World Trade Organisation
Panel Proceedings

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

(WT/DS475)

First Written Submission
by the European Union

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TABLE OF ABREVIATIONS

ABBREVIATION	FULL FORM
ALOP	Appropriate level of protection or acceptable level of risk
ARES	Advanced Records System, European Commission
ASF	African Swine Fever
ASFV	African Swine Fever Virus
ASF Instructions	Instructions on Measures for the Prevention and Eradication of African Swine Fever of 21 November 1980, approved by the General Directorate of the Ministry of Veterinary Agriculture of the USSR
ASF Order	Order 144 of the Ministry of Agriculture of the Russian Federation of 16 April 2009 on the Measures to Prevent the Spread of African Swine Fever in the Territory of the Russian Federation
Customs Union	Customs Union of Belarus, Kazakhstan, and the Russian Federation
DSB	Dispute Settlement Body, World Trade Organization
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EFSA	European Food Safety Authority
EU	European Union
EU MS	EU Member States
EURL-ASF	European Union Reference Laboratory for African Swine Fever
EUROSTAT	Statistical office of the European Union
FAO	Food and Agriculture Organization of the United Nations
FSVPS	Russian Federal Service for Veterinary and Phytosanitary Supervision (Rosselkhoznadzor)
FVO	Food and Veterinary Office of the European Commission
GATT 1994	General Agreement on Tariffs and Trade 1994
MFN	Most favoured nation
MERCOSUR	Mercado Común del Sur
OIE	World Organisation for Animal Health

ABBREVIATION	FULL FORM
OIE Terrestrial Code	OIE Terrestrial Animal Health Code (2014)
OIE Terrestrial Manual	OIE Manual of Diagnostic Tests and Vaccines for Terrestrial Animals (2014)
SANCO	Directorate General for Health and Consumers, European Commission
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SPS Committee	The Committee on Sanitary and Phytosanitary Measures established under the SPS Agreement
US	United States of America
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

LIST OF EXHIBITS

EU-1	OIE Terrestrial Code, 23rd edition, introductory note (http://www.oie.int/international-standard-setting/terrestrial-code/).
EU-2	User's Guide, OIE Terrestrial Code
EU-3	Chapter 15.1., African Swine Fever, OIE Terrestrial Code
EU-4	Chapter 4.3., Zoning and Compartmentalization, OIE Terrestrial Code
EU-5	Chapter 2.8.1., African Swine Fever, OIE Terrestrial Manual
EU-6	G/SPS/N/RUS/46 (Ukraine)
EU-7	G/SPS/N/RUS/48 (Lithuania)
EU-8	G/SPS/N/RUS/48/Add.1 (Lithuania)
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EU-14	a. (RU) Letter from Russia to the EU of 29 January 2014, FS-SA-8/1277 b. (EN) translation
EU-15	a. (RU) Letter from Russia to the EU of 14 February 2014, НФ-12-26/1650 b. (EN) translation
EU-16	a. (RU) FSVPS announcement of 6 February 2014 (http://fsvps.ru/fsvps/news/8935.html) b. (EN) translation
EU-17	a. (RU) List of returned consignments, Annex 2 to the Letter from Russia to the EU of 6 August 2014, FS-EN-7/14507 (irrelevant or confidential information has been redacted) b. (EN) translation

EU-18	a. (RU) Instructions on Measures for the Prevention and Eradication of African Swine Fever, approved by the Chief Directorate of Veterinary Medicine at the USSR Ministry of Agriculture on 21 November 1980 b. (EN) translation
EU-19	a. (RU) Letter from the Federal Service for Veterinary and Phytosanitary Surveillance of 6 June 2007 on African Swine Fever Prophylaxis, No. FS/SD-2/5356 b. (EN) translation
EU-20	a. (RU) Order no. 144 of the Ministry of Agriculture of Russian Federation of 16 April 2009, on Measures to Prevent the Spread of African Swine Fever in the Territory of the Russian Federation b. (EN) translation
EU-21	African Swine Fever from 2007 to 2014, compilation by the European Commission of maps from OIE (http://ec.europa.eu/food/animal/diseases/docs/presentation_asf_en.pdf)
EU-22	ASF epidemic situation, prevention and control of ASF in Russia, presentation by RF Chief Veterinary Officer Yevgeny A. Nepoklonov (http://web.oie.int/RR-Europe/eng/Regprog/docs/PPT/GF-TADs%20RSC5%20-%20session%204%20-%20ASF%20Russia.pdf)
EU-23	African Swine Fever spread in the Russian Federation and the risk for the region, FAO, December 2009 (http://www.fao.org/3/a-ak718e.pdf)
EU-24	Scientific Opinion on African Swine Fever, EFSA Panel on Animal Health and Welfare (AHAW), EFSA Journal 2010 8(3)1556 (http://www.efsa.europa.eu/en/scdocs/doc/1556.pdf)
EU-25	Scientific Report of EFSA, Evaluation of possible mitigation measures to prevent introduction and spread of African swine fever virus through wild boar, EFSA Journal 2014 12(3)3616 (http://www.efsa.europa.eu/en/efsajournal/doc/3616.pdf)
EU-26	Scientific Opinion on African Swine Fever, EFSA Panel on Animal Health and Welfare (AHAW), EFSA Journal 2014 12(4):3628 (http://www.efsa.europa.eu/en/efsajournal/doc/3628.pdf)
EU-27	ASF diagnosis and molecular characterization Lithuania, EURL-ASF, CISA-INIA, 1317, 28/10/2014
EU-28	ASF diagnosis and molecular characterization Poland, EURL-ASF, CISA-INIA, 1145, 30/09/2014
EU-29	ASF diagnosis and molecular characterization Latvia, EURL-ASF, CISA-INIA, 1232, 17/10/2014
EU-30	ASF diagnosis and molecular characterization Estonia, EURL-ASF, CISA-INIA, 1375, 7/11/2014

EU-31	Council Directive 2002/60/EC of 27 June 2002 laying down specific provisions for the control of African swine fever and amending Directive 92/119/EEC as regards Teschen disease and African swine fever, OJ L 192, p.27
EU-32	Commission Decision 2003/422/EC of 26 May 2003 approving an African swine fever diagnostic manual, OJ L 143, p.35
EU-33	Commission Implementing Decision 2014/43/EU of 27 January 2014 concerning certain interim protective measures relating to African swine fever in Lithuania, OJ L 26, p.44
EU-34	Commission Implementing Decision 2014/93/EU of 14 February 2014 concerning certain protective measures relating to African swine fever in Lithuania, OJ L 46, p.20
EU-35	Commission Implementing Decision 2014/100/EU of 18 February 2014 concerning certain interim protective measures relating to African swine fever in Poland, OJ L 50, p.35
EU-36	Commission Implementing Decision 2014/134/EU of 12 March 2014 concerning certain protective measures relating to African swine fever in Poland, OJ L 74, p.63
EU-37	Commission Implementing Decision 2014/178/EU of 27 March 2014 concerning animal health control measures relating to African swine fever in certain Member States, OJ L 95, p.47
EU-38	Commission Implementing Decision 2014/417/EU of 27 June 2014 concerning certain interim protective measures relating to African swine fever in Latvia, OJ L 192, p.66
EU-39	Commission Implementing Decision 2014/448/EU of 8 July 2014 amending Implementing Decision 2014/178/EU as regards African swine fever in Latvia, OJ L 201, p.31
EU-40	Commission Implementing Decision 2014/502/EU of 24 July 2014 concerning certain interim protective measures relating to African swine fever in Lithuania, OJ L 222, p.20
EU-41	Commission Implementing Decision 2014/513/EU of 31 July 2014 amending the annex to Implementing Decision 2014/178/EU as regards the areas in Lithuania, Latvia and Estonia under restriction for African swine fever, OJ L 231, p.7
EU-42	Commission Implementing Decision 2014/530/EU of 13 August 2014 concerning certain interim protective measures relating to African swine fever in Latvia, OJ L 242, p.31
EU-43	Commission Implementing Decision 2014/637/EU of 28 August 2014 amending the Annex to Implementing Decision 2014/178/EU as regards the areas under restriction for African swine fever in certain Member States, OJ L 259, p.23
EU-44	Commission Implementing Decision 2014/709/EU of 9 October 2014 concerning animal health control measures relating to African swine fever in certain Member States and repealing Implementing Decision 2014/178/EU, OJ L 295, p.63

EU-45	EU ASF regionalization map, 18 February 2014
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EU-47	EU ASF regionalization map, 27 August 2014
EU-48	EU ASF regionalization map, 11 September 2014
EU-49	EU ASF regionalization map, 22 October 2014
EU-50	Commission Implementing Decision 2014/442/EU of 7 July 2014 approving the plans for the eradication of African swine fever in feral pigs in certain areas of Lithuania and Poland, OJ L 200, p. 21
EU-51	Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Committee on Sanitary and Phytosanitary Measures, G/SPS/48
EU-52	Veterinary certificate for piglets for fattening, being exported from the EU into the Russian Federation, 11/08/2006
EU-53	Veterinary certificate for pigs for breeding, exported from the EU into the Russian Federation, 11/08/2006
EU-54	Veterinary certificate for pork meat and raw meat preparations, exported from the EU into the Russian Federation, 11/08/2006
EU-55	Veterinary certificate for slaughter pigs, exported from the EU to the Russian Federation, 16/12/2009
EU-56	Veterinary certificate for finished food products, containing raw material of animal origin, exported from the EU to the Russian Federation, 24/05/2011
EU-57	Veterinary certificate for canned meat, salamis and other ready for consumption meat products, exported from the EU to the Russian Federation, 24/05/2011
EU-58	Veterinary certificate for raw materials of animal origin meant for manufacturing of non-productive animals (petfood) and feed for fur animals, exported from the EU to the Customs Union
EU-59	Veterinary certificate for boar semen exported from the EU to the Customs Union
EU-60	Memorandum between the European Community and the Russian Federation on veterinary certification of animals and animal products to be exported from the EC to Russia of 2 September 2004
EU-61	Memorandum between the European Community represented by DG Health and Consumer Protection and the Presidency and the Russian Federation represented by the Federal Service for Veterinary and Phytosanitary Surveillance concerning principles of zoning and compartmentalization in the veterinary field of 4 April 2006

EU-62	Letter of 29 January 2014 from the EU to Russia and its Annex (pp. 1-5), ARES(2014)209377, SANCO G7/RF/mh(2014)219959
EU-63	Excel spreadsheet on Poland, Annex to the Letter of 29 January 2014 (pp. 6-8)
EU-64	Letter of 31 January 2014 from the EU to Russia, ARES(2014)226547, SANCO G7/JP/mh(2014)241111, including (1) Annex to the Veterinary certificate for pork meat and raw meat preparations, exported from the EU into the Russian Federation, (2) Annex to the Veterinary certificate for piglets for fattening, exported from the EU into the Russian Federation, (3) Annex to the Veterinary certificate for pigs for breeding, exported from the EU into the Russian Federation and (4) Annex to the Veterinary certificate for slaughter pigs, exported from the EU into the Russian Federation
EU-65	Letter of 7 February 2014 from the EU to Russia, and its Annexes I-IV, ARES(2014)304571, SANCO/G7/DP/tb(2014)328578
EU-66	African swine fever in Lithuania, presentation by the State Food and Veterinary Service of Lithuania, 6–7 February 2014
EU-67	Protective measures introduced in Poland against the African swine fever threat, General Veterinary Inspectorate of Poland, 6–7 February 2014
EU-68	Protective measures against African swine fever in Latvia, 6 February 2014
EU-69	Information on the implementation of protective measures against African swine fever in Estonia, 7 February 2014
EU-70	a. (LT) Order concerning Order No B1-31 of 20 January 2014 of the Director of the State Food and Veterinary Service on Measures to Prevent the spread of African Swine Fever No B1-48 of 24 January 2014 b. (EN) translation
EU-71	a. (LT) Order on Measures to Control African Swine Fever No B1-49 of 24 January 2014 b. (EN) translation
EU-72	a. (LT) Order on the Slaughter of Pigs as Part of the Measures to Prevent the Spread of African Swine Fever, 30 January 2014, No B1-60 b. (EN) translation
EU-73	Contingency Plans for Epidemic Diseases, Guidelines prepared by the Veterinary and Zootechnical Legislation Division, SANCO/10101/2002
EU-74	a. (LT) Contingency Plan for Classical Swine Fever (CSF) and African Swine Fever (ASF) of Lithuania, 30 December 2011 b. (EN) translation
EU-75	a. (PL) Polish Veterinary African Swine Fever Contingency Plan, January 2014 b. (EN) translation

EU-76	a. (LV) Plan for Combating Very Dangerous Infectious Animal Diseases of the Republic of Latvia, 28 February 2013 b. (EN) translation
EU-77	a. (EE) Code of Conduct for Control of African Swine Fever of Estonia, 11 April 2013 b. (EN) translation
EU-78	Final Report of a Specific Audit carried out in Lithuania from 20 to 24 July 2009 in order to Evaluate the Contingency Plans for Epizootic Diseases and the Eradication Programme for Rabies in the context of a General Audit, SANCO 2009-8265;
EU-79	Final Report of an Audit carried out in Lithuania from 27 February to 2 March 2012 in order to Evaluate the Actions Taken during Recent Outbreaks of Classical Swine Fever and to Assess Contingency Planning of Epizootic Disease, SANCO 2012-6386;
EU-80	Final Report of an Audit carried out in Latvia from 4 to 8 March 2013 in order to Evaluate the Implementation of Contingency Plans in relation to Animal Health, including provisions on the Protection of Animals during Depopulation for Disease Control, SANCO 2013-6777;
EU-81	Final Report of a Specific Audit carried out in Latvia from 15 to 19 June 2009 in order to Evaluate the Contingency Plans for Epizootic Diseases and the Eradication Programme for Rabies in the context of a General Audit, SANCO 2009-8259;
EU-82	Final Report of an Audit carried out in Estonia from 15 to 19 April 2013 in order to Evaluate the Implementation of Contingency Plans in relation to Animal Health, including provisions on the Protection of Animals during Depopulation for Disease Control, SANCO 2013- 6781;
EU-83	Final Report of a Specific Audit carried out in Poland from 7 to 16 April 2008 in order to Evaluate the Contingency Plans for Epizootic Diseases (in particular Foot and Mouth Disease and Classical Swine Fever) and to Follow-up Surveillance Activities for Bluetongue, SANCO 2008-7789
EU-84	a. (RU) Letter of 5 February 2014 from Russia to the EU, FS-SD 8/1640 b. (EN) translation
EU-85	Letter of 14 February 2014 from the EU to Russia, ARES(2014)398065, SANCO/G7/PD(2014)428299
EU-86	Letter of 6 March 2014 from the EU to Russia, ARES(2014)601346, SANCO/G7/PD/mh/(2014)630598
EU-87	Letter of 6 March 2014 from the EU to Russia, ARES(2014)605187, SANCO G7/PD/mh (2014)640752
EU-88	Working Document on EU preventive measures for ASF, Annex to the Letter ARES(2014)605187

EU-89	Protocol of the technical meeting-consultation between the EU and the FGBI ARRIAH, FGBI VGNKI experts as well as Rosselkhoznadzor representatives which was held at the FGBI Federal Center for Animal Health, Vladimir, 7 March 2014
EU-90	a. (RU) Letter of 12 March 2014 from Russia to the EU, FS-SD-4/3620 b. (EN) translation
EU-91	Letter of 13 March 2014 from the EU to Russia, including a table with the EU replies the topics mentioned in the letter FS-SD-4/3620 from Russia, ARES(2014)709435, SANCO/G7/PD/mh(2014)745829
EU-92	Letter of 21 May 2014 from the EU to Russia, including its 6 Annexes answering specific questions, ARES(2014)1658269, SANCO/G6/AB(2014)1782253
EU-93	a. (RU) Letter dated 16 May 2014 from Russia to the EU (received on 4 June 2014), FS-EN-8/7999 b. (EN) translation
EU-94	Letter of 13 June 2014 from the EU to Russia, ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505
EU-95	African swine fever in Lithuania, State Food and Veterinary Service, Lithuania, 21 August 2014
EU-96	African swine fever in Poland, Update on epidemiological situation and implemented actions, Brussels, 3-4 November 2014
EU-97	African swine fever in Latvia, Standing Committee on Plants, Animals, Food and Feed meeting, Brussels, 3-4 November 2014
EU-98	African swine fever in Estonia, Standing Committee on Plants, Animals, Food and Feed Committee, Brussels, 3-4 November 2014
EU-99	a. (RU) Letter of 29 August 2013 imposing a ban on products from Belarus, FS-AS-8/11188 b. (EN) translation
EU-100	a. (RU) Letter of 27 January 2014 lifting the ASF related restrictions with respect to the Mogilev Oblast, Belarus, FR-EN-8/1093 b. (EN) translation

I. INTRODUCTION

1. The SPS Agreement was concluded with the aim of allowing legitimate measures to protect animal and plant life and health based on scientific principles and scientific evidence, while prohibiting protectionist and abusive measures.

2. 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.

3. In spite of the EU's prompt response to the ASF outbreak, Russia banned trade in the products at issue from the entire EU territory, a measure blatantly disproportionate to the narrow location of the risk areas and in spite of EU's prompt response to control the spread of the disease and its thorough regionalization measures.

4. The Russian measures at issue consist of:

   - 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;

   - an EU-wide import ban on trade in live pigs and certain pig products, like fresh pork.

5. The measures adopted by Russia do not comply with the basic principles of the SPS Agreement. The EU presents its claims in the following order:

   - claims related to harmonization;

   - claims related to risk assessment;

   - claims related to regionalization;

   - claims related to risk management;

   - discrimination claims;

- claims related to control, inspection and approval procedures;

- transparency claims.

6. Russia did not harmonize its SPS measures according to the relevant international standards. Contrary to what Russia alleges in its notifications of the measures regarding the four EU MS concerned, all the measures at issue do not comply with and are not based on the relevant international standards, namely the OIE Terrestrial Code. While the international standards recommend allowing trade in the products at issue from ASF-free zones, Russia applies country-wide bans and does not allow imports from the ASF-free zones in the four EU MS concerned and in the rest of the EU. Consequently, Russia's measures are in breach of Articles 3.2, 3.1.and 3.3 of the SPS Agreement.

7. Russia did not follow the OIE standards and its departure from the said standards is not based on a risk assessment. Russia did not conduct any risk assessment before imposing the measures. Thus, the measures at issue are not based on scientific principles and scientific evidence. The Russian measures do not meet the requirements of Article 5.7 of the SPS Agreement as they are not based on the available pertinent information, including that from the relevant international organizations, or from sanitary measures applied by other Members. Although Russia obtained the information necessary for a more objective assessment of risks, it has not shown, and does not show, any sign of reviewing the sanitary measures accordingly within a reasonable period of time. The measures at issue do not appear to be provisional. Consequently, Russia's measures are in breach of Articles 5.1, 5.2 and 5.7 of the SPS Agreement.

