RUSSIAN FEDERATION – MEASURES ON THE IMPORTATION

OF LIVE PIGS, PORK AND OTHER PIG PRODUCTS

FROM THE EUROPEAN UNION

(DS475)

RESPONSES OF THE UNITED STATES OF AMERICA TO THE QUESTIONS TO THE THIRD PARTIES

May 19, 2015

TABLE OF REPORTS

Short Title	Full Case Title and Citation
Australia – Apples (AB)	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
Chile – Price Band System (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
China – Broiler Products (Panel)	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
China – Raw Materials (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
EC – Approval and Marketing of Biotech Products (Panel)	Panel Reports, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R / WT/DS292/R / WT/DS293R, adopted 21 November 2006
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Chicken Cuts (AB)	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
India – Agricultural Products (Panel)	Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products from the United States*, WT/DS430/R, circulated 14 October 2014
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999

US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Continued Suspension (AB)	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008
US – Softwood Lumber V (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R

PANEL'S QUESTIONS TO THE THIRD PARTIES

1. (to all third parties) Are measures with dates corresponding with the date of the Panel request or post-dating the Panel request within this Panel's terms of reference? What considerations should guide the Panel in this respect?

1. The measures within the Panel's terms of reference are generally limited to those in existence on the date of the request for establishment of the Panel.

2. Article 6.2 of the DSU requires a Member's panel request to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." "Together, these two elements constitute the '*matter* referred to the DSB', so that, if either of them is not properly identified, the matter would not be within the panel's terms of reference. Fulfilment of these requirements, therefore, is 'not a mere formality'."[1] The Appellate Body has stated that "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel'."[2] Conversely, if the measure is not in existence at the time of the establishment of the panel, as a general rule, it will not be within a panel's terms of reference.

3. However, the Appellate Body has indicated that a measure enacted subsequent to the establishment of a panel may fall within the panel's terms of reference "in certain limited circumstances."[3] The Appellate Body described those limited circumstances as: "where an original measure had merely been amended by a subsequent measure and the amendment did not, in any way, change the essence of the original measure, the measure in its amended form could constitute the 'specific measure[] at issue' identified in the panel request."[4]

2. (to all third parties) Please comment on the relevant African swine fever-related provisions in the OIE Terrestrial Code and the order of analysis of these provisions as submitted by the Russian Federation in Figure 2 (page 6) of its opening statement?

4. The United States has several concerns with the characterization of the relevant OIE Code provisions in Russia's chart. The OIE Code recommendations for ASF cover seventeen multi-paragraph articles in the Code. Russia's attempt to reduce the Chapter to an eight-box flow chart is bound to result in over-simplifications and inaccuracies. A number of these are noted below.

---

1 *China – Raw Materials (AB)*, para. 219 (emphasis in original) (quoting *US – Carbon Steel (AB)*, para. 125 and *Australia – Apples (AB)*, para. 416).

2 *EC – Chicken Cuts (AB)*, para. 156

3 *E.g.*, *Chile – Price Band System (AB)*, para. 137 ("[t]he Amendment does not change the price band system into a measure *different* from the price band system that was in force before the Amendment" (emphasis in original)) and para. 139 ("Chile's price band system remains essentially the same after the enactment of Law 19.772. The measure is not, in its essence, any different because of that Amendment. Therefore, we conclude that the measure before us in this appeal includes Law 19.772, because that law amends Chile's price band system without changing its essence") (emphasis in original)). *See also EC – Chicken Cuts (AB)*, para. 156.

4 *EC – Chicken Cuts (AB)*, para. 157 (alteration in original).

5. First, Russia's chart appears to presume that the absence of a relevant recommendation in the OIE Code governing trade in a specific product in the context of a particular disease situation suggests that an import ban is called for. However, the absence of a relevant recommendation should not be taken as a recommendation for an import ban. Rather, when the OIE Code provides no recommendation for the handling of a particular situation, a Member's measures for that situation should be supported by an appropriate assessment of risk.

6. Second, Russia's chart refers to heat treatment of products, although Chapter 15 of the OIE Code never references heat treatment. Rather, the Code provides that certain products should be accepted when they have been processed to ensure destruction of the ASF virus. Chapter 15 does not dictate the means of processing. Moreover, Chapter 15 does not include a recommendation to accept all products covered in the Chapter in the event that those products have been processed to ensure virus-destruction – whether by heat or otherwise. A recommendation to accept processed products is provided only with respect to the products covered in four Articles: 15.1.14-15.1.17.

7. Third, it is not the case that the Code recommends unconditional acceptance of all products from an ASF-free compartment. In particular, for many of the products covered by the product-specific recommendations in Chapter 15, where trade is based on compartmentalization, the Code recommends requiring certification that the products have been in an ASF-free compartment for forty days. This certification requirement would serve to prevent the importation of products that have been in an ASF-free compartment for a shorter period.

8. As noted, the OIE Code recommendations for ASF cover seventeen multi-paragraph articles in the Code. That such an extensive Chapter was necessary to accurately convey the OIE's recommendations with respect to different products and ASF-situations highlights the risk of inaccuracy in any attempt to reduce the Chapter to an eight-box flow chart.

