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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

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS475/R.

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WORKING PROCEDURES OF THE PANEL

Version as adopted on 6 January 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Upon indication from any party, at the latest on the first substantive meeting, that it shall provide information that requires protection additional to that provided for under these Working Procedures, the Panel shall, after consultation with the parties, decide whether to adopt appropriate additional procedures. Exceptions to this procedure shall be granted upon a showing of good cause.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. 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.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the European Union requests such a ruling, the Russian Federation shall submit its response to the request in its first written submission. If the Russian Federation requests such a ruling, the European Union shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel

shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Thereafter, the Panel will rule as promptly as possible on any objection to the accuracy of a translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the European Union could be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission was numbered EU-5, the first exhibit of the next submission thus would be numbered EU-6.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite the Russian Federation to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall have an opportunity to orally answer these questions. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first.

e. The Panel may, after consultation with the parties, set time limits for the opening statements; such time limits would be informed to the parties before the first substantive meeting.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the Russian Federation if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the Russian Federation to present its opening statement, followed by the European Union. If the Russian Federation chooses not to avail itself of that right, the Panel shall invite the European Union to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each third party shall provide additional copies to the interpreters. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any

matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to these questions within a deadline to be determined by the Panel.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of the executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

20. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 3 paper copies of all documents it submits to the Panel. Exhibits may be filed in 3 copies on CD-ROM or DVD and 3 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy

to ****.****@wto.org, ****.****@wto.org, ****.****@wto.org, ****.****@wto.org, and ****.****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties. The Panel will annex to its report these procedures.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES CONCERNING STRICTLY CONFIDENTIAL INFORMATION

Adopted on 8 December 2014

The following procedures apply to strictly confidential information (SCI) submitted in the course of the Panel proceedings.

1. For the purposes of these proceedings, Strictly Confidential Information (SCI) means information: (a) that is clearly designated as such by the party submitting it; (b) that is not otherwise accessible to the general public; and (c) that is commercially sensitive or, in the case of government confidential information, the release of which could reasonably be considered to cause or threaten to cause harm to the public interest, including by impairing the ability of the government to conduct its work. Each party and third party shall act in good faith and exercise restraint in designating information as SCI. The Panel shall have the right to intervene in any manner that it deems appropriate, if it is of the view that restraint in the designation of SCI is not being exercised.

2. If a party, a third party, or the Panel, contests the designation of information as SCI, the party designating the information shall provide reasons for the designation within five (5) working days. After giving the other party an opportunity to comment on the justification provided within five (5) working days, the Panel shall decide on the designation of the information.

3. As required by paragraph 3 of the Working Procedures of the Panel[1], 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.

4. Panel Members and employees of the WTO Secretariat assigned to the present dispute, including translators and interpreters, shall have access to SCI submitted in these proceedings. Employees of the Governments of the Russian Federation and the European Union, as well as of the third parties, shall have access to SCI submitted in these Panel proceedings to the extent necessary for their involvement in their official capacity in DS475 proceedings. Subject to paragraph 3 of the Working Procedures of the Panel, parties and third parties may give access to SCI only to outside advisers and experts providing assistance to the parties in these proceedings and their clerical staff.

5. On the request of either party, the Panel will review whether particular confidential information it has submitted is so sensitive that it should not be provided to the third parties, and taking into consideration the need for the third party to have access to the particular information. If the Panel finds such information to be particularly sensitive, it will direct the party submitting the information to provide a summary of the contents of the redacted information that will be made available to the third parties.

6. Each party and third party shall maintain a list of the names of all outside advisers and experts provided with access to SCI. The list shall be updated when additional outside advisers or experts are provided with access to SCI.

[1] Adopted on 8 December 2014

7. A party or third party submitting or referring to SCI in any written submission (including in any exhibits) shall mark the cover and the first page of the document containing any such information with the words "Contains Strictly Confidential Information". The specific information in question shall be enclosed in double brackets, as follows: [[xx.xxx.xx]], and the notation "Contains Strictly Confidential Information" shall be marked at the top of each page containing the SCI. In the case of an oral statement containing SCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain SCI, and the Panel will ensure that only persons authorized to have access to SCI pursuant to these Additional Working Procedures are in the room to hear that statement.

8. Any SCI that is submitted in binary-encoded form shall be clearly marked with the statement "Strictly Confidential Information" on a label on the storage medium, and clearly marked with the statement "Strictly Confidential Information" in the binary-encoded files.

9. The parties, third parties, the Panel, the WTO Secretariat, and any others permitted to have access to documents containing SCI under the terms of these Additional Working Procedures shall store all documents containing SCI so as to prevent unauthorized access to such information.

10. The Panel may include in its confidential interim report any information designated as SCI under these additional working procedures. However, the Panel will not disclose in its final report any information designated as SCI under these Additional Working Procedures. The Panel may, however, make statements of conclusion based on such information. Before the Panel makes its final report publicly available, the Panel shall give each party or third party an opportunity to ensure that any information it has designated as SCI is not contained in the report.

11. At the conclusion of the dispute[2], and within a period to be fixed by the Panel, each party and third party shall either return all documents (including electronic material) containing SCI, submitted during the Panel proceedings, to the party that submitted such documents or certify in writing to the Panel and the other parties that all such documents have been destroyed, or otherwise protect the SCI against public disclosure, consistent with the party's obligations under its domestic laws. The WTO Secretariat shall have the right to retain one copy of each of the documents containing SCI for the archives of the WTO.

12. If a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, the Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any SCI governed by these procedures, including any submissions containing information designated as SCI under these additional working procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible.

[2] Where this is defined as when (a) the Panel or Appellate Body report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel or the Appellate Body report; (b) the authority for the establishment of the Panel lapses under Article 12.12 of the DSU; or (c) a mutually satisfactory solution is notified to the DSB under Article 3.6 of the DSU.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES FOR PANEL'S EXPERT CONSULTATION

Adopted on 2 June 2015

1.1. In the course of the proceedings, the Panel shall determine if there is a need to seek expert advice. In addressing matters concerning scientific and/or technical advice from experts[1], the Panel shall have regard to the provisions of the DSU and, *inter alia*, to the objective of conducting these proceedings in an efficient and timely manner and at a reasonable cost. Should the Panel decide to consult experts, the procedures described below shall apply.

1.2. Consistent with Article 13 of the DSU and Article 11.2 of the SPS Agreement, the Panel may seek expert advice from experts and from international organizations, as appropriate.

1.3. The Panel may ask any relevant institutions, as well as the parties, for suggestions of possible experts. Parties shall not engage in direct contact with the individuals suggested on any matter related to this dispute.

1.4. The Panel shall provide the parties with a list of possible experts, their *curricula vitae* and declarations of potential conflicts of interest. In this declaration, each potential expert will be instructed to disclose information which may include the following:

a. financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;

b. professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);

c. other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);

d. considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);

e. employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members); and

f. any other relevant information.

1.5. Parties shall have the opportunity to comment and to make known any compelling objections to any particular expert.

1.6. The Panel shall select the experts on the basis of their qualifications and the need for specialized scientific expertise, and shall not select experts whom the Panel considers to have a conflict of interest either after self-disclosure or otherwise. The Panel shall decide the number of experts in light of the number and type of issues on which advice shall be sought, as well as of the different areas on which each expert can provide expertise.

1.7. The Panel shall inform the parties of the experts and international organizations it has decided to consult, in accordance with the timetable adopted by the Panel. Experts shall act in their personal capacities and not as representatives of any entity. However, should the Panel seek

[1] For the purpose of these Working Procedures, the term "expert" may be used to refer to individuals, institutions, research bodies, or international organizations.

advice from an international organization, the advice received shall be deemed to be received from the international organization and not the individual staff members or representatives of the international organization. Moreover, any staff members of such international organization that attend a meeting with the Panel, shall be deemed to do so in a representative capacity, on behalf of the respective international organization.

1.8. The experts shall be subject to the DSB's Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1), a copy of which shall be provided to them by the Panel.

1.9. The Panel shall prepare written questions for the experts. The Panel may ask the parties to suggest a limited number of questions that the Panel could ask the experts. The experts shall be requested to provide responses in writing to the Panel questions within a time-period specified by the Panel. The experts shall be requested to respond only to questions on which they have sufficient knowledge. The responses of experts shall be part of the Panel's record but shall not be attached to the Panel report as annexes. Copies of the responses shall be provided by the Panel to the parties, in accordance with the timetable adopted by the Panel. The parties shall have the opportunity to comment in writing on the responses from the experts and to pose written questions to the experts in advance of the meeting, to be answered orally during such meeting.

1.10. The Panel may provide the experts, on a confidential basis, with relevant parts of the parties' submissions, including exhibits, as well as with any additional information deemed necessary. The experts shall have the opportunity to request, through the Panel, additional factual information or clarifications from the parties, if it shall aid them in answering the Panel's questions.

1.11. The Panel may schedule a meeting with the experts, prior to the second substantive meeting with the parties. Prior to the Panel's meeting with the experts, the Panel shall ensure that:

a. the parties' comments on the experts' responses are provided to all experts;

b. each expert is provided with the other experts' responses to the Panel's questions; and

c. each expert is provided with advance questions from the parties to the experts, as described in paragraph 1.12 b. below, if any.

1.12. The Panel's meeting with the experts would be conducted as follows:

a. The Panel shall invite each expert to make an opening statement. This statement may include, but is not limited to, any clarification of their written responses to the Panel questions requested by the Panel or the parties, or information complementary to these responses. The experts that intend to make an opening statement shall provide the Panel with written versions of their statements, before they take the floor. The Panel shall make available, to the other experts, and to the parties, each expert's written statement, no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the experts questions or make comments through the Panel. To facilitate this, each party may send in writing in advance of the meeting, within a timeframe to be determined by the Panel, any questions to the experts to which it wishes to receive an oral response at the Panel's meeting with the experts. Each expert shall be invited to respond orally to the parties' questions and to react to the parties' comments.

c. The Panel may subsequently pose questions to the experts. The expert to whom the question is addressed shall be invited to respond orally to the Panel's questions. The Panel may also give the other experts the opportunity to address any question or comment.

d. Once the questioning has concluded, the Panel shall afford each expert an opportunity to present a brief closing statement.

e. The Panel may schedule additional meetings with the experts if necessary.

1.13. The Secretariat shall prepare a compilation of the experts' written replies to the Panel's questions, as well as a full transcript of any meeting with the experts for inclusion in the record of the Panel proceeding. This transcript shall not be annexed to the Panel report. The experts shall be given an opportunity to verify, before the texts are finalized, the drafts of these texts to ensure that they accurately reflect the information they provided. The parties shall likewise be given an opportunity to verify that the transcript of any meeting with the experts accurately reflects the parties' own interventions.

ANNEX B

ARGUMENTS OF THE PARTIES

EUROPEAN UNION

RUSSIAN FEDERATION

ANNEX B-1

FIRST PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. INTRODUCTION

1. The European Union (EU) is challenging measures adopted by the Russian Federation (Russia) regarding the importation of live pigs and certain pig products (the products at issue), purportedly taken because of concerns related to cases of African swine fever (ASF) accruing on a limited part of the territory of four Member States of the EU (EU MS), bordering Belarus and Russia.

2. The Russian measures at issue consist of: (1) four individual bans on trade in live pigs and certain pig products, like fresh pork, from the entire territory of Lithuania, Poland, Latvia and Estonia and (2) an EU-wide import ban on trade in live pigs and certain pig products, like fresh pork.

II. PROCEDURAL HISTORY

3. The EU requested consultations with Russia on 8 April 2014, pursuant to Articles 1 and 4 of the 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).

4. The EU requested the establishment of a panel pursuant to Article 6 of the DSU on 27 June 2014 and the panel was established on 22 July 2014.

III. FACTUAL BACKGROUND

A. African Swine Fever

1. The ASF virus

5. The ASFV is a devastating infectious disease, usually deadly, in the case of both feral pigs (wild boars) and domestic pigs of the *Sus scrofa* species. No vaccine exists to combat the ASFV. It does not affect human beings nor does it affect animal species other than domestic pigs and wild boar.

6. One of the main divergences between the EU and Russia is the approach to ASF eradication in wild boar. Russia believes that drastic increased hunting intended to achieve wild boar depopulation may produce positive results. However, the only result that such increased hunting may bring is rapid further territorial spread of the disease, through the dispersal of infected animals. This is thought to be the most likely cause of ASF introduction into certain limited parts of the EU, from Belarus and from Russia, as wild boar is not a migratory species.

7. The EU is not against hunting wild boar in the infected areas per se, but we do not favour increased hunting pressure or hunting with means which would favour dispersal of the animals.

2. The OIE standards

8. The World Organisation for Animal Health (OIE) is the relevant international standards setting body dealing with animal health issues. The version of the OIE Terrestrial Code in force at the date of the establishment of the Panel and thus relevant to the present dispute is the 23rd edition, adopted in May 2014. These are the only relevant international standards with regard to ASF.

3. ASF in Russia

3.1. Historic Overview

9. The first ASF cases were reported on the former USSR territory in 1977. More recently, ASF was introduced in Russia for the first time in the Chechnya Republic in November-December 2007. Since then ASF has become apparently endemic in wild boars in the region. The disease widely spread geographically from the Caucasus further north and westwards, to the borders with Belarus and Ukraine, in all likelihood infecting pigs in these two countries.

3.2. Present ASF situation in Russia

10. In the period 2007-2013 there were 226 ASF outbreaks in wild boar in Russia. The risk that ASF is endemic in Russia is high. The risk is also high that the virus will further spread to other areas.

3.3. ASF transmission from Russia Westwards

11. The virus strain found in the dead wild boar in Lithuania and Poland in 2014 matches 100% the ASF virus strain found in Belarus and belongs to the Genotype II from Russia.

4. ASF in the EU

4.1. Historic Overview

12. With the exception of the island of Sardinia (Italy), ASF has been eradicated elsewhere in the EU prior to 2014.

4.2. Present ASF situation in the EU

13. In view of the fact that ASF moved closer to the EU borders as evidenced by the 2013 cases in Belarus, the EU MS bordering Russia and Belarus (Estonia, Latvia, Lithuania and Poland), in compliance with existing EU legislation, put in place enhanced protection measures. These enhanced measures allowed at the beginning of 2014 the prompt detection of ASFV in a limited number of cases in wild boar in Lithuania and Poland, close to the border with Belarus.

14. A very limited geographical spread of the ASFV as of April 2015, confined to border regions with Belarus and Russia, and the non-transmission of the ASFV to our trade partners which continued to import the products at issue from the ASF-free areas in the recently affected EU Member States, gives the EU a high degree of confidence in the robustness of our ASF regionalization measures.

15. The emergency response in case of ASF in the EU Member States is based on the national "contingency plans". Directive 2002/60 establishes that each EU Member State shall draw up a contingency plan specifying the national measures to be implemented in the event of an ASF outbreak, taking into account local factors, like the pig density, which is likely to influence ASF spread.

16. In the areas considered ASF infected in the EU three major sets of measures are implemented: i) the disease control measures in case of outbreaks in domestic pigs laid down in Directive 2002/60; (ii) in case of ASF in feral pigs (wild boar) the main measures are provided for in Articles 15 and 16 of Directive 2002/60; the national eradication plans prepared by the EU Member States describe in detail the applicable measures; and (iii) an additional layer of safety by the delimitation of different parts according to the ASF risk, containing specific prohibitions and measures, as provided in Decision 2014/709.

B. The Measures at Issue

1. Measures notified to the WTO

17. Russia notified to the WTO SPS measures concerning four EU MS. *De facto,* Russia has applied an EU-wide ban since the very first ASF cases in Lithuania in January 2014. It calls this measure "provisional compliance with the terms of the veterinary certificates". However, the EU-wide ban was never notified by Russia to the WTO.

2. The EU-wide Ban

18. The refusal by Russia to accept imports of the products at issue from the entire EU amounts to an EU-wide ban. The EU identifies this specific measure at issue both as an action (an import ban or restriction) and, in the alternative, as an omission (failure to accept imports from the EU). 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).

19. Russia attempts to justify the EU-wide ban by arguing that it cannot return to a situation where veterinary export certificates are discussed bilaterally with individual EU Member States, and it apparently considers that this should somehow be imputable to the EU. In making this argument, Russia acknowledges the existence and precise content of the EU-wide ban and that it is attributable to Russia. Finally, Russia is simply wrong to suggest that anything on the record supports its assertion that the EU has, by implication, relinquished its right to bring this matter before a panel, pursuant to the terms of the DSU. The Appellate Body has made it very clear that Members cannot be considered to have relinquished their DSU rights other than expressly and unequivocally.

20. Russia chose to obstruct the process of clarifying the export certificates in light of the current situation by referring to its arrangements within the framework of the Customs Union with Belarus and Kazakhstan, which is contradicted by the text of Decision 317/2010 of the Customs Union.

3. The applicability of the SPS Agreement

21. According to its Article 1.1, the SPS Agreement covers sanitary measures which may, directly or indirectly, affect international trade. The EU established that the Russian measures are sanitary measures within the meaning of the SPS Agreement and that they "directly affect international trade". Russia did not dispute this characterization.

IV. CLAIMS

A. Claims related to harmonization

1. Article 3.2 of the SPS Agreement

22. Russia's notifications to the SPS Committee with regard to the four individual country-wide bans, concerning Lithuania, Poland, Latvia and Estonia make reference to OIE international standards. The EU considers that the Panel should start its analysis rather with respect to the harmonization claims and then continue with the claims related to risk assessment. However, whichever order of analysis the Panel may chose, given the absence of remand authority under the DSU, judicial economy may not be appropriate, especially if it prevents the Appellate Body from completing the legal analysis in the event of an appeal.

23. The only international standards with respect to the ASF are to be found in the OIE Terrestrial Code. The international standards, guidelines and recommendations for animal health are those developed under the auspices of the OIE, according to Annex A(3)(b). The OIE Terrestrial Code is thus incorporated by reference into the SPS Agreement and for the purposes of dispute settlement panels and the Appellate Body have the authority to interpret its provisions. The OIE Terrestrial Code is not an international agreement (treaty), but it is a document adopted by the World Assembly of Delegates of the OIE. However, the EU 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.

24. The Appellate Body has clarified that "a measure that conforms to an international standard would embody the standard completely and, for practical purposes, converts it into a municipal standard". The OIE Terrestrial Code recommends regionalization, while Russia applies an EU-wide ban and country-wide bans for the four partially affected EU MS. The Russian measures do not "conform to" and are not "based on" the relevant international standards.

25. The Russian notifications to the SPS Committee are inaccurate and contradictory. It invokes different chapters of the OIE Terrestrial Manual and the OIE Terrestrial Code. Chapter 2.8.1. of the OIE Terrestrial Manual only sets standards for diagnostic tests and vaccines and it does not set the standards relevant for international trade. Furthermore, according to Russia some of the measures at issue are related to food safety and the protection of humans from animal/ plant pest or disease.

26. The correct applicable standards for the respective measures are mainly to be found in Chapter 15.1. of the OIE Terrestrial Code, which deals with trade in the products at issue, in conjunction with Chapter 4.3., which deals with regionalization. The Russian measures do not conform to any of these standards. On the contrary, they go against the mentioned standards and impose country-wide bans.

27. The three elements described in the international standards "ASF free country, zone or compartment" are rather related to the objective characteristics of the ASF situation and not to the subjective choice of the importing Members. If the entire country is not ASF free, then the recommendation is to look into the regionalization measures and allow trade form ASF free zones. If the extent of the disease spread is so significant that zones cannot be effectively established, then in principle the recommendation is to allow trade from ASF free compartments.

28. The conformity with the international standards of the bans on the importation into Russia of the products at issue from the EU can be summarized as follows:

- the ban on trade in live pigs does not follow Article 15.1.5 of the OIE Terrestrial Code;

- the ban on trade in "genetic material" of pigs does not follow the recommendations in Article 15.1.8. (semen of domestic pigs) and Article 15.1.10. (in vivo derived embryos of domestic pigs) of the OIE Terrestrial Code;

- the ban on fresh pork does not follow Article 15.1.12. of the OIE Terrestrial Code;

- the four individual bans on "finished goods, which contain pork", "other prepared or canned meat", "ready to eat products, containing pork" does not follow the recommendations in Article 15.1.14. (meat products of pigs, either domestic or wild) of the OIE Terrestrial Code;

- the ban on products used for animal feeding does not follow Article 15.1.14. (products from fresh meat of pigs intended for use in animal feeding) of the OIE Terrestrial Code;

- the ban on bristles does not follow Article 15.1.16. of the OIE Terrestrial Code;

- the ban on "products of slaughter of wild boars" does not follow Article 15.1.13. (fresh meat of wild pigs) and Article 15.1.14. (meat products of wild pigs) of the OIE Terrestrial Code.

29. The same products mentioned above are also covered by the EU-wide ban, with the exception of products subjected to heat treatment or maturation. Several examples of covered products are offered by Russia as rejected consignments.

30. The EU is not required to demonstrate that its control measures are in accordance with the OIE Terrestrial Code – it is Russia that asserts that its SPS measures are in conformity with or are based on the OIE Terrestrial Code. Nevertheless, we have demonstrated that our measures are in accordance with the OIE Terrestrial Code, and specifically with the use of regionalisation.

31. The EU neither established containment zones nor compartments within the meaning of Chapter 4.3 of the OIE Terrestrial Code.

32. The EU has established areas considered to be infected with ASFV and ASF-free areas. The establishment of containment zones within the meaning of Article 4.3.3.3. of the OIE Terrestrial Code is not the only possible tool in applying regionalization, but only a possible option (*may*).

33. The EU neither identified compartments, nor requested Russia for recognition of compartments with high levels of biosecurity, *inter alia*, from the affected regions of Estonia, Latvia, Lithuania, or Poland. Instead, the EU identified zones according to the different levels of risk and requested Russia to recognize ASF-free zones from Estonia, Latvia, Lithuania, Poland and the rest of the non-affected areas in the EU.

34. Under the OIE Terrestrial Code there is no compulsory rule as to which method an exporting country may choose. The options of ASF-free zone or compartment are presented in the text of all the relevant standards in the alternative. One concept does not automatically take precedence over the other. Chapter 15.1 of the OIE Terrestrial Code recommends trade from ASF-free zones with respect to the same products it recommends trade from ASF-free compartments. Both options are equally possible and it is up to each exporting Member to choose its approach, in accordance with the provisions of Article 6 of the SPS Agreement.

35. It may happen that the exporting Member establishes ASF free zones and at the same time ASF free compartments within the zones which are not ASF free. This is a possible option available to an exporting Member and not an obligation.

36. It clearly follows from the above that Russia's measures at issue not only do not "conform to" but actually are contrary to the applicable international standards. Consequently, Russia's measures cannot be deemed as necessary to protect animal health and cannot benefit of the rebuttable presumption of consistency with the relevant provisions of the SPS Agreement, within the meaning of Article 3.2 of the SPS Agreement.

37. The reference to relevant provisions in Article 3.2 has to be understood as closely related to the subject in an appropriate way. Such provisions are those related to the risk assessment and scientific evidence. The international standards contained in the OIE Terrestrial Code are based on the most recent scientific and technical information. However, the OIE standards do not deal with other aspects, like discrimination. Accordingly, a measure which conforms to the recommendations in the OIE Terrestrial Code may still be discriminatory.

2. Article 3.1 of the SPS Agreement

38. A WTO Member has always the choice to follow the international standards or to conduct a risk assessment. However, once a WTO Member decides to rely on the relevant international standards then the language of the SPS Agreement is imperative ("shall base").

39. The "base on" requirement in Article 3.1 is different from "conform to" in Article 3.2. It means that the measures are "supported" by the international standards. The EU has demonstrated in the previous section that the Russian measures at issue are contrary to the relevant international standards. The Russian measures cannot be said to be "supported" by the international standards or to incorporate some elements of the said standards.

40. Similarly, in *India - Agricultural Products* the panel found that the Indian measures and the OIE recommendations contradicted each other and thus the Indian measures could not be said to be based on international standards. It clearly follows that the Russian measures at issue are not "based on" the applicable international standards within the meaning of Article 3.1 of the SPS Agreement.

3. Article 3.3 of the SPS Agreement

41. The right of Members to establish a higher level of sanitary protection under Article 3.3 is an autonomous right and not an exception to a "general obligation" under Article 3.1.

42. While Article 3.3 of the SPS Agreement is "not a model of clarity in drafting", the last sentence states that a measure which departs from the international standards shall not be inconsistent with any other provision of the SPS Agreement. It follows that the inconsistency of the measures at issue with several provisions of the SPS Agreement, notably those related to risk assessment, regionalization and non-discrimination, are relevant for a finding of inconsistency with Article 3.3.

43. The Appellate Body noted that "there is a 'scientific justification' for an SPS measure, within the meaning of Article 3.3, if there is a rational relationship between the SPS measure at issue and the available scientific information". A finding of inconsistency with Article 5.1 will always imply that the respective measure is inconsistent with Article 3.3.

B. Claims related to risk assessment

1. Articles 5.1 and 5.2 of the SPS Agreement

44. As 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. Under an Article 5.1 analysis, two issues should be addressed: 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.

45. The definition of the risk assessment is provided in paragraph 4 of Annex A of the SPS Agreement. As a previous panel notes, there are two types of risk assessment. Thus, the type of risk assessment to be performed in a given case depends on the objective pursued by the respective SPS measure.

46. The first type of risk assessment shall: (1) *identify the diseases* whose entry, establishment or spread a Member wants to prevent within its territory, as well as *the potential biological and economic consequences* associated with the entry, establishment or spread of these diseases; (2) *evaluate the likelihood of entry, establishment or spread* of these diseases, as well as the associated potential biological and economic consequences; and (3) evaluate the likelihood of entry, establishment or spread of these diseases *according to the SPS measures which might be applied*.

47. In turn, the second type of risk assessment involves two elements: (1) the identification of the adverse effects on animal health (if any) arising from the disease-causing organism in the food/beverages/feedstuffs at issue and (2) the identification of the potential of occurrence of the mentioned effects.

48. The "based on" requirement in Article 5.1 does not mean that the SPS measures have to "conform to" the risk assessment, but rather that the risk assessment must "reasonably support the SPS measure at stake". It refers to a "certain *objective relationship* between two elements, that is to say, to an *objective situation* that persists and is observable between an SPS measure and a risk assessment".

49. While repeatedly asked by the EU and by the Panel during the first substantive meeting to provide its risk assessment, Russia deferred answering the question and was not able to provide any supporting documentation.

50. Article 5.2 qualifies the way in which a risk assessment has to be carried out, not the substantive obligation to base a sanitary measure on a risk assessment. In adopting, maintaining and/or applying the measures at issue, Russia did not and does not take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; the prevalence of specific diseases; the existence of disease-free areas; the relevant ecological and environmental conditions; and quarantine or other treatment, as required by Article 5.2 of the SPS Agreement. Had Russia properly taken these matters into account, it would have concluded that the measures at issue are unnecessary and unjustified.

2. Article 2.2 of the SPS Agreement

51. Article 2 of the SPS Agreement, entitled "basic rights and obligations" reflects a legislative drafting technique often used in the covered agreements: there is first a general provision setting the general principles and then more specific provisions that elaborate on the contents of the respective rights and obligations. The general provision is there in principle to catch possible situations (if any) which would escape the scrutiny of the more specific provision.

52. Article 2.2 of the SPS Agreement establishes that SPS measures shall be applied only to the extent necessary to protect animal life and health, shall be based on scientific principles and shall not be maintained without sufficient scientific evidence, except as provided in Article 5.7.

53. The necessity requirement has not been clarified in the context of this provision. However, one may find useful guidance in the interpretation of necessity in the framework of Article XX(b) of the GATT or of Article 2.2 of the TBT Agreement, as well as in the provisions of Article 5.6 and footnote 3 of the SPS Agreement.