8. Russia does not recognize the concept of regionalization with regard to the EU and did not take into account the relevant regionalization principles. Russia repeatedly alleges that it needs more information for a risk assessment and requests evidence which was already supplied, which is irrelevant or which amounts to *probatio diabolica*. Consequently, Russia's measures are in breach of Articles 6.1, 6.2. and 6.3 of the SPS Agreement.

9. Russia's appropriate level of protection or acceptable level of risk (ALOP) is not clearly stated. Russia's ALOP can be deduced as being rather low given Russia's ineffectiveness in eradicating ASF at the domestic level. Even if one were to assume Russia's ALOP as rather high, the EU demonstrates that there is an alternative reasonably available, taking into account technical and economic feasibility, which could achieve Russia's ALOP while being significantly less trade restrictive than the contested measures. Such an alternative is to follow the OIE standards, which allow trade in the products at issue from the ASF-free zones. Regionalization is perfectly compatible with a very high level of protection. Consequently, Russia's measures are in breach of Articles 5.6, 5.3 and 5.4 of the SPS Agreement.

10. Russia discriminates at two different levels: it treats imported products from the EU less favourably than comparable domestic products. It also treats the EU imports at issue less favourably in comparison to imports from other countries. The measures at issue are discriminatory and amount to a disguised restriction on international trade.

11. The discrimination between Russian and EU products is arbitrary and unjustifiable. First, Russia did not impose the same restrictions on the internal movement of the products associated with the ASF risk coming from non-affected areas of its territory as it did with those coming from the non-affected areas of the EU. Second, Russia's domestic measures are ineffective in containing the spread of the ASFV, both in domestic pigs and in wild boar, while Russia bans trade in the products at issue from the whole EU.

12. Furthermore, Russia did not impose the same restrictions on imports of the products associated with the ASF risk coming from certain other countries, both WTO Members (Ukraine) and non-WTO Members (Belarus). Finally, Russia's notifications to the SPS Committee are inaccurate and contradictory, confirming that the measures are in fact disguised restrictions on international trade. Consequently, Russia's measures are in breach of Article 2.3 of the SPS Agreement.

13. Russia maintains different ALOPs in different yet comparable situations. First, Russia's measures with respect to the EU products are far more stringent (an EU-wide ban) than the measures applied with respect to the internal movement of the domestic products associated with the ASF risk within Russia. Second, Russia's

internal measures are not very effective. Thus, Russia's ALOP with respect to the EU products is extremely high while Russia's ALOP with regard to its domestic products is rather low. However, in both circumstances the measures are supposed to address the same risk and are oriented towards the same category of products. Consequently, Russia's measures are in breach of Article 5.5 of the SPS Agreement.

14. Russia consistently fails to conduct in a WTO-compatible manner its control, inspection and approval procedures. 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 zones in the EU and/or with respect to appropriately treated or processed products, on the basis of the information provided by the EU. The EU repeatedly approached Russia since early February 2014 to obtain an adaptation of the measures at issue to the regionalization measures adopted by the EU. Russia was provided with all requested information, in addition to further information provided at the EU's own initiative. Furthermore, several bilateral meetings were held between the EU authorities and the Russian authorities between February and July 2014, at which further information and explanations were provided. However, Russia failed to ensure, with respect to its own procedures for checking and ensuring the fulfilment of sanitary measures, that such procedures have been undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products. Consequently, Russia's measures are in breach of Article 8 and Annex C(1)(a), (b) and (c) of the SPS Agreement.

15. Finally, Russia failed to observe the transparency obligations in the SPS Agreement. Russia did not immediately notify its measures to the WTO and did not allow other Members the opportunity to comment or did not notify the measures at all, as in the case of the EU-wide ban. EU exporters could learn about the measures as the consignments were rejected at the border. Consequently, Russia's measures are in breach of Article 7 and Annex B(1), (2), (5) and (6) of the SPS Agreement.

II. PROCEDURAL HISTORY

16. 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). The request was circulated to the WTO Members on 14 April 2014.[1]

17. The consultations took place on 30 April and 1 May 2014 with a view to reaching a satisfactory settlement of the matter. Unfortunately, the consultations failed to settle the dispute.

18. The EU requested the establishment of a panel pursuant to Article 6 of the DSU on 27 June 2014 and its request was circulated to the Membership on 30 June 2014.[2] The DSB considered this request at its meeting on 10 July 2014, at which time Russia objected to the establishment of a panel.

19. The EU renewed its request for the establishment of a panel and the DSB established it with standard terms of reference at the DSB meeting of 22 July 2014. Australia, China, India, Japan, the Republic of Korea, Norway, Chinese Taipei, United States (US), Brazil and South Africa have reserved their right to participate in the panel proceedings as third parties.

20. On 13 October 2014 the EU requested the Director-General of the WTO to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 23 October 2014, the WTO Director-General composed the Panel.[3]

21. Following the resignation on 30 October 2014 of Mr Ulrich Kihm, Panel member, and pursuant to a request from the EU on 3 November 2014, the Director-General appointed a new member of the Panel on 6 November 2014.[4]

22. However, Mr Steve Hathaway, the new member of the Panel, also announced his resignation on 26 November 2014 and the Director-General finally appointed the

1 WT/DS475/1.
2 WT/DS475/2.
3 WT/DS475/3.
4 WT/DS475/4.

third member of the Panel on 4 December 2014, following the request of the EU of 28 November 2014. Accordingly, the composition of the Panel is as follows: [5]

Chairman: Mr Mohammad Saeed

Members: Ms Delilah Cabb Ayala

Mr Juan Antonio Dorantes

III. FACTUAL BACKGROUND

A. African Swine Fever

1. The ASF virus

23. African swine fever is caused by an enveloped DNA virus which belongs to the genus Asfivirus of the family Asfarviridae. The ASF virus (ASFV) originates in the three African wild species of pigs[6], which do not show clinical signs of disease but rather act as reservoirs of the infection.

24. The ASFV becomes a devastating infectious disease, usually deadly, in the case of both wild boars and domestic pigs of the *Sus scrofa* species. It can be transmitted in particular either via direct animal contact, semen, ova and embryo, via dissemination of contaminated food (e.g. sausages or uncooked meat) or via contacts with objects or human beings that were in contact with the virus. Ticks of the genus *Ornithodoros* are natural hosts of the virus and act as biological vectors of the infection.

25. Domestic pig production systems may be categorised, for practical purposes, according to the applied biosecurity measures into high biosecurity, limited biosecurity and free ranging production systems. In a broad sense, the concept of biosecurity refers to the implementation of preventive measures to avoid the

[5] WT/DS475/5.

[6] The warthog (*Phacochoerus africanus*), the red river hog (*Potamochoerus porcus*) and possibly the giant forest hog (*Hylochoerus meinertzhageni*).

introduction of diseases to herds and to contain the spread of infections if already present in a herd.[7]

26. In ASF-infected areas, control in the EU is done through killing of all pigs in the infected farms and destruction of cadavers and litter, cleaning and disinfection, designation of the infected and restricted zones and movement controls and restrictions of pigs and pig products, as well as epidemiological investigation (tracing of sources and possible spread of infection).

27. Wild boar (*Sus scrofa*) is a sedentary species with a short native dispersal range, not exceeding 10 km in principle. The home range area may vary according to population density and structure, food availability, climatic conditions, landscape structure and hunting practices. Movements are increased during the hunting season and during the mating season, in the latter case especially with regard to adult males. Wild boars do not migrate but the ASF infection may spread when there is continuity in their geographical distribution (corridors) and high population densities.[8]

28. In ASF infected areas the appropriate measures concern the designation of the infected zone and control of wild boar movement, including measures concerning hunters and trophies. Increased or inappropriate hunting of wild boar worsens the situation and contributes to further spread of the disease, through animals trying to escape the operation.[9]

29. Ticks do not play an active role in the geographical spread of the ASFV but rather act as reservoirs of the virus. Wild boars have never been found infested by ticks because they do not rest inside burrows potentially infested by ticks. In some European regions ticks from the species *Ornithodoros erraticus* can be important in maintaining local foci of ASF viruses, where domestic pigs are kept under traditional systems.[10]

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[7] In a broad sense, the concept of biosecurity refers to the implementation of preventive measures to avoid the introduction of diseases to herds and to contain the spread of infections if already present in a herd. EFSA ASF Scientific Opinion 2010, p. 22 (Exhibit EU-24).

[8] EFSA ASF Scientific Opinion 2010, p.29 (Exhibit EU-24).

[9] EFSA ASF Scientific Opinion 2010, p.29 (Exhibit EU-24).

[10] So far this was documented in Portugal and Spain. Estonia, Latvia, Lithuania and Poland have never been documented as affected by such ticks.

30. 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.

31. ASF is a well-known disease and several publications already exist. The World Organisation for Animal Health (OIE) has developed applicable international standards, including, *inter alia*, testing and diagnosis methods, as well as recommendations related to safe trade restrictions. Cases and outbreaks of ASF need to be notified to the OIE.

2. The OIE standards

32. The OIE is the relevant international standards setting body dealing with animal health issues. The pertinent rules for the present case in the OIE Terrestrial Animal Health Code (OIE Terrestrial Code) are mainly contained in Chapter 15.1 on ASF[11] and Chapter 4.3 on Zoning and Compartmentalization.[12] Other relevant provisions are to be found in Chapter 1 on Animal Health Surveillance and in the OIE Terrestrial Manual.

33. The version of the OIE Terrestrial Code in force at the date of the establishment of the Panel (22 July 2014) is the 23rd edition, adopted in May 2014.[13] These are the only international standards with regard to ASF.

34. Article 4.3.1. of the OIE Terrestrial Code provides that for the purposes of the Code zoning and regionalization have the same meaning. Zoning applies to an animal subpopulation defined primarily on a geographical basis (using natural, artificial or legal boundaries) and takes into account good management including biosecurity plans.[14]

35. Article 4.3.2. reads in its relevant part:

> The *exporting country* should be able to demonstrate, through detailed documentation provided to the *importing country*, that it has implemented the recommendations in the *Terrestrial Code* for establishing and maintaining such a *zone* or *compartment*.

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11 Exhibit EU-3.
12 Exhibit EU-4.
13 http://www.oie.int/international-standard-setting/terrestrial-code/ (Exhibit EU-1).
14 Exhibit EU-4.

> An *importing country* should recognise the existence of this *zone* or *compartment* when the appropriate measures recommended in the *Terrestrial Code* are applied and the *Veterinary Authority* of the *exporting country* certifies that this is the case.[15]

36. The EU will demonstrate in detail below how it supplied in a timely manner the more than the necessary information to Russia in order to objectively demonstrate that the disease free areas or areas of low disease prevalence are and are likely to remain disease free areas or areas of low disease prevalence.

37. Equally the EU will demonstrate that Russia failed to reach without undue delay a decision on the regionalization measures in the EU and to consequently allow trade to resume from disease free areas or areas of low disease prevalence.

38. Chapter 15.1 of the OIE Terrestrial Code provides for the standards for trade in live pigs and pig products.

39. The relevant standard for trade in live domestic pigs from ASF free countries, zones or compartments is stated in Article 15.1.5. of the OIE Terrestrial Code:

> *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that the *animals*:
>
> 1) showed no clinical sign of ASF on the day of shipment;
>
> 2) were kept in an ASF free country, *zone* or *compartment* since birth or for at least the past 40 days.

40. Article 15.1.8. is the relevant standard with regard to trade in semen of domestic pigs from ASF free countries, zones or compartments:

> *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that:
>
> 1. the donor *animals*:
>
> a. were kept in an ASF free country, *zone* or *compartment* since birth or for at least 40 days prior to collection;
>
> b. showed no clinical sign of ASF on the day of collection of the semen;
>
> 2. the semen was collected, processed and stored in conformity with the provisions of Chapters 4.5. and 4.6.

[15] Words in italics are displayed as in the OIE Terrestrial Code.

41. Article 15.1.10. is the relevant standard for trade in *in vivo* derived embryos of domestic pigs from ASF free countries, zones or compartments:

> *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that:
>
> 1. the donor females:
>
> a. were kept in an ASF free country, *zone* or *compartment* since birth or for at least 40 days prior to collection;
>
> b. showed no clinical sign of ASF on the day of collection of the embryos;
>
> 2. the embryos were collected, processed and stored in conformity with the provisions of Chapters 4.7. and 4.9., as relevant.

42. For trade in fresh meat of domestic pigs from ASF free countries, zones or compartments the applicable standard is to be found in Article 15.1.12.:

> *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that the entire consignment of *fresh meat* comes from *animals* which:
>
> 1) have been kept in an ASF free country, *zone* or *compartment* since birth or for at least the past 40 days, or which have been imported in accordance with Article 15.1.5. or Article 15.1.6.;
>
> 2) have been slaughtered in an approved *abattoir*, have been subjected to ante- and post-mortem inspections in accordance with Chapter 6.2., and have been found free of any sign suggestive of ASF.

43. With respect to the importation of fresh meat of wild boars from ASF free countries, zones or compartments the standard embodied in Article 15.1.13. of the OIE Terrestrial Code provides that:

> *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that:
>
> 1) the entire consignment of *fresh meat* comes from *animals* which:
>
> a) have been killed in an ASF free country or *zone*;
>
> b) have been subjected to a post-mortem inspection in accordance with Chapter 6.2. in an approved examination centre, and have been found free of any sign suggestive of ASF;
>
> and, if the *zone* where the *animal* has been killed is adjacent to a zone with *infection* in wild pigs:
>
> 2) a sample has been collected from every *animal* killed and has been subjected to a virological test and a serological test for ASF, with negative results.

44. Article 15.1.14. concerns the importation of meat products of pigs (either domestic or wild), or of products of animal origin (from fresh meat of pigs) intended for use in animal feeding, for agricultural or industrial use, or for pharmaceutical or surgical use, or of trophies derived from wild pigs:

> *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that the products:
>
> 1) have been prepared:
>
> a) exclusively from *fresh meat* meeting the conditions laid down in Articles 15.1.12. or 15.1.13., as relevant;
>
> b) in a processing establishment:
>
> i) approved by the *Veterinary Authority* for export purposes;
>
> ii) processing only *meat* meeting the conditions laid down in Articles 15.1.12. or 15.1.13., as relevant;
>
> OR
>
> 2) have been processed in an establishment approved by the *Veterinary Authority* for export purposes so as to ensure the destruction of the ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV.

45. Article 15.1.16. of the OIE Terrestrial Code is the relevant standard for trade in bristles from pigs:

> *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that these products:
>
> 1. come from an ASF free country, *zone* or *compartment*; or
>
> 2. have been processed in an establishment approved by the *Veterinary Authority* for export purposes so as to ensure the destruction of the ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV.

46. Accordingly, the applicable international standards clearly allow trade in the products at issue from ASF-free zones and trade in the products which were processed such as to ensure the destruction of the ASFV regardless whether they originate in a ASF-free country or zone or not.

3. ASF in Russia

3.1. Historic Overview

47. The first ASF cases were reported on the former USSR territory in 1977, when the third outbreak (Tavda) was located 2600km from the initial one in Odessa.[16] More recently, ASF was introduced in Russia for the first time in the Chechnya Republic in November-December 2007, when five cases in wild boar were reported to the OIE.[17]

48. Since then ASF has become apparently endemic in wild boars in the region. Mainly due to poor measures in the backyard pig sector, 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. [18]

3.2. Present ASF situation in Russia

49. The ASFV circulating in Russia belongs to the Genotype II, which is a highly virulent virus.[19] In the period 2007-2013 there were 226 ASF outbreaks in wild boar in Russia, including 93 cases called "infected objects" which were not notified to the OIE. During the same period there were 358 ASF outbreaks in domestic pigs in Russia.[20] Because some instances are not reported the full extent of the disease situation in Russia is uncertain. The risk that ASF is endemic in Russia is high, in particular because of challenges in outbreak control in the backyard pig sector. The risk is also high that the virus will further spread to other areas.[21]

50. The wild boar population in Russia is significant and widely spread in the country, although in some areas there are lower population densities. Wild boar is not present

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16 ASF epidemic situation, prevention and control of ASF in Russia, presentation by RF Chief Veterinary Officer Yevgeny A. Nepoklonov, p.9 http://web.oie.int/RR-Europe/eng/Regprog/docs/PPT/GF-TADs%20RSC5%20-%20session%204%20-%20ASF%20Russia.pdf (Exhibit EU-22).

17 African Swine Fever spread in the Russian Federation and the risk for the region, FAO, December 2009, p. 3 (Exhibit EU-23).

18 African Swine Fever from 2007 to 2014, compilation by the European Commission of maps from OIE, http://ec.europa.eu/food/animal/diseases/docs/presentation_asf_en.pdf (Exhibit EU-21).

19 EFSA ASF Scientific Opinion 2010, pp. 10-11 and 72 (Exhibit EU-24).

20 Figure 4, EFSA ASF Scientific Opinion 2014, p. 12 (Exhibit EU-26).

21 EFSA ASF Scientific Opinion 2014, p. 2 (Exhibit EU-26).

in the northern parts of the European part of Russia.[22] The risk that ASF remains endemic in wild boar in Russia is moderate.[23]

51. The production systems of the Russian Federation can be divided into three main categories: (i) industrial production units (61% of the total pig population), (ii) small commercial farms (5% of the total pig population) and (ii) backyard subsistence production (34% of the total pig population). While the industrial units have in general a high level of biosecurity, the other two categories have a very low level of biosecurity.[24]

52. Domestic pigs kept in limited biosecurity or free ranging populations receive cheap food (swill feeding) or are scavengers, which facilitates exposure to the ASFV.[25] This is confirmed by an analysis of all ASF outbreaks in Russia since 2007, according to which 63.2 % of the total number of outbreaks occurred in the backyard pig production sector. [26]

53. The main Russian legal instruments regulating ASF are the Instruction on Measures for the Prevention and Eradication of African Swine Fever of 21 November 1980 (ASF Instruction), approved by the General Directorate of the Ministry of Veterinary Agriculture of the USSR,[27] the letter from the FSVPS of 6 June 2007 on African Swine Fever Prophylaxis, No. FS/SD-2/5356[28] and the Order 144 of the Ministry of Agriculture of the Russian Federation of 16 April 2009 on the Measures to Prevent the Spread of African Swine Fever in the Territory of the Russian Federation (ASF Order).[29]

54. In the event of an ASF outbreak, the Russian measures provide for the delimitation of a protection zone, called "first endangered zone", with a radius of 5-20 km from the epizootic hotbed. This main area is encircled by a surveillance zone, called

22 EFSA ASF Scientific Opinion 2010, p. 28 (Exhibit EU-24).
23 EFSA ASF Scientific Opinion 2014, p. 2 (Exhibit EU-26).
24 EFSA ASF Scientific Opinion 2014, p. 11 (Exhibit EU-26).
25 EFSA ASF Scientific Opinion 2010, p. 23 (Exhibit EU-24).
26 EFSA ASF Scientific Opinion 2014, p. 11 (Exhibit EU-26).
27 Exhibit EU-18.
28 Exhibit EU-19.
29 Exhibit EU-20.