3. (to all third parties) What relevance do the SPS Committee's Guidelines to Further the Practical Implementation of Article 6 (G/SPS/48) have for the Panel's consideration of the measures at issue in this case?

9. As an initial matter, the United States would note that the Guidelines do not add to or diminish Members' rights and obligations under the SPS Agreement, as the Guidelines themselves make clear in paragraph 2. Rather, as paragraph 1 explains, the "guidelines are intended to provide assistance to Members in the practical implementation of Article 6 by improving transparency, exchange of information, predictability, confidence and credibility between importing and exporting Members." The United States agrees with the EU[5] that the Guidelines cannot be read as a "subsequent agreement" among the Parties. The United States, also agrees with the EU,[6] however, that the Guidelines provide a useful framework for understanding how the mechanism of Article 6 may operate.

---

5 *See* First Written Submission of the EU, para. 234.

6 *See* First Written Submission of the EU, para. 235.

4. (to all third parties) In your view, does the "provisional compliance" by the Russian Federation with the terms of the veterinary certificates constitute an SPS measure in itself?

10. The United States recalls that the SPS Agreement includes a broad definition of an SPS measure:

> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.[7]

The United States further recalls that an unwritten measure may be an SPS measure.[8]

11. Accordingly, depending on the facts of a specific dispute, and the manner in which the dispute is framed by the complaining Member in its request for panel establishment, "provisional compliance" perhaps could be the measure at issue in a dispute. In this dispute, however, the United States understands that the SPS measure at issue is the requirements imposed by the Russian Federation for the importation of pork into Russia, and the prohibition of entry of products that do not meet those requirements. Russia's veterinary certificates constitute legal instruments in which those measures are embodied.

5. (to all third parties) In your view, do the measures at issue constitute SPS measures in the context of Annex A (1) of the SPS Agreement?

12. Yes, the measures at issue constitute SPS measures. The European Union's Panel Request identifies the measures at issue as import bans, and a refusal by Russia to accept imports, "purportedly because of concerns related to a limited number of cases of African swine fever (ASF)" – an animal disease. Paragraph 1(a) of Annex A of the SPS Agreement defines a Sanitary or Phytosanitary measure as, *inter alia*, "[a]ny measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms[.]" Accordingly, the measures at issue constitute SPS measures for purposes of the SPS Agreement.

6. (to all third parties) Please express your views, and relevant legal basis, as to whether the Panel should follow a particular order in its examination of the European Union's claims and the Russian Federation's assertions.

---

7 SPS Agreement, Annex A, para. 1.

8 *See EC – Approval and Marketing of Biotech Products* (Panel), para. 7.456.

13. The United States does not understand any particular order of analysis of the EU's claims to be legally required. In different SPS disputes, the order of analysis that will most logically address the complaining Member's claims can differ. A panel may choose the order of analysis that most logically and efficiently disposes of the claims. In this dispute, the United States sees no impediment to considering the claims under Article 3 of the SPS Agreement first, as suggested by the European Union.

14. The United States also agrees with the European Union that it would make sense to consider whether Russia meets its obligations under the first sentence of Article 6.2 of the SPS Agreement before considering whether Russia's measures are consistent with Article 6.1, as a Member that has breached its obligation under Article 6.2 to recognize the concepts of disease-free areas with respect to a disease will not have met its obligation under Article 6.1 to "ensure that [its] sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area … from which the product originated."

7. (to all third parties) When examining interpretation of the references to zones and compartments in Chapter 10.4 of the OIE Terrestrial Code, the *India –Agricultural Products* panel (in paragraph 7.262 of its report) stated that "the application by the importing country of product-specific recommendations to zones or compartments presupposes that the exporting country has established such zones or compartments within its territory according to the Terrestrial Code." Do you agree with this view?

15. An importing Member will not be able to apply product-specific recommendations in the OIE Code to zones or compartments in the territory of the exporting Member if the exporting Member has not established any such zones or compartments.

16. "Zone" and "compartment" are defined terms in the OIE Code. "Zone" is defined as "a clearly defined part of a territory containing an animal subpopulation with a distinct health status with respect to a specific disease for which required surveillance, control and biosecurity measures have been applied for the purpose of international trade." "Compartment" is defined as "an animal subpopulation contained in one or more establishments under a common biosecurity management system with a distinct health status with respect to a specific disease or specific diseases for which required surveillance, control and biosecurity measures have been applied for the purpose of international trade."[9] Neither exists in the absence of "surveillance, control and biosecurity measures." Affirmative action is thus required on the part of the exporting Member to establish a zone or compartment. Consequently, unless a Member affirmatively establishes a zone or compartment, product-specific recommendations could not be applied to it.

