "evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the SPS measure which might be applied, and of the associated potential biological and economic consequences".<sup>925</sup> It claims that, consistently with Article 5.1, it follows the approach and methodologies suggested by the Terrestrial Code's risk assessment provisions in Chapter 2.1. and Articles 2.1.3. and 2.1.4., which list four sequential components of risk assessment: (a) entry assessment; (b) exposure assessment; (c) consequence assessment; and (d) risk estimation.<sup>926</sup> The final component of risk assessment consists of integrating the results from the first three components to produce overall measures of risks associated with the hazards identified.<sup>927</sup>

7.650. According to Russia, the estimation of the ASF risk related to the importation of uncertified pigs and pork products from non-affected EU member States must begin with an entry assessment, which within the meaning of Article 2.1.4. of the Terrestrial Code:

[C]onsists of describing the biological pathway(s) necessary for an importation activity to introduce pathogenic agents into a particular environment, and estimating the probability of that complete process occurring, either qualitatively (in words) or quantitatively (as a numerical estimate). The entry assessment describes the probability of the 'entry' of each of the *hazards* (the pathogenic agents) under each

<sup>920</sup> Appellate Body Report, *Japan – Apples*, para. 179.

<sup>921</sup> Russia's response to Panel question No. 309, para. 265 (referring to Panel Report, *Japan – Apples*, para. 7.10).

<sup>922</sup> Panel Report, *Japan – Apples*, Section VII.D.

<sup>923</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.3253. We recall our general comments on the Panel's temporal framework in section 7.3.6 above.

<sup>924</sup> See para. 7.208 above.

<sup>925</sup> Russia's first written submission, para. 357 (citing Annex A, paragraph 4, to the SPS Agreement).

<sup>926</sup> Russia's first written submission, para. 363.

<sup>927</sup> Russia's first written submission, para. 363.



specified set of conditions with respect to amounts and timing, and how these might change as a result of various actions, events or measures.<sup>928</sup>

7.651. Russia, therefore, argues that to conduct an entry assessment with respect to the importation of uncertified pigs and pork products from non-affected EU member States, Russia must assess and have access to information regarding "the pathways necessary for the importation of ASF and the probability of an importation event occurring in relation to each exporting country and each imported pig and pork product".<sup>929</sup> Russia further elaborates:

Such an assessment would involve many key factors, including the ASF control regime in the exporting EU Member States (e.g. surveillance mechanisms; preparedness to implement a contingency plan in the event of ASF outbreaks, including zoning and movement control, stamping out, etc.; product identification and traceability systems; level of biosecurity measures in place etc.); the incidence of ASF in the EU Member States; the quantity of pigs and pork products imported from the EU Member States into the Russian Federation; the movement of wild boar across borders and the density of wild boar populations in the EU Member States; the levels of legal and illegal trade of pigs and pork products in the EU Member States, and evaluations of the EU Member States' veterinary services, and diagnostic laboratories.<sup>930</sup>

7.652. Russia asserts that much of this information was, and still is, not available to it.<sup>931</sup> Russia further claims that the European Union's responses Russia's questions provided on 24 March 2015 "should be given little, if any, weight by the Panel in its analysis of the SPS Agreement Article 5.7 issue" since, in its view, the insufficiency of scientific evidence must be assessed at the time the relevant provisional SPS measure was adopted.<sup>932</sup> It adds that the provided information is anyway incomplete.<sup>933</sup>

7.653. Furthermore, relying on the European Commission Working Document of January 2014 and several statements made in the EFSA 2010 Opinion, Russia points out uncertainty or insufficiency of scientific data regarding: the role of wild boar in the epidemiology of the disease<sup>934</sup>; whether wild boar could have a reservoir role or are only infected in areas where there are ongoing outbreaks in domestic pigs, and potential involvement of other biological vectors<sup>935</sup>; and the role of ticks in spreading the disease.<sup>936</sup> Russia, in addition, refers to the epidemiological

<sup>928</sup> Russia's first written submission, para. 364 (citing Terrestrial Code, Article 2.1.4. (emphasis original)).

<sup>929</sup> Russia's first written submission, para. 365.

<sup>930</sup> Russia's first written submission, para. 365. See also Russia's first written submission, para. 367 (referring to Letter from the Russian Veterinary Service to DG SANCO, FS-AS-8/23743, 1 December 2014 (Exhibit RUS-131)).

<sup>931</sup> Russia's first written submission, para. 365 (referring to Letter from the Russian Veterinary Service to DG SANCO, FS-SD-8/1640, 5 February 2014 (Exhibit EU-84) ("Preliminary estimates suggest that the ASF control and containment measures implemented by DG SANCO are inconsistent with the OIE procedures. To build up a more accurate picture for further decisions on ASF regionalisation, CU experts are now compiling an extensive list of questions, including an update on the ASF epizootic situation in the EU after the occurrence of the disease in Lithuanian wild boar, implemented and envisaged ASF monitoring measures, and a comprehensive assessment of the risk of this dangerous animal disease spreading to unaffected areas in the EU."); Letter from the Russian Veterinary Service to DG SANCO, FS-SD-8/4168, 19 March 2014 (Exhibit RUS-130) ("Regrettably we could find no common ground on the process of ASF regionalisation in the EU, and the issue of sufficiency of the EU reply and of conclusive evidence that the rest of the EU is not affected by the disease."); Letter from the Russian Veterinary Service to DG SANCO, FS-EN-8/5084, 2 April 2014 (Exhibit RUS-54) ("Regrettably Russian experts are still waiting to receive detailed information on ASF-control measures, which are being taken by EU veterinary authorities, particularly arrangements for localisation of the disease in the affected countries as well as preventing the introduction of the ASF virus in other EU countries."). See also Appendix 1 below for a detailed account of the information requested through these communications.

<sup>932</sup> Russia's second written submission, para. 194 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.3253).

<sup>933</sup> Russia's second written submission, para. 194.

<sup>934</sup> Russia's second written submission, para. 187 (referring to European Commission, Working Document SANCO/G2/SB (14.01.2014), "Guidelines on surveillance and control of African swine fever in feral pigs and preventative measures for pig holdings," 14 January 2014 (Exhibit RUS-89)).

<sup>935</sup> Russia's second written submission, para. 188 (2010 EFSA Scientific Opinion, p. 8 (Exhibit EU-24)).

<sup>936</sup> Russia's second written submission, para. 189 (2010 EFSA Scientific Opinion, p. 4 (Exhibit EU-24)).

uncertainty with respect to the distance in which wild boar may carry the disease and the absence of scientific evidence regarding the level of contagion of the disease, in particular the degree of survival of wild boar.<sup>937</sup> Furthermore, Russia argues that it is prevented from conducting a risk assessment of the ASF spread to the non-affected EU member States because of "only limited data on the disease situation in the other [non-affected] EU Member States".<sup>938</sup>

7.654. Moreover, Russia alleges that the European Union failed to provide proof that the non-infected EU member States are historically ASF free, which links to the alleged failure of the European Union to provide data regarding the affected EU member States, such as information on the density of the swine population and personal subsidiary farming, necessary to determine the risk of ASF spread from the affected countries to the rest of the European Union.<sup>939</sup>

7.655. Russia maintains that each of the categories of information it requested is highly relevant. Given the key role of wild boar and backyard farms in the spread of ASF, Russia requested the EU-wide data and control measures relating to wild boar and backyard farms in order to assess the likelihood of continued spread of ASF within the European Union. Likewise, given free movement of goods in the European Union, Russia considers it relevant to have information about control measures regarding the movement of pork and pork products to processing plants, as well as the location of the processing plants exporting products to Russia. With reference to what Russia describes as instances of falsified certificates and other problems relating to veterinary control services, it considers it appropriate to request information about factors relating to veterinary services performance.<sup>940</sup>

7.656. Since the European Union did not provide the requested information, and in view of the mentioned epidemiological uncertainties, Russia concludes that there is insufficient scientific evidence available to Russia to perform a risk assessment with respect to the non-affected EU member States.<sup>941</sup>

7.657. In response to Russia's arguments, the European Union maintains that the relevant scientific information is sufficient and asserts that such information was provided by it to Russia.<sup>942</sup> In support of this assertion, the European Union refers to letters, emails, faxes, meetings and inspections through which such information was provided.<sup>943</sup>

7.658. We note that Russia refers to the potential risks associated with the importation of *uncertified* pigs and pork products from the unaffected EU member States. The European Union, however, has made no claim with regard to *uncertified* pigs and pork products. Rather, the European Union takes issue with Russia's EU-wide ban which Russia considers as its provisional compliance with the current wording of the veterinary certificates.<sup>944</sup>

7.659. We bear in mind that insufficiency of scientific evidence does not extend to situations of "scientific uncertainty" (i.e. when there is unresolved scientific uncertainty)<sup>945</sup>, nor to situations of scientific controversy.<sup>946</sup> Moreover, the possibility to supplement the underlying scientific evidence does not, by itself, render it insufficient.<sup>947</sup>

7.660. Mindful of these elements and the parties' arguments, the Panel will review whether the qualitative and quantitative aspects of the available scientific evidence, including information the European Union has provided to Russia, is of the type and scope that is (in)sufficient for Russia to conduct a risk assessment appropriate to the circumstances.

<sup>937</sup> Russia's second written submission, paras. 190 - 191.

<sup>938</sup> Russia's second written submission, para. 192.

<sup>939</sup> Russia's second written submission, paras. 193 and 83 – 88.

<sup>940</sup> Russia's second written submission, para. 196.

<sup>941</sup> Russia's second written submission, para. 196.

<sup>942</sup> European Union's second written submission, para. 68.

<sup>943</sup> European Union's second written submission, para. 68 (referring to Exhibits EU-62, EU-64, EU-65, EU-89, EU-91, EU-92, EU-94, EU-132 to EU-148). See Appendix I below.

<sup>944</sup> See sections 7.3.2.3.1 and 7.3.2.3.2 above.

<sup>945</sup> Appellate Body Report, *Japan – Apples*, paras. 183-184.

<sup>946</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 677.

<sup>947</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 702.

7.661. On the record we note that there are three main sources of scientific evidence that we need to examine. First, there is the general scientific evidence available in respect of ASF which has been exhibited by the parties or referred to in those exhibits. Second, there is the scientific evidence referred to in the written responses of the experts consulted by the Panel to the Panel's questions. Third, there is the scientific evidence available in respect of the relevant international standards. Before examining each of these categories, we recall that our analysis in respect of the availability of this information is focused on January 2014. Based on that time-frame, we have excluded relevant scientific evidence submitted by the parties which was published after the end of January 2014.<sup>948</sup>

7.662. Regarding the first source of scientific evidence, we note that ASF is a well-known disease in respect of which many scientific studies have been pursued. The parties have referred to a number of scientific reports or opinions produced by international organizations and by domestic veterinary authorities, which in our view reflect clear scientific evidence in respect of ASF. In Table 5 below we provide an overview of the documents containing such information.

**Table 5 List of scientific reports or publications from international organizations**

Reference	Exhibit No.
FAO report entitled "EMPRES Watch ... African swine fever spread in the Russian Federation and the risk for the region" dated December 2009 <sup>949</sup>	EU-23
EFSA scientific opinion on ASF, published on 19 April 2010 <sup>950</sup>	EU-24
FAO report entitled "EMPRES Watch ... African swine fever spread in the Russian Federation: risk factors for Europe and beyond" dated May 2013 <sup>951</sup>	RUS-3
OIE presentation on "The OIE International standards on CSF and ASF – recent developments", TAIEX Workshop on CSF and ASF, Vilnius, Lithuania, 3-4 September 2013.	RUS-78 and RUS-205
Finnish veterinary authority (EVIRA) Research Report on "Possible routes of entry into the country for African swine fever – Risk profile", published on September 2011.	RUS-140

7.663. Also in the context of this first category of information, the parties have referred to specific scientific articles published in diverse academic journals. These include the following:

**Table 6 List of scientific articles published in journals referred to by the parties**

Reference	Exhibit No.
Rosell, C., Navàs, FJ, & Romero, S, 2012. Reproduction of wild boar in a	EU-130

<sup>948</sup> Such information includes 2014 EFSA scientific report (Exhibit EU-25); EFSA Scientific Opinion on African Swine Fever, EFSA Journal 2014 12(4):3628 (2014 EFSA Scientific Opinion) (Exhibit EU-26); Standing group of experts on ASF in the Baltic and Eastern European region, December 2014 (Exhibit EU-108); EU Veterinary Emergency Team, Vilnius, 8 – 10 October 2014 (Exhibit EU-109); J.M. Sánchez-Viscaíno *et al*, published on January 2015 (Exhibit RUS-1); Presentation on ASF: Biosecurity in the pig breeding sector by Professor Mary Louise Penrith, on 30 October 2014 (Exhibit RUS-7); Species information on *sus scrofa* from the IUCN Red List of Threatened Species (Exhibit RUS-8); Morelle *et al*, "Towards understanding wild boar *Sus scrofa* movement: a synthetic movement ecology approach", *Mammal Review*, (2014) (Exhibit RUS-99); C. Gallardo *et al*, "Experimental Infection of Domestic Pigs with African Swine Fever Virus Lithuania 2014 Genotype II Field Isolate", *Transboundary and Emerging Diseases* (2015) (Exhibit RUS-172); L. Mur *et al*, "Detection of African Swine Fever Antibodies in Experimental and Field Samples from the Russian Federation: Implications for Control (2014) (Exhibit RUS-175); D. Gavier-Widen *et al*, "African swine fever in wild boar in Europe: a notable challenge", *Veterinary Record*, Vol. 176, No. 8 (2015), 199-200 (Exhibit RUS-277); German Federal Research Institute for Animal Health (Friedrich-Loeffler-Institut), *Qualitative Risk Analysis on the Introduction of African swine fever from Eastern Europe into Germany*, 2 April 2014 (Exhibit RUS-291).

<sup>949</sup> This report contains references to a number of scientific reports and articles. See FAO report entitled "EMPRES Watch ... African swine fever spread in the Russian Federation and the risk for the region" dated December 2009 (Exhibit EU-23), p. 9.

<sup>950</sup> This report contains references to a number of scientific reports and articles. See FAO report entitled "EMPRES Watch ... African swine fever spread in the Russian Federation and the risk for the region" dated December 2009 (Exhibit EU-23), pp. 81-91.

<sup>951</sup> This report contains references to a number of scientific reports and articles. See EMPRES Watch Vol. 28 (May 2013), "African swine fever in the Russian Federation: risk factors for Europe and beyond", (Exhibit RUS-3), p. 13.

Reference	Exhibit No.
cropland and coastal wetland area: implications for management. <i>Animal Biodiversity and Conservation</i> , 35.2:209-217.	
B.V. Boev et al, "The wild boar. Modelling and prognosis for cylvatic African swine fever", <i>Журнал Ветеринария (Veterinary Journal)</i> , December 2010.	RUS-5
K. Jerina et al., "First evidence of long-distance dispersal of adult female wild boar ( <i>Sus scrofa</i> ) with piglets", <i>European Journal of Wildlife Research</i> , Vol. 60, No. 2 (2014), pp. 367-370.	RUS-9
O. Keuling et al., "How does hunting influence activity and spatial usage in wild boar <i>Sus scrofa</i> L.?", <i>European Journal of Wildlife Research</i> , Vol. 54, No. 4 (2008), 729.	RUS-10
L. Mur et al., "Risk of African swine fever introduction into the European Union through transport-associated routes: returning trucks and waste from international ships and planes", <i>BMC Veterinary Research</i> , Vol. 8, No. 149 (2012)	RUS-11
T.G. Burrage "African Swine Fever virus infection in <i>Ornithodoros</i> ticks", <i>Virus Research</i> 173 (2013), 131-139.	RUS-12
A.Dors, E. Czyzewska et al., "Effect of various husbandry conditions on the production parameters of swine herds in Poland", <i>Polish Journal of Veterinary Sciences</i> , Vol. 16, No. 4 (2013), 707-713.	RUS-65
A. Thiermann, "Practical Application of OIE standards and guidelines on compartmentalisation", 2008.	RUS-83
R. Leaper et al., "The feasibility of reintroducing Wild Boar ( <i>Sus scrofa</i> ) to Scotland", <i>Mamal Review</i> , Vol. 29, No. 4, (1999)	RUS-98
M.L. Penrith et al., "An investigation into natural resistance to African swine fever in domestic pigs from an endemic area in Southern Africa", <i>Scientific and Technical Review of the OIE</i> , Vol. 23, No. 3 (2004), 965-977	RUS-173
E. Okoth et al., "Comparison of African swine fever virus prevalence and risk in two contrasting pig-farming systems in South-west and Central Kenya", <i>Preventive Veterinary Medicine</i> , Vol. 110, No. 2, 198-205	RUS-174
S. Costard et al., "Epidemiology of African swine fever virus", <i>Virus Research</i> , Vol. 173, No. 1 (2012), 191-197	RUS-176
O. Keuling et al., "Commuting, shifting or remaining? Different spatial utilisation patterns of wild boar <i>Sus scrofa</i> L. in forest and filed crops during summer", <i>Institute of Forest Botany and Forest Zoology, Dresden University of Technology</i> , 2008.	RUS-182
M.L. Penrith and W Vosloo, "Review of African swine fever: transmission, spread and control", <i>Journal of the South African Veterinary Association</i> , Vol. 80, No. 2 (2009), 58-62.	RUS-200

7.664. The second category of scientific evidence is the expert studies referred to by the experts in their written responses to the Panel's questions. Dr Brückner, Professor Penrith, and Dr Thomson provided with their responses a list of references. Together, those references include a significant number of scientific studies in respect of ASF which predate the cut-off date of our analysis.<sup>952</sup>

7.665. The third category of scientific evidence relates to the Terrestrial Code. We recall our findings in section 7.5.3 above, relative to Article 3.1, that the EU-wide ban, in respect of non-treated products, is not "based on" the relevant international standard, as it imposes a ban in respect of the entire territory of the European Union, whereas the relevant provisions of the Terrestrial Code envisage trade from ASF-free countries, zones and compartments. On the question of whether the relevant scientific evidence may be insufficient when an international standard exists, we note the Appellate Body's clarification that:

There is no indication in Article 5.7 that a WTO Member may not take a provisional SPS measure wherever a relevant international organization or another Member has performed a risk assessment. Information from relevant international organizations may not necessarily be considered "sufficient" to perform a risk assessment, as it may be part of the "available pertinent information" which provides the basis for a provisional SPS measure under Article 5.7. Moreover, scientific evidence that may

<sup>952</sup> Section 5 of the Compilation of the experts' responses.

have been relied upon by an international body when performing the risk assessment that led to the adoption of an international standard at a certain point in time may no longer be valid, or may become insufficient in the light of subsequent scientific developments.<sup>953</sup>

7.666. The Appellate Body added that while it is reasonable for a Member challenging the inconsistency of an SPS measure with Article 5.7 to argue that the risk assessment supporting international standards demonstrates the existence of sufficient relevant scientific evidence to perform a risk assessment, this evidence is not dispositive and may be rebutted by the Member adopting the provisional SPS measure.<sup>954</sup>

7.667. In this context, the Appellate Body further explained that "[t]he 'insufficiency' requirement in Article 5.7 does not imply that new scientific evidence must entirely displace the scientific evidence upon which an international standard relies. It suffices that new scientific developments call into question whether the body of scientific evidence still permits of a sufficiently objective assessment of risk".<sup>955</sup>

7.668. In this case, Russia has claimed from the outset that the EU-wide ban is "based on the OIE standard to the extent possible".<sup>956</sup> In our view, this implies a clear recognition by Russia of the scientific basis of the international standard relevant for this dispute. In this respect, we consider that the Appellate Body's guidance regarding the relationship between the existence of an international standard and the sufficiency of scientific evidence for the purposes of Article 5.7 does not apply to the situation before us. Rather, we see that Russia has consistently relied on the scientific basis in the Terrestrial Code to adopt and justify its measures.

7.669. Moreover, the parties have provided certain exhibits in connection with the scientific evidence related with the relevant international standard. These include the OIE ASF General Disease Information Sheets<sup>957</sup> and the OIE Technical Disease Card on ASF.<sup>958</sup> We consider that the existence of international standards enshrined in Chapter 15.1 of the Terrestrial Code, and their respective scientific basis, further confirms our view that by January 2014 there was ample scientific evidence in respect of ASF.<sup>959</sup>

7.670. Further reinforcing the extent to which the preceding scientific evidence was available to Russia by January 2014, we recall that Russia has experienced ASF outbreaks as of 2007<sup>960</sup> and has expressed on various occasions its broad scientific knowledge of ASF.<sup>961</sup> In this respect, we are of the view that Russia is well placed to manage any potential risk of the further entry and spread of ASF through imports of the products at issue from the European Union, excluding the four affected EU member States.

<sup>953</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 695.

<sup>954</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 696.

<sup>955</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 725.

<sup>956</sup> Russia's first written submission, para. 385.

<sup>957</sup> OIE General Disease Information Sheets: African Swine Fever (Exhibit RUS-4) and OIE Disease Information Sheet, African Swine Fever. Available at: <http://www.oie.int/doc/ged/D13953.PDF> (Exhibit RUS-171) (updated on May 2013).

<sup>958</sup> OIE, African Swine Fever, available at: [http://www.oie.int/fileadmin/Home/eng/Animal\\_Health\\_in\\_the\\_World/docs/pdf/Disease\\_cards/AFRICAN\\_SWINE\\_FEVER.pdf](http://www.oie.int/fileadmin/Home/eng/Animal_Health_in_the_World/docs/pdf/Disease_cards/AFRICAN_SWINE_FEVER.pdf). OIE ASF Technical Disease Card (Exhibit RUS-186) (last updated on April 2013; last accessed 23 October 2015).

<sup>959</sup> We note that the Terrestrial Code's edition in place at the time of our cut-off date for the analysis of (in)sufficiency of scientific evidence was the 22<sup>nd</sup> edition of the Terrestrial Code. In our view, this in no way affects our analysis in this section, because the OIE explained that Chapter 15.1 only underwent editorial changes from the 22<sup>nd</sup> to the 23<sup>rd</sup> edition. In that respect there is no modification in the scientific basis of the standards contained in Chapter 15.1. See OIE response communication to the Panel dated 26 August 2015.

<sup>960</sup> Russia's first written submission, para. 23 (referring to Exhibit RUS-144); response to Panel question No. 132, paras. 263-264; and second written submission, paras. 146-147.

<sup>961</sup> Russia's first written submission, paras. 32-33, 252-273; and second written submission, paras. 143-153.

7.671. Moreover, we consider that the European Union provided information to Russia in the course of January 2014, that includes further relevant scientific evidence in respect of ASF.<sup>962</sup> This information includes the reports on surveillance activities in Estonia, Latvia, Lithuania, and Poland<sup>963</sup> and a detailed annex on surveillance activities in Poland<sup>964</sup> sent on 29 January 2014.

7.672. After examining the information mentioned above, we consider that the body of scientific evidence available to Russia was abundant. In our view, this information includes knowledge of the epidemiology of the disease, the potential vectors for the transmission and spread of the disease (including behavioural ecology of wild boars), potential risks of spread of the disease in the Baltic region, and the type of control measures that could be applied.

7.673. We recall that the Appellate Body has found that there will be insufficient scientific evidence when the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in paragraph 4 of Annex A of the SPS Agreement.<sup>965</sup> We consider that the evidence in respect of ASF on record, existing in January 2014, amounts to that which would be sufficient for Russia to conduct an assessment appropriate to the circumstances in respect of the potential risk of the re-introduction and further spread of ASF associated with imports of the products at issue from the non-affected EU member States.

7.674. Moreover, we note that Article 5.2 refers to the information that a Member shall take into account in the assessment of risks. This constitutes available scientific evidence; relevant process and product methods; relevant inspection, sampling, and testing methods; prevalence of specific diseases or pests; existence of pest- or disease- free areas; relevant ecological and environmental conditions; and quarantine or other treatment. In our analysis in the context of Article 6, we concluded that a considerable amount of such information is available to Russia.<sup>966</sup>

7.675. Based on the foregoing, we find that in January 2014 the relevant scientific evidence was sufficient for Russia to conduct an assessment appropriate to the circumstances in respect of the potential risk of the re-introduction and further spread ASF associated with imports of the products at issue from the non-affected EU member States.

7.676. While the preceding finding is sufficient to conclude that the EU-wide ban does not fall within the scope of Article 5.7 and the qualified exemption to the obligations in Articles 5.1, 5.2 and 2.2 is not available to Russia, the Panel deems it prudent to examine the EU-wide ban in the context of the other three elements of Article 5.7.

#### **7.5.5.3.4.3 Whether the EU-wide ban was adopted on the basis of available pertinent information**

7.677. With respect to the second condition of Article 5.7 — that the measure should be adopted on the basis of available pertinent information — we consider that information is pertinent when there is a rational and objective relationship between the information concerning the risk and the measure.<sup>967</sup> The Appellate Body in *US/Canada – Continued Suspension* explained how this requirement should be assessed:

WTO Members' right to take provisional measures in circumstances where the relevant scientific information is "insufficient" is also subject to the requirement that such measures be adopted "on the basis of available pertinent information". Such information may include information from "the relevant international organizations" or

<sup>962</sup> See Appendix 1 below for a detailed account of additional information provided by the European Union to Russia throughout 2014 and the beginning of 2015.

<sup>963</sup> European Union's letter to Russia of 29 January 2014, ARES(2014)209377, SANCO G7/RF/mh(2014)219959 (Exhibit EU-62). Also on the record are presentations of the State Food and Veterinary Service of Lithuania on the protective measures against ASF in Lithuania, made on 7 October 2013 (Exhibit EU-114).

<sup>964</sup> Excel spreadsheet on Poland, Annex to the Letter of 29 January 2014 (pp. 6-8) (Exhibit EU-63).

<sup>965</sup> Appellate Body Report, *Japan – Apples*, para. 179.

<sup>966</sup> See section 7.5.2 above.

<sup>967</sup> See Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678.

deriving from SPS measures applied by other WTO Members. Thus, Article 5.7 contemplates situations where there is some evidentiary basis indicating the possible existence of a risk, but not enough to permit the performance of a risk assessment. Moreover, there must be a rational and objective relationship between the information concerning a certain risk and a Member's provisional SPS measure. In this sense, Article 5.7 provides a "temporary 'safety valve' in situations where some evidence of a risk exists but not enough to complete a full risk assessment, thus making it impossible to meet the more rigorous standards set by Articles 2.2 and 5.1".<sup>968</sup>

7.678. The European Union also posits that a measure being manifestly unnecessary and disproportionate would be pertinent to determining whether such a measure is based on pertinent information or whether it is rather a disguised restriction on international trade.<sup>969</sup> In this respect, the European Union sustains that in "case of a well-known disease like ASF, if there is only one case in wild boar only a few kilometres from the border with Belarus, Russia should have not banned, even provisionally, the products at issue from the whole territory of the European Union, including areas thousands of kilometres away, given the robustness of the EU measures and the epidemiology of the disease."<sup>970</sup>

7.679. Russia argues that the European Union has failed to make a *prima facie* case that Russia does not comply with Article 5.7 of the SPS Agreement. In its view, the available pertinent information indicates a high risk that the currently non ASF-infected countries may become ASF infected. Russia describes the situation as where there is "some evidentiary basis indicating the possible existence of a risk, but not enough to permit the performance of a risk assessment."<sup>971</sup>

7.680. Russia maintains that scientific research, dated July 2014, on domestic pigs and wild boar suggests that ASF may easily spread within regions of the European Union.<sup>972</sup> Russia refers to the studies that have reported that some domestic pigs and wild boar have been found in the field with antibodies to ASF, which, according to Russia, may mean that they have survived the infection.<sup>973</sup> In the view of Russia, this could expand the period of time during which the infected animals can infect other animals.<sup>974</sup> Russia also mentions the possibility that recovered animals will remain persistently infected and transmit the disease through tissues.<sup>975</sup> Finally, according to Russia, long-distance movements of long term carrier wild pigs would likely lead to further spread of ASF across the European Union's territory, which is most likely via a northern route through the Baltic countries and Poland, due to the dense, large population of wild boar in Northeast Europe.<sup>976</sup>

7.681. Russia refers to the estimation made by the German Federal Research Institute for Animal Health that the risk of entry of ASF into Germany through illegal transportation and disposal of contaminated material is estimated as high; and the risk of entry of contaminated pork meat and

<sup>968</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678 (footnote omitted).

<sup>969</sup> European Union's response to Panel question No. 148, paras. 305-307; and second written submission, para. 77.

<sup>970</sup> European Union's second written submission, para. 78.

<sup>971</sup> Russia's second written submission, para. 197 (referring to Appellate Body Report, *US/Canada – Continued Suspension*, para. 678).

<sup>972</sup> Russia's first written submission, para. 376 (referring to 2014 EFSA Scientific Opinion, at 18 (citing Mur et al., personal communication, 2014) (Exhibit EU-26) and B.V. Boev et al., "The wild boar. Modeling and prognosis for sylvatic African swine fever" (Exhibit RUS-5)).

<sup>973</sup> Russia's first written submission, para. 376.

<sup>974</sup> Russia's first written submission, para. 376 (referring to 2014 EFSA Scientific Opinion (Exhibit EU-26) p. 17).

<sup>975</sup> Russia's first written submission, para. 376 (referring to 2014 EFSA Scientific Opinion (Exhibit EU-26) p. 18, citing P.J. Wilkinson, "The persistence of African swine fever in African swine fever in Africa and the Mediterranean", *Preventive Veterinary Medicine*, Vol. 2 (1984), pp. 71-82).

<sup>976</sup> Russia's first written submission, para. 377 (referring to EFSA, "Evaluation of possible mitigation measures to prevent introduction and spread of African swine fever virus through wild boar", *EFSA Journal* (2014), 12(3):3616, (Exhibit EU-25), p. 6).

from pork derived products by vehicles or people along the main traffic routes is as high in the context of a "worst case scenario".<sup>977</sup>

7.682. Similarly, Russia relies on an academic publication that allegedly supports its arguments. In particular, it refers to the study by Gallardo and others who concluded that the fact that nearly 501 ASF cases or outbreaks have occurred in wild boar and domestic pigs in Latvia, Lithuania, and Poland, combined with the uncertain situation in Belarus, "represents a permanent risk for ASF spreading into new regions of the EU".<sup>978</sup>

7.683. According to Russia, the existence of the risk of ASF spread into non-affected EU member States was also highlighted during negotiations between Messrs. Dankvert (head of FSVPS) and Van Goethem (head of DG SANCO).<sup>979</sup>

7.684. Russia argues that the high risk of ASF spread into new regions and countries in the European Union can further be derived from the fact that there is evidence of wild boar moving from the four ASF-affected EU member States to Western Europe.<sup>980</sup> Based on evidence regarding Classical swine fever in the European Union, Russia stresses that the high density of wild boar population in Europe can easily sustain viruses.<sup>981</sup>

7.685. Russia also argues that the insufficiency of the European Union's zones to contain and control ASF demonstrates that the risk that ASF will spread further westwards or northwards is high.<sup>982</sup> Additionally, it points to the absence of any guarantees from the European Union that the products originating in its ASF-affected EU member States do not end up in the stream of commerce in the European Union.<sup>983</sup>

7.686. Russia thus concludes that the evidence indicates that significant risk exists with respect to allowing imports from the non-affected EU member States but that such evidence is not enough to conduct a risk assessment under Articles 5.1 and 5.2 of the SPS Agreement.<sup>984</sup>

7.687. With these considerations in mind, the Panel will examine whether there is a rational and objective relationship between the available pertinent information concerning the risks arising from the potential re-entry and further spread of ASF within Russia through the imports of the products at issue from the entire European Union, excluding the four affected EU member States.

7.688. We recall that, pursuant to the 2006 Memorandum, the wording of the bilateral veterinary certificate that had been agreed between the European Union and Russia allows importation of the products concerned accompanied by an attestation that the products at issue "...originate from premises and/or administrative territory of the EU Member State that are officially free from the following contagious diseases: African swine fever - during the last 3 years in the territory of the EU excluding Sardinia".<sup>985</sup> Up to and until the first outbreak of ASF in Lithuania in January 2014, the entire EU territory (with the exception of Sardinia) had been recognized by Russia as free of ASF for at least the "last 3 years". Following the outbreak of ASF in Lithuania, Russia banned certain products from all member States of the European Union, including all other European Union member States who had not themselves experienced an outbreak of ASF. Pertinent information available to Russia included the fact that the initial situation in Lithuania was limited in scope, and

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<sup>977</sup> Russia's second written submission, para. 198 (referring to Friedrich-Loeffler-Institut, "Qualitative Risikobewertung zur Einschleppung der Afrikanischen Schweinepest nach Deutschland aus Osteuropa," 2 April 2014 (Exhibit RUS-291), pp. 1-2).

<sup>978</sup> Russia's second written submission, para. 199 (referring to C. Gallardo et al., "Experimental Infection of Domestic Pigs with African Swine Fever Virus Lithuania 2014 Genotype II Field Isolate," in *Transboundary and Emerging Diseases* (2105) (Exhibit RUS-172), p. 1).

<sup>979</sup> Russia's second written submission, para. 199 (referring to Rosselkhoz nadzor news, "Negotiations between Dankvert and DG SANCO," 6 July 2014 (Exhibit RUS-251)).

<sup>980</sup> Russia's second written submission, para. 199 (referring to the Society for Applied Microbiology (SfAM), "Restrictions In Place As African Swine Fever Hits Lithuania," 31 January 2014 (Exhibit RUS-292)).

<sup>981</sup> Russia's second written submission, para. 199 (referring to 2010 EFSA Scientific Opinion, p. 28 (citing EFSA 2009c) (Exhibit EU-24)).

<sup>982</sup> Russia's second written submission, para. 200.

<sup>983</sup> Russia's second written submission, para. 201.

<sup>984</sup> Russia's second written submission, para. 203.

<sup>985</sup> See fn 117 above.



that the European Union had in place a regionalization regime for surveillance and control of ASF, and was also obliged to comply with its obligations flowing from the relevant international standards in the Terrestrial Code. Furthermore, pertinent information available on the epidemiology of ASF, potential vectors for the transmission and spread of the disease (including the behavioural ecology of wild boars), and potential risks of spread of the disease in the Baltic region, indicated that, in terms of geography, wild boar ecology and epidemiology, the likelihood of ASF entry and spread to non-adjacent countries, let alone countries or zones located much further away within the large expanse of the European Union's territory, was remote.<sup>986</sup> We recall our examination of the relevant information in the context of our consideration under Article 6 of the SPS Agreement, which addressed similar matters and which we found to be sufficient.<sup>987</sup>

7.689. We consider it also relevant to recall that the ASFV is already present and widespread within the territory of Russia. In fact, it could be that ASF was introduced into the territory of the four affected EU member States by infected wild boar originating in Russia and Belarus. Russia has described in some detail the various measures it has in place to attempt to control ASF within its territory.<sup>988</sup> Given that Russian authorities clearly have extensive knowledge of this disease and procedures in place to address potential risks relating to the further spread of ASF, we are of the view that Russia is well placed to manage any potential risk of the further entry and spread of ASF through imports of the products at issue from the European Union, excluding the four affected EU member States. Accordingly, we are unable to find, on the basis of evidence on the record, a rational and objective relationship between the EU-wide ban and the available pertinent information concerning the risks arising from the potential further entry and spread of ASF within Russia through the imports of the products at issue from the entire European Union, excluding the ASF-affected EU member States. We therefore find that the EU-wide ban was not adopted by Russia on the basis of available pertinent information.

#### **7.5.5.3.4.4 Whether Russia has sought to obtain the additional information necessary for a more objective assessment of risk in respect of the EU-wide ban**

7.690. The third requirement of Article 5.7 is that the importing Member applying the measure seeks to obtain the additional information necessary for a more objective assessment of risk.<sup>989</sup>

7.691. The European Union argues that Russia "abused the process instead of seeking information germane for the risk assessment" because the information that Russia claims to seek was either already provided by the European Union or was irrelevant for the purposes of the European Union's ASF regionalization measures.<sup>990</sup> Following the adoption of a provisional measure, the respective Member is under an obligation to seek to obtain additional information for a more objective assessment of risk. According to the European Union, the moment a Member is asking for information which is not necessary for a more objective assessment of risk, including the type of information characterized by the individual experts in the present proceedings as an "overkill" or as an attempt to "muddy the water", that Member can no longer benefit from the provisional shelter of Article 5.7. The European Union argues that such information requests are a clear warning sign that the respective Member is not genuinely seeking to perform a more objective risk assessment (objective in the sense of being based on the information available).

7.692. Russia argues that it is requesting additional information from the European Union in order to perform a proper risk assessment based on a complete picture of the epizootic situation of ASF in each EU member State, with a view to better understanding the likelihood of entry of ASF into Russia "from the importation of uncertified pigs and pork products from other [non-affected] EU member States."<sup>991</sup> Russia asserts that it has repeatedly requested from the European Union and member State officials information germane to conducting a risk assessment.<sup>992</sup>

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<sup>986</sup> See paras. 7.445- 7.447 above.

<sup>987</sup> See section 7.5.2.3 above.

<sup>988</sup> See fn 1048 below.

<sup>989</sup> Article 5.7 places the burden of seeking to obtain the additional scientific information necessary to perform a more objective risk assessment on the importing Member. See e.g. Appellate Body Report, *US/Canada – Continued Suspension*, para. 679; Panel Report, *US – Animals*, para. 7.294.

<sup>990</sup> European Union's first written submission, para. 196.

<sup>991</sup> Russia's first written submission, para. 379.

<sup>992</sup> Russia's first written submission, para. 380.

7.693. Article 5.7 does not impose explicit prerequisites regarding the additional information to be collected or a specific collection procedure.<sup>993</sup> Nevertheless, the Appellate Body has concluded that:

[T]he WTO Member adopting a provisional SPS measure should be able to identify the insufficiencies in the relevant scientific evidence, and the steps that it intends to take to obtain the additional information that will be necessary to address these deficiencies in order to make a more objective assessment and review the provisional measure within a reasonable period of time. The additional information to be collected must be "germane" to conducting the assessment of the specific risk.<sup>994</sup>

7.694. The obligation in the second sentence of Article 5.7 requires that the Member adopting a provisional SPS measure "must make best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research or by gathering information from relevant international organizations or other sources."<sup>995,996</sup> However, this does not mean that the Member is expected to guarantee specific results, nor is it expected to predict the actual results of its efforts to collect additional information at the time when it adopts the SPS measure.<sup>997</sup>

7.695. Mindful of these considerations, we recall that, following the outbreak of ASF in Lithuania, Russia banned certain products from all EU member States, including the EU member States that had not experienced an outbreak of ASF. We note that the scope of the requested information in contention between the parties relates largely to the situation in the entire territory and all EU member States, over and above the four ASF-affected member States.<sup>998</sup>

7.696. In our analysis in respect of Russia's compliance with Annex C(1)(c), we found that Russia requested information that went beyond what was necessary for undertaking and completing the procedure for the verification of the presence of ASF in the territory of the non-affected EU member States.<sup>999</sup> We recall that such unnecessary requests include particular proof that each and every one of the non-affected EU member States are historically ASF free<sup>1000</sup> as well as other categories of information which Russia claimed was necessary to determine the risk of ASF spread from the affected countries to the rest of the European Union.<sup>1001</sup>

7.697. We also recall that, pursuant to the 2006 Memorandum, the wording of the bilateral veterinary certificate agreed between the European Union and Russia allows importation of the products concerned accompanied by an attestation that the products at issue "originate from premises and/or administrative territory of the EU Member State that are officially free from the following contagious diseases: African swine fever - during the last 3 years in the territory of the EU excluding Sardinia".<sup>1002</sup> Up to and until the first outbreak of ASF in Lithuania in January 2014, the entire EU territory (with the exception of Sardinia) had been recognized by Russia as free of ASF for at least the "last 3 years".

7.698. In light of this, and given that the European Union had in place a regionalization regime for surveillance and control of ASF and that all EU member States were obliged to respect their obligations flowing from the Terrestrial Code, and that, in terms of geography, wild boar ecology and epidemiology, the likelihood of ASF entry and spread to non-adjacent countries — let alone

<sup>993</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 92, Panel Report, *US – Animals*, para. 7.295.

<sup>994</sup> Appellate Body Report, *US/Canada – Continued Suspension*, para. 679 (original footnote omitted); Panel Report, *US – Animals*, para. 7.295.

<sup>995</sup> (footnote original) Pursuant to Article 10.1 of the *SPS Agreement*, due account shall be taken of the special needs of developing country Members in respect of their ability to procure the additional information for a more objective assessment of risk.

<sup>996</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679.

<sup>997</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679. See also Panel Report, *US – Animals*, paras. 7.295-7.297.

<sup>998</sup> See Appendix 1 below.

<sup>999</sup> See paras. 7.563 - 7.571 above.

<sup>1000</sup> The letter of 12 March 2014 refers to "absence of any proof of non-existence of ASF in the territory of other [non-affected] EU member states" (Exhibit EU-90).

<sup>1001</sup> See para. 7.563 above.

<sup>1002</sup> See fn 117 above.

countries or zones located far away in the westernmost parts of the European Union's territory — was remote, we find no basis in the evidence on record to support Russia's assertion that all of the information it requested was "germane" to conducting a more objective assessment<sup>1003</sup> of the specific risk within the meaning of this element of Article 5.7. As we have already noted, the experts consulted by the Panel characterized certain of the information requested by Russia as "overkill" or as an attempt to "muddy the water".<sup>1004</sup> While Article 5.7 requires that a Member must actively make best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research or by gathering information from relevant international organizations or other sources, it does not envisage that a Member will use this process to seek information that is not germane to the specific risk involved.

7.699. We therefore find that Russia did not seek to obtain additional information that was "necessary" for a more objective assessment of risk within the meaning of Article 5.7.

#### 7.5.5.3.4.5 Whether Russia has reviewed the EU-wide ban within a reasonable period of time

7.700. The fourth condition under Article 5.7 is that the Member applying the measure reviews it within a reasonable period of time. What constitutes a reasonable period of time has to be established on a case-by-case basis<sup>1005</sup>, based upon the particular facts and circumstances of a given case. In *Japan – Agricultural Products II*, the Appellate Body stated that what constitutes a "reasonable period of time" within the meaning of Article 5.7 depends, *inter alia*, on the difficulty of obtaining the information necessary for a more objective assessment of risk.<sup>1006</sup>

7.701. We recall that the panel in *EC – Approval and Marketing of Biotech Products* interpreted the term "reasonable period of time" in Article 5.7 in a manner similar to the term "undue delay" in Annex C(1)(a).<sup>1007</sup> This concept is not dependent on the length of the delay, but rather on whether any delay is legitimate and justifiable as opposed to unwarranted or excessive.<sup>1008</sup>

7.702. The European Union argues that Russia has failed to review its measures within a reasonable period of time. The European Union identifies the six months from the date of the first outbreak in Lithuania, at the end of January 2014, to the date of the establishment of the Panel, on 22 July 2014 and the period from the time the European Union provided additional information in June 2014 until the time Russia contacted the European Union again, at the beginning of December 2014.<sup>1009</sup> Russia posits that its measure is subject to an on-going process of review that

<sup>1003</sup> By this we refer to the distinction in degree of objectivity, based on available scientific evidence, drawn from the situations covered by Articles 5.7 and 5.1. Article 5.7 requires Members applying a provisional SPS measure on the basis of pertinent available information to "seek to obtain the additional information necessary for a *more objective assessment of risk*" (emphasis added). In our view, this refers to the type of risk assessment required pursuant to Articles 5.1 and 5.2, as defined in Annex A(4) of the SPS Agreement.

<sup>1004</sup> Dr Brückner's response to Panel question No. 13 (who stated "the information requested in Exhibit RUS-131 [Letter from the Russian Veterinary Service to DG SANCO, No. FS-AS-8/23743, 1 December 2014], is in my opinion 'an overkill' of which many of the questions are not relative or needed to conduct either a sensible quantitative or qualitative risk analysis"); and Dr Thomson's response to Panel question No. 13 (who stated in respect of the questions asked through Letter of 5 February 2014 from Russia to the EU, FS-SD 8/1640 (Exhibit EU-84) "[t]hese questions are mostly variations on other questions posed by the RF. For a country that is not itself free of ASF this strikes me as an overkill and possibly an attempt to 'muddy the water'").

<sup>1005</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 93.

<sup>1006</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 93. Panel Report, *US – Animals*, para. 7.300.

<sup>1007</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1495-7.1497 (concerning Annex C(1)(a)) and 7.3245 (concerning Article 5.7). Panel Report, *US – Animals*, para. 7.301.

<sup>1008</sup> Appellate Body Report, *Australia – Apples*, para. 437; Panel Report, *US – Animals*, para. 7.301. Additionally, the panel in *US – Animals* looked to the context of Article 21.3(c) arbitrations – which determine the reasonable period of time for Members to implement the rulings and recommendations of the DSB – in which arbitrators have interpreted the term "reasonable period of time" to mean "the shortest period possible within the legal system of the [implementing] Member". Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 26. That panel observed that, while not directly applicable in these circumstances, it does suggest an understanding that when WTO Members must take legislative or regulatory actions involving complex legal processes to bring their measures into conformity with their WTO obligations reasonableness can be understood to mean as quickly as legally possible while accepting legitimate reasons for delay.

<sup>1009</sup> European Union's first written submission, para. 201.

will be completed in a reasonable period of time.<sup>1010</sup> In Russia's view, the period of time has been reasonable, taking into consideration the difficulty of obtaining the additional information necessary to conduct a review.<sup>1011</sup>

7.703. With these considerations in mind, we examine whether Russia has reviewed the measure within a reasonable period of time, in light of the particular facts and circumstances of this case, and taking into account the timeframe for the Panel's analysis (i.e. from January to the date of Panel establishment on 22 July 2014, also encompassing the dates of adoption of the measures in respect of Estonia and Latvia (September 2014)).

7.704. The panel in *US – Animals* examined the question of whether the United States reviewed the measures at issue in that dispute within a reasonable period of time. In its analysis, that panel relied on its findings under Annex C(1)(a) in respect of whether the United States had incurred undue delays in its review of Argentina's application for Northern Argentina.<sup>1012</sup> We agree with the approach of the panel in *US – Animals*. We consider that our assessment of this matter is closely linked with our examination of Russia's compliance with its obligations under Annex C(1)(a). In that respect, we found that Russia's excessive and unjustified information requests in respect of the surveillance and control measures in non-ASF affected EU member States amount to acting in a manner that impedes undertaking and completing the procedure for the verification of the existence of ASF-free areas. In light of the Appellate Body's guidance,<sup>1013</sup> we found that situation to constitute an infringement of the obligation to undertake and complete a procedure without undue delay. We therefore found that Russia undertook and completed the procedure at issue with undue delay.

7.705. Our findings in respect of Annex C(1)(a) inform our analysis of Russia's compliance with the last requirement under Article 5.7. In particular, we consider that Russia's excessive information requests led to continued delays in considering the information that the European Union provided. We do not ignore that a Member may require certain time to process detailed and complex information. A Member may even need to translate such information in order to properly assess it. However, we consider that in the situation before us concerning the non-affected EU member States, where Russia has been in possession of information for several months (from January 2014 to September 2014) and insisted on the insufficiency of such information in an unjustified manner, Russia is not reviewing its SPS measures within a reasonable period of time.

7.706. We therefore find that the fourth requirement for the application of Article 5.7 is not satisfied in the present case, because Russia did not review the EU-wide ban within a reasonable period of time.

#### 7.5.5.3.4.6 Conclusion

7.707. We have found that there was sufficient scientific evidence for Russia to conduct a risk assessment of the ASF situation in the non-affected EU member States, as appropriate to the circumstances. Moreover, we found that Russia did not provisionally adopt the measure on the basis of available pertinent information, did not seek to obtain additional information, and did not review the EU-wide ban within a reasonable period of time. Having found that Russia did not satisfy any of the four requirements for the application of Article 5.7, we find that the EU-wide ban does not fall within the scope of Article 5.7 and the qualified exemption to the obligations in Articles 5.1, 5.2 and 2.2 is not available to Russia. Thus, we now turn to assess the conformity of Russia's measures with Articles 5.1, 5.2 and 2.2 of the SPS Agreement.

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<sup>1010</sup> Russia's first written submission, para. 381.

<sup>1011</sup> Russia's first written submission, para. 381 (citing Appellate Body Report, *Japan – Agriculture Products*, para. 93). See also Russia's comments to the European Union's response to Panel question No. 236, paras. 29 and 31.

<sup>1012</sup> Panel Report, *US – Animals*, para. 7.303.

<sup>1013</sup> Appellate Body Report, *Australia – Apples*, para. 438.

#### 7.5.5.3.5 Whether Russia's measures are based on a risk assessment

7.708. In *EC – Hormones*, the Appellate Body referred to the importance of basing an SPS measure on a risk assessment, in the context of the SPS Agreement:

The requirements of a risk assessment under Article 5.1, as well as of "sufficient scientific evidence" under Article 2.2, are essential for the maintenance of the delicate and carefully negotiated balance in the *SPS Agreement* between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings".<sup>1014</sup>

7.709. In our view, this same balance holds true in respect of measures adopted for the protection of animal life and health. We are mindful that the introduction of a highly contagious disease like ASF into a previously disease-free area or into an area where the spread of the disease is subject to control measures, may have devastating economic and social effects on animal health and on human communities. Also, the presence of the disease may be highly disruptive to the ecosystem and the domestic and wild species that may be affected by such disease. In this context, we note the paramount importance of satisfying the requirements related to scientific evidence set out in Articles 2.2 and 5.1. We note that it may be the case that in a particular situation, a risk assessment that satisfies the requirements of Articles 5.1 and 5.2 and paragraph 4 of Annex A of the SPS Agreement can serve as a basis for a measure which restricts trade of certain products. However, such a determination can only be made through the examination of the corresponding measures in light of the risk assessment on which it is based.

7.710. In this dispute, Russia has argued that it is under no obligation to provide a risk assessment in respect of the EU-wide ban, because it is a measure that, if found to be attributable to Russia, was adopted on the basis of Article 5.7 of the SPS Agreement.<sup>1015</sup>

7.711. As indicated in paragraph 7.707 above, we have found that the conditions required under Article 5.7 have not been met in respect of the EU-wide ban. Therefore, the foundation of Russia's justification for not having a risk assessment on which the EU-wide ban is based does not have merit. In light of this, we need to examine whether there is a risk assessment within the meaning of paragraph 4 of Annex A.

7.712. We recall that we found in paragraph 7.249 above that the EU-wide ban pursues the objectives enshrined in both Annex A(1)(a) and A(1)(b). The first type of risk assessment required under paragraph 4 of Annex A (i.e. "evaluation of the likelihood of entry, establishment or spread of a pest or disease") is appropriate for measures seeking the objective in Annex(1)(a). The second type of risk assessment required under paragraph 4 of Annex A (i.e. "evaluation of the potential adverse effects on human or animal health arising from the presence of ... disease-causing organisms in ... feedstuffs") is appropriate for measures seeking the objective in Annex (1)(b).<sup>1016</sup> Therefore, Russia's risk assessment should encompass both types of risk assessment referred to in paragraph 4 of Annex A.

7.713. Throughout these proceedings, Russia has not argued that it has conducted a risk assessment in the sense of Article 5.1 and paragraph 4 of Annex A.<sup>1017</sup> We therefore find that the first requirement for our enquiry under Article 5.1 of the SPS Agreement is not satisfied. As we have indicated above, our analysis of the European Union's claims under Article 5.2 should be done together with the one corresponding to Article 5.1. In a situation where there is no risk assessment, it is clear that a Member does not comply with any of the requirements of Article 5.2.

7.714. Based on the foregoing, we find that the EU-wide ban is inconsistent with Articles 5.1 and 5.2 of the SPS Agreement.

<sup>1014</sup> Appellate Body Report, *EC – Hormones*, para. 177.

<sup>1015</sup> Russia's second written submission, paras. 185-203.

<sup>1016</sup> Appellate Body Report, *Australia – Salmon*, para. 123, fn 69. See also Appellate Body Report, *Australia – Salmon*, para. 120, and Panel Report, *Australia – Salmon*, paras. 8.72 and 8.116.

<sup>1017</sup> Russia rather explains why it was under no obligation to conduct a risk assessment.

### 7.5.5.3.6 Article 2.2 of the SPS Agreement

7.715. We recall that according to the Appellate Body in *India – Agricultural Products*, a finding of inconsistency with Articles 5.1 and 5.2 of the SPS Agreement raise a rebuttable presumption of inconsistency with Article 2.2.<sup>1018</sup> Therefore, we need to examine whether Russia has put forward any arguments or adduced any evidence in to rebut this presumption.

7.716. Russia's arguments in respect of the lack of a risk assessment have focused on the applicability of Article 5.7 to the EU-wide ban, and the corresponding justification in respect of Articles 5.1, 5.2, and 2.2.

7.717. Russia argues that a holistic view of the available pertinent information indicates a high risk that the currently non ASF-infected countries may become ASF infected.<sup>1019</sup> Russia points out that European scientists opine that there is a continuing risk of ASF spread to other EU member States, for instance Germany.<sup>1020</sup> According to Russia, the high risk of ASF spread into new regions in the European Union can further be derived from the fact that there is evidence of wild boar moving from the four ASF-infected EU Member States to western Europe.<sup>1021</sup> Russia also argues that significant number of outbreaks that continue to take place in the ASF-infected EU Member States, indicating that the infection remains very active.<sup>1022</sup> Russia further argues that the European Union has not provided Russia with guarantees that the products originating in its ASF-infected EU Member States do not end up in the stream of commerce in the European Union.<sup>1023</sup> Russia also asserts that Article 5.7 operates as an autonomous right of the importing Member to provisionally deviate from certain disciplines of the SPS Agreement, particularly from Articles 2.2 and 2.3.<sup>1024</sup>

7.718. We have found that the EU-wide ban is not based on pertinent available information under Article 5.7 and that there is no risk assessment on which the EU-wide ban is based. This confirms our view that the measure is neither based on scientific principles nor maintained with sufficient scientific evidence. Russia has not raised any arguments that would rebut such findings. In our view Russia has failed to rebut the presumption of inconsistency raised by our findings of inconsistency with Articles 5.1 and 5.2.

7.719. Based on the foregoing, we find the EU-wide ban is inconsistent with Article 2.2 of the SPS Agreement.

### 7.5.5.4 Conclusion

7.720. We have found that there was sufficient scientific evidence for Russia to conduct a risk assessment of the ASF situation in the non-affected EU member States, as appropriate to the circumstances. Moreover, we found that Russia did not provisionally adopt the measure on the basis of available pertinent information, did not seek to obtain additional information, and did not review the EU-wide ban within a reasonable period of time. Having found that Russia did not satisfy any of the four requirements for the application of Article 5.7 of the SPS Agreement, we find that the EU-wide ban does not fall within the scope of Article 5.7 and the qualified exemption to the obligations in Articles 5.1, 5.2 and 2.2 of the SPS Agreement is not available to Russia. We have also found that Russia did not base the EU-wide ban on a risk assessment within the meaning of paragraph 4 of Annex A of the SPS Agreement, thus breaching Articles 5.1 and 5.2. We have also found that Russia has not rebutted the presumption of inconsistency that our findings raised in respect of Article 2.2. Therefore, the EU-wide ban is also inconsistent with Article 2.2.

<sup>1018</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.24.

<sup>1019</sup> Russia's second written submission, para. 197.

<sup>1020</sup> Russia's second written submission, para. 198, citing Friedrich-Loeffler-Institut, "Qualitative Risikobewertung zur Einschleppung der Afrikanischen Schweinepest nach Deutschland aus Osteuropa," 2 April 2014, p. 1-2 (Exhibit RUS-291)

<sup>1021</sup> Russia's second written submission, para. 199, citing Society for Applied Microbiology (SfAM), "Restrictions In Place As African Swine Fever Hits Lithuania," 31 January 2014 (Exhibit RUS-292).

<sup>1022</sup> Russia's second written submission, para. 200.

<sup>1023</sup> Russia's second written submission, para. 201.

<sup>1024</sup> Russia's response to Panel question No. 154, para. 276 (citing Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.2962-7.2983).

## 7.5.6 Claims under Articles 5.3, 5.4, 5.6, and 2.2 of the SPS Agreement

### 7.5.6.1 Relevant legal provisions

7.721. Annex A(5) of the SPS Agreement defines the appropriate level of sanitary or phytosanitary protection (ALOP) as:

The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.

NOTE: Many Members otherwise refer to this concept as the "acceptable level of risk".

7.722. The European Union makes claims in respect of four provisions in Article 5 of the SPS Agreement that relate to the ALOP: Articles 5.3, 5.4, 5.5 and 5.6. The European Union frames its claims in respect of Article 5.5 together with those under Article 2.3 in connection with the alleged discriminatory treatment arising from the measures at issue. We acknowledge that our examination of the claims under Article 5.5 is contingent upon our determination of what is Russia's ALOP. In addition, we are mindful of the analytical convenience to group our analysis of the claims raised in respect of Articles 2.3 and 5.5. Therefore we address the European Union's claims under Articles 2.3 and 5.5 in section 7.6.6 below. In this section we will focus on the European Union's claims under Articles 5.3, 5.4 and 5.6.

7.723. An analysis of the European Union's claims under Articles 5.3, 5.4 and 5.6, and the alleged consequential breach of Article 2.2, in respect of both the EU-wide ban and the bans on the imports of the products at issue from the four affected EU member States, requires the identification of the level of protection that Russia has set as appropriate for ASF. The Appellate Body has reasoned that a first step in the analysis of claims under Article 5.6 is the identification of the Member's ALOP.<sup>1025</sup> Because of the close relationship between Articles 5.6 and 2.2, the identification of a Member's ALOP also becomes relevant for making findings under Article 2.2.<sup>1026</sup> In addition, we agree with the Panel in *US – Animals*, which considered that it would be difficult to make a finding as to what a Member took into account in determining its ALOP if we do not know what that Member's ALOP is.<sup>1027</sup> In a similar vein, Russia's ALOP may inform our assessment of whether Russia took into account certain economic factors in determining the measures it would apply to achieve its ALOP, pursuant to Article 5.3.

7.724. Article 5 of the SPS Agreement states in the relevant part:

*Article 5*

*Assessment of Risk and Determination of the Appropriate Level  
of Sanitary or Phytosanitary Protection*

...

3. In assessing the risk to animal or plant life or health and *determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk*, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks. (emphasis added)

<sup>1025</sup> Appellate Body Report, *Australia – Apples*, para. 344 (referred to in Panel Report, *US – Animals*, para. 7.368).

<sup>1026</sup> Panel Report, *US – Animals*, para. 7.368 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1433).

<sup>1027</sup> With respect to the importance of determining a Member's ALOP for an assessment of its measures under Article 5.4 see Panel Report, *US – Animals*, para. 7.368.

4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

...

6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.<sup>3</sup>

<sup>3</sup> For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

7.725. Before turning to the substance of the European Union's claims, the Panel will first determine what Russia's ALOP is in respect of ASF as relevant for the assessment of both the EU-wide ban and the bans on the imports of the products at issue from the four affected EU member States. Subsequently, we will examine whether the European Union has established the elements of its claims under Articles 5.3, 5.4, and 5.6 of the SPS Agreement in respect of the EU-wide ban. At the end of this section the Panel will examine the alleged consequential breach of Article 2.2 through the EU-wide ban. In section 7.6.6 below, we will examine the consistency of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland with Articles 5.3, 5.4, 5.6, and 2.2.

#### **7.5.6.2 Russia's appropriate level of protection for ASF**

##### **7.5.6.2.1 Main arguments of the parties**

###### **7.5.6.2.1.1 European Union**

7.726. In the European Union's opinion, the ALOP, as defined in Annex A(5) of the SPS Agreement, is a political choice of each government and cannot be questioned by the WTO adjudicating bodies.<sup>1028</sup> However, once a Member has chosen its desired level of protection, it should calibrate the measures according to that level.<sup>1029</sup>

7.727. The European Union maintains that Russia has not expressly stated its ALOP, and hence requests that the panel infer Russia's ALOP from the SPS measures applied in practice.<sup>1030</sup> The European Union further suggests that the evidence on record indicates that Russia has "a rather low ALOP", which cannot support an inference of "a zero-risk policy".<sup>1031</sup>

7.728. The European Union submits that the present case is significantly similar to *India – Agricultural Products*, where the panel made findings regarding India's ALOP.<sup>1032</sup> According to the European Union, in that dispute, India did not clearly identify its ALOP and imposed a country-wide ban for the disputed imported products. The European Union adds that the panel in that case has found that it could not be implied from the ban that India pursued a zero-risk policy, in part because Low Pathogenic Avian Influenza (LPAI) can be transmitted through wild birds and the

<sup>1028</sup> European Union's first written submission, paras. 238 and 239. The ALOP is also referred to as the acceptable level of risk (European Union's first written submission, para. 239, citing Appellate Body Report, *Australia – Apples*, para. 369).

<sup>1029</sup> European Union's first written submission, para. 239.

<sup>1030</sup> European Union's first written submission, paras. 242 and 243 (citing Appellate Body Report, *Australia – Salmon*, para. 207).

<sup>1031</sup> European Union's first written submission, para. 248.

<sup>1032</sup> European Union's first written submission, para. 245.



trade ban was not apt to restrict wildlife movements. The European Union notes that the panel thus concluded that India's ALOP was very high or very conservative, but not zero risk.<sup>1033</sup>

7.729. The European Union argues that Russia imposed a country-wide ban with regard to the products at issue from Estonia, Latvia, Lithuania, and Poland, as well as an EU-wide ban, despite the fact that parts of these four member States, and the entirety of the rest of the European Union's territory are not affected by ASF. The European Union, however, notes that these bans are not combined with a Russia-wide ban, as the products associated with the risk of ASF from the non-affected zones of Russia are allowed to be traded.<sup>1034</sup> In addition, the European Union asserts, these bans are not able to achieve restrictions in wildlife movements.<sup>1035</sup>

7.730. The European Union contends that the ASF measures undertaken by Russia — whereby pig products from the non-infected areas of Russia are allowed to be traded in the rest of the country — failed to contain the spread of ASF within Russia.<sup>1036</sup> Furthermore, the European Union mentions that an important factor of ASF transmission is the wild boar population.<sup>1037</sup> As explained by the European Union, more ample movements of wild boars, normally non-migratory species, could be triggered during mating season, as a result of a lack of sufficient food or by their displacement as a result of hunting.<sup>1038</sup> According to the European Union, wild boars seeking to escape hunters in Russia are the most probable vector for the spread of ASF to the European Union, via Belarus, in 2014.<sup>1039</sup>

#### 7.5.6.2.1.2 Russia

7.731. Russia asserts that its ALOP with respect to imports from Estonia, Latvia, Lithuania, and Poland is high, and explains it seeks to accomplish what the OIE requires through that high ALOP.<sup>1040</sup> Russia adds that in determining the meaning and scope of a defending Member's ALOP, a panel should have recourse to all relevant evidence, including the substance of the text of the relevant import and domestic measures. It adds that there should be no particular limits on the evidence used to determine that ALOP.<sup>1041</sup>

7.732. Russia asserts that its ALOP with respect to imports of live pigs and pork products from the European Union is high, and it is the same ALOP it applies for pigs and pork products traded within its territory.<sup>1042</sup> In its own words, Russia stresses that it has the "important objective of preventing the introduction of ASF into areas of the Russian Federation that are not infected with ASF. It has the further objective of eradicating and controlling ASF outbreaks in areas of Russia where ASF has

<sup>1033</sup> European Union's first written submission, para. 244 (citing Panel Report, *India – Agricultural Products*, paras. 7.550- 7.575).

<sup>1034</sup> European Union's first written submission, para. 245. The European Union adds that the poor effectiveness of Russia's measures is confirmed by scientific assessments (European Union's first written submission, para. 246, referring to 2014 EFSA Scientific Opinion (Exhibit EU-26), pp. 11-15).

<sup>1035</sup> European Union's first written submission, para. 245.

<sup>1036</sup> European Union's first written submission, para. 246.

<sup>1037</sup> European Union's first written submission, para. 245

<sup>1038</sup> European Union's first written submission, para. 247 (referring to 2010 EFSA Scientific Opinion, (Exhibit EU-24), p. 29, quoting Office National de la Chasse et de la Faune Sauvage (ONCFS), 2004, *La gestion du sanglier. Des pistes et des outils pour réduire les populations*. DER Cnera Cervidés-sanglier, ONCFS, St Benoist).

<sup>1039</sup> European Union's first written submission, para. 247. In fn 201 to para. 247, the European Union noted: "The ASF virus strain in the EU MS concerned matches 100% the virus strain in Belarus. ASF diagnosis and molecular characterization Lithuania, EURL-ASF, CISA-INIA, 1317, 28/10/2014 (Exhibit EU-27); ASF diagnosis and molecular characterization Poland, EURL-ASF, CISA-INIA, 1145, 30/09/2014 (Exhibit EU-28); ASF diagnosis and molecular characterization Latvia, EURL-ASF, CISA-INIA, 1232, 17/10/2014 (Exhibit EU-29); ASF diagnosis and molecular characterization Estonia, EURL-ASF, CISA-INIA, 1375, 7/11/2014 (Exhibit EU-30)." See also first written submission, paras. 48 and 56-58.

<sup>1040</sup> Russia's response to Panel question No. 159, para. 298. See also second written submission, paras. 7, and 12-19.

<sup>1041</sup> Russia's response to Panel question No. 160, para. 302.

<sup>1042</sup> Russia's first written submission, para. 250. See also, response to Panel question No. 159, para. 298; second written submission, paras. 1, 7, 12-19, and 143; response to Panel question No. 297, para. 165; response to Panel question No. 304, para. 219

occurred, but is in the process of being eradicated."<sup>1043</sup> Russia posits that this reflects the application of a "high" ALOP domestically.<sup>1044</sup>

7.733. Russia submits extensive evidence in support of its assertion that it applies a domestically high ALOP. That evidence includes reference to Russia's domestic legal framework and administrative plans for surveillance, monitoring, control and eradication of ASF.<sup>1045</sup> Russia also provided evidence in respect of the measures it applied to control and eradicate ASF in the regions of Voronezh<sup>1046</sup>, Krasnodar<sup>1047</sup> and Belgorod.<sup>1048</sup>

7.734. Russia specifically identifies certain sections of its domestic legislation as confirmation of its high ALOP domestically applied. According to Russia "the ASF Instructions aim to 'prevent . . . and eradicate . . . African Swine Fever'<sup>1049</sup> in the Russian Federation, a goal also shared by the 2012 ASF Plan which aims to 'prevent spreading and eradicate a virus of African swine fever (ASF) in the territory of the Russian Federation.'<sup>1050-1051</sup>

<sup>1043</sup> Russia's first written submission, para. 251.

<sup>1044</sup> Russia's first written submission, para. 251.

<sup>1045</sup> See Russia's first written submission, paras. 24-35 and 251-261; responses to Panel questions No. 29 and 30; and the following Exhibits: ASF Instructions (Exhibit EU-18); 2012 Plan (Exhibit RUS-13); Russian Federal Ministry of Natural Resources, Plan regarding the organizational and specific measures of monitoring, depopulation and reduction of migration activities of wild boar in the territory of the RF, including specially protected natural areas of regional and federal importance, 21 November 2013 (Wild Boar Plan) (Exhibit RUS-20); Russian Veterinary Service, Guidelines for prevention of distribution of African swine fever among wild boars (Exhibit RUS-127); Russian Federal Government Decree on the Seizure of Animals and Animal Products in case of Eradication of Highly Dangerous Animal Disease Outbreaks, No. 310, 26 May 2006 (Exhibit RUS-21); Order by the Russian Federal Ministry of Agriculture on Approval of Guidelines to Determine Animal Health Status of Pig Holdings and Organizations Involved in Pig Slaughter, Pork Product Processing and Storage, No. 258, 23 July 2010 (Exhibit RUS-22); Order by the Russian Federal Ministry of Agriculture on the Confirmation of the List of Contagious Animal Diseases That Require Containment Measures, No. 476, 19 December 2011 (Exhibit RUS-18); Order by the Russian Federal Ministry of Agriculture on the Confirmation of the Rules for Veterinary Transport Certificates and the Order of Issuance of Veterinary Transport Certificates, No. 281, 17 July 2014 (Exhibit RUS-19).

<sup>1046</sup> See Russia's first written submission, paras. 262-263. The following exhibits were submitted in support of the measures applied to control and eradicate ASF in Voronezh: Report by Voronezh Veterinary Service, No. 1418, 22 July 2014, pp. 1-2. (Exhibit RUS-108); *Decree by the Governor of Voronezh region of the Russian Federation on the Imposition of ASF-related Quarantine on the Territory of Anninsky municipal district of Voronezh region, No. 237-y, 17 July 2014.* (Exhibit RUS-109); Report by Voronezh Veterinary Service, No. 1443, 25 July 2014, p. 3. (Exhibit RUS-110); *Order by the Governor of Voronezh Region on Compensation, No. 236, 17 July 2014.* (Exhibit RUS-111); and Rosselkhoznadzor News, "To continue controlling of ASF, Voronezh Administration of Rosselkhoznadzor arrested a pork consignment from Ukraine" 23 January 2015. (Exhibit RUS-112).

<sup>1047</sup> See Russia's first written submission, paras. 264-268. The following exhibits were submitted in support of the measures applied to control and eradicate ASF in Krasnodar: G. A. Dzhailidi, R.A. Krivosos, A.A. Shevchenko, O. Yu. Chernykh, Measures for prevention and eradication of African Swine Fever in Krasnodar Territory (Exhibit RUS-113); *Resolution of the Head of Krasnodar Territory Administration (Governor), 16 August 2012* (Exhibit RUS-114); Pig Progress, "Russian Vet service: More African Swine Fever in Krasnodar region", 30 July 2012. (Exhibit RUS-115); and Declaration of Dzhailidi, para. 13. (Exhibit RUS-116).

<sup>1048</sup> See Russia's first written submission, paras. 269-272. The following exhibits were submitted in support of the measures applied to control and eradicate ASF in Belgorod: Letter from Anisimov to Vlasov report (Measures Belgorod), 10 June 2014. (Exhibit RUS-117); Pig Progress, "New ASF outbreak in Belgorod Oblast, Russia", 11 June 2014. (Exhibit RUS-118); Letter from Aleinik (Chairman of Belgorod Government) to Petrikov (Deputy Minister of Agriculture of the Russian Federation) on Implementing the Plan of ASF Measures, (Letter from Aleinik to Petrikov (Measures Belgorod)), 4 July 2014. (Exhibit RUS-119); *Resolution of Governor of Belgorod Oblast to Eliminate and Prevent Further Spread of African Swine Fever within the Infected Area, i.e. Grafskiy Les Stow of Agrotekhgarant "Alekseevsky" OOO Hunting Farm in Alekseevsky District of Belgorod Oblast, 4 June 2014, No. 56* (Exhibit RUS-120); *Resolution of the Government of Belgorod Oblast on Implementing the "Preventing the Introduction and Spread of the African Swine Fever (ASF) virus in Belgorod Oblast for 2014-2016" long term target program, 5 May 2014.* (Exhibit RUS-121); Letter from Anisimov to Vlasov (Measures in Belgorod), 27 August 2014. (Exhibit RUS-122). See also Exhibits RUS-307 and RUS-308.

<sup>1049</sup> (footnote original) Russian instructions on ASF prevention and eradication measures of 21 November 1980 (Exhibit EU-18).

<sup>1050</sup> (footnote original) 2012 Plan of Measures (Exhibit RUS-13).

<sup>1051</sup> Russia's second written submission, para. 143.

7.735. In addition, Russia argues that its ALOP, in respect of imported goods (including those from the European Union), is expressed through the objective of the Customs Union Decision No. 317 which is to "ensure protection of the customs union territory of the Customs Union against the import and spread of contagious disease pathogens, including diseases common to both animals and humans, and goods which do not comply with the Common Veterinary Requirements."<sup>1052</sup>

7.736. Russia also asserts that when faced with the "deadly" combination of high density in wild boar and high percentages of low-biosecurity backyard farms, import measures based on compartmentalization are the least trade-restrictive measures that would achieve Russia's ALOP.<sup>1053</sup> Russia posits that it has communicated to the European Union that it has applied a high ALOP in accordance with the provisions set out in the Terrestrial Code.<sup>1054</sup>

7.737. Russia further explains that the European Union's failure to demonstrate the establishment of ASF-free zones or compartments in a manner consistent with the Terrestrial Code or compliance with conditions for safe trade of treated products<sup>1055</sup>, render the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland consistent with the provisions of the Terrestrial Code.<sup>1056</sup>

#### 7.5.6.2.2 Analysis by the Panel

7.738. We recall that Annex A(5) of the SPS Agreement defines the ALOP as "[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory". The note to Annex A(5) further states that "[m]any Members otherwise refer to this concept as the 'acceptable level of risk'".

7.739. The Appellate Body in *India – Agricultural Products* indicated that Members have the prerogative and the obligation to specify their appropriate level of protection.<sup>1057</sup> It also highlighted that in the context of WTO dispute settlement proceedings, a responding Member is generally better placed than the complainant to know what objective it has set in terms of its ALOP. Therefore, the Appellate Body stated that a panel "would be expected to accord weight to the respondent's articulation of its appropriate level of protection", especially when it has been specified in advance of the adoption of the SPS measure, with sufficient precision, and has been consistently expressed by the responding Member. However, "this does not mean that a panel must defer completely to a respondent's characterization of its own" ALOP, rather, "a panel is required to ascertain the respondent's appropriate level of protection on the basis of the totality of the arguments and evidence on the record".<sup>1058</sup>

7.740. To ascertain Russia's ALOP, we need to examine whether Russia has articulated an ALOP, within the meaning of Annex A(5) of the SPS Agreement, in respect of ASF. We also need to determine whether Russia has defined its ALOP "'with sufficient precision to apply Article 5.6'<sup>1059</sup>; that is without 'such vagueness or equivocation that the application of the relevant provisions of the SPS Agreement, such as Article 5.6, becomes impossible'.<sup>1060</sup>".<sup>1061</sup> In this respect we will examine the manner in which Russia identified its ALOP and the supporting evidence it has submitted. We will also examine the European Union's objections to Russia's formulation of its

<sup>1052</sup> Russia's response to Panel question No. 297, para. 165 (referring to Customs Union Decision No. 317 (Exhibit RUS-25)). See also second written submission, para. 143.

<sup>1053</sup> Russia's response to Panel question No. 159, para. 300.

<sup>1054</sup> Russia's second written submission, paras. 12-18 and 143.

<sup>1055</sup> See fn 247 above.

<sup>1056</sup> Russia's comments to the European Union's response to Panel question No. 286, para. 149.

<sup>1057</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.221 (referring to Appellate Body Reports, *Australia – Salmon*, paras. 199 and 205-206; and *Australia – Apples*, para. 343).

<sup>1058</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.221. The Appellate Body has provided additional guidance on how to identify a Member's ALOP in: Appellate Body Reports, *India – Agricultural Products*, para. 5.226; and *Australia – Salmon*, paras. 203-204, 207. See also Panel Reports, *US – Animals*, paras. 7.377-7.381; and *India – Agricultural Products*, paras. 7.583-7.586.

<sup>1059</sup> (footnote original) Appellate Body Report, *Australia – Salmon*, para. 207.

<sup>1060</sup> (footnote original) Appellate Body Reports, *Australia – Salmon*, para. 206; and *US – Continued Suspension*, para. 523.

<sup>1061</sup> Panel Report, *India – Agricultural Products*, para. 7.556.

ALOP. After reviewing the parties' views and their supporting evidence, we will provide our views on what we consider to be Russia's ALOP.

7.741. Russia argues that its ALOP, in respect of imported goods (including those from the European Union), is expressed through the objective of the Customs Union Decision No. 317 to "ensure protection of the customs union territory of the Customs Union against the import and spread of contagious disease pathogens, including diseases common to both animals and humans, and goods which do not comply with the Common Veterinary Requirements."<sup>1062</sup>

7.742. The European Union argues that the Panel should infer Russia's ALOP from the measures applied in practice<sup>1063</sup> and it further suggests that the evidence on the record indicates that Russia's ALOP is "rather low".<sup>1064</sup> According to the European Union, the ineffectiveness of Russia's domestic measures for the control and eradication of ASF support its view that Russia applies a rather low ALOP.<sup>1065</sup>

7.743. The European Union adds that it does not agree with Russia's argument that if an ALOP is derived from the challenged measure, then the ALOP can never be more trade restrictive than required to achieve the ALOP. According to the European Union a measure could reveal purely protectionist objectives, in which case the ALOP would be inferred only from those elements that are not overtly protectionist.<sup>1066</sup> The European Union considers that bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland as well as the EU-wide ban reveal purely protectionist objectives. Therefore, the European Union could not identify non-protectionist elements on the basis of which to correctly infer Russia's ALOP.<sup>1067</sup> The European Union also considers that a conclusion about necessity can only be reached on the basis of a consideration of the alternatives.<sup>1068</sup>

7.744. We recall that the Appellate Body in *Australia – Salmon* reasoned that the ALOP "is an objective, and that the SPS measure is an instrument chosen to attain or implement that objective."<sup>1069</sup> In this respect, the panel in *US – Animals* observed that "[a]s expressions of a general objective, ALOPs are often set forth in a qualitative and generic manner."<sup>1070</sup>

7.745. As we have examined in section 7.4.4 above, among the objectives of the measures at issue is to ensure protection of Russia's territory from the further entry and spread of ASF and ASFV. Russia seems to argue this to be the level of protection it applies to the imports of the products at issue.<sup>1071</sup> In our view this formulation is rather broad. However, it provides an indication of what level of protection is being sought.

7.746. It may or may not be the case that the measures at issue are protectionist. The Panel will only address that issue as necessary for its substantive assessment of the European Union's claims. However, the European Union's argument that because of their protectionist nature such measures should not be considered when ascertaining Russia's ALOP in respect of ASF, seems to run contrary to the Appellate Body's guidance. Accepting the European Union's argument would

<sup>1062</sup> Russia's response to Panel question No. 297, para. 165 (referring to Customs Union Decision No. 317 (Exhibit RUS-25)). See also second written submission, para. 143.

<sup>1063</sup> European Union's first written submission, paras. 242 and 243 (citing Appellate Body Report, *Australia – Salmon*, para. 207).

<sup>1064</sup> European Union's first written submission, para. 248.

<sup>1065</sup> European Union's first written submission, paras. 9 and 245-248; response to Panel question No. 161, para. 328; second written submission, para. 150; and response to Panel question No. 287, para. 130.

<sup>1066</sup> European Union's opening statement at the first meeting with the Panel, para. 125.

<sup>1067</sup> European Union's response to Panel question No. 152, para. 317; second written submission, paras. 82 and 152; response to Panel question No. 287, paras. 127-130, comments to Russia's response to Panel question No. 304, para. 141..

<sup>1068</sup> European Union's opening statement at the first meeting with the Panel, para. 125.

<sup>1069</sup> Appellate Body Report, *Australia – Salmon*, para. 200.

<sup>1070</sup> Panel Report, *US – Animals*, para. 7.380.

<sup>1071</sup> Russia's response to Panel question No. 297, para. 165 (referring to Customs Union Decision No. 317 (Exhibit RUS-25)). See also second written submission, para. 143.

bar this Panel from examining Russia's ALOP on the basis of the totality of arguments and evidence on the record.<sup>1072</sup>

7.747. We are mindful of the Appellate Body's caution against a circular analysis of determining a Member's ALOP through the SPS measures it applies. However, as noted by the Appellate Body, there may be circumstances in which it may be necessary to adopt this approach.<sup>1073</sup> We consider the measures at issue to be an important element in supporting the determination of what is Russia's ALOP in respect of ASF. In particular, we consider that an examination of the measures at issue will provide an indication of the risk that Russia is willing to accept in respect of the entry and further spread of ASF in its territory, especially in respect of those areas not yet affected by ASF.

7.748. Refusing imports of the products at issue from the European Union, irrespective of whether they come from areas that may be free of ASF, reflects a stringent standard to ensure protection of Russia's territory from the entry and further spread of ASF. This is further confirmed by the refusal of treated (through thermal treatment, fermentation or maturation) products from Estonia, Latvia, Lithuania, and Poland.

7.749. We also note that according to the evidence on record, despite the measures that Russia has put in place, ASF remains present in certain areas of Russia's territory.<sup>1074</sup> Such measures include standstill of the products at issue from areas surrounding the epizootic hot-bed where ASF outbreak occurred, but do not include a blanket ban on the movement of susceptible products from other areas within Russia itself. This calls into doubt that Russia's ALOP could be considered as zero risk. Moreover, Russia has not claimed that it is seeking a zero risk policy.

7.750. We further note that Russia states that as it has "consistently expressed in its communication with the European Union ... [that] the Russian Federation has applied a high ALOP in accordance with the provisions set out in the OIE Terrestrial Code."<sup>1075</sup> In our view, this seems to confirm that Russia acknowledges that its ALOP for ASF, as applied to imports of the products at issue, could be achieved by measures that conform to the standards enshrined in the Terrestrial Code. As examined in detail in paragraphs 7.825 -7.826 below, those standards do not purport to set a zero risk, but they are designed to avoid the spread of ASF, hence could be described as setting a high level of protection.

7.751. The objective of Customs Union Decision No. 317, which Russia claims reflects its ALOP in respect of ASF, read in conjunction with the stringent measures applied to imports from the European Union and the existence of some control measures on the movement of susceptible products within its own territory, confirms that Russia's ALOP is high. However, it does not support a conclusion that Russia's ALOP is zero risk or tolerance.

#### **7.5.6.2.3 Conclusion**

7.752. We find that Russia's ALOP applied to the imports of the products at issue from the European Union in respect of ASF is high or conservative. This general finding in respect of Russia's ALOP for ASF, as applicable to the imports of the products at issue from the European Union, will be relevant in our analysis in respect of the European Union's claims under Article 5.5, which we address in section 7.7.4 below. This finding is also relevant for our analysis of the European Union's claims under Articles 5.3, 5.4, 5.6 and 2.2 of the SPS Agreement. We examine these claims in turn.

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<sup>1072</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.221.

<sup>1073</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.226.

<sup>1074</sup> See paras. 7.208-7.209 above.

<sup>1075</sup> Russia's second written submission, para. 143.