"second endangered zone", with a radius of up to 100–150 km from the epizootic hotbed.[30]

55. Russia allows intra-Russian trade in live pigs and pig products from the non-affected regions in Russia, in stark contrast to the EU-wide ban preventing trade in the EU products at issue originating in non-affected areas in the EU. Russia does not have any ASF contingency plan.[31]

3.3. ASF transmission from Russia Westwards

56. 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.[32]

57. All instances in the four recently affected EU MS occurred at very close proximity with the Russian and Belarussian borders, apparently at a time when intensive hunts were conducted in the neighbouring countries. Hunts disperse wild boar and may have channelled infected wild boars to the EU MS:

> In the context of possible wild boar role in the spread of ASF, the intensive hunting of animals in the affected areas of the Russian Federation needs to be seriously taken into account. It is well known that intensive hunting pressure on wild boar population leads to dispersion of groups and individuals (Sodeikat and Pohlmeyer, 2003; Thurfjell et al., 2013). Heavy hunting of the affected wild boar populations may significantly increase transmission and facilitate progressive geographical spread of ASF, as may have been the case in January 2014 in Ukraine. The two positive wild boar found in Lugansk Oblast have escaped from intensive hunting on the Russian side of the border to Ukraine. Similar incidents are possible along the border of affected countries (e.g. Belarus) with the EU Member States, after the recent preventive depopulation campaign that was carried out in Belarus in wild boar.[33]

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30 Article 4.1.1. of the ASF Instruction (Exhibit EU-18).

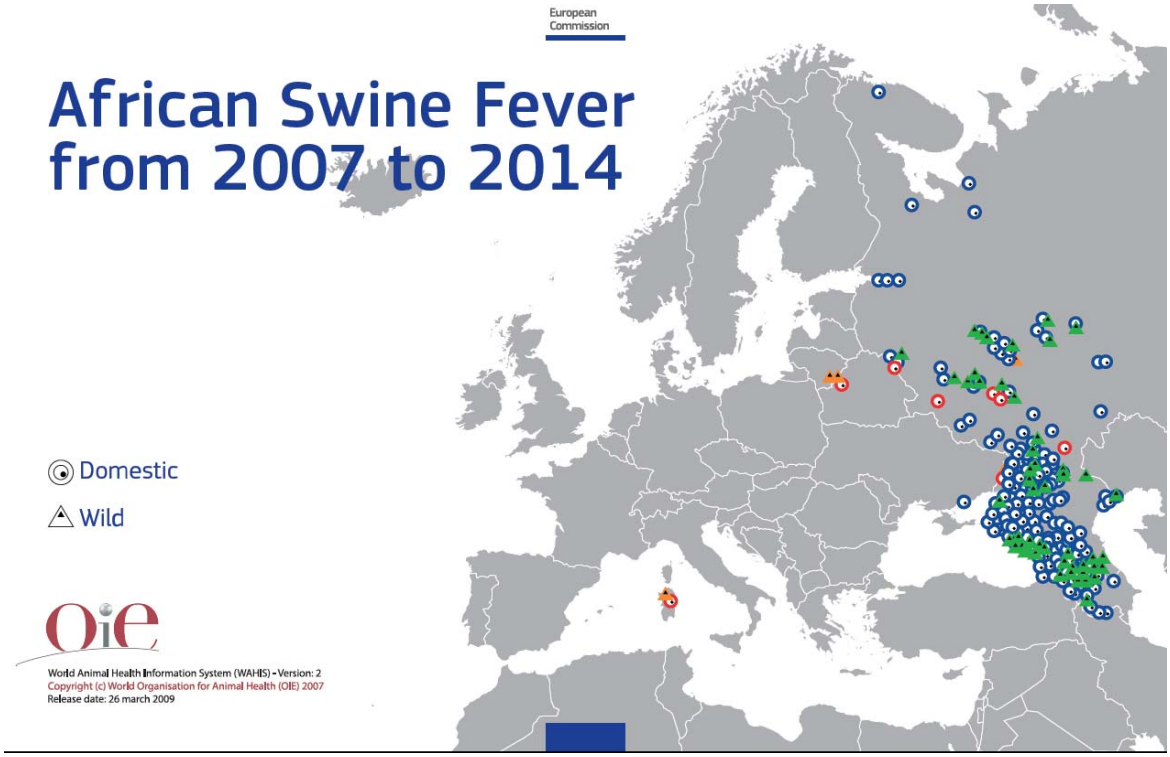
31 African Swine Fever spread in the Russian Federation and the risk for the region, FAO, December 2009, p. 5 (Exhibit EU-23).

32 ASF diagnosis and molecular characterization Lithuania, EURL-ASF, CISA-INIA, 1317, 28/10/2014 (Exhibit EU-27); ASF diagnosis and molecular characterization Poland, EURL-ASF, CISA-INIA, 1145, 30/09/2014 (Exhibit EU-28); ASF diagnosis and molecular characterization Latvia, EURL-ASF, CISA-INIA, 1232, 17/10/2014 (Exhibit EU-29); ASF diagnosis and molecular characterization Estonia, EURL-ASF, CISA-INIA, 1375, 7/11/2014 (Exhibit EU-30).

33 EFSA ASF Scientific Opinion 2014, p. 14 (Exhibit EU-26).

58. Wild boar is not a migratory species and ASF spread occurs when wild boar movements are provoked by hunting and in particular when there are corridors linking different populations, such as the corridors linking the wild boar populations in Belarus and Ukraine to those in the EU. In particular, the wild boar populations of Belarus are well connected with those of Poland and Lithuania.[34] There may also be some corridors linking infected areas in Russia to Lithuania or Latvia.[35]

I. ASF spread from the Caucasus to the EU, map as of January 2014[36]



4. ASF in the EU

4.1. Historic Overview

59. The ASFV was first introduced in Europe in 1957 in Portugal, through international catering waste (airline). This first outbreak was rapidly eradicated, but in 1960 the virus entered again in Lisbon and spread through the rest of Portugal and into Spain, where the ASFV remained endemic until 1995. During this period, some other outbreaks occurred in other European countries, affecting Andorra (1975), Belgium

34 EFSA ASF Scientific Opinion 2010, p. 28 (Exhibit EU-24).
35 EFSA ASF Scientific Opinion 2010, p. 29 (Exhibit EU-24).

(1985), France (1964, 1967 and 1974), Malta (1978), the Netherlands (1986) and Italy (1967, 1969 and 1993), including Sardinia, where ASF has remained endemic since 1978.

60. With the exception of the island of Sardinia, ASF has been eradicated elsewhere in the EU prior to 2014.[37]

4.2. Present ASF situation in the EU

61. After the initial outbreak in the Caucasus in 2007, ASF spread North and West within Russia. 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, such as: disinfection of livestock vehicles, checks on personal consignments, suspending livestock markets, enhanced biosecurity on pig farms, surveillance and testing of domestic pigs and wild boar, creation of buffer zones and measures to limit wild boar movements across borders. The EU MS contingency plans to ensure effective implementation of disease control measures laid down in EU legislation in case of outbreaks of ASF have also been revised and diagnostic capabilities were enhanced.[38]

62. 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. The isolated virus strains are identical, showing 100% homology with ASF viruses isolated in Belarus, as confirmed by the Reference Laboratory of the European Union for ASF (CISA-INIA, Madrid, Spain).[39]

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[36] Exhibit EU-21.

[37] EFSA ASF Scientific Opinion 2010, p. 9 (Exhibit EU-24).

[38] Contingency Plan for Classical Swine Fever (CSF) and African Swine Fever (ASF) of Lithuania, 30 December 2011(Exhibit EU-74), Polish Veterinary African Swine Fever Contingency Plan, January 2014 (Exhibit EU-75), Plan for Combating Very Dangerous Infectious Animal Diseases of the Republic of Latvia, 28 February 2013 (Exhibit EU-76) and Code of Conduct for Control of African Swine Fever of Estonia, 11 April 2013 (Exhibit EU-77).

[39] ASF diagnosis and molecular characterization Lithuania, EURL-ASF, CISA-INIA, 1317, 28/10/2014 (Exhibit EU-27); ASF diagnosis and molecular characterization Poland, EURL-ASF, CISA-INIA, 1145, 30/09/2014 (Exhibit EU-28); ASF diagnosis and molecular characterization Latvia, EURL-ASF, CISA-INIA, 1232, 17/10/2014 (Exhibit EU-29); ASF diagnosis and molecular characterization Estonia, EURL-ASF, CISA-INIA, 1375, 7/11/2014 (Exhibit EU-30).

63. The wild boar populations in Russia and Belarus are connected to some wild boar populations in the Eastern EU MS through geographic corridors.[40] As already explained, the most plausible reason for the westward diffusion of ASF through this geographic corridor is increased hunting pressure on the Belarussian side.[41] The infected wild boar populations in these Eastern parts of the four respective EU MS are not connected to other wild boar populations further West in the EU.

64. According to the EFSA's Scientific Report on the Evaluation of possible mitigation measures to prevent introduction and spread of African swine fever virus through wild boar (EFSA ASF Scientific Report) "no evidence was found in scientific literature proving that wild boar populations can be drastically reduced by hunting or trapping in Europe. The main reasons are the adaptive behaviour of wild boar, compensatory growth of the population and the possible influx of wild boar from adjacent areas. Thus, drastic hunting is not a tool to reduce the risk for introduction and spread of ASFV in wild boar populations".[42]

65. Soft ticks (*Ornithodorus erraticus*) are an ASFV vector in domestic pigs, but not in wild boars (which do not live in burrows). In the EU in the past ticks affected pigs in Portugal and Spain.[43] The four EU MS recently concerned by ASF have adopted measures to be taken in the case of ticks, mentioned in their contingency plans, but there have never been such ticks documented on their territory.

66. The EU domestic pig production systems are among the best in the world and highly effective in ASF prevention and eradication. Notably the high biosecurity production systems comply with a series of factors designed to ensure a proper protection against the ASFV:[44]

- Presence of physical barriers (fencing-internal and external), bird-proof netting on buildings and facilities for quarantine.

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40 The wild boar populations in Russia and Belarus are connected to some wild boar populations in the EU, mainly in Lithuania and Poland. EFSA ASF Scientific Opinion 2010, p. 28 (Exhibit EU-24).

41 EFSA ASF Scientific Opinion 2014, p. 14 (Exhibit EU-26).

42 EFSA ASF Scientific Report 2014 (Exhibit EU-25).

43 EFSA ASF Scientific Opinion 2014, p. 15 (Exhibit EU-26).

44 EFSA ASF Scientific Opinion 2010, p. 22 (Exhibit EU-24).

- Minimal and controlled people traffic and access to the farm (restriction of visits and provision of boots and clothes for visitors), fixed labour for fixed sections, equipment not shared by different sections.

- Minimal and controlled animal introduction, including quarantine for newly introduced animals.

- Husbandry type: movement records, disease records, disposal of pigs in an incinerator, slurry disposal facilities, feed loaded outside the fencing, waste management put in place, water from safe sources.

- Procedure of washing and disinfection of transport vehicles, main entrance, changing facilities for workers and visitors.

- Pest-control programmes.[45]

67. The EU has laid down prevention and control measures to be applied where ASF is suspected or confirmed either in holdings or in wild boars. They include information measures and measures to prevent and eradicate the disease. The overarching piece of legislation providing the tool for the control of ASF in the EU is the Council Directive 2002/60/EC of 27 June 2002 (Directive 2002/60).[46]

68. The EU ASF related measures are structured around this central piece of legislation. EU MS have to prepare and keep up-to-date national contingency plans, which are submitted to the European Commission for examination. The European Commission's Food and Veterinary Office (FVO) conducts regular inspections in the EU MS and makes recommendations which are complied with by the EU MS concerned.[47] Once an ASF outbreak in domestic pigs is confirmed, there are specific

[45] EFSA ASF Scientific Opinion 2010, pp. 22-23 (Exhibit EU-24).

[46] OJ L 192, p. 27 (Exhibit EU-31).

[47] Such reports of the inspections were provided to Russia by the Letter of 7 February 2014: Final Report of a Specific Audit carried out in Lithuania from 20 to 24 July 2009 in order to Evaluate the Contingency Plans for Epizootic Diseases and the Eradication Programme for Rabies in the context of a General Audit, SANCO 2009-8265 (Exhibit EU-78); Final Report of an Audit carried out in Lithuania from 27 February to 2 March 2012 in order to Evaluate the Actions Taken during Recent Outbreaks of Classical Swine Fever and to Assess Contingency Planning of Epizootic Disease, SANCO 2012-6386 (Exhibit EU-79); Final Report of an Audit carried out in Latvia from 4 to 8 March 2013 in order to Evaluate the Implementation of Contingency Plans in relation to Animal Health, including provisions on the Protection of Animals during Depopulation for Disease Control, SANCO 2013-6777 (Exhibit EU-80); Final Report of a Specific Audit carried out in Latvia from 15 to 19 June 2009 in order to Evaluate the Contingency Plans

regionalization measures providing for a protection zone and an adjacent surveillance zone. Within 90 days of the confirmation of a primary case in wild boar, the EU MS concerned submits to the European Commission a national eradication plan, which is different from the national contingency plan.[48] The European Commission takes the appropriate measures for delimitating the risk areas, taking into account factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary controls.

69. ASF is compulsorily and immediately notifiable to the competent authority in all the EU MS.[49] Then the MS have the obligation to notify the disease and provide relevant information to the Commission and the other EU MS.[50] Public information campaigns are regularly conducted in order to raise awareness and preparedness.

70. The European Commission ensures technical assistance to the Member States' national laboratories via the EU Reference Laboratory for African swine fever (EURL-ASF), as well as the scientific support of EFSA for risk assessment and the general coordination of EU MS actions. The FVO is also engaged in a series of missions in the EU MS, in order to audit their capability to respond to highly contagious animal diseases, like ASF.

71. The national contingency plans of the EU MS are regularly updated, taking into account the recommendations from the European Commission. Russia has already received the latest editions of the contingency plans of Lithuania, Poland, Latvia and Estonia.[51] The national contingency plans start by describing the ASFV operation and the legal framework, continuing with the principles for the control and eradication of the disease and the criteria for considering an outbreak to be

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for Epizootic Diseases and the Eradication Programme for Rabies in the context of a General Audit, SANCO 2009-8259 (Exhibit EU-81); Final Report of an Audit carried out in Estonia from 15 to 19 April 2013 in order to Evaluate the Implementation of Contingency Plans in relation to Animal Health, including provisions on the Protection of Animals during Depopulation for Disease Control, SANCO 2013- 6781 (Exhibit EU-82); and Final Report of a Specific Audit carried out in Poland from 7 to 16 April 2008 in order to Evaluate the Contingency Plans for Epizootic Diseases (in particular Foot and Mouth Disease and Classical Swine Fever) and to Follow-up Surveillance Activities for Bluetongue, SANCO 2008-7789 (Exhibit EU-83).

[48] Article 16(1) of the Directive 2002/60 (Exhibit EU-31).

[49] Article 3(1) of the Directive 2002/60 (Exhibit EU-31).

[50] Article 3(2) of the Directive 2002/60 (Exhibit EU-31).

[51] Attached to the Letter of 21 May 2014 from the EU to Russia, ARES(2014)1658269, SANCO/G6/AB(2014)1782253 (Exhibit EU-92).

eliminated. They also contain practical information about the decision chain at various levels in case of ASF outbreaks, including the tasks of the different institutions and persons involved, about the financing of the activities, as well as about the responsibility for training and organisational preparation.[52] The preparation of the contingency plans allows EU MS a prompt response to the challenges posed by the ASFV.

72. Where a holding contains one or more pigs suspected of being ASFV infected, the competent authorities in the EU MS immediately investigate the situation in order to confirm or rule out the presence of the said disease in accordance with the procedures laid down in the diagnostic manual.[53] These procedures are detailed in Commission Decision 2003/422/EC (Decision 2003/422) of 26 May 2003 approving an African swine fever diagnostic manual.[54]

73. When an EU MS competent authority considers that the presence of ASF in a holding cannot be ruled out, it immediately places the holding under official surveillance. All pigs have to be counted, their movements restricted, no pigs may enter or leave the holding, no pig carcases may leave the holding without an authorisation and no meat, pig products, semen, ova or embryos of pigs, animal feed, utensils, materials or waste susceptible to transmit ASF may leave the holding without authorisation. In addition, the movement of persons and vehicles to or from the holding is subject to written authorisation and appropriate means of disinfection are used at the entrances and exits.[55]

74. An additional set of measures is taken in cases where the presence of ASF is officially confirmed in a holding. These measures comprise the killing of all the pigs while a sufficient number of samples are taken, the processing of carcasses under official supervision, the tracing of pig meat which already left the holding, followed by processing under official supervision and the tracing and destruction of the

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52 Contingency Plan for Classical Swine Fever (CSF) and African Swine Fever (ASF) of Lithuania, 30 December 2011 (Exhibit EU-74), Polish Veterinary African Swine Fever Contingency Plan, January 2014 (Exhibit EU-75), Plan for Combating Very Dangerous Infectious Animal Diseases of the Republic of Latvia, 28 February 2013 (Exhibit EU-76), and the Code of Conduct for Control of African Swine Fever of Estonia, 11 April 2013 (Exhibit EU-77).

53 Article 4(1) of the Directive 2002/60 (Exhibit EU-31).

54 OJ L 143, p. 35 (Exhibit EU-32).

55 Article 4(2) of the Directive 2002/60 (Exhibit EU-31).

semen, ova or embryos of pigs collected from the holding during the period between the probable introduction of the disease into the holding and the taking of official measures. After the pigs have been eliminated, the buildings used for housing the pigs, and the vehicles used for transporting them are to be cleaned and if necessary disinsectised and disinfected.[56]

75. Directive 2002/60 further provides for the delimitation of a protection zone and a surveillance zone. Accordingly, immediately after the diagnosis of ASF has been officially confirmed in pigs on a holding, the competent authority establishes a protection zone with a radius of at least three kilometres around the outbreak site, which is itself included in a surveillance zone of a radius of at least 10 kilometres.[57]

76. This is the first tier of the complex EU regionalization measures. A second tier is added by specific European Commission decisions, as approved by the Standing Committee on Plants, Animals, Food and Feed. The second tier also comprises the zones where restrictions apply with respect to the risk posed by the ASF situation in wild boar. The EU MS eradication plans, put in place once ASF is confirmed in wild boar, contain detailed information, including maps, on the delimitation of the ASF risk zones. These risk zones take into account a worse-case scenario and provide for measures well beyond the natural home range of wild boar.