17. This is not to say that a Member will not have obligations with respect to regionalization in the absence of an exporting Member's creation of one or more zones or compartments. Article 6.2 requires the recognition of the "*concepts* of pest- or disease-free areas and areas of low pest or disease prevalence," a requirement that is independent of whether any such areas have been established. Likewise, as the *India – Agricultural Products* panel correctly recognized, "Article 6.1, first sentence, makes clear that it creates a free-standing obligation"[10]

---

[9] OIE Code, Glossary.

[10] *India – Agricultural Products (Panel)*, para. 7.675.

and obligations under Article 6.1 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.

8. (to all third parties) The Russian Federation submits that the notion of "limited outbreaks" is relevant for the quantum and quality of proof exporting Members must produce to convince importing Members of the safety of the proposed zones (Russian Federation's first written submission, paragraph 67). Do you agree?

18. Russia's First Written Submission appears to misunderstand the concept of "limited outbreaks," and its relationship to the regionalization process.

19. Russia appears to take the position that, in ascertaining whether to recognize disease-free areas or areas of low disease prevalence of an exporting Member, an importing Member can first look to see whether there are "limited outbreaks" of the disease within the Member's territory, and then adjust accordingly its view of the amount of evidence it would require of the exporting Member with respect to the ability of its zones or compartments to contain disease.[11] Russia also appears to take the position that having "limited outbreaks" means that outbreaks within a particular area are limited.[12] Russia's interpretation, however, would set up a circular analysis. In essence, a Member would be unable to demonstrate that an area is an area of low disease prevalence unless the Member had already demonstrated that the area was one of low disease prevalence.

20. A logical reading of Article 4.3.3.3 of the OIE Code makes clear that the concept of "limited outbreaks" refers to the geographical reach of disease outbreaks. Article 4.3.3.3 addresses the possibility of establishing containment zones following "limited outbreaks." Where disease outbreaks are geographically limited, the creation of such zones would be possible. On the other hand, if outbreaks are geographically spread, even if they are limited in number, the creation of such zones would not be possible.

21. There could be circumstances under which the limited or expansive geographic spread of outbreaks could be relevant to the question of whether zones or compartments in fact achieve an importing Member's appropriate level of protection (ALOP). For instance, the regular and undetected spread of a disease to new areas notwithstanding the existence of particular disease containment and surveillance procedures could be relevant to the adequacy of zones and compartments based on those surveillance and containment procedures to satisfy any particular ALOP.

9. (to all third parties) What, if any, differences exist in the meanings of the terms "zoning", "regionalisation" and "compartmentalisation" that may be germane to this dispute?

22. As discussed in the U.S. response to question 7, "zone" and "compartment" are defined terms in the OIE Code. The OIE Code equates the terms "zone" and "region" and defines both to mean "a clearly defined part of a territory containing an animal subpopulation with a distinct

[11] First Written Submission of Russia, para. 65.
[12] First Written Submission of Russia, para. 66.

health status with respect to a specific disease for which required surveillance, control and biosecurity measures have been applied for the purpose of international trade." "Compartment" is defined in the OIE Code as "an animal subpopulation contained in one or more establishments under a common biosecurity management system with a distinct health status with respect to a specific disease or specific diseases for which required surveillance, control and biosecurity measures have been applied for the purpose of international trade."[13] Zoning thus refers to a process that is based on geographical delimitations, while compartmentalization refers to a process of grouping based on biosecurity management that may not involve establishments with any particular geographical relationship.

23. "Zone" or "zoning" and "compartment" or "compartmentalization" are not terms used in the SPS Agreement. However, the terms "regional" and "region" do appear in the SPS Agreement, and in particular in the title of Article 6 and in the second sentence of Article 6.1. In addition, the SPS Agreement uses the term "area" throughout Article 6. Under Article 6, an "area" may consist of all of a country, part of a country, or all or parts of several countries. Further, Annex A of the SPS Agreement defines the terms "pest- or disease-free area" and "area of low pest or disease prevalence." While there may be differences that could be relevant in other contexts between the terms "zoning" and "regionalization" or between the terms "zone" as used in the OIE Code and "region" as used in the SPS Agreement, the United States understands that regionalization and zoning are similar concepts and that for purposes of this dispute there is little relevant distinction between them.

10. (to all third parties) For a measure to be found to "conform to" an international standard pursuant to Article 3.2, do you consider that the requirements established by the measure must be identical to those contained in the relevant international standard?

24. The United States would recall that in *EC – Hormones*, the Appellate Body explained the distinction between "based on" in Article 3.1 and "conform" in Article 3.2:

> Under Article 3.2 of the SPS Agreement, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard *completely* and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the SPS Agreement and of the GATT 1994.
>
> Under Article 3.1 of the SPS Agreement, a Member may choose to establish an SPS measure that is based on the existing relevant international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2 ….but, as earlier observed, the Member is not penalized by exemption of a complaining Member from the normal burden of showing a prima facie case of

[13] OIE Code, Glossary.

> inconsistency with Article 3.1 or any other relevant article of the SPS Agreement or of the GATT 1994.[14]

25. The United States would note, however, that the verb conform does *not* mean "make identical." Whether some small difference from an international standard would render a Member's measure not in "conformance" with that standard would require a case-by-case analysis.