### 7.5.6.3 Whether the EU-wide ban is inconsistent with Article 5.3 of the SPS Agreement

#### 7.5.6.3.1 Main arguments of the parties

##### 7.5.6.3.1.1 European Union

7.753. The European Union notes that the existence of unknown and uncertain elements does not justify a departure from the requirements under Article 5.3 (as read together with Articles 5.1 and 5.2 and paragraph 4 of Annex A) for a risk assessment.<sup>1076</sup>

7.754. According to the European Union, Russia's measures at issue do not conform to the requirements of Article 5.3 due to the fact that in assessing the risk to animal health and determining the measures to be applied for achieving the appropriate level of sanitary protection, Russia failed to take into account the relative cost effectiveness of alternative approaches to limiting risks, as well as all other relevant economic factors referred to in Article 5.3 of the SPS Agreement.<sup>1077</sup>

##### 7.5.6.3.1.2 Russia

7.755. Russia argues that the measures with respect to Estonia, Latvia, Lithuania, and Poland are presumed to be consistent with Articles 5.3, 5.4 and 5.6 because they conform to the relevant standards of the Terrestrial Code.<sup>1078</sup>

7.756. Regarding the EU-wide ban, Russia asserts that it has complied with the obligation to take into account the relevant economic factors in adopting the EU-wide ban, as it did examine the potential damages in terms of loss of production, the costs of control and the relative cost-effectiveness of alternative approaches, as illustrated in the Declaration of V. Maslov.<sup>1079</sup>

#### 7.5.6.3.2 Analysis by the Panel

7.757. Article 5.3 of the SPS Agreement identifies a number of relevant economic factors that Members "shall" take into account in assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the ALOP from such risk.

7.758. In light of the parties' arguments, the question we need to address is whether Russia took into account all relevant economic factors listed in Article 5.3, including the relative cost effectiveness of alternative approaches, when assessing the risk to animal health and determining the measure to be applied for achieving Russia's ALOP.

##### 7.5.6.3.2.1 Scope of a Member's obligation under Article 5.3 of the SPS Agreement

7.759. We consider that Article 5.3 refers to two different situations. The first situation is when a Member is "assessing the risk to animal or plant life or health". The second is when a Member is "determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection". Pursuant to Article 5.3, in both these situations Members "shall take into account" as relevant economic factors, those listed at the end of this provision. We observe that there is no indication in the text that the factors listed are only by way of example, rather this is presented as a complete list. In order to interpret the scope of a Member's obligation under Article 5.3, we first need to address the meaning of the expression "shall take into account".

7.760. No previous panel has addressed claims under Article 5.3. However, previous panels have examined the meaning of expressions similar to "shall take into account", in the context of other provisions of the Multilateral Trade Agreements.

<sup>1076</sup> European Union's first written submission, para. 261 (citing Appellate Body Report, *Australia – Salmon*, para. 130).

<sup>1077</sup> European Union's first written submission, para. 262.

<sup>1078</sup> Russia's first written submission, para. 216.

<sup>1079</sup> Russia's response to Panel question No. 154, para. 279 (referring to the Declaration by Vladimir Maslov on the ASF Outbreak that Occurred at One of the Enterprises of the AGROECO Group in the Voronezh Region of the Russian Federation (Exhibit RUS-148)).

7.761. For instance, the panel in *Japan – Apples* examined a Member's obligation, under Article 5.1 of the SPS Agreement, to take into account risk assessment techniques of international organizations. In this respect the panel reasoned that this obligation does not impose that a risk assessment be "based on" or "in conformity with" such risk assessment techniques. Rather, "such techniques should be considered relevant, but a failure to respect each and every aspect of them would not necessarily, *per se*, signal that the risk assessment on which the measure is based is not in conformity with the requirements of Article 5.1".<sup>1080</sup> This approach was confirmed by the panels in *Canada – Continued Suspension* and in *US – Continued Suspension* when referring to the same obligation under Article 5.1.<sup>1081</sup>

7.762. Similarly, the panel in *US – Continued Suspension* referred to a Member's obligation, pursuant to Article 5.2 of the SPS Agreement, to take into account available scientific information as well as other criteria listed therein when performing an assessment of risks. The panel reasoned that "taking available scientific evidence into account does not require that a Member conform its actions to a particular conclusion in a particular scientific study."<sup>1082</sup>

7.763. The panel in *US – Animals* examined the meaning of the expression "should take into account" in the context of Article 5.4 of the SPS Agreement. The panel confirmed the interpretation of the expression "take into account" provided by the Appellate Body and a previous panel. According to such guidance, to take into account means to "take into consideration, notice" and does not require any particular result of that consideration.<sup>1083</sup>

7.764. Other panels have addressed the scope of the obligation "shall take account of" in other provisions of the Multilateral Trade Agreements that refer to the special needs of developing country Members. Although the expression "shall take account of" is not identical to "shall take into account", the dictionary refers to both verbal phrases as having the same meaning.<sup>1084</sup> Those phrasal verbs mean: "to take into consideration".<sup>1085</sup> We thus consider that previous decisions in respect of provisions that contain the obligation to "take account of" may provide additional support to our interpretation of the obligation contained in Article 5.3 of the SPS Agreement.

7.765. The panel in *EC – Approval and Marketing of Biotech Products* referred to Members' obligation, pursuant to Article 10.1 of the SPS Agreement, to take account of the special needs of developing country Members in the preparation and application of SPS measures. Regarding the scope of this obligation, the panel reasoned that "[t]he dictionary defines the expression 'take account of' as 'consider along with other factors before reaching a decision'".<sup>1086</sup> Consistent with this, Article 10.1 does not prescribe a specific result to be achieved.<sup>1087</sup>

7.766. The panels in *US – Cool* and *US – Clove Cigarettes* examined a Member's obligation, pursuant to Article 12.3 of the TBT Agreement, to take into account the special needs of developing country Members in preparing and applying technical regulations, standards and conformity assessment procedures.<sup>1088</sup> The panel in *US – Clove Cigarettes* agreed with the reasoning of the panel in *EC – Approval and Marketing of Biotech Products* cited above.<sup>1089</sup> The panel in *US – Cool* concluded that Article 12.3 does not amount to a requirement for Members to

<sup>1080</sup> Panel Report, *Japan – Apples*, para. 8.241.

<sup>1081</sup> Panel Reports, *Canada – Continued Suspension*, paras. 7.452-7.459; and *US – Continued Suspension*, paras. 7.462-7.469.

<sup>1082</sup> Panel Report, *US – Continued Suspension*, para. 7.480.

<sup>1083</sup> Panel Report, *US – Animals*, para. 7.401 (quoting Appellate Body Report, *Korea – Various Measures on Beef*, para. 111; and Panel Reports, *US – Cool*, para. 7.776).

<sup>1084</sup> *Online Oxford English Dictionary*, "account (verbal phrases P2.g(a) to take account of and P2.g(c) to take into (the) account)", <http://www.oed.com/view/Entry/1194?redirectedFrom=take+into+account#eid36657016> (accessed 26 January 2016)

<sup>1085</sup> *Online Oxford English Dictionary*, "account (verbal phrases P2.g(a) to take account of) ", <http://www.oed.com/view/Entry/1194?redirectedFrom=take+into+account#eid36657016> (accessed 26 January 2016).

<sup>1086</sup> (footnote original) *The Concise Oxford Dictionary*, 10th edn., J. Pearsall (ed.) (Clarendon Press, 1999), p. 8.

<sup>1087</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1620.

<sup>1088</sup> Panel Reports, *US – Cool*, paras. 7.775-7.788; and *US – Clove Cigarettes*, paras. 7.610- 7.649.

<sup>1089</sup> Panel Report, *US – Clove Cigarettes*, paras. 7.632-7.634.

conform their actions to the special needs of developing countries but merely to give consideration to such needs along with other factors before reaching a decision.<sup>1090</sup>

7.767. We agree with the interpretation of the expression "shall take into account" provided by the panels described above. In the context of Article 5.3, we consider that a Member has the obligation to give consideration to the relevant economic factors listed therein when either assessing the risk to animal or plant life or health or determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection, and not to other economic factors. This obligation does not imply, however, that consideration of the relevant economic factors will require a particular course of action from the Member imposing an SPS measure.

7.768. The panels mentioned above also concluded that the complainant bears the burden of demonstrating that the responding Member did not take into account the particular aspect mandated in the relevant provision.<sup>1091</sup> We consider that under Article 5.3 it is the complaining party who bears the burden to demonstrate that the responding party did not take into account the relevant economic factors listed therein.

7.769. In our view, the second aspect that we need to consider is the role of this obligation within the SPS Agreement. The text of Article 5.3 refers to the obligation of taking into account the relevant economic factors listed therein when (i) assessing the risk to animal or plant life and health, and (ii) determining the measure to be applied to achieve the appropriate level of sanitary or phytosanitary protection.

7.770. The first situation is informed by the obligations that a Member imposing an SPS measure has pursuant to Articles 2.2, 5.1, and 5.2 of the SPS Agreement. These include the obligation to base SPS measures on scientific principles (Article 2.2), through an assessment of risk appropriate to the circumstances (Articles 5.1 and 5.2). In this respect, the obligation to take into account relevant economic factors when assessing the risk to animal life and health is contingent upon the obligation to base an SPS measure on a risk assessment pursuant to Articles 5.1 and 5.2 of the SPS Agreement. If a Member does not base its measures on a risk assessment it has performed or that is otherwise available to it, unless such Member is justified in not doing so (due to conformity to an international standard or adoption of a provisional measure pursuant to Article 5.7), it would not be in conformity with Article 5.3.

7.771. The second situation is informed by the text of Articles 2.2, 5.4 and 5.6 of the SPS Agreement. Among other aspects, Article 2.2 provides that Members shall ensure that their SPS measures are applied only to the extent necessary to protect human, animal or plant life or health. Pursuant to Article 5.4, when determining their ALOP, Members should take into account the objective of minimizing negative trade effects. In addition, according to Article 5.6, Members shall ensure that their SPS measures are not more trade-restrictive than required to achieve their ALOP. It is in the context of complying with these other obligations that a Member shall take into account the relevant economic factors listed in Article 5.3 when determining the measure it will apply to achieve its ALOP.

7.772. The Panel notes that if a measure is adopted pursuant to Article 5.7 of the SPS Agreement, a Member does not have the obligation to base its provisional measure on an assessment of risk pursuant to Article 5.1. As a consequence, a Member in such situation will not have to take into account the relevant economic factors listed in Article 5.3 for the purposes of assessing the risk to animal or plant life and health. However, even when a Member has adopted a provisional SPS measure pursuant to Article 5.7, it will still have the obligation to take into account, in

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<sup>1090</sup> Panel Reports, *US – Cool*, para. 7.781.

<sup>1091</sup> Panel Reports, *US – Animals*, para. 7.406 (referring to the complaining party's burden to demonstrate that the responding party did not take into account the objective of minimizing negative trade effects when determining its ALOP); *US – Clove Cigarettes*, para. 7.633 (referring to the complaining party's burden of proving that the Member adopting the technical regulation did not "take account of" developing country Member's needs, pursuant to Article 12.3 of the TBT Agreement); *US – Cool*, para. 7.774 (referring to the complaining party's burden of proving that the Member adopting the technical regulation did not "take account of" developing country Member's needs, pursuant to Article 12.3 of the TBT Agreement); and *EC – Approval and Marketing of Biotech Products*, para. 7.1622 (referring to Argentina's burden to adduce evidence and argument sufficient to raise a presumption that the European Communities has failed to take into account its special needs as a developing country Member pursuant to Article 10.1 of the SPS Agreement).



determining the measure it will apply to achieve its ALOP, the relevant economic factors listed in Article 5.3.

7.773. Based on the foregoing, we need to determine whether the European Union adduced sufficient evidence and arguments to make a *prima facie* case that Russia did not take into account the relevant economic factors listed in Article 5.3 in respect of either of the situations provided therein.

#### **7.5.6.3.2.2 Whether Russia took into account relevant economic factors when assessing the risk to animal or plant life and health**

7.774. We will first examine the European Union's arguments and evidence in respect of Russia's non-compliance with its obligation under the first situation. The European Union has systematically argued that Russia has failed to comply with its obligation to perform an assessment of risk. In respect of Article 5.3 of the SPS Agreement, it suggests that the obligation under Article 5.3 with respect to the assessment of risk to animal life and health should be made in conjunction with the obligations under Articles 5.1 and 5.2. This seems to imply that if a Member had an obligation to perform a risk assessment pursuant to those provisions, it also has the obligation to take into account the relevant economic factors listed in Article 5.3 when assessing those risks, and only those economic factors identified as being relevant.

7.775. As noted above, we consider that if there is sufficiency of scientific evidence but there is non-conformity with the relevant international standard, by not basing its SPS measures on a risk assessment, as defined in Article 5.1 and Annex A(4) of the SPS Agreement, a Member would not be in a position to act in manner consistent with Article 5.3.

7.776. We have found that the EU-wide ban is not based on the relevant international standard<sup>1092</sup> and is not based on a risk assessment as appropriate to the circumstances, in a situation where there was sufficient scientific evidence for Russia to conduct an assessment of risks as appropriate to the circumstances.<sup>1093</sup> Based on these findings and on the reasoning explained above, we find that the EU-wide ban is inconsistent with Article 5.3.

#### **7.5.6.3.2.3 Whether Russia took into account relevant economic factors when determining the measure to be applied to achieve the appropriate level of sanitary or phytosanitary protection**

7.777. We now turn to the second situation. This is, when a Member is determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection. In this respect, we consider that the obligation under Article 5.3 in respect of the determination of the measure to be applied is triggered once a Member has set its ALOP in respect of a disease or a disease-causing organism and normally after having assessed the risks related therewith. However, as we observed in paragraph 7.772 above even when a measure is adopted pursuant to Article 5.7, without a risk assessment, the obligation under Article 5.3 still applies with respect to the choice of the measure to be applied. In any event, as mentioned above, the obligation to take into account the relevant economic factors does not require a Member to adopt a particular SPS measure; rather a Member has to give consideration to those relevant economic factors in determining such a measure, and only to those factors.

7.778. In this dispute, the European Union has not provided evidence or arguments in support of its claim that Russia did not consider the relevant economic factors listed in Article 5.3, and only those factors, when determining that it would impose the measures at issue. In this respect, the European Union limited its argument to a single paragraph in its first written submission, where it states without further explanation that "[i]n assessing the risk to animal health and determining the measures to be applied for achieving the appropriate level of sanitary protection, Russia failed to take into account all relevant economic factors referred to in Article 5.3 of the SPS Agreement, including the relative cost-effectiveness of alternative approaches to limiting risks."<sup>1094</sup>

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<sup>1092</sup> See para. 7.718 above.

<sup>1093</sup> See para. 7.719 above.

<sup>1094</sup> European Union's first written submission, para. 262.

7.779. The Panel has noted that the complaining party bears the burden to adduce sufficient evidence and arguments to raise a *prima facie* case that the responding party did not take into consideration the relevant economic factors listed in Article 5.3. In our view, the European Union has not met this burden in respect of its claim that Russia did not consider those relevant economic factors, including the relative cost-effectiveness of alternative approaches to limiting risks.

7.780. The European Union seems to infer that the adoption of stringent SPS measure on its exports of the products at issue necessarily entails a lack of consideration of the relevant economic factors listed in Article 5.3. In our view, this does not suffice to support such a claim.

7.781. In addition, the Panel notes Russia's assertion that it did take into account the potential damages in terms of loss of production, the costs of control and the relative cost-effectiveness of alternative approaches.<sup>1095</sup> The European Union did not challenge this statement during the course of the proceedings.

7.782. Based on the foregoing, we consider that the European Union failed to meet its burden of making a *prima facie* case that the EU-wide ban is inconsistent with Article 5.3 of the SPS Agreement, in respect of Russia taking into account the relevant economic factors when determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection.

#### 7.5.6.3.3 Conclusion

7.783. We find that the EU-wide ban is inconsistent with Article 5.3 of the SPS Agreement, because by not basing that measure on a risk assessment in circumstances in which Article 5.7 is not applicable, Russia could have not taken into account the relevant economic factors listed in Article 5.3 when assessing the risks of entry and spread of ASF in accordance with Article 5.1 and paragraph 4 of Annex A of the SPS Agreement. However, the European Union failed to make a *prima facie* case of inconsistency of the EU-wide ban with Russia's obligation to take into account relevant economic factors listed in Article 5.3 when determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection in respect of ASF.

#### 7.5.6.4 Whether Russia took into account the objective of minimizing negative trade effects when determining the appropriate level of sanitary or phytosanitary protection

##### 7.5.6.4.1 Main arguments of the parties

###### 7.5.6.4.1.1 European Union

7.784. The European Union refers to the statement of the panel in *EC – Hormones* that Article 5.4 does not impose an obligation on the Members but it has to be taken into account when interpreting other provisions of the SPS Agreement.<sup>1096</sup>

7.785. The European Union notes that the SPS Agreement contains an implicit obligation that WTO Members determine their ALOP.<sup>1097</sup> Because Russia did not expressly specify its ALOP, the European Union deduces from an analysis of Russian domestic measures that Russia's ALOP is "rather low".<sup>1098</sup>

7.786. Because Russia applies an EU-wide ban and four individual country-wide bans, the European Union submits that Russia has not taken into account the objective of minimizing

<sup>1095</sup> Russia's response to Panel question No. 154, para. 279 (referring to the Declaration by Vladimir Maslow on the ASF Outbreak that occurred at One of the Enterprises of the AGOECO group in the Voronezh Region of the Russian Federation (Exhibit RUS-148)).

<sup>1096</sup> European Union's first written submission, para. 264 (referring to Panel Report, *EC – Hormones (Canada)*, para. 8.169).

<sup>1097</sup> European Union's first written submission, para. 265 (citing Appellate Body Report, *Australia – Salmon*, paras. 205–207).

<sup>1098</sup> European Union's first written submission, para. 265.

negative trade effects when determining its ALOP, and has thus breached the provisions of Article 5.4 of the SPS Agreement.<sup>1099</sup>

#### 7.5.6.4.1.2 Russia

7.787. Russia argues that the measures with respect to Estonia, Latvia, Lithuania, and Poland are presumed to be consistent with Articles 5.3, 5.4 and 5.6 because they conform to the relevant legal standards in the Terrestrial Code.<sup>1100</sup> Furthermore, Russia contends that the European Union failed to support claims against the EU-wide ban, which Russia considers to be justified under Article 5.7, and therefore consistent with any other provision of Article 5.<sup>1101</sup>

7.788. Russia submits that Article 5.4 does not impose any obligation and that, bearing in mind the objective of minimizing negative trade effects as set out in both Articles 5.4 and 5.6, it offered the European Union to put in place less trade restrictive measures, such as trade from ASF-free compartments or amendment to the requirements of the veterinary certificates. However, the failure of the EU member States to take adequate ASF-control and eradication measures led to the impossibility to adopt such alternative measures.<sup>1102</sup>

#### 7.5.6.4.2 Analysis by the Panel

7.789. Article 5.4 of the SPS Agreement stipulates that Members "should" take into account the objective of minimizing negative trade effects when determining their ALOP.

7.790. The panels in *EC – Hormones* and in *US – Animals*, have concluded that Article 5.4 does not impose a positive obligation on Members, because of its hortatory nature.<sup>1103</sup> However, they also found this provision to be relevant for the interpretation of other provisions of the SPS Agreement.<sup>1104</sup> Moreover, the Appellate Body in *US/Canada – Continued Suspension*, considered that a Member should respect the disciplines of Article 5.4 when choosing its ALOP.<sup>1105</sup>

7.791. The European Union seems to agree with this interpretation. However, it requests the Panel to make findings that the measures at issue are inconsistent with Russia's obligations under Article 5.4.<sup>1106</sup>

7.792. In light of the hortatory nature of Article 5.4, the Panel will not make findings with respect to whether Russia took into account the objective of minimizing negative trade effects when determining its ALOP. However, this is without prejudice to the Panel considering the objective of minimizing negative effects on international trade in its interpretation of other provisions of the SPS Agreement in light of the European Union's claims.

### 7.5.6.5 Whether the EU-wide ban is more trade restrictive than required pursuant to Article 5.6 of the SPS Agreement

#### 7.5.6.5.1 Main arguments of the parties

##### 7.5.6.5.1.1 European Union

7.793. Referring to the factual evidence on the record, the European Union concludes that Russia has "a rather low ALOP".<sup>1107</sup> At the same time, the European Union alleges that even if one were to

<sup>1099</sup> European Union's first written submission, para. 266.

<sup>1100</sup> Russia's first written submission, para. 216.

<sup>1101</sup> Russia's response to Panel question No. 154, para. 277.

<sup>1102</sup> Russia's response to Panel question No. 154, para. 280.

<sup>1103</sup> Panel Reports, *US - Animals*, para. 7.404; *EC – Hormones (Canada)*, para. 8.169; and *EC – Hormones (US)*, para. 8.166. The panel in *US – Animals* provided a detailed explanation of why Article 5.4 does not provide for a positive obligation. See Panel Report, *US – Animals*, paras. 7.397-7.404.

<sup>1104</sup> Panel Reports, *EC – Hormones (Canada)*, para. 8.169; and *EC – Hormones (US)*, para. 8.166.

<sup>1105</sup> Appellate Body Report, *US/Canada – Continued Suspension*, fn 1088.

<sup>1106</sup> European Union's, first written submission, para. 358; and second written submission, para. 194.

<sup>1107</sup> European Union's first written submission, para. 248.

assume that Russia has a very high or conservative ALOP, there is an alternative measure that cumulatively meets the conditions of footnote 3 of the SPS Agreement.<sup>1108</sup>

7.794. The European Union argues that Russia's measures at issue are more trade restrictive than required because, in the European Union's view, the application of the Terrestrial Code standards is an alternative SPS measure which:

- (1) is reasonably available, taking into account technical and economic feasibility,
- (2) achieves the Member's appropriate level of SPS protection and
- (3) is significantly less trade restrictive than the contested measure.<sup>1109</sup>

7.795. The European Union submits that the application of the Terrestrial Code, which recommends regionalization and trade from the ASF-free countries/zones or from any part of a country notifying ASF if the products underwent specific treatments, is an alternative measure that fulfils all the legal requirements in Article 5.6 of the SPS Agreement.<sup>1110</sup>

7.796. The European Union maintains that the adoption of the Terrestrial Code recommendations is a reasonably available measure because it will not impose on Russia an additional economic burden so as to make it unfeasible.<sup>1111</sup> The control measures are the responsibility of the European Union, as an exporting country, and verification of the sanitary certificates for trade in different pig products from the European Union into Russia is already carried out by the competent Russian authorities.<sup>1112</sup>

7.797. The European Union also holds that applying regionalisation as recommended in the Terrestrial Code will achieve Russia's ALOP.<sup>1113</sup> The OIE standards are based on the most recent scientific and technical information and, if correctly applied, protect animal health and welfare and veterinary public health during production and trade in animals and animal products.<sup>1114</sup> According to the European Union, the application of the Terrestrial Code, in particular regionalisation, will satisfy both "a rather low" and "a very high" ALOP.<sup>1115</sup>

7.798. The European Union also states that its control measures have proven highly effective to contain ASF. Being one of the largest exporters of pig products in the world, there is no evidence that any of the European Union's trade partners has suffered ASF outbreaks due to exports from the European Union after January 2014.<sup>1116</sup>

7.799. The European Union argues that applying regionalisation as recommended in the Terrestrial Code is significantly less trade restrictive than Russia's measures. The European Union elaborates that the Terrestrial Code allows trade from ASF-free zones within countries notifying ASF, while Russia's measures at issue are the most trade restrictive option possible – a ban on such trade.<sup>1117</sup>

7.800. In the European Union's opinion, a country-wide ban on the products at issue that may come from areas thousands of kilometres distant from an infected zone is "blatantly

<sup>1108</sup> European Union's first written submission, para. 249.

<sup>1109</sup> European Union's first written submission, para. 250, footnote omitted (citing Appellate Body Report, *Australia – Salmon*, para. 194, referring to the Panel Report, *Australia-Salmon*, para. 95) and para. 252.

<sup>1110</sup> European Union's first written submission, para. 252; and second written submission, para. 134.

<sup>1111</sup> European Union's first written submission, para. 253 and 254.

<sup>1112</sup> European Union's first written submission, paras. 254.

<sup>1113</sup> European Union's first written submission, para. 255.

<sup>1114</sup> European Union's first written submission, para. 256 (quoting User's Guide to the Terrestrial Code, paras. A.2 and A.3 (Exhibit EU-2)).

<sup>1115</sup> European Union's first written submission, para. 255.

<sup>1116</sup> European Union's first written submission, para. 257.

<sup>1117</sup> European Union's first written submission, para. 258.

disproportionate", as long as the necessary containment measures are taken in the limited areas where ASF outbreaks have occurred.<sup>1118</sup>

7.801. The European Union concludes that because of the reasons explained in the previous paragraphs, the measures at issue are inconsistent with the provisions of Article 5.6.<sup>1119</sup>

#### 7.5.6.5.1.2 Russia

7.802. Russia argues that the European Union has failed to establish a *prima facie* case that there is an alternative measure that meets all three requirements of Article 5.6.<sup>1120</sup> According to Russia, there are no less trade-restrictive alternative measures available to achieve Russia's ALOP, which is based on the relevant international standard.<sup>1121</sup>

7.803. Russia submits the Panel should dismiss the European Union's claim under Article 5.6. First, to the extent the European Union derives Russia's ALOP from the measures applied to imports, such measures, in Russia's view, cannot logically be more trade-restrictive than required to achieve their ALOP.<sup>1122</sup> Second, Russia contends that to the extent the European Union derives a different ALOP from the measures applied by Russia domestically, the European Union re-asserts a claim of allegedly distinct ALOPs that falls under Article 5.5 and should therefore be dismissed by the Panel in its consideration under Article 5.6.<sup>1123</sup>

7.804. Russia further elaborates that, if the exporting country fails to discharge its burden to establish, and to objectively demonstrate that it has established, containment zones in accordance with the OIE guidelines, the importing country may reject the exporting country's proposed zones, which do not reflect the same ALOP, and impose country-wide import restrictions.<sup>1124</sup> Russia asserts it acted accordingly and in compliance with the Terrestrial Code.<sup>1125</sup>

7.805. Russia also asserts that when faced with what it considers to be the "deadly" combination of high density of wild boar and high percentages of low-biosecurity backyard farms, import measures based on compartmentalization are the least trade-restrictive measures that would achieve Russia's ALOP.<sup>1126</sup> Later in the proceedings Russia also stated that as it has "consistently expressed in its communication with the European Union ... , the Russian Federation has applied a high ALOP in accordance with the provisions set out in the OIE Terrestrial Code."<sup>1127</sup> We understand this to mean that Russia acknowledges that measures that conform to the recommendations (i.e. on regionalization, compartmentalization or treatment to ensure destruction of ASFV) provided in the Terrestrial Code for safe trade of the products covered by Chapter 15.1 would meet Russia's ALOP.

#### 7.5.6.5.2 Analysis by the Panel

##### 7.5.6.5.2.1 Legal test

7.806. Article 5.6 of the SPS Agreement requires Members to ensure that their SPS measures are not more trade-restrictive than necessary to achieve that Member's ALOP, taking into account technical and economic feasibility.

<sup>1118</sup> European Union's first written submission, para. 258.

<sup>1119</sup> European Union's first written submission, para. 259.

<sup>1120</sup> Russia's first written submission, para. 337.

<sup>1121</sup> Russia's first written submission, para. 334.

<sup>1122</sup> Russia's first written submission, para. 336.

<sup>1123</sup> Russia's first written submission, para. 336. Russia notes that it does not apply distinct ALOPs for domestic live and imported live pigs and pork products (Russia's first written submission, fn 637 to para. 336 referring to Russia's first written submission, paras. 275-287).

<sup>1124</sup> Russia's first written submission, para. 337; and comments to the European Union's response to Panel question No. 286, para. 149.

<sup>1125</sup> Russia's first written submission, para. 337; and comments to the European Union's response to Panel question No. 286, para. 149.

<sup>1126</sup> Russia's response to Panel question No. 159, para. 300.

<sup>1127</sup> Russia's second written submission, para. 143.

7.807. Pursuant to footnote 3 of Article 5.6, in order for a measure to be considered more trade restrictive than necessary, the complainant has to demonstrate<sup>1128</sup> that there is an alternative measure that: (i) is reasonably available taking into account technical and economic feasibility; (ii) achieves the Member's ALOP; and (iii) is significantly less trade restrictive than the contested measure.<sup>1129</sup> The Appellate Body has observed that these three requirements are cumulative in nature such that, in order to establish an inconsistency with Article 5.6, all the elements must be demonstrated.<sup>1130</sup>

7.808. We recall that the Appellate Body has observed that "[t]he alternative measure proposed by a complainant contesting another Member's SPS measure is a 'conceptual tool' to be used for the purpose of the analysis under Article 5.6.<sup>1131</sup> Consequently, a demonstration that an alternative measure meets the relevant Member's appropriate level of protection does not imply that the Member whose SPS measure is found to be inconsistent with Article 5.6 must adopt that alternative measure or that the alternative measure is the only option that would achieve the desired level of protection.<sup>1132-1133</sup>

7.809. The European Union claims the measures at issue are inconsistent with Article 5.6 because applying regionalization pursuant to the Terrestrial Code is an alternative measure reasonably available to Russia, which does not involve technical difficulties or an unfeasible economic burden, while achieving Russia's ALOP and being significantly less trade-restrictive.<sup>1134</sup> The European Union posits that following the Terrestrial Code (i.e. allowing trade from disease free areas consistent with regionalization) and recognizing regionalization would constitute a significantly less trade-restrictive alternative.<sup>1135</sup>

7.810. In respect of the EU-wide ban, Russia argues that Article 5.7 "obviates" the need to comply with other provisions of Article 5, including 5.6.<sup>1136</sup>

7.811. The Panel would be required to address the issue whether Article 5.7 "obviates" the need to comply with Article 5.6 only in case it finds that Russia complies with Article 5.7.<sup>1137</sup> In paragraph 7.707 above we found that the EU-wide ban is not subject to Article 5.7. We therefore find no need to address Russia's argument in respect of the relationship between Articles 5.7 and 5.6.

7.812. We recall that in paragraph 7.494 above, we found that the EU-wide ban is not based on the international standards articulated in the Terrestrial Code.

7.813. Based on the foregoing, the Panel needs to determine whether the European Union has identified one or more alternative measures. Then the panel needs to examine whether the alternative measures submitted by the European Union: (i) are reasonably available to Russia taking into account technical and economic feasibility; (ii) achieve Russia's ALOP; and (iii) are

<sup>1128</sup> The complainant has the burden of demonstrating each of the three elements. Panel Report, *US – Animals*, para. 7.431 (referring to Appellate Body Report, *Japan – Agricultural Products II*, para. 126, and Panel Report, *India – Agricultural Products*, para. 7.525).

<sup>1129</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.203.

<sup>1130</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.203. See also Appellate Body Reports, *Australia – Salmon*, para. 194; and *Japan – Agricultural Products II*, para. 95; as well as Panel Reports, *US – Animals*, paras. 7.430-7.431; *India – Agricultural Products*, para. 7.521-7.522; *US – Poultry (China)*, para. 7.331; and *Australia – Apples*, para. 7.1098.

<sup>1131</sup> (footnote original) Appellate Body Report, *Australia – Apples*, para. 363.

<sup>1132</sup> (footnote original) Appellate Body Report, *Australia – Apples*, para. 363.

<sup>1133</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.203.

<sup>1134</sup> European Union's first written submission, para. 259.

<sup>1135</sup> European Union's second written submission, para. 134.

<sup>1136</sup> Russia's first written submission, para. 409 (citing Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.2969 finding that "Article 2.2 excludes from its scope of application the kinds of situations covered by Article 5.7"). Russia asserts that this exclusion extends to the provisions under Article 5 invoked by the European Union. See also Russia's response to Panel question No. 154, paras. 276-278; comments to the European Union's response to Panel question No. 286, para. 148.

<sup>1137</sup> This reflects the approach taken in *US – Animals* whereby the panel, having found the United States' measures were not covered by the exemption in Article 5.7, decided not to consider the United States' argument that the maintenance of a provisional measure under Article 5.7 would preclude the applicability of Article 5.6 (Panel Report, *US – Animals*, para. 7.439).

significantly less trade restrictive than the EU-wide ban.<sup>1138</sup> We turn to examine the alternative measures identified by the European Union.

#### 7.5.6.5.2.2 Whether the European Union has identified one or more alternative measures

7.814. The measures that the European Union submits as an alternative are those derived from the application of the Terrestrial Code, which recommends regionalization and trade from the ASF-free countries/zones or from any part of a country notifying ASF if the products underwent specific treatments.<sup>1139</sup> In particular, the European Union argues that instead of an EU-wide ban, Russia should allow trade of certain products according to specific provisions of Chapter 15.1 of the Terrestrial Code. Table 7 below contains the alternative measures identified by the European Union, as relevant for the EU-wide ban, on the basis of the specified provisions of the Terrestrial Code.

**Table 7 Alternative measures identified by the European Union**<sup>1140</sup>

Product	Terrestrial Code provision	Recommendation
Live pigs	Article 15.1.5	Allow trade from the ASF free zones in the EU.
Semen of domestic pigs and <i>in vivo</i> derived embryos of domestic pigs	Articles 15.1.8 and 15.10	Allow trade from the ASF free zones in the EU.
Fresh meat of domestic pigs and of wild boar	Articles 15.1.12. and 15.1.13	Allow trade from the ASF free zones in the EU.

7.815. In our view, the European Union has clearly identified the alternative measures for the products at issue. We now proceed to examine whether the measures based on the recommendations of the Terrestrial Code identified by the European Union meet the three cumulative elements of Article 5.6 of the SPS Agreement.

#### 7.5.6.5.2.3 Whether measures based on the recommendations on regionalization in the Terrestrial Code are reasonably available, taking into account technical and economic feasibility

7.816. Having determined the alternative measures identified by the European Union, we first need to examine whether such alternative measures are reasonably available to Russia, taking into account technical and economic feasibility. Regarding the first requirement, panels have noted that the examination of technical and economic feasibility should be done in light of the circumstances in the real world.<sup>1141</sup> In addition, the panel in *India – Agricultural Products* found that "measures based on the recommendations of the Terrestrial Code are technically and economically feasible, and reasonably available alternatives to" India's (the defending party's) AI measures.<sup>1142</sup>

7.817. Russia has not challenged the technical and economic availability of measures in line with the Terrestrial Code. On the contrary, Russia has claimed that its measures on imports of the products at issue from the European Union are "based to the extent possible" on the international standards articulated in the Terrestrial Code, hence implying that it considers these standards to be technically and economically available.

7.818. As indicated by the European Union, the alternative measures arising from the Terrestrial Code include accepting the imports of the products at issue originating from ASF-free areas, in line with the Terrestrial Code. In our view, accepting such imports from the European Union does not entail a high technical or economic burden. Rather, it requires appropriate cooperation between the European Union's and Russia's veterinary services in order to recognize

<sup>1138</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.203.

<sup>1139</sup> European Union's first written submission, para. 252; and second written submission, para. 134.

<sup>1140</sup> This table is prepared on the basis of the European Union's opening statement at the second meeting of the Panel, paras. 72-76.

<sup>1141</sup> Panel Report, *Japan – Apples (Article 21.5 – US)*, para. 8.171. This approach was endorsed in Panel Report, *India – Agricultural Products*, para. 7.540.

<sup>1142</sup> Panel Report, *India – Agricultural Products*, para. 7.546.

which areas are ASF-free and take the necessary steps for trade of the products at issue from those areas to resume. We recall that a primary element in permitting such trade would be modification of the text in the veterinary certificates required by Russia. According to the evidence on record, Russia has done this in the past<sup>1143</sup>, including in respect of the acceptance of treated products at issue from the non-affected EU member States.<sup>1144</sup>

7.819. Examining these elements, we consider that the recommended measures under the Terrestrial Code in respect of regionalization are reasonably available to Russia, because they are technically and economically feasible.

#### **7.5.6.5.2.4 Whether measures based on the recommendations on regionalization in the Terrestrial Code achieve Russia's ALOP**

7.820. Regarding the second requirement that the proposed alternative measure achieves Russia's ALOP, the Panel recalls that it has found Russia's ALOP to be high or conservative.<sup>1145</sup>

7.821. We recall that Russia asserts that the European Union's failure to demonstrate the establishment of ASF-free zones or compartments in a manner consistent with the Terrestrial Code or compliance with conditions for safe trade of treated products renders the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland in compliance with the provision of the Terrestrial Code.<sup>1146</sup> In our view, this confirms Russia's statement that if it were to apply measures in accordance with the recommendations provided in the Terrestrial Code, such measures would achieve Russia's ALOP.

7.822. Referring to the obligation of a Member to accept products that meet one or more of the alternatives contemplated in a relevant international standard, the European Union argues that contrary to what Russia seems to believe, a country may not choose ASF-free zones or compartments according to its ALOP.<sup>1147</sup> The European Union argues that the alternatives described in the Terrestrial Code (ASF-free country, zone or compartment) are related to the objective characteristics of the ASF situation and not to a subjective choice of the importing Member.<sup>1148</sup> The European Union considers this to be supported by the rejection of the panel in *India – Agricultural Products* of India's contention that it could choose which recommendation of the Terrestrial Code to apply in respect of Avian Influenza.<sup>1149</sup> We now turn to the application of the legal test to the facts of this case.

7.823. While referring to the second requirement – particularly to identifying the level of protection that would be achieved by the alternative measure – the panel in *India – Agricultural Products* examined the level of protection of an alternative measure based on the relevant international standards. The panel found that the Terrestrial Code provides for an optimal level of security, under which safe trade may be facilitated in order to prevent Avian Influenza from being introduced into an importing country.<sup>1150</sup>

7.824. We find it appropriate to follow a similar approach as the panel in *India – Agricultural Products*. In this dispute, Russia does not claim that its measures seek to achieve an ALOP higher than the one that would be achieved through the application of the recommendations of the

<sup>1143</sup> See exhibits EU-159 and EU-160.

<sup>1144</sup> See exhibits EU-162 and RUS-324.

<sup>1145</sup> See para. 7.752 above.

<sup>1146</sup> Russia's comments to the European Union's response to Panel question No. 286, para. 149.

<sup>1147</sup> European Union's second written submission, para. 131.

<sup>1148</sup> European Union's second written submission, para. 132.

<sup>1149</sup> European Union's second written submission, para. 133 (quoting Panel Report, *India – Agricultural Products*, para. 7.270; and Appellate Body Report, *India – Agricultural Products*, para. 5.102).

<sup>1150</sup> Panel Report, *India – Agricultural Products*, paras. 7.580 – 7.581. The Appellate Body noted that this approach was not appealed, however the Appellate Body considered it to reflect an assessment of the proposed alternative measures meeting India's ALOP. Appellate Body Report, *India – Agricultural Products*, para. 5.224.



Terrestrial Code. Rather, Russia posits that its measures are in conformity with or based on the Terrestrial Code.<sup>1151</sup>

7.825. In its responses to the Panel's questions, the OIE refers to the Terrestrial Code Foreword, which indicates that "the Code sets out standards for the improvement of terrestrial animal health and welfare and veterinary public health worldwide, including through standards for safe international trade in terrestrial animals".<sup>1152</sup> The OIE also observed that "[a]ll the various combinations of testing, treatment and certification identified in Chapter 15.1 provide for safe trade of animals and animal products".<sup>1153</sup> Furthermore, the OIE concludes that "[r]egardless of a country's policy on the ALOP, the OIE considers that the application of the measures recommended in the Terrestrial Code provide conditions for safe trade in animals and animal products."<sup>1154</sup>

7.826. In our view, the OIE's responses confirm that the provisions in Chapter 15.1 would provide an optimal level of security<sup>1155</sup> for trade in the products at issue. Based on the foregoing, we consider that the level of protection that would be achieved by the alternative measures, that is, those resulting from the application of the recommendations on regionalization in the Terrestrial Code is high or conservative.

7.827. On that basis, we need to examine whether the level of protection that would be achieved by the alternative measures suggested by the European Union meets Russia's ALOP in respect of ASF.<sup>1156</sup> We recall that we have found that both Russia's ALOP and the level of protection achieved through the alternative measures suggested by the European Union are high. We also recall that Russia acknowledges that its ALOP for ASF, as applied to imports of the products at issue, could be achieved by means of measures that conform to the standards enshrined in the Terrestrial Code.<sup>1157</sup> We therefore conclude that the level of protection achieved through measures in line with the provisions of Chapter 15.1 of the Terrestrial Code meets Russia's ALOP.

7.828. We thus move on to make the comparison between the trade restrictiveness of the EU-wide ban and the alternative measures identified by the European Union.

#### **7.5.6.5.2.5 Whether the measures based on the recommendations on regionalization in the Terrestrial Code are significantly less trade-restrictive than the EU-wide ban**

7.829. Previous panels have examined the third requirement through comparing the alternative measures proposed by the complaining party with the challenged measures.<sup>1158</sup> The panel in *India – Agricultural Products*, agreeing with the panel in *Australia – Salmon*, observed that "any measure imposing conditions upon importation, even if stringent, 'would still be significantly less restrictive to trade than an outright prohibition'".<sup>1159</sup>

7.830. With this in mind, we move on to analyse whether measures applied pursuant to the recommendations on regionalization in Chapter 15.1 of the Terrestrial Code are significantly less trade restrictive than the EU-wide.

7.831. In paragraph 7.494 above we found that the EU-wide ban is not based on the international standards articulated in the Terrestrial Code. Moreover, we recall that the European Union has demonstrated that the EU-wide ban is a composite measure which reflects Russia's refusal to

<sup>1151</sup> This is different situation than the one in *US – Animals*, where the panel examined whether the alternative measure suggested by Argentina, which was different from an international standard, would achieve the United States' ALOP in respect of FMD. Panel Report, *US – Animals*, para. 7.454-7.548. See also paras. 7.435-7.437 and 7.442.

<sup>1152</sup> OIE response to Panel question No. 19.

<sup>1153</sup> OIE response to Panel question No. 19.

<sup>1154</sup> OIE response to Panel question No. 19.

<sup>1155</sup> Panel Report, *India – Agricultural Products*, paras. 7.580 – 7.581.

<sup>1156</sup> Appellate Body Report, *Australia – Apples*, para. 344.

<sup>1157</sup> See paras. 7.750 and 7.805 above.

<sup>1158</sup> Panel Reports, *US- Animals*, para. 7.425; *India – Agricultural Products*, para. 7.591; and *Australia – Salmon*, para. 8.182

<sup>1159</sup> Panel Report, *India – Agricultural Products*, para. 7.590 (quoting Panel Report, *Australia – Salmon*, para. 8.182).

accept certain imports of the products at issue from the European Union.<sup>1160</sup> As we have explained, this means an import ban of the non-treated products at issue from the territory of the non-affected EU member States.

7.832. In our assessment of the relevant provisions in the Terrestrial Code, we have explained that certain provisions in Chapter 15.1 provide for safe trade from ASF-free areas. In our findings under Article 6.3, we found that the European Union provided to Russia the necessary evidence to objectively demonstrate that there are ASF-free areas, which are likely to remain so, within the European Union's territory outside the four affected EU member States.

7.833. Based on the foregoing, we conclude that the alternative proposed by the European Union, namely that Russia base the EU-wide ban on the recommendations on regionalization in the Terrestrial Code, which allows for safe trade of certain products at issue from ASF-free areas covered by Articles 15.1.5, 15.1.12, and 15.1.13, is significantly less restrictive to trade than a ban on the same products.

#### **7.5.6.5.3 Conclusion**

7.834. We have found that the European Union identified measures based on the recommendations on regionalization in the Terrestrial Code as a reasonably available alternative to the EU-wide ban as applied to products covered by Articles 15.1.5, 15.1.12, and 15.1.13. We have also found that the alternative is technically and economically feasible, would achieve Russia's ALOP, and is significantly less restrictive to trade than the EU-wide ban. Therefore, we conclude that the EU-wide ban is inconsistent with Article 5.6 of the SPS Agreements, with respect to non-treated products covered by Chapter 15.1 of the Terrestrial Code, because it is significantly more restrictive to trade than required to achieve Russia's ALOP.

#### **7.5.6.6 Whether the measures at issue are more than is necessary for the protection of animal health pursuant to Article 2.2**

##### **7.5.6.6.1 Main arguments of the Parties**

###### **7.5.6.6.1.1 European Union**

7.835. The European Union argues that Article 2.2 of the SPS Agreement is a more general provision and that Articles 5.1, 5.2 and 5.6 are more specific provisions.<sup>1161</sup> According to the European Union, it follows that a finding of a violation of Article 5.6 with regard to risk management will consequentially result in a violation of Article 2.2 of the SPS Agreement, more precisely with regard to the necessity requirement.<sup>1162</sup>

7.836. The European Union argues that Russia does not comply with the requirements in Article 5.6 and footnote 3 of the SPS Agreement.<sup>1163</sup>

###### **7.5.6.6.1.2 Russia**

7.837. Russia argues that what it considers as Russia's provisional compliance with the terms of the veterinary certificates is justified under Article 5.7 of the SPS Agreement.<sup>1164</sup> Russia also points out that Article 2.2 of the SPS Agreement excludes from its scope of application the kinds of situations covered by Article 5.7.<sup>1165</sup>

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<sup>1160</sup> See paras. 7.83-7.84 above.

<sup>1161</sup> European Union's second written submission, para. 129.

<sup>1162</sup> European Union's second written submission, para. 130.

<sup>1163</sup> European Union's second written submission, para. 134.

<sup>1164</sup> Russia's first written submission, para. 382.

<sup>1165</sup> See Russia's first written submission, fn 697, referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.2969.

## 7.5.6.6.2 Analysis by the Panel

### 7.5.6.6.2.1 Relevant legal provision

7.838. Article 2.2 of the SPS Agreement provides:

Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

7.839. According to Article 2.2, an SPS measure must: (i) be applied only to the extent necessary to protect human, animal or plant life or health; (ii) be based on scientific principles; and (iii) not be maintained without sufficient scientific evidence, except as provided for in Article 5.7.<sup>1166</sup> The European Union's claims relative to Article 5.6 pertain solely to (i): the SPS measure being applied only to the extent necessary to protect human, animal or plant life or health.

7.840. The Appellate Body has found that the basic obligations set out in Article 2 inform, impart meaning to, and are made operative in other provisions of the SPS Agreement, including through certain of the more specific obligations set out in Article 5. The obligation that a Member shall ensure that an SPS measure is applied only to the extent necessary to protect human, animal or plant life or health is closely linked to the obligation set out in Article 5.6.<sup>1167</sup>

7.841. This close relationship has been interpreted to mean that a finding of inconsistency with Article 5.6 may lead to a presumption of inconsistency with the obligation in Article 2.2 to ensure that an SPS measure is applied only to the extent necessary to protect human, animal or plant life or health. This means that a panel should verify if such presumption has been rebutted in order to confirm a breach of Article 2.2 after finding an inconsistency under Article 5.6.<sup>1168</sup>

7.842. The panel in *India – Agricultural Products* examined the "necessity" requirement in the context of other relevant provisions of the covered agreements and concluded that, similarly to the requirements of Article 5.6, they focus on the trade restrictiveness of a measure, its contribution to the purported objective, and whether that contribution may be made by a less trade-restrictive alternative.<sup>1169</sup> The panel also found that "a finding that a measure is inconsistent with Article 5.6 may lead to a presumption that the same measure is inconsistent with the obligation in Article 2.2 to ensure that an SPS measure is applied only to the extent necessary to protect human, animal or plant life or health".<sup>1170</sup> We agree with the panel in *India – Agricultural Products* that the "necessity" requirement in Article 2.2 is closely linked to the determination under Article 5.6.

7.843. The European Union argues that, based on the relationship between Articles 2.2 and 5.6<sup>1171</sup>, a finding of violation of Article 5.6 with regard to risk management will consequentially result in a violation of the necessity requirement enshrined in Article 2.2.<sup>1172</sup> The Appellate Body has been clear in endorsing the analysis provided by the panel in *India – Agricultural Products* in considering that a breach of Article 5.6 does not result in a consequential violation of Article 2.2. Rather, such a finding may lead to a rebuttable presumption.<sup>1173</sup>

7.844. In our view, Russia has not provided any arguments or evidence that would rebut the presumption raised from a finding of inconsistency with Article 5.6. Rather, it has focused its arguments on the consistency of the measures at issue with its obligations under Article 5.6.

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<sup>1166</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1424.

<sup>1167</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.208. See also Panel Report, *US – Animals*, para. 7.367 (quoting Appellate Body Report, *Australia – Apples*, para. 339).

<sup>1168</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38.

<sup>1169</sup> Panel Report, *India – Agricultural Products*, paras. 7.607-7.613.

<sup>1170</sup> Panel Report, *India – Agricultural Products*, para. 7.614.

<sup>1171</sup> European Union's second written submission, para. 129 (referring to Panel Report, *EC – Hormones (Canada)*, para. 8.99).

<sup>1172</sup> European Union's second written submission, para. 130.

<sup>1173</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38.

7.845. We recall our finding that the EU-wide ban is significantly more restrictive to trade than the alternative measures identified by the European Union. The Panel also found that the alternative measures are available to Russia and met Russia's ALOP in respect of ASF.

#### **7.5.6.6.2.2 Conclusion**

7.846. In light of our findings under Article 5.6 and the arguments and evidence raised by Russia in order to rebut the presumption of inconsistency with Article 2.2 raised by a finding of inconsistency of the EU-wide ban with Article 5.6, we find that the EU-wide ban is inconsistent with Article 2.2 of the SPS Agreement because it is applied beyond the extent necessary to protect human and animal life or health.

### **7.6 Claims relating to the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland**

#### **7.6.1 Claims under Articles 3.1 and 3.2 of the SPS Agreement**

##### **7.6.1.1 Main arguments of the parties**

###### **7.6.1.1.1 European Union**

7.847. The European Union asserts that Russia's measures do not "conform to" and are not "based on" any relevant international standards within the meaning of Articles 3.2 and 3.1 of the SPS Agreement, respectively, but rather, they go against the relevant international standards.<sup>1174</sup>

7.848. The European Union posits that a measure that actually contradicts the international standards cannot be said to be based on the respective standards.<sup>1175</sup>

7.849. The European Union argues that while the relevant international standards recommend trade from ASF-free areas in several products at issue, or trade in products which have been treated so as to ensure the destruction of the ASFV, Russia does exactly the contrary and bans trade from ASF-free areas in the EU.<sup>1176</sup>

###### **7.6.1.1.2 Russia**

7.850. Russia focuses its arguments on conformity of bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, with the relevant international standards under Article 3.2, which would create a (rebuttable) presumption of consistency with relevant provisions of the SPS Agreement.<sup>1177</sup> In the alternative, Russia asserts that its measures in respect of imports from Estonia, Latvia, Lithuania, and Poland are "based on" the relevant international standards within the meaning of Article 3.1.<sup>1178</sup>

##### **7.6.1.2 Main arguments of the third parties**

###### **7.6.1.2.1 Australia**

7.851. Australia argues that in light of Article 3.2 of the SPS Agreement, the Panel will have to determine, as a matter of fact, whether Russia's measures conform to, or are based on, the Terrestrial Code, noting that only measures which conform to international standards enjoy the presumption of consistency with the SPS Agreement.<sup>1179</sup>

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<sup>1174</sup> European Union's first written submission, paras. 113 and 122.

<sup>1175</sup> European Union's oral statement at the second substantive meeting, para. 56.

<sup>1176</sup> European Union's oral statement at the second substantive meeting, para. 57.

<sup>1177</sup> Russia's first written submission, paras. 215 – 217.

<sup>1178</sup> Russia's first written submission, para. 214.

<sup>1179</sup> Australia's third-party submission, para. 7.

7.852. Australia asserts that with the foregoing supposition in mind, it would be appropriate for the Panel to commence its analysis with the claims under Article 3, followed by consideration, if necessary, of the subsequent claims under Articles 5 and 6 of the SPS Agreement.<sup>1180</sup>

#### **7.6.1.2.2 Brazil**

7.853. Brazil emphasizes that while Members are allowed to deviate from the use of international standards and to adopt a higher level of protection than those recognized by the OIE, Articles 3.2 and 3.3, together with Articles 5.1 and 6 of the SPS Agreement, require that such a higher level of protection in the context of the principle of regionalization should only be adopted based upon a risk assessment.

7.854. Brazil stresses that the Terrestrial Code also establishes recommendations for importation from countries or zones considered infected with ASF and that consequently, if a Member decides to deviate from these standards and/or recommendations, then such decision should be based on scientific evidence, consubstantiated in a risk assessment.<sup>1181</sup>

#### **7.6.1.3 Analysis by the Panel**

##### **7.6.1.3.1 Introduction**

7.855. The questions before the Panel are: whether Russia's measures in respect of imports of the products at issue from Estonia, Latvia, Lithuania, and Poland "conform to" the relevant provisions of the Terrestrial Code within the meaning of Article 3.2 of the SPS Agreement; and/or whether they are more simply "based on" such relevant international standards for the purposes of Article 3.1 of the SPS Agreement. In the case of the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, the "based on" and "conform to" assessments are alternatives.

7.856. In section 7.5.1.3.2 above, we have examined the text of Article 3 of the SPS Agreement. To avoid unnecessary repetition, we will not replicate the text of Article 3.

7.857. We recall that the parties' evidence and argumentation have focused on the issue of whether Russia's bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are "based on" and/or "conform to" the relevant international standard within the meaning of Articles 3.1 and 3.2 of the SPS Agreement. We thus centre our analysis on these provisions.

7.858. In section 7.5.1.3.2 above, we referred to the manner in which the Appellate Body and previous panels have understood the meaning of Articles 3.1 and 3.2, and focused on the legal standard that needs to be met for a measure to be considered to be based on the relevant international standards pursuant to Article 3.1.

7.859. We note that Article 3.2 of the SPS Agreement provides that SPS measures that conform to international standards, guidelines, or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of the SPS Agreement and the GATT 1994. If a Member promulgates an SPS measure that conforms to an international standard, such a measure would embody the international standard completely and, for practical purposes, convert it into a municipal standard. Such a measure thus enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the SPS Agreement and of the GATT 1994.<sup>1182</sup>

7.860. We further note that Article 3.1 of the SPS Agreement establishes that Members shall base their SPS measures on international standards, guidelines, or recommendations, where they exist. In *EC – Hormones*, the Appellate Body stated that "[a] thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the

<sup>1180</sup> Australia's third-party submission, para. 9.

<sup>1181</sup> Brazil's third-party submission, para. 14.

<sup>1182</sup> Appellate Body Report, *EC – Hormones*, para. 170.

latter".<sup>1183</sup> The Appellate Body considered that, to be "based on" an international standard, a measure "may adopt some, not necessarily all, of the elements of the international standard".<sup>1184</sup> The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2, but the Member is not penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant article of the SPS Agreement or of the GATT 1994. That is, the burden of proof would still lie on a complainant to make a *prima facie* case of violation of Article 3.1.<sup>1185</sup> In *EC – Sardines*, the Appellate Body remarked that "there must be a very strong and very close relationship between two things to be able to say that one is 'the basis for' the other".<sup>1186</sup> The Appellate Body thus stated that, where a technical regulation and the relevant international standard contradict each other, it cannot properly be concluded that the international standard has been used "as a basis for" the technical regulation.<sup>1187</sup> As the Appellate Body recognized in *EC – Sardines*, the term "as a basis for" in Article 2.4 of the TBT Agreement is similar to the language used in Article 3.1 of the SPS Agreement.<sup>1188</sup> Furthermore, the panel in *India – Agricultural Products* concluded that a fundamental departure from the relevant international standard amounts to a contradiction of such a standard.<sup>1189</sup>

7.861. In respect of the relationship between the obligations in Articles 3.1 and 3.2, the Appellate Body and previous panels have found that a measure that is "based on" a standard does not necessarily conform to that same standard, as some of the elements of the standard may not be present in the measure at issue.<sup>1190</sup> Following this approach, the panel in *India – Agricultural Products* observed that failure to meet the "based on" threshold in Article 3.1 would also result in not meeting the more rigorous "conform to" threshold in Article 3.2.<sup>1191</sup>

7.862. In paragraph 7.256 above, we explained that there may be situations where a departure or deviation of one element of a measure from a certain aspect of a standard may not necessarily constitute an outright contradiction of that aspect of the standard. For example, in cases where a standard applies for a particular set or subset of products, part of a measure pertaining to one product may be based on the international standard while another part of the measure pertaining to a different product, may not be *based* on the international standard. Furthermore, distinctions may exist between standards. There may be standards that are conditional on the exporting Member undertaking particular actions, whether on a one-off basis or as part of an ongoing, continuous and dynamic SPS situation that may introduce temporal considerations or may require additional action.

7.863. In this case, the parties have agreed on the products that are subject to the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. Those include live pigs; pig genetic material (excluding Latvia); finished products containing pork; products from slaughter of wild boar; raw pork raw products (excluding Lithuania and Poland); horn-hoofed materials, leather and intestinal materials; bristles; feed for pigs<sup>1192</sup>; and hunting trophies not subjected to full taxidermy treatment.<sup>1193</sup>

<sup>1183</sup> Appellate Body Report, *EC – Hormones*, para. 163.

<sup>1184</sup> Appellate Body Report, *EC – Hormones*, para. 171.

<sup>1185</sup> The Appellate Body has clarified that there is no "general rule – exception" relationship between the three relevant paragraphs of Article 3. Accordingly, these three alternative scenarios are equally available to WTO Members. The Appellate Body explained that "this right of a Member to establish its own level of sanitary protection under Article 3.3 of the *SPS Agreement* is an autonomous right and *not* an 'exception' from a 'general obligation' under Article 3.1". (emphasis original) Appellate Body Report, *EC – Hormones*, para. 172.

<sup>1186</sup> Appellate Body Report, *EC – Sardines*, para. 245.

<sup>1187</sup> Appellate Body Report, *EC – Sardines*, para. 248.

<sup>1188</sup> Appellate Body Report, *EC – Sardines*, para. 242. The panel in *India – Agricultural Products* referred to this Appellate Body jurisprudence at paragraphs 7.265-7.269 of its Report.

<sup>1189</sup> Panel Report, *India – Agricultural Products*, para. 7.271.

<sup>1190</sup> Appellate Body Report, *EC – Hormones*, para. 163.

<sup>1191</sup> Panel Report, *India – Agricultural Products*, para. 7.202.

<sup>1192</sup> Heat-treated ready-made feedstuffs (minimum temperature: 70 degrees in Celsius, minimum treatment time: 20 minutes) are excluded from the ban on the products at issue from Estonia. See Exhibits EU-13 and RUS-37.

<sup>1193</sup> See Exhibits EU-7, EU-8, EU-10, EU-11, EU-168 and RUS-28 (regarding the measures in respect of Lithuania); Exhibits EU-9, EU-10, EU-11, EU-168 and RUS-29 (regarding the measures in respect of Poland); Exhibits EU-12 and EU-169 (regarding the measures in respect of Latvia); and Exhibits EU-13 and RUS-37

7.864. In light of their product coverage, the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland trigger different Terrestrial Code Chapter 15.1 recommendations for the import of live pigs (both domestic and wild); semen of domestic pigs; *in vivo* derived embryos of domestic pigs; fresh meat (of domestic and wild pigs); meat products of pigs (either domestic or wild); products of animal origin (from fresh meat of pigs) intended for use in animal feeding, for agricultural or industrial use, or for pharmaceutical or surgical use; trophies derived from wild pigs; products of animal origin (from pigs, but not derived from fresh meat) intended for use in animal feeding and for agricultural or industrial use; and bristles (from pigs). As we have already observed<sup>1194</sup>, Articles 15.1.5 – 15.1.17 are each tailored to a particular subset of the relevant products. Some of those recommendations refer to imports from ASF-free countries, zones or compartments, and from countries or zones considered infected with ASF. Some of the mentioned articles also provide for trade of products that have been processed so as to ensure destruction of the ASFV, and that the necessary protections were taken after processing to avoid contact of the product with any source of ASFV. Likewise, as the experts confirmed, numerous horizontal Terrestrial Code provisions including, but not limited to, Chapter 4.3 and Article 5.3.7, are relevant in determining whether the exporting country has established an OIE-consistent ASF-free zone.<sup>1195</sup>

7.865. In paragraph 7.260 above we explained that certain of the Terrestrial Code's provisions contain clear proscriptive standards, which are more conducive to a clear-cut determination of "based on" in light of whether the standard has been implemented. On the other hand, other Terrestrial Code provisions contain standards that allow considerable flexibility as to the means by which Members may base their measures on, and/or offer a range of options to a Member in order to be based on the relevant international standard, sometimes on the basis of certain defined exhaustive or non-exhaustive criteria or factors. Such more flexible standards recognize the inherent discretion of Members to exercise judgment in a particular set of circumstances, and a panel's review must take the particular nature of the provision of the relevant international standard at issue into account in light of the specific facts and circumstances of the dispute.<sup>1196</sup> Moreover, standards calling for interactive processes, where certain steps may be contingent upon the satisfaction of other steps, may require a panel to examine the actions of both the importing and exporting Members. The extent to which an importing country's obligation to adhere to the international standard, guideline, or recommendation is excused or limited by the exporting country's actions or inactions must be determined on a case-by-case basis.

7.866. With this approach in mind, we proceed to examine whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are "based on" and/or "conform to" the relevant international standards in the Terrestrial Code.

7.867. Having ascertained the precise measures under review and the applicable legal test, in our analysis under Article 3 of the SPS Agreement, we will proceed as follows: (i) identifying the relevant international standards; (ii) discerning the meaning of such international standards; (iii) assessing the measures at issue in light of these international standards in order to determine whether the measures "conform to" and/or are "based on" the standards.

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(regarding the measures in respect of Estonia). See also European Union's response to Panel question No. 77, paras. 148-151; response to Panel question No.271, paras. 83-89; and Russia's response to Panel question No. 77, para. 127; response to Panel question No. 271, paras. 95-98.

<sup>1194</sup> See section 7.5.1.3.3 above.

<sup>1195</sup> See e.g. Dr Thomson's response to Panel Question 31, para. 4.19 of Compiled Experts' Replies, referring to Chapters 4.3 and 4.4 of the Terrestrial Code; Dr Brückner's response to Panel Question 34, para. 4.31 of Compiled Experts' Replies, referring to Article 5.3.7 of the Terrestrial Code; and Dr Brückner's response to Panel Question 55, para. 4.151 of Compiled Experts' Replies, referring to Chapters 4.3 and 15.1 of the Terrestrial Code.

<sup>1196</sup> For example, Article 5.1.1 of the Terrestrial Code provides that "[b]ecause of differences between countries in their animal health situations, various options are offered by the Terrestrial Code." (OIE, *Terrestrial Animal Health Code* 23<sup>rd</sup> edn (2014), Vol. 1, p. 171) Article 4.3.1 of the Terrestrial Code provides that "[i]n most cases, the import regulations developed will rely in part on judgments made about the effectiveness of sanitary procedures undertaken by the exporting country, both at its borders and within its territory." (OIE, *Terrestrial Animal Health Code* 23<sup>rd</sup> edn (2014), Vol. 1, p. 116)

#### **7.6.1.3.2 Identifying the relevant international standards**

7.868. In section 7.5.1.3.3 above, we referred to the manner in which the Appellate Body and panels have indicated that a panel should identify the relevant international standards in a particular dispute. Based on that guidance we endorse the parties' shared view that the relevant international standards for the purpose of this dispute are articulated in the 23<sup>rd</sup> edition of the Terrestrial Code.<sup>1197</sup>

7.869. We considered above that while the parties agree that the Terrestrial Code contains the relevant international standards, the parties have differing views on the precise provisions of the Terrestrial Code that are relevant in this dispute, and in particular the hierarchy and interrelationships between and among the Terrestrial Code's zoning and regionalization (Chapters 4.3, 4.4 and 5.4) provisions and its ASF-specific provisions (Chapter 15.1).

7.870. In sections 7.5.1.3.3 and 7.5.1.3.4 above, we have described in detail our understanding of the structure and content of the Terrestrial Code and recalled the parties' arguments in that respect. In paragraph 7.271 above, we also observed in this respect that the difference in the situations covered by the provisions of Chapter 15.1 (i.e. those related to goods originating in ASF-free countries zones or compartments and processed products processed to ensure destruction of ASFV) warrants an independent examination of the standards applicable to the categories of products subject to each situation. In other words, we consider that the structure of Chapter 15.1 provides a clear identification of two sets of standards that a measure could be based on. Those categories include standards for (i) trade in pig products originating from ASF-free countries, zones or compartments; and (ii) trade in pig products subject to processing to ensure destruction of ASFV.

7.871. In light of the parties' comments and the structure of the recommendations in Chapter 15.1 of the Terrestrial Code, we will pursue an independent analysis in respect of the two categories of standards applicable in respect of ASF. We will therefore first discern the meaning of the relevant international standards contained in Chapter 15.1 of the Terrestrial Code applicable to non-treated products, which refers to those pig products originating from ASF-free countries, zones or compartments. We will then discern the meaning of the relevant international standards contained in Chapter 15.1 of the Terrestrial Code applicable to treated products. We now turn to that examination.

#### **7.6.1.3.3 Discerning the meaning of the relevant international standards**

7.872. Table 8 below sets out the product-specific provisions in Chapter 15.1 of the Terrestrial Code that pertain to the products at issue from Estonia, Latvia, Lithuania, and Poland that are subject to the bans.

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<sup>1197</sup> See paras. 7.263-7.264 above.



**Table 8 Product-specific provisions of Chapter 15.1 of the Terrestrial Code relevant to each product category covered by the measures at issue<sup>1198</sup>**

Lithuania <sup>1199</sup>	Poland <sup>1200</sup>	Latvia <sup>1201</sup>	Estonia <sup>1202</sup>	Relevant international standard (relevant product-specific provisions of Chapter 15.1 of the Terrestrial Code)
live pigs	live pigs	live pigs	live pigs	<p><u>Article 15.1.5.</u>  <b>Recommendations for importation from ASF-free countries, zones or compartments</b>                      For domestic pigs  <i>Veterinary Authorities</i> should require the presentation of an <i>international veterinary certificate</i> attesting that the <i>animals</i>:</p> <ol style="list-style-type: none"> <li>1) showed no clinical sign of ASF on the day of shipment;</li> <li>2) were kept in an ASF-free country, <i>zone</i> or <i>compartment</i> since birth or for at least the past 40 days.</li> </ol>
genetic material	genetic material	N/A	pig genetic material	<p><u>Article 15.1.8.</u>  <b>Recommendations for importation from ASF-free countries, zones or compartments</b>                      For semen of domestic pigs  <i>Veterinary Authorities</i> should require the presentation of an <i>international veterinary certificate</i> attesting that:</p> <ol style="list-style-type: none"> <li>1) the donor <i>animals</i>:                             <ol style="list-style-type: none"> <li>a) were kept in an ASF-free country, <i>zone</i> or <i>compartment</i> since birth or for at least 40 days prior to collection;</li> <li>b) showed no clinical sign of ASF on the day of collection of the semen;</li> </ol> </li> <li>2) the semen was collected, processed and stored in conformity with the provisions of Chapters 4.5 and 4.6.</li> </ol> <p><u>Article 15.1.10</u>  <b>Recommendations for importation from ASF-free countries, zones or compartments</b>                      For <i>in vivo</i> derived embryos of domestic pigs</p>

<sup>1198</sup> This Table contains the relevant product-specific provisions in Chapter 15.1 of Terrestrial Code and the products as identified in Russia's measures. As the European Union does not practice "compartmentalization", and has not sought to rely on this concept in its argumentation under Article 3 of the SPS Agreement, Article 15.1.6 and other compartment-specific provisions are excluded from Table 8.

<sup>1199</sup> See Exhibits EU-7, EU-8, EU-10, EU-11, EU-168 and RUS-28.

<sup>1200</sup> See Exhibits EU-9, EU-10, EU-11, EU-168 and RUS-29.

<sup>1201</sup> See Exhibits EU-12 and EU-169.

<sup>1202</sup> See G/SPS/N/RUS/76 (Exhibit EU-13) and Russia's letter to the European Union of 11 September 2014, FS-NV-8/17431 (Exhibit RUS-37).

Lithuania 1199	Poland <sup>1200</sup>	Latvia <sup>1201</sup>	Estonia 1202	Relevant international standard (relevant product-specific provisions of Chapter 15.1 of the Terrestrial Code)
				<p><i>Veterinary Authorities</i> should require the presentation of an <i>international veterinary certificate</i> attesting that:</p> <p>1) the donor females:</p> <p>a) were kept in an ASF-free country, <i>zone</i> or <i>compartment</i> since birth or for at least 40 days prior to collection;</p> <p>b) showed no clinical sign of ASF on the day of collection of the embryos;</p> <p>2) the embryos were collected, processed and stored in conformity with the provisions of Chapters 4.7. and 4.9., as relevant.</p>
finished products containing pork <sup>1203</sup>	finished products containing pork	finished products containing pork <sup>1204</sup>	end [finished] products containing pork <sup>1205</sup>	<p>Articles 15.1.14 and 15.1.15</p> <p><u>Article 15.1.14</u></p> <p><b>Recommendations for the importation of meat products of pigs (either domestic or wild), or for products of animal origin (from fresh meat of pigs) intended for use in animal feeding, for agricultural or industrial use, or for pharmaceutical or surgical use, or for trophies derived from wild pigs;</b></p> <p><i>Veterinary Authorities</i> should require the presentation of an <i>international veterinary certificate</i> attesting that the products:</p> <p>1) have been prepared:</p> <p>a) exclusively from <i>fresh meat</i> meeting the conditions laid down in Articles 15.1.12. or 15.1.13., as relevant;</p> <p>b) in a processing establishment:</p> <p>i) approved by the <i>Veterinary Authority</i> for export purposes;</p> <p>ii) processing only <i>meat</i> meeting the conditions laid down in Articles 15.1.12. or 15.1.13., as relevant;</p> <p>OR</p> <p>2) have been processed in an establishment approved by the <i>Veterinary Authority</i> for export purposes so as to ensure the destruction of the ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV.</p>

<sup>1203</sup> Through Letter of the Russian Federal Service for Veterinary and Phytosanitary Supervision No. FS-EN-8/5081, of 2 April 2014 (Exhibit EU-168), products excluded from the bans on imports from Lithuania and Poland were limited to cats and dogs' feeds which are thermally treated (temperature not lower than 70°C for not less than 20 minutes).

<sup>1204</sup> Excluding cats' and dogs' feeds which are thermally treated (temperature not lower than 70°C for not less than 20 minutes).

<sup>1205</sup> Excluding feed additives resulted from chemical or microbiological synthesis and heat-treated ready-made feedstuffs (minimum temperature: 70 degrees in Celsius, minimum treatment time: 20 minutes).

Lithuania 1199	Poland <sup>1200</sup>	Latvia <sup>1201</sup>	Estonia 1202	Relevant international standard (relevant product-specific provisions of Chapter 15.1 of the Terrestrial Code)
				<p><u>Article 15.1.15.</u>  <b>Recommendations for the importation of products of animal origin (from pigs, but not derived from fresh meat) intended for use in animal feeding and for agricultural or industrial use</b>  <i>Veterinary Authorities</i> should require the presentation of an <i>international veterinary certificate</i> attesting that these products:</p> <p>1) have been prepared:  a) exclusively from <i>fresh meat</i> meeting the conditions laid down in Articles 15.1.12. or 15.1.13., as relevant;  b) in a processing establishment:  i) approved by the <i>Veterinary Authority</i> for export purposes;  ii) processing only <i>meat</i> meeting the conditions laid down in Articles 15.1.12. or 15.1.13., as relevant;  OR  2) have been processed in an establishment approved by the <i>Veterinary Authority</i> for export purposes so as to ensure the destruction of the ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV.</p>
products from slaughter of wild boar	products from slaughter of wild boar	N/A	meat of wild boar	<p>Articles 15.1.13. and 15.1.14.</p> <p><u>Article 15.1.13</u>  <b>Recommendations for importation from ASF-free countries or zones</b>  <b>From fresh meat of wild pigs</b>  <i>Veterinary Authorities</i> should require the presentation of an <i>international veterinary certificate</i> attesting that:</p> <p>1) the entire consignment of <i>fresh meat</i> comes from <i>animals</i> which:  a) have been killed in an ASF-free country or zone;  b) have been subjected to a post-mortem inspection in accordance with Chapter 6.2. in an approved examination centre, and have been found free of any sign suggestive of ASF;  and, if the <i>zone</i> where the <i>animal</i> has been killed is adjacent to a <i>zone</i> with <i>infection in wild pigs</i>;  2) a sample has been collected from every <i>animal</i> killed and has been subjected to a virological test and a serological test for ASF, with negative results.</p>
N/A	N/A	pork	pork	Articles 15.1.12 and 15.1.14

Lithuania 1199	Poland <sup>1200</sup>	Latvia <sup>1201</sup>	Estonia 1202	Relevant international standard (relevant product-specific provisions of Chapter 15.1 of the Terrestrial Code)
		raw pork products	raw port products	<p><u>Article 15.1.12.</u>  <b>Recommendations for importation from ASF-free countries, zones or compartments</b>  For fresh meat of domestic pigs  <i>Veterinary Authorities</i> should require the presentation of an <i>international veterinary certificate</i> attesting that the entire consignment of <i>fresh meat</i> comes from <i>animals</i> which:</p> <ol style="list-style-type: none"> <li>1) have been kept in an ASF-free country, <i>zone</i> or <i>compartment</i> since birth or for at least the past 40 days, or which have been imported in accordance with Article 15.1.5. or Article 15.1.6.;</li> <li>2) have been slaughtered in an approved <i>abattoir</i>, have been subjected to ante- and post-mortem inspections in accordance with Chapter 6.2., and have been found free of any sign suggestive of ASF.</li> </ol>
horn-hoofed materials, leather, intestinal materials	horn-hoofed materials, leather, intestinal materials	N/A	horn-hoofed materials, leather, intestinal materials	We note that although the European Union and Russia agree that Articles 15.1.1-15.1.4 are the relevant standard for this product (European Union's response to Panel question No.272; Russia's response to Panel question No. 272), we consider that there is no Article in Chapter 15.1 which directly or specifically deals with these categories of products. As such, we consider them not to be subject to an international standard.
bristles	bristles	N/A	hair coat	<p><u>Article 15.1.16.</u>  <b>Recommendations for the importation of bristles (from pigs)</b>  <i>Veterinary Authorities</i> should require the presentation of an <i>international veterinary certificate</i> attesting that these products:</p> <ol style="list-style-type: none"> <li>1) come from an ASF-free country, <i>zone</i> or <i>compartment</i>; or</li> <li>2) have been processed in an establishment approved by the <i>Veterinary Authority</i> for export purposes so as to ensure the destruction of the ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV.</li> </ol>
feed for pigs	feed for pigs	N/A	all types of feed stuffs and feed additives for pigs	Article 15.1.14.
hunting trophies	hunting trophies	N/A	hunter's trophies	Article 15.1.14

Lithuania 1199	Poland <sup>1200</sup>	Latvia <sup>1201</sup>	Estonia 1202	Relevant international standard (relevant product-specific provisions of Chapter 15.1 of the Terrestrial Code)
not subjected to full taxidermy treatment	not subjected to full taxidermy treatment		derived from sensible animal species without full taxidermy treatment	

#### 7.6.1.3.3.1 Non-treated products

7.873. In section 7.5.1.3.4.2 above we pursued an inquiry into the meaning of the relevant international standards in the Terrestrial Code applicable to certain categories of non-treated products originating from ASF-free countries, zones or compartments. In particular, we examined the provisions applicable to live pigs (piglets for fattening and pigs for breeding), pork meat, and raw meat preparations. These include Articles 15.1.5, 15.1.12 and 15.1.14.

7.874. Acceptance of non-treated products covered by the articles in Chapter 15.1 listed in Table 8 above, is contingent upon the determination that the products in question come from ASF-free countries, zones, or compartments.

7.875. Articles 15.1.2, 15.1.3, and 15.1.4 provide the conditions that should be met for a country, zone or compartment to be considered free of ASF. In paragraphs 7.288-7.326 above, we examined in detail the meaning of those provisions in the Terrestrial Code. We will rely on our analysis provided above for our assessment of whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland "conform to" or are "based on" the standards articulated in those provisions.

#### 7.6.1.3.3.2 Treated products

7.876. The second category of products covered by the standards contained in the Terrestrial Code is treated products. In particular, Articles 15.1.14 (meat products of pigs), 15.1.15 (products of animal origin (from pigs, but not derived from fresh meat) intended for animal feeding and for agricultural or industrial use), and 15.1.16 (bristles from pigs) contain the standards applicable for trade in certain pig products that have been processed so as to ensure destruction of ASFV, regardless of whether they originate from animals in ASF-free countries, zones or compartments.

7.877. The specific conditions required by the standards applicable to treated products, as enshrined in Articles 15.1.14, 15.1.15 and 15.1.16, are that such pig products "have been processed in an establishment approved by the Veterinary Authority for export purposes so as to ensure the destruction of the ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV."

7.878. These standards lay down two cumulative requirements. The first has to do with the processing of the pig products concerned. Such processing should be done in an establishment approved by the veterinary authority for export purposes and it should be so as to ensure the destruction of the ASFV.

7.879. Chapter 15.1 does not indicate how the destruction of the ASFV can be achieved. This being a matter of science, we see the need to rely on certain elements on record of a scientific nature. Among them, we have reference to the responses from the OIE to the Panel questions, the responses from the experts to the Panel questions, experts' interventions during the meeting with the Panel, and the relevant exhibits submitted by the parties.

7.880. The OIE explained that Chapter 15.1 does not contain specific recommendations on the processing required to "ensure the destruction of the ASFV".<sup>1206</sup> While the Terrestrial Code does not currently contain specific recommendations on the inactivation of ASFV, there is some guidance in the OIE Technical Disease Card on ASF, which states that the virus may be inactivated by heat at 56°C for 70 minutes or 60°C for 20 minutes.<sup>1207</sup> The OIE explained that these recommendations are based on a 1977 study carried out in the United States, which is cited in the EFSA report, 2010.<sup>1208</sup> The OIE cautioned that the OIE Technical Disease Cards are not adopted standards. Rather, they are short summaries of scientific evidence. Attention must be paid to

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<sup>1206</sup> OIE responses to Panel's questions No. 8 and 9.

<sup>1207</sup> OIE, ASF Technical Disease Card (Exhibit RUS-186).

[http://www.oie.int/fileadmin/Home/eng/Animal\\_Health\\_in\\_the\\_World/docs/pdf/Disease\\_cards/AFRICAN\\_SWINE\\_FEVER.pdf](http://www.oie.int/fileadmin/Home/eng/Animal_Health_in_the_World/docs/pdf/Disease_cards/AFRICAN_SWINE_FEVER.pdf) (last updated on April 2013, last accessed on 20 November 2015).

<sup>1208</sup> OIE response to Panel questions No. 8 and 9.

scientific information that is published subsequent to the publication of a Technical Disease Card.<sup>1209</sup>

7.881. The experts advising the Panel indicated that studies undertaken using both the classical swine fever virus and the ASF virus concluded that both require similar times and temperatures for inactivation. Chapter 15.2 on classical swine fever provides details that are proposed for inclusion in the updated version of Chapter 15.1 that is currently in progress.<sup>1210</sup> More specifically, Drs Brückner and Thomson stated that it is accepted that heating virus-containing material to an internal temperature of 70° C will inactivate most animal pathogens including ASF virus.<sup>1211</sup> Thus, while the relevant international standards do not precise the time and duration of heat treatment that would ensure ASFV destruction, the Panel's experts have indicated that an internal temperature of 70° C would achieve this and should lead to acceptance of such heat-treated products.

7.882. This statement is in line with what is expressed in the 2010 EFSA scientific opinion, according to which ASFV "is inactivated by heat treatment at 60°C for 30 min and by many solvents that disrupt lipid bilayers and by commercial disinfectants."<sup>1212</sup> Furthermore, the cited scientific opinion indicates that "In products prepared by curing, such as Parma ham, viral infectivity was not demonstrated in ham 300 days after processing and curing. ... The virus survived for 140 days in Iberian and Serrano hams and for 112 days in loin."<sup>1213</sup> The scientific opinion concludes that no "infectious ASFV has been found in cooked or canned hams when processed at 70°C."<sup>1214</sup>

7.883. We further note that based on the evidence on record, Russia accepted certain forms of processing for allowing the imports of specific products originating from the European Union's territory outside the four affected EU member States, and, for the period between 6 February 2014<sup>1215</sup> and 7 April 2014,<sup>1216</sup> also from areas within Lithuania and Poland. Such categories of processing are (i) thermal treatment in a hermetically sealed container with index  $F_0$  3,00<sup>1217</sup>; (ii) thermal treatment at a minimum temperature of 80°C which should be provided over the entire layer of the meat; (iii) thermal treatment in a hermetically sealed container at 60°C during minimum of 4 hours, while the temperature in the centre should be kept during 30 minutes at a minimum of 70°C; (iv) natural fermentation and maturation within the time of not less than 9 months for boneless meat, thereby achieving the following indicators: Aw not more

<sup>1209</sup> OIE response to Panel questions No. 2, 8 and 9.

<sup>1210</sup> Expert responses to Panel Questions 16 and 17. The OIE indicated that the OIE had decided to update Chapter 15.2 Classical swine fever (CSF) then use this revised text as a model for the review of Chapter 15.1, taking account of the similarities in the epidemiology of the two diseases while respecting the specific features of each one. Chapter 15.2 contains specific articles on the requirements for the inactivation of CSF in swill (Article 15.2.22), in meat (Article 15.2.23), in casings and in skins and trophies (19). Consistent with this approach and recognising the need for Chapter 15.1 to contain more specific information on the inactivation of ASFV by processing, the ad hoc expert Group on African swine fever, which met in April 2014 recommended certain modifications and a draft revised text was distributed to Member Countries by the TAHSC in February 2015 (submitted to the Panel as Annex 1 to the OIE responses). The OIE clarified that this draft text is a proposal of an elected Commission but does not have the status of a standard at this time. Member Countries submitted extensive comments on the draft and the final wording of the adopted text cannot be predicted. However, the OIE indicated, it is expected that the revised Chapter 15.1 will contain specific recommendations on the inactivation of African swine fever virus, including in swill and in meat. The ad hoc Group on African swine fever reported that there is limited scientific information on the inactivation of the virus and that more research is needed on this topic. Information from a 2010 report of the European Food Safety Agency was used in the development of these recommendations (20). OIE Member Countries are encouraged to provide additional scientific evidence to assist in refining the proposals in the draft revised text circulated in February 2015.

<sup>1211</sup> Dr Thomson, Transcript, paras. 1.387 and Dr Brückner, Transcript, para. 1.388.

<sup>1212</sup> 2010 EFSA Scientific Opinion (Exhibit EU-24), p. 11.

<sup>1213</sup> 2010 EFSA Scientific Opinion (Exhibit EU-24), p. 12.

<sup>1214</sup> 2010 EFSA Scientific Opinion (Exhibit EU-24), p. 12.

<sup>1215</sup> Russia's letter to the European Union of 5 February 2014, FS-EN-8/1642 (Exhibit EU-162).