54. The second element of Article 2.2 is the general requirement to base measures on scientific principles and not maintain them without sufficient scientific evidence. Article 5.1 is a more specific provision related to these principles, requiring WTO Members to undertake a risk assessment. A violation of the more specific provision in Article 5.1 constitutes also a violation of the more general requirements in Article 2.2.

Russia did not provide any risk assessment for the measures at issue, violated the provisions of Article 5.1 of the SPS Agreement, and therefore the provisions of Article 2.2. Similarly, 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.

3. Article 5.7 of the SPS Agreement

55. The case-law refers to Article 5.7 as a "qualified exemption" from the provisions of Article 5.1 or as an autonomous right. In an emergency situation the importing Member is not compelled to perform a risk assessment within the meaning of Article 5.1, but rather to conduct a "less" objective assessment of risk within the meaning of Article 5.7. What that might amount to can only be assessed on a case-by-case basis, and, depending on the circumstances, the less objective assessment of risk might be initially extremely cursory. However, as the situation evolves, one would expect it to crystalize further.

56. According to the panel in *EC — Approval and Marketing of Biotech Products,* the provisional adoption of an SPS measure is not a condition for the applicability of Article 5.7, as the measure at issue has to satisfy all the criteria set forth in Article 5.7 in order to be provisionally adopted.

57. The Appellate Body held that four cumulative requirements are imposed upon a Member having recourse to this provision. It may provisionally adopt an SPS measure if this measure is (1) imposed in respect of a situation where 'relevant scientific information is insufficient' and (2) adopted 'on the basis of available pertinent information'. Such a provisional measure may not be maintained unless the respective Member: (3) 'seek[s] to obtain the additional information necessary for a more objective assessment of risk'; and (4) 'review[s] the … measure accordingly within a reasonable period of time'.

58. With regard to the first condition, the application of Article 5.7 is triggered by the insufficiency of scientific evidence and not by the existence of scientific uncertainty.

59. The Appellate Body determined in *Japan - Apples* that the relevant scientific evidence is "insufficient" within the meaning of Article 5.7 if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the SPS Agreement. The Appellate Body also noted that although further scientific investigation is possible, this does not equate to the insufficiency of the relevant scientific evidence.

60. In SPS cases is not uncommon that there is scientific controversy. However, such controversy should not lead to the conclusion that the relevant scientific evidence is "insufficient". The 'insufficiency' of the scientific evidence is not a perennial state, but rather a transitory one, which lasts only until such time as the imposing Member procures the additional scientific evidence.

61. With regard to the second condition, according to the Appellate Body the information is pertinent when there is a rational and objective relationship between the information and the measure.

62. It may very well be that with regard to the same ASF outbreaks and cases some WTO Members recognize the EU regionalization measures and allow trade from the ASF-free areas, while others impose a ban on the products at issue from the entire EU Member State affected. Measures adopted by other WTO Members are not relevant (some of them may very well be WTO inconsistent), but what matters would rather be the risk assessment and the scientific evidence underlying those measures (if any). This is a science-based process.

63. In the present case such rational and objective relationship exists with respect to information from Members which accepted the EU regionalization measures, allowed trade to continue, and as a consequence did not suffer any ASF introduction. Such measures can only confirm the robustness of the EU ASF regionalization measures. Countries that accept the products at issue from the non-restricted areas in the four recently ASF affected EU Member States, as well as from all the other non-affected zones in the EU are Albania, Bahamas, Canada, Georgia, Haiti, FYR Macedonia, Iceland, Republic of Moldova, New Zealand, Namibia, Norway, Switzerland, Ukraine, United States and Vietnam.

64. The *category* of information or data (defined in abstract terms) to be considered in a risk assessment is the same under Article 5.1 and Article 5.7. In both cases, it is contextually informed by the language of Articles 5.1, 5.2 and 5.3 and the definition of risk assessment in Annex A(4). It may equally be contextually informed by other provisions of the SPS Agreement, including Article 5.7. In fact, no provision of the SPS Agreement explicitly limits the information that might be relevant. Rather, the risk assessment must be "appropriate to the circumstances".

65. The difference between an Article 5.1 situation and an Article 5.7 situation does not relate to the abstract delimitation of the category of data that might be relevant, but rather relates to the extent to which the category is *populated by data*.

66. The other two conditions of Article 5.7 require that the importing Member seeks to obtain the additional information necessary for a more objective assessment of risk and review the sanitary measure accordingly within a reasonable period of time.

67. The Appellate Body noted that the additional information sought must be relevant for conducting a more objective risk assessment. However, if the information sought is irrelevant, the defending Member cannot provisionally shelter its measures under Article 5.7. Further, it will likely be in breach of Article 8 and Annex C(1) of the SPS Agreement. In the present case the necessary information for an objective risk assessment was already provided at an early stage by the EU to Russia and supplemented in several instances.

68. Compliance with the fourth condition, with regard to a "reasonable period of time" has to be established on a case-by-case basis. The EU submits that Russia has failed to review its measure within a reasonable period of time. In the cases where science remains insufficient to form a definitive view because the disease is new and not sufficiently studied, the reasonable period of time could last for many years or decades, depending on the nature of the problem. However, unlike previous cases such as the Hormones or GMO which involved relatively "new" issues, there does not seem to be much controversy between the parties about the science of ASFV.

C. Claims related to regionalization

1. Articles 6.1 and 6.2 of the SPS Agreement

69. The regionalization requirements in Article 6 should be understood in the light of the "significantly less trade restrictive alternative" requirement in Article 5.6. A regional ban (instead of a country-wide ban) should not be automatically equated to a low ALOP. Adaptation to the regional conditions is a relevant factor in the Articles 3.2 and 5.1/5.2 or 5.7 analyses.

70. Article 6.1 of the SPS Agreement is a more general provision which informs the following paragraphs. The panel in *India-Agricultural Products* stated that the assessment of the conformity of a Member's measure with Article 6 should start with the first sentence of the Article 6.2, then continue with the second sentence of Article 6.2 and with Article 6.1.

71. Similarly to *India-Agricultural Products*, in this case Russia did not recognize the concept of disease-free areas with respect to ASF in the EU. The EU observes that the alleged explicit "recognition" of regionalization by Russia is contradicted by the facts of the case. It may be inferred from the unreasonable refusal to accept the regionalization measures of the exporting Member, including irrelevant questions asked pursuant to Article 6.3 of the SPS Agreement, that an importing Member does not, in fact, recognize the concept of disease-free areas. Russia's actions and inactions with respect to ASF-related regionalization in the EU do not match - and in fact contradict - the apparent explicit recognition.

72. The two provisions in Articles 6.2 and 6.3 are related to each other, in the sense that if the importing Member does not even recognize the concept of regionalization with respect to ASF, then any attempts by an exporting Member to prove that the conditions for safe trade in the products at issue from the non-affected areas are fulfilled would be rendered fruitless.

73. In the same vein, the EU agrees with the panel's finding in *India- Agricultural Products* and with Australia's proposition that for a measure to comply with Article 6.2 it must at least not deny or contradict the recognition of such areas.

74. Each of the measures at issue is therefore inconsistent with Russia's obligations under Articles 6.1 and 6.2 of the SPS Agreement, 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. 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 highly effective transparent 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.

2. Article 6.3 of the SPS Agreement

75. With regard to 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 Article 6.2, second sentence of the SPS Agreement. In case of disagreement between the importing and the exporting Members, the exporting Member can defer the dispute to the WTO adjudicating bodies.

76. Since the detection of ASF in wild boar in Lithuania in January 2014 the EU has provided Russia information beyond what is necessary for objectively demonstrating that disease-free areas are and are likely to remain disease-free areas.

77. The information was supplied via an exchange of email messages and registered letters between the competent services and access was allowed to Russian and Customs Union experts for inspection in the EU. Several meetings took place, both in the EU and in Russia, in order to further discuss any aspects that the Russian counterpart considered required further clarification. However, most of the outstanding issues invoked by the Russian authorities were not relevant for the purposes of ASF regionalization within the EU, were already answered, or sought to impose upon the EU a *probatio diabolica.* Russia abusively used the information requests as a delaying

technique and not for a "more" or "less" objective risk assessment, which has never been conducted or at least never provided to the EU or to the Panel.

78. The SPS Committee has developed specific Guidelines on Article 6. These Guidelines describe a possible succession of steps in the process of the recognition of zoning, from step A to Step I. Furthermore, the SPS Committee Guidelines make reference to the fact that Members should proceed with a recognition process without "undue delay", and that the discussions should be undertaken within a "reasonable period of time", normally within 90 days of a request.

79. These Guidelines provide a useful framework for understanding how the mechanism of Article 6 may operate. The panel in *India- Agricultural Products* has considered these Guidelines "to be informative in [the] consideration of how to approach Article 6 because they expand on the Members' own understanding of how the provisions of Article 6 are to be implemented". The Guidelines served for confirming a conclusion already reached by the panel.

80. The EU explained in detail how its regionalization system with regard to ASF works. The EU permanently adapts the areas considered to be infected to the latest developments in the ASFV spread, so as to anticipate further developments. It is significant that since August 2014 there were no cases and outbreaks outside of the areas considered to be infected. It is also significant that only three clusters of outbreaks occurred outside of the areas considered to be infected since the first case in wild boar in Lithuania in January 2014.

81. The EU operates with the concepts of ASF-free areas and areas considered infected with ASF, within the meaning of Chapter 15.1 of the OIE Terrestrial Code. The areas considered infected with ASF are divided into four parts, out of which Parts I, II and III are relevant for the purposes of the present dispute; specific prohibitions and measures (including additional biosecurity measures) apply with regard to trade in the products at issue from those areas. The national eradication plans address surveillance and control measures with respect to feral pigs (wild boar) and they may contain a different terminology, as used by the respective EU Member States. The protection zones and surveillance zones refer to outbreaks in domestic pigs; they are both included in Part III of Decision 2014/709 with respect to the four EU Member States at issue. Separately from all of the above, a "buffer zone" was established in Lithuania after the several cases/outbreaks in Belarus, as a preventive measure in 2013.

82. It follows that the EU has provided in a timely manner all the necessary information with respect to its ASF regionalization measures in Lithuania, Poland, Latvia and Estonia, in order to objectively demonstrate to Russia that the rest of these EU MS and the rest of the EU (except Sardinia) are and are likely to remain disease free areas. Reasonable access has been given to Russia for inspection, testing and other relevant procedures. However, Russia failed to conclude its recognition process without undue delays. Accordingly, Russia is in breach of its obligations under Article 6 of the SPS Agreement.

D. Claims related to risk management

1. Article 5.6 of the SPS Agreement

83. The phrase "appropriate level of sanitary or phytosanitary protection", also referred to as the acceptable level of risk, is defined in Annex A(5) of the SPS Agreement. The SPS Agreement and the corresponding case law recognize that each WTO Member may establish the level of protection it deems appropriate. This includes a "zero-risk" policy and may cover any ascertainable risk, including small or "negligible" risks. The right of a Member to define its appropriate level of protection is not, however, an absolute or unqualified right. Article 3.3 of the SPS Agreement also makes this clear.

84. The scope of a panel's review is not to decide the ALOP for a Member. A Member is in principle entitled to establish its own ALOP, subject only to complying with certain specific provisions in the SPS Agreement.

85. With regard to a Member's ALOP the powers of a Panel concern two main aspects. First, the Panel may deduce a Member's ALOP from the measures at issue, if it is not clearly stated or if there is discrepancy between what is stated and the specific facts of the respective case.

86. Second, the SPS Agreement qualifies a Member's decisions on ALOPs in a number of ways. In particular, according to Article 5.4 Members should, when establishing their ALOP, take into account the objective of minimizing negative trade effects. Furthermore, according to Article 5.5 of the SPS Agreement, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. This provision does not apprehend the fixing of the ALOP *per se*, but it does speak to a need for consistency in setting ALOPs.

87. In the present case Russia has not expressly stated its appropriate level of protection. According to the Appellate Body, if the level of protection is not specified in writing, a panel should infer it from the SPS measures applied in practice.

88. The present case presents similarities to *India - Agricultural Products.* The EU-wide ban and the four individual bans are not combined with a Russia-wide ban, as products associated with the risk of ASF from the non-affected zones of Russia are allowed to be traded. In addition, these bans are not able to achieve restrictions in wildlife movements, an important factor of ASF transmission being the wild boar populations. Furthermore, infected wild boars may move into Russia also from its affected neighbours in the Caucasus region.

89. In conclusion, all factual evidence on the record indicates that in fact Russia has a rather low ALOP. This can in no circumstances support an inference of a zero-risk policy as Russia's ALOP.

90. Even if one were to assume that Russia has a very high or conservative ALOP, the EU submits 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 a less trade-restrictive alternative, cumulatively meeting the conditions of footnote 3 of the SPS Agreement.

91. Indeed, the adoption of the OIE standards is an alternative 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. Consequently, the measures at issue are inconsistent with the provisions of Article 5.6 of the SPS Agreement.

2. Articles 5.3 and 5.4 of the SPS Agreement

92. 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. However, 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.

93. According to the panel in *EC- Hormones* 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. Furthermore, the Appellate Body noted in *Australia — Salmon* that the SPS Agreement contains an implicit obligation that WTO Members determine their ALOP.

94. By applying an EU-wide ban and four individual country-wide bans for the EU MS concerned, Russia has clearly not taken into account the objective of minimizing negative trade effects when determining its ALOP and has thus breached the provisions of Article 5.4 of the SPS Agreement.

E. Discrimination claims

1. The order of analysis

95. Article 2.3 of the SPS Agreement deals with sanitary measures which discriminate between Members or which are applied in a manner which would constitute a disguised restriction on international trade, while Article 5.5 of the SPS Agreement deals more specifically with distinctions in levels of protection which result in discrimination or a disguised restriction on international trade.

96. The Appellate Body has stated that a violation of Article 5.5 of the SPS Agreement would automatically trigger a violation of Article 2.3 of the SPS Agreement, while the reverse is not necessarily true. However, the panel in *India-Agricultural Products* started its analysis with the order proposed by the complainant, namely with Article 2.3. After finding several violations of Article 2.3 the panel exercised judicial economy as to the claims brought in the alternative by the US under Article 5.5 of the SPS Agreement. The EU will present its arguments similarly.

2. Article 2.3 of the SPS Agreement

2.1. Unjustifiable discrimination: the legal standard

97. The obligations in the two sentences of Article 2.3 should not be mechanistically distinguished, as the respective concepts impart meaning to one another. Russia's measures violate the obligations contained in both sentences of Article 2.3.

98. According to a previous panel, there are three cumulative requirements to be met before a violation of the first sentence of Article 2.3 can be established:(1) 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;(2) the discrimination is arbitrary or unjustifiable; and(3) identical or similar conditions prevail in the territory of the Members compared.

99. The first requirement contains a national treatment component (the discrimination operating between the territory of the Member imposing the measure and the territory of another Member) and an MFN component (the discrimination operating between territories of Members other than the Member imposing the measure).The second requirement (the discrimination is "arbitrary or unjustifiable") focuses on the cause of the discrimination, or the rationale put forward to explain its existence. The third requirement concerns the presence of similar or identical conditions in the Members taken as comparators. These identical or similar conditions should be relevant conditions. In this respect the analysis concerning the justifiability of the discrimination and the relevance of the conditions prevailing becomes congruent.

100. The EU will prove that all three conditions in the first sentence of Article 2.3 are met, with regard to two different instances of discrimination (corresponding to the national treatment and MFN principles): (1) a total ban on imports from the entire territory of the EU (and from the entire territory of the four affected EU MS) vs. a limited ban on Russian domestic products, applied only to the products from a limited area around the ASF epizootic hotbed; furthermore, the ban on imports from countries reporting ASF such as the EU is disproportionate in comparison to the measures with limited efficiency to ensure proper detection and containment of ASF within Russia; and (2) 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 EU.

2.2. The first instance of unjustifiable discrimination

101. First, Russia does not accept regionalization, which would allow trade in the products at issue from the entire EU territory, except the ASF affected areas in the four mentioned MS and the island of Sardinia. However 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.

102. Second, this discrimination between the Russian territory and the EU territory is arbitrary and unjustifiable because the difference in treatment cannot be explained by a different epizootic status. In practice the EU regionalization measures are effective, which cannot be said about the Russian measures.

103. Third, for the purposes of the Article 2.3 analysis the same or similar conditions prevailed both in the EU (including in the four EU MS concerned) and in Russia. Therefore, Russia imposed a disproportionate ban on the EU products at issue after the ASF notifications to the OIE, while the Russian domestic measures have limited efficiency in ensuring proper detection and containment of ASF within Russia, where trade in the products associated with the risk of ASF of Russian origin is in principle permitted.

2.3. The second instance of unjustifiable discrimination

104. The second instance of unjustifiable discrimination concerns the trade in the products at issue from the EU and trade in the products associated with the risk of ASF from another WTO Member, in this case Ukraine.

105. Relevant to the present case are two instances of discrimination, both occurring before the date of the establishment of the panel. 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.

106. The second instance of discrimination occurred at the beginning of 2014 with respect to the Lugansk region. 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. Strangely enough, in its First Written Submission Russia presents a letter sent to the Ukrainian authorities on 30 January 2014, that is 15 days after Russia already adopted the decision with respect to the Lugansk region and three days after the imposition of the EU-wide ban. In that letter Russia asked inter alia information on measures and proposals for regionalisation (after the decision on regionalization was already taken).

107. First, the difference in treatment of the Ukrainian and EU territory (and the four EU MS concerned 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.

108. Second, the discrimination is arbitrary and unjustifiable because the difference in treatment cannot be explained by a different epizootic status.

109. Third, for the purposes of the analysis under Article 2.3 of the SPS Agreement, the same or similar conditions prevailed both in the EU and in Ukraine, because the existence of the ASFV on both the Ukrainian and the EU territories was the relevant feature triggering the import prohibition imposed by Russia on live pigs and certain pig products from the entire EU, on the one hand, and the limited territorial import ban on Ukrainian like pig products, on the other hand.

2.4. Disguised restriction

110. 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 in the framework of the *chapeau* to Article XX of the GATT 1994, which contains similar language.

111. 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.

112. First, Russia's ASF measures amount to a disguised restriction on international trade for several reasons because Russia's application of drastic measures towards imports from the EU 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 which is clearly disproportionate and discriminatory.

113. Second, Russia's attempt to justify its measures by the OIE standards is a clear misreading of the OIE Terrestrial Code and the OIE Terrestrial Manual which clearly allow for regionalization.

114. 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. Finally, Russia's measures also do not comply with the requirements of Article 5.7 of the SPS Agreement as demonstrated in the respective section.

115. Furthermore, Russia's WTO notifications with respect to the four individual EU Member States bans are misleading and constitute evidence that the four measures at issue are in fact disguised restrictions on international trade. According to Russia's notifications some of the measures at issue are related to food safety and the protection of humans from animal/ plant pest or disease.

116. It follows from the above that the Russian measures are 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.

3. Article 5.5 of the SPS Agreement

117. This obligation embodied in Article 5.5 of the SPS Agreement is the principle of non-discrimination in risk management, with respect to the risks to human, animal or plant life or health. According to the Appellate Body, three cumulative conditions have to be met in order to establish a violation of Article 5.5: (1) the Member concerned adopts different appropriate levels of sanitary protection in several "different situations"; (2) those levels of protection exhibit differences which are "arbitrary or unjustifiable"; and (3) the measure embodying those differences results in "discrimination or a disguised restriction on international trade".

118. As long as ASF transmission through domestically-produced products and through EU products are viewed as distinct situations, Russia breaches the provisions of Article 5.5, by applying different levels of protection without any justification.

119. It has been previously decided that the type of situations envisaged by Article 5.5 are *comparable* situations, such as "situations involving the same substance or the same adverse health effect". In the present case the situations are comparable in the sense that they involve the same virus and the same health effects.

120. Finally, the measures embodying the respective differences result in "discrimination or a disguised restriction on international trade".

121. In conclusion, the EU submits that the measures at issue are inconsistent with the provisions of Article 5.5 of the SPS Agreement. In addition, the breach of Article 5.5 results in a consequential breach of Article 2.3 of the SPS Agreement.

F. Claims related to control, inspection and approval procedures

122. 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". The EU notes that a previous panel found that the failure to observe the provisions of Annex C implies a consequential breach of Article 8 of the SPS Agreement.

123. Russia wrongfully considers that the EU's claims under Annex C and Article 8 of the SPS Agreement fall outside the scope of the mentioned provisions. This assertion is also supported by the US in its third party submission. According to Russia, the type of procedures covered by Article 8 refers only to the approval of a product or the use of additives. They do not cover "negotiations between Members leading to the adoption of a procedure".

124. The Russian assertions are wrong for a number of reasons. First, the language used in Article 6.3 of the SPS Agreement, referring to "inspection and…other relevant procedures" is very similar to the language used in Annex C and Article 8, which also refer to "inspection, control and approval procedures". Against this background, the EU does not see any reason why there should be a different meaning attached to the type of procedures envisaged by Article 8 so as to exclude the type of inspections and other relevant procedures mentioned in Article 6.3. Second, the EU

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 consideration of the objective and rational factors of the kind non-exhaustively enunciated in Article 6.2 second sentence of the SPS Agreement.

125. It follows from the above that the EU claims pursuant to Annex C and Article 8 fall within the type of situations contemplated by those legal texts.

126. The agreed minutes of the meeting of 7 March 2014 mention that the EU veterinary representative "answered all the questions asked by the Russian party". However, the Russian authorities continued to claim that they need more information in order to reach a decision on regionalization. *Inter alia*, such information requests referred to (1) proof that the historically ASF-free regions all over the EU are actually free, contrary to the provisions of the OIE Terrestrial Code; (2) detailed information about foreign hunters, who entered the EU Member States to hunt wild boar during the period 2013-2014, detailed by region or (3) detailed information about pig farms and meat processing factories attested to ship animals and products to the territory of the Customs Union.

127. The measures at issue are contrary to 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. Russia has breached consequently Article 8 of the SPS Agreement.

G. Transparency claims

128. In *Japan — Agricultural Products II*, Japan appealed the panel's findings arguing that the "regulations" referred to in Annex B(1) are limited to legally enforceable instruments. The Appellate Body rejected this appeal and noted that the list of instruments contained in the footnote to Annex B(1) is not exhaustive in nature. The Appellate Body has noted that a violation of the Annex B(1) results in a consequential violation of Article 7 of the SPS Agreement.

129. The Russian ban with respect to 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 and only notified to the WTO 16 days after their imposition. Another measure at issue, namely the import ban relating to the entire EU territory, has, to the knowledge of the EU, neither been published, nor notified to the WTO.

130. *Inter alia*, given that the measures at issue were not substantially the same as the content of the international standards, guidelines or recommendations and given that they had a significant effect on trade of the EU and its Member States, Russia failed to publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal. It is noted that, insofar as the EU-wide ban is concerned, were it to be the case that Russia considered that urgent problems of health protection arose, Russia failed to immediately notify other Members, through the WTO Secretariat, the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem.

131. In light of the above Russia has breached the provisions of Annex B(1), (2), (5) and (6) of the SPS Agreement and consequently Article 7 of the SPS Agreement.

V CONCLUSIONS AND REQUEST FOR FINDINGS

132. For the reasons set out in this submission, the EU requests the Panel to find that Russia's measures, as set out above, are inconsistent with Russia's obligations contained in 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.

133. The EU respectfully requests the Panel to recommend that the Dispute Settlement Body requests Russia to bring the contested measures into conformity with its obligations under the SPS Agreement.

ANNEX B-2

SECOND PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I INTRODUCTION

1. Through its submissions and statements in the present proceedings, the EU has demonstrated that the Russian measures at issue lack scientific justification and are clearly disproportionate. The EU provided solid evidence with respect of each of its claims.

2. Russia has not managed to explain why the measures it has taken against the products at issue from the EU are justified. Russia put forward different allegations which may be distilled into four main themes: the in-existence of the EU-wide ban; conformity of its measures with international standards; presentation of its measures as emergency measures; and insufficiency of information under the regionalisation provisions. These four main aspects of Russia's defence must all fail.

II FACTUAL ASPECTS

A. The measures at issue

3. The EU notes 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.

4. The EU also notes that the Parties do not dispute that the measures taken by Russia with respect to Latvia and Estonia are within the Panel's terms of reference, even if they correspond to or post-date the date of the panel request. In practice, the two individual measures extended the ban to processed products with respect to the two mentioned EU Member States.

5. With regard to the EU-wide ban, the EU recalls 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".

6. As explained in our previous submissions, Russia attempts to justify the EU-wide ban by arguing that it cannot return to a situation where veterinary export certificates are discussed bilaterally with individual EU Member States, and Russia apparently considers that this should somehow be imputable to the EU. In making this argument, Russia acknowledges the existence and precise content of the EU-wide ban. It also acknowledges that the EU-wide ban is attributable to Russia.

7. Russia is simply wrong to suggest that anything on the record supports its assertion that the EU has, by implication, relinquished its right to bring this matter before a panel, pursuant to the terms of the DSU. In *EC – Bananas III (Article 21.5 – Ecuador II)* the Appellate Body has made it very clear that Members cannot be considered to have relinquished their DSU rights other than expressly and unequivocally. There is no such specific commitment undertaken by the EU not to challenge certain Russian measures

8. According to Article 6.1 of the SPS Agreement, WTO Members are under a *continuing* obligation of *adaptation* to regional SPS characteristics. It is in this context that the reference to the veterinary certificates in Russia's accession documents should be understood. The 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.

9. It is also important to recall that Russia chose to obstruct the process of clarifying the export certificates in light of the current situation by referring to its arrangements within the framework of the Customs Union with Belarus and Kazakhstan.

10. Finally, Russia's allegation that the EU-wide ban does not constitute an SPS measure within the meaning of Annex A(1) must also fail. The EU-wide ban is clearly within the purview of Annex A(1) of the SPS Agreement, which contains a broad definition of an SPS measure.

B. The products at issue

11. The EU understands that the EU – wide ban covers live pigs and products of pig origin covered by the certificates for export from the EU to Russia and that include the phrase "African swine fever – during the last 3 years in the territory of the EU Member State excluding Sardinia", with the exception of products having undergone treatment as explained in the EU's responses to Panel questions 77 and 271, where it describes the products covered by the individual bans and the EU wide ban.

12. Examples of products covered by the EU wide ban are available in the list of returned consignments provided by Russia for the first semester of 2014: pig offal, frozen pork, frozen pig skin. A few weeks after the introduction of the measures at issue there were no longer instances of rejected consignments. Evidently, no operator is going to incur the ruinous costs of consigning shipments to the Russian border in the knowledge that they will be refused entry.

C. ASF eradication in wild boar

13. The individual experts confirm the EU's position concerning drastic hunting intended to exterminate the wild boar. The EU considers that the hunting pressure and hunting practices should remain constant in order to not increase (and rather decrease) the spread of the ASFV.

14. The individual experts could not point to significant evidence of wild boar infected with ASF (or diseases equivalent to ASF) migrating outside their normal home range in the natural habitats found in and immediately adjacent to the recently affected areas in the EU. Excluding factors linked to human intervention, the individual experts do not expect the range of wild boar to change significantly, and with respect to a significant population, in a relatively short space of time.

15. Further developing this idea, Professor Mary Louise Penrith considers that wild boar may travel outside their normal home range primarily due to human intervention, like drastic hunting. The finding of dead wild boars along the border with Belarus may be the consequence of heavy hunting pressure on the Belarussian side. The virus isolated from the dead wild boars in the EU proved identical to the virus circulating in Belarus.