11. (to all third parties) Please provide your views on the consequences of a finding that a measure "conforms to" an international standard, pursuant to Article 3.2, including in respect of the burden of proof and the nature and operation of the presumption referred to in Article 3.2 and its impact on a complainant's case.

26. Article 3.2 provides that:

> Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

27. This sentence has two parts – accordingly, a measure that conforms to international standards, guidelines or recommendations shall be (1) "deemed to be necessary to protect human, animal or plant life or health" and (2) "presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994." The effect of the deeming "to be necessary to protect human, animal or plant life and health" upon the application of a "relevant provision" may depend on the particular "relevant provision" at issue. For example, the United States understands that if a measure is in conformity with international standards and deemed to be necessary to protect human, animal or plant life and health, the measure would be consistent with the requirement of Article 2.2 to be based on scientific principles.

12. (to all third parties) In light of the present dispute, please provide your views on Brazil's argument in paragraph 20 of its third party statement that "…once a Member has chosen its ALOP it should calibrate its internal measures to that level of protection".

28. The SPS Agreement applies to "measures which may, directly or indirectly, affect international trade."[15] Measures which affect only internal trade are not in and of themselves subject to the disciplines of the SPS Agreement, including those concerning a Member's ALOP – although a measure affecting only internal trade could, in some circumstances, serve as evidence that a measure affecting international trade is consistent or inconsistent with disciplines of a WTO agreement.

29. The United States considers that it does not make sense to view a Member as having distinct levels of protection with respect to the spread of a disease through domestic products and the spread of the same disease through imported products. The risk being protected against is the

---

[14] *EC – Hormones (AB)*, paras. 170-171 (emphasis added).

[15] Art. 1.1.

risk of spread of the same disease. Indeed, to adopt a higher ALOP for the risk of spread of a disease through imported products than for the risk of spread of the same disease through domestic products would not be consistent with Article 5.5 of the SPS Agreement, which requires Members to "avoid arbitrary or unjustifiable distinctions in the levels [of protection] it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade."

13. (to all third parties) Please provide your views on paragraph 6 of Japan's third party statement in relation to the identification of the appropriate level of protection.

30. The United States would recall that the Appellate Body considered the question of the identification of a Member's ALOP in *Australia – Salmon*. The Appellate Body explained:

> We recognize that the SPS Agreement does not contain an explicit provision which obliges WTO Members to determine the appropriate level of protection. Such an obligation is, however, implicit in several provisions of the SPS Agreement, in particular, in paragraph 3 of Annex B, Article 4.1, Article 5.4 and Article 5.6 of the SPS Agreement. With regard to Article 5.6, for example, we note that it would clearly be impossible to examine whether alternative SPS measures achieve the appropriate level of protection if the importing Member were not required to determine its appropriate level of protection.
>
> We thus believe that the *SPS Agreement* contains an implicit obligation to determine the appropriate level of protection. We do not believe that there is an obligation to determine the appropriate level of protection in quantitative terms. This does not mean, however, that an importing Member is free to determine its level of protection with such vagueness or equivocation that the application of the relevant provisions of the *SPS Agreement*, such as Article 5.6, becomes impossible. It would obviously be wrong to interpret the *SPS Agreement* in a way that would render nugatory entire articles or paragraphs of articles of this Agreement and allow Members to escape from their obligations under this Agreement.
>
> While in this case Australia determined its appropriate level of protection, and did so with sufficient precision to apply Article 5.6, we believe that in cases where a Member does not determine its appropriate level of protection, or does so with insufficient precision, the appropriate level of protection may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied. Otherwise, a Member's failure to comply with the implicit obligation to determine its appropriate level of protection – with sufficient precision – would allow it to escape from its obligations under this Agreement and, in particular, its obligations under Articles 5.5 and 5.6.[16]

31. The United States would also note that it agrees with Japan that the effectiveness of a measure could be relevant to the question of the level of protection reflected by the measure –

[16] *Australia – Salmon (AB)*, paras 205-207.

particularly where the extent of the effectiveness of the measure was known to the Member maintaining the measure, and that Member continued to maintain the measure.

14. (to all third parties) Please explain your understanding of the meaning of "relevant provisions of the SPS Agreement" within the context of Article 3.2 of the SPS Agreement and its significance for this case.

32. The United States understands the phrase "the relevant provisions" to refer to any substantive provision of the SPS Agreement or the GATT 1994 implicated by the fact that under, the first clause of Article 3.2, a measure that conforms to an international standard "shall be deemed to be necessary to protect human, animal or plant life or health." Many provisions of the GATT 1994, and some provisions of the SPS Agreement, will not be related to the question of whether a measure is "necessary to protect human, animal or plant life or health." For example, Article XIII of the GATT 1994 or Paragraph 1 of Annex B of the SPS Agreement would not turn on whether a measure is necessary to protect human, animal or plant life or health.