<sup>1216</sup> Exhibits EU-10, EU-11 and EU-168.

<sup>1217</sup> ( $F_0$  – calculated damaging effect on bacterial spores.  $F_0 = 3$  means that the coldest point of the product was heated enough to get the same damaging effect achieved with the help of immediate heating and cooling (121°C (250°F) in 3 minutes).

than 0,93 or pH not more than 6.0; and (v) for ham and fillets, treatment using natural fermentation and maturing during minimum 190 days for ham and 140 days for fillets.<sup>1218</sup>

7.884. The second requirement laid down by the standards is that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV.

#### **7.6.1.3.4 Whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland "conform to" the relevant international standards**

7.885. We recall that the panel in *India – Agricultural Products* examined first whether India's measures were "based on" the international standard before going into the question of whether they conformed to such a standard. That panel considered this to be the appropriate order of analysis under Article 3 of the SPS Agreement because the "based on" threshold in Article 3.1 is lower than the "conform to" threshold in Article 3.2.<sup>1219</sup> In our view, this approach is not appropriate in these proceedings.

7.886. We consider that it is appropriate for us to first examine the more stringent "conform to" threshold. As we have explained above, a challenged measure may be "based on" the international standard with respect to one element, but not with respect to another element. This, however, does not hold true in respect of a challenged measure "conforming to" the same international standard. The Appellate Body's guidance is very clear in indicating that a measure that conforms to an international standard would embody the international standard completely, and, for practical purposes, convert it into a municipal standard.<sup>1220</sup>

7.887. We therefore consider that it is most appropriate for us to first examine whether the import bans on the products at issue from Estonia, Latvia, Lithuania, and Poland "conform to" the international standards contained in the Terrestrial Code. If they are found not to conform to the standards, we would proceed to examine whether such measures are "based on" those standards. We turn to the first of these questions.

7.888. Prior panels and the Appellate Body have not been called upon to delve in detail into the meaning of "conform[ity] to" the relevant international standard for the purposes of Article 3.2 of the SPS Agreement. Pursuant to the terms of Article 3.2, a finding that Russia's measures "conform to" relevant international standards would establish a presumption of consistency of Russia's measures with its relevant SPS obligations, and thus would have implications for this Panel's disposition of other claims in this dispute. Should we find "conformity to", as we understand that this presumption is "rebuttable"<sup>1221</sup>, we would further need to consider how to assess whether or not this presumption has been rebutted in respect of each of the relevant provisions. In this respect, Russia asserts that, as the bans on the products at issue from Estonia, Latvia, Lithuania, and Poland conform to the Terrestrial Code, they benefit from a presumption of consistency with the relevant provisions of the SPS Agreement pursuant to Article 3.2, which Russia identifies as Articles 2.2, 2.1, 5.2, 5.3, 5.4, 5.6, 6.1, 6.2 and 6.3.<sup>1222</sup> The European Union posits that the relevant provisions, closely related to the subject in an appropriate way, are those related to risk assessment and scientific evidence, but not to discrimination.<sup>1223</sup> The parties thus agree that SPS provisions relating to discrimination would not be classified as "relevant" in this context.

7.889. On their face, none of the bans on the imports of the products at issue from Estonia<sup>1224</sup>, Latvia<sup>1225</sup>, Lithuania<sup>1226</sup>, and Poland<sup>1227</sup> embody the relevant international standards contained in

<sup>1218</sup> Russia's letter to the European Union of 5 February 2014, FS-EN-8/1642 (Exhibit EU-162).

<sup>1219</sup> Panel Report, *India – Agricultural Products*, para. 7.203.

<sup>1220</sup> Appellate Body Report, *EC – Hormones*, para. 170. See Panel Report, *India – Agricultural Products*, paras. 7.197 and 7.202.

<sup>1221</sup> Appellate Body Report, *EC – Hormones*, para. 170.

<sup>1222</sup> Russia's first written submission, para. 216.

<sup>1223</sup> European Union's response to Panel question No. 118, paras. 237 – 239.

<sup>1224</sup> G/SPS/N/RUS/76 (Exhibit EU-13) and Letter from the Russian Veterinary Service to DG SANCO, FS-NV-8/17431, 11 September 2015 (Exhibit RUS-37).

<sup>1225</sup> G/SPS/N/RUS/64 (Exhibit EU-12) and Russia's letter of instruction of 27 June 2014, FS-NF-8/11315 (Exhibit EU-169).



the Terrestrial Code applicable to both treated and non-treated pig products. While the provisions of Chapter 15.1 of the Terrestrial Code contain specific recommendations as to how safe trade can happen in respect of certain pig products, the measures applicable to the four affected EU member States provide bans on the imports of most of those products. For example, whereas Article 15.1.15 would permit imports of pig products for use in animal feeding if these have been processed so as to ensure the destruction of the ASFV, Russia applies an unconditional ban on these products. Similarly, Article 15.1.16 would permit imports of bristles from an ASF-free zone subject to processing to destroy the ASFV, but these are unconditionally banned by Russia. In our view, the challenged measures cannot be construed as embodying the relevant international standards.

7.890. Based on the foregoing, we find that the import bans on the products at issue from Estonia, Latvia, Lithuania, and Poland do not conform to the relevant international standards contained in the Terrestrial Code, and thus are inconsistent with Article 3.2 of the SPS Agreement.

#### **7.6.1.3.5 Whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are "based on" the relevant international standards**

##### **7.6.1.3.5.1 Introduction**

7.891. We recall the distinction that we have identified in Chapter 15.1 of the Terrestrial Code in respect of the standards applicable to treated and non-treated products. Based on that distinction, we will undertake an independent examination on whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are "based on" the standards applicable to each of those categories of products.

##### **7.6.1.3.5.2 Treated products**

7.892. In respect of the measures applied to Estonia, Latvia, Lithuania, and Poland, for treated products, the European Union asserts that the relevant Terrestrial Code provisions (Articles 15.1.14 through 16) permit trading of pork products that have been processed in an approved establishment so as to ensure the destruction of the ASFV. To the extent that Russia's measures ban the importation of products addressed in Articles 15.1.14 through 16 from Estonia, Latvia Lithuania and Poland, regardless of whether they have been subject to any form of treatment, they are in contradiction of the relevant international standards contained in the Terrestrial Code. Thus, they are not in conformity with these standards.<sup>1228</sup>

7.893. According to Russia, its measures "conform to" the Terrestrial Code. The exporting country bears the burden of demonstrating that the necessary precautions were taken, which the European Union has failed to do in respect of exports from Estonia, Latvia, Lithuania, and Poland.<sup>1229</sup> Russia further asserts that it is able to accept products from ASF-infected countries that meet OIE-consistent regionalization, compartmentalization and/or heat-treated standards.<sup>1230</sup>

7.894. The issue before the Panel is whether Russia's bans on treated products from Estonia, Latvia, Lithuania, and Poland, are "based on" the relevant international standard in respect of products processed so as to ensure destruction of ASFV.

7.895. When discerning the meaning of the international standards articulated in the relevant Terrestrial Code provisions (Articles 15.1.14-.16),<sup>1231</sup> we noted that those Articles envisage trading

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<sup>1226</sup> G/SPS/N/RUS/48 (Exhibit EU-7), G/SPS/N/RUS/48/Add.1 (Exhibit EU-8), G/SPS/N/RUS/48/Add.2 (Exhibit EU-10), Letter from the Russian Veterinary Service to DG SANCO, FS-EN-8/1023, 25 January 2015 (Exhibit RUS-28) and OIE WAHIS interface (Exhibit RUS-168).

<sup>1227</sup> G/SPS/N/RUS/49 (Exhibit EU-9), G/SPS/N/RUS/49/Add.1 (Exhibit EU-11), Letter from Russian Veterinary Service, FS-NV-8/2972, 27 February 2014 (Exhibit RUS-29) and OIE WAHIS interface (Exhibit RUS-168).

<sup>1228</sup> European Union's first written submission, paras. 132-135 and 140.

<sup>1229</sup> Russia's opening statement at the first meeting of the Panel, para. 37; and second written submission, para. 29.

<sup>1230</sup> Russia's response to Panel question No. 115, para. 206;

<sup>1231</sup> See section 7.6.1.3.3.2 above.

of pork products that have been processed in an approved establishment so as to ensure the destruction of the ASFV. The provisions of the Terrestrial Code relating to the processing of products indicate that the import recommendations are not related to the ASF status of a particular country, zone, or compartment, but rather to the certification that an adequate processing method has been undertaken to ensure destruction of ASFV. These provisions foresee that importation should be permitted if requisite processing has been undertaken and certified. As mentioned above, the Panel's experts have indicated that an internal temperature of 70° C would achieve this and should lead to acceptance of such heat-treated products.<sup>1232</sup>

7.896. In contrast, Russia imposed general import bans on treated products from Estonia, Latvia, Lithuania, and Poland.<sup>1233</sup> Furthermore, Russia exempts from the import ban "finished feed for cats and dogs" (Latvia, Lithuania and Poland) and synthesized feed additives and heat treated ready-made feedstuffs (Estonia).<sup>1234</sup>

7.897. Russia has questioned the effectiveness of the processing plants within the four affected EU member States in ensuring the destruction of ASFV and in taking the necessary precautions after processing to avoid contact of the product with any source of ASFV.<sup>1235</sup> The European Union has rejected Russia's claim and provided certain information in that respect through a letter dated 4 April 2014.<sup>1236</sup>

7.898. We note that Article 15.1.14 of the Terrestrial Code established the processing requirement to ensure destruction of ASFV of products made from fresh pork that are intended for animal feeding (i.e. cat and dog food) and does not differentiate between these and heat-treated products for human consumption with regard to virus inactivation. The same is true with respect to Article 15.1.15 for products not made from fresh pork. Dr Brückner and Professor Penrith confirmed that there would be no reason for the heat treatment to differ in respect of pet feed.<sup>1237</sup> Russia has provided no justification for accepting the adequacy of the heat-treatment for certain products, while at the same time excluding the importation of the other heat-treated products at issue. Moreover, we recall that between 6 February 2014 and 7 April 2014, Russia accepted the imports of treated products from Lithuania and Poland, even when there had been ASF outbreaks in the territory of these EU member States.<sup>1238</sup>

7.899. Processing adequate to ensure the destruction of ASFV should permit safe international trade in the products concerned pursuant to the relevant international standards, rather than the imposition of an import ban. However, to the extent that Russia's measures at issue ban the products addressed in Articles 15.1.14 through 16, they depart fundamentally from the relevant international standards. In our view, this constitutes a contradiction, which according to the applicable legal test would lead to the conclusion that the international standard has not been used "as a basis for" the challenged measures.

7.900. Based on the foregoing we find that the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, to the extent they apply to treated products, are not "based on" the relevant international standards and are thus inconsistent with Article 3.1 of the SPS Agreement.

#### **7.6.1.3.5.3 Non- treated products**

7.901. The European Union argues that the bans imposed on the products at issue contradict the relevant provisions of the Terrestrial Code, and therefore do not conform to the relevant international standards.<sup>1239</sup>

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<sup>1232</sup> Transcript, paras. 1.387 – 1.388.

<sup>1233</sup> See para. 7.889 above. Also note that, as described in para. 7.883, in the period between 6 February 2014 and 7 April 2014, Russia accepted imports of treated products from Lithuania and Poland.

<sup>1234</sup> As indicated in Tables 1 and 4 above.

<sup>1235</sup> Russia's second written submission, para. 29. See also Exhibit RUS-209.

<sup>1236</sup> See Exhibit RUS-56.

<sup>1237</sup> Reference to Expert responses to Panel question 17.

<sup>1238</sup> See para. 7.871 above. See Exhibits EU-162 and EU-10, EU-11, and EU-168.

<sup>1239</sup> European Union's first written submission, paras. 126, 131, 133-138, and 140.

7.902. Russia argues that it has objectively rejected the ASF-free zones claimed by the European Union to exist, relying on the relevant provisions of the Terrestrial Code. Russia argues that its measures at issue are based on the relevant international standards.<sup>1240</sup>

7.903. As a result of our examination of the meaning of the relevant international standards applicable to non-treated products, we come to the conclusion that before comparing the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland with those standards for the purposes of determining whether those measure are "based on" them, we consider that it is appropriate and instructive for us to turn to our examination of the European Union's claims under Article 6 of the SPS Agreement.

7.904. We consider this approach to be appropriate in the circumstances of the present case, where our conclusions under Article 3.1 of the SPS Agreement will have no impact on the complainant's burden of proof in respect of claims brought under other provisions of the SPS Agreement (i.e. Article 6). We recall our finding that the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland do not "conform to" the relevant international standards. In that context, we are not barred from following this approach. That would not be the case when a panel is examining a justification that the challenged measures "conform to" the relevant international standard pursuant to Article 3.2, because an affirmative finding of such justification would raise a presumption of consistency with the relevant provisions of the SPS Agreement and of the GATT 1994.<sup>1241</sup>

7.905. Therefore, we will suspend our analysis of the parties' claims under Article 3 in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, to the extent they apply to non-treated products, being "based on" the international standards applicable to non-treated products, with a view to informing our analysis through an examination of such measures under Article 6 of the SPS Agreement. Following our analysis of the consistency of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland with Article 6, we will resume our analysis of whether those measures, to the extent they apply to non-treated products, are "based on" the relevant international standards applicable to non-treated products and provide our findings in that respect. We now turn to examine the European Union's claims under Article 6 in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.

## 7.6.2 Claims under Articles 6.1, 6.2, and 6.3 of the SPS Agreement

### 7.6.2.1 Main arguments of the parties

#### 7.6.2.1.1 European Union

7.906. The European Union claims that the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are inconsistent with Articles 6.1 and 6.2, because Russia has not ensured, and does not ensure, that the measures at issue are adapted to the sanitary characteristics of the area from which the products at issue originate and to which they are destined. The European Union further contends that these measures fail to take into account, *inter alia*, the level of prevalence or absence of ASF, the existence of eradication and control programs (immediately implemented in accordance with international standards laid down by the OIE), and appropriate criteria or guidelines developed by the relevant international organizations.<sup>1242</sup>

7.907. Regarding the first sentence of Article 6.2, the European Union argues that Russia failed to recognize the concepts of disease-free areas with respect to ASF in the European Union.<sup>1243</sup> The European Union claims that this is evidenced by Russia's application of four indiscriminate bans on the products at issue from Estonia, Latvia, Lithuania, and Poland.<sup>1244</sup> With respect to the second sentence of Article 6.2, the European Union further argues that these bans were applied without taking into account relevant factors such as geography, ecosystems, epidemiological surveillance

<sup>1240</sup> Russia's first written submission, paras. 78-79, and 214.

<sup>1241</sup> See Appellate Body Report, *EC – Hormones*, paras. 102 and 170.

<sup>1242</sup> European Union's first written submission, para. 216.

<sup>1243</sup> European Union's first written submission, para. 215.

<sup>1244</sup> European Union's first written submission, para. 210.

and the effectiveness of sanitary controls.<sup>1245</sup> The European Union claims that given its large geographical territory, the geographical factor must be taken into account and highlights its control measures in this regard. The European Union outlines the various steps taken to control ASF in live pigs and wild boars.<sup>1246</sup>

7.908. The European Union submits that with respect to Article 6.3, it has provided Russia with information beyond what is necessary for objectively demonstrating that disease-free areas or areas of low disease prevalence are and are likely to remain disease-free areas or areas of low disease prevalence, respectively.<sup>1247</sup>

#### 7.6.2.1.2 Russia

7.909. Russia's defence in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland is premised on compliance with Articles 6.1, 6.2 and 6.3<sup>1248</sup> because of its objective decision not to recognize the various European Union zones, based on the appropriate Terrestrial Code benchmarks and the more general criteria outlined in Article 6 of the SPS Agreement.<sup>1249</sup> According to Russia, the Panel should examine if Russia's decision not to recognize the European Union's zones is objectively justifiable, rather than engaging in a *de novo* examination of that decision.<sup>1250</sup> Russia argues that the conformity of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland with the Terrestrial Code (as provided for under Article 3.2) vests them with a presumption of consistency, which the European Union has failed to rebut.<sup>1251</sup>

7.910. In the alternative, Russia argues that the European Union failed to act consistently with the provisions set out in Article 6.3 of the SPS Agreement in relation to the requested recognition of zones, and as a consequence is unable to establish that Russia acted inconsistently with Articles 6.1 and 6.2 of the SPS Agreement.<sup>1252</sup>

7.911. Russia also posits that independently of Article 6.3, the European Union failed to demonstrate that Russia violates Article 6.2, because, among other things, Russia has in place laws (e.g. CU Decision No. 317 and the 2006 Memorandum) that explicitly recognize the concept of regionalization.<sup>1253</sup>

#### 7.6.2.2 Main arguments of the third parties

##### 7.6.2.2.1 Australia

7.912. Australia asserts that it agrees with Russia that the first sentence of Article 6.2 of the SPS Agreement requires only the recognition of the *concept of* "pest- or disease-free areas and areas of low pest or disease prevalence". Australia however, also stresses that the "Appellate Body [*sic*] in *India - Agricultural Products* went on to find '... in our view, to comply with Article 6.2, SPS measures adopted by WTO Members must at a minimum not deny or contradict the recognition of the concepts of such areas when these concepts are relevant with respect to the disease at issue'".<sup>1254</sup>

<sup>1245</sup> European Union's first written submission, para. 210.

<sup>1246</sup> European Union's first written submission, paras. 211-214.

<sup>1247</sup> European Union's first written submission, para. 218.

<sup>1248</sup> Russia's second written submission, paras. 50-56. Russia contends that any objective assessment of an ASF-free zone, consistent with the factors identified in Articles 6.1 and 6.2 of the SPS Agreement, would have to include the assessment of the zoning principles as set out in the Terrestrial Code Article 4.3.3 as well as the related principles in Article 5.3.7.

<sup>1249</sup> Russia's second written submission, para. 127.

<sup>1250</sup> Russia's second written submission, para. 49.

<sup>1251</sup> Russia's second written submission, paras. 128-129. See also response to Panel question No. 118, paras. 215-224.

<sup>1252</sup> Russia's second written submission, paras. 130-132.

<sup>1253</sup> Russia's second written submission, paras. 133-141.

<sup>1254</sup> Australia's third-party submission, para. 19 (citing Panel Report, *India – Agricultural Products*, para. 7.698 (not yet adopted at the time of the filing of the submission)).

7.913. Australia emphasizes that it will be necessary for the Panel to determine whether Russia's measures, notified or otherwise, operate in a manner such as to deny or contradict the recognition of such areas. Such a finding may be informed by the Panel's other findings under Article 3 and Article 5 of the SPS Agreement.<sup>1255</sup>

#### 7.6.2.2.2 Brazil

7.914. Brazil argues that the main question under discussion in this topic is whether it is possible to rightfully impose an import prohibition (country and/or EU-wide ban) if the importing Member considers that the measures adopted by the exporting Member were not sufficient to establish disease- or pest-free zones or compartments.<sup>1256</sup>

7.915. Brazil asserts that adaptation to regional conditions in the context of Article 6.1 of the SPS Agreement entails taking into account, *inter alia*, appropriate criteria or guidelines which may be developed by the relevant international organizations.<sup>1257</sup>

7.916. Brazil argues that a Member has the right to consider that the measures adopted by another Member are not satisfactory for the determination of the containment zone, if (i) there was no conformity with the standard in the sense of Article 3.2 or (ii) the level of protection sought by the importing Member is higher than the one established by the standard. In Brazil's view, if an importing Member considers that the measures adopted by the exporting Member do not conform to the international standard in the sense that the measures adopted do not "embody the international standard completely", then there could be a basis for the establishment of an import prohibition. On the other hand, a Member may choose to adopt a higher level of protection and decide that the mechanism established by the exporting country is not sufficient according to its own appropriate level of protection. Brazil points out that if this is the case, a risk assessment to provide scientific justification must be elaborated to justify the SPS measure.<sup>1258</sup>

#### 7.6.2.2.3 Norway

7.917. Norway argues that in examining the claims relating to regionalization, the Panel should first assess whether Russia properly has recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, and whether any determination of such areas is based on relevant factors, including geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary and phytosanitary control. Second, the panel should assess whether Russia has ensured that the measures at issue in this case are adapted to the SPS characteristics of the affected area, as set out in Article 6.1. According to the second sentence of this provision, it should be considered whether Russia in its assessment of the SPS characteristics of a region has taken into account relevant factors, such as the level of prevalence of African Swine Fever, the existence of eradication and control programmes, and appropriate criteria or guidelines developed by the relevant international organizations.

7.918. Norway emphasized that that a finding that the respondent party has not recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, will lead to a finding that this party has not ensured that its measures are adapted to the SPS characteristics of the those areas pursuant to the first sentence of Article 6.1, and that conversely, where there is a finding that the respondent party *has* recognised these concepts, a consideration must be undertaken, of whether this party has ensured that its measures are adapted to the SPS characteristics of the affected areas and whether it took into account relevant factors when assessing the SPS characteristics of a region, consistent with Article 6.1.<sup>1259</sup>

#### 7.6.2.2.4 United States

7.919. The United States argues that the provisions of Article 6 contain separate but inter-related obligations that must be read together in context. The United States emphasizes that while the

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<sup>1255</sup> Australia's third-party submission, para. 20.

<sup>1256</sup> Brazil's third-party submission, para. 4.

<sup>1257</sup> Brazil's third-party submission, para. 5.

<sup>1258</sup> Brazil's third-party submission, paras. 7-9.

<sup>1259</sup> Norway's third-party submission, paras. 27-30.

first sentence of Article 6.1 of the SPS Agreement imposes an obligation with respect to measures, the first sentence of Article 6.2 requires recognition of concepts, i.e. pest- or disease-free areas and areas of low pest or disease prevalence.<sup>1260</sup>

7.920. The United States highlights that neither the obligations in the first sentence of Article 6.2 of the SPS Agreement, nor those in Article 6.1, arise only following a request under Article 6.3 to recognize a specific area as a pest- or disease-free area or area of low pest or disease prevalence.<sup>1261</sup>

### **7.6.2.3 Analysis by the Panel**

#### **7.6.2.3.1 Introduction**

7.921. The issues before the Panel are whether Russia's bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are consistent with Articles 6.1 and 6.2 of the SPS Agreement, and whether the European Union has satisfied the requirements of Article 6.3 of the SPS Agreement.

7.922. In section 7.5.3.2 above, we have examined the text of Articles 6.1, 6.2, and 6.3 of the SPS Agreement, the relationship between these provisions, the order in which to analyse them, and the legal test corresponding to each of these provisions. We then examined the EU-wide ban in light of the guidance identified in those sections. To avoid unnecessary repetition, we will not replicate the general guidance on which we will base our assessment of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. Rather, we will include cross-references to the relevant sections and findings, when necessary.

7.923. We recall that as explained in paragraph 7.365 above that it may be difficult for any exporting country to seek recognition of a disease-free area in the absence of a regulatory scheme in the importing country that permits the recognition of such a concept. Similar to the analytical process the Panel undertook in that section of the report, the Panel will first examine whether Russia recognizes the concept of disease-free areas within the meaning of Article 6.2 of the SPS Agreement. Should we find that Russia recognizes such a concept, we will proceed to examine whether the European Union provided the necessary evidence thereof in order to objectively demonstrate to Russia that such areas are, and are likely to remain, pest- or disease-free in accordance with Article 6.3. Informed by the Panel's findings on this issue, we will continue by considering 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 originated and to which they are destined.

#### **7.6.2.3.2 Whether Russia recognizes the concept of pest- or disease-free areas and areas of low pest or disease prevalence pursuant to the first sentence of Article 6.2**

7.924. In section 7.5.2.3.4 above we examined this question in respect of the EU-wide ban. Our reasoning in that section is grounded on the recognition of the concepts foreseen in the first sentence of Article 6.2 of the SPS Agreement. As part of our analysis, we addressed the European Union's argument that the recognition of such concepts may not be done in the abstract, but rather that it requires such recognition in the application of the challenged SPS measure.

7.925. The result of our analysis led us to find that Russia recognizes the concepts mentioned in Article 6.2 in respect of ASF, and as a consequence the EU-wide ban is not inconsistent with Russia's obligations under Article 6.2 of the SPS Agreement. We consider that such finding is equally applicable with respect to the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. We therefore find that such measures are not inconsistent with Russia's obligations under Article 6.2 of the SPS Agreement.

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<sup>1260</sup> United States' third-party submission, paras. 3-6.

<sup>1261</sup> United States' third-party submission, paras. 7-11.

7.926. Following this finding we turn to examine the European Union's compliance with the provisions of Article 6.3 in order to have findings that will inform our analysis of Russia's obligations under Article 6.1.

### **7.6.2.3.3 Whether the European Union objectively demonstrated that there are disease-free areas or areas of low disease prevalence within the territory of Estonia, Latvia, Lithuania, and Poland, pursuant to Article 6.3 of the SPS Agreement**

#### **7.6.2.3.3.1 Introduction**

7.927. The European Union argues that since the detection of ASF in wild boar in Lithuania in January 2014 the European Union has provided Russia information which it considers as beyond what is necessary for objectively demonstrating that disease-free areas or areas of low disease prevalence are, and are likely to remain, disease-free areas or areas of low disease prevalence, respectively.<sup>1262</sup> The European Union contends that it has provided in a timely manner all the necessary information with respect to its ASF regionalization measures in Lithuania, Poland, Latvia and Estonia, to objectively demonstrate to Russia that the rest of these EU member States and the rest of the European Union, except Sardinia, are and are likely to remain disease-free areas; and that reasonable access has been given to Russia for inspection, testing and other relevant procedures. The European Union asserts that Russia failed to conclude its recognition process without undue delays, in violation of its obligations under Article 6 of the SPS Agreement.<sup>1263</sup>

7.928. The European Union opines that under Article 6.3 of the SPS Agreement, an importing Member is under no obligation to automatically accept a regionalization proposal from the exporting Member. However, its decision must take into account objective factors such as those enunciated in the second sentence of Article 6.2 of the SPS Agreement: geography, ecosystems, epidemiological surveillance and the effectiveness of sanitary controls, and that in case of disagreement between the importing and the exporting Members, the exporting Member can refer the dispute to the WTO adjudicating bodies. According to the European Union, a Panel presented with such a case has the duty to make an objective assessment of the matter before it according to Article 11 of the DSU.<sup>1264</sup>

7.929. Russia argues that the European Union has failed to objectively demonstrate to Russia that the alleged ASF-free areas in the four affected EU member States "are, and are likely to remain, pest- or disease-free areas", in accordance with Article 6.3 of the SPS Agreement.<sup>1265</sup> In Russia's view, the European Union has failed to effectively establish ASF containment zones in accordance with the OIE guidelines and as such, the European Union has failed to demonstrate that ASF-free regions "are and are likely to remain, pest- or disease-free areas," and the entirety of the four affected EU member States should be considered ASF-infected.<sup>1266</sup> Russia argues that the European Union failed to provide timely, comprehensive and accurate information relevant for assessing its zones and its ASF-control measures, in a manner inconsistent with Article 6.3 of the SPS Agreement and Terrestrial Code Article 5.3.7. Russia also indicates that the European Union's legal framework is relevant as a theoretical matter and is similar to Russia's legislation, however, it does not contain information about the effectiveness or the extent to which the ASF control measures described therein have been implemented.<sup>1267</sup> Furthermore, the European Union withheld national eradication plans from Russia, until March 2015 and May 2015 despite acknowledging that these reports contained highly relevant information.<sup>1268</sup>

#### **7.6.2.3.3.2 Legal test**

7.930. In section 7.5.2.3.5.2 above we explained the legal test applicable to our examination of the European Union's claims under Article 6.3 of the SPS Agreement. As explained below, we will follow the same legal test in our examination of the European Union's claims under Article 6.3 in

<sup>1262</sup> European Union's first written submission, paras. 218 and 219 - 232.

<sup>1263</sup> European Union's first written submission, para. 236.

<sup>1264</sup> European Union's response to Panel question No. 112, paras. 219-220.

<sup>1265</sup> Russia's first written submission, para. 236.

<sup>1266</sup> Russia's first written submission, para. 237.

<sup>1267</sup> Russia's comments to the European Union's response to Panel question No. 322, para. 193.

<sup>1268</sup> See Russia's second written submission, paras. 58-77.

respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. We recall that this examination referred to the assessment of what is the necessary evidence to objectively demonstrate both the existence of ASF-free areas and that those areas are likely to remain so. In our view, the differences in the ASF situation in each of the four affected EU member States, as well as in the type of information that the European Union provided in respect of each of the affected EU member States, justify that we examine the information provided by the European Union to Russia separately in respect of each of the four affected EU member States. We recall that some of the categories of information are common to the four affected EU member States. Therefore, we will address the categories of common information where relevant and indicate when we will pursue our assessment specific to each of the four EU member States.

#### **7.6.2.3.3.3 Information provided by the European Union to Russia from January 2014**

7.931. In section 7.5.2.3.5.3 above we provide a detailed account of the information, according to what is on record, which the European Union provided to Russia from January 2014. This information, together with other relevant exhibits on record, is the basis for the assessment that we undertake in respect of whether the European Union provided to Russia the necessary evidence to objectively demonstrate that there are areas within Estonia, Lithuania, Latvia, and Poland free of ASF and likely to remain so. In the next section we undertake such an examination.

#### **7.6.2.3.3.4 Panel's assessment of the evidence provided by the European Union to Russia**

##### ***Introduction***

7.932. In paragraph 7.395 above, we indicated that among the "necessary evidence" required to "objectively demonstrate" the disease status in a particular area, pursuant to Article 6.3 of the SPS Agreement, a Member should provide evidence of (i) geography; (ii) ecosystems; (iii) epidemiological surveillance; (iv) effectiveness of sanitary or phytosanitary 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. We also noted that this is an illustrative list, and that these elements are not cumulative. Furthermore, some of these elements are interrelated. For example, geography may not be a relevant factor in the spread of all pests or diseases, and control and eradication programmes are relevant only when a particular disease is known to exist within an area. At the same time, the level of prevalence of a specific disease can only be established through effective surveillance programmes.

7.933. We recall that the preceding categories and the amount of evidence that a Member should present in support of the disease status of a particular area needs to be determined on a case-by-case basis. Therefore, before examining to what extent the European Union provided evidence in respect of each of these categories, we will review certain aspects relevant to this dispute that will enable us to identify in a manner more specific to this dispute the clusters of information the European Union should have provided to Russia in order to objectively demonstrate that there are areas within its territory free of ASF and likely to remain so.

7.934. A particularly relevant aspect of what categories of evidence are germane to a particular dispute has to do with the nature of the disease and the type of characteristics that an exporting Member is claiming to prevail within an area of its territory. The European Union claims that it has objectively demonstrated that an area within its territory is free of ASF and is likely to remain so.<sup>1269</sup> In section 7.5.2.3.5.4 we analysed the information that the European Union provided in support of the absence of ASF in those areas of the European Union outside Estonia, Latvia, Lithuania, and Poland (those EU member States affected with ASF outbreaks throughout 2014). In this section we will focus our examination on the alleged ASF-free character of certain areas within those EU member States affected with ASF.

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<sup>1269</sup> European Union's opening statement at the second meeting of the Panel, paras. 46-54.



7.935. The difference in approach is primarily based on the distinct geographic scope of application of the challenged measures. In our view, the EU-wide ban, following the imposition of the ban on the imports of the products at issue from Estonia, Lithuania, Latvia and Poland, is not applicable to the imports of the products at issue from those territories. In this vein, we consider that the most appropriate analytical approach in considering the situation as at 11 September 2014, is to separately examine the "necessary evidence" that the European Union should have submitted to Russia to "objectively demonstrate" that there are areas within the four affected EU member States that are disease-free and likely to remain so. To do this, we will take into account that among the SPS characteristics of certain parts in the countries where the areas under examination are located is the presence of ASF.

7.936. We recall that according to the definition of pest- or disease-free area in paragraph 6 of Annex A of the SPS Agreement

a pest- or disease-free area may surround, be surrounded by, or be adjacent to an area – whether within part of a country or in a geographic region which includes parts of all of several countries – in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.

7.937. We will keep in mind in pursuing our examination of whether the European Union provided to Russia the necessary evidence to objectively demonstrate the existence of ASF-free areas within each of the affected EU member States and that those areas are likely to remain ASF-free. In particular, we note that pursuant to this definition of a disease-free area, the presence of a disease in the territory of a country does not imply the impossibility of establishing disease free areas that surround, are surrounded by, or are adjacent to an area in which a specific disease is known to occur but is subject to control measures.

7.938. In paragraph 7.404 above, we described the type of evidence that the European Union should provide to Russia in respect of demonstrating two aspects of the ASF-status of areas within its territory. The first type of evidence refers to those areas being ASF-free. The second refers to the likelihood of those areas remaining free of ASF. We find guidance in those observations to engage in our assessment of what is the necessary evidence the European Union should have provided to Russia to objectively demonstrate the existence of ASF-free areas, which are likely to remain so, within the territories of Estonia, Latvia, Lithuania, and Poland.

7.939. Based on the foregoing, we consider that the European Union should have provided to Russia necessary evidence in respect of (i) geography; (ii) epidemiological surveillance of ASF; (iii) the effectiveness of sanitary or phytosanitary controls in respect of ASF; (iv) regarding ecosystems, in particular the presence of ASF in wildlife and the patterns of behavioural ecology in wildlife; (v) the level of prevalence of ASF; and (vi) the existence of eradication or control programmes. Furthermore, the information provided by the European Union to Russia in respect of these categories should objectively demonstrate that there are ASF-free areas within each of the four affected EU member States.

7.940. In paragraphs 7.412 and 7.413 above we identified the categories of necessary evidence that the European Union should have provided to Russia to objectively demonstrate that ASF-free areas are likely to remain so. These categories include the necessary evidence in respect of the effectiveness of its control measures on ASF (including information on their effectiveness in the real world). For this purpose, we will address the information provided on: (i) the surveillance programme; (ii) diagnostic analysis; (iii) measures for early detection and response, including movement control; and (iv) eradication of the disease.

7.941. We are mindful of the difference in time in respect of the occurrence of ASF outbreaks in the four affected EU member States. We recall that the first outbreak in Lithuania was confirmed on 24 January 2014<sup>1270</sup>, the first outbreak in Poland was confirmed on 17 February 2014<sup>1271</sup>, the

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<sup>1270</sup> Communication of 24 January 2014: African swine fever (ASF) in two wild boars in Lithuania, in Salcininkai and Varena Regions, at the border with Belarus (Exhibit EU-132). See also ASF cases in the

first outbreak in Latvia was confirmed on 26 June 2014<sup>1272</sup>, and the first outbreak in Estonia was confirmed on 8 September 2014.<sup>1273</sup> We also recall our observation in respect of our analysis of the European Union's obligation under Article 6.3 with respect to the EU-wide ban, that we would examine the European Union's obligation in the time-frame between the adoption of the EU-wide ban and the cut-off date of 11 September 2014.<sup>1274</sup> We have examined each measure individually. Moreover, in the particular circumstances of this case and in light of the temporal considerations we have outlined above<sup>1275</sup>, we have decided to undertake a composite and progressive examination of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. Where relevant, we will refer to particular information pertaining to each one of the four affected EU member States.

***Assessment of common evidentiary elements regarding the ASF-free areas within the four affected EU member States***

7.942. The first type of information relates to geography. In our view, this category includes information relative to the place where the outbreaks of ASF have occurred, as well as to any other relevant geographic features of the territories which are claimed to be free of ASF.

7.943. According to the evidence on record, between 24 January 2014 and 27 June 2014, the European Union sent Russia's Permanent Mission in Brussels communications reporting the occurrence of new ASF outbreaks in the affected EU member States.<sup>1276</sup> Attached to those communications, the European Union usually sent the reports received from the national veterinary authorities of the respective EU member State. Most of those reports included detailed geographic information in respect of the site where the outbreaks occurred.

7.944. In addition, the European Union informed Russia's Permanent Mission in Brussels of the Commission Implementing Decisions that were adopted to adjust the existing protection and surveillance zones to the geographical scope of the new outbreaks that occurred within each of the four affected EU member States.<sup>1277</sup>

7.945. Attached to the letter of 7 February 2014, the European Union provided Russia with the 2010 EFSA scientific opinion on ASF. This document contains information relevant to understanding the geographic situation of the four affected EU member States.<sup>1278</sup>

7.946. Moreover, as we have already explained<sup>1279</sup>, the veterinary authorities in the EU member States constantly report the occurrence of any outbreak to the OIE in order for such information to be included in the weekly follow up reports of the OIE WAHIS database. The information published

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European Union notified to the OIE (Exhibit EU-118) and Data from OIE WAHIS Interface, as of 31 August 2015 (Exhibit RUS-296 revised).

<sup>1271</sup> Communication of 17 February 2014: African swine fever (ASF) confirmed in Poland in a wild boar found 900 meters from the border with Belarus (Exhibit EU-136). See also ASF cases in the European Union notified to the OIE (Exhibit EU-118) and Data from OIE WAHIS Interface, as of 31 August 2015 (Exhibit RUS-296 revised). The report to the OIE indicates that the event started on 13 February 2014 and was confirmed on 17 February 2014. See Follow-up report No.6, Reference OIE: 15045, Report Date: 31/03/2014, Country: Poland (Exhibit EU-152).

<sup>1272</sup> Communication of 26 June 2014: African swine fever (ASF) detection in Latvia (Exhibit EU-147). See also ASF cases in the European Union notified to the OIE (Exhibit EU-118) and Data from OIE WAHIS Interface, as of 31 August 2015 (Exhibit RUS-296 revised). The report to the OIE indicates the event started on 25 June 2014 and was confirmed on 26 June 2014. See Follow-up report No.34, Reference OIE: 17579, Report Date: 22/04/2015, Country: Latvia (Exhibit EU-153).

<sup>1273</sup> See also ASF cases in the European Union notified to the OIE (Exhibit EU-118) and Data from OIE WAHIS Interface, as of 31 August 2015 (Exhibit RUS-296 revised). The report to the OIE indicates the event started on 2 September 2014 and was confirmed on 8 September 2014. See Follow-up report No.43, Reference OIE : 17604, Report Date: 28/04/2015, Country: Estonia (Exhibit EU-155).

<sup>1274</sup> See section 7.3.6 above.

<sup>1275</sup> See section 7.3.6 above.

<sup>1276</sup> See Exhibits EU-132, EU-133, EU-134, EU-135, EU-136, EU-137, EU-138, EU-139, EU-140, EU-141, EU-142, RUS-30, EU-143, EU-144, EU-145, EU-146, EU-147, EU-148, EU-206, EU-186, EU-207, EU-208, EU-209, EU-210, EU-187, RUS-326, RUS-327, RUS-328, EU-177, EU-211, and EU-212.

<sup>1277</sup> See Exhibits EU-33-EU-44. See also Appendix 1 below for a description of other communications.

<sup>1278</sup> 2010 EFSA Scientific Opinion (Exhibit EU-24).

<sup>1279</sup> See para. 7.425 above.

in this database includes information on the place where the reported outbreaks have occurred, as well as maps on the location of these sites.<sup>1280</sup>

7.947. The European Union also provided to the Panel and to Russia, as an exhibit to its first written submission, a compilation of maps indicating the changes in the ASF situation in the European Union from 2007 to 2014.<sup>1281</sup> Furthermore, some of the other pieces of evidence referred to below provide relevant information on the geographic situation in the four affected EU member States.<sup>1282</sup>

7.948. In our view, the European Union provided ample evidence in respect of the geographic situation of the disease in each of the four affected EU member States. This information included constant updates that provided an understanding of the situation on the ground as it was evolving.

7.949. We have already examined evidence provided by the European Union to Russia in respect of the second category of information, that is, epidemiological surveillance of ASF. Such information refers to (i) the legal framework contained in Articles 3 and 18 of Council Directive 2002/60/EC; (ii) the European Union's ASF diagnostics manual (contained Commission Decision 2003/422/EC); (iii) an indication of the reliability of the European Union's notifications through the WAHIS information system to verify the ASF situation in the EU member States at any given point in time; (iv) surveillance programmes approved for 2013 for Estonia, Latvia, Lithuania, and Poland; and (v) an indication of the type of active surveillance applied in the designated risk areas in 2013 covering the four affected EU member States.<sup>1283</sup> After examining this evidence, we concluded that the explanations and information provided by the European Union, sufficiently demonstrate that the European Union has had in place appropriate ASF monitoring and surveillance mechanisms. To further reinforce this conclusion, we recall that the European Union complemented the information on the monitoring investigations conducted in the four affected EU member States throughout 2014, through its letters to FSVPS 6 March 2014<sup>1284</sup>, 13 March 2014<sup>1285</sup> and 13 June 2014.<sup>1286</sup>

7.950. The third category of evidence concerns the effectiveness of sanitary or phytosanitary controls in respect of ASF. Regarding this cluster of information we have already referred to the measures that the European Union adopted to prevent the introduction of ASF both in the affected and the non-affected EU member States.<sup>1287</sup> Such measures include identification of pigs and oversight of their movement (pursuant to Directive 2008/71/EC); regulations applicable to feeding of animal products to pigs (including the prohibition of swill feeding); limitations on intra-EU trade in live pigs; measures on the introduction into the European Union of personal consignments of animal products; surveillance and inspection of food hygiene, including pig and wild boar products; specific rules upon occurrence of ASF in EU member States (as provided in Council Directive 2002/60/EC); and measures to mitigate the risk of introduction of ASF from neighbouring countries. We also noted that in addition to these measures, the European Union provided information in respect of contingency plans for infectious diseases and audits thereof.<sup>1288</sup> Finally, we also noted that the European Union has been keen to clarify and address situations that have caused Russia concern in respect of the prevention of ASF.<sup>1289</sup>

<sup>1280</sup> See Exhibits EU-152-156.

<sup>1281</sup> African Swine Fever from 2007 to 2014, compilation by the European Commission of maps from OIE ([http://ec.europa.eu/food/animal/diseases/docs/presentation\\_asf\\_en.pdf](http://ec.europa.eu/food/animal/diseases/docs/presentation_asf_en.pdf)) (Exhibit EU-21).

<sup>1282</sup> See, e.g. the eradication plans for Estonia (Exhibit EU-117), Latvia (Exhibit EU-116), Lithuania (Exhibit EU-101) and Poland (Exhibit EU-102), which were provided to Russia in the course of the first months of 2015.

<sup>1283</sup> See paras. 7.430-7.435 above.

<sup>1284</sup> European Union's letter to Russia of 6 March 2014, ARES(2014)601346, SANCO/G7/PD/mh/(2014)630598 (Exhibit EU-86).

<sup>1285</sup> European Union's letter to Russia of 13 March 2014, ARES(2014)709435, SANCO/G7/PD/mh(2014)745829 (Exhibit EU-91)

<sup>1286</sup> European Union's letter to Russia of 13 June 2014, ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505 (Exhibit EU-94).

<sup>1287</sup> See paras. 7.422-7.425 above.

<sup>1288</sup> See para. 7.442 above.

<sup>1289</sup> See para. 7.443 above.

7.951. In addition to such information, the European Union provided to Russia copies of the contingency plans for Estonia<sup>1290</sup>, Latvia<sup>1291</sup>, Lithuania<sup>1292</sup>, and Poland<sup>1293</sup> through the letter of 21 May 2014.<sup>1294</sup> Russia objects to the usefulness of these plans, as Russia argues that they are not exclusively applicable to ASF but to other infectious diseases as well, and that they are not updated.<sup>1295</sup> Moreover, Russia considers the substance of the control measures described in the contingency plans inadequate, as they fail to make reference to a wild boar reduction strategy and a backyard farm elimination/reduction strategy.<sup>1296</sup> Russia also objects to the usefulness of these plans as they do not constitute evidence of implementation of the measures in a timely, complete, and effective manner in the event of an ASF outbreak.<sup>1297</sup> In this regard, Russia points to the European Union's own audit reports regarding countries' preparedness to implement contingency plans, which raise significant doubts about the veterinary services' preparedness and capacity to implement the measures set out in the contingency plans.<sup>1298</sup> Despite this objection, in our view, these documents provide a clear indication of the measures that would be applied in each of these four affected EU member States in case of an outbreak of ASF. Furthermore, the European Union provided information, in respect of Lithuania, in support of the legal orders at the national level requiring the application of those measures.<sup>1299</sup> Although this could be useful to further support the effectiveness of the control measures in Estonia, Latvia, and Poland, we do not consider provision of similar information for these three EU member States as essential in light of the general exchange of information in this respect.

7.952. Russia challenges the effectiveness of the control measures that the European Union has in place. Russia's main argument is that because of the continued ASF outbreaks and the geographic spread of these outbreaks in the territory of the four affected EU member States, the continuous redrawing of the contours of the infected zones and the numerous outbreaks occurring outside the infected zones, the European Union's control measures are ineffective.<sup>1300</sup> Russia examines these measures from the comments that its experts provided throughout 2014 on their scepticism in respect of the positive outcomes that the European Union measures might achieve. In Russia's view, the European Union system is flawed.<sup>1301</sup>

7.953. In our view, the experts consulted by the Panel provided a valuable explanation as to the manner in which it would be best to understand the current situation in the eastern European region. The experts noted that controlling and eradicating ASF is very difficult because of its highly contagious and virulent nature, and its presence in wild boar. In that context, the experts indicated that ASF is very hard to control.<sup>1302</sup> In these circumstances, it is hard for us to assess the effectiveness of the measures exclusively based on the extent of the spread of the disease following the initial outbreaks. Given that this dispute concerns measures imposed by Russia in 2014, it does not seem to be appropriate to rely solely on an examination made with the benefit of hindsight. Thus, we consider and take into account the structure and design of the control measures, together with the rest of the relevant necessary evidence, including the level of prevalence of the disease, in order to examine the European Union's compliance with its obligation under Article 6.3. We assign particular importance to these considerations in the context of our assessment of whether the European Union provided to Russia the necessary evidence to

<sup>1290</sup> Code of Conduct for Control of African Swine Fever of Estonia, 11 April 2013 (Exhibit EU-77).

<sup>1291</sup> Plan for Combating Very Dangerous Infectious Animal Diseases of the Republic of Latvia, 28 February 2013 (Exhibit EU-76).

<sup>1292</sup> Contingency Plan for Classical Swine Fever (CSF) and African Swine Fever (ASF) of Lithuania, 30 December 2011 (Exhibit EU-74).

<sup>1293</sup> Polish Veterinary African Swine Fever Contingency Plan, January 2014 (Exhibit EU-75).

<sup>1294</sup> European Union's letter to Russia of 21 May 2014, ARES(2014)1658269, SANCO/G6/AB(2014)1782253 (Exhibit EU-92).

<sup>1295</sup> See Russia's comments to the European Union's response to Panel question No. 322, para. 198.

<sup>1296</sup> See Russia's response to Panel question No. 322, paras. 293-298.

<sup>1297</sup> Russia's responses to Panel question No. 322, para. 292.

<sup>1298</sup> Russia's responses to Panel question No. 322, paras. 299-310.

<sup>1299</sup> Order on Measures to Control African Swine Fever No B1-49 of 24 January 2014 (Exhibit EU-71) and Order on the Slaughter of Pigs as Part of the Measures to Prevent the Spread of African Swine Fever, 30 January 2014, No B1-60 (Exhibit EU-72).

<sup>1300</sup> Russia's opening statement at the second meeting of the Panel, paras. 8-29.

<sup>1301</sup> Russia's response to Panel question No. 279, para. 137.

<sup>1302</sup> Professor Penrith, Transcript para. 1.195; Dr Brückner, Transcript, para. 1.196; Dr Thomson, Transcript, para. 1.198; and Dr Thiermann, Transcript, para. 1.199.

objectively demonstrate that ASF-free areas within each of the four affected EU member States are likely to remain ASF-free.

7.954. The next type of evidence that we consider necessary for the European Union to objectively demonstrate that certain areas in the four affected EU member States are ASF-free, concerns the relevant ecosystems. The first aspect that we will examine in this respect is whether there is knowledge of ASF not being established in wildlife in the areas claimed to be free of ASF.

7.955. The evidence on record indicates that ASF outbreaks in the four affected EU member States have occurred in wild boars.<sup>1303</sup> In our view, this is a risk factor that needs to be considered in light of the information we have examined in respect of wild boar behavioural ecology. In this regard, we noted that the 2010 EFSA scientific opinion on ASF indicated that "[w]ild boar do not migrate, at least according to the classic definition of migration. Some small seasonal movements are registered but always inside the usual individual home range that varies from 20-100 km<sup>2</sup>. Infections can spread between larger regions, however, where there is continuity in the geographical distribution of the wild boar, as observed for CSF (EFSA, 2009c). In this respect, Ukraine (Crimea), Poland and Romania may be at risk due to the continuous distribution and the high density of wild boar. Possible corridors may also exist from the infected Russian areas into Lithuania or Latvia. Where wild boar are absent or natural/artificial barriers prevent direct contact between infected and susceptible populations, infections usually fade out spontaneously (Artois et al., 2002); for ASF, this pattern has been observed in Sardinia only (Firinù and Scarano, 1988)."<sup>1304</sup> This was further confirmed through the explanation provided in the attachment to the letter sent by DG SANCO to FSVPS on 13 June 2014, where the European Union explained the criteria used to identify the borders of the infected/free/high risks zones in the territories of Poland and Lithuania.<sup>1305</sup> The Panel's experts confirmed the scientific merit of this fact.<sup>1306</sup>

7.956. Another important category of information to consider relates to the prevalence of the disease. The European Union has provided almost daily information to Russia in respect of every new ASF outbreak in the four affected EU member States. Whenever such information has not been made directly available, it was provided through the information reports done by each EU member State to the OIE to be published through the WAHIS database. This information, together with the estimates of the wild boar population in the four affected EU member States provided by the European Union to Russia, would allow Russia to know the level of prevalence of ASF in the territory of the four affected EU member States.<sup>1307</sup>

7.957. The final type of information that we will examine relates to the existence of eradication or control programmes for ASF. According to the overarching European Union's legal framework on ASF, following an ASF outbreak EU member States should ensure that eradication and control programmes are put in place. However, as explained below, it was not until March and May 2015 that the European Union provided to Russia the approved ASF eradication programmes for Estonia, Latvia, Lithuania, and Poland. Russia acknowledged in the course of these proceedings, such programmes provided valuable information in order to substantiate a claim that certain areas are ASF-free, and likely to remain so.<sup>1308</sup> Russia also argues that the type of information set out in Lithuania's, Poland's, Latvia's, and Estonia's eradication plans was not previously provided by the European Union to Russia, specifically with respect to the borders of Lithuania's initial zones.<sup>1309</sup>

7.958. Article 16 of Council Directive 2002/60/EC<sup>1310</sup> requires EU member States to submit to the Commission, within 90 days of the confirmation of a primary case of ASF in wild boar, a written plan of measures taken in order to eradicate African swine fever in wild boar. The plan must contain a description of the measures taken to eradicate the disease in wild boar in the infected area, and the measures applied on the pig holdings in the above-mentioned infected area. According to Article 16, the EU Commission shall then examine the plan in order to determine

<sup>1303</sup> Pig Progress, "New ASF outbreak in Belgorod Oblast, Russia", 11 June 2014 (RUS-118).

<sup>1304</sup> 2010 EFSA Scientific Opinion (Exhibit EU-24), p.29

<sup>1305</sup> European Union's letter to Russia of 13 June 2014, ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505 (Exhibit EU-94), p. 4.

<sup>1306</sup> See fn 636 above.

<sup>1307</sup> See fn 588 above.

<sup>1308</sup> Russia's comments to the European Union's response to Panel question No. 236, para. 59-60.

<sup>1309</sup> Russia's second written submission, para. 67.

<sup>1310</sup> Council Directive of 27 June 2002, 2002/60/EC (Exhibit EU-31).

whether it permits the desired objectives to be attained. The plan, if necessary with amendments, shall be approved in accordance with the accelerated regulatory procedure contained in Article 24(2) of Council Directive 2002/60/EC.

7.959. In response to the Panel's questions, the European Union indicated that Lithuania initially submitted its eradication plan to the European Commission on 22 April 2014; Poland on 14 May 2014; Latvia on 26 September 2014, and Estonia on 12 December 2014.<sup>1311</sup> The European Commission formally approved the submitted plans by Decision 2014/442 on 7 July 2014 (Lithuania and Poland)<sup>1312</sup> and by Decision 2015/570 on 7 April 2015 (Estonia and Latvia)<sup>1313</sup>. Poland submitted a modification of the plan that was accepted formally by means of a letter on 24 November 2014.<sup>1314</sup>

7.960. The Panel notes with some bewilderment, however, that the European Union sent the Polish and Lithuanian eradication plans to Russia only on 24 March 2015<sup>1315</sup>; the Estonian and Latvian plans were provided to Russia in the context to the European Union's answers to the Panel's questions on 19 May 2015.<sup>1316</sup> The European Union provides no explanation for the delay in sending the Lithuanian and Polish plans, and explains that the Estonian and Latvian plans were not sent at that time (March 2015) as they were not yet formally approved.<sup>1317</sup> No explanation was provided either for the delays in the approval of the various eradication plans, especially for that submitted by Latvia.

7.961. The Panel is cognizant of the fact that the development of an eradication plan, while required by the European Union legislation, is not necessarily required in order to recognize an area as free of a pest- or disease and likely to remain so. Article 6.1 refers, *inter alia*, to the existence of eradication or control programmes, and we are aware that many animal diseases, especially those affecting wildlife may be impossible to fully eradicate. However, the existence of effective control programmes should nonetheless make it possible to establish disease-free areas.

7.962. In the present case, as eradication plans were indeed developed for the four affected EU member States, the Panel has examined each of these plans to determine to what extent they provide evidence that was not previously made available to Russia and that would have been necessary for Russia to assess whether the European Union could demonstrate that areas within each one of these four EU member States were free of ASF. The result of this examination, as explained in detail below with respect to each affected EU member State, is that although these eradication plans provided the information in a more organized and readily accessible manner, they generally do not include information which had not yet been provided by the European Union to Russia.

7.963. Based on the foregoing, we consider that the European Union provided to Russia the necessary evidence to objectively demonstrate that, at any given point in time, there were ASF-free areas within each of the four affected EU member States.

7.964. However, it is more difficult for the Panel to determine whether the information provided by the European Union was sufficient to objectively demonstrate that the disease-free areas within each of the four affected EU member States were "likely to remain" so. As we have indicated above<sup>1318</sup>, our assessment of this matter will be focused on whether in addition to the necessary evidence to objectively demonstrate that there are ASF-free areas within each of the affected EU member States, the European Union provided to Russia the necessary evidence in respect of the effectiveness of its control measures.

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<sup>1311</sup> European Union's response to Panel question No. 19.

<sup>1312</sup> Exhibits EU-50, EU-101 and EU-102.

<sup>1313</sup> Exhibits EU-103, EU-116 and EU-117.

<sup>1314</sup> Letter of 4 November 2014, Ref. Ares(2014)3660850 (Exhibit EU-129).

<sup>1315</sup> Letter of 24 March 2015 from the EU to Russia, Ref. Ares(2015)1284836 (RUS-154). See also Exhibits RUS-167, EU-101, and EU-102.

<sup>1316</sup> Eradication plan for African swine fever in wild boar in Latvia (Exhibit EU-116) and Plan for the eradication of African swine fever from feral pig population in Estonia (Exhibit EU-117).

<sup>1317</sup> See European Union's response to Panel question No. 19.

<sup>1318</sup> See paras. 7.939- 7.941 above.

7.965. We are cognizant that we must make our ruling on the basis of the information that the European Union had provided to Russia as at 11 September 2014. While both parties have provided information regarding subsequent cases of ASF within the four affected EU member States until the second half of 2015, neither party could have known, in September 2014, what the situation would be almost one year later. Moreover, no previous Panel has dealt with a complaint brought during the course of an active outbreak of a highly contagious disease, at a time when the situation continued to evolve rapidly.

7.966. We have explained in our analysis of the temporal framework that the Panel needs to pursue, that we are entitled to weight the evidence that predates and postdates the establishment of the Panel.<sup>1319</sup> Moreover, pursuant to our duty to examine the totality of the evidence on record in order to make an objective assessment of the matter before us<sup>1320</sup>, as well as in the light of the importance of subsequent events in the context of the present dispute, we will examine the evidence on record that post-date the establishment of the Panel.

7.967. In our view, one of the largest challenges in the context of the ASF outbreaks within the four affected EU member States is the constantly shifting situation and frequent expansion of the protection and surveillance zones.<sup>1321</sup> The European Union has explained that this is not at all problematic because the ASF control system applied in the European Union is designed to continually adjust in order to be a step ahead of the disease.<sup>1322</sup> The European Union noted that whenever an outbreak occurred near to or within the buffer zone (which is ASF-free), the buffer zone was further enlarged to ensure a safety margin around the designated ASF-free zone. This view is to a certain extent endorsed by Dr Brückner who described the process of adaptation of measures to the spread of ASF.<sup>1323</sup> In our view, the provision of information in this context should be detailed and efficient. Otherwise, it would be very difficult to consider that such evidence amounts to what is necessary to objectively demonstrate that there are ASF-free areas, which are likely to remain so.

7.968. With these considerations in mind we turn to examine whether the European Union provided to Russia the necessary evidence to objectively demonstrate that ASF-free areas within each of the four affected EU member States are likely to remain ASF-free. We will examine this question in respect of each of the four affected EU member States, following the chronological order of the outbreaks (i.e. Lithuania, Poland, Latvia, and Estonia).

<sup>1319</sup> See para. 7.177 above (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

<sup>1320</sup> See, e.g. Appellate Body Reports, *EC – Hormones*, para. 133; *Japan – Apples*, para. 221; *EC – Asbestos*, para. 161; *Australia – Salmon*, para. 266; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Agricultural Products II*, paras. 141 and 142; *Korea – Dairy*, para. 138; *Korea – Alcoholic Beverages*, paras. 161 and 162; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; *US – Gambling*, para. 363; *EC – Selected Customs Matters*, para. 258; *US – Carbon Steel*, para. 142; and *Brazil – Retreaded Tyres*, para. 185.

<sup>1321</sup> See Exhibits EU-119, EU-120, EU-121, EU-33 to EU-44, and RUS-297 (revised). We recall that Article 9 of Council Directive 2002/60/EC (Exhibit EU-31) refers to infected zones as protection zones and to buffer zones as surveillance zones, where there have been ASF outbreaks in domestic pig holdings. Article 15 of Council Directive 2002/60/EC (Exhibit EU-31) provides for the establishment of disease control measures, including the establishment of protection and surveillance zones. Throughout the report we refer to: infected zones, as those areas where there have been ASF outbreaks and have been identified by the EU legislation as protection zones; to buffer zones, as those areas referred to in the EU legislation as surveillance zones; and to ASF-free areas, as those areas where ASF has not been reported, excluding both infected and buffer zones. We further note that after the issuance of Commission Implementing Decision 2014/178/EU (Exhibit EU-37) on 27 March 2014, the protection zones in the affected EU member States were divided into those concerning domestic pigs and wild boar (feral pigs) population, called Part III, and those concerning only wild boar population, called Part II. Surveillance zones were identified as Part I. On 9 October 2014, Commission Implementing Decision 2014/709/EU (Exhibit EU-44) further distinguished the areas concerning domestic and wild boar population (Part III as per Commission Implementing Decision 2014/178/EU) between those areas where the epidemiological situation has been established and the disease has become endemic, now called Part IV, and those where the situation is still dynamic with uncertain evolution, now called Part III.

<sup>1322</sup> See European Union's response to Panel question No. 19.

<sup>1323</sup> Dr Brückner's response to Panel oral question No. 7, Transcript, para. 1.196.

***Assessment of the evidence provided by the European Union to Russia to objectively demonstrate that ASF-free areas in Lithuania are likely to remain so***

7.969. We now turn to examine the extent to which the European Union provided to Russia the necessary evidence to objectively demonstrate that ASF-free areas in Lithuania were likely to remain so. As we noted in paragraph 7.940 above, the most important evidence for demonstrating that a disease-free area is likely to remain so relates to the effectiveness of control measures. We will thus consider the evidence provided in respect of the effectiveness of control measures applied in Lithuania. For this purpose, we will address the information provided on: (i) the surveillance programme; (ii) diagnostic analysis; (iii) measures for early detection and response; and (iv) eradication of the disease. In undertaking this task, we will address the information provided by the European Union to Russia, including that contained in the eradication plan of Lithuania. We will assess how much of the information contained therein had already been provided by the European Union to Russia. In pursuing this examination we will focus on reviewing the necessary evidence that the European Union provided to Russia in respect of the effectiveness of the control measures in Lithuania. We will also examine the outbreaks that took place in Lithuania after January 2014 and until the establishment of the Panel on 22 July 2014, as well as the subsequent situation. Our examination of this matter is also informed by our analysis in respect of the categories of necessary evidence that we have examined in the previous section to determine the European Union's objective demonstration of the existence of ASF-free areas in the four affected EU member States.

7.970. Our examination of the documentation provided by the European Union to Russia shows that information regarding the initial cases and their location was provided to Russia on 24 January 2014, the same day the disease was confirmed.<sup>1324</sup> Russia was informed of the establishment of control zones, including the infected area, and the measures applied within each of these zones to control the spread of ASF, on 27 January 2014.<sup>1325</sup> More information relating to the surveillance and sampling strategy, as well as to protective measures in Lithuania, was provided to Russia on 7 February 2014.<sup>1326</sup> Reports on the emergency response measures of Lithuania were also provided in February and March 2014, and the contingency plan as well as further information on surveillance, eradication and monitoring were provided in April, May and June 2014.<sup>1327</sup>

7.971. As we noted above<sup>1328</sup>, the ASF eradication plan for Lithuania<sup>1329</sup> was approved in July 2014, but provided to Russia only in March 2015. The Panel notes that the plan contains:

<sup>1324</sup> Communication of 24 January 2014: African swine fever (ASF) in two wild boars in Lithuania, in Salcininkai and Varena Regions, at the border with Belarus (Exhibit EU-132).

<sup>1325</sup> Commission Implementing Decision 2014/43/EU of 27 January 2014 concerning certain interim protective measures relating to African swine fever in Lithuania, OJ L 26, p.44 (Exhibit EU-33), (Communication of 24 January 2014: African swine fever (ASF) in two wild boars in Lithuania, in Salcininkai and Varena Regions, at the border with Belarus (Exhibit EU-132) and Communication of 27 January 2014: African swine fever (ASF) in Lithuania. Interim protective measures (Exhibit EU-133).

<sup>1326</sup> African swine fever in Lithuania, presentation by the State Food and Veterinary Service of Lithuania, 6–7 February 2014 (Exhibit EU-66), Order on Measures to Control African Swine Fever No B1-49 of 24 January 2014 (Exhibit EU-71(b)), and Order on the Slaughter of Pigs as Part of the Measures to Prevent the Spread of African Swine Fever, 30 January 2014, No B1-60 (Exhibit EU-72).

<sup>1327</sup> Contingency Plan for Classical Swine Fever (CSF) and African Swine Fever (ASF) of Lithuania, 30 December 2011 (Exhibit EU-74), Final Report of an Audit carried out in Lithuania from 27 February to 2 March 2012 in order to Evaluate the Actions Taken during Recent Outbreaks of Classical Swine Fever and to Assess Contingency Planning of Epizootic Disease, SANCO 2012-6386; (Exhibit EU-79), Annex, Response of the Competent Authorities of Lithuania to the recommendations of Report ref. DG(SANCO)/2012-6386-MR of an audit carried out from 27 February to 02 March 2012, Updated Action plan received on 9 October 2012 (Exhibit EU-234), Response of the Competent Authorities of Lithuania to the recommendations of Report ref. DG(SANCO)/2012-6386-MR of an audit carried out from 27 February to 02 March 2012, Action plan received on 14 May 2012 (Exhibit EU-235), Veterinary Control Programme on African swine fever early detection in Lithuania and Belarus in 2014, 2013 (Exhibit EU-238), and European Commission, Final Report of an Audit Carried out in Lithuania from 14 to 16 April 2014 in order to evaluate the implementation of animal health controls in relation to African Swine Fever (2014 EU Veterinary Audit Report for Lithuania, 14-16 April 2014) (Exhibit RUS-69).

<sup>1328</sup> See paras. 7.959- 7.960 above

<sup>1329</sup> Eradication plan of African swine fever in feral pigs in certain areas of Lithuania (communicated to Russia on 24 March 2015) (Exhibit EU-101) and ASF Eradication plan for African swine Fever in wild boars in the Southern part of Lithuania, June 2014 (Exhibit RUS-156).



(i) a chronology of events and recalls the EU legal requirements to develop an eradication plan; (ii) describes the epidemiological investigations undertaken and the various hypothesis regarding the source of the introduction of ASFV; (iii) defines the infected and risk areas; (iv) describes the surveillance programmes and preventive measures applicable to wild boars; and (v) describes the surveillance programmes and preventive measures applicable to pig holdings in the infected and risk areas.

7.972. While the prompt provision of the Lithuanian eradication plan could have facilitated the assessment by Russia of whether there was an effective establishment and maintenance of a disease-free area within that country, a careful examination of the content of the eradication plan reveals that most of the information contained therein was previously made available to Russia through various different communications and their respective attachments. We are unable to identify any significant information in the eradication plan that was not previously made available to Russia.

7.973. In examining the different categories of information provided to Russia, we see that even before the first outbreak in Poland, the European Union had submitted to Russia on 7 February 2014, a summary report of ASF surveillance activities implemented in Lithuania, Poland, Latvia and Estonia.<sup>1330</sup> This report covers the period 1 November 2013 to 28 January 2014 and provides information on the surveillance undertaken on the basis of sampling of wild boars and domestic pigs.

7.974. We have already examined above the information that the European Union provided to Russia to objectively demonstrate the existence of ASF-free areas. We have concluded that, as at 22 July 2014, the European Union had provided to Russia the necessary evidence to objectively demonstrate that there were ASF-free areas within Lithuania. In considering, in particular, the information in respect of the effectiveness of the sanitary controls established in Lithuania, we have examined the information regarding the evolution of ASF within Lithuania from the first case in January 2014 until the time of establishment of the panel on 22 July 2014.<sup>1331</sup> During this period of time, following the first outbreak of ASF in Lithuania, subsequent cases occurred only either within the designated infected area or within the immediately surrounding buffer zone. It would thus appear that until 22 July 2014, the European Union had effectively demonstrated that the designated ASF-free area within Lithuania would remain ASF-free.<sup>1332</sup> As at the time of establishment of the Panel, it would appear that the European Union had effectively demonstrated the effectiveness of the control measures to ensure that the ASF-free area of Lithuania would remain so. We recall, however, that we have agreed to consider the information provided by the parties until September 2014.

7.975. The Panel is aware that immediately following the establishment of the Panel, on 24 July 2014, a new outbreak occurred in a part of Lithuania that was unrelated to the first cases and zones, in an area located outside the infected and buffer zones established through Commission Implementing Decision 2014/178/EU of 27 March 2014.<sup>1333</sup> This outbreak was in a large holding of domestic pigs (19,411 pigs)<sup>1334</sup>, and could raise concerns about whether the control and prevention programmes were effective. In response to this outbreak, the European Union issued Commission Implementing Decision 2014/502/EU of 24 July 2014, expanding the infected and buffer zones.<sup>1335</sup> We also recall that the experts have indicated that further cases of ASF among wild pigs and outbreaks in domestic holdings could be expected to occur, and such occurrence does not amount to a failure of the ASF control measures.<sup>1336</sup> The experts also indicated that as long as additional outbreaks remained confined to the declared infected zone

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<sup>1330</sup> Exhibits EU-62 and EU-63.

<sup>1331</sup> We have examined the data provided by both parties in this respect. We have focused our attention in Exhibits EU-118 and RUS-275 and RUS-296 revised.

<sup>1332</sup> ASF cases in the European Union notified to the OIE (Exhibit EU-118) and Data from OIE WAHIS Interface, as of 31 August 2015 (Exhibit RUS-296 revised).

<sup>1333</sup> Exhibit EU-37.

<sup>1334</sup> ASF cases in the European Union notified to the OIE (Exhibit EU-118) and Data from OIE WAHIS Interface, as of 31 August 2015 (Exhibit RUS-296 revised).

<sup>1335</sup> Exhibit EU-40.

<sup>1336</sup> Professor Penrith, Transcript para. 1.195; Dr Brückner, Transcript, para. 1.196; Dr Thomson, Transcript, para. 1.198; and Dr Thiermann, Transcript, para. 1.199.

then there should not be any consequence for free zones.<sup>1337</sup> Furthermore, as explained by the experts, the purpose of a buffer zone, which is itself free of ASF, is to ensure that the designated ASF-free areas are physically separated from ASF infection areas. A case or outbreak in a buffer zone, therefore, does not call into question the disease-free status of the designated disease-free area. It does, however, change the status of the buffer zone to an ASF-infected area. Also, as according to the European Union regulation, no trade is permitted from the buffer zone, hence a case or outbreak within the buffer zone would not affect the risk of Russia importing ASF-infected products. An outbreak within a free zone, however, has the effect of immediately changing the status of that zone to an ASF-infected zone.<sup>1338</sup>

7.976. The next case in Lithuania was also in a domestic holding (albeit a very small one with only 2 pigs), this time within the buffer zone.<sup>1339</sup> The incident began on 29 July 2014, when a pig became sick in a farm in the Utena district in Lithuania. The pig died on 5 August 2014 and was tested for ASF. On 6 August 2014 the test confirmed the presence of ASF. This is highly indicative of an effective monitoring and surveillance programme. Moreover, as this situation evolved, on 31 July 2014 the European Union issued Commission Implementing Decision 2014/513/EU which expanded the protection zone to include the Utena district.<sup>1340</sup> On 22 August 2014, there was another incident in a domestic holding (again of only 2 pigs) which occurred outside the infected and the buffer zones. Following this case, on 28 August 2014, the European Union issued Commission Implementing Decision 2014/673/EU which expanded the infected and buffer zones in Lithuania.<sup>1341</sup> Subsequently, except for one infected wild boar found in the buffer zone on 10 December 2014, all other cases in Lithuania occurred within already infected zones.<sup>1342</sup> Based on the information available as at 11 September 2014, we consider that the European Union had provided sufficient evidence to objectively demonstrate that the disease-free areas within Lithuania were likely to remain ASF-free.

7.977. We are fully aware that, according to information provided by both parties<sup>1343</sup>, further cases of ASF occurred in Lithuania after September 2014. While we consider this information to be important for Russia's consideration of the European Union's claim that it had established disease-free areas within Lithuania that were likely to remain disease-free, it was clearly not possible for the European Union to have provided such information as at 11 September 2014. We will thus examine this information in the context of our consideration of Article 6.1, below.

***Assessment of the evidence provided by the European Union to Russia to objectively demonstrate that ASF-free areas in Poland are likely to remain so***

7.978. We will now examine the extent to which the European Union provided to Russia the necessary evidence to objectively demonstrate that ASF-free areas in Poland were likely to remain

<sup>1337</sup> See experts' responses to Panel question No. 32, Compilation of experts' responses, paras. 4.20-4.24. See in particular, Professor Penrith's response.

<sup>1338</sup> See Dr Thomson's response to Panel question No. 32, Compilation of experts' responses, para. 4.22. See also Article 15.1.4 of the Terrestrial Code and Russia's opening statement at the second meeting of the Panel, paras. 30-32.

<sup>1339</sup> There is a discrepancy between the data provided by the European Union in Exhibit EU-118 and by Russia in Exhibit RUS-296 revised in respect of the outbreak happening in Lithuania on 29 July 2014. According to Exhibit EU-118 there were no outbreaks in Lithuania on 29 July 2014, however, one was confirmed on 6 August 2014. Exhibit RUS-296 revised identifies an outbreak happening on 29 July 2014. As reported in the OIE WAHIS Interface, the starting date of this incident is 29 July 2014, see Exhibit EU-154, p. 1/17.

<sup>1340</sup> Commission Implementing Decision 2014/513/EU of 31 July 2014 amending the annex to Implementing Decision 2014/178/EU as regards the areas in Lithuania, Latvia and Estonia under restriction for African swine fever, OJ L 231, p.7 (Exhibit EU-41).

<sup>1341</sup> Commission Implementing Decision 2014/637/EU of 28 August 2014 amending the Annex to Implementing Decision 2014/178/EU as regards the areas under restriction for African swine fever in certain Member States, OJ L 259, p.23 (Exhibit EU-43). We note that there is a discrepancy between the information provided by the European Union in EU-118 and Russia in Exhibit RUS-296 (revised) on whether this incident occurred in the infected zone. According to Exhibit EU-118 this incident occurred in an infected zone. According to Exhibit RUS-296 (revised) this incident occurred outside the infected and the buffer zone. Comparing the infected and buffer zones in place in Lithuania at that time (as reflected in Exhibits EU-37 and EU-41), we conclude that this incident occurred in an area not yet designated as infected or buffer zone.

<sup>1342</sup> ASF cases in the European Union notified to the OIE (Exhibit EU-118) and Data from OIE WAHIS Interface, as of 31 August 2015 (Exhibit RUS-296 revised).

<sup>1343</sup> Exhibits EU-118 and RUS-296 revised.

so. As we noted in paragraph 7.940 above, the most important evidence for demonstrating that a disease-free area is likely to remain so relates to the effectiveness of control measures. We will thus consider the evidence provided in respect of the effectiveness of control measures applied in Poland. For this purpose, we will address the information provided on: (i) the surveillance programme; (ii) diagnostic analysis; (iii) measures for early detection and response; and (iv) eradication of the disease. In undertaking this task, the Panel will analyse the information provided by the European Union to Russia, including that in the eradication plan of Poland. The Panel will assess how much of the information contained therein had already been provided by the European Union to Russia. In pursuing this examination, the Panel will focus on reviewing the necessary evidence that the European Union provided to Russia in respect of the effectiveness of the control measures in Poland. The Panel will also examine other information submitted by the European Union to Russia, as well as examine the outbreaks that took place in Poland after February 2014 and until the establishment of the Panel on 22 July 2014, as well as the subsequent situation. Our consideration of this matter is also informed by our analysis in respect of the categories of necessary evidence that we have examined in the previous section to determine the European Union's objective demonstration of the existence of ASF-free areas in the four affected EU member States.

7.979. Our examination of the documentation provided shows that information regarding the initial cases and their location was provided to Russia on 17 February 2014,<sup>1344</sup> following the first outbreak on 13 February 2014. Russia was informed through this communication, as well as through subsequent ones in February, March and April 2014,<sup>1345</sup> of the establishment of control zones, including the infected area, and a risk area, and the measures applied within each of these zones to control the spread of ASF. Information relating to the surveillance and sampling strategy, as well as to protective measures in Poland, was also provided in these communications. Reports on the emergency response measures of Poland were also submitted in February and March 2014, and the contingency plan, as well as further information on surveillance, eradication and monitoring were provided in April, May and June 2014.<sup>1346</sup> The Panel further notes that the eradication plan for Poland was not provided to Russia in a timely manner as previously discussed in paragraph 7.960.

7.980. In particular, the Polish eradication plan<sup>1347</sup> contains information on: (i) eradication measures; (ii) epidemiological investigations and controls carried out in the infected area; (iii) designation of infected area and buffer zone; and (iv) surveillance programmes and prevention measures applicable to wild boar in the infected and buffer zone; and (v) surveillance programmes and prevention measures applicable to pig holdings in the infected areas. While the prompt provision of the Polish eradication plan could have facilitated the assessment by Russia of whether there was an effective establishment and maintenance of a disease-free area within that country, a careful examination of the content of the eradication plan reveals that most of the information contained therein was previously made available to Russia through different communications and their respective attachments. We have been unable to identify any significant information in the eradication plan that was not previously made available to Russia.

7.981. In examining the different categories of information provided to Russia, we see that even before the first outbreak in Poland, the European Union had submitted to Russia on 7 February 2014, a summary report of ASF surveillance activities implemented in Lithuania, Poland, Latvia and Estonia.<sup>1348</sup> This report covers the period 1 November 2013 to 28 January 2014 and provides information on the surveillance undertaken on the basis of risk based and statistically valid sampling of wild boars and domestic pigs to allow for early detection of the disease in Poland, among other countries. Information on the protective measures introduced in Poland against

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<sup>1344</sup> Communication of 17 February 2014: African swine fever (ASF) confirmed in Poland in a wild boar found 900 meters from the border with Belarus (Exhibit EU-136).

<sup>1345</sup> Exhibits EU-138, EU-139, EU-140, EU-141, EU-142, EU-143. See also Appendix 1 below.

<sup>1346</sup> Exhibits EU-92, EU-94. See also Appendix 1 below.

<sup>1347</sup> Eradication plan of African swine fever in feral pigs in certain areas of Poland (communicated to Russia on 24 March 2015) Exhibit EU-102.

<sup>1348</sup> European Union's letter to Russia of 29 January 2014, ARES(2014)209377, SANCO G7/RF/mh(2014)219959 (Exhibit EU-62) and Excel spreadsheet on Poland, Annex to the Letter of 29 January 2014 (pp. 6-8) (Exhibit EU-63).

ASF,<sup>1349</sup> was also submitted by the European Union on 7 February 2014, which provided information on the risk analysis undertaken to determine the possible pathways of ASF in Europe, and the actions implemented to curb ASF spread, including before and after the outbreak in neighbouring Lithuania. Further to the 17 February 2014 outbreak in Poland, the European Union provided, at the beginning of March 2014, specific information on its monitoring and surveillance activities to address the outbreaks, including its implementation of Directive 2002/60/EC.<sup>1350</sup> During March 2014 to September 2014, the Panel notes that the European Union submitted various documents to Russia related to the adoption of additional control measures in Poland to curb ASF spread, epidemiological updates or other surveillance related information.<sup>1351</sup>

7.982. We have already examined the measures taken by the European Union above in the context of determination of ASF-free areas. We have concluded that, as at 22 July 2014, the European Union had taken the appropriate measures to establish ASF-free areas within Poland. In considering, in particular, the effectiveness of the sanitary controls established in Poland, we have examined the information regarding the evolution of ASF within Poland from the first case in February 2014 until the time of establishment of the panel on 22 July 2014.<sup>1352</sup> During this period of time, following the first outbreak of ASF in Poland, subsequent outbreaks occurred only within the designated infected area. It would thus appear that until 22 July 2014, the European Union had effectively demonstrated that the designated ASF-free area within Poland would remain ASF-free.<sup>1353</sup> We recall, however, that we have decided to consider the information provided by the parties until 11 September 2014.

7.983. The Panel notes that following the establishment of the Panel, there were other outbreaks which occurred only within the designated infected area. Two of these incidents occurred in small domestic holdings (maximum of 8 pigs, of which at most 5 pigs were infected) before 11 September 2014.<sup>1354</sup>

7.984. The maps provided by Russia also corroborate that there has been little expansion of the designated infected or buffer zones in Poland, all of which correspond to a small north-eastern part of the country.<sup>1355</sup>

7.985. Based on the information available as at 11 September 2014, we consider that the European Union had provided to Russia the necessary evidence to objectively demonstrate that the disease-free areas within Poland were likely to remain ASF-free.

7.986. While we are aware that some further ASF cases occurred in Poland after September 2014, as noted earlier this information was clearly not available to the European Union as at 11 September 2014. We will thus consider this evidence when examining Russia's measures in the context of Article 6.1.

***Assessment of the evidence provided by the European Union to Russia to objectively demonstrate that ASF-free areas in Latvia are likely to remain so***

7.987. We now turn to examine the extent to which the European Union provided to Russia the necessary evidence to objectively demonstrate that ASF-free areas in Latvia were likely to remain so. As we noted in paragraph 7.940, the most important evidence for demonstrating that a disease-free area is likely to remain so relates to the effectiveness of control measures. For this purpose, we will consider the necessary evidence provided in respect of the effectiveness of control

<sup>1349</sup> Protective measures introduced in Poland against the African swine fever threat, General Veterinary Inspectorate of Poland, 6–7 February 2014 (Exhibit EU-67).

<sup>1350</sup> Communication of 5 March 2014: African swine fever (ASF) in Lithuania and Poland – Presentations on the situation (Exhibit EU-143).

<sup>1351</sup> Communication of 27 March 2014: Adoption of control measures relating to African swine fever in certain Member States (Exhibit EU-146).

<sup>1352</sup> We have examined the data provided by both parties in this respect. We have focused our attention on Exhibits EU-118 and RUS-275 and RUS-296 revised.

<sup>1353</sup> ASF cases in the European Union notified to the OIE (Exhibit EU-118) and (Exhibit RUS-296 revised).

<sup>1354</sup> ASF cases in the European Union notified to the OIE (Exhibit EU-118).

<sup>1355</sup> Overview of updated outbreaks, zone changes, and outbreaks out of zone, as of 31 August 2015. (Exhibit RUS-297 revised).

measures applied in Latvia before and after the first outbreak on 26 June 2014, namely, information on: (i) the surveillance programme; (ii) diagnostic analysis; (iii) measures for early detection and response; and (iv) eradication of the disease. In undertaking this task, we will address the information provided by the European Union to Russia, including that contained in the eradication plan of Latvia. We will assess how much of the information contained therein had already been provided by the European Union to Russia. In pursuing this examination we will focus in reviewing the necessary evidence that the European Union provided to Russia in respect of the effectiveness of the control measures in Latvia.

7.988. In examining the information provided by the European Union to Russia before the first outbreak in Latvia, we see that the European Union had submitted to Russia on 7 February 2014, a summary report of ASF surveillance activities implemented in Lithuania, Poland, Latvia and Estonia. This report<sup>1356</sup> covers the period 1 November 2013 to 28 January 2014 and provides information on the surveillance undertaken on the basis of risk based and statistically valid sampling of wild boar and domestic pigs to allow for early detection of the disease in Latvia, among other countries. Furthermore, the European Union provided to Russia Latvia-specific reports on the 2013 audit of animal health contingency plans<sup>1357</sup> and ASF preventative measures that were implemented in 2013<sup>1358</sup> in February 2014. These reports show that Latvia had surveillance and monitoring mechanisms in place prior to the outbreaks. In regards to the early detection programme for implementation in 2014<sup>1359</sup> which was provided to Russia as an attachment to the document provided on 7 February 2014<sup>1360</sup>, the Panel notes the document itself indicates that the attached programme was for implementation in 2013 and that the revision for 2014 was still under discussion.

