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

(DS475)

THIRD PARTY SUBMISSION OF

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TABLE OF CONTENTS

TABLE OF REPORTS

Short Form	Full 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
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

I. INTRODUCTION

1. The United States welcomes this opportunity to present its views to the Panel in this proceeding. This issues in this dispute include important systemic matters regarding the proper legal interpretation of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement"). In this submission, the United States will present its views on certain legal issues regarding the interpretation of Article 6 and the scope of Article 8 and Annex C.

II. ARGUMENT

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

2. Article 6 of the SPS Agreement sets forth a set of inter-related obligations. These must be read together in context so as to result in a coherent set of obligations with regard to regionalization of SPS measures. In the context of this dispute, the United States would make the following two key points:

- Article 6.2 differs from Article 6.1, and requires a recognition of *concepts*: namely, the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

- While Article 6.3 requires the exporting Member to provide evidence necessary for the recognition of a specific area within its territory as a pest- or disease-free area or area of low pest or disease prevalence, neither the obligations in Article 6.2, first sentence, nor those in Article 6.1, arise only following a request to recognize a specific area as a pest- or disease-free area or area of low pest or disease prevalence.

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

3. The United States would recall that Articles 6.1 and 6.2 have different thrusts – 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. More specifically, Article 6.1, first sentence, obligates Members to "*ensure* that their [SPS] *measures* are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated and to which the product is destined" (emphasis added). On the other hand, Article 6.2, first sentence, obligates Members to "*recognize the concepts* of pest- or disease-free areas and areas of low pest or disease prevalence" (emphasis added).

4. The panel in *India – Agricultural Products* expounded on the distinction between these provisions:

> [T]he use of different wording in these subparagraphs suggests that the paragraphs are intended to have distinctive effects. Whereas 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 (in this case, suitable for the SPS characteristics of the area), Article 6.2, first sentence, requires that a

> Member make a particular acknowledgement (in this case, of the concepts of "pest- or disease-free areas" and "areas of low pest or disease prevalence").[1]

5. That panel further explained:

> That these respective sentences refer to different subjects ("SPS measures" in Article 6.1, and the "concepts" of "pest- or disease-free areas" and "areas of low pest or disease prevalence" in Article 6.2) is also of significance in terms of their import. Article 6.1, first sentence, requires Members to ensure that [their] SPS measures are suitable for the SPS characteristics of an area. Notwithstanding the fact that "pest- or disease-free areas" and "areas of low pest or disease prevalence" are defined, respectively, in Annex A(6) and A(7) of the SPS Agreement, the Panel notes that, in the context of the first sentence of Article 6.2, these terms are referred to as concepts for the purpose of that provision. A concept is an "abstract idea" or "an idea of a class of objects; a general notion or idea". Hence, Article 6.2, first sentence, requires Members to acknowledge particular abstract ideas.[2]

6. Accordingly, Article 6.2 requires recognition of the *concepts* of certain types of areas: 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 *measures*: Members must ensure that "their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of" both the area from which the product originated and to which the product is destined.

2. 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

7. Article 6.3 of the SPS Agreement provides that:

> Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively.

8. In *India – Agricultural Products*, the panel properly found that 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 by an exporting Member that an area within its territory is pest- or disease-free or an area of low pest

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[1] *India – Agricultural Products (Panel)*, para. 7.669.

[2] *India – Agricultural Products (Panel)*, para. 7.670 (quoting the Oxford English Dictionary, OED Online).

or disease prevalence.[3] 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]

9. The *India – Agricultural Products* panel correctly recognized that 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. That panel explained:

> A plain reading of Article 6.1, first sentence, makes clear that it creates a free-standing obligation. There is no conditional language linking the obligation to Article 6.3, to an extraneous event such as the request of an exporting Member to recognize an area, or to any other event or situation.[5]

10. The *India – Agricultural Products* panel supported its reasoning with the observation that "other provisions in the SPS Agreement that foresee an interaction between the importing and exporting Members, such as Article 4, explicitly condition the importing Member's actions upon an action by the exporting Member."[6] There is no such explicit condition in Article 6.1. 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.

11. 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.

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

12. The European Union raises claims under Article 8 and Annex C with respect to the manner in which the Russian Federation handled the European Union's requests for regional

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3 *India – Agricultural Products (Panel)*, paras. 7.678-7.680.

4 *India – Agricultural Products (Panel)*, para. 7.677.

5 *India – Agricultural Products (Panel)*, para. 7.675.

6 *India – Agricultural Products (Panel)*, para. 7.679.

treatment of areas within the European Union and for the ability to ship treated or processed pork or pig products. The European Union's Article 8 and Annex C claims are in addition to the numerous substantive claims that the European Union raises with respect to the Russian Federation's failure to grant these requests – claims which, if successful, would result in findings and recommendations with respect to the Russian Federation's measures regardless of the Panel's analysis of the claims under Article 8 and Annex C.

13. The claims under Article 8 and Annex C, however, are based on an incorrect premise. For those claims to succeed, the Russian Federation's process for evaluating the European Union's requests 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.

14. Annex C is entitled "control, inspection, and approval procedures," and Article 8 provides that:

> Members shall observe the provisions of Annex C in the operation of *control, inspection and approval procedures*, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.[7]

15. A footnote to the title of Annex C, moreover, provides that: "Control, inspection and approval procedures include, inter alia, procedures for sampling, testing and certification."

16. Annex C thus 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 the process amounted to an "approval" procedure.

17. 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

[7] Article 8 (emphasis added).

permission to ship from a particular area a product already approved and available in the importing Member's market.

18. 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." The Appellate Body has explained that "[s]ince the procedures referred to in Annex C(1) are those that check and ensure fulfilment of SPS measures, this suggests that such measures exist prior to the operation, undertaking, or completion of, the relevant procedures, as the latter seek to check and ensure fulfilment with the former."[8] Here, the European Union's contention is that "[t]he 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."[9] The process for modifying a measure, however, would not be a procedure to check and ensure fulfillment of that (unmodified) measure.

III. CONCLUSION

19. The United States thanks the Panel for providing an opportunity to comment on important legal issues at stake in this proceeding.

[8] *Australia – Apples (AB)*, para. 436.

[9] European Union First Written Submission, para. 337.