16. The individual experts disagreed with Russia's contentions that its domestic measures, like the shooting of wild boars, are effective. The most recent ASF EFSA Scientific Opinion confirms the EU's position and recommends targeted hunting, giving priority to adult and sub-adult females. It is interesting to note that in its responses to the Panel questions Russia seems to change its position and acknowledge the value of EFSA's approach.

D. Certain measures related to domestic pigs

17. Under EU rules it is not possible that meat from pigs slaughtered by small backyard farmers *on their own premises* is placed on the EU market or exported to third countries. That meat cannot be certified by veterinary services for any kind of dispatch or consumption other than direct/immediate home/domestic consumption (Regulation 853/2004).

18. From an animal health point of view, there is no reason why *abattoirs* approved for export may not slaughter animals that are in compliance with EU rules, including if the animals come from backyard farms located in non-restricted areas. This is in line with the idea, highlighted by Dr Brückner, which simply put states that "free means free". Accordingly, in principle any establishment located in a free area should be free to trade its live animals or pork products regardless of where these animals are kept. However, there are a number of caveats to this concept in practice.

19. The EU legislation on food safety hygiene rules applicable to pig meat (Regulation 852/2004 on the hygiene of foodstuffs, Regulation 853/2004 laying down specific hygiene rules for food of

animal origin and Regulation 854/2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption) ensures the application of basic common hygiene requirements throughout the food chain, starting with primary production. Those rules apply to any food business operator, like an abattoir, independently of whether that particular operator has been approved for export to Russia or elsewhere.

20. Free movement of goods within the EU should, in no way, be taken to mean that there is an absence of controls with regard to the intra-EU trade in the products at issue. With regard to *trade in the products at issue* across state borders inside the EU, Directive 64/432 contains a set of harmonized measures related to animal health problems affecting intra EU trade in swine, while intra EU trade in porcine semen is regulated under Directive 90/429. Directive 64/432 makes reference to the rules laid down in the framework legislation (Directive 90/425 concerning veterinary and zootechnical checks applicable in intra-EU trade in certain live animals and products with a view to the completion of the internal market), in particular with respect to checks at origin, to the organization of, and follow-up to, the checks to be carried out by the country of destination, and to the safeguard measures to be implemented

III. CLAIMS

A. Claims related to harmonization

21. As already explained in our previous submissions, the EU is not required to demonstrate that its control measures are in accordance with the OIE Terrestrial Code – it is Russia that asserts that its SPS measures (*"the measures at issue"*) are in conformity with or are based on the OIE Terrestrial Code and attempts to draw the benefits of the rebuttable presumption in Article 3.2. However, the EU has proved that its ASF regionalisation measures are in accordance with the OIE Terrestrial Code.

22. Russia's measures at issue do not conform to and are not based on the relevant OIE standards. With regard to the *measures at issue*, the panel in *US-Animals* reiterates that a measure which actually contradicts the international standards cannot be said to be based on the respective standards.

23. This reasoning is relevant in the context of the present case, as Russia's measures at issue contradict the very standards they claim to be following. 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 and bans processed products from the four partially affected EU Member States.

24. The relevant international standards in Chapter 15.1. for the products at issue from the EU (either subject to the individual bans only or to both the EU-wide ban and the individual bans) are found in Articles 15.1.1.-15.1.4., 15.1.5., 15.1.8., 15.1.10., 15.1.12.- 15.1.16. of the OIE Terrestrial Code.

25. Russia attempts to explain its non-conformity with the OIE standards by essentially referring to the "impact of sequencing provisions" and to the "dynamic disease developments" which should in its opinion bear on the interpretation of "conform to" in Article 3.2 of the SPS Agreement.

26. With regard to the "sequencing provisions", the EU complies with the OIE regionalisation recommendations as contained in Articles 4.3.2., 4.3.3.1., 4.3.3.5. and 4.3.3.6. of the OIE Terrestrial Code.

27. With regard to the "dynamic disease developments", Russia in essence contends that the limited geographical spread of ASFV within the four EU Member States should be associated to a continuous need of re-considering the submitted information, which should be updated with new information. The EU recalls that besides providing the information which together constitutes the EU's biosecurity plan as early as of February 2014 (except the mid to long term measures provided in the eradication plans), the EU constantly provided to its main trade partners, including to Russia, communications with the latest ASF developments, including coloured maps, by means of faxes and e-mail messages. In addition, almost monthly presentations by the affected EU Member

States in the PAFF Committee were posted on the European Commission's official website, in a transparency exercise not matched by many countries in the world, and not matched by Russia.

28. In light of the above, Russia's allegation of conformity of the measures at issue with the relevant international standards within the meaning of Article 3.2 should be dismissed, as the OIE Terrestrial Code recommends trade from the ASF-free areas and not the imposition of bans.

B. Claims related to risk assessment

1. Articles 5.1, 5.2 and 2.2 of the SPS Agreement

29. Russia's measures do not "conform to" and are not "based on" the OIE recommendations. The EU would like to recall that a WTO Member may go beyond the relevant OIE standards, provided that it conducts a risk assessment within the meaning of Article 5.1 of the SPS Agreement. As of today, 20 months after the initial ban, Russia has not produced any risk assessment, attempting to rely instead on an alleged compliance with the OIE standards. The EU has demonstrated that this is misconceived.

30. The EU explained that the Appellate Body in *India- Agricultural Products* and the panel in *US-Animals* confirm that a violation of Article 5.1 leads to a presumption of inconsistency with Article 2.2 of the SPS Agreement, where the conditions in Article 5.7 are not fulfilled.

31. As explained in the Closing Statement at the second substantive meeting, Russia's "evidence" does not constitute an objective and scientific basis for the measures at issue. In particular, Russia misconstrues the notion of disease prevalence, misrepresents the 2015 EFSA ASF Scientific Opinion, as well as a response of professor Penrith, and culminates by presenting a picture of wild boar "jaywalking" on the streets of Riga, Latvia, an ASF free area.

2. Article 5.7 of the SPS Agreement

32. It is clear that the measures at issue do not conform to and are not based on the OIE standards. It is equally clear that Russia did not conduct, does not have and did not provide the Panel and the EU with any risk assessment as required by Article 5.1 of the SPS Agreement.

33. The one and the only provision in the SPS Agreement which may still shelter a Member's measures in such circumstances is Article 5.7 of the SPS Agreement. But Russia does not fulfil any of its requirements:

- the relevant scientific information is sufficient and it was provided by the EU to Russia, through numerous letters, emails, faxes, meetings and inspections;

- the Russian measures were not adopted on the basis of available pertinent information, but rather *ignoring* the available pertinent information; for instance, Russia attempted to draw conclusions from the mere imposition of bans by other WTO Members, instead of rather closely scrutinizing their *underlying scientific evidence* and of rather observing that none of the numerous EU trade partners allowing trade to continue did suffer any ASF introduction;

- Russia did not seek to obtain the additional information necessary for a *more objective* assessment of risk, but rather asked for information which was not necessary, like proof of ASF freedom for the EU Member States *historically free* according to the provisions of the OIE Terrestrial Code; and

- Russia did not review its measures accordingly within a reasonable period of time; the more time passes by, the more apparent Russia's failure to comply with Article 5.7 becomes, and the more egregious its breach of Article 5.1 and the other relevant provisions of the SPS Agreement.

34. The EU agrees that the sufficiency of the relevant scientific evidence should be assessed with respect to the time the SPS measure is adopted. However, the EU draws the Panel's attention to the fact that afterwards the respective Member is under an obligation to seek to obtain additional information for a more objective assessment of risk as per Article 5.7.

35. The moment when the respective 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 (see Russian letters of 5 February and 12 March 2014).

36. According to Article 5.7 of the SPS Agreement, an importing Member is not absolved of any obligation in an emergency situation. Instead, what Article 5.7 envisages is a *"less" objective assessment of risk,* as opposed to a "more objective assessment of risk", which shall trigger the review of its sanitary measure within a reasonable period of time. This "less" objective assessment of risk is not attributable to any bias, but is linked to the objective fact that the relevant scientific evidence is insufficient for the purposes of making a definitive decision. Thus, in an emergency situation the importing Member is not compelled to perform a risk assessment within the meaning of Article 5.1, but rather to conduct a *"less" objective assessment of risk* within the meaning of Article 5.7.

37. In this particular case the issue is not a general lack of scientific knowledge about the disease or issue under consideration. The EU has provided vast amounts of information about the actual situation on the ground and its control measures.

38. The available pertinent information may fall within the categories described in Article 5.2: available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; *existence of disease-free areas*; relevant ecological and environmental conditions; and quarantine or other treatment. However, due to the time limitations, the importing Member is under no obligation to take into account these factors in a similar way as under Article 5.1 of the SPS Agreement.

39. Similarly to the connection between Articles 5.1 and 5.7 through the concept of a "less" objective assessment of risk, we consider that Articles 5.6 and 5.7 are connected in the same way, insofar as they at least inform each other contextually. Thus, if, as a matter of fact, a panel is faced with a measure that the importing Member is attempting to shield under Article 5.7, but that measure is manifestly unnecessary and disproportionate, that would be pertinent to determining whether or not the measure is in fact based on pertinent information, or whether it is rather a disguised restriction on international trade. Thus, it would be capable of supporting the conclusion that the measure breaches both Article 5.7 and Article 5.6.

40. Accordingly, the EU considers that even in emergency situations such as those envisaged by Article 5.7 the measures taken by the importing Member should not be disproportionate to the risks, in the sense that it should be necessary, taking into account any available alternatives. A rational relationship should exist in any case. This analysis may also be supported by the Panel's findings related to the non-discrimination claims, raised under Articles 2.3 and 5.5.

41. Russia's difference in treatment of Ukraine and Belarus in comparison to the EU with respect to similar situations is relevant in the context of Article 5.7. Indeed, the EU does not consider that there is any basis in the available pertinent information for discriminating between EU and Ukraine or Belarus with regard to the ASF regionalisation measures.

42. Furthermore, the EU considers that Russia's Acceptable Level of Protection (ALOP) cannot be deduced from the measures at issue. However, assuming *arguendo* that a rather high ALOP can be deduced from the respective bans, then Russia maintains different ALOPs in *comparable* situations, as it clearly has a rather low ALOP with respect to ASF in Russia according to the evidence on the record.

43. In light of the above, it clearly follows that Russia cannot provisionally shelter its measures under Article 5.7 of the SPS Agreement.

C. Claims related to regionalisation

1. Containment zones are not the only form of ASF regionalisation according to the OIE Terrestrial Code

44. The EU has neither established containment zones nor compartments within the meaning of Chapter 4.3 of the OIE Terrestrial Code.

45. The EU has delimitated between areas considered to be infected with ASFV and ASF-free areas. The establishment of *containment zones* within the meaning of Article 4.3.3.3. of the OIE Terrestrial Code is not the only possible tool in applying regionalisation, but only a possible option. If the establishment of containment zones would be the only possibility under the OIE Code, in practice that would amount to almost an impossibility of effectively controlling diseases like bluetongue through the use of regionalisation.

46. Russia itself accepted straightforward regionalisation in the case of the Classical Swine Fever (CSF) occurrence in Latvia in December 2013. The EU recalls that differently from the ASF chapter, which does not contain any express reference to containment zones, the CSF chapter contains such a reference in Article 15.2.5., entitled "Establishment of a containment zone within a CSF free country or zone". The EU did not establish containment zones following CSF cases in wild boar in Latvia during the period November 2013- January 2014. Instead, the EU used a straightforward concept of regionalisation, which did not prevent Russia from lifting a previous ban with respect to the entire territory of Latvia on 16 December 2013.

47. After receiving the responses of the individual experts and of the OIE to the Panel questions, Russia has finally conceded that containment zones are not the only form of regionalisation which can be established in the case of ASF by an exporting country in conformity with the OIE Terrestrial Code.

48. In the OIE Terrestrial Code the concept of zoning is broad. It includes protection and containment zones but is not limited to these two possibilities. It also includes, for example, infected zones, zones that are free of disease with or without vaccination, zones that are officially recognized by the OIE for certain diseases, and seasonally free zones for other diseases. Various applications of the zoning concept are found in the disease specific chapters as appropriate to the epidemiology of each disease.

49. One of the recurring themes in Russia's submissions is the so-called "lack of adequate mandated standstill, i.e. restrictions on movements of animals and other commodities by EU legislation". Russia invokes Article 4.3.3.3.(a) of the OIE Terrestrial Code whereas the EU did not establish containment zones.

50. However, the EU has taken the appropriate measures. As a general rule, and on top of the main control measures, the EU instituted a prohibition on the dispatch of live pigs, porcine semen, ova and embryo, pig meat, pig meat preparations, pig meat products and any other products containing pig meat as well as consignments of animal by-products from porcine animals from certain areas listed in the Annex to the Decision 2014/178 and then Decision 2014/709 (i.e. the prohibition on the dispatch of live pigs apply to areas listed in Parts II, III and IV of the Annex, other prohibitions apply to areas listed in Parts III and IV of the Annex).

51. The derogation from the prohibition on the dispatch of live pigs from the areas listed in Part II of the Annex, as well as the derogation from the prohibition on the dispatch of consignments of live pigs for immediate slaughter from the areas listed in Part III of the Annex, and the dispatch of consignments of pig meat, pig meat preparations and pig meat products obtained from such pigs are subject to strict biosecurity measures.

52. With regard to animal by-products, the EU Member States concerned may authorise the dispatch of unprocessed carcases of pigs other than feral pigs and of animal by-products of porcine origin from areas listed in Part III of the Annex only to a processing, incineration or co-incineration plant located outside the areas listed in Part III of the Annex, subject to strict conditions. The same Decision in its Article 10 also provides for a Prohibition on the dispatch to other Member States and third countries of consignments of animal by-products from porcine animals from the areas listed in the Annex.

53. In addition to the above-mentioned provisions in Decision 2014/709, the national eradication plans also contain such additional biosecurity requirements. The EU has provided as examples several such provisions in the national eradication plans.

54. It follows from the above that the EU ASF regionalisation measures are robust, giving us a high degree of confidence in their adequacy.

2. The OIE Terrestrial Code does not recommend only compartmentalisation in the case of ASF

55. Russia's initial construction relied on containment zones as the only form of ASF regionalisation under the OIE Terrestrial Code. As a consequence of the EU's "failure" to establish containment zones (and thus the rest of the territory not being considered ASF free), Russia claimed that the only solution was to adopt *compartmentalisation*. The two arguments are interconnected. But this construction is wrong. If regionalisation is not limited only to containment zones, then one does not need compartmentalisation as a consequential option at all, as long as the ASF regionalisation is correctly conducted by the EU.

56. As Dr Alejandro Thiermann stated during the meeting with the experts, "a compartment is really not the approach for a disease like African swine fever". The same expert explained that he is aware of only one case of compartmentalisation, for a different disease (avian influenza).

57. Similarly to *India- Agricultural Products*, Russia's misinterpretation of the OIE Terrestrial Code attempts to identify a "condition of entry" according to which an importing Member has discretionary choice regarding control measures. The Appellate Body has confirmed that a correct interpretation of the OIE Terrestrial Code does not mean that the importing country may impose on the exporting Member compartmentalisation instead of regionalisation.

3. Russia violates Article 6.1 of the SPS Agreement by not taking into account the similar status of certain areas in the EU and in Russia and by not adapting its measures to the ASF situation in the EU

58. Article 6 of the SPS Agreement addresses the adaptation to regional conditions, including disease-free areas. Adaptation to the regional conditions is a factor which should be taken into account for the purposes of conformity with international standards within the meaning of Article 3.2 of the SPS Agreement, as long as the relevant international standards recommend regionalisation.

59. Moreover, should a Member not conform to or base its measures on international standards, it has the possibility to conduct a risk assessment, as appropriate to the circumstances, within the meaning of Article 5.1. In conducting such a risk assessment, one of the relevant factors mentioned in Article 5.2 is the existence of disease-free areas. Even in emergency situations of the kind contemplated in Article 5.7, the importing Member should take into account the same category of data mentioned in Article 5.2, but to a different extent.

60. The panel report in *US-Animals* states that "if 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". The individual experts have also recognized the importance of this adaptation.

61. Furthermore, in the circumstances of the present case, the EU has understood that there are regions in Russia where wild boars do not occur. To the extent to which domestic pigs also do not occur in those regions, the introduction of the products at issue would not present ASF-related sanitary risks and importation to consumers in those regions should be allowed. Because in Russia there are no domestic borders, one solution may be that the products at issue (especially raw products) are imported under customs supervision. This may ensure that such raw products reach the processing plants which may need them, without any risk that they will be disseminated as raw products in other parts of Russia.

4. Russia does not recognize the concept of disease-free areas with respect to the ASF regionalisation measures in the EU, contrary to Article 6.2 of the SPS Agreement

62. In *India- Agricultural Products,* the Appellate Body has described the relationship between all three paragraphs of Article 6 and especially between Articles 6.1 and 6.2. Accordingly, the

recognition of the concept of disease-free areas under Article 6.2 should not be understood in abstract terms, but as reflected in the measure at issue.

63. In its First Written Submission, Russia has devoted considerable space explaining that its legislation "recognizes the concept of disease-free areas in the abstract, pursuant to Article 6.2 of the SPS Agreement". Russia contends that this dispute can be distinguished from *India-Agricultural Products* due to the explicit recognition of regionalisation in its legislation. It further notes that the memorandum of 2006 and the bilateral certificates in use *before* the occurrence of the ASF cases and outbreaks in the four recently affected EU Member States also demonstrate that Russia recognizes regionalisation.

64. Comparing Russia's understanding of "recognition" with the recent guidance from the Appellate Body, it is clear that Russia is actually in breach of its obligations under Article 6 of the SPS Agreement. Indeed, 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.

65. In the same vein, the EU agrees with the panel's finding in *India- Agricultural Products* and with Australia's proposition that for a measure to comply with Article 6.2 it must at least not deny or contradict the recognition of such areas.

66. However, Russia extended the same reasoning applicable to its abstract recognition of disease free areas in its legislation to the recognition of such areas in the relevant veterinary certificates, explaining how it chose to "provisionally comply with the terms of these veterinary certificates".

67. Instead of "provisionally" complying with the terms of the veterinary certificates, Russia was under an obligation pursuant to Article 6.1 of the SPS Agreement to *adapt* its measures to the sanitary characteristics from which the products at issue originate and to which they are destined. The measure called by Russia "provisional compliance with the terms of the veterinary certificates" is in fact the measure identified by the EU as the EU-wide ban.

68. Russia incorrectly asserts that "with respect to the four ASF-infected countries, the EU Member States notified to the OIE that the ASF outbreak affects the whole territory". Instead, Russia should know very well as a user of the OIE WAHIS that upon the first occurrence of a disease in a previously free country, even if there is only one isolated case, the notification should pertain to the whole territory of that country, as confirmed by the OIE itself in a document entitled Notification Procedure.

69. Russia did not take into account factors of the kind non-exhaustively mentioned in Articles 6.1 and 6.2 of the SPS Agreement in order to *recognize* the concept of disease-free areas with regard to ASF in the EU and to *adapt* its measures accordingly. In particular, Russia failed to take into account factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary controls.

70. The factors mentioned in Article 6.2 of SPS Agreement are reflected in Article 9(2) of Directive 2002/60.

71. With regard to geography, Article 4.3.3.1. of the OIE Terrestrial Code states that "the extent of a zone and its geographical limits should be established by the Veterinary Authority on the basis of natural, artificial and/or legal boundaries, and made public through official channels".

72. The EU recalls that it explained to Russia that the distances between the limits of the areas where restrictions apply and the locations where infected wild boars were found are several times wider than the distance such animals could be expected to travel, according to the EFSA ASF Scientific Opinion 2010, which was communicated to Russia as an annex to the letter of 7 February 2014. Also, with the letter of 13 June 2014 the EU further explained that besides the distance from the disease cases, other factors were taken into account. Several of the numerous faxes and communications sent to EU's main trading partners, including Russia, contained relevant maps.

Similarly, detailed information on the implementation of the ASF regionalisation measures was provided by the EU Member States in the PAFF Committee.

73. In March 2015 the European Commission provided Russia with copies of the eradication plans of Lithuania and Poland and in April 2015 the eradication plans of Estonia and Latvia followed, all referring to delimitation of the infected areas. Russia has also received a document containing the detailed administrative regions in Poland as part of the Polish contingency plan attached to the letter of 21 May 2014.

74. With regard to ecosystems it is relevant to ascertain the capacity of a biotope or habitat to sustain a susceptible population and the degree of concentration/dispersion. This is a relevant factor to the present case because of the wild boar presence. Also, human intervention in the ecosystem, in particular by managing practices such as hunting and feeding wild boars is essential to understanding how the ecosystem has been considered by the EU when applying regionalisation and claiming disease free status. The EU Member States regularly described the applicable measures in the publicly available presentations in the PAFF Committee.

75. The intensity and effectiveness of the EU's epidemiological surveillance should have been a key element in Russia's analysis of the EU ASF regionalisation measures. The combination of active and passive surveillance, with special emphasis on the areas at risk located relatively close to the disease cases already identified, provide a very solid reassurance that the limits of the ASF-free zones and the zones considered to be affected are properly demarcated.

76. Russia claims that the EU failed to adequately increase surveillance after the ASF outbreaks, relying on an early audit report carried out by the European Commission in Lithuania in April 2014. The EU explained in detail how Lithuania took into account the FVO audit, including as reflected in the eradication plan.

77. During the meeting with the experts Dr Alejandro Thiermann explained, in the context of wild boar hunting, that the EU surveillance system is among the best in the world. Underreporting is much less likely to happen in the EU than in other parts of the world.

78. The effectiveness of the sanitary controls has been repeatedly demonstrated at different levels. The disease control measures put in place after the occurrence of the few outbreaks reported proves that the contingency plans and the control measures applied in holdings are highly effective as no further outbreaks have been reported as secondary outbreaks in Lithuania and Latvia since September 2014 because all outbreaks were properly extinguished.

79. In addition, the sanitary controls at the external borders with infected pork products from Belarus seized, together with awareness campaigns, have minimised the risk of ASF introduction through that route.

80. The list of factors enunciated in Article 6.2 is non-exhaustive. A similar relevant factor may be the epidemiology of the disease, which is related to the characteristics of the disease agent and of the host species. It is important to note that there is no evidence of soft ticks (*Ornithodoros sp.*) being involved in the epidemiology of the disease in the four recently affected EU Member States. Furthermore, the existence of a single host species (pigs) makes the epidemiology simpler than other diseases affecting pigs and ruminants (like FMD).

81. Russia maintains that the EU failed to take significant actions to eliminate backyard production in the four ASF-infected EU Member States. The EU does not believe that total elimination of backyard production is necessary. Even before ASF reached the EU, as early as of 2013, the EU has taken measures to reduce backyard production under low biosecurity conditions in certain risk areas, in particular Decision 2013/498.

82. In light of the above, an objective assessment of factors such as geography, ecosystems, epidemiological surveillance, the effectiveness of sanitary controls and the ASF epidemiology should have easily led Russia to reaching a conclusion on the appropriateness of the EU ASF regionalisation measures. By not taking into account these factors, Russia failed to determine disease free areas on the basis of the mentioned factors and breached its obligations under Article 6.2 of the SPS Agreement.

83. The situation in the present case is in fact similar to that in *India-Agricultural Products* and the EU respectfully requests the Panel to find that Russia does not recognize the concept of disease free areas with respect to ASF in the EU. As a consequence, Russia also fails to adapt its measures to the sanitary characteristics of the areas from which the products at issue originated and to which the products are destined, within the meaning of Article 6.1 of the SPS Agreement.

5. The EU adduced all the necessary evidence as per Article 6.3 of the SPS Agreement

84. The EU has explained that the relevant date for the purpose of WTO proceedings is the date of the panel establishment. With the exception of certain situations falling under the SCM Agreement, this has been the practice of previous panels and of the Appellate Body. However, this does not mean that subsequent developments are not relevant. Subsequent developments may be relevant to the extent that they confirm the facts and evidence as of the date of panel establishment and should be limited to those instances when due process is respected and Parties have the opportunity to properly discuss that evidence. In making "an objective assessment of the matter before it" within the meaning of Article 11 of the DSU, a panel may not arbitrarily chose a cut-off date. By choosing an arbitrary date, a panel cannot contribute towards "securing a positive solution of the dispute" as per Article 3.7 of the DSU.

85. The EU submits that at any point in time, including after the date of the panel establishment, Russia failed to adapt the measures at issue to the sanitary conditions in the exporting and in the importing countries, as required by Article 6.1 of the SPS Agreement. More than 20 months after the adoption of the measures at issue, Russia has not conducted any risk assessment, be it more or less objective.

86. The EU has provided the necessary evidence to the Russian authorities in order to demonstrate that ASF free areas are free and are likely to remain ASF free. During the meeting with the individual experts, Dr Gideon Brückner explained that a free zone should always be judged taking into account the current status of the zone.

87. The EU's ASF regionalisation measures are designed is such a way so as to guarantee to our trade partners, including Russia, that *at any point in time* products at issue come from an ASF free area, according to the requirements of Article 6.3 of the SPS Agreement. The adaptation condition in Article 6.1 is a continuous obligation and importing Members should take that into account. However, an importing Member cannot unduly delay the regionalisation recognition proceedings under the pretext of re-confirmation and update of the information.

88. The EU timely provided to Russia information that can be rationally and reasonably expected in the circumstances. However, Russia came back with requests for information described by the experts as an *"overkill"* and a possible attempt to *"muddy the water"*. It required an unprecedented level of details, which is clearly unreasonable (e.g. letters of 5 February and 12 March 2014).

89. The EU explained that there are two tiers of EU ASF measures: the general ASF legislation (Directive 2002/60) and the specific measures delimitating different Parts according to different levels of risk (Decisions 2014/178, 2014/709). Russia claimed that eradication plans were necessary in order to enable it to reach a conclusion on the EU ASF regionalisation measures.

90. The EU further clarified that eradication plans are medium to long term strategy documents and that immediate measures were already put in place as per the requirements of Article 15 of Directive 2002/60. The national eradication plans were not necessary to Russia in order to conduct its risk assessment, although they may be taken into account when available. This means that once the eradication plans are available an importing country may revise its risk assessment in light of the adaptation condition in Article 6.1 of the SPS Agreement.

91. The EU provides several types of evidence in support of the implementation of the measures required by Directive 2002/60 in the four partially affected EU Member States following the first cases of ASF in wild boar and the outcomes evaluation of their effectiveness:

- prompt communications from the affected EU Member States to the other EU Member States and major trading partners, including Russia, often containing relevant maps;

- detailed updates on the ASF situation in the regulatory Standing Committee on Plants, Animals, Food and Feed (PAFF), providing the opportunity for peer review by the other EU Member States (almost on a monthly basis and publicly available);

- transparent audits regularly carried out by the European Commission's Food and Veterinary Office (FVO);

- the EU Treaties provide for the possibility for the European Commission to initiate infringement proceedings against the EU Member States which fail to fulfil their obligations under EU law.

D. Claims related to risk management

92. Article 2.2 is a more general provision and Articles 5.1, 5.2 and 5.6 are more specific provisions. This understanding is confirmed with regard to the relationship between Articles 2.2 and 5.6 by previous panels. It follows that a finding of 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.

93. Where a relevant international standard provides for alternative requirements – "ASF free country, zone or compartment", an importing Member must accept products that meet one or more of the identified alternatives in order to "conform to" the international standard, on the basis of objective criteria of the kind described in Article 6.2 second sentence of the SPS Agreement. Contrary to what Russia seems to believe, a country may not choose ASF-free zones or compartments according to its ALOP. The three elements described in the international standards "ASF free country, zone or compartment" are related to the objective characteristics of the ASF situation and not to the subjective choice of the importing Members.

94. The reasonably available alternatives are compliance with the relevant OIE standards. Accordingly, instead of an EU-wide ban and four individual EU Member States bans, Russia should allow trade in the products at issue from the EU.