15. (to Brazil) With reference to paragraphs 5 and 20 of Brazil's third party statement, please explain (i) which party, i.e. complainant or respondent, has the burden of establishing what the ALOP of the Member concerned is? (ii) how a panel should ascertain what a Member's ALOP is if it is not clearly defined?

33. In dispute settlement, a complaining Member has the burden of establishing a prima facie case of a breach of an obligation in a covered WTO agreement. To the extent that an ALOP with particular characteristics constitutes an element of an alleged breach, the complaining Member would have the burden to make out a prima facie case that the responding Member's ALOP had those characteristics.

17. (to all third parties) Where an SPS measure is not based on international standards or on measures applied by other Members, is this dispositive that the measures are not adopted "on the basis of available pertinent information", pursuant to Article 5.7 of the SPS Agreement? What, if any, other information may be considered to be pertinent? Does this differ in cases where no relevant international standard exists?

34. The United States understands that this question is premised on a situation where an international standard exists with respect to a particular disease, but where the measure at issue is not based on that standard. In this situation (as well as in most other situations), the evaluation under Article 5.7 must be based on the analysis of the specific facts at issue. The information on which the international standard was based would constitute available information pertinent to the matter. On the other hand, other available information may also be pertinent. All of the information must be evaluated to determine whether the measure at issue meets the Article 5.7 requirement to be adopted on the basis of available pertinent information.

18. (to all third parties) Please provide your views on the relationship between Article 5.7 of the SPS Agreement and other paragraphs of Article 5.

35. As the United States explained in its oral statement, it does not view Article 5.7 as providing an exception from the discipline of Article 5.5. Article 5.8 sets forth a procedural

obligation that is not contingent on the existence of any particular quantum of scientific evidence and that is therefore unrelated to the applicability of Article 5.7 to any situation.

36. By contrast, Article 5.1 sets forth a requirement for "an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health," and Articles 5.2 and 5.3 set forth requirements applicable when conducting such an assessment of risks. Article 5.7, however, addresses the situation where relevant scientific evidence is insufficient to permit such an assessment, and accordingly provides an exception to Articles 5.1-5.3.

19. (to all third parties) Please provide your views on whether, when an SPS measure is "based on" or "conforms to" an international standard, that same measure could be justified under Article 5.7 because there is insufficient scientific evidence to undertake a risk assessment.

37. If an SPS measure conforms to an international standard, the presumption of consistency set forth in Article 3.2 would obviate the need for any consideration of whether the measure could be justified under Article 5.7.

20. (to all third parties) Please provide your views on the relationship between Articles 2.2 and 5.1, in light of India's arguments in paragraph 5 of its third party statement.

38. The plain meaning of Articles 2.2 and 5.1 confirms that there is no basis to claim Article 2.2 is a defense that excuses the risk assessment obligation in Article 5.1.

39. The texts of Articles 2.2 and 5.1 interrelate. Article 2.2's text is broader and more general in character, such that Article 5.1 might constitute a specific application of Article 2.2, but not encompass all conceivable situations where Article 2.2 might apply.

40. The Appellate Body has reached this conclusion on each occasion it has analyzed these provisions:

> *EC – Hormones*: "The Panel considered that Article 5.1 may be viewed as a specific application of the basic obligations contained in Article 2.2 of the SPS Agreement … We agree with this general consideration and would also stress that Articles 2.2 and 5.1 should constantly be read together. Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1."[17]
>
> *Australia – Salmon*: "We agree with the Panel, and, therefore, conclude that, by maintaining an import prohibition … in violation of Article 5.1, Australia has, by implication, also acted inconsistently with Article 2.2 of the SPS Agreement."[18]
>
> *Japan – Agricultural Products II*: "In our Report in European Communities – Hormones, we agreed with a statement by the panel in that case that Article 5.1

[17] *EC – Hormones (AB)*, para. 180.
[18] *Australia – Salmon (AB)*, para. 138.

> may be viewed as a specific application of the basic obligations contained in Article 2.2. This statement can not possibly be interpreted as support for limiting the scope of Article 2.2 "in favour" of Article 5.1."[19]
>
> *US – Continued Suspension*: "This requirement [Article 2.2] is made operative in other provisions of the SPS Agreement, including Article 5.1, which requires SPS measures to be "based on" a risk assessment."[20]
>
> *Australia – Apples*: "The Appellate Body has also held that there is a one-way, dependent relationship in law between the more specific provisions of Article 5.1 or Article 5.2, on the one hand, and the more general provisions of Article 2.2, on the other hand. Thus, the Appellate Body has ruled that a violation of Article 5.1 or Article 5.2 can be presumed to imply a violation of Article 2.2, but that the reverse does not hold true—that is, a violation of Article 2.2 does not imply a violation of Article 5.1."[21]

21. (to all third parties) Do you consider that Article 5.3 of the SPS Agreement presupposes the existence of a risk assessment?

41. No, Article 5.3 describes what factors a Member must take into account in making the type of assessment of risk addressed by this article. In particular, Article 5.3 imposes obligations that apply "[i]n assessing the risk to animal or plant life or health." Article 5.1 requires Members to ensure that their SPS measures are "based on an assessment … of the risks to human, animal or plant life or health." Article 5.3 thus applies when a Member conducts the assessment described in Article 5.1.