7.989. The first ASF case in Latvia occurred on 26 June 2014, and information regarding the outbreak was provided to Russia on the same day the disease was confirmed.<sup>1361</sup> In this communication, the European Union provided to Russia information on the location and scope of the outbreaks, establishment of protection and surveillance zones, and confirmation that implementation of the measures applied within each zone had begun. Throughout July 2014, the European Union provided to Russia more information relating to the adoption and amendment of the Commission Implementing Decision on protective measures, and updates and maps of new outbreaks in Latvia.<sup>1362</sup>

7.990. On 22 July 2014, the European Union notified Russia about new outbreaks which occurred in Latvia outside the designated buffer or infected areas.<sup>1363</sup> At this point in time, the previously ASF-free areas were no longer ASF-free, which would call into question the effectiveness of the previously developed surveillance and protection zones. This situation differs from that in Lithuania and Poland, because of the frequency of cases occurring outside the zones designated as protection and surveillance zones, and because of the large distance between the new incidents. The Panel notes that since the first outbreak until 11 September 2014, three of 31 outbreaks in domestic holdings occurred outside of designated buffer or infected areas, including the first outbreak, according to the information provided by the European Union.<sup>1364</sup> Despite the low prevalence, the large distance between the outbreaks and the distance of the new outbreaks from the borders of the designated infected and buffer zones raise questions regarding the effectiveness of control measures in Latvia.

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<sup>1356</sup> European Union's letter to Russia of 29 January 2014, ARES(2014)209377, SANCO G7/RF/mh(2014)219959 (Exhibit EU-62).

<sup>1357</sup> Final Report of an Audit carried out in Latvia from 4 to 8 March 2013 in order to Evaluate the Implementation of Contingency Plans in relation to Animal Health, including provisions on the Protection of Animals during Depopulation for Disease Control, SANCO 2013-6777 (Exhibit EU-80).

<sup>1358</sup> Protective measures against African swine fever in Latvia, 6 February 2014 (Exhibit EU-68).

<sup>1359</sup> Veterinary Programme on African swine fever early detection in Latvia in 2014, 2013 (Exhibit EU-239).

<sup>1360</sup> European Union's letter to Russia of 7 February 2014, ARES(2014)304571, SANCO/G7/DP/tb(2014)328578 (Exhibit EU-65) and Annotated annex to the letter of 7 February 2014, with references to the EU exhibit numbers corresponding to each document (Exhibit EU-214).

<sup>1361</sup> Communication of 26 June 2014: African swine fever (ASF) detection in Latvia (Exhibit EU-147).

<sup>1362</sup> (Exhibit EU-148), (Exhibit EU-206), (Exhibit EU-207), (Exhibit EU-209), (Exhibit EU-210), (Exhibit EU-212).

<sup>1363</sup> Communication of 22 July 2014: African Swine Fever in Latvia (Exhibit EU-187).

<sup>1364</sup> See Exhibit EU-118.

7.991. The European Union submitted evidence that demonstrates it promptly provided to Russia updates and maps of new outbreaks in Latvia. However, the European Union failed to meet this burden with respect to significant information on revised or updated control measures following this outbreak until September 2014.

7.992. On 19 May 2015, the eradication plan of Latvia was provided to Russia<sup>1365</sup>, almost eleven months after the initial ASF outbreak and five weeks after the plan was approved by the EU Commission. The plan contains information on: (i) the chronology of ASF outbreaks and EU legal requirements to develop an eradication plan; (ii) epidemiological investigations and findings in wild boars and domestic pigs; (iii) definition of infected and risk areas; (iv) surveillance programmes and preventive measures applicable to wild boars and pig holdings in the infected and risk areas; and (v) implementation of measures and administrative issues.

7.993. There is insufficient evidence on record supporting the European Union's provision to Russia of evidence pertaining to the implementation or modification of control measures following the first outbreak in Latvia and until September 2014. In our view, the timely provision of Latvia's eradication plan would have amplified the information available to Russia to assess the situation in Latvia.<sup>1366</sup>

7.994. We are aware that ASF continued to spread in Latvia after September 2014. We will examine the information provided by both parties in this regard in the context of our analysis under Article 6.1, below.

7.995. After examining the information regarding ASF outbreaks, protection measures, surveillance programmes, and early detection and response plans against ASF, as well as the evolution of ASF within Latvia before and after the first outbreak, the Panel observes that although the European Union 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, the European Union failed to provide updated and additional information on Latvia's early detection, surveillance and eradication plans after the outbreaks. Such information would have been necessary for Russia to evaluate the capacity and effectiveness of Latvia's ASF control plans. We therefore conclude that, as at 11 September 2014, the European Union had not provided sufficient information to "objectively demonstrate" to Russia that the designated ASF free areas in Latvia were likely to remain free of ASF, pursuant to Article 6.3 of the SPS Agreement.

***Assessment of the evidence provided by the European Union to Russia to objectively demonstrate that ASF-free areas in Estonia are likely to remain so***

7.996. We now turn to examine the extent to which the European Union provided to Russia the necessary evidence to objectively demonstrate that ASF-free areas in Estonia were likely to remain so. As we noted in paragraph 7.940 above, the most important evidence for demonstrating that a disease-free area is likely to remain so relates to the effectiveness of control measures. We will thus consider the evidence provided by the European Union to Russia in respect of the effectiveness of control measures applied in Estonia. For this purpose, we will address the information provided on: (i) the surveillance programme; (ii) diagnostic analysis; (iii) measures for early detection and response; and (iv) eradication of the disease. In undertaking this task, the Panel will analyse the information provided by the European Union to Russia, including that in the eradication plan of Estonia. The Panel will assess how much of the information contained therein had already been provided by the European Union to Russia. In pursuing this examination, the Panel will focus in reviewing the necessary evidence that the European Union provided to Russia in respect of the effectiveness of the control measures in Estonia. The Panel will also examine other information submitted by the European Union to Russia, as well as examine the outbreaks that took place in Estonia. Unlike the other affected member States, the first case in Estonia occurred only on 8 September 2014 well after the establishment of the Panel. Therefore, all of the information regarding actual cases dates from this time. Our consideration of this matter is also

<sup>1365</sup> Eradication plan for African swine fever in wild boar in Latvia (Exhibit EU-116).

<sup>1366</sup> Russia claims that the following information included in Latvia's eradication plan had not been previously provided to Russia by the European Union, and was useful for Russia's assessment of the regionalization measures in Latvia: identification of the likely cause of ASF spread and compensation of farms in the infected and risk areas (mostly backyard farms). Russia's second written submission, para. 69.

informed by our analysis in respect of the categories of necessary evidence that we have examined in the preceding section to determine the European Union's objective demonstration of the existence of ASF-free areas in the four affected EU member States.

7.997. Our examination of the documentation provided by the European Union to Russia, as available on record, shows that unlike the case in the other three EU member States, where the European Union officially communicated the existence of the first ASF outbreak in writing to Russia, we have no indication that the European Union sent a similar letter in the case of Estonia. However, we recall that the veterinary authorities in the EU member States regularly report the disease outbreaks to the OIE.

7.998. The Panel observes that prior to the 8 September 2014 outbreak in Estonia, the European Union provided to Russia, in February 2014, information on the ASF preparedness and surveillance measures in Estonia.<sup>1367</sup> In addition, in February 2014 the European Union submitted to Russia the results of a 2013 audit,<sup>1368</sup> and a contingency plan was provided in May 2014.<sup>1369</sup> Given the temporal parameters of this dispute and the fact that the first outbreak took place in September 2014, the Panel considers that the shorter time-frame for the consideration of the necessary evidence of the effectiveness of control measures necessitates an examination of additional information provided by the European Union after September 2014. The Panel further notes that the eradication plan for Estonia was not provided to Russia in a timely manner as previously discussed in paragraph 7.960.

7.999. In particular, the Estonian eradication plan<sup>1370</sup> contains information on: (i) epidemiological investigations and controls carried out in the infected area; (ii) surveillance programmes and prevention measures in the infected area; (iii) coordination with hunters, wildlife services and veterinary controls; (iv) campaigns to increase hunters' awareness of preventive measures; and (v) management of the wild boar population. While the prompt provision of the Estonian eradication plan could have facilitated the assessment by Russia of whether there was an effective establishment and maintenance of a disease-free area within that country, a careful examination of the content of the eradication plan reveals that most of the information contained therein was previously made available to Russia through different communications and their respective attachments. We have been unable to identify any significant information in the eradication plan that was not previously made available to Russia.

7.1000. In examining the different categories of information provided to Russia, we see that even before the first outbreak in Estonia, the European Union had submitted to Russia on 7 February 2014, a summary report of ASF surveillance activities implemented in Lithuania, Poland, Latvia, and Estonia.<sup>1371</sup> This report covers the period 1 November 2013 to 28 January 2014 and provides information on the surveillance undertaken on the basis of risk based and statistically valid sampling of wild boars and domestic pigs to allow for early detection of the disease in Estonia, among other countries. The European Union presented information to the Standing Committee on Plants, Animals, Food and Feed at the beginning of November 2014 in relation to the surveillance and monitoring activities following the first outbreak.<sup>1372</sup> An examination of the information on record shows that the European Union also submitted a code of conduct for control of African swine fever in Estonia in January 2015,<sup>1373</sup> however, the Panel notes that the information contained in this document does not provide updated information on the monitoring and surveillance activities in Estonia following the outbreak.

<sup>1367</sup> European Union's letter to Russia of 7 February 2014, ARES(2014)304571, SANCO/G7/DP/tb(2014)328578 (Exhibit EU-65).

<sup>1368</sup> Final Report of an Audit carried out in Estonia from 15 to 19 April 2013 in order to Evaluate the Implementation of Contingency Plans in relation to Animal Health, including provisions on the Protection of Animals during Depopulation for Disease Control, SANCO 2013- 6781 (Exhibit EU-82).

<sup>1369</sup> European Union's letter to Russia of 21 May 2014, ARES(2014)1658269, SANCO/G6/AB(2014)1782253 (Exhibit EU-92).

<sup>1370</sup> Plan for the eradication of African swine fever from feral pig population in Estonia (Exhibit EU-117).

<sup>1371</sup> European Union's letter to Russia of 29 January 2014, ARES(2014)209377, SANCO G7/RF/mh(2014)219959 (Exhibit EU-62).

<sup>1372</sup> African swine fever in Estonia, Standing Committee on Plants, Animals, Food and Feed, Brussels, 3-4 November 2014 (Exhibit EU-98).

<sup>1373</sup> Code of Conduct for Control of African Swine Fever of Estonia, 11 April 2013 (Exhibit EU-77).

7.1001. We have already examined the measures taken by the European Union above in the context of determination of ASF-free areas. We have concluded that, as at 22 July 2014, the European Union had provided to Russia the necessary evidence to objectively demonstrate that there were ASF-free areas within Estonia on the basis of the surveillance and control measures taken on the basis of the European Union's legal framework. In considering, in particular, the effectiveness of the sanitary controls established in Estonia, the Panel has borne in mind that most of the evidence available for Estonia in this respect post-dates the establishment of the Panel. During the period of time, following the first outbreak of ASF in neighbouring Lithuania, to the time of the establishment of the Panel, it would appear that the European Union had effectively demonstrated that the designated ASF-free area within Estonia would remain ASF-free.<sup>1374</sup> As previously explained in paragraph 7.941, we decided to consider the information provided by the parties until 11 September 2014.

7.1002. We are aware that ASF continued to spread in Estonia after September 2014. We will examine the information provided by both parties in this regard in the context of our analysis under Article 6.1, below.

7.1003. All of the evidence available for Estonia post-dates the establishment of the Panel, but it seems to demonstrate an effective control system that has prevented movement of infected boar into the ASF-free area and contained outbreaks in domestic pig holdings within infected zones, with few cases affecting a small pig population. Hence this subsequent evidence does not undermine our 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.

### **Conclusion**

7.1004. Based on the foregoing analysis, we conclude that at least as at 11 September 2014, the European Union failed to provide to Russia the necessary evidence to objectively demonstrate, pursuant to Article 6.3 of the SPS Agreement, that there are areas within Latvia, which are likely to remain free of ASF. We also conclude that the same does not hold true in respect of Estonia, Lithuania, and Poland, because the European Union provided to Russia the necessary evidence to objectively demonstrate that in these three EU member States there are ASF-free areas which are likely to remain so. Furthermore, the evidence on the record regarding the information that the European Union has submitted to Russia subsequent to 11 September 2014 serves to confirm and support our findings.

### **7.6.2.3.4 Whether Russia, through the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, ensured adaptation to the SPS characteristics of the European Union and of Russia in respect of ASF, pursuant to Russia's obligations under Article 6.1 of the SPS Agreement**

#### **7.6.2.3.4.1 Introduction**

7.1005. The European Union argues that Russia fails, through the bans on the products at issue from Estonia, Latvia, Lithuania, and Poland, to adapt its measures to the SPS characteristics of the European Union and of Russia in respect of ASF. This is because in assessing the sanitary characteristics of the affected area, Russia failed to take into account, *inter alia*, the level of prevalence or absence of ASF, the existence of eradication and control programmes (immediately implemented in accordance with international standards laid down by the OIE), and appropriate criteria or guidelines developed by the relevant international organizations.<sup>1375</sup> The European Union further stresses that despite the implementation of appropriate regionalization measures within the European Union, Russia fails to recognise the EU territory, excluding the restricted areas, as disease-free areas.<sup>1376</sup> The European Union also points out that Article 6.1 of the SPS Agreement requires that measures are adapted not only to the area from which a product originates, but also to the area to which it is destined. In this regard, the European Union highlights that there are

<sup>1374</sup> ASF cases in the European Union notified to the OIE (Exhibit EU-118) and Data from OIE WAHIS Interface, as of 31 August 2015 (Exhibit RUS-296 revised).

<sup>1375</sup> European Union's first written submission, para. 215.

<sup>1376</sup> European Union's first written submission, para. 215.



regions in Russia where wild boars do not occur and that to the extent to which domestic pigs do not occur in those regions in Russia, the introduction of the products at issue would not present ASF-related sanitary risks and importation to consumers in those regions should be allowed.<sup>1377</sup>

7.1006. Russia argues that taking into consideration the very factors listed in Article 6.1 of the SPS Agreement, it objectively and reasonably did not accept the European Union's zones.<sup>1378</sup> Russia asserts that in evaluating whether there is an objective basis for Russia's decision not to recognise the proposed ASF-free zones in conformity with the applicable Terrestrial Code standards and consistent with Article 6 of the SPS Agreement, the Panel must determine whether Russia's decision regarding the various European Union zones was "objectively justifiable". Russia stresses that in conducting that review, the Panel must not substitute its own judgement of the weight to be given certain evidence for that given by the importing country. Rather, it must determine whether the totality of the circumstances and evidence (or lack thereof) was sufficient to support the objectivity of Russia's decision in light of the relevant provisions of the Terrestrial Code and SPS Agreement Article 6 criteria and the available information.<sup>1379</sup> Russia further posits that there exist considerable parallels between the more specific zoning provisions in Terrestrial Code Chapter 4.3 and Article 5.3.7 and the more general relevant factors listed in Articles 6.2 and 6.1 of the SPS Agreement.<sup>1380</sup> In this regard Russia argues that first, Article 6.1 makes mandatory the taking into account "the appropriate criteria and guidelines which may be developed by the relevant international organizations", meaning any objective assessment of an ASF-free zone consistent with Article 6.1 of the SPS Agreement would have to include the assessment of the zoning "principles" set out in Terrestrial Code Article 4.3.3 as well as the related Article 5.3.7.<sup>1381</sup> Second, all of the general factors listed in SPS Agreement Articles 6.1 and 6.2 for importing countries to take into account when deciding to accept regionalization are also included in the more specific provisions of Chapter 4.3 of the Terrestrial Code, and that regardless of whether the Terrestrial Code provisions in Articles 4.3.3 and 4.3.3.3 are binding on the European Union in seeking to establish an ASF-free zone, at a minimum, these provisions are relevant benchmarks for assessing the general criteria of Article 6 of the SPS Agreement.<sup>1382</sup> Third, Article 6.3 of the SPS Agreement also overlaps considerably with Terrestrial Code Article 5.3.7, which addresses the "sequence of steps to be taken in establishing a zone/compartiment and having it recognized for international trade purposes".<sup>1383</sup> Russia concludes that the Terrestrial Code is a more detailed and elaborated version of the general provisions set out in Article 6 of the SPS Agreement. Accordingly, if the Panel finds that Russia was objectively justified in not accepting the EU zones in conformity with the Terrestrial Code zoning/regionalization standards, recommendations, and guideline benchmarks, it should also find that it acted consistently with Article 6 of the SPS Agreement.<sup>1384</sup>

7.1007. In light of the parties' arguments, the Panel is faced with the question of whether Russia, in applying the bans on the products at issue from Estonia, Latvia, Lithuania, and Poland, adapted its measures to the SPS characteristics of the European Union and of Russia in respect of ASF, pursuant to Russia's obligations under Article 6.1 of the SPS Agreement. To address this question, the Panel will first examine the applicable legal test, including a review of Russia's argument of the applicable standard of review.

#### **7.6.2.3.4.2 Legal test and standard of review**

7.1008. In section 7.5.2.3.6.2 above we examined the applicable legal test pursuant to Article 6.1. In that section we also addressed the standard of review that we should follow in the instant case.

7.1009. In addition to the considerations set out in that section, we consider it relevant to address Russia's argument that according to the Appellate Body in *India – Agricultural Products*, "an exporting Member claiming, for example, that an importing Member has failed to determine a

<sup>1377</sup> European Union's second written submission, para. 128.

<sup>1378</sup> Russia's first written submission, para. 231.

<sup>1379</sup> Russia's second written submission, para. 49. See also Russia's response to Panel question No. 113, paras. 190-196.

<sup>1380</sup> Russia's second written submission, para. 50.

<sup>1381</sup> Russia's second written submission, para. 51.

<sup>1382</sup> Russia's second written submission, para. 52.

<sup>1383</sup> Russia's second written submission, para. 53.

<sup>1384</sup> Russia's second written submission, para. 56.

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."<sup>1385</sup>

7.1010. However, we note that the Appellate Body continued:

This is not to suggest, as India does, 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. Indeed, as noted above, *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. Moreover, as noted above, 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.* We also observe that Article 6.1 expressly identifies "criteria or guidelines" developed by relevant organizations as relevant for the assessment of the SPS characteristics of regions, which suggests that, under certain circumstances, the adaptation of an SPS measure to regional SPS characteristics may be accomplished by taking into account relevant criteria and guidelines developed by such organizations, if any. Finally, we recall 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. All of these considerations reinforce 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.<sup>1386</sup> (emphasis added)

7.1011. 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.

#### **7.6.2.3.4.3 Whether the bans of the products at issue from Estonia, Latvia, Lithuania, and Poland are adapted to the relevant SPS characteristics of areas within those EU member States and to the SPS characteristics of Russia**

7.1012. We recall that pursuant to Article 6.1 of the SPS Agreement Russia has the obligation to adapt its SPS measures to the sanitary and phytosanitary characteristics of the area from which the product originated and to which the product is destined. In this case, this means adaptation to the SPS characteristics of Estonia, Latvia, Lithuania, and Poland and to the SPS characteristics of Russia. To determine whether Russia has made such an adaptation, we will first determine and examine the SPS characteristics in each of those areas and then analyse whether Russia's bans on the products at issue from Estonia, Latvia, Lithuania, and Poland are indeed adapted to these characteristics.

7.1013. In section 7.6.2.3.3 above, we examined whether the European Union provided to Russia the necessary evidence to objectively demonstrated that there are disease-free areas, which are likely to remain so, within the territory of Estonia, Latvia, Lithuania, and Poland, pursuant to Article 6.3 of the SPS Agreement. Our finding, after reviewing the evidence provided by the European Union to Russia together with the evidence on the record, as indicated in paragraph

<sup>1385</sup> Russia's second written submission, para. 130 (quoting Appellate Body Report, *India – Agricultural Products*, para. 5.156).

<sup>1386</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.157. (footnotes omitted)

7.1004 above, is in the negative with respect to Latvia; and in the positive with respect to Estonia, Lithuania, and Poland. We recall that we found that the European Union has provided the necessary evidence in support of its claims that there are ASF-free areas within the four affected EU member States. However, the European Union failed to provide the necessary evidence to Russia to objectively demonstrate that the ASF-free areas in Latvia are likely to remain ASF-free.

7.1014. Based on our finding under Article 6.3 with respect to Estonia, Lithuania, and Poland, we consider that the European Union has provided the necessary evidence to objectively demonstrate that there are areas within each of these three EU member States characterized as being free of ASF and likely to remain so. In addition, based on our finding under Article 6.3 with respect to Latvia, we consider that the European Union provided the necessary evidence to objectively demonstrate that there are areas within Latvia characterized as being free of ASF. However, because of the ongoing nature of the obligation to ensure adaptation pursuant to Article 6.1, we consider that to determine the SPS characteristics in the four affected EU member States, it is appropriate for us to further consider the most updated information on record in respect of the ASF outbreaks. We turn to examine the SPS characteristics in each of the affected EU member States, particularly in respect of the most updated status of the presence of ASF.

7.1015. According to the information provided by the European Union there were 77 incidents/cases in Lithuania between January 2014 and April 2015, the last occurring on 16 April 2015. Of these 77 cases, six occurred in domestic pig holdings – and the last of these outbreaks was on 31 August 2014.<sup>1387</sup> We also note that according to the more updated information provided by Russia, an additional 38 cases of ASF outbreaks were reported between 4 June 2015 and 27 August 2015, of which only one occurred outside the designated infected area, but within the buffer zone, in a wild boar. 11 outbreaks were reported in domestic pigs in the infected zone within this period. Based on Russia's updated information, a total of 123 incidents occurred in Lithuania between 24 January 2014 and 27 August 2015.<sup>1388</sup> Examining these figures together with the most updated geographical information on record<sup>1389</sup>, we consider it to be clear that in August 2015, there were areas in Lithuania that remained free of ASF.

7.1016. According to the information provided by the European Union there were 59 incidents of ASF reported in Poland between February 2014 and April 2015, the last occurring on 16 April 2015. Of these 59 cases, only three occurred in domestic pig holdings – and the last of these outbreaks was on 31 January 2015. We also note that according to the more updated information provided by Russia, an additional 13 cases of ASF outbreaks were reported between 29 May 2015 and 21 August 2015, of which no additional outbreaks were reported outside of the designated infected area. Based on Russia's updated information, a total of 80 outbreaks occurred in Poland between 13 February 2014 and 21 August 2015.<sup>1390</sup> Examining these figures together

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<sup>1387</sup> ASF cases in the European Union notified to the OIE (Exhibit EU-118).

<sup>1388</sup> Exhibit RUS-296 revised. According to the data submitted by Russia on the outbreaks in Lithuania (RUS-275), there are some differences indicated in the number of outbreaks and their location (i.e. within the buffer, infected or disease-free zones), as compared to the information provided by the European Union in Exhibit EU-118. Russia indicates 85 cases of ASF outbreaks in Lithuania between 24 January 2014 to 4 June 2015, of which: (i) 2 cases occurred in domestic pigs outside of the buffer and infected zones (29 July 2014 and 22 August 2014); and (ii) 2 cases occurred in wild boars in the buffer zone (10 December 2014 and 18 May 2015). The updated exhibit provided by Russia (RUS-296 Revised) provides additional information on the number of outbreaks in Lithuania up to 27 August 2015. An additional 38 cases of ASF outbreaks are reported between 4 June 2015 and 27 August 2015, of which only one related to an outbreak in wild boar in the buffer zone. 11 outbreaks are also reported in domestic pigs in the infected zone within this period. Based on Russia's updated information, a total of 123 outbreaks occurred in Lithuania between 24 January 2014 and 27 August 2015.

<sup>1389</sup> According to the information available in Exhibits EU-119 and RUS-297 revised.

<sup>1390</sup> Exhibit RUS-296 revised. According to the data submitted by Russia on the outbreaks in Poland (RUS-275), whilst having some differences in dates, corroborates the three incidents of outbreak in domestic pigs in the infection zone (17 July 2014, 5 August 2014 and 30 January 2015) and one case of infected wild boar within the buffer zone (19 March 2015) indicated in EU's exhibit (EU-118). In total, 67 incidents are reported for Poland between 13 February 2014 and 29 May 2015. The updated exhibit provided by Russia (RUS-296 Revised) provides additional information on the number of outbreaks in Poland after 13 February 2014 and up to 21 August 2015. An additional 13 cases of ASF outbreaks are reported between this period, of which no additional outbreaks are reported outside of the designated infected area. Based on Russia's updated information, a total of 80 outbreaks occurred in Poland between 13 February 2014 and 21 August 2015.

with the most updated geographical information on record<sup>1391</sup>, we consider it to be clear that in August 2015, there were areas in Poland that remained free of ASF.

7.1017. According to the information provided by the European Union, Latvia reported a total of 251 incidents between 26 June 2014 and 17 April 2015. Ten of the cases in wild boar were found in the ASF-free area, and seven infected boar were found within the buffer zones. According to the information provided by Russia, five outbreaks occurred in domestic pigs outside of the designated buffer or infected zones, between 26 June 2014 and 1 September 2015.<sup>1392</sup> We recall our finding under Article 6.3 that the European Union failed to provide information to Russia that objectively demonstrated that the ASF-free areas in Latvia were likely to remain free of the disease. This finding was largely based on the fact that the evidence on record regarding the information in respect of Latvia that had been provided by the European Union to Russia as at 11 September 2014 called into question the effectiveness of the ASF control measures applied in Latvia. Despite such findings, examining the figures mentioned above together with the most updated geographical information on record<sup>1393</sup>, we consider that in August 2015, there were areas in Latvia that remained free of ASF.

7.1018. According to the information provided by the European Union, there were 84 incidents of ASF in Estonia between September 2014 and April 2015, the last occurring on 17 April 2015. Of these 84 cases, none had occurred in domestic pig holdings and none of the infected wild boar had been found in ASF-free zones. Seven of the infected boars (including the first one) were found in the buffer zone. The last one of which, was found on 16 April 2015. Based on the information available as at 11 September 2014, we consider that the European Union had provided sufficient evidence to objectively demonstrate that the disease-free areas within Estonia were likely to remain ASF-free. We also note that according to the more updated information provided by Russia, on 18 May 2015 there was a case in wild boar outside the infected and buffer zones. In addition, the Panel observes that the first three outbreaks in domestic pigs occurred within a designated infected zone on 18 July 2015, affecting only 4 animals. The situation in domestic pigs changed as the summer progressed, with 14 cases in small holdings (ranging from affecting 1 to 15 animals) in designated infected zones, between 25 July and 27 August 2015. The number of outbreaks in wild boar grew, always occurring within the infected and buffer zones (there were only 8 cases in the buffer zone). Based on Russia's updated information, a total of 250 outbreaks occurred in Estonia between 2 September 2014 and 2 September 2015. Examining these figures together with the most updated geographical information on record<sup>1394</sup>, we consider it to be clear that in August 2015, there were areas in Estonia that remained free of ASF.

7.1019. It is to these particular characteristics in Estonia, Latvia, Lithuania, and Poland to which Russia has the obligation to adapt the bans on the imports of the products at issue from these affected EU member States.

7.1020. In our view, imposing an outright ban on the products at issue, such as the one imposed by Russia on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, and failing to recognize the existence of ASF-free areas within these four EU member States, amount to not adapting the measure to the sanitary and phytosanitary characteristics of each of the four affected EU member States. Moreover, this conclusion is reinforced by our subsequent analysis in respect of the adaptation of the bans on the imports of the products at issue from the four affected EU member States to the SPS characteristics in Russia.

7.1021. Moreover, our examination on Russia's obligation under Article 6.1 will address whether there are elements in the SPS characteristics of the area to which the products are destined to which the challenged measures should have been adapted. We will also examine if there are additional factors, which in the light of the circumstances of the present case, would shed light on our examination of Russia's obligations under Article 6.1.

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<sup>1391</sup> According to the information available in Exhibits EU-119 and RUS-297 revised.

<sup>1392</sup> Exhibit RUS-296 revised.

<sup>1393</sup> According to the information available in Exhibits EU-119 and RUS-297 revised.

<sup>1394</sup> According to the information available in Exhibits EU-119 and RUS-297 revised.

7.1022. We note that starting in 2007, there have been ASF outbreaks in Russia and that ASF has not been eradicated in Russia.<sup>1395</sup> In our view, this forms part of the SPS characteristics of the territory to which the products at issue from the European Union are destined and to which Russia must adapt its measures. The SPS experts consulted by the Panel stressed many times that it "needs to be remembered that the RF [Russia] is not an ASF-free country".<sup>1396</sup>

7.1023. In our examination of this matter in respect of the EU-wide ban, we have noted that the panel in *US – Animals* observed, "[i]f for instance, a particular area within the territory of an importing Member has a similar SPS status as the area of origin of a product (e.g. has the same level of prevalence of a given disease), that Member may be required to tailor its measure by relaxing the restrictions on imports into that area".<sup>1397</sup> We agree with this statement, in the sense that the level of prevalence of a given disease in the territory of the importing Member is part and parcel of the situation to which what that importing Member must adapt its SPS measures to. We recall also the comment by Dr Thomson that "it seems to me that the problem under discussion is a regional one encompassing the Caucasus, Baltic States, the Russian Federation and eastern parts of the EU. As indicated elsewhere, from an ASF perspective, the whole region seems to be in roughly the same position. Most of the vast surface area of the EU lies outside this region ..."<sup>1398</sup> This is not to say that a country in which a disease occurs cannot impose any import restrictions to prevent the further entry of the disease into regions in which control measures are in place, or its spread into areas of the importing country which are free of the disease. Rather, the fact that a disease already exists within the importing area and that control measures are in place, are factors that affect 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.

7.1024. In addition, pursuant to the second sentence of Article 6.1, in assessing the SPS characteristics of a region, Members shall take into account, among other things, the level of prevalence of the specific diseases, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations. In our view, because a Member needs to know which are the SPS characteristics to which its SPS measures need to be adapted, it would be difficult for a Member to act in accordance with its obligations under Article 6.1 if it has not pursued an assessment of the areas from where the products at issue originate and to which they are destined.

7.1025. As we have noted in our examination of this matter in respect of the EU-wide ban, we agree with the panel in *US – Animals* that "the obligation to 'take into account' the factors enumerated in the second sentence [of Article 6.1] is intrinsically connected to the obligations relating to the assessment of risks under Article 5 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' when assessing the risks as required by Article 5.1. Therefore, it is reasonable to conclude that the assessment of the SPS characteristics of an area, taking into account the factors listed in the second sentence of Article 6.1 could be conducted as part of a Member's risk assessment."<sup>1399</sup><sup>1400</sup>

7.1026. It is undisputed 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. In section 7.6.5 below, we examine the justifications raised by Russia to excuse compliance with its obligation, pursuant to Article 5.1, to base its SPS measures on a risk assessment. Notwithstanding our examination in section 7.6.5 below in respect of the European Union's claims under Articles 5.1, 5.2, 2.2 and 5.7, we consider it relevant to our analysis under Article 6.1 that Russia has not made an assessment of the risks arising from the imports of the products at issue from the territory of the European Union, including Estonia, Latvia, Lithuania, and Poland. In particular, we consider that the lack of

<sup>1395</sup> See Russia's first written submission, para. 23 (referring to OIE WAHIS Interface, Event summary Reports, African swine fever, Russia (2007-2014). (Exhibit RUS-144)); response to Panel question No. 143, para. 264; and second written submission, paras. 146-147. See also paras. 4.22-4.24 above.

<sup>1396</sup> Dr Thomson, para. 2.128 (response to Panel question 13).

<sup>1397</sup> Panel Report, *US – Animals*, para. 7.642.

<sup>1398</sup> Dr Thomson's response to EU Question No.5, para. 1.128.

<sup>1399</sup> (footnote original) Our statement should not be read to preclude the possibility of other situations where Article 6.1 could be applied in the absence of a risk assessment.

<sup>1400</sup> Panel Report, *US – Animals*, para. 7.644.

risk assessment limits a Member's ability to assess the SPS characteristics of the areas from where the products in question originate and of the areas to which they are destined.

7.1027. In this case, we consider that rejecting the imports of goods from the entire territory of Estonia, Latvia, Lithuania, and Poland, and not tailoring the bans on the imports of the products at issue from these four affected EU member States in a manner that ensures adaptation to the presence of ASF in certain areas in Russia, constitutes a breach of Russia's obligation under Article 6.1. This breach is further reinforced by Russia's failure to make a risk assessment as appropriate to the circumstances, which in this case entail an exhaustive examination, including the corresponding scientific justification, of the regionalization measures adopted by the European Union and the potential risks to different areas within Russia. We consider, for example, that the risk posed by imports into those areas of Russia where ASF currently exists, including among wild boar, may be significantly different than the risk to areas of the Russian territory that are free of ASF. This would in particular be the case if the control and surveillance measures that Russia applies to ASF within its territory are indeed as effective as claimed by Russia.

#### **7.6.2.3.4.4 Conclusion**

7.1028. Based on the foregoing, we find that 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 ban 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 or refer to 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. We therefore find that 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.

#### **7.6.2.4 Conclusion in respect of the consistency of the bans on the products at issue from Estonia, Latvia, Lithuania, and Poland, with Article 6 of the SPS Agreement**

7.1029. In this section we find 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.<sup>1401</sup>

7.1030. We also find that at least as at 11 September 2014, the European Union failed to provide to Russia the necessary evidence to objectively demonstrate, pursuant to Article 6.3 of the SPS Agreement, that there are areas within Latvia, which are free of ASF and are likely to remain so. We also find that the European Union 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 ASF-free and are likely to remain so.<sup>1402</sup>

7.1031. Lastly we find that 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 ban 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.<sup>1403</sup>

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<sup>1401</sup> See section 7.5.2.3.4 above.

<sup>1402</sup> See section 7.5.2.3.5 above.

<sup>1403</sup> See section 7.5.2.3.6 above.

### **7.6.3 Whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are "based on" the relevant international standards under Article 3.1 of the SPS Agreement (continued)**

#### **7.6.3.1 Assessing whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, as applicable to non-treated products, are "based on" the international standards applicable to non-treated products**

7.1032. In section 7.6.1.3.3 we discerned the meaning of the relevant international standards in this dispute, articulated in the Terrestrial Code. At the end of that section we observed that as a result of our examination of the meaning of the relevant international standards applicable to non-treated products in the light of the parties' arguments and of the circumstances in this dispute, we concluded that before comparing the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland with those standards for the purposes of determining whether those measures are "based on" them, we considered it appropriate and instructive for us to turn to our examination of the European Union's claims under Article 6 of the SPS Agreement. After conducting our examination of the European Union's claims under Article 6 and reaching the respective findings, we now resume our examination of whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are based on the relevant provisions of the Terrestrial Code applicable to the non-treated products at issue.

7.1033. In sections 7.6.1.3.1 and 7.6.1.3.2 above, we expounded on the applicable legal standard under Article 3.1 of the SPS Agreement. For a measure to be based on a relevant international standard it should be "founded", "built upon" or "supported by" such a standard. Moreover, if a measure is found to contradict, that is, it fundamentally departs from, the standard it cannot be properly concluded that such an international standard has been used "as a basis for" the respective measure.<sup>1404</sup> In light of these criteria, we now turn to examine the question of whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are "based on" the relevant provisions of the Terrestrial Code.

7.1034. We recall that the provisions of the Terrestrial Code relating to ASF status provide for recognition of ASF-free countries, zones, and compartments. Thus, Articles 15.1.2, 15.1.3 and 15.1.4 each make reference to an ASF-free "country", "zone" or "compartment" on an equal footing,<sup>1405</sup> without imposing any sequence, preference or hierarchy amongst the three terms. Moreover, pursuant to certain Articles in Chapter 15.1 of the Terrestrial Code<sup>1406</sup>, trade of certain pig and pork products is safe when they originate from animals located in an ASF-free country or zone.<sup>1407</sup> The relevant provisions of the Terrestrial Code thus require recognition of ASF-free areas, contingent upon the proper establishment of those areas.

7.1035. In section 7.5.2.3.5 above we concluded that the European Union did not provide Russia with the necessary evidence to objectively demonstrate that areas in Latvia are free of ASF and are likely to remain so.<sup>1408</sup> This failure, read in the context of the information on record available to Russia up to September 2014, would support the fact that there are uncertainties in respect of the existence of ASF-free areas within Latvia which are likely to remain ASF-free. In this respect, we understand that the standards articulated in the Terrestrial Code for the trade of non-treated pig products are the basis for the bans on the imports of the products at issue from Latvia.

7.1036. In section 7.5.2.3.5 above we also concluded that the European Union provided to Russia the necessary evidence to objectively demonstrate that areas in Estonia, Lithuania, and Poland are free of ASF and are likely to remain so.<sup>1409</sup> Given that the relevant provisions of the Terrestrial Code call upon OIE members to allow for the possibility of recognition of ASF-free status (whether historically or on the basis of eradication) on a country or "zone" basis, the failure of Russia to even allow for the possibility for imports from Poland since February 2014 amounts, in our view, to

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<sup>1404</sup> See para. 7.254 above.

<sup>1405</sup> For definitions of these concepts, see paras. 7.293-7.297 above.

<sup>1406</sup> For a list of the Articles of Chapter 15.1 of the Terrestrial Code relevant to our examination of non-treated products see Table 8 above.

<sup>1407</sup> See section 7.5.1.3.4.2 above.

<sup>1408</sup> See section 7.5.2.3.5.4 above.

<sup>1409</sup> See section 7.5.2.3.5.4 above.

a "fundamental departure" from the provisions of the Terrestrial Code dealing with ASF-free status, in particular, Articles 15.2-15.4. Accordingly, we find that, the bans on the imports of the products at issue from Estonia, Lithuania, and Poland, as applicable to non-treated products, contradict the relevant international standards and therefore it cannot be considered to be "based on" that standard for the purposes of Article 3.1 of the SPS Agreement.

7.1037. Based on the foregoing, we find that the bans on the imports of the products at issue from Latvia, as applicable to non-treated products originating from ASF-free areas, are based on the Terrestrial Code and are in consequence consistent with Russia's obligation to base its SPS measures on international standards, pursuant to Article 3.1 of the SPS Agreement.

### **7.6.3.2 Conclusion on whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are "based on" the relevant international standards**

7.1038. We recall that we considered it most appropriate to pursue an examination of whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland in respect to two categories of products covered by such measures. The first relates to the scope of the challenged measures in respect of products subject to treatment, which we examined in light of the Terrestrial Code provisions that articulate the standards for the trade of treated pork products (Articles 15.1.14-15.1.16). The second relates to the scope of the challenged measures in respect of non-treated products originating from ASF-free areas, which we examined in light of the Terrestrial Code provisions that articulate the standards for the trade of non-treated products (Articles 15.1.2-15.1.4, 15.1.5, 15.1.8, 15.1.10, 15.1.12, 15.1.13, 15.1.14, 15.1.15, and 15.1.16).

7.1039. Regarding the scope of the challenged measures in respect of treated products we find that the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are not "based on" the relevant international standards, as articulated in Articles 15.1.14-15.1.16 of the Terrestrial Code; and are therefore, to the extent applicable to treated products, inconsistent with Article 3.1 of the SPS Agreement.

7.1040. Regarding the scope of the challenged measures in respect of non-treated products we find that the bans on the imports of the products at issue from Latvia are "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 applicable to non-treated products, consistent with Article 3.1 of the SPS Agreement. We also find that the bans on the imports of the products at issue from Estonia, Lithuania, and Poland, as applicable to non-treated products, 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 applicable to non-treated products, inconsistent with Article 3.1 of the SPS Agreement.

## **7.6.4 Claims under Article 8 and Annex C of the SPS Agreement**

### **7.6.4.1 Main arguments of the parties**

#### **7.6.4.1.1 European Union**

7.1041. The European Union claims that Russia failed and fails to modify the measures at issue in order to permit the resumption of imports to Russia of the products at issue from non-affected areas in the European Union and/or with respect to appropriately treated or processed products.<sup>1410</sup> The European Union's claim under Article 8 and Annex C of the SPS Agreement refers to "the acceptance of EU regionalization measures".<sup>1411</sup> The European Union argues that Russia failed to ensure that procedures for checking and ensuring the fulfilment of SPS measures were undertaken and completed without undue delays and in a manner no less favourable for imported products than for like domestic products under Annex C(1)(a). The European Union further contends that Russia failed to observe its obligations in the operation of approval procedures as

<sup>1410</sup> European Union's first written submission, para. 337.

<sup>1411</sup> European Union's second written submission, para. 161.



embodied in Annex C(1)(b). The European Union also claims that Russia failed to ensure that information requirements were limited to what was necessary for appropriate control, inspection and approval procedures in Annex C(1)(c). In this respect, the European Union concludes that Russia's measures are in breach of Annex C(1)(a), (b) and (c) of the SPS Agreement and, consequently, of Article 8 of the SPS Agreement.<sup>1412</sup>

#### 7.6.4.1.2 Russia

7.1042. Russia contends that the scope of control, inspection and approval procedures set out in Article 8 and Annex C of the SPS Agreement does not cover the European Union's claims and the evidence presented. In addition, Russia submits that even if the scope of Annex C did cover the measures subject to the European Union's claims, the European Union has not put forward sufficient evidence and has not met its burden of proof to establish a *prima facie* case of a violation of Article 8 and Annex C(1)(a), (b) and (c) of the SPS Agreement. In respect of the measures on imports from Estonia, Latvia, Lithuania, and Poland, Russia asserts that the record supports the conclusion that the four European Union member States failed to provide Russia with comprehensive, timely and adequate information of implementation of effective ASF control measures, not only in its initial ASF-free zone regionalization request, but also subsequently with respect to each legislative change to the borders of the alleged ASF-free zone. Russia asserts that it reviews its provisional measures on a regular basis, but the European Union's failure to provide sufficient information has resulted in the current delay. According to Russia, one or more of the Panel's experts has considered relevant a number of the questions asked by Russia with respect to all the EU member States.<sup>1413</sup>

#### 7.6.4.2 Main arguments of the third parties

##### 7.6.4.2.1 Brazil

7.1043. Brazil refers to Russia's argument that negotiations leading up to the adoption of a procedure fall outside of the purview of Article 8 and Annex C of the SPS Agreement. Brazil considers that the existence of negotiations involving certain procedures is not, in itself, a decisive criterion for the determination of the applicability of Article 8.<sup>1414</sup> In addition, Brazil refers to the requirement to complete SPS procedures without undue delay, and highlights that the delay will be undue when it is unjustified, excessive, unwarranted or disproportionate.<sup>1415</sup>

##### 7.6.4.2.2 United States

7.1044. The United States considers that the European Union's claim under Article 8 and Annex C of the SPS Agreement is based on the incorrect premise that the measures at issue fall under the purview of those provisions, because they are not control, inspection, nor approval procedures of an existing SPS measure, but rather a request for modifying the scope of such a measure.<sup>1416</sup>

#### 7.6.4.3 Analysis by the Panel

##### 7.6.4.3.1 Introduction

7.1045. The European Union presents its claims under the provisions of the SPS Agreement related to control, inspection and approval procedures, in the following order: (i) Annex C(1), with particular reference to subparagraphs (a), (b) and (c); and (ii) Article 8. The European Union argues that in light of its arguments presented under Article C(1), Russia has breached the provisions of Annex C(1) (a), (b) and (c), and, consequently, Article 8.<sup>1417</sup> Russia presents its

<sup>1412</sup> European Union's first written submission, paras. 343-344; European Union's second written submission, paras. 167-185.

<sup>1413</sup> Russia's comment to the experts' responses to Panel questions 12-13. See also Russia's second written submission, paras. 61-77 and 83-86, and 196.

<sup>1414</sup> Brazil's third-party submission, paras. 22-27.

<sup>1415</sup> Brazil's third-party submission, paras. 28-33.

<sup>1416</sup> United States' third-party submission, paras. 12-18.

<sup>1417</sup> European Union's first written submission, para. 344.

arguments under both Article 8 and Annex C(1), including the relevant sub-paragraphs of Annex C(1)(a), (b) and (c).

7.1046. The Panel is called upon to examine the scope of application of Article 8 and Annex C of the SPS Agreement, and to assess the claims of inconsistency raised by the European Union in respect of Annex C(1)(a), (b), and (c). Before turning to the corresponding assessment, we refer to the relevant legal provisions.

#### **7.6.4.3.2 Relevant legal provisions**

7.1047. Article 8 of the SPS Agreement, entitled "Control, Inspection and Approval Procedures", provides:

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

7.1048. Annex C of the SPS Agreement is entitled "Control, Inspection and Approval Procedures". An accompanying footnote is attached to the title of Annex C, which states that:

<sup>[7]</sup> Control, inspection and approval procedures include inter alia, procedures for sampling, testing and certification.

7.1049. Annex C(1) provides , in relevant part, that:

1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

(a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;

(b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

(c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs;

7.1050. Article 8 of the SPS Agreement requires Members to "observe the provisions of Annex C in the operation of control, inspection and approval procedures", thereby incorporating the disciplines of Annex C into the operative part of the SPS Agreement. This is consistent with the language of Article 1.3 of the SPS Agreement, which states that "[t]he annexes are an integral part of th[e] Agreement". Thus, the non-observance of the obligations in Annex C(1) "implies a

violation of Article 8".<sup>1418</sup> Accordingly, the Panel will first determine whether Russia has breached its obligations under Annex C(1)(a), (b) and (c). A ruling that Russia has breached obligations under Annex C will consequently mean that Article 8 has also been breached.

7.1051. As Russia contests that the challenged actions of Russia fall within the scope of Article 8 and Annex C(1) of the SPS Agreement, the Panel will first address whether Article 8 and Annex C(1) of the SPS Agreement are applicable to Russia's actions. If we find that the challenged actions fall within the scope of these provisions, we will proceed to assess the European Union's claims of inconsistency with Annex C(1)(a)-(c), and, consequently, Article 8.

#### **7.6.4.3.3 Whether the challenged actions of Russia fall within the scope of Article 8 and Annex C(1) of the SPS Agreement**

7.1052. In section 7.5.4.3.3 above we summarized and addressed the parties' arguments in respect of whether the procedure at issue, as identified by the European Union, falls within the scope of Article 8 and Annex C(1) of the SPS Agreement. We recall the parties' arguments and then examine them in light of the manner in which the procedure at issue is applied for the purposes of the ASF areas within the four affected EU member States.

##### **7.6.4.3.3.1 The European Union's complaint**

7.1053. The European Union posits, in respect of Article 8 and Annex C of the SPS Agreement, that the acceptance of the European Union's regionalization measures is not a negotiation between two Members, as argued by Russia, but instead an objective exchange of information requiring the decision of the importing Member.<sup>1419</sup> The European Union enumerates a series of events, dating from early February 2014, which it argues constitutes undue delay encountered in the process, including (i) Russia's repeated request for information previously provided; (ii) Russia's requests for irrelevant information; and (iii) Russia's failure to reply to additional information and explanations submitted by the European Union.<sup>1420</sup>

7.1054. Russia argues that the European Union, in its claim of Russia's undue delay in responding to communications or meeting requests, only provides some information on the discussions and exchanges that have taken place between Russia and the European Union.<sup>1421</sup> Russia argues that the evidence the European Union provided distorts the overall picture of the constant information exchange and intensive negotiations concerning regionalization, including the numerous explanations provided by Russia in relation to the insufficiency of submitted information. Russia concludes that the European Union has merely asserted a violation of Article 8 and Annex C(1)(a) by pointing to alleged delays in evaluating requests for regionalization without demonstrating that these delays were "undue". Russia submits that even if the scope of the procedures covered the measures subject to the European Union's claims the European Union has not put forward sufficient evidence and has not met its burden of proof to establish the *prima facie* case of a violation of Article 8 and Annex C(1)(a), (b) and (c) of the SPS Agreement.<sup>1422</sup>

7.1055. To the extent that the European Union is challenging Russia's actual non-acceptance to date of the European Union's request for recognition of ASF-free areas, we see no obligation in Article 8 or Annex C(1)(a)-(c) that mandates a particular *outcome* in respect of the procedures

<sup>1418</sup> Panel Report, *US – Poultry (China)*, para. 7.394. See also Panel Report, *US – Animals*, para. 7.62. The panel in *EC – Approval and Marketing of Biotech Products* found that failure to observe the provisions of Annex C of the SPS Agreement implies a consequential breach of Article 8. Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1569.

<sup>1419</sup> European Union's second written submission, para. 162.

<sup>1420</sup> European Union's first written submission, para. 339; response to Panel question No. 194, paras. 383-384; and second written submission, paras. 161, and 167-183.

<sup>1421</sup> Russia's first written submission, paras. 432-433. With regard to Article 8 and Annex C(1)(a), Russia highlights that the European Union in its claims refers to "non-affected areas in the EU", but does not identify what it means by this reference. Russia indicates that it presents its arguments on the assumption that the European Union refers to Estonia, Latvia, Lithuania, and Poland.

<sup>1422</sup> Russia's closing statement at the second meeting with the Panel, para. 3.

they address.<sup>1423</sup> We understand, nevertheless, that the European Union is challenging Russia's process of consideration of its request for recognition of ASF-free areas, in particular, relating to certain information requested by Russia.<sup>1424</sup>

7.1056. Accordingly, we first examine whether such a process falls within the scope of application of Article 8 and Annex C. In this examination, we will consider whether the identified actions of Russia, as the responding Member, constituted "any procedures" that fall within the scope of Article 8 and Annex C(1). If so, we will consider whether those procedures were aimed at "checking and ensuring the fulfilment of sanitary or phytosanitary measures."<sup>1425</sup>

#### 7.6.4.3.3.2 Scope of control, inspection and approval procedures

##### "Any" procedure

7.1057. In section 7.5.4.3.3.2 above, we examined this issue in respect of the EU-wide ban. As we noted, the alleged procedure at issue by the European Union concerns recognition of ASF-free areas in the European Union. In our view, this refers both to areas within and outside Estonia, Latvia, Lithuania, and Poland. For the purposes of our analysis, we examine separately the situation of how Russia considered the areas outside these four affected EU member States (which we have assessed in section 7.5.2 above, *vis-a-vis* the EU-wide ban) and how Russia considered the areas inside these four affected EU member States. In this section, we focus on the latter of these situations. However, in our view, our examination of whether Russia's consideration of the ASF-free areas within Estonia, Latvia, Lithuania, and Poland amounts to "any procedure" is common for the consideration of areas inside and outside the four affected EU member States. We therefore rely on our analysis of this matter as explained in section 7.5.4.3.3.2 above. We now turn to our assessment of whether Russia's consideration of the ASF-free areas within the four affected EU-member States was to "check or ensure the fulfilment" of SPS measures."

##### To "check and ensure" the "fulfilment" of SPS measures

7.1058. Article 8 and Annex C(1) apply to the procedures dealing with control, inspection and approval "which are aimed at checking and ensuring the fulfilment of SPS measures."<sup>1426</sup> Annex A(1) defines "sanitary or phytosanitary measure" as any measure applied to achieve any of the objectives set out therein. We consider that the phrase "to check and ensure the fulfilment of an SPS measure" means that Article 8 and Annex C cover any procedure to make certain that a measure applied to achieve one of the objectives in Annex A(1) is fulfilled, that is, fully implemented.<sup>1427</sup> The Appellate Body observed in this respect that "since the procedures referred to in Annex C(1) are those that check and ensure fulfilment of SPS measures, this suggests that such measures *exist* prior to the operation, undertaking, or completion of, the relevant procedures, as the latter seek and ensure fulfilment with the former."<sup>1428</sup>

7.1059. We therefore examine whether Russia's procedure at issue checks and ensures the fulfilment of an SPS measure as defined in Annex A(1).

<sup>1423</sup> We do not mean to say that there is no core obligation in these provisions to reach a decision. Rather, these provisions foresee a requirement to conduct a procedure and reach a final determination, whether it be positive or negative. See, for example, Panel Report, *US – Animals*, para. 7.112.

<sup>1424</sup> Appellate Body Report, *Australia – Apples*, para. 420 ff. The Appellate Body report on *Australia – Apples* clarified that a complainant enjoys discretion in identifying the measures at issue and the Panel should not conflate the requirement to identify the measures at issue with the requirement to identify the legal basis of the complaint. This clarification was given in the part of the report in which the Appellate Body determined whether the panel erred in finding that the claims under Annex C(1)(a) and Article 8 of the SPS Agreement were outside of its term of reference. Article 6.2 of the DSU does not impose any additional requirement, as the Panel's analysis implies, that a complainant must, in its request for establishment of a panel, demonstrate that the identified measure at issue causes the violation of, or can violate, the relevant obligation. The question of whether the measures identified in the panel request *can violate*, or *cause the violation of*, the obligation in Annex C(1)(a) and Article 8 is a substantive issue to be addressed and resolved on the merits. Appellate Body Report, *Australia – Apples*, para. 423.

<sup>1425</sup> See, for example, Panel Report, *US – Animals*, para 7.71.

<sup>1426</sup> Panel Report, *US – Poultry (China)*, para. 7.356.

<sup>1427</sup> We find support for this approach in Panel Report, *US – Animals*, para 7.73.

<sup>1428</sup> Appellate Body Report, *Australia – Apples*, para. 436.

7.1060. We recall our findings in paragraph 7.231 above that the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland constitute SPS measures within the meaning of Annex A(1), and, our findings in paragraph 7.517 above, that the procedures at issue - Russia's process for considering the European Union's request for ASF regionalization - are interlinked with the imposition and perpetuation, as well as the geographical and product scope, of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.

7.1061. Russia has insisted<sup>1429</sup> that the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, were adopted in part on the basis of the 2006 memorandum<sup>1430</sup> and of the bilateral veterinary certificates<sup>1431</sup>; both of which were already in existence. Furthermore, the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland were clearly adopted in connection with Russia's overarching SPS regulation on animal diseases, as contained in Customs Union Decision 317.<sup>1432</sup> Against this backdrop, we consider that the procedure at issue (i.e. Russia's process of consideration of the European Union's request for the recognition of ASF-free areas within the European Union including the four affected EU-member States), is focused on determining whether the epizootic situation in the European Union warrants an adaptation of the veterinary certificates bilaterally agreed in 2006. In this vein, the procedure at issue concerns checking fulfilment of a measure that is already in existence covered by Article 8 and Annex C(1) of the SPS Agreement (rather than constituting "negotiations" concerning regionalization and revisions to certificates that would fall into the category of processes for modifying a measure).

7.1062. We now turn to our examination of the consistency of the process at issue with paragraphs (a) through (c) of Annex C(1).

#### **7.6.4.3.4 Whether the procedure at issue was undertaken in accordance with Annex C(1)(a)-(c) of the SPS Agreement**

##### **7.6.4.3.4.1 Order of analysis**

7.1063. We recall that the European Union has raised claims in respect of paragraphs (a) through (c) of Annex C(1) of the SPS Agreement. As we have already noted<sup>1433</sup>, we are free to structure the order of our analysis of the European Union's claims taking into account the circumstances of the present case, in a manner that is consistent with the structure and logic of the provisions at issue.<sup>1434</sup> Most of the European Union's arguments and evidence have focused on the fact that Russia has requested unnecessary evidence, which was not examined in a timely fashion, raising alleged violations of paragraphs (c) and (a) of Annex C(1). Furthermore, the European Union, in a summary fashion, addresses other potential violations concerning paragraph (b) of Annex C(1).

7.1064. Based on the foregoing, we will continue our analysis by addressing whether the procedures at issue breach paragraph (c) of Annex C(1), followed by our corresponding examination in respect of paragraphs (a) and then (b) of Annex C(1).

##### **7.6.4.3.4.2 Legal test**

7.1065. In section 7.5.4.3.4.2 above we have examined in detail the applicable legal test under Annex C(1)(a) through (c). We will rely on our considerations provided in that section when addressing the subsequent questions concerning the manner in which Russia undertook and

<sup>1429</sup> Russia's first written submission, paras. 343 and 345; Russia's response to Panel question No. 78, para.129; and Russia's second written submission, paras. 172-174.

<sup>1430</sup> European Union-Russia Memorandum of 4 April 2006 concerning principles of zoning and compartmentalization in the veterinary field (Exhibit EU-61).

<sup>1431</sup> Veterinary certificate for piglets for fattening (Exhibit EU-52); Veterinary certificate for pigs for breeding (Exhibit EU-53); the Veterinary certificate for pork meat and raw meat preparations (Exhibit EU-54); Veterinary certificate for slaughter pigs(Exhibit EU-55); Veterinary certificate for finished food products (Exhibit EU-56); Veterinary certificate for canned meat, salamis and other ready for consumption meat products(Exhibit EU-57).

<sup>1432</sup> Customs Union Decision No. 317 (Exhibit RUS-25).

<sup>1433</sup> See para 7.29 above.

<sup>1434</sup> Appellate Body Reports, *Canada – Autos*, para. 151; and *Canada – Wheat Exports and Grain Imports*, para. 109. See also Panel Report, *US – Animals*, para. 7.13.

completed the procedure at issue in respect of the ASF-free areas the European Union claimed to exist within Estonia, Latvia, Lithuania, and Poland.

***Whether the procedure at issue is consistent with Article 8 and Annex C(1)(a), C(1)(b) and C.(1)(c)***

**Introduction**

7.1066. As we have indicated, we consider that it is most appropriate for us to begin our examination of the European Union's claims under Article 8 and Annex C(1) with an assessment of the inconsistency of the procedure at issue, in respect of the products at issue from Estonia, Latvia, Lithuania, and Poland, with Annex C(1)(c). We thus begin with this assessment and then proceed with our examination pursuant to Annex C(1)(a) and C(1)(b).

**Whether the procedure at issue is inconsistent with Annex C(1)(c)**

7.1067. The European Union posits that Russia's information requirements were not limited to what is necessary for the assessment of the European Union's regionalization measures in respect of ASF, thus breaching Annex C(1)(c).<sup>1435</sup> In support of this contention, the European Union referred to specific information requests that we examine below. Russia argues that the European Union did not make a *prima facie* case and failed to meet its burden of demonstrating that Russia violated Annex C(1)(c).<sup>1436</sup>

7.1068. In particular, the European Union claims that Russia requested unnecessary information. Such requests are reflected in the letters that FSVPS sent to DG SANCO on 5 February and 12 March 2014.

7.1069. The European Union's arguments are formulated as generally applicable to ASF-free areas in its entire territory, this is, including areas both inside and outside the four affected EU member States. As we have explained above, we consider that we need to undertake our analysis separately in respect of the information requirements related to ASF-free areas inside and outside EU member States where ASF outbreaks have occurred. We consider that this distinct approach is appropriate, flowing from our understanding that there is a difference between what needs to be demonstrated in support of the existence of an ASF-free area inside and outside a country where an ASF outbreak has occurred. We recall that this difference is called for based on the levels of risk posed by products originating from a territory that is close to an area affected by ASF, especially in the light of the home range of wild boar and potential links between wild boar populations. Moreover, in our assessment under Article 6.3 in sections 7.5.2.3.5 (in respect of the EU-wide ban) and 7.6.2.3.3 (in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland), we explained the different necessary evidence that the European Union had to provide to Russia to objectively demonstrate the existence of ASF-free areas, and the likelihood of those areas remaining ASF-free, both inside and outside the four affected EU member States.

7.1070. In addition, we recall that the ASF situation in the four affected EU member States changed throughout 2014. The differences in the degree of spread of ASF in the territory of each affected EU member State could affect the amount of information necessary for Russia to undertake and complete the procedure at issue. We will therefore identify the type of information that Russia was requesting in respect of the territories affected by ASF throughout 2014 in order to assess the extent to which such information was necessary for Russia's completion of the procedure at issue. We generally refer to the information requested in respect of the four affected EU member States, as we consider that regardless of when the outbreaks took place in each of those EU member States, the information requests made in respect of Lithuania in February 2014 reflected the type of information that Russia considered necessary for the completion of the procedure at issue. Such standard of requested information, as modified throughout the subsequent communications of 2014, will serve as our benchmark in respect of the completion of the procedure at issue for the four ASF affected EU member States.

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<sup>1435</sup> European Union's second written submission, para. 184.

<sup>1436</sup> Russia's first written submission, para. 441.

7.1071. We turn to the European Union's arguments in respect of the information requested by Russia for the assessment of ASF-free areas within Estonia, Latvia, Lithuania, and Poland.

7.1072. Regarding the letter of 5 February 2014<sup>1437</sup>, the European Union identifies the following information as unnecessary and irrelevant: (i) swine population in personal subsidiary farming with detailed density by region; (ii) production volume of different farms and factories; (iii) volumes of exported wild boar meat and trophies; and, (iv) detailed information about foreign hunters. In its arguments, the European Union claims that the aforementioned requests were unnecessary to assess the European Union's regionalization measures.<sup>1438</sup> In addition, the European Union contests the relevance of Russia's requests for information, done through the letter of 5 February 2014, pertaining to (i) pig farms and meat processing factories, including information about the suppliers and production volumes; and (ii) rough estimation of enterprises attested to ship animal products, by level of zoosanitary condition.<sup>1439</sup> The European Union argues that while this information might be relevant for compartmentalization, it is not relevant for regionalization. The European Union further claims that not only was Russia already in possession of the information with regard to attested pig farms and processing factories, but that the requested information on the level of sanitary condition was also irrelevant for regionalization, as all farms in the free-regions are ASF-free.<sup>1440</sup>

7.1073. Regarding the letter of 12 March 2014<sup>1441</sup>, the European Union considers that Russia requested the following unnecessary and irrelevant information: (i) absence of any proof of non-existence of ASF in the territory of other EU member states; and (ii) absence of any proof of impossibility of getting meat of animals infected by ASF virus in the production cycle of pork from other EU member states.<sup>1442</sup>

7.1074. The European Union also claims that Russia, through the letter from FSVPS to DG SANCO dated 16 May 2014, requested answers to questions where the European Union had already provided exhaustive replies.<sup>1443</sup> Furthermore, the European Union contends that this letter also requested unnecessary information, such as that referring to (i) zoo sanitary status of small farms (due to the big number of them in the territories of the infected/high risk zones with regard to ASF) and measure of their bio protection (possibility of free range, feed base, the regime of introducing the newly arrived animals in the herd, etc.); and (ii) Cartographical visualization of the establishments attested to supply live pigs and swine products from the EU Member States (Poland and Lithuania, in particular) to the Russian Federation with indication of the raw material bases of these establishments.<sup>1444</sup>

7.1075. Moreover, the European Union argues that it has made clear to Russia that "no [infected] establishment is allowed to supply pig meat or pig meat products to the establishments authorised to export to the Russian Federation."<sup>1445</sup> On this basis, the European Union posits that it has provided abundant evidence to substantiate its claims under Annex C and Article 8 of the SPS.<sup>1446</sup>

<sup>1437</sup> Russia's letter to the European Union of 5 February 2014, FS-SD 8/1640 (Exhibit EU-84).

<sup>1438</sup> European Union's second written submission, paras. 168-169.

<sup>1439</sup> European Union's second written submission, para. 172. See also first written submission, para.

339.

<sup>1440</sup> European Union's second written submission, paras. 172 – 173. The European Union referred to similar information requests formulated through the letter of 16 May 2014, see second written submission, paras. 177-178 (referring to Russia's letter to the European Union of 16 May 2014, FS-EN-8/7999 (Exhibit EU-93)).

<sup>1441</sup> Russia's letter to the European Union of 12 March 2014, FS-SD-4/3620 (Exhibit EU-90/RUS-135).

<sup>1442</sup> European Union's first written submission, para. 339; and second written submission, para. 176.

<sup>1443</sup> European Union's first written submission, para. 339 (referring to Russia's letter to the European Union of 16 May 2014, FS-EN-8/7999 (Exhibit EU-93)).

<sup>1444</sup> European Union's second written submission, paras. 177-181.

<sup>1445</sup> European Union's second written submission, para. 182.

<sup>1446</sup> In its response to Panel Question 194, the European Union identified information requested by Russia in March 2014 that had already been provided or which was not relevant for the purposes of Russia's assessment of the European Union's regionalization measures:

– proof that the historically ASF-free regions all over the EU are actually free, contrary to the provisions of the OIE Terrestrial Code;

– information about swine population in the industry sector and personal subsidiary farming with detailed density by region; detailed information about pig farms, pork processing factories and semi-finished

7.1076. In turn, Russia has argued that these information requests are justified. According to Russia, the experts have confirmed that there has been an objective basis for Russia's requests.<sup>1447</sup>

7.1077. The Panel asked the experts to comment on the relevance of the questions included in some of Russia's information requests for the purposes of assessing the relevant risks.<sup>1448</sup>

7.1078. In his response to this question, Dr Brückner noted that the "intention and the magnitude of the information required is unclear". Dr Brückner further observed that

The information normally required from an exporting country would be restricted to the pathogen concerned and the potential hazards related to that pathogen and from the area under dispute (ASF affected area) and would in general require information that are not yet available from the exporting country (which in the case of exports from the EU to the Russian Federation would by default already be available for other animal and animal product exports). However, the information requested in Exhibit RUS-131, is in my opinion "an overkill" of which many of the questions are not relative or needed to conduct either a sensible quantitative or qualitative risk analysis.<sup>1449</sup>

7.1079. In her response to this question, Professor Penrith indicated that such information "appears to be the information that the EU might use to perform a very detailed risk assessment for spread of the virus in the EU".<sup>1450</sup> Professor Penrith further explained that all of the EU member States "cannot be considered to pose an equal risk of ASF for Russia". Therefore, some information requested by Russia is irrelevant for certain areas in the European Union (i.e. wild boar populations and their movement in insular territories; and stamping out policies in territories which have never experienced ASF or haven't done so in more than 20 years).<sup>1451</sup> Moreover, Professor Penrith indicated that the information required by Russia should be limited to the list of items she identified, and mentioned that more detail might be required from countries that have experienced outbreaks.<sup>1452</sup> Professor Penrith conclude her response by indicating that the "great majority of the information required is not relevant or necessary for a risk assessment by Russia".

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products, graded by production volume; regulatory acts, providing for wild boar hunting and further utilization of killed animals (for food, as trophies); regulations on export of wild boar meat and trophies, number of killed animals and exported meat and trophies during 2013-2014; detailed information about foreign hunters, who entered the EU member States to hunt wild boar during the period 2013-2014, detailed by region (including information about the number and the country of origin); detailed information about pig farms and meat processing factories attested to ship animals and products to the territory of the Customs Union, including information about the suppliers (number, country, region) and production volumes, detailed by region; rough estimation of enterprises attested to ship animal products to the territory of the Customs Union, by level of zoosanitary condition, equivalent to the previously conducted evaluation of the Russian and Belarusian enterprises, detailed by regions and graded by production volumes.

<sup>1447</sup> Russia's closing statement at the second meeting with the Panel, para. 4. See also Russia's comments to the European Union's response to Panel question No. 322; and Russia's comments to the experts' responses to Panel question Nos. 12 and 13.

<sup>1448</sup> Panel question No. 13 to the experts. The communications to which the Panel's question referred are those sent by Russia to the European Union or certain EU member States, dated 5 February 2014 (Exhibit EU-84), 12 March 2014 (Exhibit EU-90/Exhibit RUS-135), 10 April 2014 (Exhibit RUS-240), 16 May 2014 (Exhibit EU-93), 31 July 2014 (Exhibit RUS-157), and 1 December 2014 (Exhibit RUS-131).

<sup>1449</sup> Dr Brückner's response to Panel question No. 13, Compilation of the experts' responses, para.

2.123.

<sup>1450</sup> Professor Penrith's response to Panel question No. 13, Compilation of the experts' responses, para.

2.125.

<sup>1451</sup> Professor Penrith's response to Panel question No. 13, Compilation of the experts' responses, para.

2.125.

<sup>1452</sup> Professor Penrith's response to Panel question No. 13, Compilation of the experts' responses, para. 2.125. The list of information Professor Penrith referred to was provided in her response to Panel question No. 12. Such list is comprised by the following information: (i) Whether the disease is notifiable throughout the country and what means are used to ensure that this is known; (ii) if diagnostic capacity for ASF is available in the country (veterinary personnel and pig value chain actor trained in field diagnosis and laboratory capacity for confirmation of a field diagnosis); (iii) legislation in place for prevention and management of serious disease outbreaks including ASF; (iv) veterinary knowledge of and authority over all domestic pigs in the country or zone; (v) veterinary knowledge of the species, population, distribution and habitat of wild pigs in the country or zone; (vi) the epidemiological basis for recognition of a zone including all relevant topographical features;



7.1080. In his response to this question, Dr Thomson expressed his views on the relevance of the information requested through the five letters identified by the Panel. In respect of the letter dated 5 February 2014 (Exhibit EU-84), Dr Thomson noted that some of the questions contained in this exhibit are variations of other questions posed elsewhere by Russia, and indicated that for a country "that is not itself free of ASF this strikes me as an overkill and possibly an attempt to 'muddy the water'."<sup>1453</sup> Regarding the letter dated 10 April 2014 (Exhibit RUS-240), Dr Thomson noted that the three questions posed are of doubtful relevance, partly because "it would be reasonable to ask the EU for the results and conclusions drawn from surveys conducted in its territory generally", not so asking for the surveys themselves from Poland.<sup>1454</sup> Regarding the letter dated 16 May 2014 (Exhibit EU-93) Dr Thomson noted that, with the exception of the information regarding the presence of ASF vector in the EU member States, the questions posed appear to be relevant.<sup>1455</sup> Regarding the letter dated 31 July 2014 (Exhibit RUS-157) Dr Thomson indicated that this "request seems to me relevant and justified".<sup>1456</sup> Lastly, in respect of the letter dated 1 December 2014 (Exhibit RUS-131), Dr Thomson indicated that he could find relevance and therefore justification for the questions pertaining to (i) ASF early detection and contingency plan for each EU member State; (ii) detailed information regarding monitoring and surveillance of wild boars in each EU member State; (iii) detailed information regarding the measures taken by each EU member State to prevent trans-boundary spread of ASF in the European Union (excluding data demonstrating their effectiveness); and (iv) information regarding the role of ticks in the spread of ASF in the EU member States. Dr Thomson added, referring to the other questions in that letter, that they "strike me either as repetition or as questions which few if any countries in the world, including the RF, would be able to provide satisfactory answers to. It needs to be remembered that the RF is not an ASF-free country".<sup>1457</sup>

7.1081. In our view, the expert's responses indicate that some of the information requested by Russia is excessive for what would be necessary for Russia to perform a risk analysis of the spread of ASF from the European Union into Russia. To our mind this is directly relevant to the issue before us.

7.1082. As we have described in paragraph 7.516 above, the immediate objective of the procedure at issue is to assess whether there are ASF-free areas in the territory of the European Union, including those areas in Estonia, Latvia, Lithuania, and Poland. As explained in paragraphs 7.1069 and 7.1070 above, the information requirements that we would examine in this section are those that would be necessary for undertaking and completing the procedure at issue, as directed at the verification of the ASF-free character of certain areas in ASF affected EU member States. This would include the information we have already identified as constituting the necessary evidence that the European Union should have provided to Russia in order to objectively demonstrate the existence of ASF-free areas, which are likely to remain so, in the affected EU member States.<sup>1458</sup>

7.1083. Against this backdrop we consider that Russia's information requirements, in respect of the verification of the existence of ASF-free areas within ASF affected EU member States should be limited to (i) geography; (ii) epidemiological surveillance of ASF; (iii) the effectiveness of sanitary or phytosanitary controls in respect of ASF; (iv) ecosystems, in particular the presence of ASF in wildlife and the patterns of behavioural ecology in wildlife; (v) the level of prevalence of ASF; and (vi) the existence of eradication or control programmes.<sup>1459</sup> In our view, some of the information

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and (vii) the scope and extent of active surveillance for ASF undertaken in the country or zone to support the contention that the country or zone is free of ASF. Professor Penrith's response to Panel question No. 12, compilation 2.114.

<sup>1453</sup> Dr Thomson's response to Panel question No. 13, Compilation of the experts' responses, para. 2.131.

<sup>1454</sup> Dr Thomson's response to Panel question No. 13, Compilation of the experts' responses, para.

2.130. <sup>1455</sup> Dr Thomson's response to Panel question No. 13, Compilation of the experts' responses, para.

2.132. <sup>1456</sup> Dr Thomson's response to Panel question No. 13, Compilation of the experts' responses, para.

2.129. <sup>1457</sup> Dr Thomson's response to Panel question No. 13, Compilation of the experts' responses, para.

2.128. <sup>1458</sup> See paras. 7.935-7.936 above.

<sup>1459</sup> See para. 7.935 above.

requests made by Russia between February 2014 and July 2014 go beyond these areas. As indicated by the experts, some of the information requested by Russia seems to us to be unnecessary and unjustified.

7.1084. As we have explained, the type of information that Russia was justified in requesting in respect of EU member States where ASF outbreaks have occurred differs from that which Russia was justified in requesting in support of the assessment of ASF-free areas outside affected EU member States. We recall Professor Penrith's view that the former category of information could be more detailed. With this in mind, we move on to identify the information that in our view is excessive in respect of what Russia was justified in requesting for undertaking and completing the procedure at issue in respect of the ASF-free areas within affected EU member States.

7.1085. In particular, excessive information requests were made through the letter of 5 February 2014 in respect of (i) detailed information about pig farms, pork processing factories and semi-finished products, graded by production volume; (ii) regulations on export of wild boar meat and trophies, number of killed animals and exported meat and trophies during 2013-2014 (for regions adjacent to the infected zone); (iii) detailed information about foreign hunters, who entered the country to hunt the wild boar during 2013-2014 (including information about the number and the country of origin), detailed by country and region; (iv) detailed information about pig farms and meat processing factories approved to ship animals and products to the territory of the CU, including information about the suppliers (number, country, region) and production volumes, detailed by country and region; and (v) rough estimation of enterprises approved to ship animal products to the territory of the CU, by level of zoosanitary condition, equivalent to the previously conducted evaluation of the Russian and Belarusian enterprises, detailed by regions and graded by production volume.

7.1086. Moreover, through the letter dated 16 May 2014, Russia requested the following information, which seems to us to be excessive in respect of the assessment of ASF-free areas in Estonia, Latvia, Lithuania, and Poland: (i) cartographical visualization of the establishments approved to supply live pigs and swine products from the affected EU member States (Poland and Lithuania, in particular) to Russia with indication of the raw material bases of these establishments; (ii) zoo sanitary status of small farms (due to the large number of them in the territories of the infected/high risk zones with regard to ASF) and measure of their bio protection (possibility of free range, feed base, the regime of introducing the newly arrived animals in the herd, etc.); (iii) data on internal evaluation by the veterinary services of the EU member States of resources (human, technical, financial ones) needed for the creation and maintenance of abovementioned ASF-free zones; (iv) data on functional isolation of sub-populations of domestic and wild animals in zones with the proves of the absence of migration/seasonal movements of wild boars between the zones; and (v) data on the presence of the ASF vector in the EU member States.<sup>1460</sup> We recall that some of the preceding information might have been relevant to assess the situation in an affected EU member State. However, the level of detail required in respect of these categories of information seems excessive. We recall that the information that Russia would be justified in asking for is the kind that would be necessary for undertaking and completing the procedure at issue. In the instant case, Russia requested an excessive amount of detail in respect of several categories of information that, in our view, go beyond what we have identified as necessary for an objective demonstrative of the existence of ASF-free areas in an affected EU member State.

7.1087. Based on the foregoing, we consider that Russia formulated information requirements there were not limited to what was necessary for the procedure at issue, thus breaching Annex C(1)(c).

#### **Whether the procedure at issue is inconsistent with Annex C(1)(a)**

7.1088. We have outlined above the parties' arguments pertaining to Annex C(1)(a), which also relate to the affected EU member States.

7.1089. Russia argues that the evidence the European Union provided distorts the overall picture of the constant information exchange and intensive negotiations concerning regionalization,

<sup>1460</sup> Russia's letter to the European Union of 16 May 2014, FS-EN-8/7999 (Exhibit EU-93).

including the numerous explanations provided by Russia in relation to the insufficiency of submitted information. Russia also argues that it made several offers to resume trade with the European Union on the condition that trade would be conducted in an ASF-free manner.<sup>1461</sup> Russia concludes that the European Union has merely asserted a violation of Article 8 and Annex C(1)(a) by pointing to alleged delays in evaluating requests for regionalization without demonstrating that these delays were "undue". On the contrary, Russia argues that it has taken reasonable time to assess the European Union's regionalization requests, especially in light of the deteriorating ASF situation in the European Union.<sup>1462</sup> In this regard, Russia contends that the European Union has not put forward sufficient evidence to make a *prima facie* case and failed to meet its burden of proof in demonstrating that Russia violated Article 8 and Annex C(1)(a).<sup>1463</sup>

7.1090. We recall that a determination of whether a delay in an approval, control or inspection procedure is undue, for the purposes of Annex C(1)(a), has to be examined in light of the circumstances of a particular case.<sup>1464</sup> Moreover, "not every delay" caused by a Member is contrary to Annex C(1)(a), and a Member is not liable for delays not attributable to it.<sup>1465</sup>

7.1091. In paragraph 7.571 above we noted that, mindful of the guidance provided by previous panels and the Appellate Body, we consider that a delay is undue if it is "unwarranted, or otherwise excessive, disproportionate or unjustifiable."<sup>1466</sup> In considering whether the European Union's allegation of "delay" can be considered to be "undue", we will examine whether the delay is unwarranted, or otherwise excessive, disproportionate or unjustifiable.

7.1092. As part of this examination, we consider whether there were any periods of inaction or inability to proceed on the substance of the application that would constitute delays within the meaning of Annex C(1)(a).<sup>1467</sup> This entails not only a consideration of the total period of time during which Russia, as the importing Member, conducts the procedure, but also requires an overall assessment of the facts and circumstances in this case. The absolute length of time required for a Member to evaluate a particular request – and the time needed for any interim series of steps required in order to ascertain the comprehensiveness, accuracy and pertinence of the information – will depend on the specific circumstances of the case.<sup>1468</sup> We agree with the view of the panel in *US – Animals* on the importance of having a point of reference in order to gauge the reasonableness of the length of time of the review process, referring to such indicators like the standard processing time reflected in the policy and practice of the Member carrying out the procedure, as well as guidelines provided by the OIE.<sup>1469</sup>

7.1093. Furthermore, we recall our observations in section 7.3.6 above on the importance of temporal considerations in this case. We note that the panel in *US – Animals* identified an end-date for the period of time it would take into account for the purpose of assessing the alleged undue delays in the conduct of the responding Member's procedures.<sup>1470</sup> With reference to the Appellate Body ruling in *EC – Chicken Cuts* and the panel ruling in *EC – Approval and Marketing of Biotech Products*, the panel in *US – Animals* determined that the appropriate end-date for which to examine the complainant's claims would be the date of the establishment of the Panel.<sup>1471</sup>

7.1094. In the instant case, we recall the exchanges that took place between the parties in connection with the European Union's request for recognition of ASF-free areas in the European

<sup>1461</sup> Russia's first written submission, paras. 435 – 436.

<sup>1462</sup> Russia's first written submission, para. 437.

<sup>1463</sup> Russia's first written submission, para. 438.

<sup>1464</sup> Appellate Body Report, *Australia – Apples*, para. 437.

<sup>1465</sup> Russia's first written submission, para. 434 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1495 and 7.1497).

<sup>1466</sup> Panel Report, *US – Animals*, para. 7.129. With reference to the Appellate Body Report, *Australia – Apples*, para. 437 (referring to Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495).

<sup>1467</sup> Using the order analysis by the panel in *US – Animals*, para. 7.127.

<sup>1468</sup> Panel Report, *US – Animals*, para. 7.114. That panel observed that applicant Members present different SPS circumstances that "may also be affected by law, policy, governance, and veterinary infrastructures".

<sup>1469</sup> Panel Report, *US – Animals*, para. 7.117.

<sup>1470</sup> Panel Report, *US – Animals*, para. 7.118.

<sup>1471</sup> Panel Report, *US – Animals*, para. 7.118.

Union was initially presented through the letter dated 31 January 2014<sup>1472</sup> (at that time, there had only been two outbreaks in wild boars in Lithuania) and Russia's negative response to this request through the letter dated 29 July 2014 (after the date of the establishment of the Panel and after the outbreaks in Poland and Latvia had already occurred. We further recall the subsequent exchanges, including Russia's communication of 1 December 2014 and the European Union's 23 December 2014 response.

7.1095. Against this background, we need to determine whether the procedure at issue, aimed at the recognition of ASF-free areas in the affected Member states, was undertaken and completed without any undue delay.

7.1096. As we have indicated in our analysis of the European Union's claims pursuant to Annex C(1)(c), Russia made a number of information requests that went beyond the information that was necessary for the procedure at issue. We underline that this was the case in respect of those areas located in the EU member States affected with ASF outbreaks, regardless of the moment when the initial outbreak occurred in the respective EU member State.

7.1097. In our view, when a Member makes unjustified and unnecessary information requests, which go beyond what would be required to make a substantive assessment of the situation subject to the procedure at issue, a Member would be acting in a manner that impedes undertaking and completing the respective procedures. In the present case, Russia's excessive and unjustified information requests in respect of detailed information on the pig sector and foreign hunters in ASF-affected EU member States amount to that situation. In light of the Appellate Body's guidance quoted above<sup>1473</sup>, such a situation may constitute an infringement of the obligation to undertake and complete a procedure without undue delay.

7.1098. Moreover, we consider that Russia's references to its preferred tools for control and eradication of ASF in the affected EU member States, including safe trade from compartments as opposed to ASF-free zones (or areas)<sup>1474</sup>, is indicative of Russia's reluctance to consider the European Union's request in a timely fashion.

7.1099. Based on the foregoing we conclude that the procedure at issue was undertaken and completed with undue delay, thus breaching Annex C(1)(a)'s first clause.

7.1100. We now turn to the European Union's claim in respect of the second clause in Annex C(1)(a), this is, the procedure at issue was undertaken and completed in a manner less favourable for imported products than for like domestic products. Regarding this claim, the Panel will examine whether the European Union has established that the products at issue from the European Union have been treated in a "less favourable manner" than domestic products with respect to the undertaking and completion of the procedure at issue.

7.1101. We recall and refer to our analysis above in the context of the EU-wide ban.<sup>1475</sup> Similarly, we understand the rationale behind the European Union's argument here is that the unnecessary and excessive information requests addressed by Russia to the European Union in respect of the recognition of ASF-free areas within the affected EU member States were not made in respect of the corresponding trade of like products in Russia.

7.1102. In our view, the European Union has not provided sufficient evidence that would support its contention that such type of information is not required by Russia in order to determine which areas within Russia are ASF-free. In addition, the European Union has not clearly explained the internal process in Russia to determine the recognition of ASF-free areas in Russia, beyond stating that there is no ban on the internal trade of the products at issue originating from ASF-free areas in Russia. Without this information, we are not in a position to ascertain whether Russia took more than one year or which type and quantity of evidence Russia required from its regional authorities

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<sup>1472</sup> European Union's letter to Russia of 31 January 2014, ARES(2014)226547, SANCO G7/JP/mh(2014)241111 (Exhibit EU-64).

<sup>1473</sup> Appellate Body Report, *Australia – Apples*, para. 438.

<sup>1474</sup> Letter from the Russian Veterinary Service to DG SANCO, No. FS-AS-8/23743, 1 December 2015 (Exhibit RUS-131).