Products at issue from the EU	**relevant international standard**
live pigs, pig genetic material	15.1.1.–15.1.4.; 15.1.5.; 15.1.8., 15.1.10.
end products containing pork	15.1.1.-15.1.4.; 15.1.12; 15.1.14; 15.1.15.
meat of wild boar	15.1.1. –15.1.4., 15.1.13., 15.1.14.
pork	15.1.1.-15.1.4.; 15.1.12.
raw pork products	15.1.1.-15.1.4.; 15.1.12.; 15.1.14.
bristles	15.1.1.-15.1.4.; 15.1.16.
feed stuffs and feed additives for pigs	15.1.1-15.1.4.; 15.1.14.; 15.1.15.
hunter's trophies without full taxidermy treatment	15.1.1 – 15.1.4.; 15.1.14.

95. The panel in *India- Agricultural Products* considered that the OIE Terrestrial Code provides for an optimal level of biosecurity, under which safe trade may be facilitated in order to prevent AI from being introduced into an importing country. Similarly, the OIE Terrestrial Code also provides for a level of sanitary security under which safe trade may be facilitated in order to prevent infection with ASFV. The Appellate Body then confirmed that the OIE Code, if applied correctly, provides for less trade restrictive measures to country-wide bans in its product-specific recommendations.

96. In light of the above, it follows that Russia does not comply with the requirements in Article 5.6 and footnote 3, as the EU demonstrated that following the OIE standards and recognizing regionalisation would constitute a significantly less trade restrictive alternative measure.

E. Discrimination claims

1. Article 2.3 of the SPS Agreement

97. The EU recalls that in *US-Animals* the US competent authorities provided a quicker recognition of regionalisation measures in Brazil and in Chile, while being still in the process of assessing an Argentinian request related to the foot-and-mouth disease (FMD) free area of Patagonia. The panel report in *US-Animals* largely supports the EU's discrimination claims in the present case. In *US-Animals* the panel first found that several aspects of the sanitary measures in place in Patagonia (Argentina) and in Santa Catarina (Brazil) are comparable in terms of efficacy and that the relevant conditions in Patagonia, Santa Catarina and Chile do have "a resemblance or likeness" and are "of the same nature or kind", being therefore similar within the meaning of Article 2.3 of the SPS Agreement.

98. First, the EU has explained how the measures at issue discriminate between the products at issue from the EU and similar products presenting a rather higher (or at least equivalent) level of risk originating in Russia. The relevant conditions prevailing both in the affected EU Member States and in Russia are the existence of ASF on both the Russian and the EU territories, because that was the relevant feature that triggered the import prohibitions imposed by Russia.

99. Second, with respect to Ukraine, relevant to the present case are two instances of discrimination, both occurring before the date of the establishment of the panel. The first instance occurred in 2012, when Russia did not apply any ban to Ukrainian products following an ASF case in the Zaporozhye region. The second instance of discrimination occurred at the beginning of 2014 with respect to the Lugansk region. Strangely enough, in its First Written Submission Russia presents a letter sent to the Ukrainian authorities on 30 January 2014, requesting *inter alia* information on measures and proposals for regionalisation after the decision on regionalisation was already taken!

100. Third, with regard to Belarus, while for the purposes of Article 2.3 first sentence the discrimination should occur between WTO Members, the EU shares the US assessment according to which the concept of disguised restriction on international trade in the second sentence of Article 2.3 does not have such a limitation. In practice, it means that similar factors should be taken into account by the Panel in its analysis of the Russian treatment of Belarus products and the conditions of discrimination between WTO Members. In the context of the similarly worded *chapeau* of Article XX of the GATT 1994 the Appellate Body took into account its analysis regarding "arbitrary and unjustifiable discrimination" in reaching its conclusions on "disguised restriction on international trade".

101. Accordingly, Russia breaches the provisions of Article 2.3 of the SPS Agreement.

2. Article 5.5 of the SPS Agreement

102. The EU notes that Russia's explanations with regard to the "infected objects" not notified to the OIE seem to be contradictory. While Russia quotes its legislation defining "infected objects" as, *inter alia*, factories, means of transport, refrigerators, it alleges that it notified to the OIE all the outbreaks and cases, including these infected objects. But outbreaks and cases refer to animals infected by a pathogenic agent, while factories, means of transports and refrigerators are not animals.

103. A recent declaration by a Russian industry representative confirms that ASF spread from some municipal districts of the Voronezh region to other districts in spite of the fact that the competent Russian authorities took measures with regard to those ASF outbreaks and in spite of the fact that the cited holding was considered of the safest degree as per the Russian biosecurity standards.

104. The situation in Russia is more worrying as the main factor of ASF spread are not the wild boars but rather domestic pigs, which can be associated with more human mistakes and loose enforcement measures. Russia is also lacking an ASF contingency plan.

105. All the above information has to be seen and assessed in the context of the very important - and relatively quick- geographical spread, thousands of kilometres from the initial ASF outbreaks.

106. Russia's ALOP cannot be derived from the measures at issue, as these measures do not contain non-protectionist elements. The Panel may establish Russia's ALOP on the basis of the level of protection reflected in the domestic SPS measures *actually applied*. In light of the above, the lack of proper application and enforcement of the Russian ASF legislation clearly leads to the conclusion that Russia's ALOP *actually applied* is rather low.

107. In any event, even if the Panel finds a rather high ALOP reflected in the EU-wide ban and in the four individual bans, 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. The ALOP is a function of what Russia seeks to protect on Russian territory. It is not or should not be a function of different trade partners.

108. Finally, the EU recalls that, unlike Article 2.3, Article 5.5 of the SPS Agreement does not contain a reference to "Members". For the purposes of the EU's Article 5.5 claims the discrimination with regard to Belarus is also relevant.

F. Claims related to control, inspection and approval procedures

1. Recognition of regionalisation falls within the scope of Article 8 and Annex C of the SPS Agreement

109. Russia wrongfully considers that the EU's claims under Annex C and Article 8 of the SPS Agreement fall outside the scope of the mentioned provisions. This assertion is also supported by the US in its Third Party Submission. However, the panel in *US-Animals* clearly states that recognition of regionalisation falls within the scope of Article 8 and Annex C of the SPS Agreement.

110. The EU explained why Russia's assertions are wrong for a number of reasons. First, the language used in Article 6.3 of the SPS Agreement, referring to "inspection and…other relevant procedures" is very similar to the language used in Annex C and Article 8, which also refer to "inspection, control and approval procedures". The EU does not see any reason why there should be a different meaning attached to the type of procedures envisaged by Article 8 so as to exclude the type of inspections and other relevant procedures mentioned in Article 6.3. The Article 6 Guidelines and Footnote 7 to the SPS are supportive of this interpretation.

111. Second, unlike Russia the EU does not view the acceptance of the regionalisation measures as a "negotiation" between two different Members. This is rather an objective exchange of information and the decision of the importing Member is to be taken with consideration of the objective and rational factors of the kind non-exhaustively enunciated in Article 6.2 second sentence of the SPS Agreement. Article 6.3 makes it clear that the necessary information shall be provided in order to *objectively demonstrate* to the importing Member that the disease-free areas are disease-free and are likely to remain disease-free areas. This understanding is confirmed in Article 5.3.7 of the OIE Terrestrial Code, which describes the sequence of steps to be taken in establishing a zone and having it recognised for international trade purposes. Similarly, Article 4.1 of the SPS also makes reference to the exporting Member *objectively demonstrating* to the importing Member that its measures are suitable.

112. It follows from the above that the EU claims pursuant to Annex C and Article 8 fall within the type of situations contemplated by those legal provisions.

2. Russia requested information which is not necessary for the purposes of assessing the EU ASF regionalisation measures, resulting in undue delays

113. Russia did not manage to rebut the *prima facie* case made by the EU with respect to our Annex C and Article 8 claims.

114. The delays in the operation of the control, approval and inspection procedures linked to the EU wide ban and the individual EU Member States bans are clearly attributable to Russia. While the need for additional information does not amount to undue delay, the repeated request of non-necessary and irrelevant information does. It equally does amount to undue delays the lack of responsiveness for long periods of time, without further feedback on the key issues invoked in order to delay the procedures.

115. The EU explained in detail and illustrated with clear examples the type of information which Russia required from the EU, allegedly for the purpose of completing its approval procedures with respect to the EU regionalisation measures. The EU is pleased to note that the individual experts appointed by the Panel substantially agree with our assessment. Also, the EU promptly notified all changes in the ASF situation in the recently affected EU Member States, as explained in detail in our Responses to the Panel questions.

116. The EU has provided abundant evidence to substantiate its claims under Annex C and Article 8 of the SPS Agreement. The EU recalls that the agreed minutes of the meeting of 7 March 2014 mention that the EU veterinary representative "answered all the questions asked by the Russian party". Russia's information requirements were not limited to what is *necessary* for appropriate control, inspection and approval procedures as required by Annex C(1)(c) of the SPS Agreement. To the contrary, the EU explained in detail that Russia's information requirements extended to numerous issues which were not necessary for the assessment of the EU regionalisation measures.

117. Russia's control, inspection and approval procedures were not undertaken and completed *without undue delays*, as required by Annex C(1)(a) of the SPS Agreement. The panel in *US-Animals* analysed if the US authorities' review processes of Argentina's requests were undertaken and completed without undue delay. It concluded that in those particular circumstances most of the delays incurred in the review of Argentina's request for the recognition of Patagonia as FMD free were undue.

118. In the present case the EU provided solid evidence, confirmed by the individual experts' responses to the Panel questions, that Russia's failure to assess the EU's regionalisation request resulted in delays which are undue, because such delays are "unwarranted, or otherwise excessive, disproportionate or unjustifiable".

119. It is particularly important in that regard to note that Russia repeatedly requested information which is not germane to conducting a risk assessment in the present case. It came back with requests for non-relevant information several times, always claiming that it needs more information to perform its assessment, given the changes in the ASF situation. It is precisely this kind of delaying behaviour which was condemned by the panel in *US-Animals.*

120. The EU agrees with the panel in *US-Animals*, which found that "what matters is whether there is a legitimate reason, or justification, for a given delay, not the length of the delay as such". In the circumstances of the present case Russia's delays in control, inspection and approval procedures with respect to the EU ASF regionalisation measures are undue, whether we consider the date of the panel establishment or a date 20 months later.

121. In particular, it bears significance that as early as February and March 2014 Russia required from the EU information which is irrelevant for conducting a risk assessment in the present case. With the letter of 5 February 2014 Russia requested information not only with respect to Lithuania (the only partially affected EU Member State at the time) but also with respect to all the other EU Member States about foreign hunters, who entered the country to hunt the wild boar during 2013-2014, as well as an estimation of enterprises attested to ship animal products to the territory of the CU, by level of zoosanitary condition. One month later, the letter of 12 March 2014 contains the already notorious in the present proceedings reference to "absence of any proof of non-existence of ASF in the territory of other EU member states".

122. Russia cannot successfully defend itself by arguing that it has had to wait for information from the EU which was labelled as an "overkill" and as an attempt to "muddy the water" by the

individual experts appointed by the Panel. Such a period constitutes a delay and such a delay is undue for the purposes of Article 8 and Annex C(1)(a) of the SPS Agreement.

123. It is true that, differently from *US-Animals,* in the present case there were several changes in the delimitation of the different areas. However, all these changes are a normal part of the EU system, which is designed so as to ensure that new cases and outbreaks do not occur in the ASF free areas. It is significant that since August 2014 no new cases or outbreaks occurred outside the areas considered to be infected with ASF. In addition, all changes took place in a limited geographical area and were based on the same guiding principles. Thus, in the circumstances of the present case, Russia was able to conduct a risk assessment and to reach a conclusion with regard to the EU ASF regionalisation measures.

124. In addition, the EU recalls that Article 5.3.7. of the OIE Terrestrial Code recognizes the importance of the trading history between two countries. Clearly the EU and Russia have a long history of trade. Russia should have taken their knowledge of the EU system in light of the long-standing EU-Russia trading relationship into account while analysing the EU ASF regionalisation measures. In the words of Dr Alejandro Thiermann, as emphasized during the meeting with the individual experts, *trust* is an important element between trade partners with an established relationship.

125. The EU also explained that procedures with respect to the products at issue from the EU were conducted in a less favourable manner than for the like domestic products, contrary to Annex C(1)(a) of the SPS Agreement. The EU explained in detail in the section dedicated to the discrimination claims how Russia discriminates between the products at issue from the EU and the like domestic products.

126. Finally, Russia did not publish or otherwise communicate to the EU the standard processing period and did not comply with any of the other requirements in Annex C(1)(b) of the SPS Agreement.

127. As Russia failed to rebut our *prima facie* case, the Panel should find that Russia is in breach of its obligations under Annex C(1)(a), (b), (c) and Article 8 of the SPS Agreement.

G. Transparency claims

128. The EU highlights that even in an emergency scenario an importing Member is not absolved of any obligation with regard to the transparency of its measures. Quite to the contrary, Annex B(6) contains a set of detailed requirements which should be followed.

129. Russia notified the measure at issue with regard to Lithuania to the WTO Secretariat only more than 2 weeks after its adoption. Similarly, Russia 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.

130. Russia is equally unable to rebut EU's arguments regarding the lack of any notification at all, through the WTO Secretariat, of the EU wide ban, while acknowledging its existence, under the different name of "provisional compliance with the terms of the veterinary certificates".

131. In light of the above, Russia has failed to rebut the *prima facie* case made by the EU with regard to the breach of the provisions of Annex B(1), (2), (5) and (6) of the SPS Agreement and, consequently, of Article 7 of the SPS Agreement.

IV. CONCLUSIONS AND REQUEST FOR FINDINGS

132. Russia failed to rebut the EU's *prima facie* case on any of the claims the EU advanced. Furthermore, Russia significantly changed its position during the proceedings, in light of the responses from the individual experts and from the OIE, as well as the latest EFSA ASF Scientific Opinion. Accordingly, the EU requests the Panel to find that Russia's measures, as set out above, are inconsistent with Russia's obligations contained in 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.

133. The EU respectfully requests the Panel to recommend that the Dispute Settlement Body requests Russia to bring the contested measures into conformity with its obligations under the SPS Agreement.

ANNEX B-3

FIRST PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

I. FACTUAL BACKGROUND

1. ASF is a highly contagious viral disease, which is difficult to control and spreads mainly in areas that have high concentrations of wild boar and backyard farms with low levels of biosecurity. This lethal combination is present in many Eastern European countries. Certain geographical features, including forest migration corridors, suggest that ASF may easily spread within regions of the European Union. While ASF is extremely lethal (with mortality rates close to 100%), recent scientific studies suggest that the mortality rate may not be 100%. Recovered animals may therefore remain infected, thus increasing the risk of further ASF spread.

2. Recognizing the severity of ASF, the Russian Federation has implemented rigorous and comprehensive ASF-control and eradication measures mainly through the ASF Instructions[1], which set out strict containment zones and standstill requirements for ASF outbreaks in the Russian Federation.[2] Through Customs Union Decision No. 317, the Russian Federation likewise extends ASF control measures to imported products, allowing for imports from ASF-infected countries provided that the exporting country or region has been ASF-free for 36 months – in accordance with the OIE Terrestrial Code principles of regionalization.[3]

3. In response to ASF outbreaks in EU Member States, the Russian Federation imposed temporary import restrictions on ASF-infected EU Member States as neither the European Union nor the infected EU Member States have been unable to demonstrate that its proposed zones were adequate to control ASF and consistent with the OIE Terrestrial Code. As a consequence of the ASF outbreaks, EU veterinary officials were no longer able to certify that the territory of the European Union (excluding Sardinia) was ASF-free over the prior three years, a condition of export for live pigs and certain pork products as stipulated in the veterinary certificates[4] and agreed upon by the European Union and the Russian Federation through the 2004 Memorandum.[5] The consequence was the inability of the European Union to export live pigs and pork products to the Russian Federation.

4. The Russian Federation has similarly imposed import restrictions with respect to Belarus and Ukraine, which experienced ASF outbreaks in 2013 and 2014.

II. LEGAL ARGUMENTS

A. Arguments regarding import restrictions on the four ASF-infected EU Member States: Lithuania, Poland, Latvia and Estonia

1. The Russian Federation's import restrictions with respect to the infected EU Member States conform to the relevant international standard and are consistent with Article 3.2 of the SPS Agreement

5. Article 3.2 of the SPS Agreement provides that SPS measures that conform to the relevant international standard shall be deemed necessary and are presumed consistent with the relevant provisions of the SPS Agreement.[6] The relevant international standard for animal diseases is the OIE Terrestrial Code.

6. The most pertinent provisions for ASF are set out in OIE Terrestrial Code Chapters 4.3, 4.4, 5.3, and 15. As set out in the chart below, the relationship between these different articles is not linear but rather sequential.

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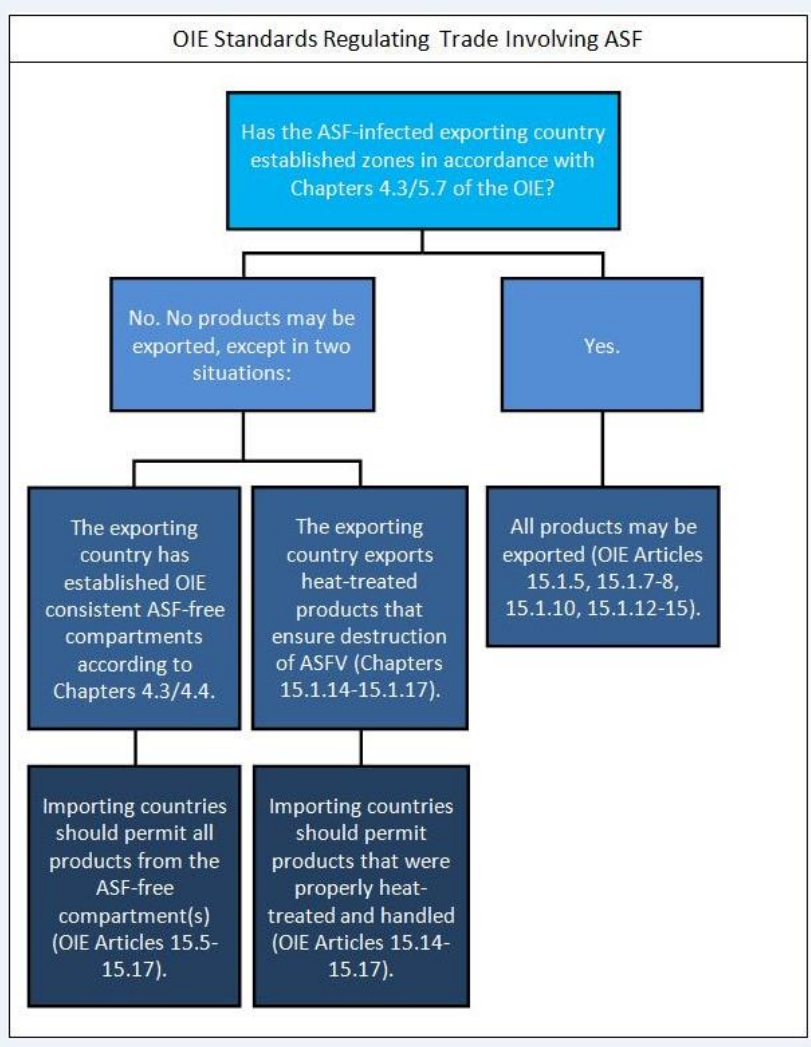
[1] Exhibit EU-18.
[2] Ibid.
[3] Exhibit RUS-25.
[4] Exhibits EU-52 to EU-54
[5] Exhibit EU-60
[6] Appellate Body Report, *EC – Hormones*, para. 163.



i. Non-heat-treated products

7. As can be derived from this chart, the provisions regarding non-heat-treated products set out in Chapter 15.1 of the OIE Terrestrial Code are triggered only when the exporting country has determined to establish OIE-consistent zones and has objectively demonstrated this to the importing country. An exporting country's failure to establish OIE-consistent zones and/or compartments allows the importing country to legitimately and appropriately apply country-wide import restrictions on non-heat-treated products.[7]

8. For an exporting country to effectively establish a zone under the OIE Terrestrial Code, it must demonstrate to the importing country that it has implemented the recommendations in Article 4.3.3 of the OIE Terrestrial Code, which sets forth "Principles for defining and establishing a zone or compartment, including protection and containment zones".[8] Irrespective of whether or not a country labels its zones containment zones and/or protection zones, or claims to adhere to "straightforward regionalization", the principles set out in Article 4.3.3 of the OIE Terrestrial Code cannot be ignored by countries claiming to have established OIE-consistent zones. Indeed, nothing in OIE Terrestrial Code suggests that there exist separate principles for "straightforward" zones that differ from the principles set out for containment and/or protection zones.

9. The OIE Terrestrial Code's zoning principles set out in Article 4.3.3 include: (i) intensified movement control; (ii) identification of the source of ASF outbreak; (iii) stamping-out policy; (iv) absence of new cases of the disease within the containment zone for two incubation periods (i.e.

[7] Panel Report, *India – Agricultural Products*, para. 7.261.
[8] Exhibit EU-4, Article 4.3.2.

30 days for ASF); and (v) increased passive and targeted surveillance. Importantly, zones must take into account the epidemiology of the disease, in particular the presence and role of susceptible wildlife species.[9]

10. In addition, an ASF-infected country wishing to continue to export should, pursuant to OIE Terrestrial Code Article 5.3.7, provide the importing country with an explanation of why the area can be treated as an epidemiologically separate zone for international trade purposes. This principle is also reflected and reinforced in Article 6.3 of the SPS Agreement and the 2006 Memorandum.[10]

ii. Heat-treated products

11. The relevant OIE Terrestrial Code provisions regarding heat-treated products are set out in Articles 15.1.14, 15.1.15,15.1.16 and 15.1.17. These provisions permit the trading of pork products that "have been processed in an establishment approved by the Veterinary Authority for export purposes *so as to ensure the destruction of the ASF*, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASF."[11] The exporting country carries the burden of demonstrating that "the necessary precautions were taken after processing to avoid contact of the product with any source of ASF."

b. *The Russian Federation conforms to the OIE Terrestrial Code*

12. The Russian Federation is willing and able to accept products from ASF-infected countries that meet OIE-consistent regionalization, compartmentalization and/or heat-treated standards. CU Decision 317 establishes that the Russian Federation is able and willing to accept imported products from ASF-infected countries that have established OIE-consistent regions. In addition, the record reflects that that the Russian Federation is able and willing to accept imports from ASF-infected countries/regions that have established OIE-consistent compartments. Furthermore, the Russian Federation allows for the import of products that have been adequately heat-treated.

i. The Russian Federation's decision not to accept the EU's series of growing zones for non-heat treated products was objectively justified and conforms to the OIE Terrestrial Code

13. In evaluating whether the Russian Federation's decision not to accept the EU's zones was reasonable in accordance with the OIE Terrestrial Code, the Panel must decide, based on the totality of the evidence, in its temporal, epidemiological and geographic context, whether the Russian Federation's decision was "objectively justifiable." The Panel may not engage in a *de novo* evaluation of the evidence and must refrain from attributing its own weight or drawing inferences from particular facts and evidence. The appropriate short-hand description of this standard of review for the Panel to apply is whether the Russian Federation's decisions on the EU's various zones were "objectively justifiable." Based on this standard of review, the Russian Federation's decision not to accept the EU's zones is objectively justified.

14. Effectiveness is a central principle of the OIE Terrestrial Code's zoning provisions.[12] Yet undisputed evidence demonstrates that the European Union's zones of containment and ASF control measures have not been effective in containing the further considerable spread of ASF.

15. First, the European Union's zones of containment have proven to be inadequate. This may well be because of the combination in the four ASF-infected EU Member States of high wild boar density *and* the high percentage of small backyard low-biosecurity pig operations where domestic and wild boars can intermingle.[13] The OIE Terrestrial Code reflects the need to adapt the zones to the epidemiology of the disease, taking into account especially the role of wildlife species and the application of biosecurity measures.[14] Therefore, any effectively established zone of containment should take into account not only the role played by wild boar in transmitting ASF and the large distances over which wild boar can spread ASF,[15] but also the fact that ASF is more contagious

[9] Exhibit EU-4, Article 4.3.2.
[10] Exhibit EU-61.
[11] OIE Terrestrial Code Articles 15.1.14, 15.1.15, 15.1.16, 15.1.17. (Emphasis added). (Exhibit EU-3)
[12] Exhibit EU-4, Article 4.3.1.
[13] Exhibit RUS-3, Figure 8; and Figure 3 of the Russian Federation's Opening Statement. See also Exhibit RUS-150; and Figure 4 of the Russian Federation's Opening Statement.
[14] Exhibit EU-4, Article 4.3.2.
[15] Exhibits RUS-8;and RUS-149, p. 8.

than previously thought.[16] In light of this, any zone of containment in the four ASF-infected EU Member States must be generously sized, and ASF control measures must be strongly enforced. However, throughout 2014 and 2015, the European Union kept expanding its zones of containment in these four ASF-infected EU Member States, which suggests that the original zones established by the European Union were not effective in preventing further outbreaks.[17]

16. Second, the continual changes to these zones of containment – caused by high levels of continuing ASF outbreaks – indicate that the European Union's containment zones have not been effective in controlling the spread of ASF. Specifically, the OIE Terrestrial Code provides that a zone cannot be effectively established if there are more than "limited" outbreaks.[18] Whether or not an outbreak is limited depends on the number of outbreaks, speed and spread of disease, and the geographic area it has infected. The hundreds of outbreaks and cases the European Union has experienced over the course of a year, covering vast territory in four EU Member States, certainly cannot be considered "limited".[19]

17. Third, the ineffectiveness of the European Union's control measures is demonstrated by its failure to meet the so-called "30-day" rule set out in the OIE Terrestrial Code.[20] According to this rule, the effectiveness of a containment zone is reflected in the fact that there have been no new cases in the containment zone within a minimum of two incubation periods from the last detected case (i.e. 30 days).[21] The European Union has not been able to demonstrate this. Thus, the entire territory of those four infected EU Member States may be considered ASF-infected.

18. Fourth, the European Union failed to adopt adequate movement restrictions to prevent the spread of ASF from the zones of containment to the rest of the country pursuant to relevant provisions in the OIE Terrestrial Code.[22] Indeed, EU legislation allows for the movement of certain non-heat-treated ASF-susceptible products from ASF infected zones without first establishing an ASF-free compartment as recommended by OIE Terrestrial Code Chapter 15.1.

19. Fifth, the European Union failed to provide the Russian Federation with transparent, timely and complete information justifying its ever-expanding containment zones. Of particular significance is the European Union's continuing failure to provide the Russian Federation with information the European Union itself deems essential when evaluating ASF outbreaks. Pursuant to the EU's overarching ASF legislation in the context of the "90-day" plans, each time infection zones are redefined, Member States are under the obligation to ensure that "the Commission and the other Member States are informed of these amendments without delay."[23] However, the European Union waited many months before it finally provided copies of the 90-day plans for Poland and Lithuania in March 2015. The Russian Federation received copies of Latvia and Estonia's eradication plans as late as May 2015.

20. Other factors the Russian Federation took into account were: the European Union's failure to adequately increase passive and targeted surveillance, incidents of pork smuggling and related evidence creating doubts about the capacity of the veterinary service in the ASF-infected Member States; and the Russian Federation's own experience in controlling ASF on its territory over the past seven years.

21. Based on these factors, the Russian Federation's decision not to accept imports of live pigs and pork products from the infected EU Member States was objectively justifiable.