22. (to all third parties) Brazil, in its third party statement, provided its views on the trade-restrictiveness of measures in accordance with Article 5.6 of the SPS Agreement. Please provide your views on paragraph 17 of Brazil's third party statement, which reads: "In any case, an importing member must objectively assess the evidence submitted by the member establishing the containment zone in order to demonstrate that the requirements of the international standards are not properly fulfilled. For the importing Member to establish that the exporting member is not in compliance with the requirements established by the international standard, it shall base its decision on appropriate and sufficient evidence subject, of course to the scrutiny of the panel".

42. Article 5.6 requires Members to ensure that their SPS "measures are not more trade restrictive than required to achieve their" ALOP. Thus, under Article 5.6, the question will not necessarily be whether the exporting Member's disease containment activities are consistent with relevant international standards. Where an exporting Member has sought an importing Member's recognition of zones within its territory, the importing Member will not generally be able to ascertain whether application of measures on the basis of such zones will achieve its

---

19 *Japan – Agricultural Products II*, para. 82.
20 *US – Continued Suspension (AB)*, para. 674.
21 *Australia – Apples (AB)*, para. 340.

ALOP in the absence of an assessment of any relevant evidence that has been submitted by the exporting Member.

23. (to all third parties) Do you consider that a measure which conforms to the relevant international standard could be considered to constitute a disguised restriction on trade?

43. The United States considers that it would be difficult to establish rules governing all situations.

24. (to all third parties) To what extent do Articles 2.3 and 5.5 apply to trade with a non–WTO Member (e.g. Belarus)? Are there any particular considerations the Panel should take into account where a non-WTO Member is concerned?

44. The first sentence of Article 2.3 states that "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members." As this sentence refers exclusively to discrimination between *Members*, it would not apply with respect discrimination between a Member and a non-Member. This is confirmed by the difference between the phrasing of the first sentence of Article 2.3 and of Article XX of the GATT 1994, which refers to "the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between *countries* where the same conditions prevail" (emphasis added).

45. The second sentence of Article 2.3, however, contains no language suggesting that trade with non-Members could not be considered in assessing whether a measure constitutes "a disguised restriction on international trade." Indeed, discriminatory treatment in favor of a non-Member where identical or similar conditions prevail could constitute evidence that the measure applicable to a Member amounts to a disguised restriction.

46. Likewise, Article 5.5 does not refer to distinctions between Members but between "different situations." In particular, Article 5.5 provides 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." Accordingly, a breach of Article 5.5 could arise where the ALOP applied to a situation in a non-Member differs in an arbitrary and unjustifiable way from the ALOP applied to a situation in a Member.

25. (to all third parties) Are the requirements for an SPS measure to be deemed a "disguised restriction on international trade" identical under Articles 2.3 and 5.5?

47. Articles 2.3 and 5.5 both use the term: "disguised restriction on international trade." A panel could logically look to the same types of considerations when considering whether distinctions in ALOPs result in a disguised restriction on international trade for purposes of Article 5.5 and whether SPS measures are applied in a manner which would constitute a disguised restriction on international trade for purposes of Article 2.3.

26. (to all third parties) Please provide your views on paragraphs 6-9 of the United States' third party statement, that "a Member's compliance with Article 5.7 does not preclude a breach of Article 5.5".

48. The United States continues to maintain the views expressed in paragraphs 6-9 of the U.S. Third Party Statement.

27. (to all third parties) In the context of Article 5.5, are the situations in the European Union and in the Russian Federation comparable because they involve the same virus and the same health effects?

49. The United States understands the situations in the European Union and in the Russian Federation to be comparable for purposes of Article 5.5. The situations at issue involve the risk of transmission of the same disease through trade in the same products.

28. (to all third parties) Please provide your views on Australia's proposition, in paragraphs 19 and 20 of its third party submission, that for a measure to comply with Article 6.2 it must not deny or contradict the recognition of such areas.

50. A Member must not deny or contradict the concept of disease-free areas. While an individual measure may on its own apply explicitly on a non-regionalized basis, other measures of a Member may nonetheless clarify that the Member recognizes the concept and will recognize a specific disease-free area if it obtains sufficient evidence to support such recognition. However, mere capacity to alter a measure would not suffice to overcome language in a measure contradicting the concept. Capacity to alter a measure would, on its own, evidence capacity to recognize the concept of disease-free areas in the future, but not that the Member currently recognizes the concept.

29. (to all third parties) Article 6.1 of the SPS Agreement requires that measures be adapted not only to the area from which a product originates, but also the area to which it is destined. Please comment on the relevance of the latter provision in the current case.

51. Article 6.1 is clear that SPS measures should be adapted to the disease conditions in the area to which a product is destined. For instance, the presence of endemic disease in the area to which a product is destined might render inappropriate the application of SPS measures aimed at preventing the introduction of the disease into the area. By contrast, if a disease is not present in the area to which a product is destined, measures to prevent its introduction could be consistent with Article 6.1.