<sup>1475</sup> See paras. 7.572-7.591 above.

to determine the existence of ASF-free areas in Russia. We therefore consider that the European Union has not satisfied the burden of demonstrating that Russia's procedure does not comply with the second clause of Annex C(1)(a).

7.1103. In light of our finding above with respect of the first clause of Annex C(1)(a), that Russia undertook and completed the procedure at issue with undue delay, we conclude that the procedure at issue is inconsistent with Annex C(1)(a).

**Whether the procedure at issue is inconsistent with Annex C(1)(b)**

7.1104. The European Union contends that Russia violates all five of the obligations contained in Annex C(1)(b).<sup>1476</sup> Russia argues that the European Union merely recites the obligations of the provisions, without explaining how the specific procedural obligations were breached.<sup>1477</sup>

7.1105. According to the European Union, Russia did not publish or otherwise communicate to the European Union the standard processing period and did not comply with any of the other requirements in Annex C(1)(b) of the SPS Agreement.<sup>1478</sup> The European Union further argues, in its responses to the Panel question No. 197, that despite the repeated requests from Russia for more evidence with regards to the European Union's regionalization measures, Russia never provided any information as to the anticipated period of time for the approval proceedings.<sup>1479</sup> The Panel<sup>1480</sup> requested the European Union to indicate whether it had requested from Russia information regarding the anticipated processing period for the European Union's regionalization request, and to provide the relevant evidence in support of its presentation of this request. The European Union responded as follows:

The EU stressed on several occasions that the information provided should enable Russia to assess and accept the EU ASF regionalisation measures.<sup>1481</sup>

Despite the unprecedented amount of information provided to Russia, it insisted on not having received sufficient information so as to enable it to perform a risk assessment.

Given Russia's refusal to acknowledge it received all relevant information, the EU's efforts were focused on the provision of the supplementary information requested. Under those circumstances a specific request on the anticipated processing period of the EU's request was not addressed to Russia.<sup>1482</sup>

7.1106. We therefore find that the European Union did not make a request within the meaning of this provision, and thus did not trigger an obligation on the part of Russia to communicate the anticipated processing period.<sup>1483</sup>

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<sup>1476</sup> In *US - Animals*, the panel first examined whether the challenged measures fell under its term of reference. Panel Report, *US - Animals*, paras. 7.188 and 7.190. The panel opined that to comply with Article 6.2 of the DSU, a complainant was required to specify in a sufficiently clear manner which of the five obligations in the provision it was challenging in its panel request. In this case, we consider that the European Union has indicated that it is challenging all five obligations in Annex C(1)(b). See European Union's panel request, p.5.

<sup>1477</sup> Russia's first written submission, para. 439.

<sup>1478</sup> European Union's second written submission, para. 187.

<sup>1479</sup> European Union's response to Panel question No. 197, para. 388.

<sup>1480</sup> Panel Question 289, seeking clarification of paragraph 342 of the European Union's first written submission.

<sup>1481</sup> (footnote original) Letters of 20 February 2014 (Exhibit EU-175), 6 March 2014 (Exhibit EU-86) and of 13 March 2014 (Exhibit EU-91).

<sup>1482</sup> European Union's response to Panel Question No. 289, paras. 135-137.

<sup>1483</sup> We note that the panel in *EC - Approval and Marketing of Biotech Products* considered that the anticipated processing period is to be provided to applicants upon request and in that dispute, no evidence of applicants' requests was provided. Panel Reports, *EC - Approval and Marketing of Biotech Products*, paras. 7.1587-7.1589.

7.1107. Furthermore, we recall that a *prima facie* case "is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."<sup>1484</sup>

7.1108. The European Union has not attempted to provide any sort of argument or evidence in support of its claim that the procedure at issue is inconsistent with Annex C(1)(b) of the SPS Agreement. We therefore consider that the European Union has failed to make a *prima facie* case in respect of the alleged inconsistency of the procedure at issue with Annex C(1)(b).

#### 7.6.4.4 Conclusion

7.1109. As explained in the previous sections, we find that Russia's process of consideration of the European Union's request for recognition of ASF-free areas within the European Union including the four affected EU member States falls within the scope of Article 8 and Annex C(1) of the SPS Agreement. We also find that Russia formulated information requirements that were not limited to what was necessary for the procedure at issue, thus breaching Annex C(1)(c). Moreover, Russia undertook and completed the procedure at issue with undue delay, thus rendering the procedure at issue inconsistent with Annex C(1)(a). We consider that the European Union has failed to make a *prima facie* case in respect of the alleged inconsistency of the procedure at issue with Annex C(1)(b). In light of these findings, we find that the procedure at issue is inconsistent with Article 8 of the SPS Agreement.

### 7.6.5 Claims under Articles 2.2, 5.1, 5.2, and 5.7 of the SPS Agreement

#### 7.6.5.1 Main arguments of the parties

##### 7.6.5.1.1 European Union

7.1110. The European Union argues that because Russia's measures do not "conform to" and are not "based on" the OIE recommendations, it is necessary to establish whether there is a solid scientific basis for their imposition.<sup>1485</sup>

7.1111. The European Union highlights that an analysis under Article 5.1 of the SPS Agreement entails addressing two issues: whether there is a "risk assessment" within the meaning of the SPS Agreement and whether the SPS measures at issue are "based on" the mentioned risk assessment.<sup>1486</sup>

7.1112. The European Union argues that Russia did not provide any risk assessment in support of its EU-wide ban, although such a risk assessment was requested during the numerous contacts took place between the Russian and the EU competent veterinary authorities.<sup>1487</sup>

7.1113. The European Union points out that Article 5.2 of the SPS Agreement contains a list of factors that have to be taken into account while performing a risk assessment.<sup>1488</sup> The European Union argues that in adopting, maintaining and/or applying the measures at issue, Russia did not and does not take into account those factors.<sup>1489</sup>

7.1114. The European Union posits that since Russia did not provide any risk assessment for the measures at issue, Russia therefore violates the provisions of Article 5.1 of the SPS Agreement, and that it follows that the provisions of Article 2.2 are also breached.<sup>1490</sup>

7.1115. The European Union points out that while solely Article 5.7 of the SPS Agreement may still shelter a Member's measure in such circumstances, Russia does not fulfil any of the requirements of such provision.<sup>1491</sup>

<sup>1484</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>1485</sup> European Union's first written submission, para. 153.

<sup>1486</sup> European Union's first written submission, para. 154.

<sup>1487</sup> European Union's first written submission, para. 165.

<sup>1488</sup> European Union's first written submission, para. 168.

<sup>1489</sup> European Union's first written submission, para. 170.

<sup>1490</sup> European Union's first written submission, para. 176.

### 7.6.5.1.2 Russia

7.1116. Russia argues that its import restrictions on the four affected EU member States are in line with international standards, and that thus, they are presumed to be consistent with the relevant provisions of the SPS Agreement, including Article 2.2.<sup>1492</sup>

### 7.6.5.2 Main arguments of the third parties

#### 7.6.5.2.1 Australia

7.1117. Australia emphasizes that Russia does not appear to have conducted a risk assessment in relation to trade in relevant products from those areas affected by ASF, whether within the four affected EU member States or EU-wide.<sup>1493</sup>

7.1118. Australia highlights that it is necessary for the Panel to consider whether the level of scientific information was insufficient so as to justify Russia's provisional adoption of SPS measures not based on a risk assessment in accordance with Article 5.7 of the SPS Agreement.<sup>1494</sup>

7.1119. Australia stresses that the insufficiency of evidence must relate to information that is relevant to the risk assessment in question. Australia also notes that the reasonable period of time requirement has to be established on a case-by-case basis, and that, as in the present case, where, in its view, the apparent uncertainty relates to containment zones for ASF, the Panel may wish to take into account related rules and guidelines on regionalization.<sup>1495</sup>

#### 7.6.5.2.2 Brazil

7.1120. Brazil argues that there is no fixed or rigid reference for the determination of what means "sufficient scientific evidence" for the purpose of this provision, and the amount of scientific evidence may vary according to the circumstances of the case. Brazil however highlights that while amount of scientific evidence considered sufficient to justify a provisional measure in the context of Article 5 may vary, the ruling by the Appellate Body in *Japan – Apples* where the Appellate Body considered that there was a large quantity of scientific evidence when it verified the existence "of scientific studies as well as practical experience having accumulated for the past 200 years", may serve as a reference.<sup>1496</sup>

#### 7.6.5.2.3 Norway

7.1121. Norway highlights that while under Article 2.1 of the SPS Agreement, Members have the right to take SPS measures "necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with provision of the [...] Agreement", such right carries with it certain obligations, including those in Article 5 of the SPS Agreement.<sup>1497</sup>

7.1122. Norway asserts that Article 5.1 of the SPS Agreement is viewed as a "specific application" of the basic obligation set out in Article 2.2 of the SPS Agreement and that the Appellate Body has clarified that where a measure is not based on a risk assessment in accordance with Article 5.1, it will be presumed to be inconsistent with the second and third prongs of Article 2.2 of the SPS Agreement.<sup>1498</sup>

7.1123. Norway stresses that with respect to Article 5.7 of the SPS Agreement, the Appellate Body has identified four cumulative requirements that must be fulfilled for a Member to have recourse to Article 5.7: (i) It must be imposed in respect of a situation where "relevant scientific

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<sup>1491</sup> European Union's second written submission, para. 68.

<sup>1492</sup> Russia's second written submission, para. 296; see also Russia's second written submission, fn 664.

<sup>1493</sup> Australia's third-party submission, para. 10.

<sup>1494</sup> Australia's third-party submission, para. 11.

<sup>1495</sup> Australia's third-party submission, para. 14.

<sup>1496</sup> Brazil's third-party submission, para. 21 (citing Appellate Body Report, *Japan – Apples*, paras. 180, 186, and 188).

<sup>1497</sup> Norway's third-party submission, paras. 3-4.

<sup>1498</sup> Norway's third-party submission, para. 5.

information is insufficient"; (ii) It must be adopted "on the basis of available pertinent information"; (iii) The Member must "seek to obtain the additional information necessary for a more objective assessment of risk"; and (iv) The Member must "review the [...] measure accordingly within a reasonable period of time".<sup>1499</sup>

7.1124. Norway emphasizes that the threshold condition for the application of Article 5.7 of the SPS Agreement is that evidence is insufficient, and that the main question will be whether the available scientific evidence permits, in quantitative or qualitative terms, an assessment of risks within the meaning of Article 5.1.<sup>1500</sup>

7.1125. Norway highlights that "insufficient" in the context of Article 5.7 of the SPS Agreement refers to both situations where there is not enough scientific evidence (in quantitative terms) and to situations where there is enough evidence, but it does not give reliable results (in qualitative terms).<sup>1501</sup>

7.1126. Norway posits that with respect to the second element, the "available pertinent information" must equate to "some evidence of a risk", even if it is not enough to perform a proper risk assessment. In addition, there must be a rational relationship between the evidentiary basis and the provisional measure, and that even if the rigorous standards of Article 5.1, together with Articles 5.2 and 5.3 and annex A(4), do not apply under Article 5.7, those standards must be considered as relevant context, and thus indicate what types of information may be considered as "available pertinent information".<sup>1502</sup>

7.1127. With respect to the third element which is to "seek to obtain the additional information necessary for a more objective assessment of risk", Norway emphasizes that this reflects the temporary nature of the provisional measures within the meaning of Article 5.7 of the SPS Agreement, and that while the "the information sought must be germane to conducting 'a more objective assessment of the risk', i.e. the evaluation of the likelihood of entry, establishment or spread of, in casu, a pest, according to the SPS measures that might be applied", a Member "is not expected to guarantee specific results [...] [n]or is it expected to predict the actual results of its efforts to collect additional information at the time when it adopts the SPS measure".<sup>1503</sup>

7.1128. With respect to the requirement of review within a reasonable period of time, Norway highlights that what constitutes a "reasonable period of time" should be conducted on a case-by-case basis, and that it will depend "upon the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review and the characteristics of the provisional SPS measure".<sup>1504</sup>

### 7.6.5.3 Analysis by the Panel

#### 7.6.5.3.1 Introduction

7.1129. The European Union framed its claims under Articles 2.2, 5.1, 5.2 and 5.7 of the SPS Agreement in the same manner for both the EU-wide ban and the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. The European Union argues that the measures at issue are not based on a risk assessment conducted in accordance with Articles 5.1 and 5.2.<sup>1505</sup> Furthermore, the European Union contends that because Russia has violated Article 5.1 by not providing a risk assessment for the measures at issue, consequentially, Russia has also violated Article 2.2.<sup>1506</sup> In respect of Article 5.7, the European Union argues that this is

<sup>1499</sup> Norway's third-party submission, para. 8.

<sup>1500</sup> Norway's third-party submission, paras. 10-12.

<sup>1501</sup> Norway's third-party submission, para. 14 (citing Appellate Body Report, *Japan – Apples*, para. 185).

<sup>1502</sup> Norway's third-party submission, para. 19.

<sup>1503</sup> Norway's third-party submission, para. 20 (citing Appellate Body Report, *Japan – Agricultural Products II*, para. 92).

<sup>1504</sup> Norway's third-party submission, para. 21.

<sup>1505</sup> European Union's first written submission, paras. 165 and 170.

<sup>1506</sup> European Union's first written submission, para. 176. See also opening statement at the first meeting with the Panel, paras. 78-80; response to Panel question No. 122, paras. 255-257; and second written submission, para. 65.



not a situation where scientific evidence is insufficient, and that Russia has failed to comply with any of the conditions of Article 5.7.<sup>1507</sup> According to the European Union, the sufficiency of scientific evidence should be assessed at the time of adoption of the measure. Furthermore, following the measure's adoption, the Member is obliged to seek to obtain the additional information necessary for a more objective assessment of risk. According to the European Union, the moment a Member asks for information that is not necessary for a more objective assessment of risk, including the type of information characterized by the individual experts in the present proceedings as an "overkill" or as an attempt to "muddy the water", that Member can no longer benefit from the provisional shelter of Article 5.7. Such information requests are a clear warning sign that the respective Member is not genuinely seeking to perform a more objective risk assessment (objective in the sense of being based on the pertinent information available). Russia has not performed and has not provided any risk assessment in support of the measures at issue.<sup>1508</sup>

7.1130. Russia relies on different approaches to defend the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland and the EU-wide ban. In respect of the former, it counters that the measures regarding Estonia, Latvia, Lithuania, and Poland are presumed to be consistent with Articles 2.2, 5.1 and 5.2 because they conform to the relevant legal standards in the Terrestrial Code within the meaning of Article 3.2.<sup>1509</sup> At a late state in the proceedings, Russia's argument was, to the extent the Panel were to find that Article 6 of the SPS Agreement does *not* provide a basis for importing Members to take precautionary trade actions pending compliance by an exporting country with Article 6.3 of the SPS Agreement, and that the appropriate temporal analysis is the time of the Panel's establishment, those measures would be justified under Article 5.7.<sup>1510</sup> Russia argues that accordingly, it would obviate any basis for claims by the European Union with respect to Articles 5.1, 5.2, and 2.2 of the SPS Agreement regarding Russia's bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.<sup>1511</sup>

7.1131. In section 7.5.5.3.3.1 above, we have examined the text of Articles 5.1, 5.2, 2.2 and 5.7 of the SPS Agreement, the relationship between these provisions, the order in which to analyse them, and the legal test corresponding to each of these provisions. We then examined the EU-wide ban in light of the guidance identified in those sections. To avoid unnecessary repetition, we will not replicate the general guidance on which we will base our assessment of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. Rather, we will include cross-references to the relevant sections and findings, when necessary.

7.1132. Based on our understanding of Russia's arguments and our findings in respect of Article 6 of the SPS Agreement and the temporal framework in light of which we examine the measures at issue, we consider that the conditions for the consideration of Russia's alternative argument are met. Therefore, we turn to examine whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland fall under Article 5.7.

<sup>1507</sup> European Union's first written submission, para. 202; opening statement at the first meeting of the Panel, paras. 81-95; and second written submission, para. 68.

<sup>1508</sup> European Union's first written submission, paras. 165 and 170.

<sup>1509</sup> Russia's first written submission, paras. 216 and 296; and response to Panel question No. 126, para. 235.

<sup>1510</sup> We note that Russia raised this argument in response to Panel question No. 279, and included additional arguments in support of this argument in Russia's responses to Panel questions No. 293 and 294. All of these questions were posed by the Panel after the second substantive meeting, and replied to by Russia on 8 October 2015. We are concerned with the impact that such timing may have on due process. In this respect, we note that the European Union did not raise any issue with the timing of the formulation of this alternative argument and from the outset of the proceedings challenged the applicability of Article 5.7 in respect of both the EU-wide ban and the bans on the imports of the products at issue from the four affected EU member States. We recall that the Appellate Body has found that "[i]t follows that the principles of good faith and due process oblige a responding party to articulate its defence promptly and clearly. This will enable the complaining party to understand that a specific defence has been made, 'be aware of its dimensions, and have an adequate opportunity to address and respond to it.' Whether a defence has been made at a sufficiently early stage of the panel proceedings to provide adequate notice to the opposing party will depend on the particular circumstances of a given dispute." (Appellate Body Report, *US – Gambling*, para. 272 (quoting Appellate Body Report, *Chile – Price Band System*, para. 164)). In the light of the circumstances of the present case, we consider that, although Russia could well have raised this particular alternative defence in respect of the EU member State-specific bans earlier, the European Union had adequate opportunity to address this argument.

<sup>1511</sup> Russia's response to Panel question No. 279, para. 134.

### 7.6.5.3.2 Whether Article 5.7 applies to the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland

7.1133. In terms of burden of proof, we recall that the panel in *EC – Approval and Marketing of Biotech Products*, operating under the premise that Article 5.7 is a "qualified right", concluded that because Article 5.1 is only applicable if Article 5.7 is not, "when a complaining party presents a claim of violation under Article 5.1, the burden is on the complaining party to establish a prima facie case of inconsistency with both Articles 5.1 and 5.7."<sup>1512</sup> The panel in *US – Animals* observed that "nothing in the case law on Article 5.7 or other provisions which establish exemptions or provide the ability to derogate from certain WTO obligations supersedes the basic premise that the party asserting something bears the burden of proving it."<sup>1513</sup><sup>1514</sup> Accordingly, the Panel finds that the initial burden was on the European Union as part of its case under Article 5.1 to raise the inapplicability of Article 5.7 – which it did in its Panel request and first written submission.<sup>1515</sup> As Russia has asserted that its measures fall within the scope of Article 5.7, it carries the burden to prove that each of the four cumulative requirements has been satisfied.<sup>1516</sup>

7.1134. The European Union argues that this is not a situation where scientific evidence is insufficient and that Russia has failed to comply with any of the conditions of Article 5.7.<sup>1517</sup>

7.1135. Russia argues, in the alternative, that the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are justified under Article 5.7 of the SPS Agreement.<sup>1518</sup> Russia does not provide clear argumentation in respect of the manner in which the four prongs of Article 5.7 are satisfied in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. Rather, Russia makes limited references to some of those four prongs.

7.1136. Regarding the sufficiency of scientific evidence, Russia considers that the Panel is not limited to examining the sufficiency of scientific evidence at the time of the adoption of the challenged measure, but rather on an ongoing basis. In that respect, Russia posits that the 2015 EFSA scientific report confirms the continuing scientific uncertainty with respect of ASF spread and ASF eradication, in particular in the context of the European Union as a whole.<sup>1519</sup>

7.1137. In addition, Russia indicates that the initial imposition of the four measures for each of the affected EU member States corresponds to provisional import bans on various live pig and pork products upon the notification by the individual EU member State of the initial ASF outbreaks. Such initial bans were precautionary measures.<sup>1520</sup> We understand this to mean that Russia based

<sup>1512</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.3000. Like the Panel in *US – Animals*, para. 7.292, we note that the panel in *EC – Approval and Marketing of Biotech Products* based its reasoning on the Appellate Body decision in *EC – Tariff Preferences* on similar language in the Enabling Clause, which was issued later in time than the Appellate Body decision that discussed Article 5.7 of the SPS Agreement. The Appellate Body in *EC – Tariff Preferences* stated that where the permissive provision constitutes a right rather than an exception, "the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour". Appellate Body Report, *EC – Tariff Preferences*, para. 88.

<sup>1513</sup> (footnote original) See e.g. Appellate Body Report, *Japan – Apples*, para. 157 ("the party that asserts a fact is responsible for providing proof thereof."). Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* (where the Appellate Body concluded that "the characterization of [a] provision as a derogation does not pre-determine the question as to which party bears the burden of proof with regard to the requirements stipulated in the provision.") (Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.56 (referring to Appellate Body Report, *China – Raw Materials*, para. 334)).

<sup>1514</sup> Panel Report, *US – Animals*, para. 7.292.

<sup>1515</sup> European Union's panel request (WT/DS475/2), p. 3; first written submission, paras. 177-202; and second written submission, paras. 66-83.

<sup>1516</sup> We find additional support for this approach in Panel Report, *US- Animals*, para. 7.293.

<sup>1517</sup> European Union's first written submission, para. 202; opening statement at the first meeting of the Panel, paras. 81-95; and second written submission, para. 68.

<sup>1518</sup> Russia's response to Panel question No. 279, para. 134. See also response to Panel question No. 293, para. 148; response to Panel question No. 294, para. 150.

<sup>1519</sup> Russia's response to Panel question No. 309, paras. 266-267.

<sup>1520</sup> Russia's response to Panel question No. 295, para. 156. Russia also refers to responses to Panel's questions No. 279, 293, and 294.

its measures on pertinent available information related to the presence of ASF in the four affected EU member States.

7.1138. Russia argues that it then sought additional information. In particular, Russia indicates that it actively engaged the European Union and sent top Russian SPS officials to conduct in-country visits and to meet with veterinary officials in Estonia, Latvia, Lithuania, and Poland at various moments throughout 2014.<sup>1521</sup> Russia concludes that based on the spread of ASF in the affected EU member States, as well as on the evidence regarding ASF outbreaks in the second half of 2014 and through the middle of 2015, and on the European Union's failure to objectively demonstrate its ASF-free zones would remain ASF-free, it continued the maintenance of the measures.<sup>1522</sup>

7.1139. In the Panel's examination to determine whether Russia's measures fall within the scope of Article 5.7, we turn first to determining whether scientific evidence was (in)sufficient for Russia to assess the relevant risks within the meaning of Articles 5.1 and 5.7 and as defined by paragraph 4 of Annex A. If the Panel finds that scientific information is insufficient, we would examine whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland meet the other three conditions of Article 5.7.

7.1140. The parties have addressed all four requirements in their arguments. The European Union's concerns relate both to the adoption and to the continued application, or maintenance, of the measure at issue. Most of the evidence cited by the European Union in support of its assertions under Article 5.7 relates to the period following adoption of the measure in respect of Lithuania and extends throughout 2014, including the dates on which the measures were adopted in respect of the imports of the products at issue from Poland (February 2014), Latvia (June 2014) and Estonia (September 2014). The information referred to by the European Union includes material that it sent to Russia on its own initiative and in response to Russia's requests.<sup>1523</sup> Therefore, the Panel finds it appropriate to begin by examining the sufficiency of scientific evidence, throughout the relevant dates of 2014. The Panel will then examine the extent to which the bans on the imports of the products at issue from the affected EU member States were based on available pertinent information; followed by an assessment of whether Russia has sought to obtain additional information necessary for a more objective assessment of risk. Lastly the Panel will assess whether Russia has reviewed the challenged measures accordingly within a reasonable period of time. As these requirements are cumulative, if we find that Russia has failed to comply with any one of these four requirements Russia would be precluded from relying on Article 5.7 to exclude the applicability of other provisions of the SPS Agreement. We consider this approach to be appropriate in order to provide sufficient findings in respect of the parties' claims.

7.1141. We will pursue a comprehensive examination of the four prongs of Article 5.7 in respect of the bans on the products at issue from Estonia, Latvia, Lithuania, and Poland. Where relevant, we will refer to information specifically pertaining to any of the four affected EU member States.

#### **7.6.5.3.2.1 Whether relevant scientific information was insufficient at the time the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland were adopted**

7.1142. The first condition for the application of Article 5.7 is insufficiency of scientific evidence. As we have noted, according to the Appellate Body in *Japan – Apples*, this is the case when the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of the risks as required under Article 5.1 and as defined in paragraph 4 of Annex A.<sup>1524</sup> Russia has argued that the sufficiency of scientific evidence should be examined in an ongoing manner. Russia refers to the observation made by the panel in *Japan – Apples* regarding the time-frame for the examination of the sufficiency of scientific evidence under Article 5.7.<sup>1525</sup> However, we agree with the view expressed by the panel in *EC – Approval and*

<sup>1521</sup> Russia's response to Panel question No. 295, para. 157.

<sup>1522</sup> Russia's response to Panel question No. 295, paras. 158-159.

<sup>1523</sup> For a detailed account of such exchanges see Appendix 1 below.

<sup>1524</sup> Appellate Body Report, *Japan – Apples*, para. 179.

<sup>1525</sup> Russia's response to Panel question No. 309, para. 265 (referring to Panel Report, *Japan – Apples*, para. 7.10).

*Marketing of Biotech Products* that the (in)sufficiency of the relevant scientific evidence should be assessed with respect to the time the SPS measure is adopted.<sup>1526</sup> Accordingly, we will focus our examination on the dates, as relevant for each affected EU member States, throughout 2014, starting with January 2014, when the ban on the imports from Lithuania was adopted.

7.1143. As we indicated above, Russia does not provide a detailed basis for its alternative claim under Article 5.7. We understand Russia's argument that there is insufficient scientific evidence to be formulated in the broader context of Russia's claims in respect of the EU-wide ban and the overall insufficiency of scientific evidence for it to perform a risk assessment appropriate to the circumstances.<sup>1527</sup> In respect of the sufficiency of scientific evidence for Russia's assessment of the risks from the ASF situation in the affected EU member States, Russia posits that the 2015 EFSA scientific report confirms the continuing scientific uncertainty with respect of ASF spread and ASF eradication, in particular in the context of the European Union as a whole.<sup>1528</sup>

7.1144. In response to Russia's arguments, the European Union maintains that the relevant scientific information is sufficient and asserts that such information was provided by it to Russia.<sup>1529</sup> In support of this assertion, the European Union refers to letters, emails, faxes, meetings and inspections through which such information was provided.<sup>1530</sup>

7.1145. We bear in mind that insufficiency of scientific evidence does not extend to situations of "scientific uncertainty" (i.e. when there is unresolved scientific uncertainty)<sup>1531</sup>, nor to situations of scientific controversy.<sup>1532</sup> Moreover, the possibility to supplement the underlying scientific evidence does not, by itself, render it insufficient.<sup>1533</sup>

7.1146. We also note that Russia refers to the potential risks associated with the importation of pigs and pork products from the affected EU member States, including certain categories of those which have been subject to treatment for the inactivation of ASFV.<sup>1534</sup> While The European Union's complaint is with respect to Russia's bans on the imports of the products at issue from the affected EU-member States and the failure to adapt these bans pursuant to the SPS Agreement.

7.1147. We recall our earlier observations that ASF is already present in parts of Russia<sup>1535</sup>, particularly in areas that border the territories of Estonia, Latvia and Belarus. The risks to be assessed in this case, therefore, are those of the potential re-entry or further spread of ASF into Russia, and especially into the ASF-free regions of Russia.

7.1148. Mindful of these elements and the parties' arguments, the Panel will review whether the qualitative and quantitative aspects of the available scientific evidence, including information the European Union has provided to Russia, is of the type and scope that is (in)sufficient for Russia to conduct a risk assessment appropriate to the circumstances.

7.1149. In section 7.5.5.3.5 above, we examined the sources of scientific evidence on record in order to determine whether, for the purposes of the risks associated with the ASF situation in the non-affected EU member States, there was (in)sufficient evidence for Russia to conduct a risk

<sup>1526</sup> This accords with the view of previous panels, e.g. the Panel in *EC – Approval and Marketing of Biotech Products*, that an assessment of whether relevant scientific evidence is insufficient should be made with reference to the time of adoption of the relevant provisional SPS measure. Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.3253. We recall our general comments on the Panel's temporal framework in section 7.3.6 above.

<sup>1527</sup> Russia's response to Panel question No. 309, paras. 266-267.

<sup>1528</sup> Russia's response to Panel question No. 309, paras. 266-267.

<sup>1529</sup> European Union's second written submission, para. 68.

<sup>1530</sup> European Union's second written submission, para. 68 (referring to Exhibits EU-62, EU-64, EU-65, EU-89, EU-91, EU-92, EU-94, EU-132 to EU-148). See Appendix 1 below.

<sup>1531</sup> Appellate Body Report, *Japan – Apples*, paras. 183-184.

<sup>1532</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 677.

<sup>1533</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 702.

<sup>1534</sup> Exhibits EU-7, EU-8, EU-10, EU-11, EU-168 and RUS-28 (regarding the measures in respect of Lithuania); Exhibits EU-9, EU-10, EU-11, EU-168 and RUS-29 (regarding the measures in respect of Poland); Exhibits EU-12 and EU-169 (regarding the measures in respect of Latvia); and Exhibits EU-13 and RUS-37 (regarding the measures in respect of Estonia). See tables 1 and 2 above.

<sup>1535</sup> See para. 7.208 above.

assessment appropriate to the circumstances. We will rely on that examination for our assessment of the (in)sufficiency of scientific evidence in respect of the ASF situation in the affected EU member States.

7.1150. In our view, the presence of ASF in the territory of a country is a factor that needs to be considered in the context of an assessment of risks as appropriate to the circumstances. However, we consider that in the case of a disease like ASF – which, as we have found, is widely known, has been studied in detail and for which a great deal of scientific evidence is available — the uncertainties that may surround the introduction and spread of such disease in a previously un-affected territory should not impede a Member's ability to conduct a risk assessment. In our view, this has been particularly true in respect of the ASF-affected EU member States, especially at the time that Russia adopted each of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.

7.1151. We recall that as of January 2014, and furthermore thereafter, there has been a lot of scientific evidence available in respect of the epidemiology of ASF, the potential vectors for the transmission and spread of ASF (including behavioural ecology of wild boars), potential risks of spread of ASF in the Baltic region, and the type of control measures that could be applied. Moreover, Russia received (at least by 7 February 2014), information in respect of contingency planning in the European Union and the affected EU member States, as well as the general regulatory framework applicable within the European Union in respect of control of ASF.

7.1152. This information has been available to Russia in a very particular context. Russia had first hand experience in dealing with ASF for at least seven years at the time the first outbreaks occurred in the European Union. In our view, Russia was equipped with publicly available scientific evidence on the disease, together with trained experts who understood the risks and the manner to assess them. Russia rejects this view, largely based on the argument that the European Union did not provide detailed information in a number of areas, thus raising scientific uncertainty in respect of ASF spread and ASF eradication. It might be the case that some of the information requested by Russia could supplement the information already available for conducting a risk assessment as appropriate to the circumstances. However, the Appellate Body has clearly stated that the "application of Article 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence."<sup>1536</sup> On that basis, the Appellate Body concluded that it was "unable to endorse Japan's approach of interpreting Article 5.7 through the prism of 'scientific uncertainty'".<sup>1537</sup> Following the Appellate Body's guidance, we cannot accept Russia's approach of assessing the (in)sufficiency of scientific evidence in the light of persistent scientific uncertainties.

7.1153. We recall that we have found that the European Union did not provide Russia with the necessary evidence to objectively demonstrate that there were ASF-free areas, which were likely to remain so, within each of the four affected EU member States. In our view, our examination under Article 6.3 does not mirror our examination under Article 5.7 for the purposes of determining the (in)sufficiency of scientific evidence. While under Article 6.3 our focus is on a particular type of evidence provided by the European Union to Russia (i.e. the necessary evidence to objectively demonstrate the existence of ASF-free areas, which are likely to remain so), under Article 5.7 we are making a broader examination in respect of the available scientific evidence that was available to Russia to conduct a risk assessment of the ASF situation in the four affected EU member States. Our findings under Article 6.3 thus only inform our analysis of the evidence on record that we are addressing in this section. As we have explained, the information provided by the European Union to Russia supports our view that there was sufficient scientific evidence available for Russia to conduct a risk assessment as appropriate to the circumstances. We further note that our finding under Article 6.3 in respect of the affected EU member States relates to the failure of the European Union to objectively demonstrate that there were ASF-free areas, which were likely to remain so, within the affected EU member States. In this respect, the basis for our finding on the European Union's failure does not affect the sufficiency of the scientific evidence which we consider was available to Russia to conduct a risk assessment in respect of the ASF situation in affected EU member States at the time of the adoption of each of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.

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<sup>1536</sup> Appellate Body Report, *Japan – Apples*, para. 184.

<sup>1537</sup> Appellate Body Report, *Japan – Apples*, para. 184.

7.1154. Our finding that there was sufficient evidence for Russia to conduct a risk assessment does not mean that the conclusions of such an assessment would necessarily have been favourable to permitting imports from the four affected EU member States. That is, Russia's risk assessment might well have identified levels of risk for the re-introduction and further spread of ASFV associated with imports from the four affected EU member States that might, hypothetically, have supported Russia's decision to ban such imports.

7.1155. Based on the foregoing, we consider that there was, throughout 2014 and at the time of adoption of each of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, sufficient scientific evidence for Russia to conduct a risk assessment as appropriate to the circumstances in respect of the ASF situation in each of those four EU member States.

7.1156. While the preceding finding is sufficient to conclude that the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland do not fall within the scope of Article 5.7 and the qualified exemption to the obligations in Articles 5.1, 5.2 and 2.2 is not available to Russia, the Panel deems it prudent to examine these bans in the context of the other three elements of Article 5.7.

#### **7.6.5.3.2.2 Whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland were adopted on the basis of available pertinent information**

7.1157. We have found that there is sufficient scientific evidence in respect of ASF for Russia to conduct a risk assessment of the ASF situation in the affected EU member States, as appropriate to the circumstances. However, in order to provide a complete overview of the measures at issue, we will examine the remaining requirements of Article 5.7.

7.1158. With respect to the second condition of Article 5.7 – that the measure should be adopted on the basis of available pertinent information, we have indicated that it is pertinent when there is a rational and objective relationship between the information concerning the risk and the measure.<sup>1538</sup>

7.1159. The European Union also posits that a measure being manifestly unnecessary and disproportionate would be pertinent to determining whether such a measure is based on pertinent information or whether it is rather a disguised restriction on international trade.<sup>1539</sup> In this respect, the European Union sustains that in "case of a well-known disease like ASF, if there is only one case in wild boar only a few kilometres from the border with Belarus, Russia should have not banned, even provisionally, the products at issue from the whole territory of the European Union, including areas thousands of kilometres away, given the robustness of the EU measures and the epidemiology of the disease."<sup>1540</sup>

7.1160. Russia indicates that the initial imposition of the four measures for each of the affected EU member States corresponds to provisional import bans to various live pig and pork products upon the notification by the individual EU member State of the initial ASF outbreaks. Such initial bans were precautionary measures.<sup>1541</sup> We understand this to mean that Russia based its measures on pertinent available information related to the presence of ASF in the four affected EU member States.

7.1161. Moreover, we consider that our review of the evidence that we have identified as available for Russia to conduct a risk assessment of the situation in the four affected EU member States, may inform our examination of the pertinent available information on which Russia allegedly based its measures in respect of Estonia, Latvia, Lithuania, and Poland.

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<sup>1538</sup> See Appellate Body Reports, *US/Canada – Continued Suspension*, para. 678. See also para. 7.675 above.

<sup>1539</sup> European Union's response to Panel question No. 148, paras. 305-307; and second written submission, para. 77.

<sup>1540</sup> European Union's second written submission, para. 78.

<sup>1541</sup> Russia's response to Panel question No. 295, para. 156. Russia also refers to its responses to Panel question Nos. 279, 293, and 294.

7.1162. With these considerations in mind, the Panel will examine whether there is a rational and objective relationship between the available pertinent information concerning the risks arising from the potential re-entry and further spread of ASF within Russia through the imports of the products at issue from the four affected EU member States and each of the bans on the imports of the products at issue from those EU member States, as applied in respect of treated and non-treated products. We begin our examination in respect of non-treated products.

7.1163. Russia indicates that its measures were adopted on the basis of precaution under Article 5.7 as an immediate response to the ASF outbreaks in Lithuania (January 2014), Poland (February 2014), Latvia (June 2014), and Estonia (September 2014). To assist us in our analysis, we classify pertinent information available to Russia as follows: (i) scientific reports available to Russia, (ii) Russia's experience in handling ASF outbreaks, and (iii) the notifications provided by the European Union in respect of the ASF outbreaks in each of the four affected EU member States.<sup>1542</sup>

7.1164. Within the first category of information, we find the 2010 EFSA scientific opinion. Section 4.2.1.4 of this opinion explains the presence of ecological corridors connecting indirectly the Trans Caucasian Countries (TCC) and Russia's wild boar population with that of the European Union. In this respect, the opinion observes that the "wild boar populations of Belarus are well connected with those of Poland and Lithuania, while the Ukrainian wild boar populations are connected with the wild boar populations of Poland and Romania and, to a lesser extent, the Slovak Republic and Hungary."<sup>1543</sup> When explaining the ecology of wild boar and the non-migratory nature of *sus scrofa*, the opinion indicates that infections "can spread between larger regions, however, where there is continuity in the geographical distribution of the wild boar ... In this respect, Ukraine (Crimea), Poland and Romania may be at risk due to the continuous distribution and the high density of wild boar. Possible corridors may also exist from the infected Russian areas into Lithuania to Latvia".<sup>1544</sup> The FAO EMPRES Watch 2013 report further confirms the risks associated with the transmission of ASF through wild boar.<sup>1545</sup>

7.1165. Further to the scientific evidence we referred to in the preceding paragraph, we recall the information in respect of the outbreaks that occurred in each affected EU member State. As we have noted, according to the evidence on record, the European Union directly informed Russia of the outbreaks in Lithuania, Poland and Latvia.<sup>1546</sup> In addition, the EU member States regularly notified the OIE of the outbreaks taking place in the territory of the four affected EU member States.<sup>1547</sup>

7.1166. We consider it also relevant to recall that the ASFV is already present and widespread within the territory of Russia. In fact, it could be that ASF was introduced into the territory of the four affected EU member States by infected wild boar originating in Russia and Belarus. Russia has described in some detail the various measures it has in place to attempt to control ASF within its territory. We understand that Russia relies on the experience of its authorities in respect of ASF as an additional element in support of its contention that the initial measures on the four affected EU member States are based on pertinent available information.

7.1167. We find that there is a rational and objective relationship between the occurrence of ASF in the territory of each of the affected EU member States and the adoption of a ban on the imports of those products. This finding is of course limited to the initial moment of the adoption of such measures and in respect of non-treated products. We recall our findings under Article 6.1 that Russia still has an obligation to ensure adaptation of its measures (i.e. the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland) to the SPS characteristics in the areas where the products originate and in the areas to which they are destined.

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<sup>1542</sup> See fn 587 to para. 7.420 above and Exhibits EU-152-156. See also Appendix 1 below.

<sup>1543</sup> 2010 EFSA Scientific Opinion (Exhibit EU-24), p. 29.

<sup>1544</sup> 2010 EFSA Scientific Opinion (Exhibit EU-24), p. 30.

<sup>1545</sup> FAO, EMPRES Watch, May 2013 (Exhibit RUS-3), p. 9.

<sup>1546</sup> In respect of the outbreaks in Lithuania see Exhibit EU-132; regarding the outbreaks in Poland see Exhibit EU-136; and regarding the outbreaks in Latvia see Exhibit EU-147. See also Appendix 1 below.

<sup>1547</sup> See ASF cases in the European Union notified to the OIE (Exhibit EU-118). See fn 587 to para. 7.420 above and Exhibits EU-152-156. See also Appendix 1 below.

7.1168. Based on the foregoing, we consider that there is a rational and objective relationship between the bans on the products at issue from Estonia, Latvia, Lithuania, and Poland, and the available pertinent information concerning the risks arising from the potential re-entry and further spread of ASF within Russia through the imports of non-treated products at issue from the affected EU member States.

7.1169. We turn to examine whether the application of the bans on the imports of the treated products at issue from the four affected EU member States are based on pertinent available information. In paragraphs 7.876-7.878 above we examined the available pertinent information in respect of the existing treatments for the inactivation of ASFV, including that available throughout 2014. We recall that in paragraphs 7.1029-7.1031 above, we found that the bans on most of the treated products at issue from the four affected EU member States contradict the international standards contained in the Terrestrial Code in respect of treated products. As part of our analysis, we indicated that Russia does not provide any justification for limiting the "acceptable" treated products to certain categories of cat and dog feed. Based on our reasoning regarding the contradiction of the bans on most treated products at issue from the four affected EU member States, we consider that such measures, in respect of treated products, are not based on available pertinent information.

7.1170. We move on the third requirement under Article 5.7 of the SPS Agreement.

#### **7.6.5.3.2.3 Whether Russia has sought to obtain the additional information necessary for a more objective assessment of risk in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland**

7.1171. The third requirement of Article 5.7 is that the importing Member applying the measure seeks to obtain the additional information necessary for a more objective assessment of risk.<sup>1548</sup>

7.1172. The European Union argues that Russia "abused the process instead of seeking information germane for the risk assessment" because the information that Russia claims to seek was either already provided by the European Union or was irrelevant for the purposes of the European Union's ASF regionalization measures.<sup>1549</sup> Following the adoption of a provisional measure, the respective Member is under an obligation to seek to obtain additional information for a more objective assessment of risk. According to the European Union, the moment a Member is asking for information which is not necessary for a more objective assessment of risk, including the type of information characterized by the individual experts in the present proceedings as an "overkill" or as an attempt to "muddy the water", that Member can no longer benefit from the provisional shelter of Article 5.7. The European Union argues that such information requests are a clear warning sign that the respective Member is not genuinely seeking to perform a more objective risk assessment (objective in the sense of being based on the information available).

7.1173. Russia argues that it sought additional information. In particular, Russia indicates that it actively engaged the European Union and sent top Russian SPS officials to conduct in-country visits to meet with veterinary officials in Estonia, Latvia, Lithuania, and Poland at various moments throughout 2014.<sup>1550</sup>

7.1174. Article 5.7 does not impose explicit prerequisites regarding the additional information to be collected or a specific collection procedure.<sup>1551</sup> Nevertheless, the Appellate Body has concluded that:

[T]he WTO Member adopting a provisional SPS measure should be able to identify the insufficiencies in the relevant scientific evidence, and the steps that it intends to take to obtain the additional information that will be necessary to address these

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<sup>1548</sup> Article 5.7 places the burden of seeking to obtain the additional scientific information necessary to perform a more objective risk assessment on the importing Member. See e.g. Appellate Body Report, *US/Canada – Continued Suspension*, para. 679; Panel Report, *US – Animals*, para. 7.294.

<sup>1549</sup> European Union's first written submission, para. 196.

<sup>1550</sup> Russia's response to Panel question No. 295, para. 157.

<sup>1551</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 92, Panel Report, *US – Animals*, para. 7.295.



deficiencies in order to make a more objective assessment and review the provisional measure within a reasonable period of time. The additional information to be collected must be "germane" to conducting the assessment of the specific risk.<sup>1552</sup>

7.1175. The obligation in the second sentence of Article 5.7 entails that the Member adopting a provisional SPS measure "must make best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research or by gathering information from relevant international organizations or other sources."<sup>1553</sup><sup>1554</sup> However, this does not mean that such a Member is expected to guarantee specific results, nor is it expected to predict the actual results of its efforts to collect additional information at the time when it adopts the SPS measure.<sup>1555</sup>

7.1176. Mindful of these considerations, we recall that, following the outbreak of ASF in each affected EU member State, Russia banned certain products from each of those EU member States. We note that the scope of the requested information in contention between the parties relates largely to the situation in the entire territory and all EU member States, over and above the four ASF-affected member States.<sup>1556</sup>

7.1177. In our analysis in respect of Russia's compliance with Annex C(1)(c), we found that Russia requested information that went beyond what was necessary for undertaking and completing the procedure for the verification of the presence of ASF in the territory of the affected EU member States.<sup>1557</sup> We recall that such unnecessary requests include: (i) detailed information about pig farms, pork processing factories and semi-finished products, *graded by production volume*; (ii) regulations on export of wild boar meat and trophies, *number of killed animals and exported meat and trophies during 2013-2014* (for regions adjacent to the infected zone); (iii) detailed information about foreign hunters, who entered the country to hunt the wild boar during 2013-2014 (including information about the number and the country of origin), detailed by country and region; (iv) detailed information about pig farms and meat processing factories approved to ship animals and products to the territory of the CU, *including information about the suppliers (number, country, region) and production volumes, detailed by country and region*; (v) rough estimation of enterprises approved to ship animal products to the territory of the CU, by level of zoosanitary condition, equivalent to the previously conducted evaluation of the Russian and Belarusian enterprises, *detailed by regions and graded by production volume*; (vi) cartographical visualisation of the establishments approved to supply live pigs and swine products from the affected EU member States (Poland and Lithuania, in particular) to Russia with indication of the raw material bases of these establishments; (vii) zoo sanitary status of small farms (due to the big number of them in the territories of the infected/high risk zones with regard to ASF) and measure of their bio protection (possibility of free range, feed base, the regime of introducing the newly arrived animals in the herd, etc.); (viii) data on internal evaluation by the veterinary services of the EU member States of resources (human, technical, financial ones) needed for the creation and maintenance of abovementioned ASF free zones; (ix) data on functional isolation of sub-populations of domestic and wild animals in zones with the proves of the absence of migration/seasonal movements of wild boars between the zones; and (x) data on the presence of the ASF vector in the EU member States.<sup>1558</sup> In our examination under Annex C(1)(c) we recalled that some of the preceding information might have been relevant to assess the situation in an affected EU member State. However, the level of detail required in respect of these categories of information seems excessive. We recall that the information that Russia would be justified in asking for is the kind that would be necessary for undertaking and completing the procedure at issue. We concluded that, Russia is requested an excessive amount of detail in respect of several

<sup>1552</sup> Appellate Body Report, *US/Canada – Continued Suspension*, para. 679 (original footnote omitted); Panel Report, *US – Animals*, para. 7.295.

<sup>1553</sup> (footnote original) Pursuant to Article 10.1 of the *SPS Agreement*, due account shall be taken of the special needs of developing country Members in respect of their ability to procure the additional information for a more objective assessment of risk.

<sup>1554</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679.

<sup>1555</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 679. See also Panel Report, *US – Animals*, paras. 7.295-7.297.

<sup>1556</sup> See Appendix 1 below.

<sup>1557</sup> See para. 7.1087 above.

<sup>1558</sup> Russia's letter to the European Union of 16 May 2014, FS-EN-8/7999 (Exhibit EU-93).

categories of information that, in our view, go beyond what we have identified as necessary for an objective demonstration of the existence of ASF-free areas in an affected EU member State.<sup>1559</sup>

7.1178. Furthermore, we consider that our finding under Article 6.3 that the European Union failed to objectively demonstrate that there are ASF-free areas, likely to remain so, within Latvia, is not dispositive of the existence of such ASF-free areas. It could very well be the case that the European Union may be able to demonstrate through the provision of additional information, some of which was provided to Russia in the course of these proceedings, that there are ASF-free areas, likely to remain so, within at least some of the four affected EU member States.

7.1179. In light of this, we find no basis in the evidence on record to support Russia's assertion that all of the information it requested was "germane" to conducting a more objective assessment<sup>1560</sup> of the specific risk within the meaning of this element of Article 5.7. As we have already noted, the experts consulted by the Panel characterized certain of the information requested by Russia as "overkill" or as an attempt to "muddy the water".<sup>1561</sup> While Article 5.7 requires that a Member must actively make best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research or by gathering information from relevant international organizations or other sources, it does not envisage that a Member will use this process to seek information that is not germane to the specific risk involved.

7.1180. We therefore find that Russia did not seek to obtain additional information that was "necessary" for a more objective assessment of risk within the meaning of Article 5.7.

#### **7.6.5.3.2.4 Whether Russia has reviewed the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland within a reasonable period of time**

7.1181. The fourth condition under Article 5.7 is that the Member applying the measure reviews it within a reasonable period of time. What constitutes a reasonable period of time has to be established on a case-by-case basis<sup>1562</sup>, based upon the particular facts and circumstances of a given case. In *Japan – Agricultural Products II*, the Appellate Body stated that what constitutes a "reasonable period of time" within the meaning of Article 5.7 depends, *inter alia*, on the difficulty of obtaining the information necessary for a more objective assessment of risk.<sup>1563</sup>

7.1182. We recall that the panel in *EC – Approval and Marketing of Biotech Products* interpreted the term "reasonable period of time" in Article 5.7 in a manner similar to the term "undue delay" in Annex C(1)(a).<sup>1564</sup> This concept is not dependent on the length of the delay, but rather on whether any delay is legitimate and justifiable as opposed to unwarranted or excessive.<sup>1565</sup>

<sup>1559</sup> See para. 7.1086 above.

<sup>1560</sup> By this we refer to the distinction in degree of objectivity, based on available scientific evidence, drawn from the situations covered by Articles 5.7 and 5.1. Article 5.7 requires Members applying a provisional SPS measure on the basis of pertinent available information to "seek to obtain the additional information necessary for a *more objective assessment of risk*" (emphasis added). In our view, this refers to the type of risk assessment required pursuant to Articles 5.1 and 5.2, as defined in Annex A(4) of the SPS Agreement. In the past, panels such as *US – Animals* have referred to the text of Article 5.7 without clarifying a particular definition of the term "more objective assessment of risk". Rather they focused on what we mention in para. 6.55, which is the type of additional information that would be necessary.

<sup>1561</sup> Dr Brückner's response to Panel question No. 13 (who stated "the information requested in Exhibit RUS-131 [Letter from the Russian Veterinary Service to DG SANCO, No. FS-AS-8/23743, 1 December 2014], is in my opinion 'an overkill' of which many of the questions are not relative or needed to conduct either a sensible quantitative or qualitative risk analysis"); and Dr Thomson's response to Panel question No. 13 (who stated in respect of the questions asked through Letter of 5 February 2014 from Russia to the EU, FS-SD 8/1640 (Exhibit EU-84) "[t]hese questions are mostly variations on other questions posed by the RF. For a country that is not itself free of ASF this strikes me as an overkill and possibly an attempt to 'muddy the water'").

<sup>1562</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 93.

<sup>1563</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 93. Panel Report, *US – Animals*, para. 7.300.

<sup>1564</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1495-7.1497 (concerning Annex C(1)(a)) and 7.3245 (concerning Article 5.7). Panel Report, *US – Animals*, para. 7.301.

<sup>1565</sup> Appellate Body Report, *Australia – Apples*, para. 437; Panel Report, *US – Animals*, para. 7.301. Additionally, the panel in *US – Animals* looked to the context of Article 21.3(c) arbitrations – which determine

7.1183. The European Union argues that Russia has failed to review its measures within a reasonable period of time. The European Union identifies this period as the six months from the date of the first outbreak in Lithuania, at the end of January 2014, to the date of the establishment of the Panel, on 22 July 2014 and the period from the time the European Union provided additional information in June 2014 until the time Russia contacted the European Union again, at the beginning of December 2014. Russia posits that based on the spread of ASF in the affected EU member States, as well as on the evidence regarding ASF outbreaks during the second half of 2014 and through the middle of 2015, and on the European Union's failure to objectively demonstrate its ASF-free zones would remain ASF-free, it continued the maintenance of the challenged measures.<sup>1566</sup>

7.1184. With these considerations in mind, we examine whether Russia has reviewed the measures in respect of the affected EU member States within a reasonable period of time, and taking into account the timeframe for the Panel's analysis (i.e. from January to the date of Panel establishment on 22 July 2014, also encompassing the dates of adoption of the measures in respect of Estonia and Latvia (September 2014)).

7.1185. The panel in *US – Animals* examined the question of whether the United States reviewed the measures at issue in that dispute within a reasonable period of time. In its analysis, that panel relied on its findings under Annex C(1)(a) in respect of whether the United States had incurred undue delays in its review of Argentina's application for Northern Argentina.<sup>1567</sup> We agree with the approach of the panel in *US – Animals*. We consider that our assessment of this matter is closely linked with our examination of Russia's compliance with its obligations under Annex C(1)(a). In that respect we found that Russia's excessive and unjustified information requests in respect of the surveillance and control measures in non ASF-affected EU member States amount to acting in a manner that impedes undertaking and completing the procedure for the verification of the existence of ASF-free areas. In light of the Appellate Body's guidance<sup>1568</sup>, we found that situation to constitute an infringement of the obligation to undertake and complete a procedure without undue delay. We therefore found that Russia undertook and completed the procedure at issue with undue delay.

7.1186. Our findings in respect of Annex C(1)(a) inform our analysis of Russia's compliance with the last requirement under Article 5.7. In particular, we consider that Russia's excessive information requests led to continued delays in considering the information that the European Union provided. We do not ignore the proposition that a Member may require certain time to process of detailed and complex information. A Member may also need to translate such information in order to properly assess it. However, we consider that in a situation like the one of the affected EU member States, where Russia has received information during more than seven months (from January to September 2014) and insisted on the insufficiency of such information in an unjustified manner, Russia is not reviewing its SPS measures within a reasonable period of time.

7.1187. We therefore find that the fourth requirement for the application of Article 5.7 is not satisfied in the present case, because Russia did not review the bans on the products at issue from Estonia, Latvia, Lithuania, and Poland within a reasonable period of time.

#### 7.6.5.3.2.5 Conclusion

7.1188. We have found that there was sufficient scientific evidence for Russia to conduct a risk assessment of the ASF situation in the Estonia, Latvia, Lithuania, and Poland, as appropriate to the circumstances. Moreover, we found that Russia provisionally adopted the measure on the basis of

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the reasonable period of time for Members to implement the rulings and recommendations of the DSB— in which arbitrators have interpreted the term "reasonable period of time" to mean "the shortest period possible within the legal system of the [implementing] Member". Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 26. That panel observed that, while not directly applicable in these circumstances, it does suggest an understanding that when WTO Members must take legislative or regulatory actions involving complex legal processes to bring their measures into conformity with their WTO obligations reasonableness can be understood to mean as quickly as legally possible while accepting legitimate reasons for delay.

<sup>1566</sup> Russia's response to Panel question No. 295, paras. 158-159.

<sup>1567</sup> Panel Report, *US – Animals*, para. 7.303.

<sup>1568</sup> Appellate Body Report, *Australia – Apples*, para. 438.

available pertinent information, except in respect of treated products at issue. However, Russia did not seek to obtain additional information, and did not review the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland within a reasonable period of time. Having found that Russia did not satisfy three of the four requirements for the application of Article 5.7, we find that each of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, do not fall within the scope of Article 5.7 and the qualified exemption to the obligations in Articles 5.1, 5.2 and 2.2 is not available to Russia. Thus, we now turn to assess the conformity of Russia's measures with Articles 5.1, 5.2 and 2.2 of the SPS Agreement.

#### 7.6.5.3.3 Whether Russia's measures are based on a risk assessment

7.1189. We have noted the importance of Members basing their SPS measures on a risk assessment in order to maintain the "delicate and carefully negotiated balance in the *SPS Agreement* between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings"<sup>1569</sup>, as well of animals.<sup>1570</sup> With this in mind, we move on to assess whether Russia's measures are based on a risk assessment.

7.1190. In this dispute, Russia has argued that it is under no obligation to provide a risk assessment in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, because they are measures that conform to the relevant international standards, or alternatively, were adopted on the basis of Article 5.7 of the SPS Agreement.<sup>1571</sup>

7.1191. In paragraph 7.890 above, we have found that the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, do not conform to the Terrestrial Code. Furthermore, as indicated in paragraph 7.1188 above, we have found that the conditions required under Article 5.7 have not been met in respect of the bans on the four affected EU member States. Therefore, the foundation of Russia's justification for not having a risk assessment on which those bans are based does not have merit. In light of this, we need to examine whether there is a risk assessment within the meaning of paragraph 4 of Annex A.

7.1192. We recall that we found in paragraph 7.1188 above that the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland pursue the objectives enshrined in both Annex A(1)(a) and A(1)(b). The first type of risk assessment required under paragraph 4 of Annex A (i.e. "evaluation of the likelihood of entry, establishment or spread of a pest or disease") is appropriate for measures seeking the objective contained in Annex(1)(a). The second type of risk assessment required under paragraph 4 of Annex A (i.e. "evaluation of the potential adverse effects on human or animal health arising from the presence of ... disease-causing organisms in ... feedstuffs") is appropriate for measures seeking the objective contained in Annex (1)(b).<sup>1572</sup> Therefore, Russia's risk assessment should encompass both types of risk assessment referred to in paragraph 4 of Annex A.

7.1193. Russia has acknowledged throughout these proceedings that it has not conducted a risk assessment in the sense of Article 5.1 and paragraph 4 of Annex A.<sup>1573</sup> We therefore find that the first requirement for our enquiry under Article 5.1 of the SPS Agreement is not satisfied. As we have indicated above<sup>1574</sup>, our analysis of the European Union's claims under Article 5.2 should be done together with the one corresponding to Article 5.1. In a situation where there is no risk assessment, it is clear that a Member does not comply with any of the requirements of Article 5.2.

7.1194. Based on the foregoing, we find that the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland is inconsistent with Articles 5.1 and 5.2 of the SPS Agreement.

<sup>1569</sup> Appellate Body Report, *EC – Hormones*, para. 177.

<sup>1570</sup> See para. 7.712 above.

<sup>1571</sup> Russia's first written submission, paras. 216 and 296; Russia's response to Panel question No. 126, para. 235; and Russia's response to Panel question No. 279, para. 134.

<sup>1572</sup> Appellate Body Report, *Australia – Salmon*, para. 123, fn 69. See also Appellate Body Report, *Australia – Salmon*, para. 120, and Panel Report, *Australia – Salmon*, paras. 8.72 and 8.116.

<sup>1573</sup> Russia's second written submission, paras. 185-203.

<sup>1574</sup> See para. 7.713 above.

#### **7.6.5.3.4 Article 2.2 of the SPS Agreement**

7.1195. We recall that according to the Appellate Body in *India – Agricultural Products*, a finding of inconsistency with Articles 5.1 and 5.2 of the SPS Agreement raises a rebuttable presumption of inconsistency with Article 2.2.<sup>1575</sup> Therefore, we need to examine whether Russia has raised any arguments in support of such a rebuttal.

7.1196. Russia's arguments in respect of the lack of a risk assessment have focused on the conformity of the bans on the imports of the products at issue from the affected EU member States with the Terrestrial Code. As an alternative argument, Russia referred to the applicability of Article 5.7 to these measures, and the corresponding justification in respect of Articles 5.1, 5.2, and 2.2. However, we do not understand Russia to have raised arguments in support of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland being based on scientific principles and not being maintained without sufficient scientific evidence.

7.1197. In our view, our findings in respect of the bans on the imports of the products at issue from the affected EU member States not conforming to the Terrestrial Code and not falling under Article 5.7 and the lack of a risk assessment on which these measures are based, confirms that such measures are neither based on scientific principles nor maintained with sufficient scientific evidence. Russia has not rebutted such findings. In our view, Russia has failed to rebut the presumption of inconsistency raised by our findings of inconsistency with Articles 5.1 and 5.2.

7.1198. Based on the foregoing we find the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland to consequentially violate Article 2.2 of the SPS Agreement.

#### **7.6.5.4 Conclusion**

7.1199. We have found that there was sufficient scientific evidence for Russia to conduct a risk assessment of the ASF situation in the affected EU member States, as appropriate to the circumstances. Moreover, we found that Russia provisionally adopted the measures on the basis of available pertinent information, except with respect to treated products at issue. We also found that Russia did not seek to obtain additional information, and did not review the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland within a reasonable period of time. Having found that Russia did not satisfy three of the four requirements for the application of Article 5.7 of the SPS Agreement, we find that the bans on the affected EU member States do not fall within the scope of Article 5.7 and the qualified exemption to the obligations in Articles 5.1, 5.2 and 2.2 of the SPS Agreement is not available to Russia. We have also found that Russia did not base the bans on the affected EU member States on a risk assessment within the meaning of paragraph 4 of Annex A of the SPS Agreement, thus breaching Articles 5.1 and 5.2. We have also found that Russia has not rebutted the presumption of inconsistency that our findings raised in respect of Article 2.2, therefore the bans on the affected EU member States are also inconsistent with Article 2.2.

#### **7.6.6 Claims under Articles 5.3, 5.4, 5.6, and 2.2 of the SPS Agreement**

##### **7.6.6.1 Introduction**

7.1200. In section 7.5.6 above we explained that the European Union makes claims in respect of four provisions in Article 5 of the SPS Agreement that relate to the ALOP: Articles 5.3, 5.4, 5.5, and 5.6. In the light of this approach, we decided that before turning to the substance of the European Union's claims, we would first examine what is Russia's ALOP in respect of ASF. In paragraph 7.752 above, we found that Russia's ALOP for ASF is high or conservative. We have also explained that our examination in respect of Russia's ALOP for ASF is common for the assessment of the European Union's claims in respect of both the EU-wide ban and the bans on the imports of the products at issue from the four affected EU member States.

7.1201. In section 7.5.6 above we examined the consistency of the EU-wide ban with Articles 5.3, 5.4, 5.6, and 2.2 of the SPS Agreement. In that section we reproduced the text of the relevant

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<sup>1575</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.24.

legal provisions<sup>1576</sup> and the applicable legal test in respect of each of those provisions.<sup>1577</sup> We will rely on that analysis for our examination of the European Union's claims under Articles 5.3, 5.4, 5.6, and 2.2 in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. We turn to our corresponding assessment of those European Union's claims.

#### **7.6.6.2 Whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are inconsistent with Article 5.3 of the SPS Agreement**

7.1202. In section 7.5.6.3 above we have presented the parties' arguments, set out the applicable legal test under Article 5.3 of the SPS Agreement, and undertaken our examination of the consistency of the EU-wide ban with Article 5.3. We rely on that analysis for our examination of the consistency of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland with Article 5.3 of the SPS Agreement.

7.1203. In our analysis above, we examined two questions in respect of the EU-wide ban. The first is whether Russia took into account relevant economic factors when assessing the risk to animal or plant life and health. The second is whether Russia took into account relevant economic factors when determining the measure to be applied to achieve the appropriate level of sanitary or phytosanitary protection.

7.1204. As noted above,<sup>1578</sup> in respect of the first question, we consider that if there is sufficiency of scientific evidence but lack of conformity with the relevant international standard, by not basing its SPS measures on a risk assessment, as defined in Article 5.1 and Annex A(4) of the SPS Agreement, a Member would not be in a position to act in manner consistent with Article 5.3.

7.1205. In the instant dispute we have found that the ban on the imports of the products at issue from Latvia, as applicable to non-treated products, is based on the relevant international standard<sup>1579</sup>. We have also found that the bans on the imports of the products at issue from Estonia, Lithuania, and Poland, as applicable to non-treated products, are not based on the relevant international standard.<sup>1580</sup> In addition, we have found that the bans on the imports of the products at issue from the four affected EU member States, as applicable to treated products, are not based on the relevant international standards.<sup>1581</sup> Moreover, we have found that the bans on the imports of the products at issue from the four affected EU member States, as applicable both to treated and non-treated products, are not based on a risk assessment as appropriate to the circumstances, in a situation where there was sufficient scientific evidence for Russia to conduct an assessment of risks as appropriate to the circumstances.<sup>1582</sup> Based on these findings and on the reasoning explained above, we find that the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are inconsistent with Article 5.3.

7.1206. In 7.5.6.5.1.1 above we addressed the question of whether Russia took into account relevant economic factors when determining the measure to be applied to achieve Russia's ALOP for ASF. In respect of this second question, we found that the European Union failed to meet its burden of making a *prima facie* case that the EU-wide ban is inconsistent with Article 5.3 of the SPS Agreement, in respect of Russia taking into account the relevant economic factors when determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection.<sup>1583</sup>

7.1207. We see no distinction in the manner in which the European Union argued its case in respect of the EU-wide ban and the bans on the imports of the products at issue from four affected EU member States. Rather, the European Union formulated its arguments under Article 5.3 for both

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<sup>1576</sup> See section 7.5.6.1 above.

<sup>1577</sup> See above paras. 7.762-7.776 in respect of Article 5.3; paras. 7.789-7.792 in respect of Article 5.4; paras. 7.806-7.813 in respect of Article 5.6; and paras. 7.839-7.845 in respect of Article 2.2 of the SPS Agreement.

<sup>1578</sup> See para. 7.775 above.

<sup>1579</sup> See para. 7.1040 above.

<sup>1580</sup> See para. 7.1040 above.

<sup>1581</sup> See para. 7.1039 above.

<sup>1582</sup> See para. 7.1199 above.

<sup>1583</sup> See para. 7.783 above.

sets of measures.<sup>1584</sup> Therefore, we consider our finding in paragraph 7.783 above in respect of the EU-wide ban is also applicable to the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.

7.1208. Based on the foregoing we find that the bans on the products at issue from Estonia, Latvia, Lithuania, and Poland are inconsistent with Article 5.3 of the SPS Agreement, because by not basing those measures on a risk assessment in circumstances in which Article 5.7 is not applicable, Russia could have not taken into account the relevant economic factors listed in Article 5.3 when assessing the risks of entry and spread of ASF in accordance with Article 5.1 and paragraph 4 of Annex A of the SPS Agreement. However, the European Union failed to make a *prima facie* case of inconsistency of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland with Russia's obligation to take into account relevant economic factors listed in Article 5.3 when determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection in respect of the entry and spread of ASF.

### **7.6.6.3 Whether Russia took into account the objective of minimizing negative trade effects when determining the appropriate level of sanitary or phytosanitary protection**

7.1209. In section 7.5.6.4 above we have presented the parties' arguments, set out the applicable legal test under Article 5.4 of the SPS Agreement, and undertaken our examination of the consistency of the EU-wide ban with Article 5.4. We rely on that analysis for our examination of the consistency of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland with Article 5.4 of the SPS Agreement.

7.1210. In our analysis above, we concluded that in light of the hortatory nature of Article 5.4, we would not make findings with respect to whether Russia took into account the objective of minimizing negative trade effects when determining its ALOP. However, this is without prejudice to the Panel considering the objective of minimizing negative effects on international trade in its interpretation of other provisions of the SPS Agreement in light of the European Union's claims.

### **7.6.6.4 Whether the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are more trade restrictive than necessary pursuant to Article 5.6 of the SPS Agreement**

#### **7.6.6.4.1 Introduction**

7.1211. In section 7.5.6.5 above we have presented the parties' arguments, set out the applicable legal test under Article 5.6 of the SPS Agreement, and undertaken our examination of the consistency of the EU-wide ban with Article 5.6. We rely on that analysis for our examination of the consistency of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland with Article 5.6 of the SPS Agreement.

7.1212. We note that Russia has formulated specific arguments in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. Therefore, we briefly refer to Russia's arguments before turning to our analysis of whether these measures are inconsistent with Article 5.6. We will rely on the European Union's argument as summarized in section 7.5.6.5.1.1 above.

#### **7.6.6.4.2 Main arguments of the parties**

##### **7.6.6.4.2.1 European Union**

7.1213. The European Union argues that Russia has not expressly stated its ALOP.<sup>1585</sup> According to the European Union if the level of protection is not specified in writing, a panel should infer it from the SPS measures applied in practice.<sup>1586</sup>

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<sup>1584</sup> European Union's first written submission, para. 262.

<sup>1585</sup> European Union's first written submission, para. 242.

<sup>1586</sup> European Union's first written submission, para. 243.

7.1214. The European Union asserts that while Russia has imposed a country-wide ban in respect to the products at issue for each of the four affected EU member States, it has not combined this ban with a Russia-wide ban.<sup>1587</sup> The European Union also argues that factual evidence indicates that in fact, Russia has a rather low ALOP<sup>1588</sup>, and that even assuming that Russia has a very high or conservative ALOP, there is a possible alternative that cumulatively meets the conditions of footnote 3 of the SPS Agreement.<sup>1589</sup>

7.1215. The European Union stresses that the application of the OIE standards, which recommend regionalization and trade from the ASF-free countries/zones or for any part of a country notifying ASF if the products underwent specific treatments, is such an alternative, fulfilling all the legal requirements in Article 5.6 of the SPS Agreement.<sup>1590</sup> The European Union argues that such an alternative is reasonably available to Russia, and does not involve technical difficulties or an unfeasible economic burden, while at the same time, achieving Russia's ALOP and being significantly less trade-restrictive.<sup>1591</sup> The European Union concludes that Russia's measures at issue are thus inconsistent with the provisions of Article 5.6 of the SPS Agreement.<sup>1592</sup>

#### 7.6.6.4.2.2 Russia

7.1216. Russia argues that the European Union has failed to establish a *prima facie* case that there is an alternative measure that meets all three requirements of Article 5.6.<sup>1593</sup> According to Russia, there are no less-restrictive alternative measures available to achieve Russia's ALOP, which is based on the relevant international standard.<sup>1594</sup>

7.1217. Russia submits the Panel should dismiss the European Union's claim under Article 5.6. First, to the extent the European Union derives Russia's ALOP from the measures applied to imports, such measures, in Russia's view, cannot logically be more trade-restrictive than required to achieve their ALOP.<sup>1595</sup> Second, Russia contends that to the extent the European Union derives a different ALOP from the measures applied by Russia domestically, the European Union re-asserts a claim of allegedly distinct ALOPs that falls under Article 5.5 and should therefore be dismissed by the Panel in its consideration under Article 5.6.<sup>1596</sup>

7.1218. According to Russia, the application of the Terrestrial Code is not a less trade restrictive measure, as argued by the European Union, because Russia's measures concerning Estonia, Latvia, Lithuania, and Poland already "conform to and/or are based" on the relevant standards of the Terrestrial Code.<sup>1597</sup> Russia further elaborates that, if the exporting country fails to discharge its burden to establish, and to objectively demonstrate that it has established, containment zones in accordance with the OIE guidelines, the importing country may reject the exporting country's proposed zones, which do not reflect the same ALOP, and impose country-wide import restrictions.<sup>1598</sup> Russia asserts it acted accordingly and in compliance with the Terrestrial Code.<sup>1599</sup>

7.1219. Russia also asserts that when faced with what it considers to be the "deadly" combination of high density of wild boar and high percentages of low-biosecurity backyard farms, import

<sup>1587</sup> European Union's first written submission, para. 245.

<sup>1588</sup> European Union's first written submission, para. 248.

<sup>1589</sup> European Union's first written submission, para. 249.

<sup>1590</sup> European Union's first written submission, para. 252.

<sup>1591</sup> European Union's first written submission, para. 258.

<sup>1592</sup> European Union's first written submission, para. 259.

<sup>1593</sup> Russia's first written submission, para. 337.

<sup>1594</sup> Russia's first written submission, para. 334.

<sup>1595</sup> Russia's first written submission, para. 336.

<sup>1596</sup> Russia's first written submission, para. 336. Russia notes that it does not apply distinct ALOPs for domestic live and imported live pigs and pork products (Russia's first written submission, fn 637 to para. 336 referring to Russia's first written submission, paras. 275-287).

<sup>1597</sup> Russia's first written submission, para. 337.

<sup>1598</sup> Russia's first written submission, para. 337; comments to the European Union's response to Panel question No. 286, para. 149.

<sup>1599</sup> Russia's first written submission, para. 337; and comments to the European Union's response to Panel question No. 286, para. 149.



measures based on compartmentalization are the least trade restrictive measures that would achieve Russia's ALOP.<sup>1600, 1601</sup>

#### 7.6.6.4.3 Analysis by the Panel

7.1220. As explained above<sup>1602</sup>, in order to assess the consistency of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland with Article 5.6 of the SPS Agreement, the Panel needs to determine whether the European Union has identified one or more alternative measures. Then the panel needs to examine whether the alternative measures submitted by the European Union: (i) are reasonably available to Russia taking into account technical and economic feasibility; (ii) achieve Russia's ALOP; and (iii) are significantly less trade restrictive than the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.<sup>1603</sup>

7.1221. Before turning to our examination of the alternative measures identified by the European Union, we recall that the Panel would be required to address the issue whether Article 5.7 "obviates" the need to comply with Article 5.6 only in case it finds that Russia complies with Article 5.7.<sup>1604</sup> In section 7.719 we found that the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland are not subject to Article 5.7. We therefore find no need to address Russia's argument in respect of the relationship between Articles 5.7 and 5.6.

7.1222. We also recall that in paragraph 7.1037 above, we found that the ban on the imports of the products at issue from Estonia, as applicable to non-treated products, is based on the relevant international standard. We have also found that the bans on the imports of the products at issue from Latvia, Lithuania, and Poland, as applicable to non-treated products, are not based on the relevant international standard. In addition, we have found that the bans on the imports of the products at issue from the four affected EU member States, as applicable to treated products, are not based on the relevant international standards.

7.1223. With these considerations in mind we turn to examine the alternative measures identified by the European Union.

##### 7.6.6.4.3.1 Whether the European Union has identified one or more alternative measures

7.1224. The measures that the European Union submits as an alternative are those derived from the application of the Terrestrial Code, which recommends regionalization and trade from the ASF-free countries/zones or from any part of a country notifying ASF if the products underwent specific treatments.<sup>1605</sup> In particular, the European Union argues that instead of an EU-wide ban, Russia should allow trade of certain products according to specific provisions of Chapter 15.1 of the Terrestrial Code. Table 9 below contains the alternative measures identified by the European Union, as relevant for the EU-wide ban, on the basis of the specified provisions of the Terrestrial Code.

**Table 9 Alternative measures identified by the European Union**<sup>1606</sup>

Product	Terrestrial Code provision	Recommendation
Live pigs	Article 15.1.5	Allow trade from the ASF free zones in the EU.
Semen of domestic pigs and <i>in</i>	Articles 15.1.8 and 15.1.10	Allow trade from the ASF free

<sup>1600</sup> Russia's response to Panel question No. 159, para. 300.

<sup>1601</sup> Russia's second written submission, para. 143.

<sup>1602</sup> See para. 7.810 above.

<sup>1603</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.203.

<sup>1604</sup> This reflects the approach taken in *US – Animals* whereby the panel, having found the United States' measures were not covered by the exemption in Article 5.7, decided not to consider the United States' argument that the maintenance of a provisional measure under Article 5.7 would preclude the applicability of Article 5.6 (Panel Report, *US – Animals*, para. 7.439).

<sup>1605</sup> European Union's first written submission, para. 252; and second written submission, para. 134.

<sup>1606</sup> This table is prepared on the basis of the European Union's opening statement at the second meeting of the Panel, paras. 72-76.

Product	Terrestrial Code provision	Recommendation
<i>vivo</i> derived embryos of domestic pigs		zones in the EU.
Fresh meat of domestic pigs and of wild boar	Articles 15.1.12. and 15.1.13	Allow trade from the ASF free zones in the EU.
Pig products which have been processed so as to ensure the destruction of the ASFV (e.g. heat treatment, maturation)	Article 15.1.14	Allow from the entire territory of the four partially affected EU Member States
Bristles	Article 15.1.16	Allow trade from the ASF free country, zones or compartment; or which have been processed in an establishment approved by the Veterinary Authority for export purposes so as to ensure the destruction of the ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV.

7.1225. In our view, the European Union has clearly identified which would be the alternative measures for the products at issue. We now proceed to examine whether the measures based on the recommendations of the Terrestrial Code identified by the European Union meet the three cumulative elements of Article 5.6 of the SPS Agreement.

#### **7.6.6.4.3.2 Whether measures based on the recommendations in the Terrestrial Code are reasonably available, taking into account technical and economic feasibility**

7.1226. Having determined the alternative measures identified by the European Union, we first need to examine whether such alternative measures are reasonably available to Russia, taking into account technical and economic feasibility. In section 7.5.6.5.2.3 above we have found that the measures recommended in the Terrestrial Code in respect of regionalization are reasonably available to Russia, because they are technically and economically feasible. We rely on this finding for the purposes of the analysis we are undertaking in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.

7.1227. Moreover, we note that the European Union has also identified as an alternative measure to the bans on the imports from Estonia, Latvia, Lithuania, and Poland the recommendations in the Terrestrial Code in respect of treated products. This is, accepting trade of products treated (processed) in an establishment approved for export purposes so as to ensure destruction of ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV, as enshrined in Articles 15.1.14 and 15.1.16.

7.1228. We have observed that Russia has not challenged the technical and economic feasibility of measures in line with the Terrestrial Code. On the contrary, Russia has claimed that its measures on imports from the four affected EU member States "conform to" or "are based on" the international standards articulated in the Terrestrial Code, hence implying that it considers these standards to be technically and economically feasible.

7.1229. As indicated by the European Union, the alternative measures arising from the Terrestrial Code include accepting the imports of the treated products, in line with Chapter 15.1 of the Terrestrial Code. In our view, accepting such imports from the European Union does not entail a high technical or economic burden. Rather, it requires appropriate cooperation between the European Union's and Russia's veterinary services in order to verify compliance with the processing requirements for safe trade in each of the four affected EU member States.

7.1230. Examining these elements, we consider that the recommended measures under the Terrestrial Code in respect of regionalization are reasonably available to Russia, because they are technically and economically feasible.

#### **7.6.6.4.3.3 Whether measures based on the recommendations in the Terrestrial Code achieve Russia's ALOP**

7.1231. In section 7.5.6.5.2.4 we found that the measures recommended in the Terrestrial Code in respect of regionalization achieve Russia's high ALOP. We rely on this finding for the purposes of the analysis we are undertaking in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.

7.1232. Moreover, we recall that the European Union has also identified as an alternative measure to the bans on the imports from Estonia, Latvia, Lithuania, and Poland the recommendations in the Terrestrial Code in respect of treated products. This is, accepting trade of products treated (processed) in an establishment approved for export purposes so as to ensure destruction of ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV, as enshrined in Articles 15.1.14 and 15.1.16.

7.1233. In its responses to the Panel's questions the OIE refers to the Terrestrial Code Foreword, which indicates that "the Code sets out standards for the improvement of terrestrial animal health and welfare and veterinary public health worldwide, including through standards for safe international trade in terrestrial animals".<sup>1607</sup> The OIE also observed that "[a]ll the various combinations of testing, treatment and certification identified in Chapter 15.1 provide for safe trade of animals and animal products".<sup>1608</sup> Furthermore, the OIE concludes that "[r]egardless of a country's policy on the ALOP, the OIE considers that the application of the measures recommended in the Terrestrial Code provide conditions for safe trade in animals and animal products."<sup>1609</sup> In our view, the OIE's explanations include reference to the recommendations for safe trade arising from treatment (processing) of products at issue as provided in Chapter 15.1 of the Terrestrial Code.

7.1234. On that basis, we need to examine whether the level of protection that would be achieved by the alternative measures suggested by the European Union meets Russia's ALOP in respect of ASF.<sup>1610</sup> We recall that we have found that both Russia's ALOP and the level of protection achieved through the alternative measures suggested by the European Union are high. We also recall that Russia acknowledges that its ALOP for ASF, as applied to imports of the products at issue, could be achieved by means of measures that conform to the standards enshrined in the Terrestrial Code.<sup>1611</sup> We therefore conclude that the level of protection achieved through measures in line with the provisions of Chapter 15.1 of the Terrestrial Code in respect of treated products meet Russia's ALOP.

7.1235. We thus move on to make the comparison between the trade restrictiveness of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, and the alternative measures identified by the European Union.

#### **7.6.6.4.3.4 Whether the measures based on the recommendations in the Terrestrial Code are significantly less trade-restrictive than the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland**

7.1236. We recall that previous panels have examined the third requirement through comparing the alternative measures proposed by the complaining party with the challenged measures.<sup>1612</sup> The panel in *India – Agricultural Products*, agreeing with the panel in *Australia – Salmon*, observed that "any measure imposing conditions upon importation, even if stringent, 'would still be significantly less restrictive to trade than an outright prohibition'".<sup>1613</sup>

<sup>1607</sup> OIE response to Panel question No. 19.

<sup>1608</sup> OIE response to Panel question No. 19.

<sup>1609</sup> OIE response to Panel question No. 19.

<sup>1610</sup> Appellate Body Report, *Australia – Apples*, para. 344.

<sup>1611</sup> See paras. 7.750 and 7.805 above.

<sup>1612</sup> Panel Reports, *US– Animals*, para. 7.425; *India – Agricultural Products*, para. 7.591; and *Australia – Salmon*, para. 8.182

<sup>1613</sup> Panel Report, *India – Agricultural Products*, para. 7.590 (quoting Panel Report, *Australia – Salmon*, para. 8.182).

7.1237. With this in mind, we move on to analyse whether measures applied pursuant to the recommendations on regionalization in Chapter 15.1 of the Terrestrial Code are significantly less trade restrictive than the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland.

7.1238. In paragraph 7.871 above we explained that we would separately examine the bans on the imports from Estonia, Latvia, Lithuania, and Poland as applicable to treated and non-treated products at issue. Following that distinction, we made separate findings on whether those measures, as applied to treated and non-treated products at issue, are based on the relevant international standards articulated in the Terrestrial Code. In order to properly examine the measures at issue, we consider that we should follow the same analytical approach in the context of our assessment of whether the measures based on the recommendations on regionalization in the Terrestrial Code are significantly less-trade restrictive than the bans on the imports from the four affected EU member States. We will begin our examination with an assessment of the matter in respect of treated products, followed by the corresponding analysis of non-treated products.

### *Treated products*

7.1239. In paragraph 7.898 above we found that the bans on the imports from Estonia, Latvia, Lithuania, and Poland, applicable to treated products, are not based on the international standards articulated in the Terrestrial Code. Moreover, we recall that these measures impose a general import ban to most treated products from Estonia, Latvia, Lithuania, and Poland.<sup>1614</sup>

7.1240. In our assessment of the relevant provisions in the Terrestrial Code, we have explained that certain provisions in Chapter 15.1 provide for safe trade of pig products, regardless of whether they originate from ASF-free areas, that have been subject to treatment (processed) in an establishment approved for export purposes so as to ensure destruction of ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV.<sup>1615</sup>

7.1241. Based on the foregoing, we conclude that the alternative proposed by the European Union, namely that Russia accept pig products which have been certified to satisfy the treatment requirements explained above, which allows for safe trade of those treated pigs products covered by Articles 15.1.14, 15.1.15, and 15.1.16, is significantly less restrictive to trade than a ban on the same products.

### *Non-treated products*

7.1242. In paragraph 7.1040 above we found that the ban on the imports from Latvia, as applicable to non-treated products, is based on the international standards articulated in the Terrestrial Code in respect of non-treated products coming from ASF-free areas. We also found that the bans on the imports from Estonia, Lithuania, and Poland, as applicable to non-treated products, are not based on the relevant international standard.