77. Since the first ASF case in wild boar in Lithuania occurred near the border with Belarus in January 2014, the following successive measures were taken by the European Commission with regard to the delimitation of relevant areas in the EU MS concerned[58]:

- Commission Implementing Decision 2014/43/EU of 27 January 2014 concerning certain interim protective measures relating to African swine fever in Lithuania;[59]

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56 Article 5(1) of the Directive 2002/60 (Exhibit EU-31).

57 Article 9(1) of the Directive 2002/60 (Exhibit EU-31).

58 For a recent overview of ASF situation in the four affected EU MS at issue see African swine fever in Lithuania, State Food and Veterinary Service, Lithuania, 21 August 2014 (Exhibit EU-95), African swine fever in Poland, Update on epidemiological situation and implemented actions, Brussels, 3-4 November 2014 (Exhibit EU-96), African swine fever in Latvia, Standing Committee on Plants, Animals, Food and Feed meeting, Brussels, 3-4 November 2014 (Exhibit EU-97) and African swine fever in Estonia, Standing Committee on Plants, Animals, Food and Feed, Brussels, 3-4 November 2014 (Exhibit EU-98).

59 OJ L 26, p.44 (Exhibit EU-33)

- Commission Implementing Decision 2014/93/EU of 14 February 2014 concerning certain protective measures relating to African swine fever in Lithuania;[60]

- Commission Implementing Decision 2014/100/EU of 18 February 2014 concerning certain interim protective measures relating to African swine fever in Poland;[61]

- Commission Implementing Decision 2014/134/EU of 12 March 2014 concerning certain protective measures relating to African swine fever in Poland;[62]

- Commission Implementing Decision 2014/178/EU of 27 March 2014 concerning animal health control measures relating to African swine fever in certain Member States (Decision 2014/178);[63]

- Commission Implementing Decision 2014/417/EU of 27 June 2014 concerning certain interim protective measures relating to African swine fever in Latvia;[64]

- Commission Implementing Decision 2014/448/EU of 8 July 2014 amending Implementing Decision 2014/178/EU as regards African swine fever in Latvia;[65]

- Commission Implementing Decision 2014/502/EU of 24 July 2014 concerning certain interim protective measures relating to African swine fever in Lithuania;[66]

- Commission Implementing Decision 2014/513/EU of 31 July 2014 amending the annex to Implementing Decision 2014/178/EU as regards the areas in Lithuania, Latvia and Estonia under restriction for African swine fever;[67]

- Commission Implementing Decision 2014/530/EU of 13 August 2014 concerning certain interim protective measures relating to African swine fever in Latvia;[68]

60 OJ L 46, p.20 (Exhibit EU-34).
61 OJ L 50, p.35 (Exhibit EU-35).
62 OJ L 74, p.63 (Exhibit EU-36).
63 OJ L 95, p.47 (Exhibit EU-37).
64 OJ L 192, p.66 (Exhibit EU-38).
65 OJ L 201, p.31 (Exhibit EU-39).
66 OJ L 222, p.20 (Exhibit EU-40).
67 OJ L 231, p.7 (Exhibit EU-41).
68 OJ L 242, p.31 (Exhibit EU-42).

- Commission Implementing Decision 2014/637/EU of 28 August 2014 amending the Annex to Implementing Decision 2014/178/EU as regards the areas under restriction for African swine fever in certain Member States;[69]

- Commission Implementing Decision 2014/709/EU of 9 October 2014 concerning animal health control measures relating to African swine fever in certain Member States and repealing Implementing Decision 2014/178/EU (Decision 2014/709);[70]

78. Detailed data on the establishment of the different risk zones is provided in the national eradication plans, prepared by the EU MS concerned in conformity with the requirements of Directive 2002/60.[71] The Commission Implementing Decision 2014/442/EU of 7 July 2014 approving the plans for the eradication of African swine fever in feral pigs in certain areas of Lithuania and Poland (Decision 2014/442) is the relevant legal instrument.[72]

79. The delimitation of the areas in the framework of the second tier is effectuated taking into account the level of risk.[73] Areas are listed in Part III of the Annex to Decision 2014/709 when the ASF concerns both pig holdings and the wild boar population, the situation being still dynamic, with uncertain evolution. When ASF is present only in the wild boar population, the respective areas are listed in Part II. When the risk is due to a certain proximity to the infection in the wild boar population, areas are listed in Part I. Finally, Part IV concerns both wild boar and domestic pigs, containing only the island of Sardinia (Italy), where the epidemiological situation has been stabilised and the disease has become endemic.

80. The EU ASF legislation is based on the OIE international standards. In order to ensure a higher level of animal health protection, the EU goes beyond the OIE recommendations and applies stricter standards in certain circumstances. In the current application of regionalisation in Latvia, Lithuania and Poland no live pigs,

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69 OJ L 259, p.23 (Exhibit EU-43).

70 OJ L 295, p. 63 (Exhibit EU-44).

71 Article 16 of the Directive 2002/60 (Exhibit EU-31).

72 OJ L 200, 9.7.2014, p. 21 (Exhibit EU-50). The Estonian and Latvian eradication plans are currently assessed by the European Commission.

73 The last version of the second tier of EU regionalization measures regarding ASF in domestic pigs is to be found in Decision 2014/709 (Exhibit EU-44).

their semen, embryos or ova are allowed to be moved from the infected areas.[74] Exceptions are provided only when compliance with strict and safe criteria is proven[75] and are based on the OIE standards, which allow trade in the mentioned products, if certain conditions are fulfilled.[76]

81. These stricter requirements are applied following the scientific data according to which in terms of risk of ASF spread, movements of different porcine commodities pose different levels of risk. As a general rule, the movement of live pigs, their semen, ova and embryos and animal by-products of porcine origin from infected areas pose higher risks in terms of exposure and consequences than the movement of meat, meat preparations and meat products.

B. The Measures at Issue

1. Measures notified to the WTO

82. Russia notified to the WTO its SPS measures concerning four EU MS. *De facto,* Russia has however applied an EU-wide ban since the very first ASF cases in Lithuania in January 2014. The measures taken under this EU-wide ban were never notified by Russia to the WTO.

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

74 Article 2 of the Decision 2014/709 (Exhibit EU-44).
75 Article 3 of the Decision 2014/709 (Exhibit EU-44).
76 See Article 15.1.6., Article 15.1.9. and Article 15.1.11. of the OIE Terrestrial Code (Exhibit EU-2).

maintenance, transportation, slaughter and cutting of pigs" from Lithuania as of 25 January 2014.[77]

84. The second notified measure – on 4 March 2014 - is a ban on imports from Poland as described in the administrative notice from the FSVPS of 27 February 2014 (FS-NV-8/2972) announcing a temporary restriction on imports of "live pigs and its genetic material; pork products (which were not heat treated no less than 80ºC for at least 30 minutes); products from slaughter of wild boars; horn-hoofed and leather, intestinal materials; bristles; feed for pigs; hunting trophies, which were not subjected to full taxidermy treatment; previously used equipment for maintenance, transportation, slaughter and cutting of pigs" from Poland as of 27 February 2014.[78]

85. Russia then extended the bans on imports with regard to both Lithuania and Poland as described in the administrative notice of the FSVPS of 2 April 2014 (FS-EN-8/5081). This notice announced the extension of the import restrictions in force to "finished goods, which contain pork, except finished feed for cats and dogs, which were heat treated (no less than 70°C for no less than 20 min)", from Lithuania and Poland as of 7 April 2014. This extension of the existing bans was notified to the WTO on 4 April 2014.[79]

86. There followed a ban on imports from Latvia as described in the administrative notice of the FSVPS of 27 June 2014 (FS-NF-8/11315). This notice refers to a temporary restriction on imports of "live pigs and its genetic material; ready to eat products, containing pork, except for cats' and dogs' feed (which were heat treated no less than 70ºC for at least 20 minutes); pork and raw pork products". This measure was notified to the WTO on 16 July 2014.[80]

87. The most recent measure concerns a ban on imports from Estonia as described in the administrative notice of the FSVPS of 11 September 2014 (FS-NV-8/17431). This ban covers the importation of "live pigs, fresh pork, chilled or frozen products of animal origin elsewhere unnamed or not included; dead animals of Chapter 01 or 03, unfit for food, meat and edible meat by-products, salted in brine, dried or smoked;

77 G/SPS/N/RUS/48 (Exhibit EU-7).
78 G/SPS/N/RUS/49 (Exhibit EU-9).
79 G/SPS/N/RUS/48/Add.2 and G/SPS/N/RUS/49/Add.1 (Exhibits EU-10 and EU-11).

edible meat flour or meat by-products flour, products used for animal feed, sausages and similar products of meat, meat by-products or blood, food preparations based thereon, other prepared or canned meat, meat by-products or blood". This was notified to the WTO on 16 September 2014.[81]

2. The EU-wide Ban

88. 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). The EU also seeks review of this specific measure at issue both insofar as it is written, and insofar as it is unwritten.

89. The EU notes the letter sent to the EU dated 29 January 2014 (FS-SA-8/1277) from the FSVPS referring to certain export certificates previously used for certain exports from the EU to Russia, and notably the phrase "healthy animals grown in farms and/or administrative territories officially free from contiguous animal diseases, including African Swine Fever during 3 years in the whole territory of the EU except Sardinia."[82]

90. In this respect, the Russian authorities made the following statement: "veterinary doctors in the EU Member-States must stop certification of the abovementioned products. Otherwise these products accompanied with these veterinary certificates

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80 G/SPS/N/RUS/64 (Exhibit EU-12).

81 G/SPS/N/RUS/76 (Exhibit EU-13).

82 See in particular the Veterinary certificate for piglets for fattening, being exported from the EU into the Russian Federation, 11/08/2006 (Exhibit EU-52); the Veterinary certificate for pigs for breeding, exported from the EU into the Russian Federation, 11/08/2006 (Exhibit EU-53); the Veterinary certificate for pork meat and raw meat preparations, exported from the EU into the Russian Federation, 11/08/2006 (Exhibit EU-54); the Veterinary certificate for slaughter pigs, exported from the EU to the Russian Federation, 16/12/2009 (Exhibit EU-55); the Veterinary certificate for finished food products, containing raw material of animal origin, exported from the EU to the Russian Federation, 24/05/2011 (Exhibit EU-56); the Veterinary certificate for canned meat, salamis and other ready for consumption meat products, exported from the EU to the Russian Federation, 24/05/2011 (Exhibit EU-57).

issued after 27.01.2014, cannot be allowed into the territory of the Member States of the Customs Union and are subject to returns."[83]

91. This measure was confirmed and re-iterated in a letter of 14 February 2014 (HF-12-26/1650) from the Ministry of Agriculture of the Russian Federation, stating that "this incident considerably changes the epizootic status not only of Lithuania, but of the whole EU".[84]

92. Since the end of January 2014, imports of the products at issue (with the exception of heat treated meat) were no longer accepted from all EU MS, as evidenced by several documents.

93. According to an official announcement of the FSVPS from 6 February 2014, the importation of pork products (frozen heads and hearts) of Austrian and German origin was banned in the Tver and Pskov regions, because of alleged ASF risks in the whole EU.[85]

94. The importation into Russia of consignments of frozen pork lard from Poland, as well as frozen pork from Germany, Belgium and Poland was not allowed after 25 January 2014 because the "ASF epizootic situation is not represented in item 4.3 of the veterinary certificate, taking into account the registered outbreak of the African Swine Fever in the Republic of Lithuania".[86]

95. The importation into Russia of consignments of frozen pork offal products (heart) from Austria and frozen pork meat (from heads) from Austria and Germany was not allowed after 25 January 2014 because of the "unreliability of information regarding the freedom of the EU territory from the African Swine Fever (ASF) declared in item 4.3 of the veterinary certificate of Austria/Germany No […] for pork meat and

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83 Exhibit EU-14.

84 Exhibit EU-15.

85 FSVPS announcement of 6 February 2014 (http://fsvps.ru/fsvps/news/8935.html) (Exhibit EU-16).

86 Items 7, 8, 9 and 16 from the List of returned consignments, Annex 2 to the Letter from Russia to the EU of 6 August 2014, FS-EN-7/14507. Irrelevant and confidential data has been redacted from this document. (Exhibit EU-17).

raw pork meat products exported from the EU to the RF (due to the ASF outbreak in the territory of Lithuania)".[87]

96. Similarly, the importation into Russia of a consignment of pork meat from the Netherlands was not allowed because "the date of issue of the veterinary certificate for the goods from the EU is 11.02.2014 (Instructions of the Rosselkhoznadzor of 29.01.2014 № FS-SA-7/1275)".[88]

97. The EU-wide ban evidenced by the mentioned documents has never been notified to the WTO by Russia.

3. The applicability of the SPS Agreement

98. According to Article 1.1 the SPS Agreement covers sanitary measures which may, directly or indirectly, affect international trade. The EU will establish that the Russian measures are sanitary measures within the meaning of the SPS Agreement and that they directly affect international trade.

99. In respect of the first element, sanitary measures are defined in the relevant parts of Annex A(1) as measures applied:

> (a) 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;
>
> (b) to protect […] animal life or health within the territory of the Member from risks arising from […] disease-causing organisms in […] feedstuffs; […]

100. It is to be noted that Russia incorrectly notified its individual restrictions to the SPS Committee as justified on grounds related to food safety and the protection of humans from animal/ plant pest or disease[89] or only related to food safety.[90] As already stated before, the ASFV affects only swine populations and it is not harmful to humans.

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87 Items 13,14 and 15 from the List of returned consignments, Annex 2 to the Letter from Russia to the EU of 6 August 2014, FS-EN-7/14507 (Exhibit EU-17).

88 Item 35 from the List of returned consignments, Annex 2 to the Letter from Russia to the EU of 6 August 2014, FS-EN-7/14507. (Exhibit EU-17).

89 The measures concerning Latvia and Estonia (Exhibits EU-12 and EU-13).

90 The measures concerning Lithuania and Poland (Exhibits EU-7 and EU-9).

101. The ASFV is a "disease" within the meaning of the Annex A(1)(a) of the SPS Agreement.[91] It may also be characterized as a "disease-causing organism" and thus fall within the scope of Annex A(1)(b) of the SPS Agreement, because in some instances it may not manifest itself in chronic forms (in the case of African wild boar species), becoming lethal once transferred to non-African wild species or to domestic pigs.[92]

102. Annex A(1) of the SPS Agreement further states that:

> Sanitary […] 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.

103. The Russian ban is enacted through "relevant laws, decrees, regulations, requirements and procedures", consisting of the four administrative notices concerning the individual EU Member States and the requirements and procedures related to the EU-wide ban.

104. With respect to the second element, previous panels have found that "it is not necessary to demonstrate that an SPS measure has an *actual effect* on trade".[93] It follows that *potential* effects are also covered by this requirement. This is a very broad interpretation. The EU further notices that in other parts of the SPS Agreement the language used refers to a "significant effect on trade" which may imply a higher threshold.[94]

105. In the present case, the Russian measures have a major effect on trade. Approximately one fourth of EU exports of pig products covered by the measures at

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[91] Similarly, the avian influenza virus has been found to constitute a disease. Panel Report, *India-Agricultural Products*, para. 7.150.

[92] For instance, the avian influenza virus has also been found to constitute a disease-causing organism. Panel Report, *India-Agricultural Products*, para. 7.152.

[93] Panel Report, *US - Poultry (China)*, para. 7.89, Panel Report, *EC - Approval and Marketing of Biotech Products*, para. 7.435.

[94] Annex B(5) of the SPS Agreement.

issue, went to the Russian market prior to the imposition of the ban. Clearly, an import ban such as that introduced by Russia directly affects international trade.[95]

106. It follows from the above that the Russian measures, namely the individual bans concerning Estonia, Latvia, Lithuania and Poland, as well as the EU-wide ban, clearly fall within the definitions in Annex A(1)(a) and (b). In addition, they "directly affect international trade" within the meaning of Article 1.1 of the SPS Agreement. Thus, the SPS Agreement is applicable to the present case.

IV. CLAIMS

A. Claims related to harmonization

1. Article 3.2 of the SPS Agreement

107. 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 references are inaccurate and contradictory. Furthermore, in making such references, Russia is mistakenly alleging that it follows international standards.

108. The panel in *India-Agricultural Products* agreed with the defendant on the order of analysis and started its assessment under the harmonization provisions of the SPS Agreement, proceeding only afterwards with the analysis of the claims related to the lack of a risk assessment. Were the panel to have found that India's avian influenza measures "conform to" international standards, then they would have been presumed to be consistent with the relevant provisions of the SPS Agreement.[96]

109. Following this reasoning, the EU will begin the presentation of its claims in the present case with its claims related to Article 3 of the SPS Agreement.

110. Article 3 encourages Members to harmonize their SPS measures, distinguishing between three different situations: when the measures are "based on" international

[95] Panel Report, *India-Agricultural Products*, para. 7.156.

standards, when the measures "conform to" the said standards and when the measures are more stringent than the international standards.

111. Article 3.2 of the SPS Agreement 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.

112. 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".[97]

113. In light of the description of the OIE standards and the Russian measures set out above, it is clear in the present case that the Russian measures not only do not conform to, but fundamentally depart from, the relevant international standards. The standards in question expressly allow trade and contain specific recommendations with regard to regionalization.

114. The EU recalls that in establishing whether or not a Member has an obligation to conform to international standards or to base its SPS measure on international standards, a panel needs only determine whether such standards exist:

> We do not need to consider the levels of protection or types of SPS measures recommended by the standard, the consensus behind it, or its adoption process.[98]

115. The only international standards with respect to the ASF are to be found in the OIE Terrestrial Code. The OIE is the relevant international organization listed in Annex A(3) of the SPS Agreement for matters of animal health and zoonoses.

116. As a preliminary step, it must be established which is the relevant edition of the OIE Terrestrial Code for the purposes of the present proceedings. In *India-Agricultural*

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96 Panel Report, *India- Agricultural Products*, para. 7.124.

97 Appellate Body Report, *EC – Hormones*, para. 170.

98 Panel Report, *India- Agricultural Products*, para. 7.205, Panel Reports, *EC – Hormones (Canada)*, para. 8.72; and *EC – Hormones (US)*, para. 8.69 .