30. (to all third parties) Please provide your views on the relationship between the three paragraphs of Article 6, and the manner in which the Panel should examine the obligations contained therein.

52. The United States refers to paragraphs 2-11 of the Third Party Submission of the United States.

31. (to all third parties) Please provide your views on Brazil's arguments, in paragraphs 4-9 of its third party submission, on whether it is possible for an importing Member to impose an import prohibition (country and/or EU-wide ban) if it considers that the measures adopted by the exporting Member are not sufficient to establish disease- or pest-free zones or compartments.

53. Where a Member adopts measures that are not in conformity with an international standard, its measures must be based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health. The United States agrees with Brazil that where an importing Member chooses not to recognize a zone notwithstanding the exporting Member's satisfaction of requirements that according to the international standard should prompt recognition of the zone, the Member would be required to perform "an assessment … of the risks" in accordance with Article 5.1.

32. (to all third parties) Article 6.2 of the SPS Agreement lists the factors that Members should use to determine pest-or disease-free areas and areas of low pest prevalence. In your view, what should constitute the "relevant information" for determining if a pest- or disease-free zone is viable or acceptable?

54. The considerations listed in Article 6.2 as bearing on the "determin[ation] of pest-or disease-free areas and areas of low pest prevalence" also logically bear on the question of whether a proposed pest- or disease-free zone is viable or acceptable. They are "factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls." Other factors may also be relevant, depending on the particular situation at issue.

33. (to all third parties) Does the importing country have the final discretion as to whether or not a particular disease-free zone is viable for acceptable, in the context of Article 6.2 of the SPS Agreement?

55. Members have discretion in adopting SPS measures (including with respect to regionalization), but at the same time, Members have agreed to certain disciplines on that discretion. Many of those disciplines – such as contained in Article 2, Article 3, Article 5, and Article 6 – are at issue in this dispute.

34. (to all third parties) Please provide your views on the regionalization methods that are provided for within the OIE Terrestrial Code, in relation to African swine fever. Please elaborate on this response with specific reference to articles of the OIE Terrestrial Code and relevance to the details of this dispute.

56. Chapter 15 of the OIE Code provides recommendations for importation of numerous products from ASF free countries, zones or compartments. These provisions accordingly establish the propriety of the application of the concepts of zoning or compartmentalization with respect to the covered products. Other paragraphs in Chapter 15 offer recommendations for importation from ASF-free countries or zones, without reference in the relevant recommendation to compartments, suggesting that with respect to these products, the OIE Code endorses zoning

but not compartmentalization. Chapter 15 also provides recommendations on ascertaining the ASF status of a country, zone or compartment, how to establish that a country, zone, or compartment is ASF-free, and how a country, zone, or compartment can recover ASF-free status following an ASF-outbreak.

35. (to all third parties) Please provide your views on the European Union's arguments in paragraph 102 of its first opening statement, with reference to the recognition obligation in Article 6.2.

57. Where legal instruments or statements of a Member indicate that a Member recognizes the concept of disease-free areas, the evidentiary burden would be on the complaining Member to establish that – despite the existence of these instruments or statements – the importing Member did not in fact recognize the concept of regionalization.

58. In these circumstances, however, there may be little practical significance to a claim under Article 6.2. A Member would breach Article 6.1 if it engages in inappropriate activities designed to avoid recognizing an area as disease-free after receiving evidence documenting that recognition would be consistent with the Member's measures and achieve the Member's level of protection. Indeed, Article 6.1 is designed to address the situation where an exporting Member feels that there was an improper basis for an importing Member's failure to recognize an area within the exporting Member as disease free.

36. (to all third parties) Please provide your views on the argument of the United States, in paragraphs 12 - 18 of its third party submission, that the measures at issue do not constitute control, inspection or approval procedures for the purposes of Article 8 and Annex C of the SPS Agreement.

59. The United States continues to maintain the views expressed in paragraphs 12-18 of the U.S. Third Party Submission.

37. (to all third parties) In paragraphs 30-33 of its third party submission, Brazil addresses the meaning of the term 'without undue delay'. Please provide your views on the assessment of 'without undue delay' in the context of this case.

60. Without prejudice to the U.S. view that the measures at issue do not constitute control, inspection or approval procedures for the purposes of Article 8 and Annex C, the United States would note that the Appellate Body has found this term to require avoidance of "periods of time that are unwarranted, or otherwise excessive, disproportionate or unjustifiable."[22] The Appellate Body has also explained that whether a procedure has been unduly delayed is a question that must be considered on a case-by-case basis and that cannot be assessed in the abstract.[23] The United States would understand that here, an assessment of whether there was "undue delay" would involve consideration of, at the very least, the nature of the decision, as well as the

[22] *Australia – Apples (AB)*, para. 437.
[23] *Australia – Apples (AB)*, para. 437.

quantity and nature of the evidence that Russia needed to consider and the timeframe in which it was provided to Russia.