7.1243. In our assessment of the relevant provisions in the Terrestrial Code, we have explained that certain provisions in Chapter 15.1 provide for safe trade from ASF-free areas. In our findings under Article 6.3, we found that the European Union failed to provide to Russia the necessary evidence to objectively demonstrate that there are ASF-free areas, which are likely to remain so, within Latvia. We also found that the European Union provided to Russia the necessary evidence to objectively demonstrate that there are ASF-free areas, which are likely to remain so, in Estonia, Lithuania, and Poland.<sup>1616</sup>

7.1244. Based on the foregoing, we conclude that the European Union has failed to demonstrate that the alternative it identified in respect of non-treated products, namely that Russia base the

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<sup>1614</sup> Excluding thermally treated (temperature not lower than 70°C for not less than 20 minutes) cat and dog food from Estonia, Latvia, Lithuania, and Poland; as well as feed additives resulted from chemical or microbiological synthesis from Estonia. See Table 1 (Product coverage of the measures at issue) below para. 7.144 above.

<sup>1615</sup> See para. 7.287 above.

<sup>1616</sup> See para. 7.1004 above.

challenged measures on the recommendations on regionalization in the Terrestrial Code, which allows for safe trade of pigs products from ASF-free areas covered by Articles 15.1.5, 15.1.8, 15.1.10, 15.1.12, 15.1.13, and 15.1.16, is significantly less restrictive to trade than a ban on the same products from Latvia. We also conclude that the alternative proposed by the European Union, namely that Russia base the bans on the imports from Estonia, Lithuania, and Poland on the recommendations on regionalization in the Terrestrial Code, which allows for safe trade of pig products from ASF-free areas covered by Articles 15.1.5, 15.1.12, and 15.1.13, is significantly less trade restrictive to trade than a ban on the same products from Estonia, Lithuania, and Poland.

#### **7.6.6.4.4 Conclusion**

7.1245. We have found that the European Union identified measures based on the recommendations on treated (processed) products in the Terrestrial Code as a reasonably available alternative to the bans on the imports from Estonia, Latvia, Lithuania, and Poland, as applied to treated products covered by Articles 15.1.14, 15.1.15, and 15.1.16 of the Terrestrial Code. We have also found that the alternative is available to Russia, technically and economically feasible to Russia, would achieve Russia's ALOP, and is significantly less restrictive to trade than the bans on the imports from Estonia, Latvia, Lithuania, and Poland. Therefore, we conclude that those measures, as applicable to treated products, are inconsistent with Article 5.6 of the SPS Agreements, with respect to treated products covered by Chapter 15.1 of the Terrestrial Code, because they are significantly more trade restrictive than required to achieve Russia's ALOP.

7.1246. We have also found that the European Union identified measures based on the recommendations on regionalization in the Terrestrial Code as a reasonably available alternative to the bans on the imports from Estonia, Latvia, Lithuania, and Poland, as applied to non-treated products covered by Articles 15.1.5, 15.1.8, 15.1.10, 15.1.12, and 15.1.13 of the Terrestrial Code. We have also found that the alternative is technically and economically feasible and would achieve Russia's ALOP, and is significantly less restrictive to trade than the bans on the imports of the products at issue from Estonia, Lithuania, and Poland. However, we have found that the European Union failed to demonstrate that the alternative measure is significantly less restrictive to trade than the ban on the imports of the products at issue from Latvia. Therefore, we conclude that the European Union failed to demonstrate that the ban on the imports from Latvia, as applicable to non-treated products, is inconsistent with Article 5.6 of the SPS Agreements. We also conclude that the bans on the imports of the products at issue from Estonia, Lithuania, and Poland, as applicable to non-treated products, are inconsistent with Article 5.6 of the SPS Agreement, because they are significantly more trade restrictive than required to achieve Russia's ALOP .

#### **7.6.6.5 Whether the measures at issue are more than is necessary for the protection of animal health pursuant to Article 2.2 of the SPS Agreement**

##### **7.6.6.5.1 Main arguments of the Parties**

###### **7.6.6.5.1.1 European Union**

7.1247. The European Union argues that Article 2.2 of the SPS Agreement is a more general provision and that Articles 5.1, 5.2 and 5.6 are more specific provisions.<sup>1617</sup> According to the European Union, it follows that a finding of a violation of Article 5.6 with regard to risk management will consequentially result in a violation of Article 2.2 of the SPS Agreement, more precisely with regard to the necessity requirement.<sup>1618</sup>

7.1248. The European Union argues that Russia does not comply with the requirements in Article 5.6 and footnote 3 of the SPS Agreement.<sup>1619</sup>

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<sup>1617</sup> European Union's second written submission, para. 129.

<sup>1618</sup> European Union's second written submission, para. 130.

<sup>1619</sup> European Union's second written submission, para. 134.

#### 7.6.6.5.1.2 Russia

7.1249. Russia argues that its import restrictions on the four infected EU Member States are in line with the international standards. Russia argues that consequently, they are presumed to be consistent with the relevant provisions of the SPS Agreement, including Article 2.2.<sup>1620</sup>

#### 7.6.6.5.2 Analysis by the Panel

7.1250. In section 7.5.6.6.2.1 above we set out the legal test applicable in respect of Article 2.2 and indicated that we agree with the panel in *India – Agricultural Products* that the "necessity" requirement in Article 2.2 is closely linked to the determination under Article 5.6.

7.1251. In its second written submission, the European Union argues that, based on the relationship between Articles 2.2 and 5.6<sup>1621</sup>, a finding of violation of Article 5.6 with regard to risk management will consequentially result in a violation of the necessity requirement enshrined in Article 2.2.<sup>1622</sup> The Appellate Body has been clear in endorsing the analysis provided by the panel in *India – Agricultural Products* in considering that a breach of Article 5.6 does not result in a consequential violation of Article 2.2. Rather, such a finding may lead to a rebuttable presumption.<sup>1623</sup>

7.1252. In our view, Russia has not provided any arguments or evidence that would rebut the presumption raised from a finding of inconsistency with Article 5.6. Rather, it has focused its arguments on the consistency of the measures at issue with its obligations under Article 5.6.

7.1253. We recall our finding that the bans on the imports of the products at issue, as applicable to treated products, from Estonia, Latvia, Lithuania, and Poland, are significantly more trade restrictive than the alternative measures identified by the European Union. The Panel also found that the alternative measures are available to Russia and met the Russia's ALOP in respect of ASF.

#### 7.6.6.5.3 Conclusion

7.1254. In light of our findings under Article 5.6 and the arguments and evidence raised by Russia in order to rebut the presumption of inconsistency with Article 2.2 raised by a finding of breach of Article 5.6, we find that the bans on the imports of the products at issue, as applicable to treated products, from Estonia, Latvia, Lithuania, and Poland, are inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect human and animal life or health.

### 7.7 Claims under Articles 2.3 and 5.5 of the SPS Agreement

#### 7.7.1 Introduction

7.1255. The Panel will now examine the European Union's claims that Russia's measures are inconsistent with Articles 2.3 and 5.5 of the SPS Agreement.

7.1256. At the outset, we observe that the European Union has formulated individual and independent claims in respect of Russia's obligations under Articles 2.3 and 5.5 of the SPS Agreement.<sup>1624</sup> In light of this, before we proceed to examine each of the European Union's claims, we must first determine the relationship between Articles 2.3 and 5.5 and decide the order of our analysis of the European Union's claims in respect of these two provisions.

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<sup>1620</sup> Russia's first written submission, para. 296.

<sup>1621</sup> European Union's second written submission, para. 129 (referring to Panel Report, *EC – Hormones (Canada)*, para. 8.99.

<sup>1622</sup> European Union's second written submission, para. 130.

<sup>1623</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.37-5.38.

<sup>1624</sup> European Union's first written submission, section IV.E; and second written submission, section III.E.

### 7.7.2 Relationship between Articles 2.3 and 5.5 of the SPS Agreement and order of analysis

7.1257. Article 2.3 addresses sanitary measures which (i) arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail; or (ii) are applied in a manner which would constitute a disguised restriction on trade. Article 5.5 deals with a situation where (i) the imposing Member has adopted ALOPs in several different situations; (ii) those levels of protection exhibit arbitrary or unjustifiable "differences"/"distinctions" in their treatment of different situations; and (iii) these arbitrary or unjustifiable differences result in discrimination or a disguised restriction on trade.

7.1258. The Appellate Body has found that Articles 2.3 and 5.5 are closely related.<sup>1625</sup> Both articulate non-discrimination obligations and condemn disguised restrictions on international trade. Article 2.3 is of a more general character than Article 5.5. A violation of Article 2.3 will not necessarily imply a violation of Article 5.5<sup>1626</sup>, and arbitrary or unjustifiable discrimination in the sense of the first sentence of Article 2.3, can be found to exist without any examination under Article 5.5.<sup>1627</sup>

7.1259. On the basis of this relationship, panels faced with claims under both Articles 2.3 and 5.5 have typically adopted the approach of examining the claim under Article 5.5 before turning to the claim under Article 2.3. Indeed, in most disputes in which a claim under Article 2.3 was made, it was argued, not as an independent claim, but rather as a consequential breach of the alleged breach of Article 5.5.<sup>1628</sup>

7.1260. In *India – Agricultural Products*, the complainant, the United States, ordered its analysis such that its primary claim was under Article 2.3 of the SPS Agreement and, in the "alternative"<sup>1629</sup>, under Article 5.5 of the SPS Agreement. That panel addressed the Article 2.3 claim first and then exercised judicial economy in respect of the United States' "alternative" claim under Article 5.5.<sup>1630</sup>

7.1261. In this Panel proceeding, the European Union orders its claims following the approach undertaken by the panel in *India – Agricultural Products*.<sup>1631</sup> Thus, the European Union first addresses its claims in respect of Article 2.3, followed by those claims under Article 5.5.<sup>1632</sup> The European Union indicates that it prefers this approach because of the broader nature of the non-discrimination obligations contained in Article 2.3, as opposed to the focus of Article 5.5 on discrimination that may arise in respect of distinctions in levels of protection.<sup>1633</sup> In its first written submission, Russia rebutted the European Union's claims starting with Article 5.5 followed by Article 2.3. However, Russia was silent on the order of analysis the Panel should follow.

7.1262. We recall that the Appellate Body has recognized a panel's discretion to depart from the sequential order suggested by the complaining party when this is required in the light of the correct interpretation or application of the legal provisions at issue.<sup>1634</sup>

<sup>1625</sup> Appellate Body Report, *EC - Hormones*, para. 212.

<sup>1626</sup> Panel Report, *Australia – Salmon*, para. 8.109.

<sup>1627</sup> Appellate Body Report, *Australia – Salmon*, para. 252; and Panel Report, *US – Poultry (China)*, para. 7.318.

<sup>1628</sup> Panel Reports, *Australia – Salmon (Article 21.5 - Canada)*, paras. 7.112-7.114; *EC – Approval and Marketing of Biotech Products*, paras. 7.1446-7.1448, 7.1765-7.1766 and 7.3405-7.3406; *US – Poultry (China)*, paras. 7.318-7.319; and *Australia – Apples*, para. 7.1095.

<sup>1629</sup> Panel Report, *India – Agricultural Products*, para. 7.336 (referring to United States' first written submission, Section VIII.H).

<sup>1630</sup> Panel Report, *India – Agricultural Products*, para. 7.481.

<sup>1631</sup> European Union's first written submission, paras. 270-271.

<sup>1632</sup> European Union's second written submission, para. 135.

<sup>1633</sup> European Union's first written submission, para. 268.

<sup>1634</sup> Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, para. 277. See also Appellate Body Reports, *Canada – Renewable Energy/Feed in Tariff Program*, para. 5.8; and Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 126-129; and Panel Report, *US – Animals*, para. 7.13; and *Australia – Salmon*, paras. 8.42-8.48.

7.1263. Furthermore, we recall that Article 2.3 has a broader scope than Article 5.5. In this particular case, the European Union has framed distinct, although related, arguments in respect of why the measures at issue run contrary to Russia's obligations under Articles 2.3 and 5.5. The European Union has not framed its claims under Article 2.3 as consequential to findings in respect of Article 5.5.

7.1264. In light of the above, we will adopt the order of analysis suggested by the European Union and begin by examining the European Union's claim that Russia's measures result in arbitrary and unjustifiable discrimination inconsistent with Article 2.3 of the SPS Agreement. We will then examine the European Union's claim that Russia is in breach of Article 5.5 of the SPS Agreement as it makes arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, because such distinctions result in discrimination or a disguised restriction on international trade.

### **7.7.3 Whether Russia's measures are inconsistent with Article 2.3 of the SPS Agreement**

#### **7.7.3.1 Main arguments of the parties**

##### **7.7.3.1.1 European Union**

7.1265. The European Union argues that Russia's measures violate the obligations contained in both sentences of Article 2.3 of the SPS Agreement. The European Union clarifies that the obligations in the two sentences of Article 2.3 should not be mechanically distinguished, as the respective concepts impart meaning to one another.<sup>1635</sup>

##### **7.7.3.1.1.1 First sentence of Article 2.3 –arbitrary or unjustifiable discrimination**

7.1266. The European Union stresses that there are three cumulative conditions that should be satisfied before a violation of the first sentence of Article 2.3 can be established. Those conditions are (i) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member; (ii) the discrimination is arbitrary or unjustifiable; and (iii) identical or similar conditions prevail in the territories of the Members compared.<sup>1636</sup>

7.1267. The European Union argues that in the present dispute, the three cumulative conditions are satisfied in respect of two instances of discrimination.<sup>1637</sup> The first instance refers to the difference in treatment afforded to imported products from the European Union and internal trade of Russian domestic products at issue. The products at issue from the entire territory of the European Union (including the entire territory of the four affected EU member States) are subject to a total import ban, which runs against regionalization that would allow trade of the products at issue from the entire European Union, except the ASF-affected areas in the four EU member States and Sardinia. By contrast, there is only a limited ban on trade of Russian domestic products, applied only to those products from a limited area around an ASF epizootic hotbed.<sup>1638</sup>

7.1268. In respect of that situation, the European Union argues that (i) the difference in treatment results in discrimination as Russia allows intra-Russian trade in live pigs and pig products from the non-affected areas and does not apply a Russia-wide ban on the products associated with the risk of ASF; (ii) the discrimination between the Russian territory and the European Union's territory is arbitrary and unjustifiable because the difference in treatment cannot be explained by a different epizootic status; and (iii) the same or similar conditions prevailed both in the European Union (including in the four affected EU member States) and in Russia, i.e. the existence of the ASF virus within both the Russian and the European Union territories, which was

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<sup>1635</sup> European Union's first written submission, para. 273.

<sup>1636</sup> European Union's first written submission, para. 274 (citing *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111).

<sup>1637</sup> European Union's first written submission, para. 286.

<sup>1638</sup> European Union's first written submission, para. 287-289.



the relevant feature triggering the import prohibition imposed by Russia on live pigs and certain pig products from the European Union.<sup>1639</sup>

7.1269. The second instance of discrimination, according to the European Union, refers to the initial acceptance of regionalization measures of other WTO Members, like Ukraine, while not recognizing the "state-of-the art" ASF regionalization measures in the European Union.<sup>1640</sup> In particular, the European Union refers to two situations, both pre-dating the panel establishment. One occurred in 2012, when Russia selectively did not apply any ban to Ukrainian products following an ASF case in the Zaporozhye region. A second situation occurred in early 2014 with respect to the Lugansk region. The European Union highlights in this regard that on 15 January 2014 Russia announced a ban on the trade from the Lugansk region, while accepting pig products from the rest of Ukraine. This regional ban was notified to the WTO on 21 January 2014.<sup>1641</sup>

7.1270. In respect of this second instance, the European Union argues that (i) the difference in treatment of the Ukrainian and European Union territory (and the four affected EU member State territories) results in discrimination because, in the case of Ukraine, a country-wide ban was not imposed as a reaction to the notification of an ASF outbreak; (ii) such discrimination is arbitrary and unjustifiable because the difference in treatment cannot be explained by a different epizootic status; and (iii) the same or similar conditions prevailed both in the European Union and in Ukraine, because the existence of the ASFV within both territories was the relevant feature triggering the import prohibition imposed by Russia on the products at issue from the entire European Union, on the one hand, and the limited territorial import ban on Ukrainian like pig products, on the other hand.<sup>1642</sup>

#### **7.7.3.1.1.2 Second sentence of Article 2.3 — disguised restriction on international trade**

7.1271. The European Union argues that Russia's measures at issue amount to a disguised restriction on international trade for several reasons: first, Russia's application of drastic measures towards imports from the European Union while being far less stringent with regard to the internal movement of domestic products or with regard to imports from other countries, including other WTO Members, amounts to a disguised restriction on international trade. Second, Russia's attempt to justify its measures by the OIE standards is a clear misreading of the Terrestrial Code and the OIE Terrestrial Manual. Third, Russia did not provide any risk assessment in support of its measures, which is required under Article 5.1 of the SPS Agreement for measures that do not "conform to" and are not "based on" international standards.<sup>1643</sup>

7.1272. The European Union concludes that the measures at issue are therefore contradictory, contrary to international standards, protectionist, discriminatory and not based on scientific evidence and scientific principles, thus constituting a disguised restriction on international trade within the meaning of the second sentence of Article 2.3 of the SPS Agreement.<sup>1644</sup>

7.1273. The European Union further posits that while for the purposes of Article 2.3 first sentence, the discrimination should occur between WTO Members, the concept of disguised restriction on international trade in the second sentence of Article 2.3 does not have such a limitation.<sup>1645</sup>

7.1274. The European Union contends that in practice, this means that similar factors should be taken into account by the Panel in its analysis of the Russian treatment of Belarussian products and the conditions of discrimination between WTO Members. In particular, the European Union explained that such distinction is relevant taking into account the context of the similarly worded *chapeau* of Article XX of the GATT 1994, which the Appellate Body took into account in its analysis

<sup>1639</sup> European Union's first written submission, paras. 288-294.

<sup>1640</sup> European Union's first written submission, para. 299.

<sup>1641</sup> European Union's second written submission, paras. 139-140.

<sup>1642</sup> European Union's first written submission, paras. 301-304.

<sup>1643</sup> European Union's first written submission, paras. 313-322.

<sup>1644</sup> European Union's first written submission, para. 323.

<sup>1645</sup> European Union's second written submission, para. 136 (referring to the United States' third-party responses to Panel question No. 24, para. 45).

regarding "arbitrary and unjustifiable discrimination" in reaching its conclusions on "disguised restriction on international trade".<sup>1646</sup>

#### 7.7.3.1.2 Russia

7.1275. Russia separates its defence on this claim into two main streams: one pertaining to the country-wide measures in respect of Estonia, Latvia, Lithuania, and Poland; and a second concerning the EU-wide ban.

##### 7.7.3.1.2.1 First sentence of Article 2.3 – arbitrary or unjustifiable discrimination

7.1276. In respect of Estonia, Latvia, Lithuania, and Poland, Russia submits that its measures are not inconsistent with Article 2.3 as they do not arbitrarily or unjustifiably discriminate against the European Union, neither in comparison with Russia's internal movement restrictions, nor in comparison with Russia's treatment of Belarus and Ukraine.

7.1277. Russia asserts, in the first instance, that its import restrictions on products from ASF-infected EU member States are not discriminatory compared to Russia's internal movement restrictions.<sup>1647</sup> Russia explains that its measures do not *de jure* treat live pigs and pork products imported from the ASF-infected EU member States differently from the way it treats its own products after a domestic ASF outbreak, and that any *de facto* difference in the application of measures is based on and caused by the inability of the European Union to objectively demonstrate that its alleged ASF-free regions are and will remain ASF-free. In Russia's view, taking into account the "conditions prevailing in the EU's ASF-infected countries," Russia's decision to reject the European Union's zones while upholding its domestic zones is not discriminatory.<sup>1648</sup>

7.1278. Russia further considers that assuming *arguendo* that there are differences between Russia's measures with respect to imports from the four infected EU member States and its domestic measures, such differences are neither arbitrary nor do they result in unjustifiable discrimination under Article 2.3 of the SPS Agreement. Furthermore, Russia argues that contrary to the European Union's suggestion, any formal difference in treatment or formal differences between measures does not suffice to establish arbitrary discrimination within the meaning of Article 2.3 of the SPS Agreement. Rather, Russia posits that an assessment of whether a difference in treatment is arbitrary or unjustified needs to be based on the rationale put forward to explain its existence.<sup>1649</sup>

7.1279. Russia argues that the difference in treatment is not arbitrary because it results from the European Union's inability to provide a reasonably objective basis for the zones it has established and on whether its alleged ASF-free areas are and will remain ASF-free.<sup>1650</sup> Moreover, Russia argues that there is no arbitrary or unjustifiable discrimination because measures that are structured or operate differently can reflect the same ALOP.<sup>1651</sup>

7.1280. Russia also argues that the European Union has failed to demonstrate that identical or similar conditions prevail. Russia argues that *first*, any larger size of the geographic area covered by the import measures compared to the domestic measures is due to the European Union's inability and unwillingness to propose reasonably-sized ASF-infected zones or any compartments, and by contrast, Russia applies strict and extensive domestic zoning measures. *Second*, imports from these infected EU member States to Russia pose a greater risk of spreading the ASF virus, particularly in light of the lax standstill provisions mandated by European Union legislation, and by contrast, Russia applies strict standstill provisions coupled with a wide variety of other eradication and control measures.<sup>1652</sup>

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<sup>1646</sup> European Union's second written submission, para. 137. See also European Union's response to Panel question No. 169, paras. 349-350.

<sup>1647</sup> Russia's first written submission, para. 304.

<sup>1648</sup> Russia's first written submission, para. 305.

<sup>1649</sup> Russia's first written submission, para. 307-308.

<sup>1650</sup> Russia's first written submission, para. 309.

<sup>1651</sup> Russia's second written submission, paras. 143-159.

<sup>1652</sup> Russia's first written submission, paras. 311-314.

7.1281. In respect of the EU-wide ban and the European Union's claims of discrimination between other EU member States and Ukraine/Belarus, Russia asserts that the European Union has failed to establish that Russia's provisional compliance with the terms of the veterinary certificates results in treatment of imports of pigs and pig products from the other EU member States that is less favourable than the treatment of similar imports from Ukraine and Belarus.

7.1282. With respect to Ukraine, Russia asserts that it agreed upon and complied with a veterinary certification system similar to the certification system agreed with the European Union: the veterinary certificates indicate that the products originate from Ukraine territory that has been ASF-free for three years; and provide for the possibility of discontinuation of certification of pigs and pork products if the territories are no longer ASF-free for the past three years. Russia's provisional compliance with the veterinary certificates is not arbitrary or unjustifiable; not permitting the importation of uncertified pig products is consistent with treatment of all uncertified pigs and pork products from any other Member with which Russia has a certification system. At the time of the panel request, Russia did not discriminate between live pigs and pork products from other EU member States and Ukraine. The alleged arbitrary and unjustifiable discrimination flows from the failure of the European Union to meet the ASF-related requirements contained in the agreed veterinary certificates.

7.1283. With respect to Belarus, Russia submits that any different treatment between Belarus and the European Union is justified and not arbitrary as it reflects the fact that Belarus recognized and established compartments with high levels of biosecurity, whereas the European Union failed to provide information sufficient to assess the likelihood of entry of ASF into Russia from the importation of uncertified pig and pork products from other EU member States. The claimed discrimination flows from the failure of the European Union to meet the ASF-related requirements contained in the agreed veterinary certificates.

#### **7.7.3.1.2.2 Second sentence of Article 2.3 — disguised restriction on international trade**

7.1284. In respect of the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, Russia relies on its evidence and argumentation under Article 5.5 in asserting that its measures do not constitute a disguised restriction on international trade.

7.1285. In respect of the EU-wide ban, Russia submits that the European Union has failed to demonstrate that such measure constitutes a disguised restriction on international trade inconsistent with the second sentence Article 2.3. The situation flows from the failure of the European Union to meet the ASF-related requirements contained in the agreed veterinary certificates. Russia believes importation would be unsafe until a proper risk analysis has been conducted, and that it has been acting in good faith.<sup>1653</sup>

7.1286. With regard to the first claim of discrimination, Russia asserts that it did not engage in arbitrary or unjustifiable discrimination in its treatment of the European Union when compared with the treatment of live pigs and pork products in its own territory.

7.1287. Russia reiterates that this dispute may be distinguished from *India - Agricultural Products* in that whereas in that dispute, the same condition i.e. the presence of NAI in India or another Member, "is the relevant distinction that triggers the import prohibition imposed by India's AI measures", in this dispute, the mere presence of ASF did not automatically "trigger" the relevant measures, i.e. the domestic regionalization measures versus country-wide import restrictions with respect to the four ASF-infected EU Member States. Instead, the presence of ASF triggered *an assessment of the adequacy of the EU regionalization measures*. In Russia's view, unlike the *India - Agricultural Products*, this dispute does not involve identical or similar conditions.<sup>1654</sup>

7.1288. Russia also refers to and reiterates its arguments under Article 5.3 of the SPS Agreement in claiming that it did not engage in arbitrary or unjustifiable discrimination under Article 2.3 of the SPS Agreement.<sup>1655</sup>

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<sup>1653</sup> Russia's first written submission, para. 407.

<sup>1654</sup> Russia's second written submission, para. 163.

<sup>1655</sup> Russia's second written submission, para. 164.

7.1289. With regard to the second discrimination claim, Russia argues that it did not engage in arbitrary or unjustifiable discrimination with respect to either Ukraine or Belarus.

7.1290. Russia highlights that with respect to Belarus, the European Union has changed its position. Russia points out that the European Union has acknowledged that Belarus is not a WTO Member and the non-discrimination obligation contained in Article 2.3 of the SPS Agreement is applicable only to WTO Members.<sup>1656</sup>

7.1291. With respect to Ukraine, Russia argues that following an examination that revealed the inadequacy of Ukraine's containment measures, Russia decided not to accept Ukraine's zones, just as it did with respect to the affected EU member States. Russia also claims that such alleged discrimination is no longer in place today, nor was it in place at the date of the Panel establishment.<sup>1657</sup>

7.1292. Finally, Russia argues that relevant jurisprudence has established that evidence post-dating the panel establishment is relevant in assessing whether or not Russia has violated its obligations under Article 2.3 of the SPS Agreement. Russia asserts that not taking into account the ongoing dynamic ASF developments in the European Union would limit the ability of the Panel to assist the parties in "secur[ing] a positive solution to a dispute" and to help them arrive at the "satisfactory settlement of the matter" in accordance with the aim of the dispute settlement mechanism.<sup>1658</sup>

### **7.7.3.2 Analysis by the Panel**

#### **7.7.3.3 Introduction**

7.1293. The European Union formulates its claims jointly in respect of both sets of measures at issue (i.e. the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland and the EU-wide ban), with reference to three alleged instances of discrimination. Russia raises its defence separately in respect of the bans on the products at issue from Estonia, Latvia, Lithuania, and Poland and in respect of the EU-wide ban. We consider it appropriate to undertake a joint analysis in order to reach conclusions under Article 2.3 in respect of both sets of measures at issue.

7.1294. We note that the European Union refers to three situations of discrimination. Therefore, for the sake of clarity, the Panel will structure its analysis by first addressing the legal provision at issue and then examining the relevant parts thereof in respect of each of the situations of discrimination invoked by the European Union. When necessary, the Panel will clarify whether its findings refer to the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland or to the EU-wide ban.

#### **7.7.3.4 The legal provisions at issue**

7.1295. Article 2 of the SPS Agreement is entitled "Basic Rights and Obligations". Article 2.3 provides:

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

7.1296. Article 2.3 of the SPS Agreement contains two primary obligations. Pursuant to the first obligation, provided in the first sentence, Members "shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other

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<sup>1656</sup> Russia's second written submission, para. 165.

<sup>1657</sup> Russia's second written submission, paras. 167-168.

<sup>1658</sup> Russia's second written submission, para. 169.

Members." According to the second obligation, contained in the second sentence, Members' SPS measures: "shall not be applied in a manner which would constitute a disguised restriction on international trade."<sup>1659</sup> We will examine whether each of the measures at issue meet each of these obligations.

### 7.7.3.5 The first sentence of Article 2.3 of the SPS Agreement

7.1297. A claim under the first sentence of Article 2.3 of the SPS Agreement consists of three cumulative elements: (i) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member; (ii) the discrimination is arbitrary or unjustifiable; and (iii) identical or similar conditions prevail in the territory of the Members compared.<sup>1660</sup>

7.1298. The Appellate Body has clarified that these three requirements inform each other, such that the analysis of each element cannot be undertaken in isolation from that of the other two. The Appellate Body added that the sequence of analysis of the three requirements may vary as a function of the circumstances of each dispute. The Appellate Body also observed that the first sentence of Article 2.3 does not appear to mandate a particular order for analysing these requirements. In the Appellate Body's view, logically, identifying the relevant conditions, and assessing whether they are identical or similar, will often provide a good starting point for an analysis under this provision.<sup>1661</sup>

7.1299. Based on this guidance, we will first examine the legal test for each of the requirements. Then we will examine whether identical or similar conditions prevail in the territory of the Members compared, whether discrimination exists in each of the situations identified by the European Union, and, if we find there are instances of discrimination, we will then examine whether such discrimination is arbitrary or unjustifiable. We will perform this assessment separately in respect of each situation of discrimination identified by the European Union.<sup>1662</sup>

7.1300. Before proceeding to examine these three elements, we observe that the European Union constructs its arguments under the first sentence Article 2.3 on the basis of its allegations of two "instances" of discrimination, the second of which refers to two "situations" of discrimination. First, the European Union challenges the fact that Russia maintains a total ban on imported products from the entire territory of the European Union (including the entire territory of the four affected EU member States) compared with a ban on Russian domestic products limited to areas encircling the epizootic hotbed. Second, the European Union challenges the fact that Russia initially accepted regionalization measures of other WTO Members, like Ukraine, while not recognizing the ASF regionalization measures in the European Union. According to the European Union such difference in treatment happened on two occasions: first, in 2012 when Russia selectively did not apply any ban to Ukrainian products following an ASF case in the Zaporozhye region; and second, on 15 January 2014 when Russia announced a ban on the trade from the Lugansk region, while accepting pig products from the rest of Ukraine.

7.1301. We now turn to the legal test applicable when assessing a claim under the first sentence of Article 2.3 of the SPS Agreement. We will then examine the three elements required to determine a breach of the first sentence of Article 2.3, in respect of each of the three situations of discrimination identified by the European Union.

<sup>1659</sup> Panel Report, *India – Agricultural Products*, para. 7.388 (referring to Appellate Body Report, *Australia – Salmon*, para. 252).

<sup>1660</sup> Panel Reports, *India – Agricultural Products*, para. 7.389; and *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.

<sup>1661</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.261.

<sup>1662</sup> We note that this approach was followed by the panel in *US – Animals*. See Panel Report, *US – Animals*, paras. 7.578, 7.600 and 7.618.

### 7.7.3.5.1 Legal test

#### 7.7.3.5.1.1 Whether identical or similar conditions prevail in the territory of the Members compared

7.1302. To facilitate our consideration of this issue, we first discern the meaning of the terms used in this provision. In this respect, the dictionary definition of the term "identical" is "designating a proposition whose terms express an identity or denote the same thing; of a thing or set of things viewed at different times – the very same; or of two or more separate things; agreeing in every detail".<sup>1663</sup> In turn, the term "similar" is defined as "of the same substance or structure throughout – homogenous; having a resemblance or likeness; of the same nature or kind".<sup>1664</sup> Finally, the term "condition" is defined as "a way of living or existing"; "the state of something"; "the physical state of something"; and "the physical or mental state of a person or thing".<sup>1665</sup>

7.1303. The panel in *India – Agricultural Products* noted, first, that the same facts that inform the assessment of whether or not discrimination is arbitrary or unjustifiable may also inform the assessment of whether or not identical or similar conditions prevail; and, second, that the relevant "conditions", for the purpose of a given analysis, may be the presence of a disease within a territory (and the concomitant risk associated with that disease).<sup>1666</sup>

7.1304. The panel thus agreed with India's contention that, if the relevant disease is present in one country but not in another, this may be an indication that identical or similar conditions do not exist. However, in view of the fact that India had not discharged its burden of proving that LPNAI<sup>1667</sup> was exotic to India, and the panel's finding that India did not maintain a surveillance mechanism adequate to detect reliably the presence or absence of LPNAI within its territory, there was no foundation upon which the panel could, in that dispute, take account of any such indication.<sup>1668</sup>

7.1305. This finding was challenged on appeal by India. In India's view, the panel had incorrectly shifted the burden of proof when requiring it to demonstrate that LPNAI was exotic to India. The Appellate Body found that the panel had not erred in make that finding, mainly because the panel had been correct in assigning the burden to India of demonstrating one of the evidentiary pillars of its argumentation.<sup>1669</sup>

7.1306. That panel also observed that the risk against which India was protecting was LPNAI, and that there was no evidence before the panel to suggest that the risks associated with LPNAI were in any way different on the basis of the origin of the relevant product. Thus, the panel considered that India was protecting against an identical or similar risk when it took measures to protect against LPNAI, regardless of whether the relevant product originated in India or in the United States or somewhere else. Therefore, the panel found that the risks against which India was protecting in India constituted conditions that were similar to those in other Members, including the United States.<sup>1670</sup>

7.1307. Following this analytical approach, the panel in *India – Agricultural Products* opined that the "relevant conditions" referred to the presence of NAI<sup>1671</sup> in India or another Member. The panel explained that under conditions where NAI is present in a country other than India, India applies an import prohibition. In contrast, the panel stated, under conditions where NAI is present in

<sup>1663</sup> *Shorter Oxford English Dictionary on Historical Principles*, 6th ed. (Oxford University Press, 2007) Vol. 1, p. 1319 as quoted in Panel Report, *US – Animals*, para. 7.572.

<sup>1664</sup> *Shorter Oxford English Dictionary on Historical Principles*, 6th ed. (Oxford University Press, 2007), Vol. 2, p. 2838 as quoted in Panel Report, *US – Animals*, para. 7.572.

<sup>1665</sup> *Merriam-Webster*, available at <http://www.merriamwebster.com/dictionary/condition> (last accessed 9 December 2014) as quoted in Panel Report, *US – Animals*, para. 7.572.

<sup>1666</sup> Panel Report, *India – Agricultural Products*, para. 7.460.

<sup>1667</sup> Low pathogenicity notifiable avian influenza (LPNAI).

<sup>1668</sup> Panel Report, *India – Agricultural Products*, para. 7.467.

<sup>1669</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.280.

<sup>1670</sup> Panel Report, *India – Agricultural Products*, paras. 7.468-7.470.

<sup>1671</sup> Notifiable avian influenza (NAI).

India, the relevant provisions of India's legislation<sup>1672</sup> permit movement and trade outside the surveillance zone. For the panel, the measures in question thus addressed the same condition – the presence of NAI – and they did so differently. The panel clarified that it was not stating that the disease situation of India was identical or similar to the disease situation of the United States, but rather that the relevant condition for an analysis under this element of Article 2.3 was the presence of NAI in India or another Member because this was the relevant distinction that triggered the import prohibition imposed by India's AI measures. That panel therefore concluded that the relevant conditions were identical or similar between India and other countries (including the United States) for the purpose of this element of the first sentence Article 2.3 of the SPS Agreement.<sup>1673</sup>

7.1308. We note that the situation in this case is clear in respect of the presence of the relevant disease, ASF, in the territory of the Members compared. Russia recognizes that ASF exists in its territory.<sup>1674</sup> Because of the fact that ASF is not exotic to Russia, and that, as described by Russia, there are extensive programmes in place to control ASF spread within Russia's territory<sup>1675</sup>, the comparisons identified by the panel in *India – Agricultural Products* are particularly relevant to this case.

7.1309. We recall that the panel in *US – Animals* stated:

In the context of the chapeau of Article XX, the Appellate Body stated in *EC – Seal Products* that "only 'conditions' that are relevant for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case" should be considered.<sup>1676</sup> It further observed that the regulatory objective pursued by the measure at issue may also provide useful guidance on the question of which "conditions" prevailing in different Members are "relevant"<sup>1677, 1678</sup>.

7.1310. The panel in *US – Animals* considered that the challenged measure aimed to ensure that imports of foot and mouth Disease (FMD)-susceptible animals and products were allowed only if the level of risk posed by such imports met the United States' ALOP for FMD.<sup>1679</sup> The panel found that the condition that had to be identical or similar in the two regions compared was the level of risk of FMD-introduction posed by imports of the product at issue from the two regions, as well as their ability to meet the United States' ALOP.<sup>1680</sup> A salient fact in that case was that FMD is not present anywhere within the United States.

7.1311. We agree with the panel in *India – Agricultural Products* that the relevant "conditions" for the purposes of a given analysis in the first sentence of Article 2.3 may be the presence of a disease within a territory and the concomitant risk associated with that disease. In addition, we consider that unlike the situation examined by the panel in *US – Animals*, the approach of the panel in *India – Agricultural Products* addresses the risks associated with the entry of a disease that is already present and widespread in India, hence the approach in *India – Agricultural Products* is more fitting to the situation.

7.1312. Therefore, with a view to informing the Panel's interpretation of the relevant conditions prevailing in the territory of Russia, the Panel will take into account whether ASF is present in the territories of the Members compared, as well as the risks associated with that disease. The Panel will assess these elements in the territory of the Members compared in each of the three situations of alleged discrimination.

<sup>1672</sup> India's National Action Plan for 2012 (NAP 2012).

<sup>1673</sup> Panel Report, *India – Agricultural Products*, paras. 7.463-7.464.

<sup>1674</sup> See paras. 7.207-7.208 above.

<sup>1675</sup> See paras. 7.1336-7.1337 below.

<sup>1676</sup> (footnote original) Appellate Body Report, *EC – Seal Products*, para. 5.299.

<sup>1677</sup> (footnote original) Appellate Body Report, *EC – Seal Products*, para. 5.300.

<sup>1678</sup> Panel Report, *US – Animals*, para. 7.572.

<sup>1679</sup> Panel Report, *US – Animals*, para. 7.580.

<sup>1680</sup> Panel Report, *US – Animals*, para. 7.580.

### 7.7.3.5.1.2 Whether the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member

7.1313. Examining the meaning of "discrimination" under the first sentence of Article 2.3, the Panel draws guidance from how this term has been interpreted in the context of this provision, as well as other provisions of the covered agreements, and in particular, the chapeau of Article XX of the GATT 1994. The chapeau of Article XX states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [enacted for the purposes listed in the subparagraphs of Article XX.]

7.1314. The Appellate Body has elaborated on the meaning of "discrimination" in this context as resulting "not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in those exporting countries".<sup>1681</sup>

7.1315. Citing this guidance, the panel in *India – Agricultural Products* went on to state

We note that the language of Article 2.3 of the SPS Agreement is similar to that of the chapeau to Article XX. Both provisions speak of "arbitrary" and "unjustifiable" discrimination, and a comparison between conditions prevailing in different "countries" (in the context of Article XX) or "Members" (in the context of Article 2.3). We also note that the last recital of the preamble to the SPS Agreement states that the SPS Agreement "elaborate[s] rules for the application of the provisions of GATT 1994 which relate to the use of [SPS] measures, in particular the provisions of Article XX(b)", which includes the chapeau. Given the similarities between these provisions and the reference to Article XX of the GATT 1994 in the preamble of the SPS Agreement, we consider it appropriate to interpret "discrimination" in Article 2.3 of the SPS Agreement in a manner similar to that which the Appellate Body adopted in the context of Article XX of the GATT 1994. Hence, in the context of Article 2.3 of the SPS Agreement, we consider that discrimination may result not only (i) when Members in which the same conditions prevail (including between the territory of the Member imposing the measure, and that of other Members) are treated differently, but also (ii) where the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country.<sup>1682</sup>

7.1316. The panel in *US – Animals* agreed that the language of the chapeau of Article XX of the GATT 1994 presents a number of similarities with that of Article 2.3: both provisions speak of arbitrary and unjustifiable discrimination, and a comparison between the "conditions" prevailing in different Members.<sup>1683</sup> That panel also observed that the last recital of the preamble of the SPS Agreement states that the Agreement "elaborate[s] rules for the application of the provisions of GATT 1994 which relate to the use of [SPS] measures, in particular the provisions of Article XX(b)", which includes the chapeau.<sup>1684</sup> Therefore, it considered that the chapeau of Article XX provided useful context for its interpretation of the terms of Article 2.3.<sup>1685</sup>

7.1317. Turning to the requirement that the measures discriminate between Members that are in identical or similar conditions, the *US – Animals* panel noted that

<sup>1681</sup> Appellate Body Report, *US – Shrimp*, para. 165.

<sup>1682</sup> Panel Report, *India – Agricultural Products*, para. 7.400.

<sup>1683</sup> Panel Report, *US – Animals*, para. 7.570.

<sup>1684</sup> Panel Report, *US – Animals*, para. 7.570.

<sup>1685</sup> Panel Report, *US – Animals*, para. 7.570.



[T]he Appellate Body consistently stated that different treatment does not necessarily amount to discrimination. The focus of a discrimination analysis is whether the measure at issue alters the conditions of competition to the detriment of products originating in the territories of Members other than the Member imposing the measure or between the territory of the Member imposing the measure and that of another Member.<sup>1686</sup> In *US – Shrimp*, the Appellate Body found that "discrimination" in the context of the chapeau of Article XX may result not only when Members in which the same conditions prevail are treated differently, but also where the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country.<sup>1687</sup> Further, according to the Appellate Body, discrimination may arise not only from "the detailed operating provisions" of a measure, but also from the application of a measure "otherwise fair and just on its face".<sup>1688</sup> Finally, the panel in *US – Poultry (China)* stated that discrimination may stem from both "'substantive' SPS measures" and "procedural and information requirements".<sup>1689, 1690</sup>

7.1318. Therefore, the Panel may consider that discrimination in the context of Article 2.3 may result not only when Members in which the same conditions prevail are treated differently, but also where the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country. Furthermore, discrimination may arise not only from "the detailed operating provisions" of a measure, but also from the application of a measure "otherwise fair and just on its face". Moreover, discrimination may stem from both "'substantive' SPS measures" and "procedural and information requirements". While the Panel derives substantive guidance from prior cases relating to Article XX (chapeau), we are also mindful of the "preliminary observation" relating to the characterization of Article 2.3 made by the Appellate Body in *India – Agricultural Products*

We begin by observing that, notwithstanding certain similarities between its language and that of the chapeau of Article XX of the GATT 1994, Article 2.3, first sentence, of the SPS Agreement, sets out an obligation and is not expressed in the form of an exception. Thus, a complainant raising a claim that a Member's SPS measure is inconsistent with Article 2.3, first sentence, bears the overall burden of establishing its *prima facie* case of inconsistency.<sup>1691</sup>

7.1319. This "preliminary observation" serves as an important reminder that, although the language of Article 2.3 of the SPS Agreement and the chapeau of Article XX of the GATT 1994 may be similar, they are of a different legal character and accordingly require a different allocation in the applicable burden of proof. For the purposes these proceedings, this means that the European Union, as complainant, retains the burden of establishing its *prima facie* case of inconsistency with the elements of Article 2.3 with respect to each of its specific claims.

#### 7.7.3.5.1.3 Whether the discrimination is arbitrary or unjustifiable

7.1320. To facilitate our consideration of this issue, we first discern the meaning of the terms used in this provision. In this respect, the dictionary definition of the term "arbitrary" is "based on mere opinion or preference as opp[osed] to the real nature of things, capricious, unpredictable, inconsistent".<sup>1692</sup> In turn, the term "unjustifiable" is defined as "not justifiable, indefensible"<sup>1693</sup>,

<sup>1686</sup> (footnote original) See e.g. Appellate Body Reports, *EC – Asbestos*, paras. 98-99; *Dominican Republic – Import and Sale of Cigarettes*, para. 96; and *Philippines – Distilled Spirits*, para. 256.

<sup>1687</sup> (footnote original) Appellate Body Report, *US – Shrimp*, para. 165. See also Panel Report, *India – Agricultural Products*, para. 7.400; and Panel Report, *US – Poultry (China)*, para. 7.292.

<sup>1688</sup> (footnote original) Appellate Body Report, *US – Shrimp*, para. 160.

<sup>1689</sup> (footnote original) Panel Report, *US – Poultry (China)*, para. 7.147. In the context of the chapeau of Article XX of the GATT 1994, see Appellate Body Reports, *US – Shrimp*, para. 160; *EC – Seal Products*, para. 5.302.

<sup>1690</sup> Panel Report, *US – Animals*, para. 7.573.

<sup>1691</sup> The Appellate Body made this "preliminary observation" on Article 2.3 before addressing India's claims under Article 11 of the DSU. Appellate Body Report, *India – Agricultural Products*, para. 5.260.

<sup>1692</sup> *Online Oxford English Dictionary* (as quoted in Panel Report, *US – Poultry (China)*, para. 7.259; and Panel Report, *US – Animals*, para. 7.587).

with "justifiable" meaning "[c]apable of being legally or morally justified or shown to be just, righteous, or innocent; defensible" and "[c]apable of being maintained, defended, or made good".<sup>1694</sup>

7.1321. In a number of cases, the Appellate Body has explained that an analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the chapeau of Article XX "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".<sup>1695</sup> In particular, in *Brazil – Retreaded Tyres* the Appellate Body focused its analysis on whether the measure at issue bore a "rational connection to" its stated objective of protecting human life or health under subparagraph (b) of Article XX.<sup>1696</sup> This approach was adopted by the panels in *US – Poultry (China)*, *India – Agricultural Products* and *US – Animals* in their analysis under Article 2.3 of the SPS Agreement.<sup>1697</sup>

7.1322. In the context of an analysis of Article 5.5 of the SPS Agreement, which constitutes a specification of the basic obligation contained in Article 2.3, the Appellate Body in *Australia – Salmon* upheld the panel's finding that the measure at issue was arbitrarily and unjustifiably discriminatory because it treated differently two products that presented the same level of risk.<sup>1698</sup>

7.1323. Based on this guidance, the focus of our analysis will be the rationale that Russia puts forward to explain each of the situations of discrimination alleged by the European Union in respect of the measures at issue. As part of the assessment of whether the discrimination against imports of the products at issue from the European Union (*vis-à-vis* Russia) or between imports from the European Union and Ukraine<sup>1699</sup> stemming from Russia's measures is "arbitrary or unjustifiable", the Panel will examine whether the regulatory distinction between the two situations/sets of imports bears a rational connection to the stated objective of the measures.<sup>1700</sup>

### 7.7.3.5.2 First instance of discrimination: treatment of domestic products in Russia

#### 7.7.3.5.2.1 Whether identical or similar conditions prevail in Russia and in the European Union

7.1324. According to the European Union, the same or similar conditions prevailed both in the European Union (including in the four affected EU member States) and in Russia, i.e. the existence of the ASFV in both the Russian and the European Union territories. The European Union posits that the first occurrence of ASF within the European Union was the relevant feature triggering the import prohibition imposed by Russia on the products at issue from the European Union.<sup>1701</sup>

7.1325. Russia asserts that there are differences in "conditions" between the situation in the European Union and in Russia with respect to ASF control measures in at least two instances. The first refers to the differences in the size of zones established in Russia and in the European Union

<sup>1693</sup> *Online Oxford English Dictionary* (as quoted in Panel Report, *US – Poultry (China)*, para. 7.259; and Panel Report, *US – Animals*, para. 7.587).

<sup>1694</sup> *Online Oxford English Dictionary* (as quoted in Panel Reports, *US – Poultry (China)*, para. 7.259; and *US – Animals*, para. 7.587).

<sup>1695</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 225-226 (in turn referring to Appellate Body Reports, *US – Gasoline* pp. 25-26 and 28; *US – Shrimp*, paras. 163-172; and *US – Shrimp (Article 21.5 – Malaysia)*, paras. 144 and 147). See also Appellate Body Report, *EC – Seal Products*, para. 5.303; and Panel Report, *US – Poultry (China)*, para. 7.261.

<sup>1696</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.

<sup>1697</sup> Panel Report, *US – Poultry (China)*, para. 7.261. See also Panel Report, *India – Agricultural Products*, para. 7.429.

<sup>1698</sup> Appellate Body Report, *Australia – Salmon*, para. 158.

<sup>1699</sup> The European Union clarified, in the course of the proceedings that its references to Belarus were only relevant in the context of the second, and not the first, sentence of Article 2.3. See European Union's second written submission, paras. 136-137. We therefore do not examine allegations pertaining to Belarus in connection with the first sentence of Article 2.3. However we note that the following exhibits pertain to this argument: Exhibits EU-100, RUS-42, and RUS-43.

<sup>1700</sup> The same approach was followed by the panel in *US – Animals*. See Panel Report, *US – Animals*, para. 7.589.

<sup>1701</sup> European Union's first written submission, para. 294.

to contain ASF.<sup>1702</sup> The second refers to the different standstill provisions in place in the affected zones both in the European Union and in Russia.<sup>1703</sup>

7.1326. In this regard, Russia further posits that this dispute may be distinguished from *India - Agricultural Products* in that whereas in that dispute, the same condition i.e. the presence of NAI in India or another Member, was "the relevant distinction that triggers the import prohibition imposed by India's AI measures", in this dispute, the mere presence of ASF did not automatically "trigger" the relevant measures, i.e. the domestic regionalization measures versus country-wide import restrictions with respect to the four ASF-infected EU member States. Instead, the presence of ASF triggered *an assessment of the adequacy of the EU regionalization measures*. In Russia's view, unlike *India - Agricultural Products*, this dispute does not involve identical or similar conditions.<sup>1704</sup>

7.1327. As described in paragraph 7.1312 above, to determine whether similar conditions prevail in the European Union and in Russia in respect of trade of the products at issue, we will consider the presence of ASF in each territory, and the risks thereof.

7.1328. We recall that it is an undisputed fact that ASF and ASFV have been present in Russia from 2007. It is also an undisputed fact that ASF and ASFV were introduced to the European Union territory on January 2014 through infected wild boar in Lithuania near the border with Belarus. There have been infected wild boars in Estonia, Latvia, Lithuania, and Poland. In addition, certain domestic pig holdings have been infected with ASF, throughout 2014 and up to the second half of 2015, in Estonia, Latvia, Lithuania, and Poland.<sup>1705</sup>

7.1329. The experts have identified the different risks associated with the presence of ASF in a particular area. We recall the view of Dr Thomson that "the problem under discussion is a regional one encompassing the Caucasus, Baltic States, the Russian Federation and eastern parts of the EU. As indicated elsewhere, from an ASF perspective, the whole region seems to be in roughly the same position."<sup>1706</sup> We also recall Dr Thomson's view that

In my opinion the crux of this trade issue is that both the EU and the RF are confronted by a similar problem, i.e. both have suffered incursion of ASF into their territories and both, as part of their ASF management strategy, have established ASF-free zones. The RF seems to be insinuating that the risk of importing ASF from ASF-free zones in countries comprising the eastern part of the EU is greater than for internal trade in the same commodities and products derived from ASF-free zones within the RF. I do not have sufficient experience of the situation on the ground to either accept or reject this insinuation. However, it seems to me that the risks are probably similar. If that is so, to be consistent with Article 6, the risks of internal and this proposed external trade are not significantly different. If that is so there is no sanitary reason to prevent the proposed cross-border trade.<sup>1707</sup>

7.1330. From the experts' answers, we discern that those risks associated with the disease are present both in the territory of the European Union and of Russia.

7.1331. Based on the foregoing, we consider that the relevant conditions are identical or similar between Russia and the European Union for the purposes of the first sentence of Article 2.3 of the SPS Agreement.

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<sup>1702</sup> Russia's response to Panel question No. 174, para. 307.

<sup>1703</sup> Russia's response to Panel question No. 174, para. 308.

<sup>1704</sup> Russia's, response to Panel question No. 174, para. 309; and second written submission, para. 163.

<sup>1705</sup> Exhibits EU-118 and RUS-296 revised. See paras. 7.1015-7.1018 above.

<sup>1706</sup> Dr Thomson's response to Panel question No. 5, Compilation of the experts' responses, para. 1.128

<sup>1707</sup> Dr Thomson's response to Panel question No. 54, Compilation of the experts' responses, para. 4.149.

### 7.7.3.5.2.2 Whether Russia's measures discriminate between imported and domestic products

7.1332. The European Union argues that the difference in treatment of imports of the products at issue, as compared to intra-Russian trade of such products, results in discrimination. In particular, the European Union posits that Russia bans imports of the products at issue from the entire territory of the European Union, while it allows for trade in the products at issue from non-affected areas within Russia, based on regionalization measures surrounding an ASF epizootic hotbed.<sup>1708</sup>

7.1333. Russia asserts that the import restrictions on products from the ASF-infected EU member States are not discriminatory compared with the restrictions applied on the internal movement of products coming from ASF infected areas. From a *de jure* perspective, Russia claims to apply regionalization and compartmentalization both to imported and domestic products. From a *de facto* perspective, Russia argues that any difference in treatment is solely the consequence of the European Union's inability to objectively demonstrate that its ASF-free regions are and will remain ASF-free.<sup>1709</sup>

7.1334. We first recall that as indicated in paragraph 7.1318 above, in order to find that there is a discriminatory treatment, we have to determine that the same or similar conditions prevailing in both Members are treated differently, or that the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country.

7.1335. We have found that the EU-wide ban bars the importation of products originating from non- ASF affected areas.<sup>1710</sup> We have also found that the EU-wide ban is not based on the relevant international standards. We recall that the bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland impose nation-wide import prohibitions. We have found that those measures do not conform to the relevant international standards.<sup>1711</sup> We have also found that the bans on the imports of the products at issue from Estonia, Lithuania, and Poland are not based on the relevant international standard while the ban on non-treated products from Latvia is based on the relevant international standard.<sup>1712</sup>

7.1336. We are called upon to examine how Russia treats intra-Russian trade in the products at issue. After examining the content of the *1980 ASF Instructions*,<sup>1713</sup> together with the evidence on how they have been applied in different areas within Russia,<sup>1714</sup> it is clear to us that Russia's domestic legislation does not mandate the imposition of a ban on the products at issue coming from certain regions, zones or compartments beyond the first and second endangered areas surrounding the epizootic hotbed (section 5 of the *1980 ASF Instructions*). Furthermore, we note that Russia contends that it does not maintain a Russia-wide ban in respect of the domestic trade of the products at issue.<sup>1715</sup>

7.1337. In addition, Russia has acknowledged that it allows for trade of the products at issue from certain facilities that meet Level IV biosecurity standards even if they are located within an area

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<sup>1708</sup> European Union's first written submission, paras. 287-290.

<sup>1709</sup> Russia's first written submission, para. 305.

<sup>1710</sup> See paras. 7.83-7.84 above.

<sup>1711</sup> See para. 7.890 above.

<sup>1712</sup> See paras. 7.1039-7.1040 above.

<sup>1713</sup> Russian instructions on ASF prevention and eradication measures of 21 November 1980 (Exhibit EU-18).

<sup>1714</sup> See fn 1048 above.

<sup>1715</sup> Russia's responses to Panel question No. 266, para. 51.

considered to be infected with ASF.<sup>1716</sup> Level IV refers to high-level protected holdings which may be certified as such if they meet specific biosecurity standards described in Russia's legislation.<sup>1717</sup>

7.1338. Based on this evidence, it is clear for us that Russia allows for internal trade of the products at issue originating in areas that it considers to be ASF-free.

7.1339. In this respect, there is a clear distinction in the treatment of the products under the same conditions, i.e. imports of products from areas not affected by ASF. The imported products coming from non-ASF affected areas within the European Union are not allowed to enter into Russia's market, while intra-Russian trade is possible for those products coming from non-ASF affected areas. In this respect, we find that the EU-wide ban discriminates against products originating in the non-ASF affected areas of the European Union compared to the treatment granted to trade in domestic products. The bans on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland discriminate because they impose nation-wide import prohibitions. As we have seen, there is no Russia-wide ban on intra-Russian trade in the products concerned.

7.1340. If we were to accept Russia's argument that the distinction in treatment does not amount to discrimination, due to Russia's objective refusal of the European Union's regionalization measures, we would need to examine the second scenario of potential discrimination. That is, whether the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country.

7.1341. We note that previous panels have focused their assessment of discrimination pursuant to the first sentence of Article 2.3 of the SPS Agreement on the question of whether there has been a difference in treatment. However, the Appellate Body in *US – Shrimp* examined measures adopted by the United States in respect of the importation of certain shrimp and shrimp products, specifically Section 609 of Public Law 101-162 (Section 609). Pursuant to those measures, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using mechanisms for the protection of turtles comparable in effectiveness to those required in the United States, if those shrimp originated in waters of countries not certified under Section 609. The Appellate Body considered that the measures at issue were, in their application, more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers. In this regard, the Appellate Body noted that "discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."<sup>1718</sup>

7.1342. We note that Russia's regulation in respect of imports of veterinary products refers to the adaptation of SPS measures to particular sanitary conditions based on the principles of regionalization.<sup>1719</sup> Russia allows for the establishment of particular ASF-free regions, zones or compartments from which internal trade of the products at issue is allowed. However, as described above, pursuant to the measures at issue, Russia imposes a nation-wide import ban on the products at issue from the four ASF affected EU member States, as well as an EU-wide ban on products at issue from the rest of the European Union's territory. Nevertheless, in light of our analysis and findings under Article 6<sup>1720</sup> and the regionalization dialogue outlined in Appendix 1, we do not consider that the application of the measures at issue do not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting members in such a way as to lead to another form of discrimination within the meaning of the first sentence of Article 2.3 of the SPS Agreement.

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<sup>1716</sup> Russia's first written submission, para. 34; and response to Panel question No. 138, paras. 247-249. See also Order by the Russian Federal Ministry of Agriculture on Approval of Guidelines to Determine Animal Health Status of Pig Holdings and Organizations Involved in Pig Slaughter, Pork Product Processing and Storage, No. 258, 23 July 2010. (Exhibit RUS-22).

<sup>1717</sup> Order by the Russian Federal Ministry of Agriculture on Approval of Guidelines to Determine Animal Health Status of Pig Holdings and Organizations Involved in Pig Slaughter, Pork Product Processing and Storage, No. 258, 23 July 2010. (Exhibit RUS-22).

<sup>1718</sup> Appellate Body Report, *US – Shrimp*, para. 165.

<sup>1719</sup> See para. 7.204 and Table 3 above.

<sup>1720</sup> Section 7.6.2 above.

7.1343. We consider that Russia's argument regarding its objective refusal of the European Union's regionalization measures does not affect our previous finding that there has been discriminatory treatment. The reason underlying such treatment, as discussed in the following section, might be relevant to determine whether the discrimination is arbitrary or unjustifiable, not whether the discrimination itself exists.

7.1344. Based on the foregoing, we find that through the measures at issue Russia discriminates between imports of the products at issue from non ASF-affected areas in the European Union and domestic trade of the products at issue from non ASF-affected areas within Russia.

#### 7.7.3.5.2.3 Whether the discrimination is arbitrary or unjustifiable

7.1345. The European Union argues that the difference in treatment is arbitrary and unjustifiable because it cannot be explained by a different epizootic status. According to the European Union its regionalization and control measures are effective, which cannot be said of Russia's measures.<sup>1721</sup> In the European Union's view, Russia imposed a disproportionate ban on the products at issue from the European Union after the ASF notifications to the OIE. On the other hand, while the Russian domestic measures have limited efficiency in ensuring proper detection and containment of ASF within Russia, trade in the products associated with the risk of ASF of Russian origin is in principle permitted.<sup>1722</sup>

7.1346. Russia argues that the difference in treatment is not arbitrary because it results from the European Union's inability to provide a reasonably objective basis for the inadequate zones it has established and the European Union's failure to demonstrate that its alleged ASF-free areas are and will remain ASF-free.<sup>1723</sup> In this respect, Russia notes that the Panel's assessment should focus on the cause of the discrimination or the rationale put forward in support of its existence.<sup>1724</sup>

7.1347. We agree with Russia that our examination of whether the discrimination is arbitrary or unjustifiable should focus on the cause of the discrimination or rationale put forward in support of its existence. In this respect, the Panel finds useful guidance in the panel reports in *US – Animals* and *US – Poultry (China)*. Those panels considered that the meaning of "arbitrary or unjustifiable discrimination" pursuant to Article 2.3 of the SPS Agreement involves a consideration of whether there is a "rational connection" between the reasons given for the discriminatory treatment and "the stated objective of the measure".<sup>1725</sup> We therefore need to examine whether the regulatory distinction between imports from the European Union and domestic trade bears a rational connection to the stated objectives of the measures.

7.1348. In section 7.4.4.2.1.1 above the Panel examined the scope of the EU-wide ban. Based on the evidence examined there, we find that the EU-wide ban's objective is to ensure that non-treated products from any of the territories of the European Union not affected by ASF are not imported into Russia, because of the European Union's veterinarians inability to certify the veterinary requirements set forth in the veterinary certificates agreed by both parties in 2006. Such requirements refer to the absence of ASF during three years in the whole territory of the European Union except Sardinia.

7.1349. In addition, in section 7.4.4.2.2.1 above the Panel examined the objectives of the bans imposed on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland. After reviewing the text of each of those measures, as well as their notifications to the WTO by Russia, we concluded that the objective of the four EU member States specific bans is to ensure the protection of Russia's territory from ASF and ASFV.

7.1350. Based on the foregoing, broadly speaking the regulatory objective of the measures at issue is to limit the re-entry and further spread of ASF from additional sources into Russia's

<sup>1721</sup> European Union's first written submission, para 291.

<sup>1722</sup> European Union's first written submission, para 297.

<sup>1723</sup> Russia's first written submission, para. 309.

<sup>1724</sup> Russia's first written submission, para. 308.

<sup>1725</sup> Panel reports, *US – Animals*, para. 7.574 and 7.588; and *US – Poultry (China)*, para. 7.147. In the context of the chapeau of Article XX of the GATT 1994, see Appellate Body Reports, *US – Shrimp*, para. 160; and *EC – Seal Products*, para. 5.302.

territory. The European Union has provided a detailed explanation of the surveillance, control and eradication measures that its regulation envisages.<sup>1726</sup> The European Union has also provided information on the measures that it has applied to ensure protection from entry and spread of ASF into its territory.<sup>1727</sup> In our view, the European Union's ASF-related measures provide evidence that they also pursue the objective of ensuring protection against the further entry and spread of ASF.

7.1351. Furthermore, we understand that Russia has acknowledged that pursuant to the Terrestrial Code the European Union is entitled to select an ASF control strategy of its choice, and that the crux of the parties' disagreement stems from Russia's view that the European Union has not demonstrated the actual effectiveness of the zones it has established. Such discrepancy does not speak to the regulatory objective of the ASF-related measures adopted by the European Union.

7.1352. We recall our finding that Russia has set a high or conservative ALOP in respect of ASF.<sup>1728</sup> Based on the objective of the European Union's measures, we can deduce the ALOP of those measures to be ensuring protection from entry and spread of ASF.<sup>1729</sup> In our view, that is a high or conservative ALOP that at least matches Russia's in respect of ASF. Such an objective has been applied through a number of measures aimed at controlling the spread of ASF from those areas currently infected and at eradicating the disease within the four affected EU member States.<sup>1730</sup>

7.1353. The Panel is cognizant of Russia's claims that the European Union's control methods have not been effective in preventing the entry and further spread of ASF within the four affected EU member States.<sup>1731</sup> The evidence on the Panel's record also demonstrates that despite Russia's best efforts<sup>1732</sup>, Russia's control methods have not been entirely successful in preventing the spread of ASF within Russia's territory since its initial introduction. Indeed, at the first meeting with the Panel, Russia detailed how despite costly and extensive efforts to establish an ASF-free compartment, particular enterprises were nonetheless infected with ASF.<sup>1733</sup> The Panel is not convinced that Russia's control methods, while somewhat different from those applied in the European Union, have been any more effective in preventing the further spread of ASF over time.

7.1354. As described in paragraphs 7.211, 7.228, and 7.748 above, the objective of the measures at issue is to ensure protection of Russia's territory from the further entry and spread of ASF. When assessing the European Union's claims under Article 3 of the SPS Agreement, we observed that the evidence on record, including the experts' views, support the proposition that there are ASF-free areas within the European Union.<sup>1734</sup> However, Russia has refused to accept any of them on the basis of a number of factors that Russia considers to objectively support such refusal.<sup>1735</sup> We also found that Russia allows for domestic trade of the products at issue that come from areas or compartments considered to be free of ASF pursuant to Russia's regulatory framework.<sup>1736</sup>

7.1355. Taken together, these findings constitute strong indicators, or warning signals<sup>1737</sup>, that Russia's measures arbitrarily or unjustifiably discriminate between domestic and imported products. However, before reaching our conclusions, we find it appropriate to consider Russia's explanations as to the rationale underlying the regulatory distinction between the products at issue imported from the European Union and those domestically produced.

<sup>1726</sup> See Appendix 1 and Appendix 2 below.

<sup>1727</sup> See Appendix 1 and Appendix 2 below.

<sup>1728</sup> See para. 7.752 above.

<sup>1729</sup> Council Directive of 27 June 2002, 2002/60/EC (Exhibit EU-31), Article 1.

<sup>1730</sup> See Appendix 1 and Appendix 2 below.

<sup>1731</sup> See e.g. Russia's first written submission, paras. 309 and 313.

<sup>1732</sup> See fns 1045, 1046, 1047, 1048 to para. 7.733 above, where the Panel refers to the measures adopted by Russia in the regions of Voronezh, Krasnodar and Belgorod.

<sup>1733</sup> See Exhibit RUS-148.

<sup>1734</sup> See sections 7.5.2 and 7.6.2 above.

<sup>1735</sup> See Russia's second written submission, paras. 57-127.

<sup>1736</sup> See para. 7.1338 above.

<sup>1737</sup> Using the same expressions of the panel in *US – Animals*. Panel Report, *US – Animals*, para. 7.590.

7.1356. Russia explains, when referring to the ban on imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, that the European Union has not been able to demonstrate that its alleged ASF-free zones are indeed free of ASF and are likely to remain so.<sup>1738</sup>

7.1357. We are mindful that according to the provisions of the Terrestrial Code (especially Article 5.3.7.1), the importing country has a certain degree of flexibility to recognize or reject a zone for international trade purposes. However, we are also mindful that pursuant to its obligations under the SPS Agreement, in the circumstances of the present dispute, Russia should at least explicitly recognize, in the measure itself, the possibility for such recognition to take place. Russia is not doing this either on the face of the measures at issue nor on the basis of their application. We consider that this conclusion is without prejudice to our findings under Article 6.2 of the SPS Agreement, that Russia has recognized the concept of disease free areas in its overarching SPS legislation in respect of ASF.<sup>1739</sup> This is because in our analysis under Article 6.2 we are addressing a separate question that does not directly relate to the existence of instances of discrimination as the ones we are examining in this context.

7.1358. None of the measures at issue contains any explicit indication that there is a possibility to recognize ASF- free zones or compartments from the territory of the European Union. The instruments through which the EU-wide ban is enforced only refer to the inability of the European Union to issue the veterinary certificates that attest ASF-freedom for the last 3 years in the entire European Union excepting Sardinia. Based on such inability they require the European Union to refrain from issuing those veterinary certificates. In addition, Russia has ordered border authorities to pay special attention to compliance with this requirement.

7.1359. The measures on Estonia, Latvia, Lithuania, and Poland impose a "temporary restriction" on imports of the products at issue. However, on their face, they do not explicitly provide for potential regionalization in the European Union.

7.1360. This holds true also in respect of the application of both sets of measures. Although Russia has requested additional information<sup>1740</sup> and has formally rejected the European Union's recognition of ASF- free zones<sup>1741</sup>, up to this point Russia has not been open to recognizing any area outside the four affected member States (and Sardinia), regardless of the particular characteristics of the different areas within the European Union. Rather, Russia has remained closed to the possibility that there are ASF-free zones within the European Union outside the four affected member States (and Sardinia). Russia has kept in place its EU-wide ban on imports of the products at issue. Russia has also maintained its country-wide "temporary restrictions" on the imports of the products at issue from the entire territory of Estonia, Latvia, Lithuania, and Poland.

7.1361. We have already noted that trade in the products at issue on the basis of the OIE standards would ensure protection to Russia from the re-entry and further spread of ASF and ASFV. Such measures include trade from ASF-free countries, zones or compartments. We have also observed that both parties agree that the Terrestrial Code offers certain flexibilities in respect of the manner in which a Member may establish its ASF- free zones. In addition, considering the evidence on record as well as the experts' responses, it seems to us that at least certain areas from the European Union's territory could be considered as free from ASF.<sup>1742</sup>

7.1362. Based on the foregoing, we conclude that, by allowing domestic trade of the products at issue from ASF- free areas outside the first and second endangered zones and from ASF- free compartments, and prohibiting imports of the same products from ASF- free areas within the European Union, as well as denying through its measures and through their application the recognition of ASF- free areas, Russia's measures arbitrarily or unjustifiably discriminate between Members (including the territory of the Member imposing the measure) where the same conditions prevail. This amounts to a violation of the first sentence of Article 2.3 of the SPS Agreement.

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<sup>1738</sup> Russia's first written submission, para. 309.

<sup>1739</sup> See para. 7.379 above.

<sup>1740</sup> See Appendix 1 below.

<sup>1741</sup> Russia's letter to the European Union of 29 July 2014, C-EH-8/13771 (Exhibit RUS-263).

<sup>1742</sup> See in section. 7.6.2.3.4 above our analysis in respect of the SPS characteristics in certain areas in the European Union.



### 7.7.3.5.3 Preliminary considerations regarding the two situations involved in the second instance of discrimination

7.1363. We recall that regarding the second instance of discrimination, the European Union refers to two situations: first, in 2012 when Russia selectively did not apply any ban on Ukrainian products following an ASF case in Zaporozhye region; and second, on 15 January 2014, when Russia announced a ban on the trade from the Lugansk region, while accepting pig products from the rest of Ukraine.

7.1364. Russia asserts that the situations described in respect of the second instance of discrimination are no longer in place and were not in place at the date of the establishment of the Panel.<sup>1743</sup> In Russia's view, this demonstrates that the European Union has failed to meet its burden to demonstrate that the second instance of discrimination breaches Russia's obligations under Article 2.3.

7.1365. The European Union considers that even if a measure is no longer in force, a panel may still make findings in respect of such measure without issuing recommendations.<sup>1744</sup>

7.1366. We recall that the measures at issue are the bans imposed by Russia on the imports of the products at issue from the four affected EU member States and from the rest of the European Union. In this sense, the objection raised by Russia is not whether a challenged measure that pre-dates the establishment of a panel can be considered for the purposes of dispute settlement. Rather, the question is whether in assessing a claim of discrimination under the first sentence Article 2.3, the situation compared with the measure challenged can be one that pre-dates the establishment of the Panel and is no longer in place.

7.1367. The Appellate Body and panels have examined whether it is appropriate for them to make findings on an expired measure.<sup>1745</sup> In this regard, the Appellate Body stated that "[w]hether a measure is still in force is not dispositive of whether that measure is currently affecting the operation of any covered agreement. Therefore, we disagree with the United States' argument that measures whose legislative basis has expired are incapable of affecting the operation of a covered agreement in the present, and that, accordingly, expired measures cannot be subject of consultations under the DSU."<sup>1746</sup> However, the fact that a measure has expired may affect the recommendations that a Panel may make pursuant to Article 19.1 of the DSU.<sup>1747</sup>

7.1368. The Appellate Body has also noted that temporal limitations to the measures that may be within a panel's terms of reference do not apply in the same way to evidence. Rather, evidence in support of a claim may pre-date or post-date the establishment of the panel.<sup>1748</sup> Thus, a panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment.<sup>1749</sup> The Appellate Body added that a "panel enjoys a certain discretion to determine the relevance and probative value of a piece of evidence that pre-dates or post-dates its establishment".<sup>1750</sup>

<sup>1743</sup> Russia's second written submission, para. 169.

<sup>1744</sup> European Union's comments to Russia's response to Panel question No. 259, para. 41.

<sup>1745</sup> Appellate Body Reports, *China – Raw Materials*, para. 263 (referring to Panel Report, *US – Wool Shirts and Blouses*, para. 6.2; Panel Report, *Indonesia – Autos*, para. 14.9; Panel Report, *Chile – Price Band System*, para. 7.126; Panel Report, *Dominican Republic – Imports and Sale of Cigarettes*, para. 7.344; and Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1303-7.1312).

<sup>1746</sup> Appellate Body Report, *US – Upland Cotton*, para. 262.

<sup>1747</sup> Appellate Body Report, *US – Upland Cotton*, para. 272.

<sup>1748</sup> See section 7.3.6 above.

<sup>1749</sup> The Appellate Body has noted that "However, we recall that, in *US – Cotton Yarn*, the Appellate Body stated (when reviewing a textile safeguards determination) that a Member cannot be expected to examine "evidence that did not exist and that, therefore, could not possibly have been taken into account when the Member made its determination. ... Consequently, a panel must not consider evidence which did not exist *at that point in time*." (Appellate Body Report, *US – Cotton Yarn*, paras. 77 and 78 (original emphasis; footnote omitted)) We also note the Appellate Body's statement in *EC – Sardines* that "[t]he interim review stage is not an appropriate time to introduce new evidence." (Appellate Body Report, *EC – Sardines*, para. 301)". Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

<sup>1750</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

7.1369. In our view, the situations that the European Union is requesting us to consider under the second instance of discrimination are to be regarded as evidence. We are mindful that such evidence predates the establishment of the Panel. However, this does not preclude us from addressing such evidence considering the European Union's claims under the first sentence of Article 2.3 of the SPS Agreement in respect of the second instance of discrimination.

#### **7.7.3.5.4 Second situation of discrimination: treatment of imports from Ukraine in 2012**

##### **7.7.3.5.4.1 Whether identical or similar conditions prevail in Ukraine in 2012 and in the European Union at the time of the establishment of the Panel**

7.1370. The European Union refers to the second situation of discrimination in the following terms: "The first instance occurred in 2012, when Russia did not apply any ban to Ukrainian products following an ASF case in the Zaporozhye region. Russia considered at the time that the Ukrainian measures were sufficient to prevent any spread of the ASFV.<sup>1751</sup><sup>1752</sup> However, neither in its second written submission nor in its responses to the Panel's questions does the European Union explain in which manner the relevant conditions are similar or identical between the situation in Ukraine in 2012 and the situation in the European Union at the time of the establishment of this Panel.

7.1371. Russia neither challenges this assertion nor puts forward arguments in respect of this alleged instance of discrimination.

7.1372. As we mentioned in paragraph 7.1312 above, to determine whether similar conditions prevail in the European Union and in Ukraine in respect of trade of the products at issue, we will consider the presence of ASF in each territory, and the risks thereof.

7.1373. The only exhibit that the European Union provides in order to support the existence of ASF in Ukraine in 2012 is an FSVPS press note that refers to a letter from the deputy head of FSVPS to the president of the State Veterinary and Phytosanitary Service of Ukraine.<sup>1753</sup> That letter refers to "self-imposed restrictions on exports of African swine fever susceptible animals in connection with the occurrence of disease outbreaks in the village of Kamyshevodka, Primorsk district in the Zaporozhia region of Ukraine." This demonstrates the presence of ASF in the territory of the Zaporozhia region of Ukraine.

7.1374. However, we consider that the European Union does not adduce any type of evidence in support of the particular characteristics of the presence of ASF in that region. Furthermore, the European Union does not formulate any type of arguments as to why the prevailing conditions in Ukraine in 2012 are similar or identical to those in the European Union at the time of the establishment of the Panel. The European Union seems to consider, without a clear indication in this respect, that the arguments it formulated in its first written submission in respect of the second instance of discrimination are applicable to the situation relative to the imports of the products at issue from Ukraine in 2012.

7.1375. The flaws and shortcomings in the European Union's case largely limit our ability to perform the comparison between the relevant conditions in Ukraine in 2012 and in the European Union at the time of the establishment of the Panel<sup>1754</sup> in order to determine whether such conditions are similar or identical. Without such assessment, we are not in a position to continue the rest of the examination pursuant to the first sentence of Article 2.3, in respect of the second situation of discrimination.

7.1376. Based on the foregoing, we consider that the European Union has failed to adduce sufficient evidence and arguments that would allow us to determine that relevant conditions were identical or similar between Ukraine in 2012 and the European Union at the time of the

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<sup>1751</sup> (footnote original) Press release, Russian Federal Service for Veterinary and Phytosanitary Supervision, 2 August 2012, <http://www.fsvps.ru/fsvps/news/5049.html> (Exhibit EU-165).

<sup>1752</sup> European Union's second written submission, para. 139.

<sup>1753</sup> Press release, Russian Federal Service for Veterinary and Phytosanitary Supervision, 2 August 2012, <http://www.fsvps.ru/fsvps/news/5049.html> (Exhibit EU-165).

<sup>1754</sup> See section 7.3.6 above.

establishment of this Panel<sup>1755</sup>, for the purposes of the first sentence of Article 2.3 of the SPS Agreement.

#### **7.7.3.5.5 Third situation of discrimination: treatment of imports from Ukraine between 15 and 30 January 2014**

##### **7.7.3.5.5.1 Whether identical or similar conditions prevail in Ukraine and in the European Union and whether Russia's treatment of imports from Ukraine in 2014 are arbitrarily or unjustifiably discriminatory in respect of the treatment provided to imports from the European Union**

7.1377. The third situation of discrimination to which the European Union refers arises from Russia's acceptance of regionalization in the Lugansk region in Ukraine between 15 and 30 January 2014. According to the European Union, on 15 January 2014 Russia announced a ban on the trade from the Lugansk region, while accepting pig products from the rest of Ukraine. Such ban was notified to the WTO on 21 January 2014.<sup>1756</sup> The European Union considers that identical or similar conditions prevailed both in the European Union and in Ukraine, because the presence of ASFV on both territories was the relevant feature triggering the import prohibitions imposed by Russia.<sup>1757</sup>

7.1378. Russia underlines that the European Union's claim is based on a situation that was no longer in place at the time of the establishment of the Panel, and focuses on the justified character of any different treatment that it provided to the imports from Ukraine during those two weeks.<sup>1758</sup>

7.1379. As we mentioned in paragraph 7.1312 above, to determine whether similar conditions prevail in the European Union and in Ukraine in respect of trade of the products at issue, we consider the presence of ASF in each territory, and the risks thereof. The European Union has referred to the notification to the WTO of the import ban imposed by Russia on the products at issue from Ukraine. Together with other exhibits submitted by the parties, this serves as evidence of the presence of ASF in the territory of Ukraine on 15 January 2014. As described by the European Union, accepted by Russia, and supported on the record, Russia's initial reaction to this outbreak was to impose a ban limited to those products originating from the Lugansk region.<sup>1759</sup> The Lugansk region was the only region affected by ASF at the time. A couple of weeks later, Russia reassessed this measure and imposed a new ban, which does not appear on the Panel's record as having been notified to the WTO, and which applies to products from the entire territory of Ukraine.

7.1380. It is also clear from the record that as of 25 January 2014, Russia imposed a ban on the imports of the products at issue from Lithuania. In addition, a couple of days later, Russia notified the European Union that it would no longer accept the veterinary certificates attesting that the entire European Union, except Sardinia, has been free of ASF for the last three years. Such notification, as described above, together with internal instructions in Russia and their enforcement, has led to a ban on the imports of the products at issue from the entire territory of the European Union.

7.1381. When comparing those two situations, it is clear that during the brief time-period in January 2014 mentioned by the European Union, Russia initially responded to the ASF outbreak in Ukraine by immediately recognizing ASF- free areas or zones within Ukraine, while it was not open to such possibility from the European Union.

7.1382. For the purposes of our analysis, we need to further understand whether there were any substantive differences between the ASF situation in Ukraine and in the European Union which would distinguish the risks associated with the presence of ASF in the territory of each of these

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<sup>1755</sup> See section 7.3.6 above.

<sup>1756</sup> See G/SPS/N/RUS/46 (Exhibit EU-6).

<sup>1757</sup> European Union's first written submission, paras. 300-305; and second written submission, paras. 140-142.

<sup>1758</sup> See Russia's second written submission, paras. 138 and 169; See also Russia's response to Panel question No. 166, para. 340.

<sup>1759</sup> See European Union's first written submission, para. 302; Russia's first written submission, para. 325; and G/SPS/N/RUS/46 (Exhibit EU-6).

Members. According to the descriptions of the risks associated with ASF provided by the experts, there does not seem to be any material difference between the conditions of risks associated with the presence of ASF in those Members.

7.1383. However, we have difficulties in continuing our examination of a claim of discrimination based on something that lasted 15 days and which occurred almost seven months before the date of the establishment of this Panel. We have difficulties seeing, and the European Union has not provided us with a compelling rationale concerning, the value and significance of any findings in respect of these allegations given the particular facts and circumstances with which we are faced. Accordingly, we are of the view that it is appropriate to exercise judicial economy on these allegations of discrimination by the European Union under Article 2.3. This is so as the Panel considers that findings on these elements of the claims are not necessary in order to enable the DSB to make sufficiently precise recommendations and rulings as to allow for prompt compliance with those recommendations and rulings "in order to ensure effective resolution" of the dispute.<sup>1760</sup>

#### **7.7.3.5.6 Conclusion on claims pursuant to the first sentence of Article 2.3 of the SPS Agreement**

7.1384. The Panel has found that Russia's measures on the imports of the products at issue from the European Union (including those imposed on imports from Estonia, Latvia, Lithuania, and Poland, as well as from the rest of the European Union) arbitrarily or unjustifiably discriminate in respect of domestic trade in the products at issue and imports of the products at issue from the European Union.

#### **7.7.3.6 Article 2.3, second sentence, of the SPS Agreement**

7.1385. Having found that the measures at issue arbitrarily or unjustifiably discriminate, we now turn our attention to the second sentence of Article 2.3 to consider whether the measures have been applied in a manner that would constitute a disguised restriction on trade. We note that this second sentence of Article 2.3 contains an obligation that is not conditioned upon a finding of arbitrary or unjustified discrimination. That is, the obligations contained in the first and second sentences of Article 2.3 are not cumulative in nature. Nonetheless, they are closely related.

##### **7.7.3.6.1 "disguised restriction on international trade"**

7.1386. The phrase "disguised restriction on international trade" has been interpreted by a panel for the first time, in the context of Article 2.3 of the SPS Agreement, in *India Agricultural Products*. The panel relied on previous observations of the Appellate Body within the context of Article 5.5 of the SPS Agreement. In addition to Article 5.5 of the SPS Agreement, further guidance may be sought from the previous interpretations reached within the framework of an analysis of the chapeau to Article XX of the GATT 1994, which contains similar language. Concerning the meaning of "disguised restriction on international trade", the Appellate Body in *US – Gasoline* stated that such a notion, as contained in the chapeau of Article XX of the GATT 1994, "includes disguised discrimination in international trade".<sup>1761</sup> More specifically, the Appellate Body found that "'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination".<sup>1762</sup>

7.1387. The panel in *India – Agricultural Products* applied the same reasoning, in its interpretation of "disguised restriction on international trade" in Article 2.3 of the SPS Agreement, and stated that such terms "encompass measures that constitute arbitrary or unjustifiable discrimination".<sup>1763</sup>

7.1388. The panel in *US – Animals* stated:

We see no reason to depart from the above-mentioned approach in our assessment of Argentina's claims in this dispute. We thus consider that a finding that the United States' measures result in arbitrary or unjustifiable discrimination would necessarily

<sup>1760</sup> Appellate Body Report, *Australia – Salmon*, para. 223.