Products the panel considered that the relevant edition of the OIE Terrestrial Code is the one in force at the time of the establishment of the panel.[99]

117. In reaching this conclusion, the panel referred first to the importance of determining which edition of the OIE Terrestrial Code reflects the latest science.[100] However, the panel then noted that:

> In our view, to determine that the prism through which the respondent's measure will be judged is, in effect, a moving target would offend the fundamental principle of due process as the complainant and the respondent have a right to know with some certainty the standard against which the measures will be assessed in this panel process. In other words, the scope of this dispute cannot expand or contract depending upon the science that informs the Terrestrial Code as the dispute moves through its various procedural steps.[101]

118. Accordingly, the version of the OIE Terrestrial Code in force at the date of the establishment of this Panel (22 July 2014) is the 23rd edition, adopted in May 2014.

119. As a first observation, one can easily notice from the SPS Committee notifications of the different measures that the Russian sanitary services have misconstrued the international standards they claim to follow. This is an indication that the measures are in fact disguised restrictions on international trade within the meaning of Article 2.3 of the SPS Agreement.[102]

120. Russia's attempt to justify its measures by reference to the OIE standards is a clear misreading of the OIE Terrestrial Code and the OIE Terrestrial Manual. The OIE Terrestrial Code recommends regionalization, while Russia applies an EU-wide ban and a country-wide ban for the four affected EU MS. The Russian measures do not "conform to" and are not "based on" these international standards, and in fact they actually go against the very standards invoked.

121. A chronological overview of the Russian notifications to the SPS Committee demonstrates the errors and inconsistencies in Russia's position on the question of which standards Russia asserts its measures "conform to". In the initial notification

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99 Panel Report, *India- Agricultural Products*, para. 7.212.
100 Panel Report, *India- Agricultural Products*, para. 7.210.
101 Panel Report, *India- Agricultural Products*, para. 7.211.
102 See below the section on Article 2.3 of the SPS Agreement.

concerning Lithuania, Russia invokes Chapter 2.8.1. of the OIE Terrestrial Manual.[103] In the following notification concerning Poland, Russia invokes Chapter 2.8.1. of the OIE Terrestrial Manual in conjunction with Chapter 15.1. of the OIE Terrestrial Code;[104] while in the notifications concerning Latvia and Estonia, Russia alleges conformity only with Chapter 15.1. of the OIE Terrestrial Code.[105]

122. Indeed, the correct applicable standards for the respective measures are 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. These standards recommend regionalization and prescribe the necessary steps to be taken in order to allow trade from ASF free zones. 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, as we will prove for each of the products at issue below.

123. Chapter 2.8.1. of the OIE Terrestrial Manual, quoted as the relevant international standard in the notifications concerning Lithuania and Poland, deals with ASF, but it only sets standards for diagnostic tests and vaccines and it does not set the standards relevant for international trade, which are to be found in the OIE Terrestrial Code.

124. Furthermore, in a letter from the Russian Agriculture Minister Fyodorov to EU Commissioner Borg, dated 14 February 2014, the Russian Minister refers to Article 15.1.2. of the OIE Terrestrial Code as the relevant standard concerning regionalization in Lithuania,[106] while the correct reference would have been Chapter 4.3. of the OIE Terrestrial Code in that particular context.

125. The EU will present now the Russian measures with respect to each of the products at issue and compare them with the applicable international standards.

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103 G/SPS/N/RUS/48 (Exhibit EU-7). One month later Russia submitted an addendum (G/SPS/N/RUS/48/Add.1) in which it identified the applicable international standards as Chapter 15.1 of the OIE Terrestrial Code and Chapter 2.8.1. of the OIE Terrestrial Manual (Exhibit EU-8). It is worth noting that in the notification concerning Ukraine, dated 21 January 2014 (G/SPS/N/RUS/46), Russia does not identify the relevant OIE standards at all (Exhibit EU-6).

104 G/SPS/N/RUS/49 (Exhibit EU-9).

105 G/SPS/N/RUS/64 (Exhibit EU-12) and G/SPS/N/RUS/76 (Exhibit EU-13).

106 Ref No. НФ-12-26/1650 (Exhibit EU-15).

126. The ban on trade in live pigs is contrary to Article 15.1.5 of the OIE Terrestrial Code, which recommends allowing trade from ASF free zones, provided that the veterinary certificate attests that the animals:

1. showed no clinical sign of ASF on the day of shipment and

2. were kept in an ASF free country, zone or compartment since birth or for at least the past 40 days.

127. The ban on trade in "genetic material" of pigs is contrary to 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.

128. Article 15.1.8. recommends allowing trade in semen of domestic pigs from ASF free zones, provided that the veterinary certificate attests that:

1. the donor animals:

a. were kept in an ASF free country, zone or compartment since birth or for at least 40 days prior to collection;

b. showed no clinical sign of ASF on the day of collection of the semen;

2. the semen was collected, processed and stored in conformity with the provisions of Chapters 4.5. and 4.6.

129. Article 15.1.10. recommends allowing trade in *in vivo* derived embryos of domestic pigs from ASF free zones, provided that the veterinary certificate attests that:

1. the donor females:

a. were kept in an ASF free country, zone or compartment since birth or for at least 40 days prior to collection;

b. showed no clinical sign of ASF on the day of collection of the embryos;

2. the embryos were collected, processed and stored in conformity with the provisions of Chapters 4.7. and 4.9., as relevant.

130. The ban on fresh pork is contrary to Article 15.1.12. of the OIE Terrestrial Code, which recommends allowing trade from ASF free zones, provided that the veterinary certificate attests that the animals:

1. have been kept in an ASF free country, zone or compartment since birth or for at least the past 40 days, or which have been imported in accordance with Article 15.1.5. or Article 15.1.6.;

2. have been slaughtered in an approved abattoir, have been subjected to ante- and post-mortem inspections in accordance with Chapter 6.2., and have been found free of any sign suggestive of ASF.

131. The ban on "finished goods, which contain pork",[107] "other prepared or canned meat",[108] "ready to eat products, containing pork"[109] is contrary to Article 15.1.14. (meat products of pigs, either domestic or wild) of the OIE Terrestrial Code, which recommends allowing trade, provided that the veterinary certificate attests that the products:

1. have been prepared:

a. exclusively from fresh meat meeting the conditions laid down in Articles 15.1.12. or 15.1.13., as relevant;

b. in a processing establishment:

i) approved by the Veterinary Authority for export purposes;

ii) processing only meat meeting the conditions laid down in Articles 15.1.12. or 15.1.13., as relevant;

OR

2. have been processed in an establishment approved by the Veterinary Authority for export purposes so as to ensure the destruction of the ASFV, and that the

[107] G/SPS/N/RUS/48/Add.2 (Exhibit EU-10), G/SPS/N/RUS/49/Add.1 (Exhibit EU-11).
[108] G/SPS/RUS/76 (Exhibit EU-13).
[109] G/SPS/RUS/64 (Exhibit EU-12).

necessary precautions were taken after processing to avoid contact of the product with any source of ASFV.

132. The ban on heat treated products – introduced from 7 April 2014- is a country-wide ban with respect to Lithuania, Poland, Latvia and Estonia. It is not an EU-wide ban, as products from other EU MS were still traded to Russia after April 2014. The justification of this country-wide ban is scientifically doubtful, as "finished feed for cats and dogs, which were heat treated (no less than 70°C for no less than 20 min)" was initially excluded, irrespective of the type of feed. There is no scientific ground to distinguish between the level of risk to the life and health of pigs and food and feed for cats and dogs, which are prepared from the same raw material and are subject to the same heat treatment process. There is also no international standard that justifies such a distinction being made.

133. The ban on products used for animal feeding is contrary to Article 15.1.14. (products from fresh meat of pigs intended for use in animal feeding) and Article 15.1.15. (products from pigs, not derived from fresh meat, intended for use in animal feeding) of the OIE Terrestrial Code.

134. Article 15.1.14. of the OIE Terrestrial Code recommend allowing trade, provided that the veterinary certificate attests that the products:

1. have been prepared:

a. exclusively from fresh meat meeting the conditions laid down in Articles 15.1.12. or 15.1.13., as relevant;

b. in a processing establishment:

i) approved by the Veterinary Authority for export purposes;

ii) processing only meat meeting the conditions laid down in Articles 15.1.12. or 15.1.13., as relevant;

OR

2. have been processed in an establishment approved by the Veterinary Authority for export purposes so as to ensure the destruction of the ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV.

135. The ban on bristles is contrary to Article 15.1.16. of the OIE Terrestrial Code, which recommends allowing trade, provided that the veterinary certificate attests that the products:

1. come from an ASF free country, zone or compartment; or

2. have been processed in an establishment approved by the Veterinary Authority for export purposes so as to ensure the destruction of the ASFV, and that the necessary precautions were taken after processing to avoid contact of the product with any source of ASFV.

136. The ban on "products of slaughter of wild boars" is contrary to Article 15.1.13. (fresh meat of wild pigs) and Article 15.1.14. (meat products of wild pigs) of the OIE Terrestrial Code.

137. Article 15.1.13 recommends allowing trade from ASF free zones, provided that the veterinary certificate attests that:

1. the entire consignment of fresh meat comes from animals which:

a. have been killed in an ASF free country or zone;

b. have been subjected to a post-mortem inspection in accordance with Chapter 6.2. in an approved examination centre, and have been found free of any sign suggestive of ASF;

and, if the zone where the animal has been killed is adjacent to a zone with infection in wild pigs:

2. a sample has been collected from every animal killed and has been subjected to a virological test and a serological test for ASF, with negative results.

138. The recommendations of Article 15.1.14. are already explained above and they apply *mutatis mutandis* in the case of meat products of wild pigs intended for the mentioned uses.

139. The conformity with the international standards of the bans on the importation into Russia of live pigs and certain pig products from the EU can be summarized as follows:

- the ban on trade in live pigs is contrary to Article 15.1.5 of the OIE Terrestrial Code;

- the ban on trade in "genetic material" of pigs is contrary to 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 is contrary to Article 15.1.12. of the OIE Terrestrial Code;

- the ban on "finished goods, which contain pork",[110] "other prepared or canned meat",[111] "ready to eat products, containing pork"[112] is contrary to 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 is contrary to 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 is contrary to Article 15.1.16. of the OIE Terrestrial Code;

- the ban on "products of slaughter of wild boars" is contrary to Article 15.1.13. (fresh meat of wild pigs) and Article 15.1.14. (meat products of wild pigs) of the OIE Terrestrial Code.

140. 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

110 G/SPS/N/RUS/48/Add.2 (Exhibit EU-10), G/SPS/N/RUS/49/Add.1 (Exhibit EU-8).
111 G/SPS/RUS/76 (Exhibit EU-13).
112 G/SPS/RUS/64 (Exhibit EU-12).

health and cannot be presumed to be consistent with the relevant provisions of the SPS Agreement, within the meaning of Article 3.2 of the SPS Agreement.

2. Article 3.1 of the SPS Agreement

141. Article 3.1 of the SPS Agreement reads as follows:

> To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

142. The "base on" requirement is different from "conform to" and it means that the measures are "supported" by the international standards.[113] The non-binding standards set by the relevant standard-setting international organizations do not become binding through the SPS Agreement.[114]

143. In the words of the panel in *India- Agricultural Products*:

> The terms "based on" and "conform to" form concentric circles; a measure that "conforms to" and incorporates a standard is, of course, "based on" that standard"; a measure that is "based on" a standard may not necessarily "conform to" that same standard, as some elements of the standard may not be present in the measure at issue; while it may be sufficient to adopt only some of the elements of an international standard for the measure to be "based on" such standard, Article 3.2 requires that an SPS measure embodies the standard completely to be said to "conform to" it; hence, the language in Article 3.1 whereby an SPS measure may be "based on" an international standard establishes a less rigorous threshold than that contemplated in Article 3.2 ("conform to"); a failure to meet the "based on" threshold in Article 3.1 would also result in not meeting the more rigorous "conform to" threshold in Article 3.2.[115][original footnotes omitted]

144. The EU has demonstrated in the previous section that the Russian measures at issue not only do not conform to but actually 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.

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113 Appellate Body Report, *EC – Hormones*, para. 163.
114 Appellate Body Report, *EC – Hormones*, para. 165.
115 Panel Report, *India- Agricultural Products*, para. 7.202.

145. 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.[116]

146. 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

147. Article 3.3 of the SPS Agreement provides that:

> Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.[2] Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations, shall not be inconsistent with any other provision of this Agreement.
>
> [footnote 2] For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

148. 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.[117]

149. The Appellate Body noted in *EC-Hormones* that both possibilities envisaged in Article 3.3 should conform to the other provisions of the SPS Agreement and in particular to the risk assessment obligations:

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116 Panel Report, *India- Agricultural Products*, paras. 7.269- 7.273.

117 Appellate Body Report, *EC- Hormones*, para 104.

> Article 3.3 is evidently not a model of clarity in drafting and communication. The use of the disjunctive 'or' does indicate that two situations are intended to be covered. These are the introduction or maintenance of SPS measures which result in a higher level of protection:
>
> (a) 'if there is a scientific justification'; or
>
> (b) 'as a consequence of the level of … protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5'.
>
> It is true that situation (a) does not speak of Articles 5.1 through 5.8. Nevertheless, two points need to be noted. First, the last sentence of Article 3.3 requires that "all measures which result in a [higher] level of … protection", that is to say, measures falling within situation (a) as well as those falling within situation (b), be "not inconsistent with any other provision of [the SPS] Agreement". "Any other provision of this Agreement" textually includes Article 5. Secondly, the footnote to Article 3.3, while attached to the end of the first sentence, defines "scientific justification" as an "examination and evaluation of available scientific information in conformity with relevant provisions of this Agreement …". This examination and evaluation would appear to partake of the nature of the risk assessment required in Article 5.1 and defined in paragraph 4 of Annex A of the SPS Agreement.[118]

150. On the basis of this reasoning the Appellate Body agreed with the panel that, to the extent that the respondent established for itself a level of protection higher, or more exacting, than the level of protection implied in the relevant international standards, guidelines or recommendations, the respondent was bound to comply with the requirements established in Article 5.1.[119]

151. 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".[120] A finding of inconsistency with Article 5.1 will always imply that the respective measure is inconsistent with Article 3.3.[121]

152. The EU will demonstrate in the following section that Russia did not perform a risk assessment within the meaning of Article 5.1 of the SPS Agreement. The Russian measures are thus not based on scientific principles and on scientific evidence. It will thus follow that there is no scientific justification for the Russian measures at issue, which are in breach of Article 3.3 of the SPS Agreement.

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118 Appellate Body Report, *EC — Hormones*, paras 173 and 175.

119 Appellate Body Report, *EC — Hormones*, para. 176.

120 Appellate Body Report, *Japan - Agricultural Products II*, para. 79.

B. *Claims related to risk assessment*

1. Articles 5.1 and 5.2 of the SPS Agreement

153. 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.

154. Article 5.1 of the SPS Agreement provides that:

> Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

155. Under an analysis of the Article 5.1, 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.[122]

156. 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:

> The first set of definitions deals with risks arising from the entry, establishment or spread of pests or diseases. The second addresses risks arising from specific substances in food, beverages or feedstuffs.[123]

157. Thus, the type of risk assessment to be performed in a given case depends on the objective pursued by the respective SPS measure.

158. 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;

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121 Appellate Body Report, *EC – Hormones*, para. 177.

122 Panel Reports, *EC-Biotech*, para. 7.3019.

123 Panel Report, *Australia-Salmon*, para. 8.68.

> (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*.[124]

159. The evaluation may be expressed in both quantitative and qualitative terms.[125] However, a quantitative methodology should only be used "when reliable specific numeric data are available" to support the choice ranges required. In the absence of sufficient data, a quantitative method may be misleading:

> Under the SPS Agreement, Members are free to choose either a qualitative or a quantitative methodology, in accordance with the appropriate applicable standards. However, as noted by the experts consulted by the Panel, a quantitative methodology should only be used 'when reliable specific numeric data are available' to support the choice of probability ranges and probability shapes. In the absence of sufficient data, and particularly if numbers are chosen in an arbitrary manner, a quantitative method would only give a misleading impression of objectivity and precision.[126]

160. The Appellate Body noted that a WTO Member may properly base an SPS measure on divergent or minority views, as long as these views are from qualified and respected sources.[127]

161. In turn, the second type of risk assessment involves two elements: (1) the identification of the adverse effects on human or 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.[128]

162. 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".[129] It refers to a "certain *objective*

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[124] Appellate Body Report, *Australia - Salmon*, para. 121.
[125] Appellate Body Report, *Australia-Salmon*, para. 124.
[126] Panel Report, *Australia — Apples*, para. 7.441.
[127] Appellate Body Report, *EC – Hormones*, para. 194.
[128] Panel Report, *EC-Hormones (US)*, para. 8.98 and Panel Report, *EC-Hormones (Canada)*, para. 8.101.
[129] Appellate Body Report, *US - Continued Suspension*, para. 528 and Appellate Body Report, *Canada - Continued Suspension*, para. 528.

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".[130]

163. It is noteworthy that, according to the Appellate Body, Article 5.1 does not require Members to carry out their own risk assessment, as a "SPS measure might well find its objective justification in a risk assessment carried out by another Member, or an international organization".[131]

164. In addition, the risk assessment techniques developed by the relevant international organizations should be "taken into account":

> [However,] this expression does not impose that a risk assessment under Article 5.1 be "based on" or "in conformity with" such risk assessment techniques; this suggests that such techniques should be considered relevant, but that a failure to respect each and every aspect of them would not necessarily, per se, signal that the risk assessment on which the measure is based is not in conformity with the requirements of Article 5.1.[132]

165. In the present case Russia alleged conformity with the OIE standards of the measures concerning Lithuania, Poland, Latvia and Estonia. It notified these measures to the SPS Committee as emergency measures and did not provide any risk assessment for the introduction of the respective bans. Similarly, Russia did not provide any risk assessment in support of its EU-wide ban, although such a risk assessment was requested during the numerous contacts took place between the Russian and the EU competent veterinary authorities.

166. 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.[133]

167. Article 5.2 of the SPS Agreement provides that:

> In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest — or disease — free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

130 Appellate Body Report, *EC - Hormones*, para. 189.
131 Appellate Body Report, *EC - Hormones*, para. 190.
132 Panel Report, *Japan - Apples*, para. 8.241.
133 Panel Report, *Australia — Salmon*, para. 8.57.