22. The reasonableness of the Russian Federation's decision to reject the EU's zones was supported by the decisions of many other WTO Members (e.g. Japan, Singapore, South Korea, Taiwan) that similarly had in place country-wide import restrictions by the end of 2014.

c. *The Russian Federation's decision not to accept the EU's non-identified compartments conforms to the OIE Terrestrial Code*

23. The European Union neither identified compartments nor requested the Russian Federation to recognize compartments with a high level of biosecurity. Thus, the Russian Federation was under no obligation under the OIE Terrestrial Code to allow for imports from compartments.

[16] Exhibit EU-26, p. 18.
[17] Figures 5-8 of the Russian Federation's Opening Statement.
[18] Exhibit EU-4, Article 4.3.3.3.
[19] Exhibit RUS-152.
[20] Exhibit EU-4, Article 4.3.3.3.e.
[21] Exhibit EU-3, Chapter 15.1.
[22] Exhibit EU-4, Article 4.3.3.3.c.
[23] Article 16.1 of the Directive 2002/60. (Exhibit EU-31).

d. *The Russian Federation's decision not to accept the EU's heat-treated products also conforms to the OIE Terrestrial Code*

24. The European Union has not met its burden of demonstrating that "the necessary precautions were taken after processing to avoid contact of the product with any source of ASF." EFSA scientist acknowledged that whether or not a product is properly heat-treated is crucial in determining risk of ASF spread since considerable risk of infection remains if heat-treatment is not conducted properly.[24]

25. During the period from January 2014 through the present, the European Union has never provided information or otherwise demonstrated to the Russian Federation that its heat-treated pork products have been processed in a manner which avoided contact of the product with any source of ASF. Indeed, the European Union made no such demonstration even after the Russian Federation imposed import restrictions on heat-treated products from Poland and Lithuania on 7 April 2014, and later after the Russian Federation imposed import restrictions on most heat-treated products from Latvia and Estonia.

26. Thus, the Russian Federation's import restrictions on heat-treated products from ASF infected EU Member States are also consistent with the relevant provisions of the international standard.

2. The Russian Federation's measures are presumed consistent with all Relevant SPS Provisions Under Article 3.2 of the SPS Agreement

27. The Russian Federation's import restrictions with respect to the four infected EU Member States conform to the OIE Terrestrial Code. Thus, the Russian Federation benefits from a presumption of consistency of its measures with the relevant provisions of the SPS Agreement pursuant to Article 3.2 of the SPS Agreement.[25] The relevant provisions in this case are: Articles 2.2, 5.1, 5.2, 5.3, 5.4, 5.6, 6.1, 6.2, and 6.3 of the SPS Agreement. The European Union has not put forward any evidence to rebut this presumption of consistency.

3. The Russian Federation's import restrictions are consistent with Articles 6.1, 6.2, and 6.3 of the SPS Agreement

a. *The Russian Federation recognizes the concept of regionalization consistent with SPS Article 6.2*

28. Article 6.2 requires the recognition by a WTO Member of the concepts of pest- or disease-free areas and areas of low disease prevalence.[26] The Russian Federation not only recognizes the concept of disease-free areas in the abstract;[27] its legislation Customs Union Decision 317 explicitly recognizes regionalization in the context of ASF, and the 2006 Memorandum refers to it as applied to contagious diseases and to products from the European Union.[28] In determining recognition of such ASF-free areas, the Russian Federation considers factors such as geography, epizootic factors and SPS control measures.

29. The European Union has acknowledged that the Russian Federation recognizes the concept of regionalization, stating that it "understand[s] that the Russian Federation is applying the principles of regionalization for African and Classical Swine fever in other affected countries."[29]

b. *The Russian Federation has adapted its import restrictions to regional conditions consistent with Article 6.1 of the SPS Agreement*

30. The Russian Federation not only recognizes the concept of regionalization, it also has adapted import restrictions to the regional conditions in these countries by taking into

[24] EFSA, Scientific Opinion on African Swine Fever", *EFSA Journal* (2010), 8(3):1556, pp. 11-12. (Exhibit EU-24); Evira Research Report, "Possible routes of entry into the country for African swine fever – Risk profile" (May 2011), p. 15. (Exhibit RUS-140).
[25] Appellate Body Report, *EC – Hormones*, paras. 170-172.
[26] Panel Report, *India—Agricultural Products*, para. 7.695.
[27] Exhibit EU-61.
[28] Exhibit RUS-25, Chapters 7, 8 and 9.
[29] Exhibit EU-62.

consideration the factors listed in Article 6.1 of the SPS Agreement to objectively and reasonably refuse the EU's zones. A key factor that the Russian Federation took into account were the zoning provisions of the OIE Terrestrial Code, in particular Article 4.3.3, and the European Union's failure to act consistently with these provisions. In addition, the procedure the Russian Federation used in evaluating the EU's zones closely follows the Guidelines to Article 6 of the SPS Agreement, which were established by "taking into account the work of the OIE and the IPPC in developing international standards, guidelines and recommendations to further the practical implementation of Article 6."[30]

c. *The European Union has failed to act in accordance with the steps prescribed in Article 6.3 of the SPS Agreement*

31. The European Union has failed to objectively demonstrate that the alleged ASF-free areas in the four infected EU Member States "are, and are likely to remain, pest- or disease-free areas" pursuant to Article 6.3 of the SPS Agreement. The ASF-free areas in the European Union's infected Member States is shrinking rapidly, creating uncertainty as to whether the currently alleged ASF-free areas will indeed, "remain" ASF-free.

32. In addition, the European Union has provided insufficient evidence for the Russian Federation to conclude that its ASF-free areas are and will remain disease-free. Information provided was mainly limited to information about legislation and did not include, for example, timely information about the implementation of OIE-recommended ASF eradication measures with respect to new and expanded zones, and any information regarding the situation "on the ground" as to how the measures have been implemented, enforced, adjusted to local conditions, and have been successful and not successful, among other relevant factors.

4. The Russian Federation's import restrictions are consistent with Article 5.5 of the SPS Agreement

a. *The European Union has failed to prove that the Russian Federation has adopted different ALOPs*

33. The European Union claims that the Russian Federation discriminates because it recognizes ASF-free regions within Russia and allows for intra-Russian trade from regions suffering from ASF infections while imposing country-wide import restrictions on products from the four EU infected Member States. This raises the question whether importing countries experiencing disease infections must ban all trade within their own territory to legitimately impose country-wide restrictions with respect to that same disease within the territory of other WTO Members under SPS Articles 2.3 and 5.5. The answer to this question is no.

34. An importing Member may maintain and implement the same ALOP through somewhat different measures which may have a somewhat different impact on trade. Indeed, the OIE Terrestrial Code does not envisage a total domestic standstill as a precondition to impose import-restrictions on affected products. The 2013 OIE Users Guide provided that "[t]he recommendations in the Terrestrial Code make reference only to the animal health situation in the exporting country, and assume that either the disease is not present in the importing country or is the subject of a control or eradication programme." In other words, under the OIE Terrestrial Code, an infected importing country may legitimately impose country-wide import restrictions as long as it has in place a reasonable domestic control mechanism.

35. The Russian Federation has in place a rigorous and comprehensive ASF-control programme domestically that reflects a high ALOP. Russia's overarching ASF control legislation, the ASF Instructions, sets out strict movement prohibitions on meat trade within and outside the containment zones as well as a prohibition on the transportation of animals.[31] In addition, the Russian Federation has adopted measures to reduce the spread of ASF in wild boar[32], and backyard farms, and nation-wide programs to reduce the number of free ranging domestic pigs[33]

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[30] Exhibit EU-51.

[31] 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. (Exhibit EU-18).

[32] Exhibit RUS-20, Articles 1.1, 1.2, 1.3, 1.4, 1.6, and 2.1.

[33] Exhibit RUS-40.

and increase biosecurity measures in large pig farms.[34] Importantly, the Russian Federation, the Russian Veterinary Service and the Russian pork industry have taken rigorous actions to implement these mandates, as illustrated by the examples of regional plans and actions in Belgorod, Voronezh, and Krasnodar and through testimony from Mr. Maslov, Founder and Chairman of the AGREOECO Group which runs five pig-breeding complexes in Voronezh.

36. The Russian Federation applies equivalent flexibility to imported products from trading partners. Custom Union Decision 317 accepts imports of live pigs from importing countries that have experienced ASF during the last 36 months but which have then effectively established OIE consistent zones.

37. The Russian Federation's temporary import restrictions, based on the ineffectiveness of the EU's measures, are akin to the Russian Federation's domestic ASF-infected zones involving strict standstill of live pigs and pork products. Therefore, regardless of any differences in the structure or application of the restrictions, the restrictions applied still reflect the same high ALOP.

38. Assuming *arguendo* that the Russian Federation has applied different ALOPs between the four ASF-infected EU Member States and the Russian Federation, these distinctions would be justified, in part, by the arguably higher level of risk of the transmission of ASF from imports of products from the alleged ASF-free regions in the four infected EU Member States caused by the European Union's lenient legislation on free movement in relevant products within the European Union.[35]

b. *Any alleged distinctions in ALOP do not result in discrimination or a disguised restriction on trade*

39. There is not a single test uniformly applicable in all cases to determine the existence of a disguised restriction on international trade.[36] Rather, three warning signals, taken together with other factors, can be relevant:[37] (i) the arbitrary and unjustifiable character of the differences in levels of protection; (ii) the difference in levels of protection applied; and (iii) the inconsistency of the measure at issue with Articles 5.1 and 2.2 of the SPS Agreement.[38] None of these, or other, warning signs are present in this case.

40. Regarding (i) and (ii), the Russian Federation applies the same ALOP to imported relevant products from ASF-infected EU Member States as to relevant products within the Russian Federation's ASF-infected zones. Any difference in the measures applied reflects the unwillingness of the European Union to establish reasonably sized ASF-free regions where ASF would not likely spread.[39] Additionally, as the Russian Federation's measures with respect to the four ASF-infected EU Member States conform to and/or are based on the OIE standards, they cannot simultaneously constitute a disguised restriction on trade.

41. Regarding (iii), the Russian Federation's import restrictions are presumed to be consistent with the relevant provisions of the SPS Agreement pursuant to Article 3.2, which include Articles 5.1 and 2.2 of the SPS and thus obviates the need for a full blown risk assessment.

5. The Russian Federation's import restrictions are not inconsistent with article 2.3 of the SPS Agreement

a. *Discrimination claim 1: import restrictions on products from the ASF-infected EU Member States compared to the Russian Federation's internal movement restrictions*

42. The Russian Federation's measures comply with Article 2.3 of the SPS Agreement, first sentence, because (i) the Russian Federation's measures for domestic and imported products are based on the same ALOP; (ii) any difference in treatment is not arbitrary because the European Union failed to objectively establish ASF-free regions in contrast to the Russian Federation; and (iii) the conditions in the four ASF-infected EU Member States and the Russian Federation are dissimilar since they represent different risks of ASF spread. Finally, the Russian Federation's

[34] Exhibit RUS-22.
[35] Exhibit EU-44, Articles 5, 8-12.
[36] Panel Report, *Brazil – Tyres*, para. 7.320.
[37] Appellate Body, *Australia—Salmon*, para. 166.
[38] Ibid.
[39] See paras. 15-19 above.

import restrictions do not violate Article 2.3 of the SPS Agreement, second sentence, as they do not constitute a disguised restriction on trade.

b. *Discrimination claim 2: import restrictions on products from the ASF-infected EU Member States compared to the Russian Federation's treatment of products from Belarus and Ukraine*

43. Article 2.3 of the SPS Agreement refers exclusively to WTO Members. Since Belarus is a non-WTO Member, provisions of the Article 2.3. of the SPS Agreement are not applicable to the EU's discrimination claim regarding Belarus and the European Union's claim must fail.

44. Alternatively, any difference in treatment between Belarus and the European Union is justified and not arbitrary, since it reflects the fact that Belarus recognized and established compartments with high levels of biosecurity in accordance with the OIE, whereas the European Union never proposed such compartments.[40]

45. The Russian Federation also does not discriminate with respect to Ukraine. Any imports allowed are the result of compartmentalization that Ukraine has established, in contrast to the European Union.

6. The European Union has failed to demonstrate that the Russian Federation's import restrictions are inconsistent with Article 5.6 of the SPS Agreement

46. The European Union has not demonstrated that the Russian Federation violates Article 5.6. of the SPS Agreement, as there are no less-restrictive alternative measures available to achieve the Russian Federation's ALOP, which is based on the relevant standard. The European Union proposes as a less trade restrictive measure the application of OIE standards, which recommend regionalization and trade from ASF-free countries/zones. However, the Russian Federation's import restrictions already conform to and/or are based on the OIE Terrestrial Code.[41]

B. Arguments related to the Russian Federation's provisional compliance with the veterinary certificates

1. The Russian Federation's provisional compliance with the veterinary certificates does not constitute a measures under the SPS Agreement

47. First, the European Union has failed to establish that a *de facto* consequence—the loss of market access for EU live pigs and pork products that do not meet the veterinary certificates' requirements—constitutes a measure covered by the SPS Agreement and is attributable to the Russian Federation.

48. The current inability of the European Union to export live pigs and pork products to the Russian Federation does not result from a *measure* adopted by the Russian Federation. Rather, it is the consequence of the language contained in the veterinary certificates for trade between the European Union and the Russian Federation. These certificates were negotiated by the Parties and mutually agreed upon pursuant to the 2004 Memorandum. Specifically, the Russian Federation and the European Union agreed that imports of pigs and certain pork products are allowed only if the entire European Union excluding Sardinia has been ASF-free for 36 months. Thus, when the European Union experienced its first ASF outbreaks in Lithuania in 2014, it could no longer certify imports of the relevant live pigs, pig and pork products to the Russian Federation. This was due to the European Union's veterinary officials refusal to sign the veterinary certificates after ASF outbreaks.

49. Thus, the Russian Federation's provisional compliance with the terms of the certificates does not constitute a "measure" but rather reflects the consequences of following the conditions set out in the veterinary certificates signed and mutually agreed to by the Parties. This conclusion is supported by the panel in *EC – Approval and Marketing of Biotech Products,* finding that the reference to "requirements and procedures" in the definition of an SPS measure in Annex A(1)

[40] Exhibit RUS-42.
[41] See paras. 12-22 above.

does not include the *"application*" of such "requirements and procedures".[42] Similar to the situation in *EC – Approval and Marketing of Biotech Products*, we are not dealing with a requirement or procedure itself, i.e. the veterinary certificate, but rather with the *application* of requirements or procedures which are set out in the veterinary requirement. Thus, the Russian Federation's provisional compliance with the veterinary certificates does not constitute an SPS measure.

a. *The underlying EU-Russia veterinary certificate is and continues to be valid*

50. If the Panel were to consider the 2004 veterinary certificates agreed to by the Russian Federation and the European Union to be SPS measures, then the Panel should also take note that the validity of these veterinary certificates constitutes a term of the Russian Federation's WTO membership, pursuant to paragraph 893 of the Working Party Report on the Accession of the Russian Federation, providing that "[b]ilateral veterinary export certificates initialed by one of the CU Parties before 1 July 2010, as well as any subsequent amendments to such certificates agreed with the authorized 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."[43]

51. The European Union not only confirmed the certificate's validity in the Working Party Report of the Russian Federation, but also specifically requested to extend its term of validity in 2012.[102]

b. *In the alternative, the Russian Federation's provisional compliance with the terms of the veterinary certificates is justified under Article 5.7 of the SPS Agreement*

52. According to the jurisprudence, relevant scientific evidence is "sufficient" if it is adequate to allow the performance of the risk assessment required by Article 5.1 and as defined in Annex A to the SPS Agreement.[44]

53. Without detailed information concerning the ASF situation, including eradication efforts where ASF has occurred, the epidemiology of ASF, and the geographic and other relevant characteristics of the EU Member States that can be used to predict whether the Member State will likely become infected with ASF, the Russian Federation is not able to accurately assess the probability of entry of ASF. Much of this information was, and is still, not available to the Russian Federation,[45] despite numerous requests addressed to the European Union throughout 2014.[46] When the European Union did provide information in response to the Russian Federation's requests, it was either outdated or focused almost entirely on the ASF-infected Member States; not on the other EU Members that are part of the European Union.[47]

54. The available pertinent information indicates the existence of risk. This information includes evidence of rapid spread of ASF in the four ASF-infected EU Member States; scientific studies on wild boar and the long distances they can travel, in addition to ASF spread through wild boar. All these factors, coupled with the Russian Federation's own experience, suggest that ASF may easily spread within regions of the European Union, indicating that complying with the terms of the veterinary certificate constitutes a logical precautionary concern.[48]

55. The Russian Federation has and continues to request from the European Union information germane to conducting a risk assessment, including information about the control regime in exporting EU Member States; the volume of pig and pork products imports from these countries; the movement of wild boar and density of the pig population etc.

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[42] Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.1395, 7.1407, 7.1421, 7.1441, 7.1448 and 7.1465. (Emphasis added).

[43] 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. 893 (emphasis added) (Exhibit RUS-159).

[44] Appellate Body Report, *Australia – Apples*, para. 238 (observing that "if a Member chooses to base SPS measures on a risk assessment, it must have made the preliminary determination that the relevant scientific evidence is sufficient to perform a risk assessment"). See also Appellate Body Reports, *Japan – Apples*, para. 179; *Canada – Continued Suspension*, para. 674; and *Australia – Apples*, para. 239.

[45] Exhibits EU-84; RUS-130; and RUS-54.

[46] Exhibits EU-93; and RUS-131.

[47] Exhibit RUS-41, paras. 37-43.

[48] Exhibits EU-26, p. 18; and EU-25, p. 6.

56. The Russian Federation will continue, in conjunction with the European Union authorities, to discuss the mutually acceptable terms of the veterinary certificates. The reasonable period of time depends on the specific circumstances of the case, which in this case includes taking into account the difficulty of obtaining the additional information necessary for the review, and the aggravating ASF situation in the European Union.

57. Because the Russian Federation's provisional compliance with the terms of the veterinary certificates is justified under Article 5.7 of the SPS Agreement, the European Union cannot prevail under its SPS Article 5 claims. [49]

c. *The Russian Federation's provisional compliance with the terms of the veterinary certificates is justified under Article 2 of the SPS Agreement*

i. *Discrimination Claim 1: The European Union compared to the Russian Federation*

58. Any alleged discriminatory treatment between products from the European Union and within the Russian Federation is non-arbitrary and justifiable, as it is merely the consequence of the European Union's inability to meet the requirements contained in the mutually agreed veterinary certificates. Moreover, identical or similar conditions do not prevail in other EU Member States and the Russian Federation, mainly because the European Union has failed to demonstrate that other EU Member States are, and will remain, ASF-free – and thus that imports from these areas to the Russian Federation do not risk spreading the ASF virus – whereas the Russian Federation has taken stringent and effective measures domestically.

59. Moreover, in contrast to the European Union's claim, the Russian Federation's inability to agree to the terms of the revised language of the veterinary certificate proposed by the European Union does not reflect a disguised restriction on trade. Rather, it reflects the fact that the European Union has not provided the Russian Federation with reasonable assurances and guarantees that the reduced requirements for ASF-freedom as provided for in the proposed revised veterinary certificate will ensure that the exported pork products are indeed ASF-free. This could include, for example, information as to whether the proposed language envisages that the product at issue may originate or be processed in an ASF-infected country.

60. Moreover, the Russian Federation has engaged in multiple attempts to negotiate veterinary bilateral agreements with individual EU Member States. Curiously, the European Union has discouraged such initiatives. This too indicates that the Russian Federation's actions do not amount to a disguised restriction on trade.

ii. *Discrimination Claim 2: The European Union compared to Ukraine/Belarus*

61. No discrimination existed with Ukraine as, similar to the situation with the European Union, the Russian Federation also agreed and complied with the terms of a similar veterinary certificate with Ukraine.[50] Consequently, the Russian Federation stopped importing pigs and pork products when the Ukrainian veterinary authorities could no longer certify that Ukraine was ASF-free.

62. No discrimination existed with Belarus, as stated in paragraphs 43 and 44 above.

d. *The Russian Federation's provisional compliance with the terms of the veterinary certificates is consistent with Article 6 of the SPS Agreement*

63. The Russian Federation's relevant legislation (e.g. the ASF Instructions and Customs Union Decision No. 317) recognizes the concept of disease-free areas pursuant to Article 6.2 of the SPS Agreement.

64. In making its decision to provisionally comply with the terms of the veterinary certificates, the Russian Federation analyzed the SPS characteristics of the European Union and took into account the prevalence of ASF, the existence of eradication or control programs, and the relevant OIE international standards, guidelines and recommendations. This task was rendered particularly

[49] Panel Report, *EC – Biotech*, para. 7.2969 (finding that "Article 2.2 excludes from its scope of application the kinds of situations covered by Article 5.7").

[50] Exhibit RUS-136.

difficult by the European Union's failure to provide adequate and timely information to the Russian Federation.

65. The European Union has not provided the Russian Federation with the necessary evidence to demonstrate that its Member States are and are likely to remain ASF-free under Article 6.3 of the SPS Agreement. Much of the information provided by the European Union was either outdated, irrelevant or incomplete.

e. *The Russian Federation's provisional measure is consistent with Article 8 and Annex C of the SPS Agreement*

66. The definition of "control, inspection and approval procedures" under Article 8 and Annex C of the SPS Agreement does not cover the Russian Federation's alleged "failure to modify measures" as negotiations between the Members regarding certification are not procedures for putting products on a market.[51] Moreover, the Appellate Body has explained that the procedures referred to in Annex C(1) are those that check and ensure fulfillment of SPS measures, which suggests that such measures exist prior to the operation or undertaking of the relevant procedures.[52] The modification of a measure is thus not covered by Article 8 and Annex C(1) of the SPS Agreement.

f. *The Russian Federation Took Steps to Comply with Article 7 and Annex B of the SPS Agreement*

67. The Russian Federation 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,[53] so the immediate notification requirement has been met. The nature of the ASF virus and the associated risks of the spread of ASF did not allow the Russian Federation to introduce a notice period before the measure affecting exports from Lithuania went into effect. The Russian Federation also exchanged comments with the European Union and Lithuania regarding the various options for resuming trade.[54] With respect to the Russian Federation's provisional compliance with the veterinary certificates, the European Union has failed to establish that the certification mechanism constitutes an SPS measure to which the requirements of Article 7 and Annex B of the SPS Agreement apply.

[51] Annex C.1. footnote 7 to the SPS Agreement; and Panel Report, *EC –Biotech,* para. 7.424.
[52] Appellate Body Report, *Australia – Apples*, para. 436.
[53] Exhibit RUS-28.
[54] Exhibits RUS-28; and EU-14.

ANNEX B-4

SECOND PART OF THE INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

I. ARGUMENTS REGARDING IMPORT RESTRICTIONS ON THE FOUR ASF-INFECTED EU MEMBER STATES: LITHUANIA, POLAND, LATVIA AND ESTONIA

A. The Russian Federation's import restrictions on live pigs, pork and pig products from the four infected EU Member States conform to the relevant international standard and are consistent with Articles 3.2 and 6 of the SPS Agreement

1. In making an objective assessment as to whether a measure "conforms to" the relevant international standard under Article 3.2 of the SPS Agreement and "embodies the standard completely", the Panel must take into account (a) the proscriptive nature of the relevant international provisions; (b) inherent sequencing of obligations of exporting and importing countries contained in the relevant international standard; and (c) any temporal implications from dynamic developments in the disease status.[1]

2. The Panel's review of whether the Russian Federation's decision was in conformity with the applicable international standards and principles for zoning under the OIE Terrestrial Code will, necessarily, also constitute an assessment of whether the Russian Federation met the requirements of Article 6 of the SPS Agreement.[2] Considerable parallels exist between the provisions of the OIE Terrestrial Code and Article 6 of the SPS Agreement.[3]

1. The Russian Federation's import restrictions on non-heat-treated products conform to Article 3.2 of the SPS Agreement

a. The pertinent legal provisions of the OIE Terrestrial Code for non-heat-treated products

3. The experts have clarified that it is not necessary for an exporting Member to establish a "containment zone" under Article 4.3.3.3 of the OIE Terrestrial Code.[4] Thus, the issues in this dispute have now narrowed and the Panel should focus its analysis on whether there was, and is, an objective basis for the Russian Federation not to accept the various alleged ASF-free areas within the four infected EU Member States.

4. Both parties agree that OIE Articles 1.4.6, 1.6.1, Chapters 3.1 and 3.2; Articles 4.3.3.1, 4.3.3.5, 4.3.3.6, Articles 5.1.3, 5.3.7, 15.1.2, 15.1.3, and 15.1.4 of the OIE Terrestrial Code are among the provisions of the Code that contain relevant international standards for establishing and assessing zones in this dispute.[5] The experts have also acknowledged the potential applicability of these provisions.[6]

5. Article 5.3.7 of the OIE Terrestrial Code sets out "the sequence of steps to be taken in establishing a zone/compartment and having it recognised for international trade purposes."[7] The first phase in this sequence is for the exporting country to (a) establish an OIE-consistent zone /compartment, and (b) provide detailed documentation to objectively demonstrate a basis for recognition of the disease-free zone for international trade purposes.[8] Only when these steps have been taken is the importing country in a position to make an objective assessment of whether the

[1] See Russian Federation Responses to Panel Question 306.
[2] See Russian Federation Rebuttal Submission, paras. 50-55.
[3] See Russian Federation Rebuttal Submission, paras. 50-55.
[4] Russian Federation Comments to Experts Responses to Panel Question 32, para. 85.
[5] Russian Federation Opening Statement at the Second Hearing, para. 7.
[6] Transcript of the Panel's meeting with the Experts and the Parties, paras. 1.263 – 1.268.
[7] See Russian Federation Responses to Panel Question 306, para. 248.
[8] Ibid.

disease-free zone is likely to remain disease-free. This sequence for regionalization in the OIE is also supported by the jurisprudence.[9]

6. Thus, in assessing the conformity of the Russian Federation's import restrictions on non-heat-treated products with the OIE Terrestrial Code, the Panel should consider whether the European Union has effectively established ASF-free zones and infected zones, and has provided detailed science-based documentation including the following OIE Terrestrial Code provisions:[10]

> Article 1.6.1: For zones established on the basis of self-declaration: "Member Countries should present documentation setting out the compliance of the Veterinary Services of the applicant country or zone with the provisions of Chapters 1.1, 3.1 and 3.2 of the OIE Terrestrial Code."
>
> Article 4.3.3.1: "The extent of a zone and its geographical limits should be established by the Veterinary Authority on the basis of natural, artificial, and/or legal boundaries."
>
> Article 5.3.7.1.a: "The exporting country identifies a geographical area within its territory, which it considers to contain an animal subpopulation with a distinct health status with respect to a specific disease/specific diseases based on surveillance."
>
> Article 4.3.3.5: "For a zone or compartment, the Veterinary Authority should document in detail the measures taken to ensure the identification of the subpopulation and the establishment and maintenance of its health status through a biosecurity plan."
>
> 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."
>
> Article 5.3.3.6: "Relevant animal movements into and out of the zone or compartment should be well documented and controlled. *The existence of a valid animal identification system is a prerequisite to assess the integrity of the zone or compartment.*"

7. The obligations on the importing country include the following:

> to "determine[] whether it accepts an area as a zone for the importation of animal products" (Article 5.3.7.d);
>
> to "notif[y] the exporting country of its determination and the underlying reasons, within a reasonable period of time". (Article 5.3.7).[11]

8. In evaluating whether the Russian Federation's provisional determination not to accept the zones in the four infected EU Member States was reasonable in accordance with the OIE Terrestrial Code, the Panel must decide, based on the totality of the evidence, in its temporal, epidemiological and geographic context, whether the Russian Federation's decision was "objectively justifiable."[12] The Panel may not engage in a *de novo* evaluation of the evidence and must refrain from attributing its own weight or drawing inferences from particular facts and evidence. The appropriate short-hand description of this standard of review for the Panel to apply is whether the Russian Federation's decisions on the EU's various zones were "objectively justifiable."[13] Based on this standard of review, the Russian Federation's decision not to accept the zones within the four

[9] Panel Report, *India—Agricultural Products*, para. 7.262. (emphasis added); Panel Report, *US—Animals*, para. 7.249.
[10] Russian Federation Responses to Panel Question 306, para. 250.
[11] Russian Federation Response to Panel Question 306, para. 251.
[12] Russian Federation Response to Panel Question 113, para. 190.
[13] Russian Federation Response to Panel Question 113, para. 190.

infected EU Member States is objectively justified irrespective of the temporal benchmark the Panel adopts.

b. The Russian Federation's ongoing provisional decisions not to accept ever-changing ASF-free zones

i. Assessment at the time of the Panel establishment

9. If the Panel analyzes the Russian Federation's conformity to the relevant international standard at the time of the Panel establishment, there is a strong objective basis to find that (a) the Russian Federation did not engage in undue delay in waiting until 29 July 2015 to make a provisional determination – based on the then available evidence on regionalization in Lithuania, Poland and Latvia—and (b) the provisional determination not to accept the zones in the four infected EU Member States was justified due to existing uncertainty about the epidemiology of the disease; increased ASF outbreaks despite repeated assertions by infected Member States officials that their control measures were effective; and the EU's failure to provide information regarding implementation and effectiveness of its ASF control measures, in the infected and disease-free areas.[14]

10. Importing Members legally need not, and indeed, cannot immediately accept zones upon the exporting Member's establishment of the zone and the zoning request.[15] Article 6 of the SPS Agreement and the applicable OIE provisions necessarily embody a "reasonable period of time" for the regionalization process.[16] The panel in *US—Animals* did not consider a number of months post-Argentina's regionalization request to constitute undue delay.[17] However, if the Panel finds that Article 6.3 of the SPS Agreement and parallel OIE provisions do not embody a reasonable period of time to permit importing Members to impose import restrictions pending the completion of a reasonable period of time, the Russian Federation's claims for the four affected Member States should be assessed under Article 5.7 of the SPS Agreement.[18]

11. Both the importing and exporting country require time to assess and evaluate the substance of the applicable ASF control measures, as well as the effectiveness of measures as they are actually implemented.[19] Additional time is needed when outbreaks are occurring rapidly, in a spreading geographic area, and without a clear causal basis. The European Union's own 2002/60 Directive mandates time to investigate, develop scientific data, determine the appropriate eradication methods.[20] Indeed, over the course of 2014-2015, as more information became available about the epidemiology of ASF in the four infected EU Member States, the infected EU Member States adopted or changed their ASF measures, *inter alia*, to increase wild boar hunting and/or increase biosecurity regulation and reduce the number of backyard farms[21]—measures the Russian Federation had always informed local veterinary officials in the affected Member States were necessary in the effective control of ASF.