<sup>1761</sup> Appellate Body Report, *US – Gasoline*, p. 25.

<sup>1762</sup> Appellate Body Report, *US – Gasoline*, p. 25.

<sup>1763</sup> Panel Report, *India – Agricultural Products*, para. 7.476.

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entail a finding that they are applied in a manner which would constitute a disguised restriction on international trade.<sup>1764</sup>

7.1389. We agree with the approach followed by the panels in *India – Agricultural Products* and in *US – Animals* in respect of the relationship of a finding of arbitrary or unjustified discrimination and a finding of a disguised restriction on international trade, pursuant to Article 2.3.

7.1390. Moreover, we recall that, in *Australia – Salmon*, the Appellate Body stated that a finding that an SPS measure is not based on a risk assessment is a strong indication that the measure "is not really concerned with the protection of human, animal or plant life or health but is instead a trade restrictive measure taken in the guise of an SPS measure, i.e., a 'disguised restriction on international trade'". The Appellate Body also took into account the difference in treatment associated with a certain risk between the internal movement of products within the territory of a Member and the treatment accorded to the same imported products.

7.1391. We have found above that Russia's SPS measures at issue are not based on a risk assessment under Article 5.1 of the SPS Agreement, and do not benefit from provisional justification under Article 5.7 of the SPS Agreement.<sup>1765</sup> We agree that the lack of a risk assessment for the SPS measures at issue in this case further supports the view that they constitute disguised restrictions on international trade.

7.1392. Having found that Russia's measures at issue arbitrarily or unjustifiably discriminate in respect of domestic trade in the products at issue and of imports of those products, and they are not based on a risk assessment, we find the measures at issue are applied in a manner that constitutes a disguised restriction on international trade. Therefore, the measures at issue are inconsistent with the second sentence of Article 2.3 of the SPS Agreement.

#### **7.7.3.7 Conclusion on the European Union's claim pursuant to Article 2.3 of the SPS Agreement**

7.1393. On the basis of the foregoing, the Panel concludes that Russia's ASF measures are inconsistent with the first sentence of Article 2.3 of the SPS Agreement because they arbitrarily and unjustifiably discriminate between Members where identical or similar conditions prevail. We also find that Russia's ASF measures are inconsistent with the second sentence of Article 2.3, because they are applied in a manner which constitutes a disguised restriction on international trade.

#### **7.7.4 European Union's claim pursuant to Article 5.5 of the SPS Agreement**

##### **7.7.4.1 Main arguments of the parties**

###### **7.7.4.1.1 European Union**

7.1394. The European Union argues that Russia has adopted its own "appropriate levels" of sanitary protection against risks to animal life or health. In the absence of a clear statement from Russia regarding its ALOPs, these should be inferred from the measures that the Russian Federation applies to the domestically produced products associated with the risk of ASF and from the measures that the Russian Federation applies with respect to the European Union products at issue.<sup>1766</sup>

7.1395. The European Union emphasizes that Russia's measures with respect to European Union products are far more stringent than those applied with respect to the internal movement of the domestic products associated with the ASF risk within Russia. The European Union argues that Russia also failed domestically to take effective measures in order to eradicate and contain the ASFV. In the European Union's view, it follows that Russia's ALOP with regard to domestic goods is

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<sup>1764</sup> Panel Report, *US – Animals*, para. 7.575.

<sup>1765</sup> See paras. 7.720 and 7.1199 above.

<sup>1766</sup> European Union's first written submission, para. 326.

rather low, while Russia's ALOP with respect to the European Union products at issue is very high.<sup>1767</sup>

7.1396. In the European Union's view, as long as ASF transmission through domestically-produced products and through products from the European Union are viewed as distinct situations, Russia breaches the provisions of Article 5.5, by applying different levels of protection without any justification.<sup>1768</sup> The European Union highlights that in the present case, the situations are "comparable" in the sense that they involve the same virus and the same health effects.<sup>1769</sup>

7.1397. The European Union considers that the differences exhibited by Russia's measures are arbitrary and unjustifiable. The European Union argues that Russia's WTO notifications concerning the bans on the imports from Estonia, Latvia, Lithuania, and Poland are imprecise, contradictory and prove a profound misunderstanding of the Terrestrial Code. According to the European Union, Russia's measures not only do not "conform to" and are not "based on" international standards, but they go against the relevant OIE standards. Moreover, Russia did not conduct any risk assessment. Consequently, the European Union considers that the measures at issue should be considered to amount to a disguised restriction on international trade, inconsistent with the provisions of Article 5.5 of the SPS Agreement.<sup>1770</sup> In addition, the breach of Article 5.5 results in a consequential breach of Article 2.3 of the SPS Agreement.<sup>1771</sup>

7.1398. Moreover, the European Union considers that for the purposes of Article 5.5 claims, the discrimination with regard to Belarus is also relevant.<sup>1772</sup>

#### 7.7.4.1.2 Russia

7.1399. In respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland Russia argues that the European Union confuses the concepts of "ALOP" and "measure". According to Russia a Member may adopt a high ALOP with the objective of preventing the entry or spread of a disease. A Member may then seek to achieve the objective through various legal instruments and on-the-ground prevention and eradication measures taken by various government and private sector entities and organizations. Russia explains that the question of whether Russia's ALOP is "low" or "high", must be judged by examining the acceptable level of risk expressed through the goal and objective of Russia's measures, and the fact that there may be circumstances when the objective was not achieved does not lower or diminish the objective itself.<sup>1773</sup>

7.1400. According to Russia, it applies the same ALOP to imported live pigs and pig products from infected EU member States as to those products within domestic ASF-infected zones. There are no *de jure* or *de facto* distinctions in ALOP. Russia recognizes and applies regionalization to both domestic and imported products after an ASF outbreak. Its measures as applied to Estonia, Latvia, Lithuania, and Poland conform to, or are based on, international standards, and are presumed to be consistent with the relevant provisions of the SPS Agreement (including Articles 5.1 and 2.2 on risk assessment) and GATT 1994. Moreover, the Russian Veterinary Service has engaged in a "transparent and open" discussion with the European Union Veterinary Service, and Russia's measures have caused very large losses for its pork producers. Russia is one of many Members to deem pork imports from infected EU member States as unsafe and imposed country-wide restrictions (China, Japan, Singapore, South Korea, Chinese Taipei and Ukraine). In the alternative, any alleged distinctions between Russia's treatment of domestic products and products from the European Union are not arbitrary or unjustified, and do not result in discrimination or a disguised restriction on international trade.

<sup>1767</sup> European Union's first written submission, paras. 328-329. See also second written submission, paras. 144, 150-153.

<sup>1768</sup> European Union's first written submission, para. 327.

<sup>1769</sup> European Union's first written submission, para. 330.

<sup>1770</sup> European Union's first written submission, para. 331. See also second written submission, paras. 143-149.

<sup>1771</sup> European Union's first written submission, para. 332.

<sup>1772</sup> European Union's second written submission, para. 154.

<sup>1773</sup> Russia's first written submission, para. 248.

7.1401. Regarding the EU-wide ban, Russia submits that the European Union has failed to establish that Russia's provisional compliance with the agreed veterinary certificate arbitrarily or unjustifiably discriminates between other EU member States and Russia. Because Russia's provisional compliance is justified under Article 5.7, the European Union has failed to support its claims under any provision of Article 5, including Article 5.5.<sup>1774</sup>

#### 7.7.4.2 Analysis by the Panel

7.1402. Article 5.5 of the SPS Agreement calls for non-discrimination in the management of risks to human, animal or plant life or health. Three cumulative elements must be demonstrated to establish an inconsistency with Article 5.5 (i) the Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to [human] life or health in several different situations; (ii) those levels of protection exhibit arbitrary or unjustifiable differences ("distinctions") in their treatment of different situations; and (iii) the arbitrary or unjustifiable differences result in discrimination or a disguised restriction on international trade.<sup>1775</sup>

7.1403. In section 7.7.2 above, we addressed the relationship between Articles 2.3 and 5.5 of the SPS Agreement. We noted that the Appellate Body has found that Articles 2.3 and 5.5 are closely related.<sup>1776</sup> Both articulate non-discrimination obligations and condemn disguised restrictions on international trade. Article 2.3 is of a more general character than Article 5.5. A violation of Article 2.3 will not necessarily imply a violation of Article 5.5<sup>1777</sup>, and arbitrary or unjustifiable discrimination in the sense of the first sentence of Article 2.3, can be found to exist without any examination under Article 5.5.<sup>1778</sup>

7.1404. The Appellate Body in *Argentina – Import Measures* observed:

The Appellate Body has explained that the principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute."<sup>1779</sup> Thus, panels need address only those claims "which must be addressed in order to resolve the matter in issue in the dispute"<sup>1780</sup>, and panels "may refrain from ruling on every claim as long as it does not lead to a 'partial resolution of the matter'."<sup>1781</sup> Nonetheless, the Appellate Body has cautioned that "[t]o provide only a partial resolution of the matter at issue would be false judicial economy", and that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with

<sup>1774</sup> Russia's first written submission, paras. 382 and 409. See also response to Panel question No. 129, paras. 240-241; response to Panel question No. 154, para. 277; and second written submission, paras. 204-205.

<sup>1775</sup> Appellate Body Report, *EC – Hormones*, para. 214.

<sup>1776</sup> Appellate Body Report, *EC – Hormones*, para. 212.

<sup>1777</sup> Panel Report, *Australia – Salmon*, para. 8.109.

<sup>1778</sup> Appellate Body Report, *Australia – Salmon*, para. 252; and Panel Report, *US – Poultry (China)*, para. 7.318.

<sup>1779</sup> (footnote original) Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133. (emphasis original)

<sup>1780</sup> (footnote original) Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:1, p. 340; *US – Tuna II (Mexico)*, para. 403.

<sup>1781</sup> (footnote original) Appellate Body Reports, *US – Upland Cotton*, para. 732; *US – Tuna II (Mexico)*, para. 404.

those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'<sup>1782;1783</sup>

7.1405. In *Argentina – Imports Measures* the Appellate Body also noted that:

In our view, the fact that two provisions have a different "scope and content" does not, in and of itself, imply that a panel must address each and every claim under those provisions. Indeed, if this were so, then only in the rarest of circumstances would a panel be able to exercise judicial economy on a claim. As the Appellate Body has explained in previous disputes, what should guide panels in their decision to exercise judicial economy is the need to address all of those claims whose resolution is necessary to resolve the dispute so as to avoid a partial resolution of the dispute.<sup>1784</sup>

7.1406. In light of this guidance, we consider it is appropriate to exercise judicial economy in respect of the European Union's claims under Article 5.5 of the SPS Agreement. This is, because we have already made findings in respect of the European Union's arguments on discrimination under both the first and the second sentence of Article 2.3. As the Appellate Body noted, "when read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3".<sup>1785</sup> Thus, in the context of this particular dispute, we consider our findings under Article 2.3 to be enough to provide a solution of the matters of discrimination raised by the European Union.

7.1407. Moreover, we have made a number of findings under other provisions of the SPS Agreement which support our recommendation to the DSB to request Russia to bring the measures at issue into conformity with its obligations under the SPS Agreement. In our view, the totality of our findings resolves the matter at issue in this dispute. We therefore consider that we are not exercising false judicial economy, or providing a partial resolution of this dispute.

7.1408. If this report is appealed and the Appellate Body were to disagree with our approach, we have made factual findings in respect of Russia's ALOP and in support of our findings that the measures at issue breach the first and the second sentence of Article 2.3. In our view, these factual findings would provide a basis for the Appellate Body to complete its analysis under Article 5.5.

## 7.8 Claims under Article 7 and Annex B of the SPS Agreement

### 7.8.1 Main arguments of the parties

#### 7.8.1.1 European Union

7.1409. The European Union claims that the measures in respect of Lithuania is inconsistent with Russia's obligations under Article 7 and Annex B paragraphs 1, 2, 5 and 6 of the SPS Agreement, because certain measures at issue were taken by Russia against Lithuania on 25 January 2014 (ref. FS-EN-8/1032), but only notified to the WTO on 10 February 2014, that is, 16 days after their

<sup>1782</sup> (footnote original) Appellate Body Report, *Australia – Salmon*, para. 223. (fns omitted) For instance, in *Australia – Salmon*, the Appellate Body considered that the fact that the panel made findings concerning a violation of Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) with respect to certain Canadian salmon, without findings under Articles 5.5 and 5.6 of the SPS Agreement, would not enable the DSB to make sufficiently precise recommendations and rulings so as to allow for compliance by Australia with its obligations under the SPS Agreement. (Ibid., para. 224) The Appellate Body reached a similar conclusion in *EC – Export Subsidies on Sugar*, explaining that findings under Articles 3 and 8 of the Agreement on Agriculture were not sufficient to "fully resolve" that dispute because, by declining to rule on the claims under Article 3 of the SCM Agreement, that panel precluded the possibility of a remedy being made available, pursuant to Article 4.7 of the SCM Agreement, in the event of a finding of inconsistency under Article 3 of the SCM Agreement. (Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 335)

<sup>1783</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.190.

<sup>1784</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.194.

<sup>1785</sup> Appellate Body Report, *EC – Hormones*, para. 212.



imposition.<sup>1786</sup> The European Union also argues, with respect to the EU-wide ban, that Russia has neither published it nor notified it to the WTO.<sup>1787</sup> In addition, the European Union asserts that Russia similarly notified the ban on the products at issue from Latvia only on 16 July 2014, more than two weeks after its imposition on 27 June 2014.<sup>1788</sup>

7.1410. With respect to the ban concerning Lithuania, the European Union argues that Russia failed to immediately notify other Members, through the WTO Secretariat, of the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem. The European Union also argues that Russia failed to provide copies of the regulation to other Members and to allow other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account, and that it took more than two weeks for Russia to notify the measure to the WTO after its adoption.<sup>1789</sup>

### 7.8.1.2 Russia

7.1411. Russia argues that it duly notified the measures affecting Lithuania.<sup>1790</sup> Russia argues that it immediately notified the European Union through correspondence and by telephone regarding the temporary import restrictions affecting exports from Lithuania that were implemented on 25 January 2014.<sup>1791</sup> With regard to the EU-wide ban, Russia argues that the European Union has failed to establish that the EU-wide ban constitutes a measure subject to the requirements of Article 7 and Annex B of the SPS Agreement.<sup>1792</sup>

## 7.8.2 Analysis by the Panel

### 7.8.2.1 Introduction

7.1412. The Panel underlines that transparency is of fundamental importance to the operation of the multilateral trading system. We agree with the SPS Committee that the term "transparency" is used in the context of the WTO to signify one of the fundamental principles of its agreements: the aim is to achieve a greater degree of clarity, predictability and information about trade policies, rules and regulations of Members.<sup>1793</sup>

7.1413. In examining the European Union's claims pertaining to transparency under Article 7 and Annex B of the SPS Agreement, the Panel will first reproduce the relevant legal provisions. Then, the Panel will provide a summary of the applicable legal test in respect of those provisions. After clarifying the legal test, the Panel will examine the European Union's claims in respect of the bans on the imports of the products at issue from Lithuania followed by the EU-wide ban.

### 7.8.2.2 Relevant legal provisions

7.1414. Article 7 of the SPS Agreement provides:

Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

7.1415. The relevant provisions of Annex B of the SPS Agreement provide:

<sup>1786</sup> European Union's first written submission, para. 349.

<sup>1787</sup> European Union's first written submission, para. 350. See also the European Union's response to Panel question No. 201, para. 391

<sup>1788</sup> European Union's second written submission, para. 191.

<sup>1789</sup> European Union's first written submission, para. 353.

<sup>1790</sup> Russia's first written submission, para. 442-443.

<sup>1791</sup> Russia's first written submission, para. 443, citing the letter from Russia to the European Union of 25 January 2014, FS-EN-8/1023 (Exhibit RUS-28).

<sup>1792</sup> Russia's first written submission, para. 446.

<sup>1793</sup> G/SPS/7/Rev.3, para. 1.

*Publication of regulations*

1. Members shall ensure that all sanitary and phytosanitary regulations<sup>5</sup> which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them.

2. Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

...

*Notification procedures*

5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

(a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;

(b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;

(c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;

(d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:

(a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);

(b) provides, upon request, copies of the regulation to other Members;

(c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

<sup>5</sup> Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally.

### 7.8.2.3 Legal test

#### 7.8.2.3.1 Introduction

7.1416. Article 7 of the SPS Agreement imposes an obligation on Members to notify changes in, and provide information on, SPS measures, in accordance with the provisions of Annex B of the SPS Agreement.<sup>1794</sup> The provisions of Annex B pertain to transparency of SPS regulations, touching upon publication of regulations, enquiry points and notification procedures. These provisions should be read together, and a finding of inconsistency with the provisions of Annex B would result in an inconsistency with Article 7.<sup>1795</sup> On this basis, previous panels have begun their examination of claims pursuant to Article 7 and Annex B by assessing the particular elements under Annex B.<sup>1796</sup>

7.1417. Before exploring the particular elements of the legal test in respect of the relevant paragraphs of Annex B of the SPS Agreement, the Panel recalls the allocation of the burden of proof in the context of claims brought pursuant to Article 7 and Annex B. The panel in *Japan – Apples* found that "Article 7 of the *SPS Agreement* requires Members to notify 'changes' in their SPS measures."<sup>1797</sup> In this respect, we recall that in order to establish a *prima facie* case of inconsistency with Article 7 and Annex B, whenever a claim is made regarding the notification of changes to an SPS measure, a complainant should not only raise the claims under these provisions, but also provide evidence in support of the changes in the SPS measures that should have been notified. This includes explaining how much the new regulations depart from the previous ones.<sup>1798</sup>

7.1418. Having addressed these preliminary considerations, the Panel now turns to examine the legal test in respect of the relevant obligations provided in Annex B of the SPS Agreement.

#### 7.8.2.3.2 Annex B

7.1419. The provisions of Annex B relate to publication and notification requirements. Some of the applicable obligations provided therein depend on whether there is any urgency involved, whether an international standard exists, and whether a Member's measure is substantially the same as the content of an international standard, guideline or recommendation.

7.1420. We agree with the panel in *India – Agricultural Products*, that the "transparency provisions of Annex B apply only to measures that qualify as 'SPS regulations'.<sup>1799</sup> That panel further indicated that:

The term "SPS regulations" is defined in the footnote to Annex B(1) as "[SPS] measures such as laws, decrees or ordinances which are applicable generally". The Appellate Body in *Japan – Agricultural Products II* clarified that the footnote to Annex B(1) includes an illustrative list of instruments, as indicated by the words, "such as". This list is therefore not exhaustive. The Appellate Body explained that the scope of the term "SPS regulation" also includes, in addition to "laws, decrees or ordinances", other instruments which are "applicable generally" and are "similar in character" to the instruments explicitly referred to in the illustrative list of the footnote to Annex B(1).<sup>1800;1801</sup>

<sup>1794</sup> Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 85.

<sup>1795</sup> Panel Report, *India – Agricultural Products*, para. 7.741 (referring to Panel Report, *Japan – Agricultural Products II*, para. 8.116; and Appellate Body Report, *Japan – Agricultural Products II*, para. 108).

<sup>1796</sup> Panel Report, *India – Agricultural Products*, para. 7.741

<sup>1797</sup> Panel Report, *Japan – Apples*, para. 8.319. In fn 425 to para. 8.319, that panel further noted that "we do not believe that changes of legal instruments require, in all instances, notification".

<sup>1798</sup> Panel Report, *Japan – Apples*, paras. 8.316-8.318.

<sup>1799</sup> Panel Report, *India – Agricultural Products*, para. 7.737.

<sup>1800</sup> (footnote original) Appellate Body Report, *Japan – Agricultural Products II*, para. 105. The Appellate Body further explained that:

The object and purpose of paragraph 1 of Annex B is "to enable interested Members to become acquainted with" the sanitary and phytosanitary regulations adopted or maintained by other Members and thus to enhance transparency regarding these measures. In our opinion, the scope of application of the publication

7.1421. As a threshold matter, it is therefore necessary to determine whether a measure falls within the scope of Article 7 and Annex B, deriving guidance from the text and footnote of Annex B(1).

#### 7.8.2.3.2.1 Annex B(1)

7.1422. Annex B(1) obliges Members to ensure that their adopted SPS regulations are published promptly in such a manner as to enable interested Members to become acquainted with them. In addition to constituting an SPS regulation, for a measure to be subject to the publication requirement in Annex B (i) the measure must have "been adopted"; and (ii) the measure must be "applicable generally".<sup>1802</sup>

#### 7.8.2.3.2.2 Annex B(2)

7.1423. Annex B(2) requires Members, except in urgent circumstances, to allow for a reasonable interval between the publication of the SPS regulation and its entry into force.

7.1424. At the Doha Ministerial Conference, Members decided that:

Subject to the conditions specified in paragraph 2 of Annex B to the Agreement on the Application of Sanitary and Phytosanitary Measures, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months. It is understood that timeframes for specific measures have to be considered in the context of the particular circumstances of the measure and actions necessary to implement it. The entry into force of measures which contribute to the liberalization of trade should not be unnecessarily delayed.<sup>1803</sup>

7.1425. To examine consistency with paragraph 2 of Annex B, a panel should first determine whether it is inapplicable to the circumstances of the particular case due to the existence of urgent circumstances.<sup>1804</sup> Thereafter, a panel would need to examine whether the measure was published within a reasonable interval.

#### 7.8.2.3.2.3 Annex B(5)

7.1426. Pursuant to its *chapeau*, Annex B(5) will apply when the following circumstances are met: (a) where a relevant international standard does not exist or the content of the proposed measure is not substantially the same as the content of an international standard, guideline or recommendation, and (b) if the regulation may have a significant effect on trade of other Members.<sup>1805</sup>

7.1427. Regarding the first element, the panel in *India – Agricultural Products* considered that the analysis for the purposes of the *chapeau* of Annex B(5) is different from the determination of whether a measure is "based on" or "conforms to" an international standard pursuant to Articles 3.1 and 3.2 of the SPS Agreement. That panel reasoned that for the purposes of its analysis, "substantially the same" means that "something closely approximating 'sameness' is

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requirement of paragraph 1 of Annex B should be interpreted in the light of the object and purpose of this provision.

Appellate Body Report, *Japan – Agricultural Products II*, para. 106.

<sup>1801</sup> Panel Report, *India – Agricultural Products*, para. 7.738.

<sup>1802</sup> Panel Report, *Japan – Agricultural Products II*, para. 8.109.

<sup>1803</sup> WT/MIN(01)/17, para. 3.2. The Appellate Body in *US – Clove Cigarettes* examined the legal status of paragraph 5.2 of this decision of the Ministerial Conference in the context of determining whether the definition of a "reasonable interval" in Article 12.2 of the TBT Agreement was a multilateral interpretation in the sense of Article IX:2 of the WTO Agreement. The Appellate Body concluded that paragraph 5.2 does not qualify as a multilateral interpretation within the meaning of Article IX:2 of the WTO Agreement; however, it upheld the panel's finding that it constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the Vienna Convention, on the interpretation of the term "reasonable interval" in Article 12.2 of the TBT Agreement. See Appellate Body Report, *US – Clove Cigarettes*, paras. 247-268.

<sup>1804</sup> Panel Report, *India – Agricultural Products*, paras. 7.752-7.753.

<sup>1805</sup> Panel Report, *Japan – Apples*, para. 8.310. See also Panel Report, *India – Agricultural Products*, paras. 7.771-7.772.

required".<sup>1806</sup> That panel added that, in the circumstances of that case, "for the content of an SPS regulation to be 'substantially the same' as the content of an international standard, the former must be at least 'based on' the latter according to Article 3.1 of the SPS Agreement."<sup>1807</sup>

7.1428. Regarding the second element, the panel in *India – Agricultural Products* considered that an outright prohibition on the importation of the products in question into India constituted the most restrictive measure a Member could take in respect of trade, thus having a "significant" effect on trade.<sup>1808</sup>

7.1429. We note that the Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7), adopted by the SPS Committee with effect as of 1 December 2008, encourage Members to notify all regulations that are based on, conform to or are substantially the same as an international standard, guideline or recommendation, if they are expected to have a significant effect on trade of other Members. Furthermore, the Recommended Procedures indicate:

For the purposes of Annex B, paragraphs 5 and 6 of the SPS Agreement, the concept of "significant effect on trade of other Members" may refer to the effect on trade:

- of one sanitary or phytosanitary regulation only or of various sanitary or phytosanitary regulations in combination;
- in a specific product, group of products or products in general; and
- between two or more Members.

To assess whether the sanitary or phytosanitary regulation may have a significant effect on trade, the Member concerned should consider relevant available information such as: the value or other importance of imports to the importing and/or exporting Members concerned, whether from other Members individually or collectively; the potential development of such imports; and difficulties for producers in other Members, particularly in developing country Members, to comply with the proposed sanitary or phytosanitary regulations. The concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant.<sup>1809</sup>

7.1430. If a panel is satisfied that the requirements for the application of Annex B(5) are met, it would then have to examine whether, in that particular case, the responding party has complied with each of the relevant obligations under paragraphs (a) through (d).<sup>1810</sup> Although the Committee guidelines do not provide any legal interpretation or modification to the SPS Agreement itself, they may assist in our understanding of the obligations on Members.<sup>1811</sup>

### 7.8.2.3.3 Annex B(6)

7.1431. Where urgent problems of health protection arise or threaten to arise, a Member may omit the steps described in Annex B(5) in respect of proposed measures. Annex B(6) imposes three additional conditions that must be met for a Member to take advantage of this exceptional approach, namely (a) to notify immediately other Members, through the Secretariat, of that particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s); (b) to provide, upon request, copies of the regulation to other Members; and (c) to allow other Members to make comments in writing, and to discuss these comments upon request and take the comments and

<sup>1806</sup> Panel Report, *India – Agricultural Products*, para. 7.779. That panel reached that conclusion based on the Appellate Body's interpretation of the term "substantially the same" as used in Article XXIV:8(a)(ii) of the GATT 1994. Appellate Body Report, *Turkey – Textiles*, para. 50.

<sup>1807</sup> Panel Report, *India – Agricultural Products*, para. 7.780.

<sup>1808</sup> Panel Report, *India – Agricultural Products*, para. 7.773.

<sup>1809</sup> G/SPS/7/Rev.3, paras. 8-10.

<sup>1810</sup> Panel Report, *India – Agricultural Products*, para. 7.782.

<sup>1811</sup> G/SPS/7/Rev.3, para. 3.

the results of the discussions into account. These conditions, including the condition in the *chapeau* are cumulative, such that all four conditions must be met before the provisions Annex B(6) are triggered.<sup>1812</sup>

#### 7.8.2.3.4 Order of analysis

7.1432. The European Union has raised claims under Article 7 of the SPS Agreement in connection with Annex B(1), B(2), B(5) and B(6) of the SPS Agreement. In determining the order in which we will examine those claims, we take account of the relationship between Article 7 and Annex B of the SPS Agreement.

7.1433. In light of the considerations outlined above in paragraph 7.1416 and the circumstances of this dispute, the Panel will begin by examining the threshold question of whether the measures challenged under Article 7 and Annex B fall within the scope of these provisions, deriving guidance from the text and footnote of Annex B(1). Depending on the outcome of our analysis under Annex B(1) the Panel may then address the claims under Annex B(2), Annex B(6), and Annex B(5). The Panel turns to examine these elements in respect of the bans on the imports of the products at issue from Lithuania and the EU-wide ban.

#### 7.8.2.3.5 Whether the challenged measures fall within the scope of Article 7 and Annex B

7.1434. It is uncontested that the measures regarding Lithuania have been adopted. We recall that the bans on the imports of the products at issue from Lithuania are maintained through instructions from FSVPS to the heads of territorial departments. The Panel found that those measures constitute SPS measures that have been applied as of 25 January and 27 June 2014, respectively.<sup>1813</sup> The Panel also found that the EU-wide ban is a measure attributable to the Russian Federation, adopted as of 29 January 2014.<sup>1814</sup>

7.1435. The term "SPS regulations" is defined in the footnote to Annex B(1) as "[SPS] measures such as laws, decrees, or ordinances which are applicable generally". The Appellate Body has clarified that the term "SPS regulation" includes "laws, decrees or ordinances", as well as other instruments which are "applicable generally" and are "similar in character" to the instruments explicitly referred to in the illustrative list of the footnote to Annex B(1).<sup>1815</sup>

7.1436. We are confronted with the issue whether the measures at issue here, which relate to specific actions in the aftermath of outbreaks of ASF taken within the context of a more general legislative and regulatory framework<sup>1816</sup>, qualify as "laws, decrees or ordinances" or, at the very least, legal instruments of general application, within the terms of the footnote to Annex B(1). Russia's requirement that products come from areas that have been free of ASF for at least three years has been in existence at least since 2006, when this requirement was reflected in the text of the bilaterally-agreed veterinary certificate. This requirement by Russia has not been changed. What has changed is the ASF situation within the European Union, and in particular within the four affected EU member States.

7.1437. We have carefully examined the arguments of the parties in respect to whether this change in the application of an existing requirement is subject to notification. In particular, we have scrutinized the European Union's argumentation before us. We note that the European Union has focused its arguments exclusively on the timeliness of the notification and publication of these actions.<sup>1817</sup> We have come to the conclusion that the European Union has failed to establish a *prima facie* case that the measures at issue here qualify as generally applicable laws, decrees or ordinances that would fall within the scope of Article 7 and Annex B(1) of the SPS Agreement.

<sup>1812</sup> Panel Report, *India – Agricultural Products*, para. 7.762.

<sup>1813</sup> See para. 7.170 above.

<sup>1814</sup> See para. 7.84 above.

<sup>1815</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 105. See Panel Report, *India – Agricultural Products*, para. 7.738.

<sup>1816</sup> See Customs Union Decision No. 317 (Exhibit RUS-25).

<sup>1817</sup> European Union's first written submission, paras. 351-357; and second written submission, paras. 190-193.

Having reached this conclusion, it is not necessary for us to proceed any further with our examination of the European Union's claims under Annex B.

7.1438. In the alternative, the Panel considers it appropriate to exercise judicial economy on the claims by the European Union under Annex B. This is so as the Panel considers that findings on these elements of the claims are not necessary in order to enable the DSB to make sufficiently precise recommendations and rulings as to allow for prompt compliance with those recommendations and rulings "in order to ensure effective resolution" of the dispute.<sup>1818</sup> The measures at issue are now well known to the European Union and no action by Russia at this stage would increase the transparency of these measures, in a timely manner, to the benefit of the European Union or other WTO Members.

### 7.8.3 Summary of conclusions in respect of the challenged measures

7.1439. Based on the foregoing, the Panel finds that the European Union has failed to establish a *prima facie* case that the measures at issue fall within the scope of Article 7 and Annex B. In the alternative, the Panel exercises judicial economy in respect of these claims of the European Union.

## 8 CONCLUSIONS AND RECOMMENDATIONS

8.1. As described in greater detail above, the Panel *finds* that:

- 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's territory, except for Sardinia, has to be ASF free 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 results 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.
- b. There is no limitation in Russia's Protocol of Accession to the Panel's assessment of the merits of the European Union's claims brought in respect of the EU-wide ban.
- c. The import restrictions on the products at issue from Estonia and Latvia are within the Panel's terms of reference.
- d. In respect of the European Union's claims regarding the EU-wide ban, pursuant to the SPS Agreement:
  - i. the EU-wide ban is an SPS measure within the meaning of Annex A(1) of the SPS Agreement;
  - ii. the EU-wide ban is not based on the Terrestrial Code and is in consequence inconsistent with Russia's obligation to base its SPS measures on international standards, pursuant to Article 3.1 of the SPS Agreement;
  - iii. 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;
  - iv. 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 territory, outside Estonia, Latvia, Lithuania, and Poland, which are free of ASF and are likely to remain so;

<sup>1818</sup> Appellate Body Report, *Australia – Salmon*, para. 223.

- v. Russia did not adapt the EU-wide ban to the SPS characteristics related to ASF of 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;
  - vi. Russia's process of consideration of the European Union's request for recognition of the ASF-free areas within the European Union falls within the scope of Article 8 and Annex C(1) of the SPS Agreement. Russia formulated information requirements, in respect of the EU-wide ban, that were not limited to what is necessary for the procedure at issue, thus breaching Annex C(1)(c). In addition, Russia undertook and completed the procedure at issue with undue delay, thus rendering the procedure at issue inconsistent with Annex C(1)(a). Consequently the procedure at issue is inconsistent with Article 8 of the SPS Agreement;
  - vii. there was sufficient scientific evidence for Russia to conduct a risk assessment of the ASF situation in the non-affected EU member States, as appropriate to the circumstances. Moreover, Russia did not provisionally adopt the measure on the basis of available pertinent information, did not seek to obtain the additional information necessary for a more objective assessment of risk, and did not review the EU-wide ban within a reasonable period of time. Therefore, the EU-wide ban does not fall within the scope of Article 5.7 and the qualified exemption to the obligations in Articles 5.1, 5.2 and 2.2 of the SPS Agreement is not available to Russia. Moreover, Russia did not base the EU-wide ban on a risk assessment within the meaning of paragraph 4 of Annex A of the SPS Agreement, thus breaching Articles 5.1 and 5.2; and Russia has not rebutted the presumption of inconsistency that our findings raised in respect of Article 2.2 therefore the EU-wide ban is also inconsistent with Article 2.2;
  - viii. the EU-wide ban is inconsistent with Article 5.3 of the SPS Agreement, because by not basing that measure on a risk assessment in circumstances in which Article 5.7 is not applicable, Russia could have not taken into account the relevant economic factors listed in Article 5.3 when assessing the risks of entry and spread of ASF in accordance with Article 5.1 and paragraph 4 of Annex A of the SPS Agreement;
  - ix. the EU-wide ban is inconsistent with Article 5.6 of the SPS Agreement, with respect to non-treated products covered by Chapter 15.1 of the Terrestrial Code, because it is significantly more trade restrictive than required to achieve Russia's ALOP. In light of our findings under Article 5.6 and the arguments and evidence raised by Russia in order to rebut the presumption of inconsistency with Article 2.2 raised by a finding of inconsistency of the EU-wide ban with Article 5.6, the EU-wide ban is inconsistent with Article 2.2 of the SPS Agreement because it is applied beyond the extent necessary to protect animal life or health.
- e. In respect of the European Union's claims regarding the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, pursuant to the SPS Agreement:
- i. the import restrictions on the products at issue from Estonia, Latvia, Lithuania, and Poland are SPS measures within the meaning of Annex A(1) of the SPS Agreement;
  - ii. the import bans on the products at issue from Estonia, Latvia, Lithuania, and Poland do not conform to the relevant international standards contained in the Terrestrial Code, and thus are inconsistent with Article 3.2 of the SPS Agreement. Therefore, Russia is not entitled to benefit from the presumption of consistency of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland with the other relevant provisions of the SPS Agreement and of the GATT 1994;
  - iii. the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, as applicable to treated products, are not "based on" the relevant international standards, as articulated in Articles 15.1.14-15.1.16 of the Terrestrial



Code; and are therefore, to the extent applicable to treated products, inconsistent with Article 3.1 of the SPS Agreement;

- iv. the bans on the imports of the products at issue from Estonia, Lithuania, and Poland, as applicable to non-treated products, 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 applicable to non-treated products, inconsistent with Article 3.1 of the SPS Agreement;
- v. the ban on the imports of the products at issue from Latvia, as applicable to non-treated products, 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 applicable to non-treated products, consistent with Article 3.1 of the SPS Agreement;
- vi. 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;
- vii. at least as at 11 September 2014, the European Union 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;
- viii. at least as at 11 September 2014, the European Union failed to provide to Russia the necessary evidence to objectively demonstrate, pursuant to Article 6.3 of the SPS Agreement, that there are areas within Latvia that are free of ASF *and are likely to remain so*;
- ix. 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;
- x. Russia's process of consideration of the European Union's request for recognition of ASF-free areas within the European Union including the four affected EU member States falls within the scope of Article 8 and Annex C(1) of the SPS Agreement. Russia formulated, in respect of the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, information requirements that were not limited to what is necessary for the procedure at issue, thus breaching Annex C(1)(c). Russia undertook and completed the procedure at issue with undue delay, thus rendering the procedure at issue inconsistent with Annex C(1)(a). Consequently the procedure at issue is inconsistent with Article 8 of the SPS Agreement;
- xi. there was sufficient scientific evidence for Russia to conduct a risk assessment of the ASF situation in the affected EU member States, as appropriate to the circumstances. Moreover, Russia provisionally adopted the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland, on the basis of available pertinent information, except with respect to those measures as applicable to the treated products at issue. In addition, Russia did not seek to obtain the additional information necessary for a more objective assessment of risk, and did not review the bans on the imports of the products at issue from Estonia, Latvia, Lithuania, and Poland within a reasonable period of time. Therefore, the bans on the affected EU member States do not fall within the scope of Article 5.7 and the qualified exemption

to the obligations in Articles 5.1, 5.2 and 2.2 of the SPS Agreement is not available to Russia in respect of these measures. Furthermore, Russia did not base the bans on the affected EU member States on a risk assessment within the meaning of paragraph 4 of Annex A of the SPS Agreement, thus breaching Articles 5.1 and 5.2. Russia has not rebutted the presumption of inconsistency that our findings raised in respect of Article 2.2, therefore the bans on the affected EU member States are also inconsistent with Article 2.2;

- xii. the bans on the products at issue from Estonia, Latvia, Lithuania, and Poland are inconsistent with Article 5.3 of the SPS Agreement, because by not basing those measures on a risk assessment in circumstances in which Article 5.7 is not applicable, Russia could have not taken into account the relevant economic factors listed in Article 5.3 when assessing the risks of entry and spread of ASF in accordance with Article 5.1 and paragraph 4 of Annex A of the SPS Agreement;
  - xiii. the bans on the imports from Estonia, Latvia, Lithuania, and Poland, as applicable to treated products, are inconsistent with Article 5.6 of the SPS Agreement, with respect to treated products covered by Chapter 15.1 of the Terrestrial Code, because they are significantly more trade restrictive than required to achieve Russia's ALOP. In light of our findings under Article 5.6 and the lack of arguments or evidence raised by the Russian Federation in order to rebut the presumption of inconsistency with Article 2.2 raised by a finding of breach of Article 5.6, we find that the bans on the imports of the products at issue, as applicable to treated products, from Estonia, Latvia, Lithuania, and Poland, are inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect animal life or health.
  - xiv. the bans on the imports of the products at issue from Estonia, Lithuania, and Poland, as applicable to non-treated products, are inconsistent with Article 5.6 of the SPS Agreement, with respect to non-treated products covered by Articles 15.1.5, 15.1.8, 15.1.10, 15.1.12, and 15.1.13 of the Terrestrial Code, because they are significantly more trade restrictive than required to achieve Russia's ALOP. In light of our findings under Article 5.6 and the arguments and evidence raised by Russia in order to rebut the presumption of inconsistency with Article 2.2 raised by a finding of breach of Article 5.6, we find that the bans on the imports of the products at issue, as applicable to non-treated products, from Estonia, Lithuania, and Poland, are inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect animal life or health.
- f. In respect of the European Union's claims pursuant to Article 2.3 of the SPS Agreement with respect to the measures at issue:
- i. Russia's measures at issue are 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. We also find that Russia's ASF measures are inconsistent with Article 2.3, second sentence, because they are applied in a manner which constitutes a disguised restriction on international trade.

8.2. Having found that Russia's ASF measures are inconsistent with Article 2.3 of the SPS Agreement, the Panel *declines to rule* on the European Union's claim under Article 5.5 of the SPS Agreement.

8.3. The Panel also *declines to rule* on the European Union's claims in respect of the ban on the imports of the products at issue from Latvia, as applicable to non-treated products, pursuant to Articles 5.6 and 2.2 of the SPS Agreement, because the European Union failed to make a *prima facie* case that the alternative identified by the European Union in respect of non-treated products is significantly less restrictive to trade than this measure.

8.4. The Panel also *declines to rule* on the European Union's claims in respect of the measures at issue pursuant to Article 7 and Annex B of the SPS Agreement, because the European Union has

failed to establish a *prima facie* case that the measures at issue fall within the scope of those provisions, thus failing to make a *prima facie* case of inconsistency thereof.

8.5. The Panel also *declines to rule* on the European Union's claims in respect of the measures at issue pursuant to Annex C(1)(b) of the SPS Agreement because the European Union failed to make a *prima facie* case of inconsistency thereof.

8.6. The Panel also *declines to rule* on the European Union's claims in respect of Russia not taking into account the relevant economic factors listed in Article 5.3 when determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection in respect of ASF, because the European Union failed to make a *prima facie* case of inconsistency thereof.

8.7. The Panel also *declines to rule* on the European Union's claims in respect of Russia not taking into account the objective of minimizing negative trade effects when determining the appropriate level of sanitary and phytosanitary protection, because the Panel finds that Article 5.4 does not impose a positive obligation on WTO Members.

8.8. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the specified provisions of the SPS Agreement, they have nullified or impaired benefits accruing to European Union under that agreement.

8.9. Pursuant to Article 19.1 of the DSU, having found that Russia acted inconsistently with its obligations under Articles 3.1, 3.2, 5.1, 5.2, 2.2, 5.3, 5.6, 6.1, and 8 as well as Annex C(1)(a) and C(1)(c) of the SPS Agreement, we recommend that the DSB request Russia to bring its measures into conformity with its obligations under the SPS Agreement.

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## 9 APPENDIX 1 CHRONOLOGY OF EXCHANGES OF INFORMATION BETWEEN THE EUROPEAN UNION AND RUSSIA FROM 24 JANUARY 2014

9.1. On 24 January 2014, DG SANCO sent a fax to Russia's delegation in Brussels, reporting on two outbreaks in wild boar in Lithuania, in Salcininkai and Varena regions, at the border with Belarus. Attached to the fax was the report of the director of Lithuania's State Food and Veterinary Service. This report included a detailed indication of where the outbreaks had taken place, the date on which the reported cases were found to be ASF positive (22 January 2014), as well as an indication of surveillance and control measures that were put in place.<sup>1819</sup>

9.2. On 27 January 2014, DG SANCO sent a fax to Russia's delegation in Brussels with the draft Commission Implementing Decision with the areas in Lithuania that should be considered infected.<sup>1820</sup> This draft was adopted on 27 January 2014 as Commission Implementing Decision No. 2014/43/EU.<sup>1821</sup> On 30 January 2014, DG SANCO sent this Commission Implementing Decision to Russia's delegation in Brussels.<sup>1822</sup> On the same day, DG SANCO sent a letter to the head (Mr Dankvert) of FSVPS referring to the fruitful conversation Mr Miko had with Mr Dankvert that day, and indicating that it is the European Union's understanding following that conversation that the import restrictions introduced by Russia due to ASF apply only to Lithuania (in addition to those that already apply to Sardinia), and indicated the points that could still be certified.<sup>1823</sup>

9.3. On 29 January 2014, DG SANCO sent a letter to the head of FSVPS (Mr Dankvert) referring to the certification of live pigs and their products in relation to the ASF outbreaks in Lithuania. In this letter, it was stated that the European Union has followed all the provisions of the 2004 and 2006 Memoranda having notified immediately the two cases of ASF in Lithuania. The letter further noted that the European Union had been informing Russia on a daily basis about all the control and prevention measures, surveillance activities and data which have been applied. The letter also referred to the invitation extended to Russian and Belarusian experts to join the emergency teams set up. Attached to the letter was the most recent data on ASF surveillance carried out in the EU member States at risk (Estonia, Latvia, Lithuania, and Poland). This included data on the testing undertaken in 2013 and in the first months of 2014 in these EU member States. In addition, the letter requested an additional attestation to the veterinary certificates of pork meat and raw meat preparations, piglets for fattening, pigs for breeding, and pigs for slaughter, in order to adapt the principles of regionalization to the ASF situation in the European Union.<sup>1824</sup>

9.4. On 29 January 2014, FSVPS sent DG SANCO a letter indicating, in respect of the information necessary for the acceptance of regionalization in the European Union, that DG SANCO should provide FSVPS "with the exhaustive data (items 5, 6, 7, 8, 9 and 10 [of the 2006 Memorandum]) as well as with the provisions foreseen by recommendations of the OIE Code of Terrestrial Animals, - grounded proposals on regionalization and zoning of the EU territory with regard to the ASF taking into consideration the risk assessment carried out by the EU."<sup>1825</sup> The items of the 2006 Memorandum referred to in this letter include: zones established (item 5); control and prevention measures, including surveillance programmes (item 6); epidemiological investigations and surveillance (item 7); reassessment of status of zones because of outbreaks (item 8); control measures taken and changes in the situation (item 9); and set up of a joint permanent working group.<sup>1826</sup>

<sup>1819</sup> Communication of 24 January 2014: African swine fever (ASF) in two wild boars in Lithuania, in Salcininkai and Varena Regions, at the border with Belarus (Exhibit EU-132).

<sup>1820</sup> Communication of 27 January 2014: African swine fever (ASF) in Lithuania. Interim protective measures (Exhibit EU-133).

<sup>1821</sup> Commission Implementing Decision 2014/43/EU of 27 January 2014 concerning certain interim protective measures relating to African swine fever in Lithuania, OJ L 26, p.44 (Exhibit EU-33).

<sup>1822</sup> Communication of 30 January 2014: African swine fever (ASF) in Lithuania. Interim protective measures (adoption of implementing decision) (Exhibit EU-134).

<sup>1823</sup> Exhibit EU-172 and Exhibit RUS-224.

<sup>1824</sup> European Union's letter to Russia of 29 January 2014, ARES(2014)209377, SANCO G7/RF/mh(2014)219959 (Exhibit EU-62).

<sup>1825</sup> Russia's letter to the European Union of 29 January 2014, FS-SA-8/1277 (Exhibit EU-14).

<sup>1826</sup> European Union-Russia Memorandum of 4 April 2006 concerning principles of zoning and compartmentalization in the veterinary field (Exhibit EU-61).

9.5. On 31 January 2014, DG SANCO sent a letter to the head of FSVPS with a request to accept the sanitary status of EU member States and their regions under the principle of regionalization in relation to the ASF outbreaks in Lithuania. In this letter DG SANCO recalls what had happened from 22 January 2014 up to that point, refers to the European Union's legal framework, as well as the effectiveness of the European Union's measures to control and eradicate ASF. The letter also refers to the participation of experts from Russia in the emergency veterinary team set up in Lithuania. DG SANCO also makes a formal request that competent authorities in Russia "accept the ASF-free sanitary status of EU member States." To that end, DG SANCO requests amending the wording in the veterinary certificates for pork meat and raw meat preparations, piglets for fattening, pigs for breeding, and pigs for slaughter, in the manner suggested in the annexes attached to that letter.<sup>1827</sup>

9.6. On 5 February 2014, FSVPS sent a letter to DG SANCO in response to the letter from DG SANCO dated 31 January 2014. Attached to this letter, FSVPS sent a preliminary list of questions<sup>1828</sup> that the European Union should provide to understand the situation objectively for further decisions on whether ASF regionalization was possible.<sup>1829</sup> The list of questions was divided in respect of Lithuania, the adjacent countries located in the obvious risk zone (Latvia, Estonia, and Poland), and other EU member States. However, some of the same information was requested for the three groups. These questions are listed in Table A1 below.

**Table A1 List of information requested through FSVPS's letter of 5 February 2014**

Countries	Information required
All EU member States	<ul style="list-style-type: none"> <li>- Detailed action plan of emergency response at regional and national level in case of an ASF outbreak;</li> <li>- Information about wild boar population with detailed density by region;</li> <li>- Swine population in the industry sector and personal subsidiary farming with detailed density by region;</li> <li>- The number of swine and wild boars monitoring researches rolled out during 2013-2014, detailed by region;</li> <li>- Detailed information about pig farms, pork processing factories and semi-finished products, graded by production volume;</li> <li>- Regulatory acts, which provide for and specify monitoring procedures and epidemic investigations in cases of suspicion/ mortality/ disease (differential diagnostics)/ disposal of animals susceptible to ASF – swine and wild boars;</li> <li>-Regulatory acts, providing for wild boar hunting and further utilization of killed animals (for food, as trophies);</li> </ul>
Lithuania	<ul style="list-style-type: none"> <li>- Regulatory acts, providing for wild boar hunting and further utilization of killed animals (for food, as trophies): regulations on export of wild boar meat and trophies, number of killed animals and exported meat and trophies during 2013-2014;</li> <li>- Detailed information about foreign hunters, who entered the country to hunt the wild boar during 2013-2014 detailed by region (including information about the number and the country of origin);</li> <li>- Detailed information about pig farms and meat processing factories attested to ship animals and products to the territory of the CU, including information about the suppliers (number, country, region) and production volumes, detailed by region;</li> <li>- Rough estimation of enterprises attested to ship animal products to the territory of the CU, by level of zoosanitary condition, equivalent to the previously conducted evaluation of the Russian and Belarusian enterprises, detailed by regions and graded by production volumes.</li> </ul>
Latvia, Estonia, and Poland and Other EU member States	<ul style="list-style-type: none"> <li>- Regulatory acts, providing for wild boar hunting and further utilization of killed animals (for food, as trophies): regulations on export of wild boar meat and trophies, number of killed animals and exported meat and trophies during 2013-2014 (for regions adjacent to the infected zone);</li> <li>- Information about measures taken/being taken to prevent introduction of the etiologic agent to the swine industry sector/personal subsidiary farming sector/wild boar</li> </ul>

<sup>1827</sup> European Union's letter to Russia of 31 January 2014, ARES(2014)226547, SANCO G7/JP/mh(2014)241111 (Exhibit EU-64).

<sup>1828</sup> Through a letter dated 18 February 2014, FSVPS seems to acknowledge that this list of preliminary questions, sent on 5 February 2014, is the basis on which Russia is willing to pursue an "objective evaluation of the epizootic situation in Lithuania and neighbouring countries in the zone of clear risk (Latvia, Estonia, and Poland) and other EU Member States". The letter further indicates that FSVPS is "looking forward to receive the information requested by us". See Letter of 18 February 2015 from Russia to the European Union (Exhibit EU-167).

<sup>1829</sup> Russia's letter to the European Union of 5 February 2014, FS-SD 8/1640 (Exhibit EU-84).

Countries	Information required
	population; - Description of measures taken/being taken at the territories of the EU member states, which are in the zone of the obvious ASF risk (security/ border check points); - Description of the disease and sanitation inspection process (indicating the regulatory acts) and pre-export certification at all the stages of production cycle; - Description of measures taken/being taken to control movement of live animals and pig farming products (swine products in the case of other EU member States); - Detailed information about foreign hunters, who entered the country to hunt the wild boar during 2013-2014 (including information about the number and the country of origin), detailed by country and region; - Detailed information about pig farms and meat-processing factories attested to ship animals and products to the territory of the CU, including information about the suppliers (number, country, region) and production volumes, detailed by country and region; - Rough estimation of enterprises attested to ship animal products to the territory of the CU, by level of zoosanitary condition, equivalent to the previously conducted evaluation of the Russian and Belarusian enterprises, detailed by regions and graded by production volume.

9.7. On 6 February 2014, DG SANCO sent a fax to Russia's delegation in Brussels with the draft Commission Implementing Decision and two presentations regarding the ASF situation in Lithuania, as well as the control and surveillance mechanisms put in place.<sup>1830</sup>

9.8. On 6 February 2014, DG SANCO sent a letter to the deputy head of FSVPS (Dr Nepoklonov), requesting the acceptance of declarations from official veterinarians in the EU member States attesting that certain products at issue had undergone certain forms of treatment.<sup>1831</sup>

9.9. On 7 February 2014, DG SANCO sent a letter to the head of FSVPS with additional information relevant to the preparedness and surveillance of the disease in the European Union. Of particular interest for this part of our assessment, the European Union provided information on "the structure of the pig sector in the whole of the EU as well as an overall assessment by the Commission of the contingency plans in place in the EU Member States".<sup>1832</sup> The communication further noted that "almost all of this information has been and still is publicly accessible including to your services". This letter is among the communications that the European Union identified as addressing Russia's information requests.<sup>1833</sup>

9.10. DG SANCO attached four annexes to the above-mentioned letter of 7 February 2014. In response to a question from the Panel, the European Union clarified and identified the pieces of information it has submitted as part of the record in this dispute and the corresponding exhibit number.<sup>1834</sup> We will therefore refer to the information contained in those annexes through the exhibit number to which they correspond, as provided by the European Union. Table A2 below provides an overview of the information that the European Union annexed to its communication dated 7 February 2014.

**Table A2 Overview of Evidence attached by the European Union**

Category of information	Piece of information
Legislation on ASF	EU legislation applicable to all EU member States - Council Directive 2002/60/EC, laying down specific provisions for the control of ASF (Exhibit EU-31) - Commission Decision 2003/422/EC, approving an ASF diagnostic manual (Exhibit EU-32)
EU implementing decisions adopted	- Commission Decision 2014/43/EU, concerning certain interim protective measures relating to ASF in Lithuania (Exhibit EU-33) - Commission Decision (draft) concerning certain protective measures relating to ASF in Lithuania (Exhibit EU-135)

<sup>1830</sup> Exhibit EU-135. The first of these presentations is the same as that contained in Exhibit EU-66 referred to in Table A2 below.

<sup>1831</sup> Letter from DG SANCO, G7/PD/(2014)312766 dated February 6, 2014 (Exhibit RUS-185).

<sup>1832</sup> European Union's letter to Russia of 7 February 2014, ARES(2014)304571, SANCO/G7/DP/tb(2014)328578 (Exhibit EU-65), p. 1.

<sup>1833</sup> European Union's first written submission, para. 221.

<sup>1834</sup> European Union's response to Panel question No. 322, to which the European Union exhibited Exhibit EU-214, indicating precisely to which exhibit each piece of information annexed to the letter of 7 February 2014 corresponds.

Category of information	Piece of information
<p>following the detected outbreaks in Lithuania</p> <p>National legislation in Lithuania adopted following the detected outbreaks in Lithuania</p>	<p>- Order of Lithuania's Director of State Food and Veterinary Service on the slaughter of pigs as part of the measures to prevent the spread of ASF –No. B1-60 of 30 January 2014, (Exhibit EU-72)</p> <p>- Order of Lithuania's Director of State Food and Veterinary Service concerning order No. B1-31 of 20 January 2014 on measures to prevent the spread of ASF - No. B1-48 of 24 January 2014 (Exhibit EU-70)</p> <p>- Order of Lithuania's Director of State Food and Veterinary Service on measures to control ASF –No. B1-49 of 24 January 2014, (Exhibit EU-71)</p>
<p>Pig sector structure in the European Union</p>	<p>Spreadsheet containing data on the number of farms and heads by agricultural size of farm and size of pig herd for 27 EU member States, between 2007 and 2010 (Exhibit EU-215)</p> <p>Data on the pig industry (pig production (Exhibit EU-245)) and pig population at EU level of all EU member States in 2011, 2012 and 2013 (Exhibit EU-244)</p> <p>Updated outlook on the pig sector (Presentation of the Committee for the Common Organization of the Agricultural Market of 23 January 2014 (Exhibit EU-243))</p>
<p>Detailed information on the pig sector in Lithuania</p>	<p>The letter indicates that "there are 18,526 pig farms with 657,288 pigs in total in Lithuania. In the infected area (six districts) there are 369 pig keepers with 13732 pigs (12,288 pigs kept in 5 pig farms and 1,444 pigs kept in back yard farms)." The letter also states that the list of establishments authorised for export to Russia is available to Russian authorities (as evidenced in the dedicated website of FSVPS (Exhibit EU-216)).</p>
<p>Emergency response in case ASF in the EU member States/Contingency Plans</p> <p>Information relevant to a recent audit of the Lithuanian contingency planning system</p>	<p>Guidelines for preparing contingency plans for epidemic disease – Document SANCO/10101/2002 (Exhibit EU-73)</p> <p>Presentation on Contingency Planning as part of the high level training (Better Training For safer Food) by Fred Landeg CBE BVetMed MRCVS (Exhibit EU-125)</p> <p>Report of audit of contingency plans for epizootic diseases and the eradication programme for rabies in Lithuania, carried out from 20 to 24 July 2009 (Exhibit EU-78)</p> <p>Report of audit of actions taken during recent outbreaks of classical swine fever and of contingency planning of epizootic disease in Lithuania, carried out from 27 February to 2 March 2012 (Exhibit EU-79)</p> <p>Report of audit of the implementation of contingency plans in relation to animal health, including provisions on the protection of animals during depopulation for disease control in Latvia, carried out from 4 to 8 March 2013 (Exhibit EU-80)</p> <p>Report of audit of contingency plans for epizootic diseases and the eradication programme for rabies in Latvia, carried out from 15 to 19 June 2009 (Exhibit EU-81)</p> <p>Report of audit of the implementation of contingency plans in relation to animal health, including provisions on the protection of animals during depopulation for disease control in Estonia, carried out from 15 to 19 April 2013 (Exhibit EU-82)</p> <p>Report of audit of disease contingency plans for epizootic diseases (in particular foot and mouth disease and classical swine fever) and surveillance activities for bluetongue in Poland, carried out from 7 to 16 April 2008 (Exhibit EU-83)</p> <p>Report of audit of actions taken during recent outbreaks of classical swine fever and of contingency planning of epizootic disease in Lithuania, carried out from 27 February to 2 March 2012 (Exhibit EU-79) – Available in the European Union's dedicated website (Exhibit EU-126)</p> <p>Contingency Plan for classical swine fever and ASF of Lithuania, approved by Order No. B1-831 of the Director of the State Food and Veterinary Service of 30 December 2011 (Exhibit EU-74)</p> <p>Annex with response of competent authorities of Lithuania to report of an audit carried out from 27 February to 2 March 2012 of actions taken during recent outbreaks of classical swine fever and of contingency planning of epizootic disease in Lithuania, updated on 9 October 2012 (Exhibit EU-234).</p> <p>Annex with response of competent authorities of Lithuania to</p>

Category of information	Piece of information	
Examples of audits in other EU member States		report of an audit carried out from 27 February to 2 March 2012 of actions taken during recent outbreaks of classical swine fever and of contingency planning of epizootic disease in Lithuania, updated on 14 May 2012 (Exhibit EU-235).
		Screen shots with the available information in respect of the audit reports of Finland, Portugal, the Netherlands, and Estonia (Exhibit EU-217) The website also provides access to similar audit reports to other EU member States.
		Report of audit of the implementation of contingency plans in relation to animal health, including provisions on the protection of animals during depopulation for disease control in Finland, carried out from 3 to 7 September 2012 (Exhibit EU-218)
		Annex with general comments of competent authorities of Finland to the draft audit report DG(SANCO)/2012-6401, carried out from 3 to 7 September 2012, received on 17 January 2013 (Exhibit EU-219)
		Annex with response of competent authorities of Finland to recommendations of audit report DG(SANCO)/2012-6401-MR, carried out from 3 to 7 September 2012, received on 17 January 2013 (Exhibit EU-220)
		Annex 2 summarizing legal requirements related to contingency planning of epizootic disease, including ASF (Exhibit EU-221)
		Report of audit of the implementation of contingency plans in relation to animal health, including provisions on the protection of animals during depopulation for disease control in Portugal, carried out from 24 to 28 September 2012 (Exhibit EU-222)
		General comments of competent authorities of Portugal to the draft audit report DG(SANCO)/2012-6402, carried out from 24 to 28 September 2012, received on 16 January 2013 (Exhibit EU-223)
		Annex with response of competent authorities of Portugal to recommendations of audit report DG(SANCO)/2012-6402-MR, carried out from 24 to 28 September 2012, received on 4 January 2013 (Exhibit EU-224)
		Annex 2 summarizing legal requirements related to contingency planning of epizootic disease, including ASF (Exhibit EU-225)
		Report of audit of the implementation of contingency plans in relation to animal health, including provisions on the protection of animals during depopulation for disease control in the Netherlands, carried out from 28 January to 6 February 2013 (Exhibit EU-226)
		Annex 2 summarizing legal requirements related to contingency planning of epizootic disease, including ASF (Exhibit EU-227)
		General comments of competent authorities of the Netherlands to the draft audit report DG(SANCO)/2013-6775, carried out from 28 January to 6 February 2013, received on 16 April 2013 (Exhibit EU-228)
		Response of competent authorities of the Netherlands to recommendations of the draft audit report DG(SANCO)/2013-6775, carried out from 28 January to 6 February 2013, received on 16 April 2013 (Exhibit EU-229)
		Corrigendum to the English version of the report of audit of the implementation of contingency plans in relation to animal health, including provisions on the protection of animals during depopulation for disease control in the Netherlands, carried out from 28 January to 6 February 2013 (Exhibit EU-230)
Report of audit of the implementation of contingency plans in relation to animal health, including provisions on the protection of animals during depopulation for disease control in Estonia, carried out from 15 to 19 April 2013 (Exhibit EU-231)		
General comments of competent authorities of Estonia to the		



Category of information	Piece of information
	draft audit report DG(SANCO)/2013-6781, carried out from 15 to 19 April 2013, received on 16 August 2013 (Exhibit EU-232) Response of competent authorities of Estonia to recommendations of audit report DG(SANCO)/2013-6781, carried out from 15 to 19 April 2013, received on 16 August 2013 (Exhibit EU-233)
Information on processing establishments	Presentation to the Working group on contingency planning and emergency preparedness made on 25-26 September 2013 (Exhibit EU-236) Information on all establishments in all EU member States (Example of the list in France (Exhibits EU-241 and 242)) – The letter provided a website with links to the information from all of the 28 EU member States
Emergency measures taken for the prevention and early detection of ASF	The letter provided a summary table with statistics on establishments in Lithuania, Latvia, Estonia, and Poland. Programme aimed at early detection of infection with ASFV and increasing knowledge about the risk of ASF in the territory of Poland approved for 2013 (Exhibit EU-237)
Additional information on ASF surveillance in Estonia, Latvia, Lithuania, and Poland	Veterinary Control Programme on ASF early detection in Lithuania and Belarus, approved for 2013 (Exhibit EU-238) Veterinary Control Programme on ASF early detection in Latvia in 2014, approved for 2013 (Exhibit EU-239) Program of additional veterinary supervision measures in connection with the outbreaks of African swine fever in Russia and Belorussia in 2014 in Estonia, approved for 2013 (Exhibit EU-240)
Additional information	Presentation to the Animal Food Chain and Health on 6 February 2014 by Lithuania's State Food and Veterinary Service (Exhibit EU-66) Presentation to the Animal Food Chain and Health on 7 February 2014 by Poland's General Veterinary Inspectorate (Exhibit EU-67) Presentation to the Animal Food Chain and Health on 7 February 2014 by Latvia's Veterinary Authority (Exhibit EU-68) Presentation to the Animal Food Chain and Health on 7 February 2014 by Estonia's Veterinary Food Board (Exhibit EU-69) EFSA Scientific Opinion on ASF published on 19 April 2010 (Exhibit EU-24)

9.11. On 12 February 2014, FSVPS sent a letter to DG SANCO in reply to the letter sent by DG SANCO to FSVPS on 6 February 2014. In this letter, FSVPS indicates its approval of the proposed annex to the veterinary certificate for finished food products containing raw material of animal origin, canned meat, sausages and other ready-to-eat meat products, and animal (porcine) origin raw material for the manufacture of pet food and fur-bearing animal feed.<sup>1835</sup>

9.12. On 17 February 2014, DG SANCO sent a fax to Russia's delegation in Brussels informing it of a wild boar infected with ASF in Poland, 900 meters from the border with Belarus in the Podlaskie Province. Attached to the fax was a letter from Poland's chief veterinary officer, indicating that all measures had been implemented according to Council Directive 2002/60/EC as well as with SANCO Guidelines on surveillance and control of ASF. The fax also attached a map with the approximate location of the place where the dead wild boar was found.<sup>1836</sup>

9.13. On 18 February 2014, DG SANCO sent a fax to Russia's delegation in Brussels forwarding Commission Implementing Decision 2014/93/EU of 14 February 2014<sup>1837</sup> concerning certain protective measures relating to ASF in Lithuania.<sup>1838</sup> On the same day DG SANCO sent another fax to Russia's delegation in Brussels forwarding a communication from Polish veterinary authorities indicating the area considered to be infected in accordance with Article 15 of Council Directive 2002/60/EC.<sup>1839</sup> Also on 18 February 2014, DG SANCO provided to Russia's delegation in Brussels, via fax, the draft Commission Implementing Decision concerning certain interim protective

<sup>1835</sup> Exhibit RUS-331.

<sup>1836</sup> Communication of 17 February 2014: African swine fever (ASF) confirmed in Poland in a wild boar found 900 meters from the border with Belarus (Exhibit EU-136).

<sup>1837</sup> Commission Implementing Decision 2014/93/EU of 14 February 2014 concerning certain protective measures relating to African swine fever in Lithuania, OJ L 46, p.20 (Exhibit EU-34).

<sup>1838</sup> Communication of 18 February 2014: African swine fever (ASF) in Lithuania (adoption of implementing decision) (Exhibit EU-137).

<sup>1839</sup> Communication of 18 February 2014: African swine fever (ASF) in Poland – Information on infected area (Exhibit EU-138).

measures relating to ASF in Poland.<sup>1840</sup> Finally, on the same day, the European Union informed Russia's delegation in Brussels that the draft Decision concerning interim protective measures had been adopted with the number C(2014)1179<sup>1841</sup> and attached a map with the areas covered by protective measures in Lithuania and Poland along the border with Belarus.<sup>1842</sup>

9.14. On 20 February 2014, DG SANCO sent a fax to Russia's delegation in Brussels forwarding Commission Implementing Decision 2014/100/EU of 18 February 2014 concerning certain protective measures relating to ASF in Poland.<sup>1843</sup> On the same day, DG SANCO sent a letter to the head of FSVPS indicating that "all the relevant information which should enable Russia to accept the regionalization of the EU as regards African swine fever were submitted" on 7 February 2014. The letter noted that on 8 February 2014 Mr Y. Nepoklonov acknowledged receipt of such communication. The letter also referred to the additional information that Russia's veterinary services were able to obtain in the meeting of 11 February 2014 in Vilnius.<sup>1844</sup>

9.15. On 26 February 2014, DG SANCO sent a fax to Russia's delegation in Brussels forwarding information submitted by the Polish General Veterinary Inspectorate regarding certain interim protective measures relating to ASF in Poland.<sup>1845</sup> On the same day, DG SANCO sent a letter to the head of FSVPS recalling the information sent to Russia up to that point, as well as a map illustrating the European Union's regionalization for ASF in Lithuania and Poland, and Commission Implementing Decisions 2014/93/EU of 14 February 2014 and 2014/100/EU of 18 February 2014 concerning certain protective measures relating to ASF in Lithuania and in Poland, respectively.<sup>1846</sup>

9.16. On 27 February 2014, FSVPS sent a letter to DG SANCO indicating that the European Union was holding expert consultations with bodies of the Customs Union and the Eurasian Economic Commission member states authorized in veterinary terms in respect of the amendment of the veterinary certificates agreed in 2006 and the implementation of zoning and regionalization measures in the European Union. The letter also indicated that a questionnaire had been submitted in order to build an unbiased picture for the subsequent decision on regionalization. The letter concluded indicating that following the expert consultation and reception of the answers to the questionnaire submitted, the authorized bodies of the Customs Union would consider further supplies of pigs and pork products from the EU member States to Russia.<sup>1847</sup>

9.17. On 3 March 2014, FSVPS sent a letter to DG SANCO referring to previous letters received from DG SANCO on 7, 20, 25 and 26 February 2014. The letter indicated that "[u]nfortunately the approval of conditions of regionalisation in the EU is hindered by the fact that Russian experts are still waiting to receive exhaustive information on anti-AFS [ASF] efforts undertaken by EU veterinary authorities to contain the disease (in the affected countries) and to prevent the introduction of AFSV [ASFV] into other neighbouring countries as well as other data for risk assessment, as specified in the question list" that was "provided in the letter of 05 February 2014". The letter also noted that so far, FSVPS had received reply to only 5 out of 37 questions. Moreover, the letter referred to the upcoming meeting in Vladimir and requested that the

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<sup>1840</sup> Communication of 18 February 2014: African swine fever (ASF) in Poland. Interim protective measures (Exhibit EU-139).

<sup>1841</sup> Commission Implementing Decision 2014/100/EU of 18 February 2014 concerning certain interim protective measures relating to African swine fever in Poland, OJ L 50, p.35 (Exhibit EU-35).

<sup>1842</sup> Communication of 18 February 2014: African swine fever (ASF) in Poland. Adoption of Interim protective measures (Exhibit EU-140).

<sup>1843</sup> Communication of 20 February 2014: African swine fever (ASF) in Poland (adoption of implementing decision) (Exhibit EU-141).

<sup>1844</sup> Letter of DG SANCO of 20 February 2014 (ref. SANCO/G7/PD/mh (2014) 450287 (Exhibit EU-175) and Letter from DG SANCO to the Russian Veterinary Service, SANCO/G7/PD/mh(2014) 450287, 20 February 2014 (Exhibit RUS-217).

<sup>1845</sup> Communication of 26 February 2014: African swine fever (ASF) in Poland. Measures put in place in the infected area (Exhibit EU-142).

<sup>1846</sup> Letter from DG SANCO to the Russian Veterinary Service, SANCO/G7/PD/mh(2014)542957, 26 February 2014 (Exhibit RUS-30).

<sup>1847</sup> Letter from the Russian Veterinary Service to the French Veterinary Service, 27 February 2014, ΦC-HB-8/2964 (Exhibit RUS-231).

European Union submit the required information concerning the items mentioned in the questions in the list prior to such meeting.<sup>1848</sup>

9.18. On 5 March 2014, DG SANCO sent a fax to Russia's delegation in Brussels forwarding the presentations made at the Standing Committee on the Food Chain and Animal Health on 4 March 2014 on the ASF situation in Lithuania and Poland, and in respect of the outcome of the mission of the Community Veterinary Emergency Team to Poland. The fax includes a link to the dedicated webpage where these presentations were available.<sup>1849</sup> On the same day, the European Union sent another fax to Russia's delegation in Brussels attaching a draft Commission Implementing Decision concerning certain protective measures relating to ASF in Poland.<sup>1850</sup>

9.19. On 6 March 2014, DG SANCO sent a letter to the head of FSVPS referring to logistical arrangements for a meeting scheduled to take place on 7 March 2014. The letter also included a table indicating the information that the European Union had provided to Russia in response to a letter of 5 February 2014.<sup>1851</sup>

9.20. Table A3 below provides an overview of the information provided by the European Union in the above mentioned letter of 6 March 2014.

**Table A3 Overview of information and explanations provided by 6 March 2014**

Category of information	Piece of information/Explanation
Detailed action plan of emergency response at regional and national level in case of African swine fever outbreak	<ul style="list-style-type: none"> <li>- Indicated that information on contingency plans, including audits from the Commission and measures improving the plans had been provided.</li> <li>- Noted that "the contingency plan of each country cannot be provided as they contain confidential information".</li> </ul>
Wild boar population with detailed density by country and region	<ul style="list-style-type: none"> <li>- Indicated that the reply was provided as regards Poland in the Polish presentation to the Standing Committee on the Food Chain and Animal Health on 4 March 2014.</li> <li>- Indicated that further information on the wild boar density in the European Union is available in FAO EMPRES Watch Vol. 28 of May 2013, page 8 (provided a website link to the document).</li> </ul>
Swine population in the industry sector and personal subsidiary farming with detailed density by country and region	<ul style="list-style-type: none"> <li>- Indicated that information on the structure of the pig sector in the EU has been already provided.</li> <li>- Indicated that further information on the density of pigs in low biosecurity holding in the European Union is available in FAO EMPRES Watch Vol. 28 of May 2013, page 8 (provided a website link to the document).</li> </ul>
The number of swine and wild boars monitoring investigations during 2013-2014, detailed by region	<ul style="list-style-type: none"> <li>- Indicated that reports on monitoring investigations in Estonia, Latvia, Lithuania, and Poland had been provided because they were the EU member States at risk.</li> <li>- Explained that active laboratory surveillance in other EU member States is not considered necessary given the limited movements of wild boars; and that any suspicion of ASF is compulsorily notifiable in all EU member States.</li> </ul>
Detailed information about pig farms, swine processing factories and semi-finished products, graded by production volume.	<ul style="list-style-type: none"> <li>- Explained that further detailed data, including per region, is publicly available on the EUROSTAT website (provided a dedicated webpage where such information could be accessed).</li> <li>- Provided an example of the data for each EU member State on pig holdings from such database on a pdf file entitled "Pig_sector".</li> </ul>
Regulatory acts, which provide for and specify monitoring procedures and epidemic investigations in cases of suspicion/ mortality/ disease (differential diagnostics)/ disposal of animals susceptible to ASF-	<ul style="list-style-type: none"> <li>- Explained that Council Directive 2002/60/EC and the diagnostics manual for ASF had been already provided.</li> </ul>

<sup>1848</sup> Letter from the Russian Veterinary Service to DG SANCO, FS-SD-8/3196, 3 March 2014 (Exhibit RUS-137).

<sup>1849</sup> Communication of 5 March 2014: African swine fever (ASF) in Lithuania and Poland – Presentations on the situation (Exhibit EU-143).

<sup>1850</sup> Communication of 5 March 2014: African swine fever (ASF) in Poland (Committee approval of implementing decision) (Exhibit EU-144).

<sup>1851</sup> European Union's letter to Russia of 6 March 2014, ARES(2014)601346, SANCO/G7/PD/mh/(2014)630598 (Exhibit EU-86).

Category of information	Piece of information/Explanation
swine and wild boars Regulatory acts, providing for wild boar hunting and further utilization of killed animals (for food, as trophies): regulations on export of wild boar meat and trophies, number of killed animals and exported meat and trophies during 2013- 2014 (for regions adjacent to the infected zone)	- Explained that the rules applicable to the affected zones in the European Union as regards hunting are included in the documents mentioned in the previous point. - Further explained that such information as regards unaffected areas of the European Union is not relevant for the purposes of approval of regionalization.
Information about measures taken/being taken to prevent introduction of the etiologic agent to the swine industry sector/ personal subsidiary farming sector/wild population	- Explained that the information is included in the plans that had already been made available (in respect of all EU member States except Lithuania).
Description of measures taken / being taken at the territories of the EU member states, which are in the zone of the obvious ASF risk (security/ border check points)	- Explained that the information is included in the plans that had already been made available (in respect of Poland, Latvia, and Estonia).
Description of the disease and sanitation inspection process (indicating the regulatory acts) and pre-export certification at all the stages of production cycle	- Explained that Regulation (EC) No. 882/2004 defines the official controls for the verification of compliance with the European Union animal health rules and is applicable to all the EU member States (provided a website link where the text of the regulation could be accessed).
Description of measures taken / being taken to control movement of live animals and pig farming products	- Explained that Council Directive 64/432/ECC defines the rules for the movement of bovines and pigs in the European Union (provided a website link where the text of the regulation could be accessed).
Detailed information about foreign hunters, who entered the country to hunt the wild boar during 2013-2014 (including information about the number and the country of origin), detailed by country and region	- Indicated that such information could not be given.
Detailed information about pig farms and meat processing factories attested to ship animals and products to the territory of the CU, including information about the suppliers (number, country, region) and production volumes, detailed by country and region	- Explained that information on the approved establishments for export is already available to Russia's authorities. - Further indicated that details on suppliers and production volumes cannot be dispatched.
Rough estimation of enterprises attested to ship animal products to the territory of the CU, by level of zoosanitary condition, equivalent to the previously conducted evaluation of the Russian and Belarusian enterprises, detailed by regions and graded by production volume.	- Explained that this information cannot be compiled easily, and lacks relevance for the purpose.

9.21. Also on 6 March 2014, DG SANCO sent a letter to the deputy head of FSVPS informing that a European Union Veterinary Emergency Team would visit Lithuania on 12-14 March 2014 in relation to the detection of ASF, and invited Russia to nominate an expert to join the mission team.<sup>1852</sup> Attached to the letter DG SANCO sent a draft "Working Document on EU preventive measures for ASF".<sup>1853</sup>

9.22. On 7 March 2014, experts from the European Union and Russia met in Vladimir. The representatives of Russia and the European Union produced a protocol of such meeting, recording the views of the parties expressed. The representatives of the European Union reported on the measures taken to localize and prevent further spread of ASF, and provided a map on which the zones affected by ASF are marked. The European Union's experts further observed the strengths of the measures in place. Russia's experts made some remarks on the European Union's measures. It is noteworthy that Russia's experts indicated, in respect of the questionnaire sent on 5 February 2014, that in "respond [sic] either outdated data on pig census from whole EU (until

<sup>1852</sup> Letter of 6 March 2014 from the European Union to Russia, ARES(2014)605187, SANCO G7/PD/mh (2014)640752 (Exhibit EU-87).

<sup>1853</sup> The final version of which was exhibited as Exhibit EU-88.

2010) while updated information had been provided for Poland and Lithuania or insufficient information was provided which does not allow to analyse the risks objectively." According to Russia's experts that is an underestimation of outgoing risks. The European Union's expert guaranteed that it would provide all non-confidential information requested by Russia as regards contingency plans.<sup>1854</sup>

9.23. On 10 March 2014, DG SANCO sent a letter to the head of FSVPS referring to the exchanges that took place in the course of the meeting of 7 March 2014 in Vladimir and seeking confirmation of the meeting in Madrid scheduled for 14 March 2014. The letter noted that during the meeting in Vladimir, "the European Commission has provided to your services all requested clarifications in relation to the EU situation and measures for ASF demonstrating the safety of trade from the unaffected areas of the EU."<sup>1855</sup>

9.24. On 12 March 2014, FSVPS sent a letter to DG SANCO indicating that the technical experts did not have time to discuss certain matters during the meeting in Vladimir, namely (i) remarks on the measures taken in Lithuania and Poland, which were made by the FGBU "VNIIZH" expert participating in the investigation of sources of distribution of ASF within the group of immediate response; (ii) availability of only situational response and lack of systematic approach by the European Union to avoid further distribution of ASFV; (iii) absence of any proof of non-existence of ASF in the territory of other EU member States; and (iv) absence of any proof of impossibility of getting meat of animals infected by ASFV in the production cycle of pork from other EU member States. The letter further confirmed the meeting in Madrid.<sup>1856</sup>

9.25. On 13 March 2014, FSVPS sent a letter to DG SANCO regarding certain incidents of "violations of veterinary rules" in connection with trade of certain products, supplied from Lithuanian refrigeration plants, subject to veterinary control and surveillance because they were produced in third countries or in the EU member States that do not have the right to export to the Customs Union. In this respect, FSVPS requested that DG SANCO provide them with information concerning "the EU enterprises which have been receiving pork products from Lithuanian and Polish establishments or plants since the outbreaks of" ASF in Lithuania and Poland.<sup>1857</sup>

9.26. On 13 March 2014, DG SANCO sent a letter to the head of FSVPS referring to the questions considered outstanding by Russia in respect of the information presented by the European Union during the meeting with Russia's experts on 7 March 2014. Attached to that letter, the European Union provided a table listing the topics Russia consider remaining outstanding indicating the answers provided during the meeting as well as evidence provided by the European Union.<sup>1858</sup>

9.27. Table A4 below provides a list of the information and explanations that the European Union provided to Russia attached to the above mentioned letter dated 13 March 2014.

**Table A4 Overview of information and explanations provided by the European Union on 13 March 2014**

Category of information	Piece of information/Explanation
Measures adopted to control ASF in Poland	<ul style="list-style-type: none"> <li>- Evidence was made available during on-the-spot-visit.</li> <li>- Presentations from EU member States at the Standing Committee of Food Chain and Animal Health (SCoFAH).</li> <li>- Evidence is available in full reports of the Community Veterinary Emergency Team (CVET).</li> <li>- Further evidence gathered in the second visit of CVET to Lithuania.</li> <li>- Example of biosecurity applied in Poland in pictures taken by CVET (annexed).</li> </ul>
Emergency Plans for emergency response to ASF	<ul style="list-style-type: none"> <li>- Explanation on the approach to emergency response to ASF through contingency plans.</li> </ul>

<sup>1854</sup> Protocol of technical meeting between the European Union and Russia of 7 March 2014 (Exhibit EU-89).

<sup>1855</sup> Letter of DG SANCO of 10 March 2014 (ref SANCO/G7/PD/mh(2014)6591200) (Exhibit EU-173).

<sup>1856</sup> Russia's letter to the European Union of 12 March 2014, FS-SD-4/3620 (Exhibit EU-90/Exhibit RUS-135).

<sup>1857</sup> Letter from Russian Veterinary Service, EC-AC-8/3671, 13 March 2014 (Exhibit RUS-209).

<sup>1858</sup> European Union's letter to Russia of 13 March 2014, ARES(2014)709435, SANCO/G7/PD/mh(2014)745829 (Exhibit EU-91).