168. Article 5.2 contains a list of factors that have to be taken into account while performing a risk assessment. The Appellate Body held that this is not a closed list.[134] It further noted that:

> It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.[135]

169. Risks arising from difficulties of control of compliance with certain requirements could be taken into account in the context of a risk assessment:

> It should be recalled that Article 5.2 states that in the assessment of risks, Members shall take into account, in addition to 'available scientific evidence', 'relevant processes and production methods; [and] relevant inspection, sampling and testing methods'. We note also that Article 8 requires Members to 'observe the provisions of Annex C in the operation of control, inspection and approval procedures …'. The footnote in Annex C states that 'control, inspection and approval procedures include, inter alia, procedures for sampling, testing and certification'. We consider that this language is amply sufficient to authorize the taking into account of risks arising from failure to comply with the requirements of good veterinary practice in the administration of hormones for growth promotion purposes, as well as risks arising from difficulties of control, inspection and enforcement of the requirements of good veterinary practice.[136]

170. Russia does not have 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. Russia has provided no evidence that it has taken these matters into account, 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

134 Appellate Body Report, *EC — Hormones*, para. 187.
135 Appellate Body Report, *EC — Hormones*, para. 187.
136 Appellate Body Report, *EC — Hormones*, para. 205.

171. Article 2.2 of the SPS Agreement provides that:

> Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

172. Article 2.2 contains the general principles of the SPS Agreement related to necessity and scientific disciplines for the use and maintenance of SPS measures.

173. The necessity requirement has not been clarified in the context of this provision but 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. In addition, in the specific case of risk management one may find useful guidance in the provisions of Article 5.6 and footnote 3 of the SPS Agreement.

174. The context of the phrase "not maintained without sufficient scientific evidence" in Article 2.2 also includes Article 3.3 of the *SPS Agreement.*[137]

175. 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.[138] However, given the more general wording of Article 2.2, the reverse is not necessarily true.[139]

176. Having concluded before that Russia did not provide any risk assessment for the measures at issue and therefore violated the provisions of Article 5.1 of the SPS Agreement, it follows that the provisions of Article 2.2 are also breached.[140]

3. Article 5.7 of the SPS Agreement

177. Article 5.7 of the SPS Agreement provides that:

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137 Appellate Body Report, *Japan- Agricultural Products II*, para. 79.
138 Appellate Body Report, *Australia-Salmon*, paras 137- 138.
139 Appellate Body Report, *Australia-Salmon*, para. 137.
140 See similarly the Panel Report, *India- Agricultural Products*, para. 7.332.

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

178. The case-law refers to Article 5.7 as a "qualified exemption"[141] from the provisions of Article 5.1 or as an autonomous right.[142] The EU is of the view that the claimant in an Article 5.7 claim has to adduce evidence with regard to the violation of the provisions of the said article by the defendant, which may include, as appropriate, the absence of appropriate actions by the defendant.

179. 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:

> The first sentence of Article 5.7 provides in relevant part that '[i]n cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information'. The first sentence follows a classic 'if — then' logic: if a certain condition is met (in casu, insufficiency of relevant scientific evidence), a particular right is conferred (in casu, the right provisionally to adopt an SPS measure based on available pertinent information). Thus, it is clear that Article 5.7 is applicable whenever the relevant condition is met, that is to say, in every case where relevant scientific evidence is insufficient. The provisional adoption of an SPS measure is not a condition for the applicability of Article 5.7. Rather, the provisional adoption of an SPS measure is permitted by the first sentence of Article 5.7.[143][original footnotes omitted]

180. The Appellate Body held that four cumulative requirements are imposed upon a Member having recourse to this provision:

> Pursuant to the first sentence of Article 5.7, a Member may provisionally adopt an SPS measure if this measure is:
>
> (1) imposed in respect of a situation where 'relevant scientific information is insufficient'; and

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141 Appellate Body Report, *Japan — Agricultural Products II*, para. 80.

142 Panel Report, *EC — Approval and Marketing of Biotech Products*, para. 7.2969.

143 Panel Report, *EC — Approval and Marketing of Biotech Products*, para.7.2939.

> (2) adopted 'on the basis of available pertinent information'.
>
> Pursuant to the second sentence of Article 5.7, such a provisional measure may not be maintained unless the Member which adopted the measure:
>
> (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'.
>
> These four requirements are clearly cumulative in nature and are equally important for the purpose of determining consistency with this provision. Whenever one of these four requirements is not met, the measure at issue is inconsistent with Article 5.7.[144]

181. 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:

> The text of Article 5.7 is clear: it refers to 'cases where relevant scientific evidence is insufficient', not to 'scientific uncertainty'. The two concepts are not interchangeable.[145]

182. 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:

> Thus, the question is not whether there is sufficient evidence of a general nature or whether there is sufficient evidence related to a specific aspect of a phytosanitary problem, or a specific risk. The questions is whether the relevant evidence, be it 'general' or 'specific', in the Panel's parlance, is sufficient to permit the evaluation of the likelihood of entry, establishment or spread of, in this case, fire blight in Japan.[146]

183. The Appellate Body noted the fact that although further scientific investigation is possible, this does not equate to the insufficiency of the relevant scientific evidence:

> The body of scientific evidence underlying a risk assessment can always be supplemented with additional information. Indeed, the nature of scientific inquiry is such that it is always possible to conduct more research or obtain additional information. The possibility of conducting further research or of analyzing additional information, by itself, should not mean that the relevant scientific evidence is or becomes insufficient.[147]

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144 Appellate Body Report, *Japan — Agricultural Products II*, para. 89.
145 Appellate Body Report, *Japan — Apples*, paras 183–184.
146 Appellate Body Report, *Japan — Apples*, para. 179.
147 Appellate Body Reports, *US/Canada — Continued Suspension*, para. 702.

184. 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". Divergent or minority views that are from respected and qualified sources may provide the basis for the adoption of provisional SPS measures under Article 5.7:

> Under Article 5.1, WTO Members are allowed to base SPS measures on divergent or minority views provided they are from a respected and qualified source. Thus the existence of scientific controversy in itself is not enough to conclude that the relevant scientific evidence is 'insufficient'. It may be possible to perform a risk assessment that meets the requirements of Article 5.1 even when there are divergent views in the scientific community in relation to a particular risk. By contrast, Article 5.7 is concerned with situations where deficiencies in the body of scientific evidence do not allow a WTO Member to arrive at a sufficiently objective conclusion in relation to risk. When determining whether such deficiencies exist, a Member must not exclude from consideration relevant scientific evidence from any qualified and respected source. Where there is, among other opinions, a qualified and respected scientific view that puts into question the relationship between the relevant scientific evidence and the conclusions in relation to risk, thereby not permitting the performance of a sufficiently objective assessment of risk on the basis of the existing scientific evidence, then a Member may adopt provisional measures under Article 5.7 on the basis of that qualified and respected view.[148]

185. 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 which allows the performance of a more objective assessment of risk.[149]

186. With regard to the second condition, namely that the measure should be adopted on the basis of the available pertinent information. According to the Appellate Body the information is pertinent when there is a rational and objective relationship between the information and the measure:

> WTO Members' right to take provisional measures in circumstances where the relevant scientific information is 'insufficient' is also subject to the requirement that such measures be adopted 'on the basis of available pertinent information'. Such information may include information from 'the relevant international organizations' or deriving from SPS measures applied by other WTO Members. Thus, Article 5.7 contemplates situations where there is some evidentiary basis indicating the possible existence of a risk, but not enough to permit the performance of a risk assessment. Moreover, there must be a rational and objective relationship between the

148 Appellate Body Reports, *US/Canada — Continued Suspension*, para. 677.

149 Appellate Body Reports, *US/Canada — Continued Suspension*, para. 679.

> information concerning a certain risk and a Member's provisional SPS measure. In this sense, Article 5.7 provides a 'temporary "safety valve" in situations where some evidence of a risk exists but not enough to complete a full risk assessment, thus making it impossible to meet the more rigorous standards set by Articles 2.2 and 5.1.[150]

187. 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).

188. Thus, in the present case it must relate to the risks to animal life or health and take into account risk assessment techniques developed by the relevant international organisations (Article 5.1). It must take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases; existence of disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment (Article 5.2). It must also take into account the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches (Article 5.3). It must involve an evaluation of the likelihood of entry, establishment or spread of a disease within the territory of an importing Member according to the sanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on animal health arising from the presence of disease-causing organisms in food, beverages or feedstuffs (Annex A(4)).

189. 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". For example, Article 5.7 does not expressly preclude discrimination between WTO Members, and indeed such discrimination may be justified or even required under various provisions of the SPS Agreement. Nevertheless, the fact of such discrimination in a provisional measure would not be

[150] Appellate Body Reports, *US/Canada — Continued Suspension*, para. 678.

irrelevant to an assessment under Article 5.7, since one would expect to find some basis for it in the available pertinent information, failing which, one of the conditions set out in Article 5.7 would not be complied with.

190. For instance, the EU does not understand in the present case how Russia could reach a decision on regionalization in the case of Ukraine in a very short period of time from the notification of the outbreak, while in the case of the EU, despite a great quantity of relevant information provided, Russia was not able to make an objective risk assessment half a year from the notification of the first ASF outbreak in Lithuania.[151]

191. 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*.[152] If the category is heavily populated by data, then one is likely to be in an Article 5.1 situation. If the category is sparsely populated by data, even to the extent of there being little or no data, then one is likely to be in an Article 5.7 situation. This difference is captured particularly by the term "available pertinent information" in Article 5.7. This confirms, for example, that under Article 5.7, measures may be adopted on the basis of a hypothesis, even if there is, as yet, insufficient scientific evidence, in the form of data from experiments conducted according to scientific principles. This does not mean that the measure is immune from review. The information must still be pertinent. And the other conditions of Article 5.7 must be complied with, in particular the conditions to be satisfied in order to maintain the measure.

192. 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. Again, there is no mechanistic distinction between the two provisions. In an Article

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151 For a more detailed explanation see the section on discrimination claims.

152 In the "provisional" context of Article 5.7 what weighs particularly heavily in the assessment are the need for urgent action and the objective of avoiding loss to the protected interest. Science and other information, whilst relevant to the extent present, carry less weight, simply because they are less complete. On the other hand, in the "definitive" context the proposition is that sufficient time has elapsed to permit a

5.7 scenario, it is likely that there is a pending request or application and that the administrative file remains open whilst additional information is sought. Once the category of information is sufficiently complete, and the ball has come to rest with the authorities of the importing Member, one may expect a decision within a reasonable period of time, which decision may well be better assessed through the prism of Article 5.1.

193. The Appellate Body noted with respect to the third requirement:

> The requirement that the WTO Member 'shall seek to obtain the additional information necessary for a more objective assessment of risk' implies 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 organizations or other sources. Otherwise, the provisional nature of measures taken pursuant to Article 5.7 would lose meaning. (original footnotes omitted)[153]

194. The additional information sought must be relevant for conducting a more objective risk assessment:

> Therefore, the information sought must be germane to conducting such a risk assessment, i.e., the evaluation of the likelihood of entry, establishment or spread of, *in casu*, a pest, according to the SPS measures which might be applied. We note that the Panel found that the information collected by Japan does not 'examine the appropriateness' of the SPS measure at issue and does not address the core issue as to whether 'varietal characteristics cause a divergency in quarantine efficacy'. In the light of this finding, we agree with the Panel that Japan did not seek to obtain the additional information necessary for a more objective risk assessment.[154]

195. However, if the information sought is irrelevant for the purposes of the risk assessment, 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, that is, the provisions that are designed to protect against abuses in control, assessment and approval procedures.

196. This is precisely the case with respect to the measures at issue in the present proceedings. Russia asserts that it does not have sufficient information for the performance of a risk assessment. However, the information that it claims to seek

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more considered and ultimately balanced consideration of the issue, based on more complete information: time carries less weight and science more weight.

153 Appellate Body Reports, *US/Canada — Continued Suspension*, para. 679.

154 Appellate Body Report, *Japan — Agricultural Products II*, para. 92.

was either already provided or is information that is irrelevant for the purposes of the EU ASF regionalization measures, or information that would require the EU to prove a negative, as the EU demonstrates in the sections relating to regionalization and to control, approval and inspection procedures. The EU also demonstrates in general terms how Russia has abused the process instead of seeking information germane for the risk assessment. The necessary information for an objective risk assessment was already provided at an early stage by the EU and supplemented in several instances.

197. Compliance with the fourth condition, with regard to a "reasonable period of time" has to be established on a case-by-case basis:

> In our view, what constitutes a 'reasonable period of time' has to be established on a case-by-case basis and depends on 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. In the present case, the Panel found that collecting the necessary additional information would be relatively easy. Although the obligation 'to review' the varietal testing requirement has only been in existence since 1 January 1995, we agree with the Panel that Japan has not reviewed its varietal testing requirement 'within a reasonable period of time'.[155]

198. The Appellate Body further noted that:

> The requirement that the WTO Member 'shall seek to obtain the additional information necessary for a more objective assessment of risk' implies 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 organizations or other sources. Otherwise, the provisional nature of measures taken pursuant to Article 5.7 would lose meaning. 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 which allows the performance of a more objective assessment of risk. … Finally, the Member taking the provisional SPS measure must review it within a reasonable period of time.[156] (original footnotes omitted)

199. 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, when the alleged incomplete information refers to the establishment of zones in the case of

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155 Appellate Body Report, *Japan — Agricultural Products II*, para. 93.

156 Appellate Body Reports, *US/Canada — Continued Suspension*, para. 679.

the occurrence of a well-known disease, like ASF, it is expected that the lack of sufficient relevant information will be rectified sooner rather than later.

200. The present case is different from previous cases such as the Hormones or GMO cases which involved relatively "new" issues where the science may as yet not have accumulated or is controversial. There does not seem to be much controversy between the parties about the science of ASFV. The dispute is rather about whether or not the facts of the present case, support or do not support the maintenance of the measure at issue.

201. The EU submits that Russia has failed to review its measure within a reasonable period of time. From the date of the first isolated cases of ASF in wild boar in Lithuania, at the end of January 2014, to the establishment of the Panel, on 22 July 2014, there were six months in which Russia could have, and should have, reviewed its measures. Moreover, after the additional information provided in June 2014, Russia did not provide any feedback to the EU on all the information it had received until that point. Russia contacted the EU again only at the beginning of December 2014, that is almost six months later and then, with no sign of reviewing the measures at issue.

202. In light of the above, each of the measures at issue is inconsistent with Article 5.7 of the SPS Agreement, because Russia failed to comply with any of the requirements in the said article. In this case, it is incorrect to proceed on the basis that relevant scientific evidence is insufficient. The measures at issue do not appear to be provisional. Russia did not proceed on the basis of available pertinent information, including that from the relevant international organizations, as well as from sanitary measures applied by other Members. Although Russia obtained the information necessary for a more objective assessment of risks, it has not shown any sign of reviewing the sanitary measure accordingly within a reasonable period of time.

C. Claims related to regionalization

1. Articles 6.1 and 6.2 of the SPS Agreement

203. Article 6.1 of the SPS Agreement reads as follows:

> Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, inter alia, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.

204. Article 6.2 of the SPS Agreement states that:

> Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

205. Regionalization claims are not often raised in SPS disputes.[157] In the only report to date on regionalization claims, the panel found a violation of Article 6.2 because India did not recognize the concepts of disease-free areas and areas of low disease prevalence.[158] The panel further found a consequential violation of Article 6.1 of the SPS Agreement.[159]

206. The EU recalls that regionalization is an important principle aimed at allowing the continuation of trade while maintaining a high level of sanitary protection. It is especially relevant in the case of Members with large territories where an outbreak of a disease in one part of the territory often means no risks in other parts of the territory.

207. The EU would like to clarify first the relationship between a Member's ALOP and regionalization. It is undisputed that each WTO Member may establish its own ALOP for SPS purposes. But the risk management choices of Members should be

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[157] Regionalization claims have been raised in: *Japan – Apples*; *Australia — Certain Measures Affecting the Importation of Fresh Fruit and Vegetables*; *Croatia — Measures Affecting Imports of Live Animals and Meat Products; Korea – Bovine Meat (Canada); India — Agricultural Products* and *US - Animals.*

[158] Panel Report, *India — Agricultural Products*, paras 7.693 – 7.708.

[159] Panel Report, *India — Agricultural Products*, paras 7.709 – 7.712.

reflected in measures applied in a non-discriminatory and reasonable manner, as prescribed by Articles 5.5 and 5.6 of the SPS Agreement.

208. The regionalization requirements in Article 6 should be understood in the light of the "significantly less trade restrictive alternative" requirement in Article 5.6. For the same ALOP one may opt for different measures which will have a different impact on trade. A regional ban (instead of a country-wide ban) should not be automatically equated to a low ALOP. To the contrary, it may very well be that a very high ALOP is reflected in a regional ban, allowing trade from unaffected regions within the same country.

209. The panel in *India-Agricultural Products* shed light on the relationship between the different paragraphs of Article 6 of the SPS Agreement. It 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. It will then continue with the second sentence of Article 6.2 and then with Article 6.1.

210. Similar to *India-Agricultural Products*, in this case, Russia did not recognize the concept of disease-free areas and areas of low disease prevalence with respect to ASF in the EU. Russia applies an indiscriminate EU-wide ban (and four indiscriminate bans concerning the respective EU MS), without taking into account relevant factors such as geography, ecosystems, epidemiological surveillance and the effectiveness of sanitary controls.

211. The geographical factor must be taken into account as the European Union has a large geographical territory which implies that an ASF outbreak at one border, for example that in the east, with Belarus, is very remote to another EU border in the west for example. Wild boars do not have the habit of migrating across large areas, spending most of their life in the same place, within an area of roughly 20-100 square kilometres.[160] Furthermore, the EU has been careful not to provoke the dispersal of infected wild boars to wider areas by seeking to use hunting of wild boar in an attempt to eradicate the disease. The most efficient method of dealing with the

[160] EFSA ASF Scientific Opinion 2010, p. 29 (Exhibit EU-24).

problem in wild boar is to isolate the area and let the disease follow its natural course, incurring its own disappearance.

212. The establishment of the different zones in the EU MS concerned took into account natural barriers (rivers, lakes) and artificial ones (fenced motorways), forest limits and administrative boundaries.[161] It was established in such a way that it is several times the usual range of wild boar.

213. With regard to the pigs in domestic holdings, regionalization was established in two tiers. The first tier comprises a protection zone with a radius of at least 3 kilometres around the site of an outbreak, which is included in a surveillance zone of a radius of at least 10 kilometres. The second tier takes into account factors such as those described above.

214. The EU's epidemiological surveillance is advanced and transparent and sanitary controls in its Member States are highly effective. This explains the prompt detection of ASF cases in wild boars and subsequent outbreaks in pig farms in the affected areas.

215. Notwithstanding the above, Russia failed to recognize the concepts of disease-free areas with respect to ASF in the EU. Russia also did not make any determination with respect to such areas based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary controls. Russia fails to recognise the EU territory, excluding the restricted areas, as disease-free areas, despite the implementation of appropriate regionalisation measures.

216. 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 control programs (immediately implemented in

[161] Annex I to the Letter of 13 June 2014, ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505 (Exhibit EU-94).

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

217. Article 6.3 of the SPS Agreement reads as follows:

> Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

218. 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 or areas of low disease prevalence are and are likely to remain disease-free areas or areas of low disease prevalence, respectively.