12. The European Union did not provide the Russian Federation with relevant detailed documentation consistent with their obligations under Article 6.3 of the SPS Agreement and the relevant OIE requirements.[22] The record establishes that between February and June 2014, the European Union provided a number of sheets of paper but most of the documentation provided was neither relevant nor timely to assess the actual implementation of ASF control measures.[23] Thus, by 22 July 2014, the date of the Panel establishment, the Russian Federation received (a) only modest information regarding ASF measures implemented for Lithuania and Poland, (b) no information with respect to ASF in Estonia and only minimal information concerning the situation in Latvia; (c) little relevant scientific information to gauge whether ASF-free zones would remain

[14] See Russian Federation Comment to the European Union's Response to Panel Question 236.
[15] Ibid., para. 39.
[16] Ibid., para. 40.
[17] Ibid., paras. 40-42.
[18] Russian Federation Comment to Panel Question 236.
[19] Russian Federation Comment to Panel Question 236.
[20] See, e.g., Russian Federation Comment to Panel Question 236, para. 44.
[21] See Russian Federation Comment to Panel Question 236, paras. 65-71.
[22] See e.g., Russian Federation Comment to Panel Question 322; Russian Federation Comment to Panel Question 321 (filed 8 October 2015).
[23] See, e.g., Russian Federation Comment to Panel Question 322; Russian Federation Comment to Panel Question 321 (filed 8 October 2015).

ASF-free; and (d) certain relevant information related to wild boar and small backyard production operations raised significant doubts in the Russian Federation that the European Union was not taking appropriate control measures in Lithuania and Poland.[24]

13. Most notably, by late July 2014,[25] no documentation was provided about Lithuanian and Polish eradication plans, bio-security plans, and EU audits of the veterinarian officials in these two Member States to gauge compliance with, Lithuanian and Polish legislation, contingency plans, and eradication plans. Yet it is undisputed that in April 2014, the DG SANTE had received draft eradication plans from Poland and Lithuania and approved them on 7 July 2014.[26] Similarly, by mid-April 2014, DG SANTE had initial reports from a detailed audit reflecting problems in the implementation of Lithuanian ASF control measures. And in mid-June 2014, DG SANTE had similar initial audit reports describing problems in effective implementation of Polish ASF measures.[27] Yet the European Union never provided the Lithuanian and Polish audit reports directly to the Russian Federation and the earliest such reports were available on-line were November 11 and 23, 2014, respectively.[28] Most importantly, the confidential eradication plans for Lithuania and Poland were not made available to the Russian Federation until March 2015.[29] The European Union has failed to explain adequately the delays in providing this crucial information.[30] Moreover, the European Union completely contradicted itself in arguing late in the proceedings that the eradication plans were irrelevant to a regionalization case as mid-to-long-term control measures despite having focused primarily on eradication plans as an important basis for its ASF control measures in its Second Written Submission.[31]

14. Towards the end of July 2014, a sharp increase in ASF outbreaks in Lithuania, Poland, and Latvia occurred.[32] The worsening ASF situation, in addition to the European Union's failure to provide the necessary information regarding implementation of demonstrably ineffective ASF control measures under Articles 5.3.7 and 4.3.2 of the OIE Terrestrial Code, and Article 6.3 of the SPS Agreement led the Russian Federation to provisionally determine under the conditions existing as of 29 July 2014, that the European Union had not demonstrated that its ASF-free zones in those three countries would remain ASF-free.[33]

ii. Assessment after date of Panel Establishment

15. Should the Panel assess the European Union's claims regarding the measures applicable to the four affected Member States *after* the date of the establishment of the Panel, then it must take into account undisputed evidence that during 20 months of ASF outbreaks, the original established ASF-infected zones and corresponding ASF-free areas in the four infected EU Member States went through a series of frequent and significant legislative changes.[34] Most significantly, the borders of the ASF-free zones changed a total of 20 times.[35]

16. Between early 2014 and September 2015, a total of 18 ASF outbreaks occurred in ASF-free zones in Lithuania, Latvia and Estonia.[36] The latest of these outbreaks in alleged ASF-free zones occurred on 22 May 2015—not August 2014 as repeatedly and incorrectly asserted by the European Union.[37] The OIE Secretariat and the Panel's appointed experts have all agreed that even one ASF outbreak within the alleged ASF-free zone immediately results in the loss of ASF-

[24] Russian Federation Comment to Panel Question 322; Russian Federation Comment to Panel Question 321 (filed 8 October 2015).
[25] Russian Federation Comments to Panel Questions 234, 235, 236.
[26] Russian Federation Comment to Panel Question 322, para. 257.
[27] Russian Federation Comment to Panel Question 322, para. 257.
[28] Russian Federation Comment to Panel Question 236, para. 58.
[29] See, e.g., Russian Federation Second Written Submission, para. 64.
[30] See European Union Response to Panel Question 19, paras. 79-82.
[31] See Russian Federation Comment to Panel Question 234.
[32] See Exhibit RUS-297 (revised).
[33] See Russian Federation Comment to Panel Question 236; Russian Federation Response to Panel Question 268.
[34] Russian Federation Opening Statement at the Second Hearing, para. 30.
[35] See Exhibit RUS-297 (revised).
[36] Russian Federation Opening Statement, para. 31.
[37] See Exhibit RUS-297 (revised).

free status.[38] Yet the European Union veterinary authorities chose against recovering the ASF-free status for the original ASF-free zones consistent with Article 15.1.4 of the OIE Terrestrial Code. Instead, they established new ASF-free zones that carved out the "infected" geographic regions from the old ASF-free zone—presumably based on Article 15.1.2 of the OIE Terrestrial Code.[39] This means that each time the European Union "redefines" the contours of their ASF-free areas through adopting new Commission Implementing Decisions, it establishes a *new* ASF-free area. In other words, instead of trying to recover the ASF-free status of its original ASF-free zones, the European Union has chosen to bypass these complexities and simply proclaim new ASF-free areas.

17. From a legal and practical perspective under Article 6.3 of the SPS Agreement and Article 5.3.7 of the OIE Terrestrial Code, each time such a new ASF-free zone is established, the exporting country must provide the importing country with updated information pertinent to the evolving ASF situation.[40] In this regard, zone changes occurring with regularity in the four infected EU Member States can be divided into three different categories according to their severity, nature and location of the outbreak(s) precipitating the zone changes: ASF outbreaks in the ASF-free zones; ASF outbreaks in the Part I zones; domestic pig outbreaks in part II zones. The extraordinary number of zone changes in the infected EU Member States are coupled with an ongoing evidentiary burden on the European Union to provide "detailed documentation" to justify these zones. Yet, the audit reports (which were never provided to the Russian Federation) and eradication reports (provided in March and May 2015) revealed problems with implementation of ASF measures in Poland and Lithuania, and the lack of a focus on reducing significantly wild-boar populations and numbers of back-yard low-biosecurity farming operations.[41] And no updated eradication plans have ever been produced to the Panel or the Russian Federation, despite the European Union's own Council Directive 2002/60 requiring updated reports every six months.[42]

iii. Arguments relevant for all temporal dimensions

18. Irrespective of the temporal benchmark the Panel chooses, the four infected EU Member States have failed to establish OIE-consistent zones. For instance, the four individual EU Member States have failed to present information with respect to the

19. implementation of a traceability system of animals in the infected areas, as is considered a prerequisite to assess the integrity of a zone under Article 4.3.3.6 of the OIE Terrestrial Code.[43] Nor have individual infected EU Member States identified any country-specific "biosecurity plan" under Article 4.3.3.5 of the OIE Terrestrial Code—let alone an updated plan reflecting the dynamic developments—and earlier failures to control ASF based on any initial plans.[44]

20. Moreover, individual ASF infected EU Member States and the European Union were unable to demonstrate the credibility and capability of the veterinary services of the four ASF-infected EU Member States to effectively control ASF consistent with Chapters 3.1 and 3.2 of the OIE Terrestrial Code, as required under Article 1.6.1 of the OIE Terrestrial Code.[45] These doubts about the veterinary services' failure to adopt measures appropriate to the epidemiology of the disease increase each time a new ASF-free zone was established and then discarded as ASF outbreaks surged. And these doubts were reasonably based on the high number of wild boar present in the infected EU Member States in addition to the large number of backyard farms, particularly in Lithuania, Poland and Latvia. Moreover, the Russian Federation's skepticism was triggered by multiple outbreaks that took place outside the ASF-infected areas.[46] For all these reasons, the individual EU Member States did not adhere to the relevant provisions in the OIE Terrestrial Code.

[38] For example, Dr. Thomson provides that "[i]f even one outbreak occurs in a designated ASF-free zone, the free zone *immediately* loses its 'free' status". (emphasis added). Dr. Thomson's Response to Panel Question 32, para. 4.22; Professor Penrith likewise assert that "[o]ne outbreak in the free area would be enough to alter its status". Professor Penrith's Response to Panel question 6, para. 4.105.

[39] Russian Federation Opening Statement at the Second Hearing, para. 32.

[40] Russian Federation Opening Statement at the Second Hearing, paras. 32, 35.

[41] Russian Federation Comment to Panel Question 321 (filed 8 October 2015).

[42] Russian Federation Opening Statement at the Second Hearing, para. 38.

[43] Russian Federation Opening Statement at the Second Hearing, para. 36

[44] Russian Federation Opening Statement at the Second Hearing, para. 36

[45] Russian Federation Response to Panel Question 306, para. 256.

[46] See Exhibit RUS-297 (revised).

21. The Russian Federation frequently communicated its inability to accept the proposed ASF-free zones.[47] It also communicated and updated its continuing provisional assessment with European Union SPS officials, and communicated the underlying reasons to keep in place the import restrictions with respect to the four infected EU Member States. Because of the extremely fluid and dynamic disease situation, the ongoing provisional assessments of the Russian Federation was consistent with the recommended procedures in the OIE Terrestrial Code Article 5.3.7.[48] Similarly, the Russian Federation conformed to the relevant provisions in the OIE Terrestrial Code in its assessment of the zones within the four infected EU Member States by examining the quality and credibility of the veterinary service (as set out in Article 1.1, Chapters 3.1 and 3.2 of the OIE Terrestrial Code, and Article 5.3.7); its own animal health situation with respect to the disease concerned (Article 5.3.7); other relevant OIE provisions such as whether the *z*ones were established by taking into account the epidemiology of the disease (Articles 4.3.3.5, 4.3.3, 4.3.2); whether adequate movement restrictions were put in place (Article 4.3.3; relevant provisions of Chapter 15.1); the prevalence of the disease (Article 4.3.3); the occurrence of outbreaks outside the ASF-infected areas (Articles 15.1.2, 15.1.3, 15.1.4); and whether the European Union had provided the Russian Federation with sufficient information about each of its zones, including eradication and biosecurity reports (Articles 4.3.3.5 and 5.3.1, 5.37 of the OIE Terrestrial Code).[49] Based on all these factors, the Russian Federation engaged in a "general assessment of the risk" (Article 5.3.7) that the EU's ASF-free zones are and will remain ASF-free.[50]

2. The Russian Federation's import restrictions on heat-treated products conform to Article 3.2 of the SPS Agreement

22. The relevant OIE Terrestrial Code provisions that constitute the international standard for heat-treated pork products are set out in Articles 15.1.14-15.1.17 of the OIE Terrestrial Code. These provisions permit the trading of pork products that "have been processed in an establishment approved by the Veterinary Authority for export purposes *so as to ensure the destruction of the ASF*, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASF."[51] There is no temperature requirement set out in Chapter 15.1 of the OIE Terrestrial Code.[52] Thus, an importing country's obligations under Chapter 15.1 are triggered only when each infected EU Member State has demonstrated (a) that the products have been processed to ensure destruction of the virus; and (b) that "the necessary precautions were taken after processing to avoid contact of the product with any source of ASF."

23. The European Union has not submitted any evidence demonstrating compliance of the four individual EU Member States with Articles 15.1.14-15.1.17 of the OIE Terrestrial Code.[53] Such compliance cannot be presumed by an exporting Member. With the European Union failing to establish an evidentiary basis for its alleged compliance, the Russian Federation was not required under Chapter 15.1 of the OIE Terrestrial Code to accept heat-treated products from the four ASF-infected Member States. Indeed, the Russian Federation properly complied with Article 3.2 of the SPS Agreement and the international standard for heat treated products with respect to measures involving the four infected EU Member States.

B. The Russian Federation's import restrictions are consistent with Article 5.5 of the SPS Agreement

24. The Russian Federation has in place robust ASF control measures in line with the OIE Terrestrial Code provisions. Moreover, ASF import legislation set out in Customs Union Decision 317 incorporates regionalization "carried out in accordance with the recommendations of the World Organization for Animal Health [OIE]". To the extent the OIE Terrestrial Code recommends

[47] See, e.g., Russian Federation First Written Submission, 80-96.; Russian Federation Second Written Submission, paras. 12-18; Russian Federation Response to Panel Question 268, paras. 73-75.

[48] Russian Federation Response to Panel Question 306, para. 257.

[49] Russian Federation Response to Panel Question 306, para. 257.

[50] See, e.g, Russian Federation First Written Submission, paras. 57-213; Russian Federation Rebuttal Submission, paras. 7-126; Russian Federation response to the Panel's Question 101; Russian Federation Opening Statement to the Second Hearing, paras. 6-43.

[51] See, e.g, Russian Federation Opening Statement at the First Hearing, paras. 36-39; Russian Federation Comments to the European Union's Responses to Panel Question 241, paras. 92-93.

[52] Russian Federation Response to Panel Question 252, paras. 5-7.

[53] Russian Federation's Comment to the European Union's Response to Panel Question 281.

importing countries to accept disease-free areas and areas of low disease prevalence, the Russian Federation acts accordingly.

25. The European Union has continued to assert—but never demonstrated with any credible evidence—that the Russian Federation has adopted a low ALOP as reflected by the alleged ineffectiveness of the Russian Federation's domestic measures.[54] This claim is incorrect.

26. First, it is contradicted by the unrebutted testimony and declarations of Russian Federation SPS experts Georgy Djailidi, Tatyana Ausheva, Konstantin Gruzdev, and Chairman of the board of AGROECO Group, Vladimir Maslov, demonstrating the stringency and effectiveness of Russian ASF control measures.[55] In particular, the Russian SPS officials have engaged in appropriate intensified wild boar control measures, and rapid reduction of pigs kept in backyard farms through compensation programs. As a result of these and other ASF control measures, a significant part of the Russian Federation is ASF free, has low ASF prevalence or has not had an ASF-outbreak for the last three years.[56]

27. Second, the European Union fails to address or rebut evidence the Russian Federation has presented in support of its high ALOP, despite the fact that the Appellate Body noted in *India—Agricultural Products* that the Panel is expected to "accord weight" to that Member's expression of ALOP, especially when it has been expressed with sufficient precision, consistently, and in advance of the panel proceeding as the Russian Federation has done.[57]

28. Third, a domestic ban is neither envisioned nor mandated by the OIE Terrestrial Code as a precondition to legitimately impose country-wide restrictions on imports upon failure of the exporting country to demonstrate the establishment of OIE-consistent infection and disease-free zones.[58] The European Union has never rebutted the extensive evidence that it is common practice for the European Union to ban completely all imports from trading partners affected with a disease while adopting regionalization measures for the same disease at home.[59] The unrebutted examples highlight the fact that for purposes of Articles 2.3 and 5.5 of the SPS Agreement, a country-wide domestic standstill is not required as a precondition to legitimately restrict country-wide imports under the OIE Terrestrial Code.

29. Finally, the experts have agreed in their written remarks that the OIE Terrestrial Code's zoning provisions are formally applicable only to *exporting* country zones, and not to the infection or protection zones established domestically by importing countries also suffering the same disease.[60]

C. The Russian Federation's import restrictions on the infected EU Member States are not discriminatory under Article 2.3 of the SPS Agreement

30. Article 2.3 of the SPS Agreement refers exclusively to WTO Members. To prevail on a discrimination claim as complainants, the Panel needs to find that all elements of Article 2.3 of the SPS Agreement have been violated. This includes the requirement that there exists discrimination between Members. The European Union cannot establish this with respect to Belarus, a non-WTO Member, and as such its discrimination claim fails.[61]

[54] See e.g., European Union First Written Submission, para. 248; European Union Second Written Submission, para. 150.

[55] See e.g., Declaration of Georgy Djailidi (Exhibit RUS-307); Declaration of Tatyana Ausheva. (Exhibit RUS-308); Declaration of Konstantin Gruzdev (Exhibit RUS-309); Russian Federation Opening Statement, paras. 6-12

[56] See, e.g., Russian Federation Opening Statement at the Second Hearing, para. 45.

[57] See Russian Federation Second Written Submission, para. 143.

[58] Russian Federation Second Written Submission, para. 145; Russian Federation Response to Panel Question 190, para. 364; Russian Federation Response to Panel Question 266. paras. 51-52.

[59] Examples of this are set out in the Russian Federation Rebuttal Submission, paras. 154-157; Russian Federation Response to Panel Question 190, para. 363; Russian Federation Response to Panel Question 266, para. 55.

[60] See, e.g., Dr. Gideon Bruckner's Response to Panel Question 20, para. 2.158; Dr. Gavin Thomson's Response to Panel Question 33, para. 4.30.

[61] See, e.g., Russian Federation Opening Statement, para. 48.

31. The European Union admits in its Second Written Submission that presently, "there may . . . not be any discrimination"[62] with respect to Ukraine. With respect to the EU's earlier discrimination claims, the Russian Federation notes that it initially allowed regionalization from Ukraine based on the shared historical ties and mutual trust that still existed between the two countries in January 2014.[63] Indeed, both the Russian Federation and Ukraine are Members of the Commonwealth of Independent States (CIS) and their key ASF control regionalization legislation in particular, and SPS legislation, in general, has considerable parallels—a product of their shared history under the Soviet Union. However, the Russian Federation engaged in strict follow-up inspections to ensure that regionalization in Ukraine was in fact carried out effectively and could guarantee that the ASF-free areas of Ukraine would remain ASF-free. When it discovered violations in its regionalization measures, the Russian Federation decided, as it did in the European Union, not to accept regionalization measures in Ukraine.[64] However, for a period of time it was able to continue trade from high biosecurity compartments.[65]

D. The Russian Federation's import restrictions are consistent with Article 5.6

32. The European Union has not met its burden under Article 5.6. of the SPS Agreement and demonstrated that there exists another measure that is reasonably available that achieves the Russian Federation's ALOP and is significantly less trade restrictive.

33. The European Union incorrectly claims that the Russian Federation's measures are more trade restrictive than necessary by deriving Russia's ALOP from the challenged measures. However, if an ALOP is derived from the challenged measure, then the measure by definition can never be more trade-restrictive than required to achieve the appropriate ALOP. The European Union in response to the Panel's Question 150 disagrees with this logic, stating that "the ALOP is inferred only from those elements that are not overtly protectionist."[66] Yet, the European Union fails to point at any legal provisions that support such circular legal reasoning. Indeed, whether or not elements of a measure are "overtly protectionist" is for the Panel to decide; not for one of the Parties to unilaterally presume. Moreover, the European Union has failed to demonstrate how conforming to the relevant international standard—which reflects a medium/high ALOP—would meet what it considers to be Russia's "low" ALOP.[67] Finally, the European Union's alternative is not less trade restrictive given that the Russian Federation already complies with the international standard.[68]

E. There is no basis for an Article 8, Annex C undue delay claim with respect to regionalization of the four infected Member States

34. The record supports the conclusion that the four EU Member States failed to provide the Russian Federation 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.[69] The significant and ongoing increases in ASF outbreaks—including those in alleged ASF-free zones—eclipsed the ASF-free status of the alleged ASF-free zone.

35. The Russian Federation's request for additional information from the four infected EU Member States is not evidence that it was seeking to delay the assessment and resolution of the individual Member State zoning requests. The European Union raised no objection to providing the Russian Federation with some of the requested information with respect to the four ASF-infected EU Member States.[70] The relevance and timely nature of the Russian Federation's information

[62] European Union Second Written Submission, para. 138.
[63] Russian Federation Response to Panel Question 259, para. 22
[64] Russian Federation Response to Panel Question, para. 23.
[65] Russian Federation First Written Submission, para. 330.
[66] European Union response to Question 150, para. 313.
[67] See, e.g., Russian Federation Response to Panel Question 304, paras. 217-218.
[68] See, e.g., Russian Federation Comment to Panel Question 286, para. 149.
[69] Russian Federation, Closing Statement at the Second Hearing, para. 5; Russian Federation First Written Submission paras. 151-164; for link with obligations under Article 5.7 SPS Agreement, see e.g., Russian Federation Second Written Submission, paras. 185-193.
[70] See e.g., Russian Federation Closing Statement at the Second Hearing, para. 3; Russian Federation Comment to the European Union's Response to Panel Question 322.

request with respect to the four infected EU Member States has been confirmed by the experts.[71] Thus, with respect to the four infected EU Member States, the EU's claims under Article 8 and Annex C of the SPS Agreement must fail.

II. ARGUMENTS RELATED TO THE RUSSIAN FEDERATION'S PROVISIONAL COMPLIANCE WITH THE VETERINARY CERTIFICATES

A. The Russian Federation's provisional compliance with the veterinary certificates is not a measure attributable to the Russian Federation

36. The facts on the record indicate that the so-called "EU wide ban" is not a measure directly attributable to the Russian Federation.

37. First, the legal basis of the relevant veterinary certificates is the 2004 EU-Russia Memorandum and the forms of bilateral certificate initialed by competent officials of Russia and the European Union in 2006.[72] As this Memorandum and the forms of bilateral certificate are bilateral in nature, it cannot be considered a "national" Russian measure. Indeed, the bilaterally agreed forms of veterinary certificates are a reflection of the will of both parties. There is no unilateral right to nullify the document. Therefore, the Russian Federation cannot unilaterally withdraw from, nor amend, the provisions of the veterinary certificate. Moreover, the Russian Federation is not allowed to unilaterally require any veterinary certificate or other document produced in the form other than the form of the bilateral veterinary certificate agreed with the European Union. Hypothetically, such an action, if taken, could be considered as a WTO inconsistent measure that would effectively invalidate the bilaterally agreed form of certificate contrary to Russian commitment in paragraph 893 of the Working Party Report. And such measures would be attributable to the Russian Federation.

38. Second, the implementation of the agreed certificate is not a measure that might be attributable to the Russian Federation.[73] The bilateral certificate is a document agreed between the competent authority of Russia and the competent authority of the European Union. It establishes the form of certificate that must be produced and signed by a competent veterinary official of the European Union. In this document the competent veterinary official of the relevant European Union Member State certifies that the product at issue indeed originates from the territory of the European Union and that such territory has been ASF-free for three years. This document then accompanies the respective consignment of goods exported from the European Union to the Russian Federation. At the Russian border, the Russian competent official checks the validity of the certificate issued by European Union competent officials in accordance with the form agreed, and then accepts the goods. However, the European Union's veterinary officials, not the Russian Federation's, were unable to certify compliance of the products at issue pursuant to the conditions set out in the bilaterally agreed veterinary certificates.

39. The bilaterally agreed certificates are different from the ones adopted at the national level.[74] By the decision of the Customs Union Commission, common Customs Union forms of certificates were adopted before Russia's accession to the WTO. They serve the same purpose—the veterinary official downloads the form of such certificate, signs it, and gives it to an exporter willing to trade with Russia. At the time of Russia's Accession, the European Union insisted that it was not willing to use these forms of certificates adopted on the Customs Union level (now the present Eurasian Economic Union of which Russia is a Member), and insisted that a special bilateral certificate negotiated earlier with the Russian Federation to remain in force. Because the European Union was apparently concerned that Russia might decide unilaterally to abrogate or modify the text of this agreed certificate, the European Union insisted on the inclusion of a specific commitment in paragraph 893 to Russia's Working Party Report. This granted the European Union the security that the Russian Federation would not unilaterally abrogate the validity of the agreed bilateral certificate. But what gave the European Union the *right* to insist on the agreed certificate also imposed upon it an *obligation* to implement that certificate until negotiated otherwise with the Russian Federation.

[71] See, e.g, Russian Federation Comment to Panel Questions to the Experts 12 and 13.
[72] See Russian Federation Opening Statement at the Second Hearing, paras. 50-51.
[73] Russian Federation Opening Statement at the Second Hearing, para. 52.
[74] Russian Federation Opening Statement at the Second Hearing, para. 53.

40. Indeed, the "implementation" or "action" is the European Union's veterinary authorities' inability to certify absence of ASF within the entire EU and thus to issue the necessary documents required for export of the relevant pork products to the Russian Federation.[75] There can be no implementation of the certificate by the Russian Federation because that would represent a *second* step in the process, contingent on the European Union's veterinary authorities to carry out the *first* step, i.e., issuing export certificates in accordance with the terms of the bilaterally agreed form. Rather, the initial implementing party is the one taking the necessary *first* step. In the situation in which the European Union is unable to provide a valid certificate, the process cannot proceed to a second step. Therefore, in that present situation, there is no implementation of a measure that can be attributed to the Russian Federation. Moreover, any certification requirement and procedures are applied by the EU officials issuing the certificate.