Category of information	Piece of information/Explanation
outbreaks	<ul style="list-style-type: none"> <li>- Example of audits by the European Union's Food and Veterinary Office (FVO) for CFS contingency plan in Lithuania (provided through a website link).</li> <li>- Example of application of Spanish ASF contingency plan (provided through a website link).</li> <li>- Measures put in place due to the risk posed by the presence of ASF in countries neighbouring the European Union (Decision 2013/426/EU – Exhibit RUS-349). Those measures were the object of FVO inspections (examples of those audit reports were provided through website links).</li> </ul>
Measures taken by non-affected EU member States in respect of ASF/Proof of non-existence of ASF in non-affected EU Member States	<ul style="list-style-type: none"> <li>- Explanation of the passive surveillance applied in the European Union, pursuant to Article 1.4.5 of the Terrestrial Code, to demonstrate absence of ASF in the European Union in territories that are not high-risk not adjacent to infected areas.</li> <li>- Explanation that the evidence provided by the above referred surveillance proves that the vast majority of the territory of the European Union complies with the requirements in Article 1.4.6 paragraph 1(b) of the Terrestrial Code to be considered historically free of ASF.</li> <li>- Explanation that EU member States shall notify the presence or the suspected presence of ASF to the competent authority that shall proceed to fully investigate the suspicion (Directive 2002/60/EC).</li> <li>- Explanation of the active surveillance put in place in Estonia, Latvia, Lithuania, and Poland and information regarding reports on such programmes (provided through website links).</li> <li>- Explanation that active surveillance would be expanded in 2014 to other EU member States adjacent to high risk areas, for example, Finland or Romania.</li> <li>- Explanation that this surveillance approach has been applied to other disease such as FMD, CSF, sheep pox etc., for which the European Union has a free status recognised worldwide.</li> </ul>
Absence of proof of impossibility of getting meat of animals infected by ASFV in the production cycle of pork from other EU member States	<ul style="list-style-type: none"> <li>- Explanation that the European Union's rules, fully in force in all EU member States, guarantee for the EU and for third countries trading partners that it is impossible to transmit ASF or any other similar disease like CSF by meat or animals infected by ASFV in the production cycle of pork from other EU member States.</li> <li>- Reference to the attached "Working Document on EU preventive measures for ASF" (SANCO/7073/2014/Rev1 (Exhibit EU-88)).</li> <li>- Indication that the operation and implementation of relevant regulation is regularly audited by FVO (with an website link where those reports could be accessed).</li> </ul>

9.28. On 17 March 2014, DG SANCO sent a fax to Russia's delegation in Brussels forwarding Commission Implementing Decision 2014/134/EU of 12 March 2014<sup>1859</sup> concerning certain protective measures relating to ASF in Poland.<sup>1860</sup>

9.29. On 19 March 2014, FSVPS sent a letter to DG SANCO referring to a teleconference between FSVPS and DG SANCO that took place on 18 March 2014, in respect of ASF regionalization and veterinary certificate redrafting. The letter noted that "[r]egrettably we could find no common ground on the process of ASF regionalisation in the EU, and the issue of sufficiency of the EU reply and of conclusive evidence that the rest of the EU is not affected by the disease." The letter also noted that Belgium had been the only EU member State that had provided them with "comprehensive answers to our questions about endemicity of ASF in the European Union".<sup>1861</sup>

9.30. On 27 March 2014, DG SANCO sent a fax to Russia's delegation in Brussels forwarding draft Commission Implementing Decision concerning animal health control measures relating to ASF in certain EU member States, adopted under the number C(2014)1979.<sup>1862</sup>

<sup>1859</sup> Commission Implementing Decision 2014/134/EU of 12 March 2014 concerning certain protective measures relating to African swine fever in Poland, OJ L 74, p.63 (Exhibit EU-36).

<sup>1860</sup> Communication of 17 March 2014: African swine fever (ASF) in Poland (Publication of implementing decision) (Exhibit EU-145).

<sup>1861</sup> Letter from the Russian Veterinary Service to DG SANCO, FS-SD-8/4168, 19 March 2015 (Exhibit RUS-130).

<sup>1862</sup> Communication of 27 March 2014: Adoption of control measures relating to African swine fever in certain Member States (Exhibit EU-146). See also Commission Implementing Decision of 27 March 2014, 014/178/EU (Exhibit EU-37).

9.31. On 2 April 2014, FSVPS sent a letter to DG SANCO indicating that "Russian experts are still waiting to receive detailed information on ASF-control measures which are being taken by EU veterinary authorities, particularly arrangements for localisation of the disease in the affected countries as well as preventing the introduction of the ASF virus in other EU countries". The letter also indicated that FSVPS had received no response to the request of information sent on 13 March 2014 regarding European Union traders that have received pork products originating in Lithuania and Poland following the outbreaks. Moreover, the letter noted the concerns FSVPS had raised in respect of the absence of veterinary borders within the European Union and the fact that DG SANCO "cannot guarantee that fresh porcine meat from the ASF-affected EU countries will not enter the production chain of finished food products exported to Russia." On that basis, the letter concluded by informing of the decision to impose, as of 7 April 2014, temporary restrictions on the exports of finished food products, except hot processed pet food for cats and dogs (with processing temperature above 70 degree Celsius and processing time of more than 20 minutes) from Lithuania and Poland to Russia.<sup>1863</sup>

9.32. On the same day, FSVPS sent a letter to DG SANCO observing, among other things, that the "measures announced by the European Commission seemed insufficient to ensure ASF regionalisation in the EU. Introducing restrictions in certain areas of Lithuania and Poland does not effectively prevent the risk of further spread of ASFV."<sup>1864</sup>

9.33. On 4 April 2014, DG SANCO sent a letter to the deputy head of FSVPS (Mr Saurin) reporting on developments related to incidents of suspected violations of Russian import conditions. In addition, the letter provided information concerning the list of establishments approved for the storage of animal by-products not intended for human consumption.<sup>1865</sup>

9.34. On 10 April 2014, FSVPS sent a letter to the Chief Veterinary Officer of Poland requesting information for evaluating the effectiveness of the control measures to contain the ASF outbreak and prevent its further spread. The following information was requested: (i) a number of surveillance studies conducted in March and April 2014 in order to detect ASFV in domestic pig populations (in the private and industrial sectors) and in wild boar populations within the quarantine and buffer zones (both in absolute numbers and proportionally in the total number of susceptible wild and domestic animals in the herd); (ii) a number of surveillance studies conducted in March and April 2014 in order to detect ASFV in domestic pig populations (in the private and industrial sectors) and in wild boar populations within administrative territories which are adjacent to the quarantine and buffer zones (both in absolute numbers and proportionally in the total number of susceptible wild and domestic animals in the herd); and, (iii) volumes of deliveries of pork and ready-to-eat products containing pork from the Lithuanian enterprises located in the quarantine and buffer zones to any enterprises located outside these zones, including in other European Union countries.<sup>1866</sup>

9.35. On 18 April 2014, FSVPS sent a letter to the Director of State Food and Veterinary Service of Lithuania indicating that in order to consider lifting the temporary restrictions on importation of certain finished pork products FSVPS was ready to carry out within two months an inspection of the Lithuanian animal product manufacturing establishments interested in exporting products to the Customs Union member states.<sup>1867</sup>

9.36. On 16 May 2014, FSVPS sent a letter to DG SANCO expressing its regret that the European Union had not provided the information concerning "additional risks" as noted by Russia's experts at the Vladimir meeting on 7 March 2014. The letter further noted that due to that, FSVPS would like to remind DG SANCO of the need to provide information on the following issues: (i) Justification of criteria of identification of borders of infected/free/high risk zones in the territory of Poland and Lithuania, namely regulatory and legislative acts and scientific data used as a basis for zoning in the EU member States with regard to ASF; (ii) cartographical visualization of the

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<sup>1863</sup> Letter from the Russian Veterinary Service to DG SANCO, FS-EN-8/5084, 2 April 2015 (Exhibit RUS-54)

<sup>1864</sup> Russia's letter to the European Union of 2 April 2014, FS-EN-8/5095 (Exhibit RUS-53).

<sup>1865</sup> Letter from DG SANCO to the Russian Veterinary Service, SANCO/G7/PD/mh (2014) 1055360, 4 April 2015 (Exhibit RUS-56).

<sup>1866</sup> Russia's letter to Poland of 10 April 2014, FS-NV-8/5827 (Exhibit RUS-240).

<sup>1867</sup> Letter from the Russian Veterinary Service to DG SANCO, FS-AS-8/6360, 18 April 2014 (Exhibit RUS-138.b revised).

establishments attested to supply live pigs and swine products from the EU member States (Poland and Lithuania, in particular) to Russia with indication of the raw material bases of these establishments; (iii) zoo sanitary status of small farms (due to the number of them in the territories of the infected/high risk zones with regard to ASF) and measure of their bio protection (possibility of free range, feed base, the regime of introducing the newly arrived animals in the herd, etc.); (iv) whether there were plans to implement surveillance programmes (ASF early detection) in the EU member States neighbouring Poland and Lithuania in view of the change in the ASF epizootic situation in these two countries; (v) data on internal evaluation by the veterinary services of the EU member States of resources (human, technical, financial ones) needed for the creation and maintenance of above mentioned zones; (vi) data on functional isolation of sub-populations of domestic and wild animals in zones with the proves of the absence of migration/seasonal movements of wild boars between the zones; and (vii) Data on the presence of the ASF vector in the EU member States.<sup>1868</sup>

9.37. On 21 May 2014, DG SANCO sent a letter to the deputy head of FSVPS (Mr Nepoklonov) with follow-up information requested by Russia in the framework of consultations held on 30 April and 1 May 2014. The letter refers to European Union's communications sent on 7 February and 13 March 2014, and clarifies certain information requested by Russia. The letter states "I trust that the Russian Federation will now be in a position not only to properly assess the regionalisation measures of the European Union, but more pressingly, to allow the export of pigs and pig products to the Russian Federation to resume without delay".<sup>1869</sup>

9.38. Table A5 below provides a list of the information and explanations that the European Union provided to Russia attached to the above mentioned letter dated 21 May 2014.

**Table A5 Overview of information and explanations provided by the European Union on 21 May 2014**

Category of information	Piece of information/Explanation
Further information or clarification to Russia's request to provide a detailed action plan of emergency response	<ul style="list-style-type: none"> <li>- Clarification that contingency plans are set up individually at the EU member State level. Recalls that information on those contingency plans was provided with the letter of 7 February 2014.</li> <li>- Provided a copy of the contingency plans of Poland, Lithuania, Latvia, and Estonia, indicating that all sensitive information had been removed from them.</li> <li>- Recalled that in the letter of 7 February 2014 the European Union had already provided comprehensive information in respect contingency planning in the other 24 EU member States.</li> <li>- Recalled that in the letter of 13 March 2014 the European Union sent the contingency plan of Spain, which could serve as an example of the methods and actions that make up the contingency plans used throughout the European Union.</li> </ul>
Further information regarding wild boar population data, with detailed density by country and region	<ul style="list-style-type: none"> <li>- Recalled that in the letter of 6 March 2014 a map based on a published FAO study (covering 2005-2011) was forwarded with estimated densities of wild boar population in Europe, by region.</li> <li>- Provided an updated table (apparently as of 2014) with estimated wild board population in Estonia, Latvia, Lithuania, and Poland.</li> </ul>
Detailed information about pig farms and information about swine population with detailed density by region	<ul style="list-style-type: none"> <li>- Recalled the spread-sheet with data on the number of farms and heads by agricultural size of farm and size of pig herd for 27 EU member States, as of 2010, that was provided with the letter of 7 February 2014.</li> <li>- Provided a table with pigs kept on holdings as of December 2013 for all the 28 EU member States.</li> <li>- Provided a table with the number of pig holdings as of 2010 for all 28 EU member States. The letter indicates that this information is collected every three years and 2010 was the last time it was done.</li> <li>- Provided tables with more detailed information on swine populations in Lithuania and Poland updated to 2014, based on their Control and Surveillance Programmes.</li> </ul>
Further information on measures taken to prevent the introduction of ASF	<ul style="list-style-type: none"> <li>- Recalled the information provided in respect of control and surveillance programmes of ASF in Estonia, Latvia, Lithuania, and Poland in 2013, sent with the letter of 7 February 2014.</li> <li>- Provided the plans with the control and surveillance activities foreseen in</li> </ul>

<sup>1868</sup> Russia's letter to the European Union of 16 May 2014, FS-EN-8/7999 (Exhibit EU-93).

<sup>1869</sup> European Union's letter to Russia of 21 May 2014, ARES(2014)1658269, SANCO/G6/AB(2014)1782253 (Exhibit EU-92).



Category of information	Piece of information/Explanation	
Information on foreign hunters who entered the country to hunt wild boar during 2013-2014	Estonia, Latvia, Lithuania, and Poland in 2014. - Explained the regulatory framework applicable to the treatment of carcasses of wild boar, wild boar meat, wild boar products and trophies, including movement restrictions. - Indicated the irrelevance, against this backdrop, of information about individual hunters who entered the country to hunt wild boar.	
Information about pig farms and meat processing factories attested to ship animals and products to the territory of the Customs Union	Pig population (farms and pigs)	The letter refers to the information sent with the letter of 7 February 2014 and indicates that an update of that information with more exhaustive information was provided in that communication.
	Establishments	The letter refers to the information sent with the letter of 7 February 2014 and indicates that such information is available to Russian authorities through their dedicated webpage.
	Suppliers of pig meat to establishments	Explains the clear prohibitions on the dispatch and supply of live pigs and pig meat from the legally defined infected areas, as provided in Article 8 of Commission Implementing Decision 2014/178/EU.

9.39. On 5 June 2014, FSVPS sent a letter to the Director of the State Food and Veterinary Service of Lithuania indicating the names of Russia's experts that would participate on a joint inspection at the Lithuanian plants producing products and willing to export their products to Customs Union member states. That inspection was scheduled to take place for 7-days starting on 15 June 2014. The inspection would cover: plants producing ready-to-eat meat products, the epizootic situation in Lithuania, and effectiveness of the measures taken by the veterinary services of Lithuania to monitor ASF and to prevent its spread.<sup>1870</sup>

9.40. On 13 June 2014, DG SANCO sent a letter to the deputy head of FSVPS (Mr Nepoklonov) with follow-up information requested by Russia through a letter sent to the European Union on 16 May 2014. The letter refers to the European Union's communications sent to FSVPS on 7 February, 6 and 13 March 2014, and 21 May 2014, and provides certain explanations and information in respect of the information requested by Russia. The letter underlines that the epidemiological situation of ASF in the European Union remains unchanged, because since February 2014 only two further ASF cases were discovered in wild boar in Poland.<sup>1871</sup>

9.41. Table A6 below provides a list of the information and explanations that the European Union provided to Russia attached to the above mentioned letter dated 13 June 2014.

**Table A6 Overview of information and explanations provided by the European Union on 13 June 2014**

Category of information	Piece of information/Explanation
Justification of criteria of identification of borders of ASF infected/free/high risk zones in the territory of Poland and Lithuania	Provided an explanation of the scientific data, including the home range of wild boars, taken into account in the definition of zones.
Cartographical visualization of the establishments attested to supply live pigs and swine products from the EU member States (Poland and Lithuania, in particular) to Russia with indication of the raw material bases of these establishments	Referred to the responses it had provided through its letter of 21 May 2014 in respect to the information about pig farms and meat processing factories attested to ship animals and products to the territory of the CU, including information about suppliers and production volumes, detailed by country and region (last item in TableA5 above).
Zoo sanitary status of small farms (due to the big number of them in the territories of the infected/high risk zones with regard to ASF) and measures of their bio protection (possibility of free range, feed base, the regime of introducing the newly arrived animals in the herd, etc.).	Explained that in accordance with the Terrestrial Code, the animal health status of farms/holdings, independently of their size, as regards ASF is defined by the status of the zone where they are located. This may be either infected/restricted or free from disease. Assigning such a status to individual farms - regardless of where they are located - does not exist in the Terrestrial Code, nor as a consequence, in European Union legislation.
Whether it is foreseen to plan and implement	Explained that as general rule, non-specific or passive

<sup>1870</sup> Letter from the Russian Veterinary Service to the Director of the State Food and Veterinary Service of the republic of Lithuania, FS-NV-8/9668, 5 June 2014 (Exhibit RUS-355).

<sup>1871</sup> European Union's letter to Russia of 13 June 2014, ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505 (Exhibit EU-94).

Category of information	Piece of information/Explanation
surveillance programmes (ASF early detection) in the European Union countries neighbouring Poland and Lithuania in view of the change in the ASF epizootic situation in these two countries.	surveillance is applied all over the European Union. ASF – targeted (active) surveillance is applied where there is a differentiated risk, such as in the territories or countries that neighbour infected countries. In 2013, surveillance was implemented in Estonia, Latvia, Lithuania, and Poland. Further explained that in 2014, as a result of the detected cases, surveillance in Estonia, Latvia, Lithuania, and Poland was further intensified. Such surveillance is also being intensified in other EU member States countries who consider themselves to be at risk, due to their close proximity to the border with Russia, Belarus and/or Ukraine.
Data on internal evaluation by the veterinary services of the EU countries of resources (human, technical, financial ones) needed for the creation and maintenance of above mentioned zones.	Responded that there is a systematic evaluation of the veterinary services of each EU member State through audits by the FVO. The necessary human, technical and financial resources are made available as required. Detailed reports of the audits conducted to date are publicly available through the FVO dedicated web page (the letter provides a website link where those reports could be accessed).
Data on functional isolation of sub-populations of domestic and wild animals in zones with proof of the absence of migration/seasonal movements of wild boars between the zones.	Referred to the EFSA scientific papers that were sent to Russia with the letter dated 7 February 2014, according to which wild boars do not migrate and that movements of these animals between areas is very limited. Observed that the risk of contact between domestic and wild animals in the infected areas exists, but that this is the reason for which restrictive measures have been applied on the movements of domestic pigs from the affected areas. The European Union pointed out that intensive surveillance continues to confirm the absence of the disease in farms.
Data on the presence of the ASF vector in the European Union countries.	Explained that it does not have available data yet for the infected areas of its territory and that concerns about vectors in case of ASF relate to their role in the persistence of the infection in already affected areas, thus, any question about the presence of vectors in this case, is in the European Union's view with no relevance as regards areas unaffected by ASF.

9.42. On 26 June 2014, DG SANCO sent a fax to Russia's delegation in Brussels informing the confirmation of ASF in a backyard pig holding in Kraslava district and in three wild boars found dead in Dagda district in Latvia, at the border with Belarus and forwarding a communication from Latvia's Food and Veterinary Service. The fax indicated that measures in accordance with Council Directive 2002/60/EC were being implemented and that ASF had been confirmed in the area that was already under restriction because of CSF established in Latvia (Commission Implementing Decision 2013/764/EU).<sup>1872</sup>

9.43. On 27 June 2014, DG SANCO sent a fax to Russia's delegation in Brussels forwarding the draft Commission Implementing Decision adopted on that day concerning certain interim protective measures relating to ASF in Latvia.<sup>1873</sup> On 1 July 2014, DG SANCO sent a fax to Russia's delegation in Brussels forwarding the Commission Implementing Decision 2014/417/EU adopted on 27 June 2014, the draft of which it had sent on 27 June 2014, concerning certain interim protective measures relating to ASF in Latvia.<sup>1874</sup>

9.44. On 30 June 2014, FSVPS sent a letter to DG SANCO indicating that in the light of the continuing spread of ASF throughout the European Union, specifically referring to the outbreaks in wild boar and domestic pigs in Latvia, believed that consideration of amending the veterinary

<sup>1872</sup> Communication of 26 June 2014: African swine fever (ASF) detection in Latvia (Exhibit EU-147).

<sup>1873</sup> Communication of 27 June 2014: African swine fever (ASF) in Latvia – Adoption of interim protective measures (Exhibit EU-148).

<sup>1874</sup> Communication of 1 July 2014: African Swine fever (ASF) in domestic pigs and in wild boar in Latvia Commission Implementing Decision 2014/417/EU of 27 June 2014 (Exhibit EU-206). See also Commission Implementing Decision 2014/417/EU of 27 June 2014 concerning certain interim protective measures relating to African swine fever in Latvia, OJ L 192, p.66 (Exhibit EU-38).

certificates of certain pork products should be postponed. The letter concludes referring to it being practicable to organize consultations on the issue as soon as possible.<sup>1875</sup>

9.45. On 7 July 2014, DG SANCO sent a fax to Russia's delegation in Brussels informing of the confirmation of ASF in five dead wild boars found at Poland's border with Belarus. The fax forwarded the corresponding report of Poland's Veterinary Inspection and indicated that these cases had occurred within the restricted area listed in Part II of the Annex to Commission Implementing Decision 2014/178/EU.<sup>1876</sup>

9.46. On 8 July 2014, DG SANCO sent a fax to Russia's delegation in Brussels forwarding the draft Commission Implementing Decision adopted on that day under number C(2014)4925, listing certain regions in Latvia affected by ASF in Part I and Part II of the Annex to Decision 2014/178/EU.<sup>1877</sup> On the same day, DG SANCO sent a fax to Russia's delegation in Brussels informing the confirmation of ASF in six wild boars found near Poland's border with Belarus. The fax forwarded the corresponding report of Poland's Veterinary Inspection and indicated that these cases had occurred within the restricted area listed in Part II of the Annex to Commission Implementing Decision 2014/178/EU.<sup>1878</sup>

9.47. On 9 July 2014, DG SANCO sent a fax to Russia's delegation in Brussels providing a map displaying the areas as presented in the updated Annex to Commission Implementing Decision 2014/178/EU concerning animal health control measures relating to ASF in certain EU member States.<sup>1879</sup>

9.48. On 10 July 2014, DG SANCO sent a fax to Russia's delegation in Brussels forwarding Commission Implementing Decision 2014/448/EU, adopted on 8 July 2014, amending the Annex to Commission Implementing Decision 2014/178/EU as regards ASF in Latvia.<sup>1880</sup>

9.49. On 22 July 2014, DG SANCO sent a fax to Russia's delegation in Brussels informing of the confirmation of one ASF outbreak in domestic pigs and a positive case in wild boar in the novads of Valkas. The fax forwarded the corresponding report of Latvia's Food and Veterinary Service and indicated that these cases had been confirmed outside the restricted area listed in Part I and Part II of the Annex to Commission Implementing Decision 2014/178/EU.<sup>1881</sup>

9.50. On 24 July 2014, DG SANCO sent a fax to Russia's delegation in Brussels informing of a strong suspicion of ASF in a commercial pig farm located in Rupinskai village in the Kazitiskis sub-district within Ignalina district in the eastern part of Lithuania close to the border with Belarus.<sup>1882</sup> On the same day, DG SANCO sent a fax to Russia's delegation in Brussels informing about the confirmation of ASF in one holding with domestic pigs located in the Ignalina region in Lithuania and forwarded the corresponding report of Lithuania's State Food and Veterinary Service. The fax indicated that the outbreak had been confirmed outside the restricted area listed in Part I and Part II of the Annex to Commission Implementing Decision 2014/178/EU.<sup>1883</sup> Also on 24 July 2014, DG

<sup>1875</sup> Letter from the Russian Veterinary Service to the EU Veterinary Service, 30 June 2014, ФС-СД-8/11415 (Exhibit RUS-250).

<sup>1876</sup> Communication of 7 July 2014: African swine fever (ASF) in wild boar in Poland in the restricted area listed in Part II of the Annex to Decision 2014/178/EU (Exhibit EU-186).

<sup>1877</sup> Communication of 8 July 2014: Adoption of Commission Implementing Decision amending Decision 2014/178/EU as regards African swine fever in Latvia (Exhibit EU-207). See also Commission Implementing Decision of 8 July 2014, 2014/448/EU (Exhibit EU-39).

<sup>1878</sup> Communication of 8 July 2014: African swine fever (ASF) in wild boar in Poland in the restricted area listed in Part II of the Annex to Decision 2014/178/EU (Exhibit EU-208).

<sup>1879</sup> Communication of 9 July 2014: Epidemiological update and map displaying regionalisation set out in Decision 2014/178/EU, as last amended, as regards African swine fever (Exhibit EU-209).

<sup>1880</sup> Communication of 10 July 2014: Publication of Decision amending Commission Implementing Decision 2014/178/EU as regards African swine fever regionalisation (Exhibit EU-210). See also Commission Implementing Decision of 8 July 2014, 2014/448/EU (Exhibit EU-39).

<sup>1881</sup> Communication of 22 July 2014: African Swine Fever in Latvia (Exhibit EU-187).

<sup>1882</sup> Fax, SANCO/G2/FR/is (2014) 2721683, 24 July 2014 (Exhibit RUS-326).

<sup>1883</sup> Fax, SANCO/G2/FB/is (2014) 2728623, 24 July 2014 (Exhibit RUS-327).

SANCO sent another fax with the draft Commission Implementing Decision adopted that day concerning certain interim protective measures relating to ASF in Lithuania.<sup>1884</sup>

9.51. On 28 July 2014, DG SANCO sent a letter to FSVPS reporting on the confirmed ASF outbreak in Ignalina region in Lithuania, inviting Russian authorities to participate in the EU Emergency Team that would visit Lithuania on 30-31 July. Attached to the letter the European Union sent draft Implementing Decisions revising the annex of Commission Implementing Decision 2014/178/EU.<sup>1885</sup> On the same day DG SANCO sent a fax to Russia's delegation in Brussels forwarding Commission Implementing Decision 2014/502/EU of 24 July 2014 concerning certain interim protective measures relating to ASF in Lithuania.<sup>1886</sup>

9.52. On 29 July 2014, FSVPS sent a letter to DG SANCO pointing out that, among other things, reports of ASF outbreaks in domestic pigs in areas of Latvia and Lithuania located outside the "quarantine zones" confirms the inefficiency of the preventive measures approved by the European Commission. The letter further noted that there is clear evidence of additional risks mentioned by Russia's experts at the meeting held on 7 March 2014, related to the possibility that infected meat may enter the pork production chain. The letter concluded by observing that the worsening epizootic situation in the European Union, as well as the absence of conclusive evidence of sufficient supervision and proper functioning of the determined zones, "currently preclude the Russian Federation from accepting the EU regionalization terms, proposed by the European Commission at the meeting held on 4 July 2014 in Moscow, as well as from pronouncing the entire EU territory free from AFS [ASF]."<sup>1887</sup>

9.53. On 31 July 2014, FSVPS sent a letter to DG SANCO indicating that due to the worsening epizootic situation in the EU member States and the growing number of outbreaks reported outside the "quarantine zones", they require an updated proposal regarding regionalization in the European Union. Moreover, based on the ASF outbreak at one of Lithuania's biggest pig-breeding farms located outside of the "quarantine" area, FSVPS requested that DG SANCO send "an update on whether the European Commission has introduced any additional measures restricting the movement of live animals and livestock products outside of the quarantine areas and in the EU territory."<sup>1888</sup>

9.54. On 26 September 2014, DG SANCO sent a letter to FSVPS in connection with a new case of ASF in a wild boar near the border between Estonia and Russia, located in Ida-Viru county, around 40 km from Russia's border and 220 km from the closest outbreak in Estonia. The letter underlines that "[w]e are particularly concerned regarding the possible origin of this case, in particular taking into account that so far investigations indicate no epidemiological link with other cases or outbreaks in the EU".<sup>1889</sup>

9.55. On 13 October 2014, FSVPS sent a letter to DG SANCO in response to the letter of 26 September 2014. This letter indicates that the conclusion regarding the introduction of ASF through the Leningrad region into Estonia is not sufficiently grounded. In that respect, the letter referred to the notifications Russia provided to the OIE in respect of the number of outbreaks and controls measures put in place in that area. The letter also noted that increasing ASF spread within the affected EU member States caused by non-controlled movement of animal products from the affected foci and due to absence of rigid measures to control wildlife, and underlined the benefits of compartmentalization for safe trade.<sup>1890</sup>

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<sup>1884</sup> Fax, SANCO/G2/FB/is (2014) 2729207, 24 July 2014 (Exhibit RUS-328). See also Commission Implementing Decision of 24 July 2014, 2014/502/EU (Exhibit EU-40).

<sup>1885</sup> Exhibits RUS-133 and RUS-380.

<sup>1886</sup> Fax, SANCO/G2/MP/kh (2014) 2759647, 28 July 2014 (Exhibit RUS-330). See also Commission Implementing Decision of 24 July 2014, 2014/502/EU (Exhibit EU-40).

<sup>1887</sup> Russia's letter to the European Union of 29 July 2014, C-EH-8/13771 (Exhibit RUS-263).

<sup>1888</sup> Russia's letter to the European Union of 31 July 2014, EH-8/14006 (Exhibit RUS-157).

<sup>1889</sup> Exhibits EU-177 and RUS-191. This letter refers to letters sent by DG SANCO to FSVPS on 1 and 10 July 2014 (both contained in Exhibits EU-177 and RUS-191) concerning the potential links between the ASF situation in Russia and in the affected EU member States (at that time, Latvia, Lithuania, and Poland).

<sup>1890</sup> Letter from the Russian Veterinary Service to DG SANCO, FS-EN-8/19574, 13 October 2015 (Exhibit RUS-39).

9.56. On 1 December 2014, FSVPS sent a letter to DG SANCO indicating that the process of discussion of veterinary certificates and resumption of trade in breeding pigs and pork products is getting "protracted" due to the European Union's failure to provide sufficient information required for the objective assessment of risks associated with the spread of ASF in the EU member States. The letter also referred to the European Union's unwillingness to follow compartmentalization as provided in the Terrestrial Code. Moreover, the letter requested that the European Union provide detailed information in respect of particular list of questions.<sup>1891</sup> Such questions are listed in Table A7 below.

**Table A7 Questions attached to FSVPS's letter of 1 December 2014**

No.	Question
1	Please provide the ASF early detection and contingency plan for each EU member State. For each plan which has been implemented in response to the current epizootic situation, provide evidence of the effectiveness of that plan and explain the steps officials are taking to actively enforce the plan. Discuss the budget for enforcement, the number of inspection personnel, reports of successful elimination of ASF, and plans to increase resources dedicated to enforcement.
2	Please provide detailed information regarding monitoring/surveillance of wild boars in each EU member State.
3	Please provide the characteristics of the population of wild boars in each EU member State, including detailed data on the density of the wild boar population in each region of each EU member State.
4	Please provide data regarding the role of wild boars in the spread of ASF in EU member States, including evidence regarding the functional isolation, migration, and seasonal movements of sub-populations of wild boars between different EU member States.
5	Please provide detailed information regarding the measures taken by each EU member State to prevent the trans-boundary spread of ASF in the European Union. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.
6	Please provide detailed information regarding the measures taken by each EU member State to prevent the trans-boundary spread of ASF through the movement of wild boars in the EU. For each measure, provide data demonstrating its effectiveness and explain steps officials are taking to actively enforce this measure.
7	Please provide detailed information on measures intended to prevent the spread of ASF to/from small and average-sized farms and farms/facilities with low level protection (e.g., premises where pigs are not indoors) in each EU member State. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.
8	Please explain how each EU member State control and monitors the movement of foreign hunters and the hunting of wild boars by foreign hunters. Provide data on the movements of foreign hunters between different ASF risk zones in the European Union.
9	Please provide detailed information regarding the measures taken by each EU member State to prevent the trans-boundary spread of ASF through the movement of foreign hunters and hunting-related carcasses and trophies in the European Union. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.
10	Please provide data regarding the role of ticks in the spread of ASF in EU member States, including data regarding their distribution and host preferences.
11	Please provide detailed information regarding the measures taken by each EU member State to prevent the trans-boundary spread of ASF through tick in the European Union. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.
12	Please provide detailed information regarding the measures taken by each EU member State to control and monitor the raw materials (e.g., animals for slaughterhouses, carcasses for meat production plants) used by companies that supply live swine and pork products to Russia. Provide evidence that these raw materials are not sourced from ASF infected/high risk zones.
13	Please explain whether companies in the European Union that supply live swine and pork products to Russia revised their raw material sourcing plans as a result of the changed epizootic situation in the European Union.
14	Please provide justification for the criteria used to identify borders of ASF infected / free \ high risk zones. Explain whether these criteria should be applied to other EU member States.
15	Please explain what regulations and research findings underlie principles of ASF zoning in EU member States.
16	Please provide detailed information regarding the measures taken by each EU member State to stamp out ASF. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure. Discuss the budget for enforcement, the number of inspection personnel, reports of successful elimination of ASF, and plans to increase resources dedicated to enforcement. For each EU member State that has not taken measures to stamp out ASF, explain whether these EU member States have prepared plans to stamp out ASF and provide us with all such

<sup>1891</sup> Exhibit Letter from the Russian Veterinary Service to DG SANCO, No. FS-AS-8/23743, 1 December 2015 (RUS-131).

No.	Question
	plans.
17	Please provide detailed information regarding the measures taken by each EU member State to prevent the spread of ASF through the slaughter of ASF-infected swine. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.
18	Please provide detailed information regarding the measures taken by each EU member State to prevent the spread of ASF through the improper destruction/disposal of carcasses of ASF-infected swine. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.
19	Please provide detailed information on the procedures each EU member State has in place to control and monitor the burial sites of ASF-infected swine. Explain the steps officials are taking to ensure that these procedures are followed.
20	Please provide detailed information regarding the procedures each EU member State has in place concerning the cleaning and disinfection of premises on which ASF-infected swine were located. Explain the steps officials are taking to ensure that these procedures are followed.
21	Please provide data regarding the role of the following factors in the spread of ASF in EU member States: frozen meat; chilled meat; skin fat; vehicles used to transport ASF infected swine/products; smoked meat; fermented meat; vehicles driven through ASF-infected areas; people involved in pig-keeping; slurry; animal feed; litter; fomites; vegetables; crops; pests (e.g. rodents); pets; hay and straw; and insects.
22	Please provide detailed information regarding the measures taken by each EU member State to prevent the trans-boundary spread of ASF in the European Union through the factors listed in Question 21 above. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.
23	Data on measures being taken/taken for prevention of ASF introduction in the industrial pig farms/backyard pig farms/wild population, on measures being taken/taken in the EU member States (checkpoints/BIPs) as well as information describing procedure of veterinary and sanitary inspection and pre-export certification at all stages along the whole production chain.
24	In view of a large number of small farms (pig population under 200 animals) in ASF infected / high risk zones the animal health status of these farms should be clarified as well as biosecurity measures taken there (feasibility of free range, feed supply, procedure of new-coming animal introduction in the herd).
25	Map location of plants approved for exportation of live pigs and pork products into Russia along with indication of sources of raw materials.
26	Description of measures being taken/taken for movement control of live animals and pork products, aspects of traceability of feed, equipment and tools (including used ones), approaches to passive/active surveillance of susceptible animal populations.
27	What is the procedure for ASF differential diagnosis in case of salmonellosis, erysipelas, classical swine fever and Aujeszky's? Statistical data (number of disease suspects/confirmed cases).
28	Submit contact details of the competent authority in the EU member States responsible for establishment of zones with different ASF status (for each country).
29	Was evaluation of performance of veterinary service (PVS) performed (human, technical, financial and other resources) in the EU member States including evaluation of the competent authorities responsible for establishment of zones with different ASF status for each country?
30	What criteria / factors are used to evaluate PVS in the EU member States and their equivalence with the OIE recommended criteria for evaluation of performance of veterinary services (OIE PVS Tool)?
31	ASF emergency plans including data on staff number and logistics.

9.57. On 19 December 2014, FSVPS sent a letter to DG SANCO addressing the ASF situation in Estonia. Through the letter FSVPS request that DG SANCO provide detailed information on the epizootic research of the outbreak, as well as a detailed description of the measures implemented in Estonia to prevent the spread of ASF into the neighbouring disease-free regions of Russia.<sup>1892</sup>

9.58. On 23 December 2014, DG SANCO sent a letter to FSVPS in response to Russia's letter dated 1 December 2014 requesting additional information in relation to ASF. The letter refers to the communications sent by DG SANCO to FSVPS on 7 February, 6 and 13 March, 21 May, and 13 June of 2014. The letter observed the following in respect of the first three of these five communications, "I am confident that this information is more than sufficient to allow your services to conclude on the safety of pigs and their products, originating in unaffected areas of the EU". The letter concluded that it was surprising that Russia had submitted a new set of questions despite the fact that during the last five months they had not provided any feedback on the European Union's latest responses as requested by Russia, and that Russia was claiming once

<sup>1892</sup> Letter from the Russian Veterinary Service to the Director of Veterinary and International Affairs, European Commission, HB-8/25328, 19 December 2014 (Exhibit RUS-379).

again that the European Commission had not provided all the information needed to carry out a risk assessment.<sup>1893</sup>

9.59. On 19 March 2015, FSVPS sent a letter to DG SANTE requesting an explanation on the procedure of notification of outbreaks of animal diseases by EU member States to the OIE. The letter explained that such request is based on certain doubts that FSVPS has in respect of the manner in which competent authorities in Estonia notify new outbreaks in wild boars. According to the letter, the "approach of the Estonian service prevents a comprehensive assessment of the ASF spread in the wild".<sup>1894</sup>

9.60. On 24 March 2015, DG SANTE sent to FSVPS a letter referring to the European Union's previous communications and providing answers to the questions sent by Russia in the attachment to letter FS-AS-8/24743 dated 1 December 2014. The letter includes a description of what information had already been provided by the European Union in its communications of 7 February, 6 and 13 March, 21 May, and 13 June 2014, as well as additional information complementing the information already provided to Russia.<sup>1895</sup>

9.61. Table A8 below provides an overview of the information provided by the European Union in the above mentioned communication of 24 March 2015. In addition, this communication had attached the eradication plans for Lithuania<sup>1896</sup> and Poland.<sup>1897</sup>

**Table A8 Overview of information and explanations provided by the European Union on 24 March 2015**

Category of information	Information already provided	Additional information
ASF early detection and contingency plan for each EU member State, including evidence of the effectiveness of the plan, steps for its enforcement, budget, staffing, reports of successful elimination of ASF, and plans to increase resources dedicated to enforcement.	Through the letter of 7 February 2014, the following information was provided: (i) general information on development and content of contingency plans; (ii) presentation from a Better Training for Safer Food training on the operation of contingency plans; (iii) FVO audit reports on contingency planning in Estonia, Latvia, Lithuania, and Poland; (iv) examples of audits in other EU member States; and (v) FVO presentation on contingency planning. Through the letter of 13 March 2013, the following information was provided: (i) ASF contingency plan of Spain; and (ii) FVO audit report in Lithuania. Through the letter of 21 May 2014, general information on contingency plans and the ASF contingency plan of Estonia, Latvia, Lithuania, and Poland was provided.	The European Union explained that sufficient information had already been provided to Russia. The letter also indicated that during the consultations in Geneva on 30 April to 1 May 2014, it was agreed that only contingency plans of ASF affected countries were relevant.

<sup>1893</sup> Letter from DG SANCO to the Russian Veterinary Service, SANCO/G7/PD/mh (2014) 4703183, 23 December 2014 (Exhibit RUS-132).

<sup>1894</sup> Letter from Russian Veterinary Service to the European Union Veterinary Service, FS-EN-8/4220, 19 March 2015 (Exhibit RUS-153).

<sup>1895</sup> Letter of 24 March 2015 from the EU to Russia, Ref. Ares(2015)1284836 (Exhibit RUS-154) and Letter from DG SANTE to FSVPS

Ref. Ares(2015)1284836 - 24/03/2015; EU's replies to the questionnaire sent by FSVPS with the letter FS-AS-8/23743 dated 1 December 2014 (Exhibit RUS-167).

<sup>1896</sup> Eradication plan of African swine fever in feral pigs in certain areas of Lithuania (communicated to Russia on 24 March 2015) (Exhibit EU-101) and ASF Eradication plan for African swine fever in wild boars in the Southern part of Lithuania, June 2014 (Exhibit RUS-156).

<sup>1897</sup> Eradication plan of African swine fever in feral pigs in certain areas of Poland (communicated to Russia on 24 March 2015) (Exhibit EU-102) and the Polish plan of measures in order to eradicate African Swine Fever in wild boar in infected area and buffer zone developed on the basis of Article 16 of the Council Directive 2002/60/EC. Ref. Areas (2015) 1284836 – 24/03/2015 (Exhibit RUS-149).

Category of information	Information already provided	Additional information
Detailed information regarding monitoring/surveillance of wild boars in each EU member State	Through the letter of 7 February 2014, the 2013 ASF control and surveillance programmes of Estonia, Latvia, Lithuania, and Poland was provided. Through the letter of 21 May 2014, the 2014 ASF control and surveillance programmes of Estonia, Latvia, Lithuania, and Poland were provided.	Provided website links to DG SANTE's dedicated webpage with the most updated data from the Estonia, Latvia, Lithuania, and Poland. The European Union observes that such information is permanently available and regularly updated.
Characteristics of the population of wild boars in each EU member state, including detailed data on the density of the wild boar population in each region of each EU member country.	Through the letter of 21 May 2014, data on the estimated wild boar population in Estonia, Latvia, Lithuania, and Poland was provided. Through the letter of 6 March 2014, a map based on an FAO study (with data from various statistical sources from the years 2005-2011) and indicating the estimated densities of wild boar population in the European Union by region was provided.	Explained that a lot of scientific information was made available on the GF-TADS website after the discussion of the meeting of the Standing Group of Experts on ASF in the Baltic and Eastern Europe region held on 1-2 December 2014 in Minsk (provided the website link where that information is available).
Data regarding the role of wild boars in the spread of ASF in EU member States, including evidence regarding the functional isolation, migration, and seasonal movements of sub-populations of wild boars between different EU member States.	Through the letter of 7 February 2014, the 2010 EFSA scientific opinion on ASF was provided (provided the website link where that information is available). Through the letter of 13 June 2014, the 2014 EFSA scientific opinion on ASF was provided (provided the website link where that information is available).	Explained that in addition to the information provided before, extensive and didactic discussions were held on this matter at the GF-TAD meeting on 1-2 December 2014 in Minsk (which would be available in the website link provided in that letter).
Detailed information regarding the measures taken by each EU member State to prevent the trans-boundary spread of ASF in the European Union. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.	Through the letter of 7 February 2014, Council Directive 2002/60/EC, laying down specific provisions for the control of ASF, was provided. Through the letters of 6 and 13 March 2014, the "Working Document on the EU preventive measures on ASF" was provided.	Explained that in addition, Commission Implementing Decision 2014/709/EU of 9 October 2014 concerning animal health control measures relating to ASF in certain EU member States and repealing Implementing Decision 2014/178/EU, provides for detailed rules on prohibitions and other restrictions to avoid local and trans boundary spread of the disease.
Detailed information regarding the measures taken by each EU member State to prevent the trans-boundary spread of ASF through the movement of wild boars in the EU. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.	Explained that the measures to prevent ASF spread are laid down in a comprehensive set of legislation based on Council Directive 2002/60/EC and the rest of the EU's veterinary legislation. Through the letter of 7 February 2014, Council Directive 2002/60/EC, laying down specific provisions for the control of ASF, was provided.	Explained that in addition, when wild boar is involved in the epidemiology of ASF, specific targeted measures are specified in national eradication plans. Provided a copy of Lithuania's and Poland's eradication plans approved by Commission Implementing Decision 2014/442/EC (provided the website link where that information is available). Explained that The eradication plan of Estonia and Latvia were revised in line with the Minsk GF-TAD recommendations and the draft Decision approving those plans was voted at the Standing Committee on Plants, Animals Food and Feed on 5 March 15; and that it would be expected to be adopted in the coming weeks (provided the website link to the GF-TAD recommendations). Provided a copy of report of the European Union's veterinary emergency team (CVET) mission that took place in Vilnius on 8-10 October



Category of information	Information already provided	Additional information
Detailed information on measures intended to prevent the spread of ASF to/from small and average-sized farms and farms/facilities with low level protection (e.g., premises where pigs are not indoors) in each EU member State. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.	Through the letter of 7 February 2014, Council Directive 2002/60/EC, the cornerstone of ASF legislation, was provided. Explained that these rules apply across the European Union, regardless of the size of the holdings.	2014. Explained that In addition to the control measures, preventive actions have also been taken voluntarily by some EU member States. These actions have been co-financed by the European Union as described in Commission Implementing Decision 2014/236/EU of 24 April 2014 concerning a Union financial contribution towards surveillance and other emergency measures implemented in Estonia, Latvia, Lithuania, and Poland against ASF (provided the website link where that information is available). In addition provided information presented by Latvia and Lithuania in the Standing Committee meeting of November 2014. Regarding Latvia, pig farmers who cannot implement biosecurity requirements, must slaughter pigs under official control - there were 3600 pigs slaughtered under this program and 1501 pig keepers within the restricted areas have been compensated since July 2014 (provided the website link where that information is available). Regarding Lithuania, by 15 of December 2014, in the Part III area of the Commission Implementing Decision 2014/709/EU, all pigs in holdings with low biosecurity measures will be early slaughtered after ASF tests (provided the website link where that information is available).
Manner in which each EU member State controls and monitors the movement of foreign hunters and the hunting of wild boars by foreign hunters. Provide data on the movements of foreign hunters between different ASF risk zones in the EU.	Through the letter of 21 May, information on foreign hunters was provided.	Explained that the free movement of persons is a fundamental European Union's principle enshrined in Article 45 of the Treaty on the Functioning of the European Union. As explained during the consultation meeting held on 30 April-1 May 2014 in Geneva, no differentiation is made between national and foreign hunters (provided the website link where that information is available).
Detailed information regarding the measures taken by each EU member State to prevent the trans-boundary spread of ASF through the movement of foreign hunters and hunting-related carcasses and trophies in the European Union. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.	Through the letter of 21 May, information on foreign hunters was provided.	Explained that the free movement of persons is a fundamental European Union's principle enshrined in Article 45 of the Treaty on the Functioning of the European Union. As explained during the consultation meeting held on 30 April-1 May 2014 in Geneva, no differentiation is made between national and foreign hunters (provided the website link where that information is available). Further explained that preventive measures to avoid ASF spread by commodities such as trophies carried by hunters are laid down in Council Directive 2002/60/EC in particular in point 2(c) of Article 15.
Data regarding the role of ticks in the spread of ASF in	Explained that the role of vectors (ticks) has been explained by EFSA	Explained that EFSA has stated that "Ticks do not, play an active role in

Category of information	Information already provided	Additional information
EU member states, including data regarding their distribution and host preferences.	in its scientific opinions on ASF of 2010 (provided through the letter of 7 February 2014) and of 2014 (provided through the letter of 13 June 2014). Indicated that additional information was also provided with the letter of 13 June 2014.	the geographical spread of the virus. Wild boar have never been found infested because they do not rest inside burrows potentially infested by ticks." Further indicated that in the four affected EU member States, soft ticks have never been mentioned in relation with ASF. No evidence has been found so far that they, if they exist, play a role in ASF epidemiology. Their existence/distribution in those EU member States is not documented. Also noted with importance that the role of the Ornithodoros spp. ticks as vectors in the epidemiology of ASF, relates to the persistence of the disease in infected premises after stamping-out and repopulation. The ticks have no role regarding the geographical spread of the disease and therefore such information is not relevant for the acceptance of regionalization.
Detailed information regarding the measures taken by each EU member State to prevent the trans-boundary spread of ASF through ticks in the European Union. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.	Provided the same explanation and references as indicated in the previous point.	Provided the same explanation as indicated in the previous point.
Detailed information regarding the measures taken by each EU member state to control and monitor the raw materials (e.g. animals for slaughterhouses, carcasses for meat production plants) used by companies that supply live swine and pork products to Russia. Provide evidence that these raw materials are not sourced from ASF infected/high risk zones.	Through the letter of 7 February 2014, Council Directive 2002/60/EC, the cornerstone of ASF legislation, was provided. Explained that additional detailed information had already been provided about relevant European Union measures through the letters of 13 March and 21 May 2014. Observed that it has been stated that from the defined areas, as listed in the annex to the European Union decision establishing regionalization, no establishment is allowed to supply pig meat or pig meat products to establishments authorised to export to Russia.	Explained that Commission Implementing Decision 2014/709/EU of 9 October 2014 concerning animal health control measures relating to ASF in certain EU member States provides for detailed rules (provided the website link where that information is available). Indicated that further information on implementation of ASF control measures may be found in the most recent audit reports of the FVO (provided the website link where the audit reports for Latvia, Lithuania and Poland are available, and explained that FVO audit in Estonia took place on 2-6 March 2015).
Information regarding whether companies in the European Union that supply live swine and pork products to Russia revised their raw material sourcing plans as a result of the changed epizootic situation in the European Union.	Provided the same explanation as indicated in the previous point.	Provided the same explanation as indicated in the previous point.
Justification for the criteria used to identify borders of ASF infected / free / high risk zones. Explain whether this criteria should be applied to other EU member States.	Indicated that information had already been provided through the letter of 13 June 2014.	Explained that as already stated, the European Union's regionalization is based on the criteria laid down in point 3.(b) and(c) of Article 16 of Council Directive 2002/60/EC, which is applied across the European Union. When defining an infected

Category of information	Information already provided	Additional information
		<p>area, the existence of major natural or artificial obstacles is taken into account as in the particular case of Lithuania and Estonia where a lake or river was considered as natural obstacles.</p> <p>Examples are: for Estonia: Võrtsjärv lake for Latvia: Daugava river</p>
<p>Please explain what regulations and research findings underlie principles of ASF zoning in EU member States</p>	<p>Through the letter of 7 February 2014, Council Directive 2002/60/EC, the cornerstone of ASF legislation, was provided.</p> <p>Explained that additional information had already been provided through the letter of 13 June 2014.</p>	<p>Explained that the European Union's regionalization measures are in line with Chapter 4.3 of the Terrestrial Code (zoning and compartmentalization), and are also in line with Article 6 of the WTO SPS Agreement.</p> <p>In addition, Commission Implementing Decision 2014/709/EU of 9 October 2014 concerning animal health control measures relating to ASF in certain EU member States provides for detailed rules (provided the website link where that information is available).</p>
<p>Detailed information regarding the measures taken by each EU member State to stamp out ASF, including evidence of its effectiveness, staff enforcing this measure, budget for enforcement, number of inspection personnel, reports of successful elimination of ASF, and plans to increase resources dedicated to enforcement. For each EU member state that has not taken measures to stamp out ASF, explain whether these EU member states have prepared plans to stamp out ASF and provide us with all such plans.</p>		<p>Indicated that information on implementation of specific ASF control measures may be found in the most recent audit reports of the FVO (provided the website link where the audit reports for Latvia, Lithuania and Poland are available, and explained that FVO audit in Estonia took place on 2-6 March 2015).</p>
<p>Detailed information on the measures taken by each EU member State to prevent the spread of ASF through the slaughter of ASF-infected swine. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.</p>	<p>Referred to the provisions in Articles 5 (point 1, letters a, c and d), 10, 11, and 14 of Directive 2002/60/EC. Indicated that as an additional layer of protection, Commission Implementing Decision 2014/709 contains further provisions.</p>	<p>Indicated that information on implementation of ASF control measures may be found in the audit reports of the FVO (provided the website link where the audit reports for Latvia, Lithuania and Poland are available, and explained that FVO audit in Estonia took place on 2-6 March 2015).</p>
<p>Detailed information regarding the measures taken by each EU member State to prevent the spread of ASF through the improper destruction/disposal of carcasses of ASF-infected swine. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.</p>	<p>Provided the same explanation as indicated in the previous point.</p>	<p>Provided the same explanation as indicated in the previous point.</p>
<p>Detailed information on the</p>	<p>Referred to the provisions in Articles</p>	<p>Explained that, furthermore, some of</p>

Category of information	Information already provided	Additional information
<p>procedures each EU member State has in place to control and monitor the burial sites of ASF infected swine. Explain the steps officials are taking to ensure that these procedures are followed.</p>	<p>5 (point 1, letters a, c and d), 10, 11, and 14 of Directive 2002/60/EC. Indicated that as an additional layer of protection, Commission Implementing Decision 2014/709 contains further provisions. Further explained that in addition, detailed rules apply to the disposal of carcasses by burial in Commission Regulation (EU) No 142/2011 of 25 February 2011 implementing Regulation (EC) No 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive (provided the website link where that information is available). The carcasses of pigs, which have been compulsorily killed due to an infectious virus disease, must be disposed under official supervision and in a manner, which avoids any risk of spread of the virus causing the disease. Destruction of such carcasses should normally be carried out in a rendering facility approved for the purpose by the official veterinary service. Under certain circumstances the competent authority may consider burial as an alternative method of carcass destruction.</p>	<p>the contingency plans prepared by EU member States provide for further national rules. As an example, such measures may be as follows: The dimensions of a burial pit shall be large enough for 60 adult pig carcasses with a 2 meter cover (length 6 m; width 3 m; depth 4 m); It is recommended that animals are only placed in 2 layers; To prevent carcasses in a burial pit from rising to the surface, the abdomen should be cut open before burial to allow gases to escape from the alimentary tract and the abdomen cavity.</p>
<p>Detailed information regarding the procedures each EU member state has in place concerning the cleaning and disinfecting of premises on which ASF-infected swine were located. Explain the steps officials are taking to ensure that these procedures are followed.</p>	<p>Explained that detailed rules can be found in point 1 (g) of Article 5, point 2. (c) of Article 14 and Annex II of Directive 2002/60/EC.</p>	
<p>Data regarding the role of the following factors in the spread of ASF in EU member States: frozen meat; chilled meat; skin fat; vehicles used to transport ASF infected swine/products; smoked meat; dried meat; fermented meat; vehicles driven through ASF infected areas; people involved in pig keeping; slurry; animal feed: litter; fomites; vegetables; crops; pests (e.g., rodents); pets; hay and straw; and insects.</p>	<p>Referred for detailed information to the EFSA scientific opinions on ASF of 2010 (provided through the letter of 7 February 2014) and of 2014 (provided through the letter of 13 June 2014) (provided the website links where both reports are available).</p>	<p>Referred to pages 36-40 of the 2010 EFSA scientific opinion.</p>
<p>Detailed information regarding the measures taken by each EU member State to prevent the trans-boundary spread of ASF in the European Union through the</p>	<p>Indicated that a full package of information on preventive (surveillance) and control (eradication) measures has already been provided in all letters referred above.</p>	<p>Explained that information on implementation of ASF control measures may be found in the audit reports of the FVO (provided the website link where the audit reports for Latvia, Lithuania and Poland are</p>

Category of information	Information already provided	Additional information
<p>factors listed in the previous point. For each measure, provide data demonstrating its effectiveness and explain the steps officials are taking to actively enforce this measure.</p>		<p>available, and explained that FVO audit in Estonia took place on 2-6 March 2015).</p>
<p>Data on measures being taken/ taken for prevention of ASF introduction in the industrial pig farms/ backyard pig farms/ wild population, on measures being taken/ taken in the EU member states (checkpoints/ BIPs) as well as information describing procedure of veterinary and sanitary inspection and pre-export certification at all stages along the whole production chain.</p>		<p>Explained that due to the perceived threat of the spread of ASF from countries neighbouring the European Union in the East, audits by the FVO to evaluate the implementation of border controls against ASF started already in 2013 and continued during 2014 (provided the website link where the audit reports for Estonia, Latvia, Lithuania, and Poland are available).</p> <p>Furthermore, detailed rules can be found in Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (provide the website link where such information is available).</p> <p>Further explained that EU member States affected by ASF regularly report to the Standing Committee about the outcome of reinforced controls that they perform on imported commodities. The results show that due to the increased controls the number of findings has dropped.</p> <p>The rules to be observed with regard to certification are laid down Council Directive 96/93/EC on the certification of animals and animal products (provided the website link where such information is available).</p> <p>Invited to see the links to the presentations that Latvia and Lithuania made at the Standing Committee in November 2014. In respect of Latvia, highlights that there was strengthened control of personal luggage; and random sampling from confiscated products of animal origin (out of 20 samples 3 have been found positive for ASF genome) (provided the website links where such information is available).</p> <p>Explained that according to the Memorandum of Understanding of 2004, pre-export certificates should be issued only for animals or animal products moving between two or more EU member States where the animals or the products are destined for products intended for exports to Russia and where the pre-export certificate is necessary to ensure that the final product meets the Russian import conditions. Requirements of Council Directive 96/93/EC on</p>

Category of information	Information already provided	Additional information
Data on small farms (pig population under 200 animals) in ASF infected/ high risk zones, regarding: the animal health status of these farms and the biosecurity measures taken there (feasibility of free range, feed supply, procedure of new-coming animal introduction in the herd).		veterinary certification are applicable. Explained that this issue has already been discussed on previous occasions and it was the main subject of the GF-TADS meeting in Tallinn held on 11- 12 February 2015 (provided the website link where such information is available).
Map location of plants approved for exportation of live pigs and pork products into the RF along with indication of sources of raw materials.		Explained that all farms in the European Union, except those in the infected areas, are approved for exportation to Russia. As far as food producing establishments are concerned, the list of approved establishments is established and maintained by Russia, not by the European Union.
Description of measures being taken/ taken for movement control of live animals and pork products, aspects of traceability of feed, equipment and tools (including used ones), approaches to passive/ active surveillance of susceptible animal populations		Noted that this question is rather general therefore the entire European Union's veterinary <i>acquis</i> could be cited by way of an answer. Explained that the basic European Union legislation is: Council Directive of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine (64/432/EEC) (provided the website link where such information is available).
Information regarding the procedure for ASF differential diagnosis in case of salmonellosis, erysipelas, classical swine fever and Aujeszky'; including statistical data (number of disease suspects/ confirmed cases).		Explained that the relevant European Union legislation is: Commission Decision 2003/422/EC of 26 May 2003 approving an African swine fever diagnostic manual (provided the website link where such information is available).
Contact details of the competent authority in the EU member responsible for establishment of zones with different ASF status (for each country)		Explained that the information regarding European Union delegates can be consulted in the OIE webpage (provided the website link where such information is available).
Indication of whether evaluation of performance of veterinary service (PVS) was done (including human, technical, financial and other resources) in the EU member States including evaluation of the competent authority responsible for establishment of zones with different ASF status for each country.		Explained that the Competent Authorities of the EU member States are regularly audited by the Food and Veterinary Office (FVO) of the Commission's Health and Food Safety Directorate General to ensure that European Union legislation in areas such as food safety, animal health and animal welfare is properly implemented and enforced. It considers risk and trade factors, plus the status of legislation, to prioritise visits. The reports of the FVO, including the country profiles of Member States, are publicly available on the Commission's website (provided the website link where such information is available).

Category of information	Information already provided	Additional information
Indication of What criteria/factors are used to evaluate PVS in the EU member States and their equivalence with the OIE recommended criteria for evaluation of performance of veterinary services (OIE PVS Tool).		Explained that the OIE PVS tool is a voluntary instrument offered by the OIE to those member countries wishing to engage in the OIE PVS pathway. EU member States have not requested OIE PVS evaluations from the OIE (with the exception of Bulgaria and Romania before joining the European Union), which to a certain extent would duplicate or overlap the activities of the FVO described above. However, some EU Member States have performed pilot PVS self-evaluations using the OIE PVS tool.
Information regarding ASF Emergency plans including data on staff number and logistics.		Referred to the comments provided in the first point of the table.

9.62. On 10 April 2015, FSVPS sent a letter to DG SANTE referring to the ASF situation in the European Union. The letter referred to the inefficiency of the measures in place in the European Union and to the problems of proper notification to the OIE by authorities in Estonia. The letter also noted that Russia only received the letter dated 21 May 2014, in January 2015. In respect of this letter, FSVPS observed that it did not contain the requested information on the results of active surveillance in EU member States that border the EU member States affected with ASF. The letter also underlined that some of the information attached to the letter of 21 May 2014 was in the national language, which made its analysis more complicated.<sup>1898</sup>

9.63. On 16 June 2015, DG SANTE sent a letter to FSVPS in response to an information request from FSVPS. The letter referred to an information request regarding ASF surveillance results in the EU member States bordering ASF-affected EU member States. In that respect, DG SANTE indicated that such information is not "relevant to the acceptance of regionalisation", in particular, taking into account the distance of the territories of those EU member States from the affected area and the favourable results of intensive surveillance in the ASF-free areas of the four affected EU member States. The letter explained that the latter information including regular updates, as presented at the meetings of the Standing Committee on Plants, Animals, Food and Feed, is publicly available (provided the website link where such information is available). The letter also provided a copy of the English translations of the contingency plans of Estonia, Latvia, Lithuania, and Poland.<sup>1899</sup>

<sup>1898</sup> Letter from the Russian Veterinary Service, FS-NV-8/5906, 10 April 2015 (Exhibit RUS-329).

<sup>1899</sup> Letter from the European Union Veterinary Service to the Russian Federation Veterinary Service, Ref. Ares (2015)2518258. 16 January 2015. (Exhibit RUS-319). In response to Panel question No. 321, para. 177, the European Union confirmed that those contingency plans correspond to Exhibits EU-74, EU-75, EU-76 and EU-77.

## 10 APPENDIX 2 DESCRIPTION OF COUNCIL DIRECTIVE 2002/60/EC

10.1. Council Directive 2002/60/EC<sup>1900</sup> lays down specific provisions for the control of ASF. This Directive provides a series of surveillance and control mechanisms that EU member States' veterinary authorities have to put in place in respect of ASF.

10.2. The surveillance mechanism set up in Article 3 of Council Directive 2002/60/EC provides that EU member States shall ensure that the presence or the suspected presence of ASF is compulsorily and immediately notifiable to the competent authority. Furthermore, this provision indicates that an EU member State in whose territory ASF has been confirmed shall (i) give notification of the disease and provide to the Commission and other EU member States on<sup>1901</sup>: confirmed outbreaks of ASF in holdings; confirmed cases of ASF in slaughter houses or in means of transport; confirmed primary cases of ASF in feral pigs; and results of epidemiological enquiry; and (ii) provide information to the Commission and other EU member States on further cases confirmed in feral pigs in an ASF infected area.

10.3. Article 4 of Council Directive 2002/60/EC foresees a detailed list of measures that EU member States shall adopt in cases where the presence of ASF on a holding is suspected. These measures include (1) ensuring the competent authorities immediately set in motion official means of investigation to confirm or rule out the presence of ASF, including a verification of the register of the pig identification marks; (2) when the competent authority considers that the presence of ASF in a holding cannot be ruled out, it shall have the holding placed under official surveillance and shall order that: all pigs on the holding are counted and a list of the number of pigs already sick, dead or likely to be infected is compiled and updated; all pigs on the holding are restricted to their living quarters or confined in a place where they can be isolated; no pigs can enter or leave the holding (such ban on leaving the holding may be extended to other species of animals and destruction of rodents or insects may be required); no pig carcasses may leave the holding without an authorization issued by the competent authority; certain products, feed, materials and waste likely to transmit ASF may not leave the holding without an authorization issued by the competent authority, and meat, pig products, semen, ova or embryos shall not be moved from the holding for intra-Community trade; movement of persons to or from the holding shall be subject to written authorization by the competent authority; appropriate means of disinfection shall be applied; and, an epidemiological enquiry shall be carried out; (3) where required by the epidemiological situation, the competent authority: may apply the measures mandated in cases where ASF on a holding is confirmed, including a limited application of those measures to the pigs suspected of being infected or contaminated with ASFV, provided certain conditions are met; may establish a temporary control zone around the holding where the suspicion of contamination exists, in which some or all of the previous measures shall be applied; and (4) once adopted, the previous measures shall not be lifted until the presence of ASF has been officially ruled out.

10.4. Measures that EU member States shall adopt in cases where the presence of ASF on a holding is confirmed are provided in Article 5 of Council Directive 2002/60/EC. These measures include, in addition to the ones described in numeral (2) in the previous paragraph: killing all pigs in the holding without delay under official supervision in such a way as to avoid the risk of ASF spreading during transport or killing; taking of a sufficient number of samples from the pigs when they are killed in order to that the manner of introduction of ASFV into the holding and the length of time during which it may have existed on the holding before the disease was notified may be established; processing of carcasses of pigs that have died or have been killed under official supervision; wherever possible tracing and processing under official supervision of the meat of pigs slaughtered during the period between the probable introduction of ASF into the holding and the taking of official measures ; tracing and destruction under official supervision, in such a way as to avoid the risk of ASFV spreading, of semen, ova or embryos of pigs collected from the holding during the period between the probable introduction of ASF into the holding and the taking of official measures; carrying out in accordance with the instructions of the official veterinarian processing of all substances and waste likely to be contaminated (such as feedingstuffs) and destruction of all materials for single use which may be contaminated (particularly those used for

<sup>1900</sup> Council Directive of 27 June 2002, 2002/60/EC (Exhibit EU-31).

<sup>1901</sup> Such information shall be provided in accordance with Annex I of Council Directive 2002/60/EC, which includes a detailed list of the information that an EU member State should provide to the Commission and to other EU member States upon confirmation of ASF. (Exhibit EU-31).



the killing operations); after the pigs have been eliminated, cleaning, and if necessary, disinfecting buildings used for housing the pigs, vehicles used to transport them or their carcasses and the equipment, bedding, manure and slurry likely to be contaminated; in the case of a primary outbreak of disease<sup>1902</sup>, subjecting the ASFV isolate to the laboratory procedure to identify the genetic type; and carrying out an epidemiological enquiry. Article 5 further provides that the Commission shall immediately review the situation with the EU member State concerned in the Standing Veterinary Committee (SVC) at the earliest possible opportunity, and that if necessary, additional measures to prevent the spread of ASF shall be adopted.

10.5. Article 6 of Council Directive 2002/60/EC provides for special rules applicable to holdings consisting of various production units. These rules include possible derogations, as regards healthy pig population, from the measures provided in Articles 4 and 5 when the official veterinarian confirms that the structure, size and distance apart of these production units and the operations carried out there are such that the production units provides completely separate facilities for housing, keeping and feeding, so that ASFV cannot spread from one production unit to another. Furthermore, Article 7 provides specific rules for measures in contact holdings, which are those where the official veterinarian finds, or considers on the basis of an epidemiological enquiry, that ASF may have been introduced from other holdings.

10.6. The conditions for undertaking an epidemiological inquiry in relation to suspected cases or outbreaks of ASF are laid out in Article 8 of Council Directive 2002/60/EC. Such enquiry is carried out on the basis of questionnaires prepared within the framework of contingency plans. The enquiry shall deal at least with: (a) length of time during which ASFV may have existed on the holding before the disease was notified or suspected; (b) possible origin of ASF on the holding and the identification of other holdings in which pigs may have become infected or contaminated from the same source; (c) movement of persons, vehicles, pigs, carcasses, semen, meat or any material which could have carried ASFV to or from the holdings in question; and (d) the possibility that vectors of feral pigs cause the disease to spread. Article 8 also provides that if the results of this inquiry suggest that ASF may have spread from or to holdings located in other EU member States, the Commission and the Member States concerned shall be immediately informed.

10.7. Following the official confirmation of ASF diagnosis in pigs on a holding, Article 9 of Council Directive 2002/60/EC mandates the competent authority to establish a protection zone with a radius of at least three kilometres around the outbreak site, and a surveillance zone, which shall include the protection of zone, of a radius of at least 10 kilometres. Article 9(2) provides that when establishing these zones, the competent authority must take account of: (a) the results of the epidemiological enquiry; (b) the geographical situation, particularly natural or artificial boundaries; (c) the location and proximity of holdings; (d) patterns of movements and trade in pigs and the availability of slaughterhouses and facilities for processing carcasses; and (e) the facilities and personnel available to control any movement of pigs within the zones, in particular if the pigs to be killed have to be moved away from their holding of origin. Article 9(3) provides that when a zone includes parts of the territory of several EU member States, the competent authorities of the EU member States concerned shall collaborate to establish the zone. Lastly, Article 9(4) provides that the competent authority shall take all necessary measures, including the use of prominent signs and warning notices and the use of media resources, such as the press and television, to ensure that all persons in the protection and surveillance zones are fully aware of the restrictions in force in accordance with Articles 10 and 11, and shall take such measures as it considers appropriate to ensure the adequate enforcement of these measures.

10.8. The measures that EU member States shall ensure are applied within a protection zone are contemplated in Article 10 of Council Directive 2002/60/EC. These measures include: (a) carrying out a census of all holdings as soon as possible; after the establishment of the protection zone, undertaking visits to the holdings by an official veterinarian, within not more than seven days, in

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<sup>1902</sup> The term primary outbreak is defined for the purposes of Council Directive 2002/60/EC, as the outbreak within the meaning of Article 2(d) of Council Directive 82/894/EEC of 21 December 1982 on the notification of animal diseases within the Community (Article 2(h) of Council Directive 2002/60/EC (Exhibit EU-31)). Article 2(d) of Council Directive 82/894/ECC provides: 'primary outbreak' means an outbreak [sic] not epizootiologically linked with a previous outbreak in the same region of a Member State as defined in Article 2 of Directive 64/432/EEC or the first outbreak in a different region of the same Member State. (available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31982L0894&from=en>, last visited on 5 January 2016).

order to conduct a clinical examination of the pigs and to check the register and pig identification marks; (b) prohibiting the movement and transport of pigs on public or private roads, excluding when necessary the service roads of holdings, unless approved by the competent authority when allowing the movements referred to in point (f) below<sup>1903</sup>; (c) cleaning, disinfection, and if necessary, disinsectation and treatment, as soon as possible after contamination, of trucks and other vehicles and equipment used to transport pigs or other livestock or material which may be contaminated; and prohibiting trucks or vehicles which have been used for the transport of pigs to leave the zone without being cleaned and disinfected and then inspected and re-authorised for transport by competent authority; (d) prohibiting that other domestic animals enter or leave a holding without the authorization of the competent authority; (e) immediately notifying all dead or diseased pigs on a holding to the competent authority, which shall carry out the appropriate investigations; (f) prohibiting removing pigs from the holding in which they are kept for at least 40 days<sup>1904</sup> after the completion of the preliminary cleansing and disinfection, and if necessary, disinsectation of the infected holdings; following those 40 days<sup>1905</sup>, subject to certain conditions (laid out in Article 10(3)), the competent authority may authorize the removal of pigs from the said holding to be directly transported to specific sites<sup>1906</sup>; (g) prohibiting that semen, ova or embryos of pigs leave from the holdings situated in the zone; and (h) ensuring that any person entering or leaving pig holdings complies with appropriate hygiene measures as necessary to reduce the risk of ASFV spreading. Article 10(2) provides specific conditions, where the described measures are maintained beyond 40 days,<sup>1907</sup> when the competent authority may authorize the removal of pigs from a holding within the protection zone, to be directly transported to specific sites.

10.9. Article 10(3) provides the conditions under which the competent authority may authorise the removal of pigs from the holding concerned. Article 10(4) mandates that these measures shall continue to be applied at least until: cleansing, disinfection and, if necessary, disinsectation in the infected holdings have been carried out; and pigs on all holdings have undergone clinical and laboratory examinations (which shall not take place until 45 days<sup>1908</sup> have elapsed since the completion of the preliminary cleansing) carried out in accordance with the diagnostic manual in order to detect the possible presence of ASF.

10.10. Article 11 of Council Directive 2002/60/EC provides the measures applicable within the surveillance zones. These measures include: (a) carrying out a census of all holdings; (b) prohibiting the movement and transport of pigs on public or private roads, excluding when necessary the service roads of holdings, unless approved by the competent authority;<sup>1909</sup> (c) cleaning, disinfection, and if necessary, disinsectation and treatment, as soon as possible after contamination, of trucks and other vehicles and equipment used to transport pigs or other livestock or material which may be contaminated; and prohibiting trucks or vehicles which have been used for the transport of pigs to leave the zone without being cleaned and disinfected;

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<sup>1903</sup> This prohibition does not extend to transit of pigs by road or rail without unloading or stopping; and derogations may be granted for slaughter pigs coming from outside the protection zone and on their way to a slaughterhouse situated in the said zone for immediate slaughter. Article 10.1.(b).

<sup>1904</sup> This period may be reduced to 30 days if, in accordance with the diagnostic manual, the EU member States have applied an intensive sampling and testing programme making it possible to rule out the presence of ASF on the holding in question (Article 10(5) of Council Directive 2002/60/EC).

<sup>1905</sup> This period may be reduced to 30 days if, in accordance with the diagnostic manual, the EU member States have applied an intensive sampling and testing programme making it possible to rule out the presence of ASF on the holding in question (Article 10(5) of Council Directive 2002/60/EC).

<sup>1906</sup> Those sites are: (i) a slaughterhouse designated by the competent authority, preferably within the protection or surveillance zone for the purpose of immediate slaughter; (ii) a processing plant or a suitable place where the pigs are immediately killed and their carcasses are processed under official supervision; and (iii) in exceptional circumstances, to other premises located within the protection zone (EU member States making use of this provision shall immediately inform the Commission thereof in the SVC).

<sup>1907</sup> This period may be reduced to 30 days if, in accordance with the diagnostic manual, the EU member States have applied an intensive sampling and testing programme making it possible to rule out the presence of ASF on the holding in question (Article 10(5) of Council Directive 2002/60/EC).

<sup>1908</sup> This period may be reduced to 30 days if, in accordance with the diagnostic manual, the EU member States have applied an intensive sampling and testing programme making it possible to rule out the presence of ASF on the holding in question (Article 10(5) of Council Directive 2002/60/EC).

<sup>1909</sup> This prohibition does not need to be applied to the transit of pigs by road or rail, without unloading or stopping, or to slaughter pigs coming from outside the surveillance zone and on their way to a slaughterhouse situated in the said zone for immediate slaughter. Article 11.1.(b).

(d) prohibiting that other domestic animals enter or leave a holding during the first seven days after establishment of the zone without the authorization of the competent authority; (e) immediately notifying all dead or diseased pigs on a holding to the competent authority, which shall carry out the appropriate investigations; (f) prohibiting removing pigs from the holding in which they are kept for at least 30 days<sup>1910</sup> after the completion of the preliminary cleansing and disinfection, and if necessary, desinsectation of the infected holdings; following those 30 days<sup>1911</sup>, subject to certain conditions (laid out in Article 10(3))<sup>1912</sup>, the competent authority may authorize the removal of pigs from the said holding to be directly transported to specific sites; (g) prohibiting that semen, ova or embryos of pigs leave from the holdings situated in the zone; and (h) ensuring that any person entering or leaving pig holdings complies with appropriate hygiene measures as necessary to reduce the risk of ASFV spreading. Article 11(2) provides specific conditions, where the described measures are maintained beyond 40 days<sup>1913</sup>, when the competent authority may authorize the removal of pigs from a holding within the surveillance zone, to be directly transported to specific sites.

10.11. Article 11(3) mandates that these measures shall continue to be applied at least until: cleansing, disinfection and, if necessary, desinsectization in the infected holdings have been carried out; and pigs on all holdings have undergone clinical and laboratory examinations (which shall not take place until 40 days<sup>1914</sup> have elapsed since the completion of the preliminary cleansing) carried out in accordance with the diagnostic manual in order to detect the possible presence of ASF.

10.12. The measures applicable in cases where ASF is suspected or confirmed in a slaughter house or means of transport are indicated in Article 14 of Council Directive 2002/60/EC. In case of suspicion of ASF in a slaughter house or means of transport, the first measure that EU member States shall ensure is that the competent authority immediately sets in motion official means of investigation to confirm or to rule out the presence of ASF. Should a case of ASF be detected in a slaughter house or means of transport, the competent authority shall ensure that: (a) all susceptible animals in the slaughterhouse or in the means of transport are killed without delay; (b) the carcasses, offal and animal waste of possibly infected and contaminated animals are processed under official supervision; (c) cleansing, disinfection and, if necessary, desinsectization of buildings and equipment, including vehicles, takes place under the supervision of the official veterinarian; (d) an epidemiological inquiry is carried out; (e) the ASFV isolate is subject to the laboratory procedure to identify the genetic type of virus; (f) measure regarding contact holdings are in the holding where the infected pigs or carcasses came from and in the other contact holdings (unless otherwise indicated by the epidemiological inquiry, the measures laid down in respect of cases where the presence of ASF on a holding is confirmed, shall be applied in the holding of origin of the infected pigs or carcasses); and (g) no animals are reintroduced for slaughter or transport until at least 24 hours after completion of the cleansing, disinfection and, if necessary, desinsectization operations.

10.13. Article 15 of Council Directive 2002/60/EC provides the measures applicable in cases where ASF is suspected or confirmed in feral pigs. According to this provision, immediately after the competent authority of an EU member State has information that feral pigs are suspected of being infected, it shall take all appropriate measures to confirm or rule out the presence of the disease, by giving information to the owners of pigs and to hunters, and by investigations of all

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<sup>1910</sup> This period may be reduced to 21 days if, in accordance with the diagnostic manual, the EU member States have applied an intensive sampling and testing programme making it possible to rule out the presence of ASF on the holding in question (Article 11(4) of Council Directive 2002/60/EC).

<sup>1911</sup> This period may be reduced to 21 days if, in accordance with the diagnostic manual, the EU member States have applied an intensive sampling and testing programme making it possible to rule out the presence of ASF on the holding in question (Article 11(4) of Council Directive 2002/60/EC).

<sup>1912</sup> Article 11.1(f) also provides that "[h]owever, if the pigs are to be transported to a slaughterhouse, at the request of a Member State, accompanied by appropriate justification, and in accordance with the procedure referred to in Article 24(2), derogations from Article 10(3)(e) and (f), fourth indent, may be authorised, in particular with respect to the marking of the meat from these pigs and its subsequent use, and the destination of the treated products."

<sup>1913</sup> This period may be reduced to 30 days if, in accordance with the diagnostic manual, the EU member States have applied an intensive sampling and testing programme making it possible to rule out the presence of ASF on the holding in question (Article 11(4) of Council Directive 2002/60/EC).

<sup>1914</sup> This period may be reduced to 20 days if, in accordance with the diagnostic manual, the EU member States have applied an intensive sampling and testing programme making it possible to rule out the presence of ASF on the holding in question (Article 11(4) of Council Directive 2002/60/EC).

feral pigs shot or found dead, including laboratory testing. As soon as confirmation of a primary case of ASF in feral pigs has taken place, in order to reduce the spread of ASF, the competent authority of an EU member State shall immediately: (a) establish an expert group including veterinarians, hunters, wild life biologists and epidemiologists, that shall assist the competent authority in: studying the epidemiological situation and defining an infected area in accordance with Article 16(3)(b), establishing appropriate measures to be applied in the infected area<sup>1915</sup>, drawing up the eradication plan to be submitted to the Commission in accordance with Article 16, and carrying out checks to verify the effectiveness of the measures adopted to eradicate ASF from the infected area; (b) place under official surveillance pig holdings in the defined infected area, and shall in particular order that: an official census be carried out of all pigs on all holdings, and be kept up to date by the owner (the information in the census shall be produced on request and may be checked at each inspection)<sup>1916</sup>; all pigs on the holding be kept in their living quarters or some other place where they can be isolated from feral pigs (feral pigs must not have access to any material which may subsequently come in contact with the pigs on the holding); no pigs enter or leave the holding, except where authorised by the competent authority having regard to the epidemiological situation; appropriate means of disinfection and if necessary disinsectization be used at the entrance and exits of buildings housing pigs and of the holding itself; appropriate hygiene measures be applied by all persons coming into contact with feral pigs, to reduce the risk of ASFV spreading; all dead or diseased pigs with ASF symptoms on a holding be tested for the presence of ASF; no part of any feral pig, whether shot or found dead, nor any material or equipment which could be contaminated with ASFV, shall be brought into a pig holding; pigs, their semen, embryos or ova shall not be moved from the infected area for intra-Community trade; (c) arrange that all feral pigs shot or found dead in the defined infected area are inspected by an official veterinarian and examined for ASF (and follow the applicable rules on processing of carcasses of all animals found positive or negative); (d) ensure that the ASFV isolate is subject to the laboratory procedure to identify the genetic type of virus.

10.14. Article 15(3) further provides that if a case of ASF has occurred in feral pigs in an area of an EU member State close to the territory of another EU member State, the EU member States concerned shall collaborate in the establishment of disease control measures.

10.15. The regulations in respect of plans for the eradication of ASF from a feral pig population are contained in Article 16 of Council Directive 2002/60/EC. According to Article 16 EU member States shall submit the Commission within 90 days of the confirmation of the a primary case of ASF in feral pigs a written plan of the measures taken to eradicate the disease in the area defined as infected, and of the measures applied on the holdings in that area. The Commission shall then examine the plan in order to determine whether it permits the desired objectives to be attained. The plan, if necessary with amendments, shall be approved in accordance with the accelerated regulatory procedure contained in Article 24(2) of Council Directive 2002/60/EC. Such plan may be subsequently amended or supplemented to take account of developments in the situation, including the definition of the infected area. In cases where such re-definition takes place, the respective EU member States shall ensure that the Commission and the other EU member States are informed of these amendments without delay. If the amendments concern other provisions of the plan, the EU member States shall submit the amended plan to the Commission for examination and eventual approval in accordance with the procedure referred to in Article 24(2).

10.16. As indicated in Article 16(3), the eradication plan shall contain information on: (a) the results of the epidemiological investigations and controls carried out in accordance with Article 15 and the geographical distribution of the disease; (b) the definition of the infected area within the territory of the EU member State concerned<sup>1917</sup>; (c) the organization of close cooperation between biologists, hunters, hunting organizations, the wildlife services and veterinary authorities (animal health and public health); (d) the information campaign to be enforced to increase hunters' awareness of the measures they have to adopt in the framework of the eradication plan; (e) specific efforts made to determine the extent of the infection in the feral pig population, by

<sup>1915</sup> Such measures may include suspension of hunting and a ban on feeding feral pigs.

<sup>1916</sup> However, as regards open-air pig holdings, the first census carried out may be done on the basis of an estimate (Article 15.2(b)).

<sup>1917</sup> When defining the infected area, the competent authority shall take into account: the results of the epidemiological investigations carried out and the geographical distribution of the disease; the feral pig population in the area; and the existence of major natural or artificial obstacles to movements of feral pigs. (Article 16.3.(b)).

investigating feral pigs shot by hunters or found dead, and by laboratory testing, including age-stratified epidemiological investigations; (f) the requirements to be complied with by hunters in order to avoid any spread of the disease; (g) the method of removal of feral pigs found dead or shot<sup>1918</sup>; (h) the epidemiological inquiry which is carried out on each<sup>1919</sup>; (i) surveillance programmes and prevention measures applicable to the holdings situated in the defined infected area, and, if necessary, in its surroundings, including the transport and movement of animals within, from and to the area<sup>1920</sup>; (j) other criteria to be applied for lifting the measures taken; (k) the authority with responsibility for supervising and coordinating the departments responsible for implementing the plan; (l) the information system established in order that the expert group appointed in accordance with Article 15(2)(a) can review on a regular basis the results of the eradication plan; and (m) the disease monitoring measures which shall be enforced at the earliest 12 months after diagnosis of the last case of ASF in feral pigs in the defined infected area; these monitoring measures shall stay in place for at least 12 additional months and shall at least include the provisions already enforced in accordance with points (e), (g) and (h).

10.17. Article 16 also contemplates the obligation of the respective EU member States to transmit a report concerning the epidemiological situation in the defined infected area and the results of the eradication plan to the Commission and to other EU member States. This report shall be transmitted to the Commission every six months. In addition, Council Directive 2002/60/EC contains provisions on: cleansing, disinfection and treatment with insecticides (Article 12); repopulation of pig holdings following disease outbreaks (Article 13); measures to prevent the spread of ASFV by means of vectors (Article 17); diagnostic procedures and bio-safety requirements (Article 18); use, manufacture and sale of ASF vaccines (Article 19); community controls (Article 20); contingency plans (Article 21); and disease control centres and expert groups (Article 22).

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<sup>1918</sup> Such method of removal shall be based on: processing under official supervision; or inspection by an official veterinarian and laboratory tests (Article 16.3(g)).

<sup>1919</sup> This inquiry must include the completion of a questionnaire which supplies information about: the geographical area where the animal was found dead or shot; the date on which the animal was found dead or shot; the person who found or shot the animal; the age and sex of the pig; if shot, symptoms before shooting; if found dead, the state of the carcass; and laboratory findings (Article 16.3(h)).

<sup>1920</sup> These measures shall at least include the ban on moving pigs, their semen, embryos or ova from the infected area for intra-Community trade and may include a temporary ban on pig production and on the establishment of new holdings (Article 16.3(i)).