38. (to all third parties) Please provide your views on the assertion made by the United States in paragraph 13 of its third party submission, that the measures at issue are not "control, inspection or approval procedure[s]" in the context of Article 8 and Annex C.

61. The United States continues to maintain the views expressed in paragraphs 12-18 of the U.S. Third Party Submission.

39. (to all third parties) With respect to the requirement in Annex B, paragraph 6(a) to "immediately" notify measures taken where "urgent" problems of health protection arise or threaten to arise, please provide your views with respect to what constitutes an "immediate" notification, and what constitutes "urgent" health problems.

62. An "urgent" problem of health protection would be one calling for action in a timeframe that is sufficiently short that it does not permit compliance with all of the obligations in paragraph 5 of Annex B. This interpretation best gives effect to the intent of Annex B, and paragraph 5 of Annex B in particular, to promote transparency – an intent evidenced by Annex B's title: "Transparency of Sanitary and Phytosanitary Regulations." The term "immediate" should be understood according to its ordinary meaning, which suggests an absence of any lapse of time. Accordingly, an "immediate" notification is one occurring without any lapse in time between promulgation of the relevant measure and the notification.

RUSSIA'S QUESTIONS FOR THE THIRD PARTIES

1. (to all third parties) Do individual Member States of the European Union have veterinary (food safety) certificates that were negotiated bilaterally with veterinary or food safety officials from your government and that are currently in force in trade in live pigs, pig products or pork products with that individual Member State? If so, please provide the following information for each such certificate: the date on which the current certificate was negotiated; the Member State with which the certificate was negotiated; a copy of the certificate.

63. The United States does not "negotiate" veterinary or food safety certificates with individual EU Member States, either with respect to the importation of live pigs from those Member States or with respect to the importation from them of pig or pork products. However, U.S. regulations recognize individual Member States on the basis of their disease status with respect to diseases of concern, and animal health certification requirements for imports from each Member State are based on the disease status of that Member State.

64. With respect to pig and pork products, while the United States works with Member States to develop certificates, certificate language (with respect to both animal health and food safety) is based on the requirements of U.S. regulations. While the United States maintains a single certificate applicable to the entire EU for the importation into the United States of live swine, the certification requirements reflect the fact that imports will be permitted from some EU Member

States or regions within the EU, but not others, as a result of differences in disease status between those Member States and regions.

2. (a) Is it consistent with the SPS Agreement and/or the Dispute Settlement Understanding for a panel or the Appellate Body to make a finding that a form of veterinary (food safety) certificate negotiated bilaterally by WTO Members is an arrangement subject to SPS Agreement, in particular Article 6 of the SPS Agreement?

65. Paragraph 1 of Annex A of the SPS Agreement defines a Sanitary or Phytosanitary measure as:

> Any measure applied:
>
> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
>
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
>
> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, *certification and approval procedures*; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety (emphasis added).

66. A veterinary certificate constitutes a certification procedure that aims to protect animal life or health within the territory of the Member from risks arising from the entry, establishment or spread of … diseases, disease-carrying organisms or disease-causing organisms." A food safety certificate constitutes a certification procedure that aims to protect "human … life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods [or] beverages[.]" Accordingly, veterinary and food safety certificates are SPS measures under the terms of paragraph 1 of Annex A. Moreover, nothing in the language of paragraph 1 suggests that whether a certificate or other measure falls within the definition of an SPS measure hinges on the manner in which the certificate or other

measure came into being. Accordingly, whether a certification requirement was negotiated between a Member and another Member is irrelevant – it constitutes an SPS measure regardless.

67. Article 6.1 of the SPS Agreement applies to measures. As certification requirements constitute SPS measures, they are subject to Article 6.1. Article 6.2 requires the recognition of certain concepts – namely, the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. The content of a certification requirement, whether negotiated or not, could serve as an indication of whether the Member imposing the requirement recognizes those concepts.

(b) Is it consistent with the SPS Agreement and/or the Dispute Settlement Understanding for a panel or the Appellate Body to make a finding that a form of veterinary (food safety) certificate negotiated bilaterally by WTO Members is either consistent or inconsistent with the importing Member's obligations under the SPS Agreement?

68. As discussed in the previous answer, veterinary and food safety certification requirements constitute SPS measures, regardless of whether they stem from a process of negotiation. Article 1, paragraph 1 of the SPS Agreement states that "This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade." Certification requirements for the importation of products into a Member's territory affect trade. Accordingly, certification requirements must be consistent with the SPS Agreement.

69. Article 11, paragraph 1 of the SPS Agreement explicitly states that "[t]he provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein." Moreover, the SPS Agreement is one of the Multilateral Agreements on Trade in Goods to which the DSU applies pursuant to Appendix 1 of the DSU. Accordingly, the consistency of a veterinary or food safety certificate with a Member's obligations under the SPS Agreement is subject to challenge in WTO dispute settlement, and may be the subject of a panel finding.

(c) If so, to what extent?

70. Please see prior response.