B. The underlying EU-Russia veterinary certificate is and continues to be valid

41. The terms of the EU-wide veterinary certificates are recognized by the European Union and continue to be valid – so much so that the European Union has argued their continued validity precludes individual Member States from negotiating directly with the Russian Federation.[76] This demonstrates that the European Union recognizes the present relevance and applicability of that certificate with respect to trade in live pigs and pork products between the European Union and the Russian Federation.

42. Further evidence of the continued validity of the certificate is that they were a term of the Russian Federation's WTO membership.[77] The legal basis of the Russian Federation's position is found in Article XII:1 of the Agreement Establishing the World Trade Organization; paragraph 3 of the Protocol of Accession of the Russian Federation; and paragraphs 893 and 1450 of the Working Party Report on the Accession of the Russian Federation. Accordingly, the Russian Federation and the EU committed themselves to maintain the validity of the certificates until such time as "an export certificate was agreed with a CU Party based on the agreed positions of the other CU Parties." As no such agreement had been reached by the end of January 2014, the Russian Federation was obliged pursuant to the terms of its WTO accession to continue to rely on those certificates. However, we believe that this can be called "provisional" compliance as we expect that the certificate will be renegotiated between the EAEU (former CU) and the European Union as set out in paragraph 893 of the Working Party Report.

43. All Members agreed to the terms of the Russian Federation's accession, including paragraph 893 of the Working Party Report.[78] It follows that such protocol provisions must be consistent with the SPS Agreement. Indeed, were the Panel to decide otherwise, then its recommendations and rulings on this issue would lack a sufficient legal basis, as such recommendations and rulings "cannot add to or diminish the rights and obligations provided in the covered agreements," pursuant to Article 3.2 of the DSU.

44. Finally, as the Russian Federation is not in a position to unilaterally modify the form of certificate bilaterally agreed with the European Union, the Russian Federation has on numerous occasions sought to renegotiate the current European Union-Russian Federation veterinary certificates with the European Union as a whole.[79] For example, the Russian Federation explained in a letter dated 5 February 2014 to the European Union that it met with the Customs Union to discuss the provisional measures taken with respect to ASF;[80] talks were held between the European Union, the Customs Union and the Eurasia Economic Commission with respect to amending the certificates on 9 February 2014;[81] the Parties discussed the certificate issue in

[75] Russian Federation Opening Statement at the Second Hearing, para. 54.

[76] European Union Answers to the Panel's Question 21, para. 88.

[77] See e.g., Russian Federation Second Written Submission, paras. 177-179; Russian Federation Opening Statement at the Second Hearing, para. 56; Russian Federation Opening Statement at the First Hearing, para. 50.

[78] Russian Federation Opening Statement at the Second Hearing, para. 57.

[79] Russian Federation's Second Written Submission, paras. 207-214; See Certificate Chronology (Exhibit RUS-218).

[80] Certificate chronology, item 15 (Exhibit RUS-218) (Citing Letter from the Russian Veterinary Service to the EU Veterinary Service, 5 February 2014, FS-SD-8/1640 (Exhibit EU-84)).

[81] Certificate chronology, item 18 (Exhibit RUS-218) (Citing Letter from the Russian Veterinary Service to Slovakia, 9 February 2014, ФС-НВ-8/2549 (Exhibit RUS-211)).

Moscow on 21 February 2014, where they agreed it would have to be modified in order for trade to be resumed, etc.[82] Expert consultations between the European Commission and the Russian Federation took place in the months of March, April, and May 2014, which – as demonstrated by the chronology – involved multiple in person meeting and telephone negotiations. As demonstrated by the chronology, meetings about revising the veterinary certificate also actively involved the Customs Union. The chronology, which remains largely undisputed by the European Union, demonstrates the good faith efforts of the Russian Federation in an attempt to resolve the certificate issue.

45. Further, during 2014, the Customs Union, on behalf of the Russian Federation, engaged in various negotiations with both the European Union, and with a handful of EU Member States. The intent of the negotiations was to attempt to circumvent the current inability of the EU officials to certify exports from the European Union as a result of the language in the EU-Russia certificates.

46. Yet despite these efforts, the Parties have yet to reach a final agreement. The European Union has rejected the Russian Federation proposal for a "two-step plan" for regionalization, which involved resuming imports from the European Union's Western countries that were located far away from the infected area as an intermediary solution to the problem, after which the countries at risk could be discussed.[83] It should be stated that if there was a possibility for Russia to unilaterally introduce amendments to the bilaterally agreed certificates or just to abrogate the term of its validity the Russian Federation might have imposed this plan in respect of exports from the EU, thus adopting a measure attributable to Russia. However, the bilateral nature of the agreement and the unwillingness of the European Union to agree on possible amendments prevents Russia from actions that might be attributable to Russia. The Russian Federation further proposed to engage in bilateral negotiations with individual EU Member States.[84] But the European Union insists on amending the veterinary certificates on its own terms.

C. In the alternative, the Russian Federation's provisional compliance with the terms of the veterinary certificates is justified under Article 5.7

47. In the event that the Panel does consider this to be a measure, the Russian Federation's provisional compliance with Article 5.7 of the SPS Agreement is justified on a precautionary basis.[85] First, there continues to exist insufficient scientific evidence to conduct a risk assessment for the entire European Union. For instance, the 2015 EFSA report reflects continuing scientific uncertainty about the epidemiology of ASF. For example, it noted "high uncertainty about the distance [of wild boar] travel"[86] and highlighted the importance of carcasses in spreading the ASF—of which only 10 percent are likely identified[87] – which previously was not well understood. Moreover, the 2015 EFSA report concluded that targeted, more intensified hunting would be an effective way to eradicate ASF in wild boar, in contrast to findings that were made in the EFSA 2010 report. Furthermore uncertainty continues to exist as to whether survival of wild boar can in fact transmit ASF over longer periods of time.[88] Finally, the EFSA 2015 report concludes that no correlation has been found between wild boar density and ASF spread.[89] This contradicts previous findings in the European Union reports repeatedly concluding that "[s]preading of ASF in wild boar correlate with high density of wild boar population."[90] This further confirms and highlights the

[82] Certificate chronology, item 22 (Exhibit RUS-218) (Citing Letter from the EU Veterinary Service to the Russian Veterinary Service, 25 February 2014, SANCO/G7/PD/mh(2014)515243 (Exhibit RUS-197)).

[83] Certificate chronology, item 26, 4 March 2014 (Exhibit RUS-218) (Citing Rosselkhoznadzor news, "Negotiations between Sergey Dankvert, Head of Rosselkhoznadzor, and Alex Van Meeuwen, Ambassador of the Kingdom of Belgium," 4 March 2014 (Exhibit RUS-234)); *See also* Certificate chronology, item 57 (Exhibit RUS-218) (Citing 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 (Exhibit RUS-87).

[84] Russian Federation Second Written Submission, paras. 215-218.

[85] See e.g., Russian Federation First Written Submission paras. 350-382; Russian Federation Second Written Submission, paras. 185-203; Russian Federation Opening Statement at the Second Hearing, paras. 61-67.

[86] Scientific Opinion on African Swine Fever, EFSA Panel on Animal Health and Welfare (AHAW), EFSA Journal 2015;13(7):4163, p. 29. (Exhibit RUS-293).

[87] Ibid. p. 34.

[88] Russian Federation Comments to Experts Responses to Panel Question 8, paras. 14-16.

[89] Scientific Opinion on African Swine Fever, EFSA Panel on Animal Health and Welfare (AHAW), EFSA Journal 2015;13(7):4163, p.3. (Exhibit RUS-293).

[90] Latvia PAFF meeting, African swine fever in Latvia (update). January 13-14, 2015. (Exhibit RUS-318).

uncertain scientific evidence with respect to ASF control in wild boar that continues to exist to date.

48. Second, the Russian Federation is still waiting to receive information from the European Union necessary to complete an adequate assessment of the risk of the spread of ASF.[91] The Russian Federation has quite properly focused its questions on the control measures and data resulting from surveillance in the EU Member States *not* currently suffering infections of ASF. The European Union continues to take the position—one year after these EU-wide questions were provided—that important aspects of this information are irrelevant, failing to provide the Russian Federation with key information. Among the information that the European Union has failed to provide is information about monitoring and surveillance practices in all EU Member States.[92] Given the important role of wild boar in spreading the disease and the high density of wild boar in the non-infected EU Member States, this information would be particularly essential.

49. As late as June 2015, the European Union denied the Russian Federation's request for data on ASF surveillance conducted in the non-ASF infected EU Member States.[93] Yet while it fails to provide this highly relevant information, the European Union claims that the "vast majority" of its territory qualifies as "historically free" under the OIE Terrestrial Code.[94] The European Union fails to understand that historical freedom from ASF is contingent on having in place an early detection system and measures to prevent disease introduction and no evidence that the disease has infected wildlife. Moreover, experts have agreed that the European Union taken as a whole cannot be considered historically free of ASF. Thus, the European Union has not demonstrated that it warrants the status "historically free" under Article 1.4.6 of the OIE Terrestrial Code.

50. Third, the pertinent information available indicates a significant risk that ASF may spread to other parts of the European Union. In this regard, the Russian Federation has cited to a number of scientific studies, including a report by the German Federal Research Institute for Animal Health, findings by Gallardo et. al, lead ASF scientists, as well as wild boar migration patterns.[95]

51. Fourth, the Russian Federation continues to seek additional information and is reviewing its provisional compliance with the veterinary certificates within a reasonable period of time.[96] Here, any delay in negotiating a new veterinary certificate is the result of the European Union's failure to provide the Russian Federation with guarantees that the new certificate will in fact keep ASF out of the production cycle, in light of the ever-worsening ASF conditions in the European Union. The highly dynamic, and ever-worsening ASF situation in the EU Member States indicates reason for caution, especially given that to date, the Russian Federation has not received surveillance data from the non-ASF infected Member States.

D. The Russian Federation's provisional measure is consistent with Article 8 and Annex C of the SPS Agreement

52. The recent jurisprudence set out in *US-Animals* supports the Russian Federations' arguments that the European Union's claims under Article 8 and Annex C must also fail.[97] In the event that the Panel considers adherence to the provisional certificates to constitute an SPS measure attributable to the Russian Federation, the Russian Federation has already set out that it reviews its provisional measures on a regular basis, but that the European Union's failure to provide sufficient information has resulted in the current delay.[98] Indeed, one or more expert has considered relevant a number of questions asked by the Russian Federation with respect to all EU Member States that are part of the EU Customs Union. While experts can, for legitimate reasons and in good faith, disagree as to what information they deem relevant, what is important is

[91] See e.g., Russian Federation Second Written Submission, para. 195; Russian Federation First Written Submission, paras. 367-370.; Russian Federation Opening Statement at the Second Hearing, para. 62.

[92] See Russian Federation Opening Statement at the Second Hearing, para. 62.

[93] Russian Federation Opening Statement at the Second Hearing, para. 62 (citing Exhibit RUS-319).

[94] See, e.g., European Union Second Written Submission, para. 176.

[95] See, e.g., Russian Federation First Written Submission, paras. 372-378; Russian Federation Second Written Submission, paras. 198-202; Russian Federation Opening Statement at the Second Hearing, paras. 63-65.

[96] Russian Federation First Written Submission, paras. 379-381; Russian Federation Opening Statement at the Second Hearing, para. 66.

[97] Russian Federation Response to Panel Question 304, paras. 199-201.

[98] Russian Federation First Written Submission, paras. 379-382.

whether there exists an objective basis for the Russian Federation's questions under the appropriate standard of review. This is the case with respect to the questions asked by the Russian Federation.[99]

[99] See, e.g., Russian Federation's Comment to the Expert's Response to the Panel's Questions 12-13.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. CONFORMANCE WITH INTERNATIONAL STANDARDS

1. Australia notes that the Panel will need to determine, as a matter of fact, whether Russia's measures conform to, or are merely based on, the OIE Terrestrial Animal Health Code. Article 3.2 of the Sanitary and Phytosanitary Agreement (SPS Agreement) provides that only measures which *conform to* international standards enjoy the presumption of consistency with the SPS Agreement.

2. Bearing this in mind, Australia considers that 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[1].

II. RISK ASSESSMENT

3. It will be necessary for the Panel to consider whether the level of scientific information was insufficient to justify Russia's provisional adoption of SPS measures in accordance with Article 5.7 of the SPS Agreement[2].

4. In accordance with the four cumulative requirements provided by the Appellate Body in *Japan –Agricultural Products II,* for Russia to be able to rely on Article 5.7 of the SPS Agreement[3] the Panel would need to assess whether: 1) the relevant scientific information Russia had was insufficient; 2) the measures adopted by Russia were on the basis of available pertinent information; 3) whether Russia sought to obtain additional information for a more objective assessment of the risk; and 4) whether Russia has reviewed its measures within a reasonable period of time.

5. Australia underscores that the insufficiency of evidence must relate to information that is relevant to the risk assessment in question[4]. Australia also notes that the reasonable period of time requirement has to be established on a case-by-case basis[5].

III. REGIONALIZATION

6. Australia considers that regionalization is an important principle aimed at allowing the continuation of trade while meeting an importing Member's appropriate level of protection.

7. Regionalization is especially important in the case of a Member with a large territory where an outbreak of a disease is contained to a zone in one part of their territory. The Member may have implemented disease containment by, for example, movement controls on risk products, in addition to other methods. This Member may be able to demonstrate that the disease has not spread to other parts of its territory. For this Member the risk from the 'disease-free' parts of the Member's territory is no greater than risk prior to the disease incident occurring in the Member.

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[1] This accords with the order of analysis undertaken by the Panel in *India — Measures Concerning the Importation of Certain Agricultural Products from the United States*, WT/DS430/R and Add.1R, adopted on 19 June 2015, paragraph 7.125.

[2] Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union, First Written Submission of the Russian Federation, WT/DS475, 25 February 2015, see paragraph 352.

[3] Appellate Body Report, *Japan – Measures Affecting Agricultural Products II*, WT/DS76/AB/R, adopted 19 March 1999, paragraph 89.

[4] Appellate Body Report, *Japan – Measures Affecting Agricultural Products II*, WT/DS76/AB/R, adopted 19 March, paragraph 92.

[5] Ibid, paragraph 93.

8. 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 pest- or disease-free areas and areas of low pest or disease prevalence under Article 6.2 of the SPS Agreement. Such a finding may be informed by the Panel's other findings under Article 3 and Article 5 of the SPS Agreement.

IV. TRANSPARENCY

9. Concerning the EU's claim that Russia failed to observe the transparency obligations in the SPS Agreement, Australia notes the importance of compliance with the transparency obligations. It is important that measures are published promptly and in such a manner as to enable interested Members to become acquainted with them as required by Article 7 and Annex B(1), (2), (5) and (6).

10. Australia further notes that one of the benefits of undertaking a public risk assessment process is that it provides an opportunity for all stakeholders, including trading partners, to consult with the importing country government and thereby understand the basis for each country's risk assessment conclusions and resulting sanitary measures, and to provide relevant information that may allow the continuation of trade while meeting the Member's appropriate level of protection. This provides a transparent process consistent with the obligation outlined in Article 7 of the SPS Agreement.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

(i) The principle of regionalization and the determination of containment zones

1. In the current dispute, the European Union claims that "the Russian measures not only do not conform to, but fundamentally depart from, the relevant international standards", as "the standards in question expressly allow trade and contain specific recommendations with regard to regionalization".[6] The regionalization provisions of the SPS Agreement are invoked by the complainant with respect to two sets of measures at issue: (i) country-wide bans (related to Estonia, Latvia, Lithuania and Poland); and (ii) the EU-wide ban. The EU states that "while the international standards recommend allowing trade in the products at issue from the ASF-free zones, Russia applies country-wide bans and does not allow imports from the ASF-free zones in the four EU Member States concerned and in the rest of the EU".[7]

2. On the other hand, Russia states that "where a zone or compartment has not been properly established in an ASF [African Swine Fever]-infected country, Chapter 15.1 of the OIE Terrestrial Code does not apply. In those circumstances, the importing country may legitimately and appropriately apply import restrictions to an entire country".[8] Russia argues that "since the European Union did not identify a compartment with high levels of biosecurity, the Russian Federation was under no obligation to recognize (non-existing) compartments from the infected EU Member States".[9] Russia concludes that "failure to effectively establish a containment zone in a country that is already infected with ASF permits importing Members to restrict imports from the entire country".[10]

3. In Brazil's views, 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.

4. It must be recalled that Article 6.1 of the SPS Agreement provides 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. To adapt the SPS measures, the following elements shall be taken into account, among others: (i) the level of prevalence of specific diseases or pests, (ii) the existence of eradication or control programmes, and (iii) appropriate criteria or guidelines which may be developed by the relevant international organizations.[11]

5. Given the specific issues raised in the present dispute, Brazil will focus on the third element. The existence of appropriate criteria or guidelines developed by relevant international organizations for the purpose of assisting Members in establishing containment zones within its territory in order to minimize the impact on trade of the health control measures is undisputable. Article 4.3.3.3 of the OIE Terrestrial Code is a key standard for the determination of a containment zone where control measures to prevent the spread of the infection are applied for the purposes of trade. The provision establishes the conditions that must be met for the effective establishment of a containment zone, which would allow preserving the free status of the areas outside the containment zone after its reinstatement. [12]

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[6] *Russia – Pigs (EU) (DS475)*, First Written Submission of the European Union, para. 113, p. 43.
[7] *Russia – Pigs (EU) (DS475)*, First Written Submission of the European Union, para. 6, p. 14.
[8] *Russia – Pigs (EU) (DS475)*, First Written Submission of the Russian Federation, para. 60, p. 24.
[9] *Russia – Pigs (EU) (DS475)*, First Written Submission of the Russian Federation, para. 212, p. 101.
[10] *Russia – Pigs (EU) (DS475)*, First Written Submission of the Russian Federation, para. 237, p. 109.
[11] SPS Agreement, Article 6.1.
[12] The determination of the moment in which a containment zone is established is done case-by-case and shall take into account the technical information provided by the exporting Member and an objective and timely assessment conducted by the importing Member based on the elements of the standard.

6. Brazil does not dispute 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.

7. 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"[13], then there could be a basis for the establishment of an import prohibition. As it is the case elsewhere in the SPS Agreement, the presumption that an SPS measure adopted is in conformity with an international standard depends on a case-by-case analysis.

8. On the other hand, a Member may choose to adopt a higher level of protection and decide that the mechanism established in conformity with Article 4.3.3.3 of the OIE Terrestrial Code is not sufficient for the definition of a containment zone according to its own appropriate level of protection. However, if a higher level of protection than the one provided by the international standard is chosen by the importing Member, then the same logic of the whole SPS Agreement must apply. A risk assessment to provide scientific justification must be elaborated to justify the SPS measure.

(ii) The determination of the appropriate level of protection (ALOP)

9. In the current dispute, the European Union argues that "Russia did not clearly state its ALOP" and that "deducing it from the domestic measures applied in the case of ASF, leads one to the conclusion that it is a rather low ALOP."[14] On the other hand, Russia argues that "the totality of the evidence demonstrate that it applies a high ALOP" both for domestic and imported products".[15]

10. At the outset, Brazil would like to recall that Members are entitled to determine the acceptable level of risk within its territory. The ALOP reflects the level of protection deemed appropriate by the Member to protect human, animal, or plant life or health within its territory[16], and states the sanitary or phytosanitary objective the Member seeks to achieve.

11. The right of a Member to define its ALOP is not "an absolute or unqualified right"[17], as the Member's decision must comply with the relevant requirements of the SPS Agreement. In addition, the panel must assess on a case-by-case basis whether the importing Member clearly established its ALOP, or whether the parties brought sufficient evidence for its determination. If, however, a Member fails to define its ALOP, or does so with insufficient precision, the ALOP may be established by panels "on the basis of the level of protection reflected in the SPS measure actually applied."[18]

12. In this dispute, both the complainant and the respondent have posited different views on how the level of protection adopted by the respondent should be examined, mainly with regard to the domestic measures adopted by Russia to control ASF within its territory.

13. Brazil believes that in order to address this question the Panel may focus the analysis on Russia's ALOP as concerns the risks being addressed by the challenged measure itself or on the broader collection of measures (internal and at the border) adopted by Russia to address ASF. In either case, the decisive issue is not whether Russia's ALOP is high or low but rather whether the measure is applied in a discriminatory manner or constitutes a disguised restriction on international trade.

14. If the Panel decides that the ALOP is properly defined by reference to the SPS measure (and thus finds the ALOP to be high), then it should assess whether the alleged lack of correspondingly strict internal measures could be evidence of discrimination under Article 2.3

[13] *EC-Hormones*, Appellate Body Report, para. 170.
[14] First Written Submission of the European Union, *Russia – Pigs (EU)*, para. 255.
[15] First Written Submission of the Russian Federation, *Russia – Pigs (EU)*, para. 250.
[16] *India – Agricultural Products*, Panel Report, para. 7.553.
[17] *EC – Hormones*, Appellate Body Report, para. 173.
[18] *Australia – Salmon*, Appellate Body Report, para. 207.

of the SPS Agreement. In this case, the higher the ALOP is established to imported goods, the higher it shall be also implemented to domestic products. Otherwise, Members would be able, based on the same appropriate level of protection, to adopt discriminatory treatment for domestic and imported products.

15. Likewise, if the Panel understands that the ALOP is to be defined by reference to the overall risks and measures adopted to address them (and thus finds the ALOP to be low), then the border measure could be found to be exceedingly restrictive and thus in breach of paragraphs 1, 2 and 3 (last sentence) of Article 2 of the SPS Agreement

16. In sum, irrespective of how a Member defines its ALOP, this definition cannot be used as a means to apply very stringent measures at the border and significantly more flexible control measures internally.

(iii) The requirement to complete SPS procedures without undue delay

17. Finally, another issue Brazil would like to highlight is the requirement in the SPS Agreement that SPS procedures are to be undertaken and completed without undue delay. This obligation, as set out in Article 8 and Annex C(1)(a) of the SPS Agreement, aims to prevent Members from using lengthy and unjustified SPS procedures as a trade barrier to other Members' imports.

18. The European Union argues that Russia violated Article 8 and Annex C(1)(a) of the SPS Agreement because Russia failed to modify the measures in order to permit the resumption of imports to Russia from non-affected areas in the EU.[19] Among its arguments, Russia submits that it "took reasonable time to assess the European Union's regionalization requests, especially in light of the deteriorating ASF situation on the ground in the European Union."[20]

19. Brazil will not take a position on whether or not there has been undue delay under the challenged Russian approval procedures in the present case. Brazil is concerned with the proper interpretation to be given to the expression "without undue delay" in a way that it fulfills the object and purpose of the SPS Agreement to minimize the negative effects on trade of SPS measures, as provided for in its preamble.

20. In Australia – Apples, after analyzing the ordinary meaning of the words "undue" and "delay", the Appellate Body decided that Annex C(1)(a) requires Members to ensure that SPS procedures are undertaken and completed with "appropriate dispatch", which, in other words, would represent that "they do not involve periods of time that are unwarranted, or otherwise excessive, disproportionate or unjustifiable".[21]

21. Moreover, in EC–Biotech, the Panel interpreted that "without undue delay" could adequately mean "without an unjustified loss of time".[22] This understanding is also reinforced by the expression "retard injustifié" in the French version of the SPS Agreement. Both decisions indicate that, although possible to happen, this delay must be reasonable and in all cases be justified and proportionate.

22. Brazil is aware that there is no defined deadline in Annex C(1)(a) and that the assessment of "undue delay" should be made on case-by-case basis. As the Appellate Body put it in Australia – Apples, "[…] whether a relevant procedure has been unduly delayed is [...] not an assessment that can be done in the abstract"; it would require "a case-by-case analysis as to the reasons for the alleged failure to act with appropriate dispatch, and whether such reasons are justifiable".[23]

23. Yet, it is important to bear in mind that, although Members are in principle allowed to take the time that is reasonably needed to determine with adequate confidence whether their relevant SPS requirements are fulfilled, they are also required to proceed with their SPS approval

[19] First Written Submission of the European Union, *Russia – Pigs (EU)* (DS475), para. 337.
[20] First Written Submission of the Russian Federation, *Russia – Pigs (EU)* (DS475), para. 437.
[21] Appellate Body Report, *Australia – Apples,* para. 437.
[22] *EC – Biotech*, Panel Report, para. 7.1495.
[23] *Australia – Apples,* Appellate Body Report, para.437.

procedures as promptly as possible. Therefore, a Member is not allowed to freely decide when it will finish the undertaking and complete the approval procedures. In cases in which there is a delay, the Member should ensure that it is not excessive or unwarranted and its causes are rightfully justified.[24]

[24] *EC – Biotech*, Panel Report, para. 7.1496.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA*

1. India thanks the Panel for this opportunity to present its views in the present proceedings. India does not take any position on the factual aspects of this dispute but limits its statement only to certain systemic issues concerning the Agreement on Sanitary and Phytosanitary Measures (the SPS Agreement) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU).

2. In the present dispute, the European Union (EU) has raised several claims under the SPS Agreement including Articles 3, 5 and 6 of the SPS Agreement.

3. In response, the Russian Federation states that its measures conform to the international guidelines, *in casu*, the OIE Terrestrial Code (OIE Code) and therefore, its measures are consistent with Article 3.2 of the SPS Agreement as well as the regionalization obligations under Article 6 of the SPS Agreement.[25]

India seeks to make the following observations before the Panel for its consideration:

A. Claims related to risk assessment and scientific evidence

4. The EU has alleged a consequential violation of Article 2.2 of the SPS Agreement by the Russian Federation based on the premise that the Russian Federation has violated Article 5.1 of the SPS Agreement by not providing any risk assessment for the measures at issue.[26] The Russian Federation, in its submission, has claimed that its measures are in conformity with the relevant international standards and thus, are presumed to be consistent with the relevant provisions of the SPS Agreement which include Articles 5.1 and 2.2 of the SPS Agreement.[27]

5. In this respect, without going into the specific facts of the case, it is India's position that a violation of Article 5.1 of the SPS Agreement, if established would only lead to a presumption of violation of Article 2.2 of the SPS Agreement which is rebuttable.[28] Thus, if a defence is provided under Article 2.2 of the SPS Agreement to rebut this presumption, it is then incumbent upon the Panel to analyse the same. Article 2.2 is a distinct provision and is independent of Article 5.1 of the SPS Agreement. The risk assessment under Article 5.1 of the SPS Agreement is "a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions"[29] whereas Article 2.2 directly focuses on the necessary link that must exist between the SPS measure and the scientific principles and evidence[30]. Any contrary approach will lead to an incorrect interpretation of the relationship between Article 2.2 and Article 5.1 as it would render Article 2.2 of the SPS Agreement redundant.[31]

B. Claims related to harmonization

6. Both the parties in the dispute agree that the relevant international standard is Chapter 15.1 of the OIE Code. In this regard, it should be noted that reference to the standards developed by the OIE has been made in the preamble of the SPS Agreement, Article 3.4 of the SPS Agreement as well as in Annex A (3)(b) of the SPS Agreement.