219. 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 an objective risk assessment, which has never been conducted or at least never provided to the EU.

220. The first information on the ASF regionalization measures in the EU was sent by the EU to Russia by letter of 29 January 2014,[162] comprising a summary report of surveillance for ASF implemented in Lithuania, Poland, Latvia and Estonia.

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[162] ARES(2014)209377, SANCO G7/RF/mh(2014)219959 (Exhibit EU-62).

221. It followed an exchange of letters between the parties. Five letters in particular amply and promptly answered various information requests from Russia: the letter of 7 February 2014,[163] the letter of 6 March 2014,[164] the letter of 13 March 2014,[165] the letter of 21 May 2014[166] and the letter of 13 June 2014.[167]

222. Accordingly, detailed information was supplied as attached in the four annexes to the letter of 7 February 2014,[168] with regard to:

- the applicable EU legislation, such as Directive 2002/60[169] and Decision 2014/43/EU;[170]

- the situation in Lithuania, the only EU MS concerned at the time (a limited number of cases in wild boar);[171]

- the most recent national contingency plans of Lithuania, but also Poland, Latvia and Estonia, and the other EU MS in the region bordering Belarus and Russia;

- the pig sector structure in the EU MS, in a spreadsheet containing data on the number of farms and heads by agricultural size of farm and size of pig herd for 27 EU MS, dated 2010;

- Guidelines for preparing contingency plans for epidemic diseases (document SANCO/10101/2002);[172]

- Better Training for Safer Food presentation on contingency plans;

- Reports of the audits of the Food and Veterinary Office (FVO) in Lithuania, Latvia, Estonia and Poland[173] and examples of audits in other Member States;

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163 ARES(2014)304571, SANCO/G7/DP/tb(2014)328578 (Exhibit EU-65).
164 ARES(2014)601346, SANCO/G7/PD/mh/(2014)630598 (Exhibit EU-86).
165 ARES(2014)709435, SANCO/G7/PD/mh(2014)745829 (Exhibit EU-91).
166 ARES(2014)1658269, SANCO/G6/AB(2014)1782253 (Exhibit EU-92).
167 ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505 (Exhibit EU-94).
168 ARES(2014)304571, SANCO/G7/DP/tb(2014)328578 (Exhibit EU-65).
169 Exhibit EU-31.
170 Exhibit EU-33.
171 Order B1-48 of 24 January 2014 (Exhibit EU-70), Order B1-49 of 24 January 2014 (Exhibit EU-71) and Order B1-60 of 30 January 2014 (Exhibit EU-72).
172 Exhibit EU-73.
173 Final Report of a Specific Audit carried out in Lithuania from 20 to 24 July 2009 in order to Evaluate the Contingency Plans for Epizootic Diseases and the Eradication Programme for Rabies in the

- Presentation on FVO audits on contingency planning.

223. Following the exchange of letters several meetings were organized, such as those taking place in Vilnius on 11 February 2014, in Brussels on 14 February 2014, Moscow on 21 February 2014, in Madrid on 14 March 2014, in Geneva on 25 March 2014, and in Moscow on 3 July 2014.

224. By the letter of 6 March 2014 the EU provided Russia a map based on a published FAO study (with data from various statistical sources from the years 2005-2011), indicating the estimated densities of wild boar population in Europe by region.[174]

225. A meeting of the experts followed on 7 March 2014 in the city of Vladimir, Russia. The experts discussed the EU regionalization conditions in the framework of the limited number of cases in wild boar in Lithuania and Poland and the risk presented by exports of pork and pig products from the EU to Russia. It is significant that the agreed minutes of the meeting mention that the EU veterinary representative "answered all the questions asked by the Russian party".[175]

226. However, Russia reconsidered this position and came back on 12 March 2014 asking for information which was either already supplied or which was not relevant for the purposes of the EU regionalization measures.[176]

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context of a General Audit, SANCO 2009-8265 (Exhibit EU-78); Final Report of an Audit carried out in Lithuania from 27 February to 2 March 2012 in order to Evaluate the Actions Taken during Recent Outbreaks of Classical Swine Fever and to Assess Contingency Planning of Epizootic Disease, SANCO 2012-6386 (Exhibit EU-79); Final Report of an Audit carried out in Latvia from 4 to 8 March 2013 in order to Evaluate the Implementation of Contingency Plans in relation to Animal Health, including provisions on the Protection of Animals during Depopulation for Disease Control, SANCO 2013-6777 (Exhibit EU-80); Final Report of a Specific Audit carried out in Latvia from 15 to 19 June 2009 in order to Evaluate the Contingency Plans for Epizootic Diseases and the Eradication Programme for Rabies in the context of a General Audit, SANCO 2009-8259 (Exhibit EU-81); Final Report of an Audit carried out in Estonia from 15 to 19 April 2013 in order to Evaluate the Implementation of Contingency Plans in relation to Animal Health, including provisions on the Protection of Animals during Depopulation for Disease Control, SANCO 2013- 6781 (Exhibit EU-82); and Final Report of a Specific Audit carried out in Poland from 7 to 16 April 2008 in order to Evaluate the Contingency Plans for Epizootic Diseases (in particular Foot and Mouth Disease and Classical Swine Fever) and to Follow-up Surveillance Activities for Bluetongue, SANCO 2008-7789 (Exhibit EU-83).

[174] ARES(2014)601346, SANCO/G7/PD/mh/(2014)630598 (Exhibit EU-86).

[175] Protocol of the technical meeting-consultation between the EU and the FGBI ARRIAH, FGBI VGNKI experts as well as Rosselkhoznadzor representatives which was held at the FGBI Federal Center for Animal Health, Vladimir, 7 March 2014 (Exhibit EU-89).

[176] Letter of 12 March 2014, FS-SD-4/3620 (Exhibit EU-90). In this letter Russia referred *inter alia* to "absence of any proof of non-existence of ASF in the territory of other EU member states."

227. By the letter of 13 March 2014 Russia received additional information, including a table with the EU replies the topics mentioned in the letter FS-SD-4/3620 from Russia.[177]

228. After the consultations held in Geneva on 30 April and 1 May 2014 the EU sent further information to Russia in the letter dated 21 May 2014,[178] with respect to:

- a detailed action plan of emergency response at regional and national level in case of African swine fever outbreak;

- data on the wild boar population with detailed density by country and region;

- data about pig farms and information about swine population with detailed density by region;

- information about measures taken/being taken to prevent introduction of the etiologic agent to the swine industry sector/ personal subsidiary farming sector/ wild population;

- information about foreign hunters, who entered the country to hunt the wild boar during 2013-2014 detailed by country and region;

- information about pig farms and meat processing factories attested to ship animals and products to the territory of the CU, including information about the suppliers and production volumes, detailed by country and region.

229. In a subsequent letter dated 13 June 2014[179] the EU further clarified that the definition of the zones where restrictions apply is set by the Commission following the approval of the Standing Committee on the Food Chain and Animal Health.[180] It is done on the basis of scientific data and making use of the experience gained on wild boar ecology in Europe. The geographical areas where the infection occurred in

177 ARES(2014)709435, SANCO/G7/PD/mh(2014)745829 (Exhibit EU-91).
178 ARES(2014)1658269, SANCO/G6/AB(2014)1782253 (Exhibit EU-92).
179 ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505 (Exhibit EU-94).
180 Reply to the question 1 (Justification of criteria of identification of borders of infected/free/high risk zones in the territory of Poland and Lithuania, namely regulatory and legislative acts and scientific data used as a basis for zoning in the EU countries with regard to ASF), Annex 1 to the Letter of 13 June 2014 (Exhibit EU-94).

wild boar were determined taking into account the biology of the species, as confirmed by the EFSA ASF Scientific Opinion.[181]

230. It was explained 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, in a worst-case scenario. Apart from the distance from disease cases, other factors were taken into account, such as:

- natural (such as the Võrtsjärv lake in Estonia and the Daugava river in Latvia) and artificial (fenced motorways) barriers,

- forest limits, and,

- administrative boundaries.

231. Further information on the delimitation of the areas followed with the approval by the Commission of the Lithuanian and Polish eradication plans.[182]

232. Details on the Polish administrative units were provided in the Annex to the Polish contingency plan. The Commission decisions specified each time the respective areas in Poland by reference to the administrative units.

233. 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.[183] Furthermore, the SPS Committee Guidelines make reference to the fact that Members should proceed with a recognition process without "undue delay",[184] and that the discussions should be undertaken within a "reasonable period of time", normally within 90 days of a request.[185]

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181 The home range of wild boar is 20-100 square km (EFSA ASF Scientific Opinion 2010, p. 29) (Exhibit EU-24).

182 Commission Implementing Decision 2014/442/EU of 7 July 2014 approving the plans for the eradication of African swine fever in feral pigs in certain areas of Lithuania and Poland, OJ L 200, p. 21 (Exhibit EU-50).

183 G/SPS/48, paras 20-31 (Exhibit EU-51).

184 G/SPS/48, para. 5 (Exhibit EU-51).

185 G/SPS/48, para. 15 (Exhibit EU-51).

234. However, the Article 6 SPS Committee guidelines "do not provide any legal interpretation or modification to the Agreement itself"[186] and thus cannot be read as a "subsequent agreement" among the Parties, as occurred in a previous case concerning a TBT Committee Decision.[187] In addition, the language of the decision is rather recommendatory ("should") and not imperative ("shall").[188]

235. Nevertheless, 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".[189] The Guidelines served for confirming a conclusion already reached by the panel. In addition, the Appellate Body has already stated that un-adopted GATT panel reports, which have no legal value, may nevertheless provide "useful guidance".[190]

236. 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.

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186 G/SPS/48, para. 2 (Exhibit EU-51).

187 The Appellate Body has already found that a TBT Committee Decision was a "subsequent agreement" among the Parties within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT). Appellate Body Report, *US—Tuna II (Mexico)*, para. 372, referring to the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the TBT Agreement, G/TBT/1/Rev.10.

188 The Appellate Body considered that factors such as the clear expression of "a common understanding, and an acceptance of that understanding among Members", reflected in imperative language ("shall") and the fact that the respective provision interpreted a specific term were indicative of the intention of the Members to conclude a "subsequent agreement" within the meaning of Article 31(3)(a) of the VCLT. Appellate Body Report, *US – Clove Cigarettes,* para. 267.

189 Panel Report, *India- Agricultural Products*, fn. 1197.

190 Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 14- 15.

D. Claims related to risk management

1. Article 5.6 of the SPS Agreement

237. Article 5.6 of the SPS Agreement states that:

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.[3]
>
> (original footnote)[3] For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

238. The phrase "appropriate level of sanitary or phytosanitary protection" (ALOP) is defined in Annex A(5) of the SPS Agreement as:

> The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.

239. The ALOP as such, also referred to as the acceptable level of risk[191], cannot be questioned by the WTO adjudicating bodies: it is a political choice of each government. However, once a Member has chosen its desired level of protection, it should calibrate the measures according to that level.

240. In the words of the Panel in *India-Agricultural Products*:

> An ALOP or acceptable level of risk will express a certain threshold that denotes the position of the relevant Member in relation to the intensity, extent, or relative amount of protection or risk that the Member deems to be tolerable or suitable.[192]

241. The SPS Agreement and the corresponding case law recognize that each WTO Member may establish the level of protection it deems appropriate.[193] This includes

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191 Appellate Body Report, *Australia- Apples*, para. 369.

192 Panel Report, *India-Agricultural Products*, para. 7.565.

193 Appellate Body Report, *EC – Hormones*, para. 124.

a "zero-risk" policy and may cover any ascertainable risk, including small or "negligible" risks.[194] 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.[195]

242. In the present case Russia has not expressly stated its appropriate level of protection. We recall that the Appellate Body noted in the past that:

> [I]n 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.[196]

243. Accordingly, if the level of protection is not specified in writing, a panel should infer it from the SPS measures applied in practice.

244. In *India - Agricultural Products* India did not clearly mention its ALOP but it has imposed a country-wide ban for the disputed imported products. The Panel has found that it could not be implied from the ban that India pursues a zero-risk policy, in part because Low Pathogenic Avian Influenza (LPAI) can be transmitted through wild birds and the trade ban is not apt in restricting wildlife movements. The Panel thus concluded that India's ALOP is very high or very conservative.[197]

245. The present case has significant similarities to *India - Agricultural Products.* Russia imposed a country-wide ban in respect to the products at issue for each of the four EU MS concerned: Lithuania, Poland, Latvia and Estonia. In addition, Russia has imposed an EU-wide ban, as already demonstrated. However, this ban is 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, this ban is not able to achieve restrictions in wildlife movements, an important factor of ASF

194 Appellate Body Report, *Australia-Salmon*, para. 125.
195 Appellate Body Report, *EC — Hormones*, para. 173.
196 Appellate Body Report, *Australia – Salmon*, para. 207.
197 Panel Report, *India-Agricultural Products*, paras 7.550- 7.575.

transmission being the wild boar populations.[198] Furthermore, infected wild boars may move into Russia also from its affected neighbours in the Caucasus region.

246. Trade in live pigs and pig products is not similarly restricted in Russia as it is with respect to the trade in the products at issue coming to Russia from the EU. Russia establishes a protection area (first endangered zone) and an adjacent surveillance area (second endangered zone) each time an outbreak is reported. Products from the non-infected areas of Russia are allowed to be traded in the rest of the country. Since its establishment in the Caucasus region in 2007, the ASFV has significantly spread long distances northwards, eastwards and westwards. This proves the failure of the Russian authorities to contain the spread of the ASFV. Scientific assessments also confirm the poor effectiveness of the Russian measures.[199]

247. Wild boars are an important source of the spread of ASF both within Russia and beyond its vast territory. Wild boars are not migratory species as such, and normally spend all their lives in an area very close to that where they were born, not exceeding a range of 10 km. More ample movements can be triggered only during the mating season, as a result of a lack of sufficient food or by their displacement as a result of hunting.[200] Wild boars seeking to escape hunters are the most probable vector for the introduction of ASF into the EU in 2014.[201] The EU has already concluded, on the basis of scientific data, that increased hunting is not an effective solution in ASF eradication strategy.[202] The recently affected EU MS undertook not to increase hunting pressure after the finding of ASF.

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198 However, it is less likely (but not excluded) that wild boar movement will take place from the EU to Belarus and Russia as the EU is not putting additional hunting pressure on these animals. Wild boars are sedentary animals and the main factor of dispersion is the hunting pressure, as already explained.

199 EFSA ASF Scientific Opinion 2014, pp. 11-15 (Exhibit EU-26).

200 EFSA ASF Scientific Opinion 2010, p. 29, quoting Office National de la Chasse et de la Faune Sauvage (ONCFS), 2004, La gestion du sanglier. Des pistes et des outils pour réduire les populations. DER Cnera Cervidés-sanglier, ONCFS, St Benoist (Exhibit EU-24).

201 The ASF virus strain in the EU MS concerned matches 100% the virus strain in Belarus. ASF diagnosis and molecular characterization Lithuania, EURL-ASF, CISA-INIA, 1317, 28/10/2014 (Exhibit EU-27); ASF diagnosis and molecular characterization Poland, EURL-ASF, CISA-INIA, 1145, 30/09/2014 (Exhibit EU-28); ASF diagnosis and molecular characterization Latvia, EURL-ASF, CISA-INIA, 1232, 17/10/2014 (Exhibit EU-29); ASF diagnosis and molecular characterization Estonia, EURL-ASF, CISA-INIA, 1375, 7/11/2014 (Exhibit EU-30).

202 EFSA ASF Scientific Report 2014 (Exhibit EU-25).

248. 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.

249. Even if one were to assume that Russia has a very high or conservative ALOP, the EU will demonstrate that there is a possible alternative that cumulatively meets the conditions of footnote 3 of the SPS Agreement.

250. According to the Appellate Body a SPS measure is more trade-restrictive than required if there is an alternative SPS measure which:

(1) is reasonably available, taking into account technical and economic feasibility,

(2) achieves the Member's appropriate level of SPS protection and

(3) is significantly less trade restrictive than the contested measure.[203]

251. Because it is the complaining Member that bears the burden of proof of establishing a *prima facie* case that there is an alternative measure that fulfils all the conditions in Article 5.6, the EU will demonstrate that such an alternative exists.[204]

252. 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 such an alternative, fulfilling all the legal requirements in Article 5.6 of the SPS Agreement.

253. First, the OIE Terrestrial Code is reasonably available. It is technically feasible because it has been developed at a global level with the expertise of veterinary authorities around the world. It is also widely used across the globe.

254. The adoption of the OIE standards by Russia does not impose on it an economic burden which will make it unfeasible. The control measures are the responsibility of the exporting country, in this case the EU. The expense of these control measures is not incurred by Russia, which is the importing country. Verification of the sanitary

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[203] Appellate Body Report, *Australia – Salmon*, para. 194, referring to the Panel Report, *Australia-Salmon*, para. 95.

[204] Appellate Body Report, *Japan –Agricultural Products II*, para. 126.

certificates for trade in different pig products from the EU into Russia will not impose an additional burden on the competent Russian authorities, as they already check the certificates of consignments of the products at issue.

255. Second, the OIE Terrestrial Code is well-placed to achieve Russia's ALOP. As explained above, Russia did not clearly state its ALOP. Deducing it from the domestic measures applied in the case of ASF, leads one to the conclusion that it is a rather low ALOP. Even assuming that Russia's ALOP is very high or very conservative, the application of the OIE standards will satisfy it. Regionalization can be equated with a very high ALOP. The OIE Terrestrial Code recommends trade in live pigs and different pig products from ASF-free zones, taking into account the establishment of surveillance, control and biosecurity measures to ensure that trade in the pig products from outside the affected zone is safe.

256. Paragraphs A.2 and A.3 of the User's Guide to the OIE Terrestrial Code provide that:

> Veterinary Authorities should use the standards in the Terrestrial Code to set up measures providing for early detection, internal reporting, notification and control of pathogenic agents, including zoonotic ones, in terrestrial animals (mammals, birds and bees) and preventing their spread via international trade in animals and animal products, while avoiding unjustified sanitary barriers to trade.
>
> The OIE standards are based on the most recent scientific and technical information. Correctly applied, they protect animal health and welfare and veterinary public health during production and trade in animals and animal products.[205]

257. Furthermore, in a real world where "people live and work and die"[206] the EU control measures have proven highly effective in respect of ASF containment. The EU is one of the largest exporters in the World of pig products and there is no evidence that any of our trade partners has suffered ASF outbreaks as a result of EU exports after January 2014. Thus, following the prescriptions of the OIE Code is proven as a sufficient means to prevent ASF transmission in real life conditions.