[25] India requested that its Oral Statement serve as its Integrated Executive Summary
[1] Russia FWS ('First Written Submission'), paragraph 7
[26] EU FWS, paragraph 176
[27] Russia FWS, paragraph 296
[28] Appellate Body Report, *Australia-Salmon*, paragraph 137
[29] Appellate Body Report, *Australia-Apples*, paragraph 207.
[30] Panel report, *Australia-Apples*, paragraph 7.214
[31] Panel Report, *Australia- Apples*, paragraph 7.214

7. Moreover, Article 3.2 of the SPS Agreement provides that sanitary measures conforming to international standards would have the presumption of conforming to the provisions of the SPS Agreement which would be rebuttable. Thus, it is India's submission that the OIE Code, in particular, Chapter 15.1 of the OIE Code forms the relevant context for interpretation of Articles 3.1 and 3.2 of the SPS Agreement. Therefore, Chapter 15.1 of the OIE Code must be interpreted in light of customary rules of treaty interpretation.[32] Further, interpretation is a legal function which can only be done by the Panel. Alternatively, the OIE Code, in particular, Chapter 15.1 of the OIE Code would also be considered a subsequent application of Article 3.1 and Article 3.2 of the SPS Agreement.[33]

C. Claims related to regionalization

8. Both the parties have made claims and counter claims under Article 6 of the SPS Agreement. India submits that the Panel must undertake a harmonious reading of Articles 6.1, 6.2 and 6.3 of the SPS Agreement. Without going into the specific facts of the case, India would submit that the initial burden is upon the importing country to recognize the concept of regionalization pursuant to Article 6.2 of the SPS Agreement. The recognition could be implicit wherein the relevant municipal legislation should "*not deny or contradict the recognition of the concepts of such areas when these concepts are relevant with respect to the disease at issue".*[34] Thus, as long a member's measures fulfill this requirement, it would be consistent with Article 6.2 of the SPS Agreement.

9. Once an importing member fulfils its obligation under Article 6.2 of the SPS Agreement, the burden shifts to the exporting member to provide a proposal to the importing member with respect to the recognition of its zones pursuant to Article 6.3 of the SPS Agreement. Article 6.3 provides that where exporting members claim that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence they 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. In this respect, attention is also drawn to Chapter 5.3.1 of the OIE Code according to which the exporting country is required to provide all relevant information as required by the importing country. The purpose of providing this information is to satisfy the importing country that the animal health status will be protected as reflected in Article 5.3.3 of the OIE Code. Further, Chapter 4.3 and Chapter 4.4 of the OIE Code provide guidelines on zones and compartments which can be taken into consideration while recognizing zones and compartments.

10. Thus, the Panel is required to assess whether a member has recognized the concept of regionalisation. After reaching an affirmative finding, the Panel would need to assess if the exporting member has been able to provide all the relevant information as required by the importing member and whether it has been able to satisfy the requirements under Article 6.3 of the SPS Agreement.

D. Claims related to measure being more trade restrictive than required

11. The EU has made a claim under Article 5.6 of the SPS Agreement. The EU, therefore, as a complaining party bears the burden of proof to establish a *prima facie* case that there is an alternative measure which meets all the three elements under Article 5.6 in order to establish a *prima facie* case of inconsistency with Article 5.6 of the SPS Agreement.[35]

12. In order to discharge its burden of proof of identifying the alternate measure which would fulfil the Appropriate Level of Protection (ALOP) of the respondent country, the complaining party has to first identify the measure which reflects the ALOP as sought by the responding country. Only once the correct measure is identified, would the complaining party be able to suggest an alternate measure which would offer similar ALOP and thereby discharge its burden of proof.

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[32] Panel Report, *Brazil-Aircraft (Article 21.5-Canada II),* paragraphs 5.61-5.73

[33] Article 31(3)(a) and Article 31(3)(b) of VCLT. Also see Appellate Body Report, *US-Clove Cigarettes*, paragraphs 265-267. Also see Appellate body Report, *EC-Computer Equipment*, paragraphs 90-99

[34] Panel Report, *India-Agricultural Products,* paragraph 7.698

[35] Appellate Body Report, *Japan-Agricultural Products II*, paragraph 126; Also see Panel Report, *Australia –Apples*, paragraph 7.1104

13. However, if the complaining party identifies an incorrect measure, the ALOP reflected in the incorrect measure would not be the ALOP as sought by the respondent country and in such circumstances, the alternate measure suggested by the complaining party would not be able to fulfil the ALOP of the respondent country.

14. In this respect, India submits that it is accepted jurisprudence that the ALOP has to be discerned from the measure at issue.[36] In the present dispute, the measure at issue is the Russian Federation measures which prohibit the import of certain products from the EU member states.[37] Thus, any alternate measure suggested by the EU has to fulfill the ALOP reflected in these measures which provide for import prohibition. However, it should be noted that the alternate measure suggested by the EU is based upon the domestic control measures of Russia which is not the measure at issue[38] and which does not reflect Russian Federation's ALOP.

15. If the EU's argument was to be accepted, it would mean that the alternate measure would fulfil an ALOP as identified by the EU but which is not the Russian Federation's ALOP.[39] In other words, the EU would determine the ALOP instead of the Russian Federation determining its own ALOP. This would be contrary to the principle that a country has a right to determine its own ALOP.[40]

16. India thanks the Panel for the opportunity to present its views in this proceeding.

[36] Appellate Body Report, *Australia-Salmon*, paragraphs 190-191, 197 and 207, where the Appellate Body agreed with Australia that its ALOP was reflected in the measure actually imposed on imports of fresh, chilled or frozen salmon, i.e. import prohibition and not heat treatment.

[37] EU FWS, paragraph 4

[38] *Ibid*, paragraph 255

[39] Panel Report, *US-Poultry*, paragraph 7.334

[40] Appellate Body Reports*, Australia – Salmon*, paragraph 199 (emphasis original); Also see *US – Continued Suspension*, paragraph 523

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

1. Japan would like to raise issues related to the interpretation of Articles 5.5 and 2.3 of the SPS Agreement.

I. Whether distinctions in ALOPs exist under Article 5.5 of the SPS Agreement

2. The EU alleges that "(i)n the absence of a clear statement from Russia regarding its ALOPs, it should be inferred from the measures that Russia applies to the domestically produced products associated with the risk of ASF and from the measures that Russia applies with respect to the EU products at issue."[41] After considering the applied measures with respect to EU products and the internal movement of the domestic products within Russia respectively,[42] the EU concludes "Russia's ALOP with regard to domestic goods is rather low, while Russia's ALOP with respect to the EU products at issue is very high."[43]

3. In response, Russia argues that the ALOP is "the objective or aspirational goal"[44], not "policy outcome".[45] According to Russia, the question of whether the ALOP is high or low "must be judged by examining the acceptable level of risk expressed through the goal and objective of the Russian Federation" and "[t]he fact that there may be circumstances when the objective was not achieved does not lower or diminish the objective itself."[46]

4. Japan would like to offer several observations. First, Japan agrees that the ALOP and the SPS measure "have to be clearly distinguished", as "[t]he first is an objective, the second is an instrument chosen to attain or implement that objective"[47].

5. Second, however, contrary to what Russia appears to posit, the ALOP is not merely "the objective or aspirational goal"[48]. Annex A(5) to 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 clarifies that the ALOP also means the "*acceptable* level of risk".[49] The ALOP is by definition the level which is deemed appropriate and is acceptable and anything below that level is, in contrast, neither appropriate nor acceptable. It is not something merely to be *aspired*, but the appropriate and acceptable level that must be *achieved* by the SPS measure. Thus although it cannot be "assum[ed] that the measure *always* achieves the appropriate level of protection determined by the Member"[50], it is equally wrong to assume that the ALOP is merely aspirational and need not be achieved by the SPS measure chosen to achieve that.

6. Third, while it is the "prerogative" of a Member to determine its ALOP[51], "a Member is not free to establish its level with such vagueness or equivocation as to render impossible the application of the relevant disciplines of the SPS Agreement"[52]. And "in cases where a Member does not determine its [ALOP], or does so with insufficient precision, the [ALOP]

[41] European Union's First Written Submission, para. 326.
[42] Ibid., para. 328.
[43] Ibid., para. 329.
[44] Russia's First Written Submission, para.244.
[45] Ibid., para.246.
[46] Ibid., para.248.
[47] Appellate Body Report, *Australia – Salmon*, para.200; see also ibid., para.203.
[48] Russia's First Written Submission, para.244.
[49] See also Appellate Body Report, *Australia – Apples*, para342.
[50] Appellate Body Report, *Australia – Salmon*, para.203. *Emphasis added*.
[51] Ibid., para.199; see also Appellate Body Report, *Australia – Apples,* para.342.
[52] Appellate Body Report, *Australia – Salmon,* para.206; see also Appellate Body Report, *Australia – Apples,* para.343.

may be established by panels on the basis of the level of protection *reflected in the SPS measure actually applied*."[53] In Japan's view, the effectiveness or ineffectiveness of the measure is a necessary feature or attribute of the measure and as such cannot be *a priori* excluded from the examination of the measure. In other words, the effectiveness of the measure is one factor, among others, in the inquiry into "the level of protection *reflected in the SPS measure actually applied*".

7. Japan notes, in this respect, that the panel in *United States- Poultry* stated: "(…) even in a case where a Member has expressed a particular ALOP, a panel should nevertheless examine the measure in question to determine whether that ALOP is the one actually being applied via that measure. To ignore the measure and rely solely on a Member's declared ALOP could permit a Member to evade the disciplines of Article 5.5 by simply declaring one generic ALOP for all SPS-related matters."[54] Therefore, Japan considers it is for the Panel to assess whether it can deduce from the measures applied different ALOPs.[55]

II. "Identical or Similar Conditions" under Article 2.3 of the SPS Agreement

8. Russia argues that "different conditions prevailed to the extent that imports from these infected EU Member States to the Russian Federation pose *a greater risk* of spreading the ASF virus, particularly in the light of the lax standstill provisions mandated by EU legislation".[56] Russia appears to posit that for the purpose of Article 2.3, the degree(s) of risk arising out of the presence of disease in Members' specific regulatory circumstances are the relevant conditions within the meaning of Article 2.3.

9. Japan notes in this respect that the panel in *India – Agricultural Products* did not consider the degree of risk would constitute a relevant condition. It observed that under Article 2.3 "the relevant `conditions' may be the presence of a disease within a territory (and the concomitant risk associated with that disease)."[57] Turning to the specific situations in that dispute, the panel found that "the measures in question address the same condition – the presence of NAI" and, while having recognized that there may be difference in "the disease situation" between Members, the panel ultimately concluded that "the relevant condition for our analysis under the third element of Article 2.3 is the presence of NAI in India or another Member because that is the relevant distinction that triggers the import prohibition imposed by India's AI measures"[58]. Thus according to the panel in that dispute, the "relevant" condition is the one that "triggers" the specific regulatory actions under the SPS measures, i.e. the presence of a disease.

10. Japan further notes that, in the context of the chapeau of GATT Article XX which uses an almost identical language to the one used in Article 2.3 of the SPS Agreement, the Appellate Body found that arbitrary or unjustifiable discrimination between countries where the same conditions prevail "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 export countries".[59] A differing degree of risk arising out of the presence of the same disease is one such regulatory condition for which the appropriateness of the regulatory program of an exporting Member may be inquired into. Should the degree of risk be considered as a "relevant" condition for the purpose of Article 2.3, then the situation in which the different degree of risk prevail in different Members would be excluded from the scope of Article 2.3 and likewise any measure that "does not allow for any inquiry into the appropriateness of the regulatory program for" such different condition prevailing in an exporting Member would be excluded from the scrutiny under Article 2.3.

[53] Appellate Body Report, *Australia – Salmon,* para.207.
[54] Panel Report, *United States- Poultry*, para. 7.244.
[55] Ibid., para. 7.246.
[56] Russia's First Written Submission, para.313.
[57] Panel Report, *India – Agricultural Products*, para.7.460.
[58] Ibid., para.7.463.
[59] Appellate Body Report, *US – Shrimp*, para.165.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. ISSUES RELATED TO RISK ASSESSMENT

1. Where relevant scientific evidence is insufficient to perform an assessment in line with Article 5.1 of the SPS Agreement, a Member may provisionally adopt SPS measures according to the requirements of Article 5.7. The panel in *European Communities – Biotech* explained that a measure that is compatible with Article 5.7 will not be inconsistent with Article 5.1.[60]

2. The Appellate Body has identified four cumulative requirements that must be fulfilled for a Member to have recourse to Article 5.7 of the SPS Agreement: 1) the measure must be imposed in respect of a situation where "relevant scientific information is insufficient"; 2) it must be adopted "on the basis of available pertinent information"; 3) the Member must "seek to obtain the additional information necessary for a more objective assessment of risk"; and 4) the Member must "review the […] measure accordingly within a reasonable period of time".

(i) Insufficient Scientific Evidence

3. The threshold condition for application of Article 5.7 is that the relevant scientific evidence is insufficient. The Appellate Body has held that the "'relevant scientific evidence' will be 'insufficient' within the meaning of Article 5.7 if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the SPS Agreement". [61]

4. Accordingly, the main question will be whether the available scientific evidence permits an assessment of risks within the meaning of Article 5.1, or not. The concept of risk assessment for the purposes of the SPS Agreement is found in Annex A, paragraph 4, which includes two definitions, depending on the nature of the risk to be assessed. In the case at hand, the relevant definition is the one concerned with "the evaluation of the establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological or economic consequences".

5. The Appellate Body has held that a risk assessment of this type must consist of the following three elements:[62] 1) an identification of the disease or pests whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry establishment or spread of these diseases or pests; 2) an evaluation of the likelihood of entry, establishment or spread of these diseases or pests, as well as the associate potential biological and economic consequences; and 3) an evaluation of the likelihood of entry, establishment or spread of these diseases or pests according to the SPS measures which might be applied.

6. If the available scientific evidence is insufficient to undertake an assessment within these parameters, then the gateway to Article 5.7 is open. "Insufficient" in this regard refers both to situations where there is not enough scientific evidence (in quantitative terms) and to situations where there is enough evidence, but it does not give reliable results (in qualitative terms).[63] However, insufficiency of scientific evidence is not the same as "scientific uncertainty".[64] Risk assessments "need not necessarily inform a Member 'unequivocally' about risk".[65] Furthermore, the Appellate Body has made clear that the notion of "insufficiency" does not imply "a relationship

[60] Panel Report, *EC – Biotech,* para. 7.2997. In para. 7.3000 of the report, the Panel confirms that the initial burden of proof under Article 5.7 rests with the complainant.
[61] Appellate Body Report, *Japan – Apples*, para. 179.
[62] Appellate Body Report, *Australia – Salmon,* para. 135.
[63] Appellate Body Report, *Japan – Apples,* para. 185.
[64] Appellate Body Report, *Japan – Apples,* para. 184.
[65] Panel Report, *European Communities – Biotech,* para. 7.3240.

between the scientific evidence and the matters of concern to the legislator", including the appropriate level of protection.[66]

7. According to the Appellate Body, the "possibility of conducting further research or of analysing additional information, by itself, should not mean that the relevant scientific evidence is or becomes insufficient".[67] The Appellate Body has also confirmed that the existence of scientific controversy in itself is not enough to conclude that the relevant scientific evidence is "insufficient".[68]

8. The determination of whether the relevant scientific evidence is "insufficient" must be made at time of adoption of the provisional SPS measure.[69] The "insufficiency" is, however, a transitory state, which only last until "the imposing Member procures the additional scientific evidence which allows the performance of a more objective assessment of risk."[70]

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

9. It follows from the wording of Article 5.7 that "available pertinent information" may include information from "the relevant international organizations". The Office of Epizooties (OIE) should be deemed a relevant organization in the case at hand.

10. According to the Appellate Body, 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.[71] Even if the rigorous standards of Article 5.1, together with Articles 5.2 and 5.3 and annex A(4), do not apply under Article 5.7, those standards must be considered as relevant context, and thus indicate what types of information may be considered as "available pertinent information".

(iii) Additional information must be sought

11. The third requirement under Article 5.7 sets out that the Member must "seek to obtain the additional information necessary for a more objective assessment of risk". This requirement is a reflexion of the temporary nature of the provisional measures within the meaning of Article 5.7. The Appellate Body has explained that "as of the adoption of the provisional measure, a WTO Member must make best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research or by gathering information from relevant international organization and other sources".[72] Furthermore, "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".[73] However, 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".[74]

(iv) Review within a reasonable period of time

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

[66] Panel Report, *European Communities – Biotech*, para. 7.3234.
[67] Appellate Body Report, *US/Canada – Continued Suspension*, para.702.
[68] Appellate Body Report, *US/Canada – Continued Suspension*, para. 677.
[69] Panel Report, *European Communities – Biotech,* para. 7.3253.
[70] Appellate Body Report, *US/Canada – Continued Suspension*, para. 679.
[71] Appellate Body Report, *US/Canada – Continued Suspension*, para. 678.
[72] Appellate Body Report, *US/Canada – Continued Suspension*, para. 679.
[73] Appellate Body Report, *Japan – Agricultural Products II*, para. 92.
[74] Appellate Body Report, *Japan – Agricultural Products II*, para. 92.

III. ISSUES RELATED TO REGIONALIZATION

13. An assessment of a measure's conformity with Articles 6.1 and 6.2 of the SPS Agreement should start with the first sentence of Article 6.2, followed by the second sentence of Article 6.2, before turning to Article 6.1.[75] Accordingly, 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. 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.

14. The panel in *India – Certain Agricultural Products* stated that a finding that the respondent party has not recognized the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, will lead to a finding that this party has not ensured that its measures are adapted to the SPS characteristics of the those areas pursuant to Article 6.1, first sentence.[76] 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.[77]

IV. ISSUES RELATED TO DISCRIMINATION

A. Article 2.3, first sentence

15. According to previous case law, three cumulative elements are required for a violation of the first sentence of Article 2.3 of the SPS Agreement: 1) 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; 2) the discrimination is arbitrary or unjustifiable; and 3) identical or similar conditions prevail in the territory of the Members compared.[78]

16. Regarding the first of these elements, the panel in *India – Certain Agricultural Products* found it "appropriate to interpret 'discrimination' in Article 2.3 of the SPS Agreement, in a manner similar to that which the Appellate Body adopted in the context of Article XX of the GATT 1994".[79] In this regard, it especially noted the similarity of the language in the two provisions, and in addition noted that the preamble of the SPS Agreement refers to Article XX of the GATT 1994. It went on to explain that "in the context of Article 2.3 of the SPS Agreement, we consider that "discrimination" may result not only (i) when Members in which the same conditions prevail (including between the territory of the Member imposing the measure and that of other Members) are treated differently, but also (ii) where the application of the measure at issue does not allow for an inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country".[80]

17. With respect to the second element, the panel in *India – Certain Agricultural Products* found that it would be guided, as appropriate, by the Appellate Body's interpretation of "arbitrary or unjustifiably" in the context of Article XX of the GATT 1994.[81] In line with this, the panel explained that "the meaning of "arbitrary or unjustifiable discrimination" in the context of Article 2.3 of the SPS Agreement involves a consideration of the "cause" or "rationale" put forward to explain the

[75] Panel Report, *India – Agricultural Products*, para. 680.
[76] Panel Report, *India – Agricultural Products*, para. 690.
[77] Panel Report, *India – Certain Agricultural Products*, para. 7.691.
[78] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.
[79] Panel Report, *India – Certain Agricultural Products*, para.7.400.
[80] Panel Report, *India – Certain Agricultural Products*, para 7.400.
[81] Panel Report, *India – Certain Agricultural Products*, para. 7.427.

discrimination in question, and whether there is a "rational connection" between the reasons given for the discriminatory treatment and the objective of the measure".[82]

18. In the same dispute, the panel observed that unjustifiable discrimination may exist "when a measure is applied in a "rigid and unbending" manner across members without any regard for differences between those Members".[83] One element of the panel's analysis was an observation that the respondent did not apply similar standards to the internal movement of products associated with the risk of disease as it did to imports.

19. On the third element, the panel in *India – Certain Agricultural Products* noted that the same facts that inform whether or not discrimination is arbitrary or unjustifiable may also inform whether identical or similar conditions prevail.[84] Furthermore, and of special relevance to the present dispute, it stated "that the relevant 'conditions', for the purpose of a given analysis, may be the presence of a disease within a territory (and the concomitant risk associated with that disease)".[85]

B. Article 2.3, second sentence

20. In its interpretation of Article 2.3, second sentence, the panel in *India – Certain Agricultural Products* relied, *inter alia*, on observations made by the Appellate Body regarding what factors might indicate that a Member maintains a disguised restriction on international trade within the context of Article 5.5 of the SPS Agreement. In particular, the panel noted that "a finding that an SPS measure is not based on risk assessment, including instances in which there was no risk assessment at all, is a strong indication that the measure "is not really concerned with the protection of human, animal or plant life or health but is instead a trade restrictive measure taken in the guise of an SPS measure".[86] The panel also reiterated the Appellate Body's statement that "where a panel has doubts regarding whether a responding Member applies similarly strict standards to the internal movement of products associated with risk within its territory as it does to imports of those products", that may be another factor to be taken into account.[87] In addition, the panel found that the interpretation of the phrase "disguised restriction on international trade" in the context of Article XX of the GATT 1994 was relevant for the interpretation of the similar language of Article 2.3 of the SPS Agreement.[88]

[82] Panel Report, *India – Certain Agricultural Products*, para. 7.429.
[83] Panel Report, *India – Certain Agricultural Products*, para. 7.432.
[84] Panel Report, *India – Certain Agricultural Products*, para. 7.460.
[85] Panel Report, *India – Certain Agricultural Products*, para. 7.460.
[86] Panel Report, *India – Certain Agricultural Products*, para. 7.475.
[87] Panel Report, *India – Certain Agricultural Products*, para. 7.475.
[88] Panel Report, *India – Certain Agricultural Products*, para. 7.476.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UNITED STATES

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL SUBMISSION

I. The provisions of Article 6 contain separate but inter-related obligations that must be read together in context

1. Article 6 of the SPS Agreement sets forth inter-related obligations. These must be read together in context so as to result in a coherent set of obligations with regard to regionalization.

A. While Article 6.1, first sentence imposes obligations with respect to measures, Article 6.2, first sentence, requires recognition of *concepts*

2. Article 6.1 governs a Member's measures while Article 6.2 requires the recognition of concepts and does not express a requirement for any particular relationship between this recognition and a Member's measures. The use of different wording in these subparagraphs suggests that they have distinctive effects. The obligation to ensure that SPS measures are "adapted" in Article 6.1, first sentence, denotes that a Member must make certain of its measures' suitability for the SPS characteristics of the area. By contrast, Article 6.2, first sentence, requires an acknowledgement of the concepts of "pest- or disease-free areas" and "areas of low pest or disease prevalence".

B. Neither the obligations in Article 6.2, first sentence, 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

3. The obligation to "*recognize the concepts* of pest- or disease-free areas and areas of low pest or disease prevalence" in Article 6.2 is independent of and antecedent to receipt of any claim from an exporting Member that an area within its territory is pest- or disease-free or an area of low pest or disease prevalence. Indeed, there would be no basis for an exporting Member to seek such recognition if the importing Member did not first recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

4. Obligations under Article 6.1 likewise do not arise only after an exporting Member requests recognition of specific pest- or disease-free areas or areas of low pest or disease prevalence pursuant to Article 6.3. A plain reading of Article 6.1, first sentence, makes clear that it creates a free-standing obligation. No conditional language links the obligation to Article 6.3 or to an extraneous event such as the request of an exporting Member to recognize an area. Crucially, moreover, the phrasing of the first sentence of Article 6.1 – "ensure that their sanitary or phytosanitary measures are adapted" – makes clear that it covers not only a failure to recognize particular disease-free areas where an exporting Member has made the necessary demonstration, but also adoption or maintenance of measures that would prevent the importing Member from accounting for relevant differences in the sanitary or phytosanitary characteristics of different areas.

5. At the same time, the United States notes that Article 6.1 and Article 6.3 must be read together. Article 6.3 recognizes that in certain circumstances only the exporting Member would have the evidence necessary "to objectively demonstrate to the importing Member that . . . areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence." In these circumstances, the importing Member – without the cooperation of the exporting Member – would not be in a position to determine whether or not the exporting Member is, in whole or in part, a pest-free or disease-free area, or an area of low pest or low disease prevalence.

II. The measures at issue do not constitute control, inspection, or approval procedures for purposes of Article 8 and Annex C of the SPS Agreement

6. The European Union's claims under Article 8 and Annex C are based on an incorrect premise. For those claims to succeed, the Russian Federation's process for evaluating the European Union's requests for regional treatment of areas within the European Union and for the ability to ship treated or processed pork or pig products would have to constitute a "control, inspection, or approval procedure" for purposes of Article 8 and Annex C. Yet a Member's process for evaluating such a request does not constitute such a procedure.

7. Annex C applies to "procedures" that are for "control, inspection and approval." A process for approving regionalization (that is, the adaptation of a measure to reflect the SPS characteristics of portions of an exporting Member's territory), or for approving the shipment of processed or treated products from areas otherwise ineligible to ship products to an importing Member, is a process for modifying the substantive content of the SPS measure. Such a process would not fall within the plain meaning of a "control" or "inspection" procedure. The process would therefore fall within the coverage of Annex C only if it amounted to an "approval" procedure.

8. An exporting Member's request for regionalization of an SPS measure, however, would not fall within the scope of an "approval procedure" under Article 8 and Annex C. The text of paragraph 1 of Annex C shows that the "approval" procedures referred to in that annex are those for the approval of the marketing of a new product or product ingredient in the territory of the Member at issue. Subparagraphs (a), (d), (f), and (h) refer to the "products" subject to procedures at issue in the annex – making clear that the approvals would not be for particular countries or regions of origin but for products. Moreover, paragraphs (a), (d), and (f) envision that the procedures at issue are for controls, inspections, or approvals that would also be required of domestic products. In this context, it would make little sense for "approval procedures" to encompass the process of evaluating a request for recognition of a disease-free area, or for permission to ship from a particular area a product already approved and available in the importing Member's market.

9. This result is reinforced by the chapeau of paragraph 1 of Annex C, which provides that the requirements below apply to "procedures" to "check and ensure the fulfillment of sanitary or phytosanitary measures." As the procedures referred to in Annex C(1) check and ensure fulfilment of SPS measures, such measures must exist prior to the operation, undertaking, or completion of, the relevant procedures. Here, the European Union's contention is that Russia failed 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 process for modifying a measure, however, would not be a procedure to check and ensure fulfillment of that (unmodified) measure.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

I. A Member that recognizes the concept of disease-free areas with respect to a disease may nonetheless breach Article 6.1 of the SPS Agreement

10. Article 6.2 of the SPS Agreement requires the recognition of *concepts*: namely, the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. By contrast, Article 6.1 imposes obligations on Members with respect to specific measures. One could imagine a scenario in which a Member has complied with Article 6.2, but not Article 6.1. In particular, a Member may have recognized the concepts of pest- and disease-free areas, in accordance with Article 6.2. The recognition of the concept, however, would not necessarily mean that the Member had complied with its obligation under Article 6.1 to ensure that any specific SPS measure was adapted to the sanitary or phytosanitary characteristics of the area from which the product originated.

II. A Member's compliance with Article 5.7 does not preclude a breach of Article 5.5

11. Article 5.5 concerns a Member's determinations of its appropriate levels of protection ("ALOP"). In particular, Article 5.5 states that "each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions

result in discrimination or a disguised restriction on international trade." By contrast, Article 5.7 addresses a Member's adoption of a measure where it cannot base the measure on a risk assessment because relevant scientific information is insufficient, providing that in such cases, "a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information."

12. While the SPS Agreement, through Article 5.7, permits Members, in situations where the scientific evidence is insufficient, to adopt an SPS measure on the basis of available pertinent information, the measure would still aim to achieve an underlying ALOP. And, Article 5.7 does not contain disciplines on whether ALOPs may differ in different situations. This separate and distinct issue is governed by Article 5.5. Accordingly, while Article 5.7 could serve to excuse compliance with Article 5.1 of the SPS Agreement, a Member's compliance with Article 5.7 would not decide the question of whether that Member's selection of differing ALOPs in different situations is consistent with obligations under Article 5.5.