258. Third, the OIE Terrestrial Code standards are significantly less trade restrictive, allowing trade from ASF-free zones from countries notifying ASF, while the Russian measures at issue, namely the four individual bans concerning Lithuania,

[205] User's Guide, para. A.2, (Exhibit EU-2).

Poland, Latvia and Estonia, as well as the EU-wide ban, are the most trade restrictive options. It is blatantly disproportionate to impose a country-wide ban on the products at issue, in cases where products may come from areas thousands of kilometres apart from each other, as long as the necessary measures are taken with respect to containment in the limited areas where ASF outbreaks have occurred.

259. In conclusion, 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

260. Article 5.3 of the SPS Agreement states that:

> In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

261. 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:

> [T]he existence of unknown and uncertain elements does not justify a departure from the requirements of Articles 5.1, 5.2 and 5.3, read together with paragraph 4 of Annex A, for a risk assessment. We recall that Article 5.2 requires that 'in the assessment of risk, Members shall take into account available scientific evidence'. We further recall that Article 2, entitled 'Basic Rights and Obligations', requires in paragraph 2 that 'Members shall ensure that any sanitary … measure … is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5. [207]

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206 Appellate Body Report, *EC — Hormones*, para. 187.

207 Appellate Body Report, *Australia — Salmon*, para. 130.

262. Russia's measures at issue do not conform to the requirements of Article 5.3 of the SPS Agreement. In assessing the risk to animal health and determining the measures to be applied for achieving the appropriate level of sanitary protection, Russia failed to take into account 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.

263. Article 5.4 of the SPS Agreement provides that:

> Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

264. 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:

> Guided by the wording of Article 5.4, in particular the words 'should' (not 'shall') and 'objective', we consider that this provision of the SPS Agreement does not impose an obligation. However, this objective of minimizing negative trade effects has nonetheless to be taken into account in the interpretation of other provisions of the SPS Agreement.[208]

265. The Appellate Body noted in *Australia — Salmon* that the SPS Agreement contains an implicit obligation that WTO Members determine their ALOP.[209] As already explained, if a Member does not expressly specify its ALOP it should be deduced from analysing the measures put in place by the Member. In the present case, based mainly on the analysis of its domestic measures, Russia's ALOP seems to be rather low.

266. 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.

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208 Panel Report, *EC — Hormones (Canada)*, para. 8.169.

209 Appellate Body Report, *Australia — Salmon*, paras. 205–207.

E. Discrimination claims

1. The order of analysis

267. With regard to the relationship between Article 5.5 and Article 2.3 of the SPS Agreement, the EU starts by recalling that Article 2.3 of the SPS Agreement is broader in scope, while Article 5.5 of the SPS Agreement is confined to risk management.

268. In other words, 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 (normally reflected in one or more sanitary measures) which result in discrimination or a disguised restriction on international trade. [210]

269. 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:

> We recall that the third – and decisive – element of Article 5.5 … requires a finding that the SPS measure which embodies arbitrary or unjustifiable restrictions in levels of protection results in "discrimination or a disguised restriction on international trade". Therefore, a finding of violation of Article 5.5 will necessarily imply a violation of Article 2.3, first sentence, or Article 2.3, second sentence. Discrimination "between Members, including their own territory and that of others Members" within the meaning of Article 2.3, first sentence, can be established by following the complex and indirect route worked out and elaborated by Article 5.5. However, it is clear that this route is not the only route leading to a finding that an SPS measure constitutes arbitrary or unjustifiable discrimination according to Article 2.3, first sentence. Arbitrary or unjustifiable discrimination in the sense of Article 2.3, first sentence, can be found to exist without any examination under Article 5.5.[211]

270. While other panels have followed this approach, starting with the claims under Article 5.5, the panel in *India-Agricultural Products* agreed with the US and started its analysis with the order proposed by the complainant, namely with Article 2.3.[212]

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[210] Panel Reports, *EC - Hormones (US)*, para. 8.168.

[211] Appellate Body Report, *Australia – Salmon*, para. 252; Panel Report, *US – Poultry (China)*, para. 7.318.

[212] Panel Report, *India- Agricultural Products*, paras 7.338. - 7. 347.

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.[213]

271. In this dispute the EU will present its claims related to discrimination starting with the claims under Article 2.3 and continuing with the claims under Article 5.5.

2. Article 2.3 of the SPS Agreement

2.1. Unjustifiable discrimination: the legal standard

272. The first sentence of Article 2.3 of the SPS Agreement reads as follows:

> Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

273. 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.

274. 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
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> (3) identical or similar conditions prevail in the territory of the Members compared.[214]

275. Absent relevant case-law on Article 2.3 of the SPS Agreement, the panel in *India-Agricultural Products* sought guidance on the interpretation of the first

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213 Panel Report, *India- Agricultural Products*, paras 7.385 – 7.481.

214 Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.

sentence from the case-law on the *chapeau* of Article XX of the GATT 1994, which contains similar language.[215]

276. The EU finds the *chapeau* of Article XX a proper comparator.

277. 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).

278. Conceptually, in a national treatment discrimination claim, the measure at issue is the substantive difference between the treatment afforded to national products and the treatment afforded to imported products. The measure at issue is not the treatment afforded to national products in isolation; nor the treatment afforded to imported products in isolation. Consistent with this, when implementing, a losing defendant has three options: aligning on the treatment previously afforded to national products; aligning on the treatment previously afforded to imported products; or aligning the treatment of both domestic and imported products on a new substantively origin neutral standard.

279. Similarly, in an MFN claim, the measure at issue is the substantive difference between the treatment afforded to products from one Member and the treatment afforded to products from another Member; not either comparator considered in isolation.

280. 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.[216]

281. In *Brazil –Retreaded Tyres* the respondent accorded differential treatment to retreaded tyres coming from the MERCOSUR countries and those coming from other WTO Members. Brazil sought to justify that treatment by invoking an award of a MERCOSUR arbitral tribunal. However, a significant element is that in those arbitral proceedings Brazil did not raise any defence under Article 50(d) of the

[215] Panel Report, *India- Agricultural Products*, paras 7.396.- 7.402.

Treaty of Montevideo, which performs a similar function to Article XX(b) of the GATT 1994.[217]

282. The Appellate Body found that the explanation provided by Brazil was not acceptable as a justification for the discrimination between MERCOSUR countries and non-MERCOSUR countries in relation to retreaded tyres, because it bore no relationship to the legitimate objective pursued by the import ban (the protection of life and health of humans and animals from risks arising from mosquito-borne diseases and tyre fires) or even went against it.[218]

283. The Appellate Body noted:

> [T]here is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure. … Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.[219]

284. 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.

285. The panel in *India- Agricultural Products* considered that the similar relevant conditions are the existence of the notifiable avian influenza (NAI) on both the Indian and the US territories, because that was the relevant feature that triggered the import prohibition imposed by India.[220]

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216 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226.
217 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 234.
218 Appellate Body Report, *Brazil- Retreaded Tyres*, para. 246.
219 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227. (footnotes omitted)
220 Panel Report, *India- Agricultural Products*, para. 7.463.

286. 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

287. The first instance of discrimination occurs between the Russian territory and the EU territory with respect to trade in live pigs and certain pig products in the context of the delimitation of the ASF control areas encircling the epizootic hotbed.

288. First, Russia's treatment of EU imported products consists of an EU-wide ban and four individual bans targeting the following EU MS: Estonia, Latvia, Lithuania and Poland. 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.

289. In stark contrast to the EU-wide ban applied to the EU products at issue, 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.

290. As already explained before, Russian measures in the event of an ASF outbreak provide for the delimitation of a "first endangered zone", with a radius of 5-20 km from the ASF epizootic hotbed. This main area is surrounded by a surveillance zone,

called a "second endangered zone", with a radius of up to 100–150 km from the epizootic hotbed.[221]

291. 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.[222]

292. The EU and the EU MS have put in place a state-of-the art system for the containment and prevention of ASF in domestic pigs, as further described in the section on ASF in the EU, which provides for two tiers of protection. The first tier consists in the delimitation of a protection zone with a radius of at least 3 kilometres around the outbreak site, which is included in a surveillance zone of a radius of at least 10 kilometres.[223]

293. The second tier consists of the delimitation of several areas, taking into account epizootic, geographical and administrative characteristics of the zones adjacent to the affected areas and to risk zones at the borders with Belarus and Russia.[224] For wild boar the EU regionalization measures provide for regionalization on the basis of epizootic, geographical and administrative characteristics.

294. 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. The similar relevant conditions were the existence of the ASFV on both the Russian and the EU territories, because that was the relevant feature triggering the import prohibition imposed by Russia on live pigs and certain pig products from the EU. [225]

295. Furthermore, according to the EFSA ASF Scientific Opinion, relying *inter alia* on a FAO assessment, the measures to prevent and contain ASF in Russia have limited effectiveness. Surveillance is not properly done. Outbreaks in the backyard sector

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221 Article 4.1.1. of the ASF Instruction (Exhibit EU-18).

222 EPSA ASF Scientific Opinion 2014, pp. 11-15 and 16 (Exhibit EU-26).

223 Article 9 of Council Directive 2002/60/EC (Exhibit EU-31).

224 The last version of the second tier of EU regionalization measures regarding ASF in domestic pigs is to be found in Decision 2014/709/EU (Exhibit EU-44).

225 For very similar factual circumstances and reasoning see Panel Report, *India- Agricultural Products*, para. 7.463.

are underreported and detection of new ASF introductions is most often delayed. [226] In addition, some of the outbreaks in wild boar reported internally are not notified at all to the OIE, as they are labelled as "infected objects". The evidence indicates that 93 such cases were discovered but not notified to the OIE.[227]

296. The limited effectiveness of the Russian domestic measures is confirmed by the wide geographic spread of ASF in Russia in the last seven years, from the Caucasus region mainly North and West.[228]

297. 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.

298. In light of the above, the EU has demonstrated that all the three cumulative elements of Article 2.3, first sentence, are met and consequently Russia's ASF measures at issue are inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily and unjustifiably discriminate between Russia and another Member (EU) in which the same or similar conditions prevail.

2.3. The second instance of unjustifiable discrimination

299. 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.[229] This discrimination

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[226] EFSA ASF Scientific Opinion 2014, pp. 11-15 and 16 (Exhibit EU-26).

[227] EFSA ASF Scientific Opinion 2014, p. 12 (Exhibit EU-26).

[228] See African Swine Fever from 2007 to 2014, compilation by the European Commission of maps from OIE (Exhibit EU-21) and ASF epidemic situation, prevention and control of ASF in Russia by RF Chief Veterinary Officer Yevgeny A. Nepoklonov (http://web.oie.int/RR-Europe/eng/Regprog/docs/PPT/GF-TADs%20RSC5%20-%20session%204%20-%20ASF%20Russia.pdf) (Exhibit EU-22).

[229] This is not the single case of differential (less favourable) treatment of the EU products in comparison to the products from other trade partners of Russia. In this respect, it is also noted that Russia lifted certain import restrictions against Belarus, despite the fact that ASF has been identified and notified in two regions of Belarus since June 2013. The movement of live pigs and pig products from pig farms and meat processing companies of the Mogilev Oblast, Belarus, was allowed by virtue of the administrative notice from the FSVPS of 27 January 2014 (FS-EN-8/1093) (Exhibit EU-100).

occurred at a point in time when the political relations between Russia and Ukraine were rather good.[230]

300. The notification G/SPS/N/RUS/46 of 21 January 2014 mentions that the measure applies to the import of "live pigs and its genetic material; pork products (which were not heat treated no less than 72ºC for at least 30 minutes); products from slaughter of wild boars; horn-hoofed and leather, intestinal materials; bristles; feed for pigs; hunting trophies, which were not subjected to full taxidermy treatment; previously used equipment for maintenance, transportation, slaughter and cutting of pigs". [231]

301. 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.

302. According to the letter of the FSVPS of 15 January 2014 (FS-NW-8/528), despite the finding of ASF in wild boars in a forested hunting ground in the Luhansk Region of Ukraine, close to the Russian border, Russia restricted imports of live pigs and pig products from the said Luhansk region only and did not apply a *de jure* or *de facto* ban on all pigs and pig products originating in Ukraine.

303. Second, the discrimination is arbitrary and unjustifiable because the difference in treatment cannot be explained by a different epizootic status. In practice the EU regionalization measures are highly effective. The outbreaks reported in Ukraine have been dealt with appropriately, [232] but the ASF spread seems to follow the same pattern as in Russia (involving primarily the backyard sector, swill-feeding and illegal trade of pork products.[233]

304. 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

230 In January 2014Viktor Yanukovych was still the President of Ukraine.
231 G/SPS/N/RUS/46 (Exhibit EU-6).
232 EFSA ASF Scientific Opinion 2014, p. 17 (Exhibit EU-26).
233 EFSA ASF Scientific Opinion 2014, p. 16 (Exhibit EU-26).

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.

305. In light of the above, the EU has demonstrated that all the three cumulative elements of Article 2.3, first sentence, are met and consequently Russia's ASF measures are inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily and unjustifiably discriminate between Ukraine and another WTO Member (EU) in which the same or similar conditions prevail.

2.4. Disguised restriction

306. The second sentence of Article 2.3 of the SPS Agreement reads as follows:

> Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

307. 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*.[234] The panel relied on previous observations of the Appellate Body within the context of Article 5.5 of the SPS Agreement.

308. 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'".[235]

309. 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.[236]

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234 Panel Report, *India- Agricultural Products*, paras 7.475-7.478.
235 Appellate Body Report, *Australia – Salmon*, para. 166.
236 Appellate Body Report, *Australia – Salmon*, paras. 174-176.

310. 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.

311. In this context, the Appellate Body noted that "arbitrary discrimination", "unjustifiable discrimination", and "disguised restriction on international trade" impart meaning to one another.[237] Starting from the fact that the Appellate Body has stated that "'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX",[238] the panel in *India –Agricultural Products* considered that "disguised restriction on international trade" within the meaning of Article 2.3 may similarly be read to encompass measures that constitute arbitrary or unjustifiable discrimination.[239]

312. In light of the above, Russia's ASF measures amount to a disguised restriction on international trade for several reasons.

313. First, 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.

314. Russia imposes an EU-wide ban (and a country-wide ban for the four affected MS) while it allows trade in the products associated with the risk of ASF of Russian origin, from non-affected regions of Russia. Furthermore, the Russian domestic ASF measures did not prove very effective over the last years, as evidenced by the wide geographic spread of the disease[240] and by scientific studies.[241] In this context the measures at issue are clearly disproportionate and discriminatory. Finally, Russia treats differently the EU products at issue and the EU territory, and the products

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237 Appellate Body Report, *US – Gasoline*, p. 25.

238 Appellate Body Report, *US – Gasoline*, p. 25.

239 Panel Report, *India- Agricultural Products*, paras 7.476.

240 African Swine Fever from 2007 to 2014, compilation by the European Commission of maps from OIE (Exhibit EU-21).

241 EFSA ASF Scientific Opinion 2014, pp. 11-15 (Exhibit EU-26).

associated with the risk of ASF from other WTO Members (Ukraine) or from non-WTO Members (Belarus).

315. 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. The OIE Terrestrial Code clearly allows for regionalization, while Russia applies an EU-wide ban and a country-wide ban for the four affected EU MS. Not only is it the case that the Russian measures do not "conform to" and are not "based on" international standards, but they actually go against the very standards invoked.

316. A chronological overview of the Russian notifications to the SPS Committee demonstrates the errors and inconsistencies in Russia's position on the question of which standards Russia asserts its measures "conform to": in the initial notification concerning Lithuania Russia invokes Chapter 2.8.1. of the OIE Terrestrial Manual,[242] in the following notification concerning Poland Russia invokes Chapter 2.8.1. of the OIE Terrestrial Manual in conjunction with Chapter 15.1. of the OIE Terrestrial Code,[243] while in the notifications concerning Latvia and Estonia Russia alleges conformity only with Chapter 15.1. of the OIE Terrestrial Code.[244]

317. Indeed, the correct applicable standards for the respective measures are 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. However, these standards recommend regionalization and prescribe the necessary steps to be taken in order to allow trade from ASF infected countries. 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.

318. Chapter 2.8.1. of the OIE Terrestrial Manual, quoted as the relevant international standard in the notifications concerning Lithuania and Poland, deals with ASF, but it only sets standards for diagnostic tests and vaccines and it does not set the standards relevant for international trade, which are to be found in the OIE Terrestrial Code.

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242 G/SPS/N/RUS/48 (Exhibit EU-7). In the notification concerning Ukraine, dated 21 January 2014 (G/SPS/N/RUS/46), Russia does not identify the relevant OIE standards at all (Exhibit EU-6).

243 G/SPS/N/RUS/49 (Exhibit EU-9).

244 G/SPS/N/RUS/64 (Exhibit EU-12) and G/SPS/N/RUS/76 (Exhibit EU-13).

319. Furthermore, in a letter from the Russian Agriculture Minister Fyodorov to EU Commissioner Borg, dated 14 February 2014, the Russian Minister refers to Article 15.1.2. of the OIE Terrestrial Code as the relevant standard concerning regionalization in Lithuania,[245] while the correct reference would have been Chapter 4.3. of the OIE Terrestrial Code in that particular context.[246]

320. Finally, as already mentioned before, Russia incorrectly notified its individual restrictions to the SPS Committee as justified on grounds related to food safety and the protection of humans from animal/ plant pest or disease[247] or only related to food safety.[248] However, science tells us that the ASFV affects only swine populations and it is not harmful to humans.

321. All these wrong invocations of the relevant international standards, coupled with the fact that the Russian measures actually go against the very standards they pretend to follow, are beyond any doubt the proof that the measures at issue constitute a disguised restriction on international trade.

322. 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.

323. 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

245 Ref No. НФ-12-26/1650 (Exhibit EU-15).

246 Exhibit EU-4.

247 The measures concerning Latvia (G/SPS/N/RUS/64) and Estonia (G/SPS/N/RUS/76) (Exhibits EU-12 and EU-13).

248 The measures concerning Lithuania (G/SPS/N/RUS/48) and Poland (G/SPS/N/RUS/49) (Exhibits EU-7 and EU-9).

324. Article 5.5 of the SPS Agreement provides in its relevant part that:

> With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, 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.

325. 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:

- the Member concerned adopts different appropriate levels of sanitary protection in several "different situations";

- those levels of protection exhibit differences which are "arbitrary or unjustifiable"; and

- the measure embodying those differences results in "discrimination or a disguised restriction on international trade".[249]

326. Russia has adopted its own appropriate levels of sanitary protection against risks to animal life or health. In the absence of a clear statement from Russia regarding its ALOPs, 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.

327. 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.

328. Russia's measures with respect to EU products are far more stringent (an EU-wide ban) than the measures applied with respect to the internal movement of the domestic products associated with the ASF risk within Russia. Russia failed

[249] Appellate Body Report, *EC - Hormones*, para. 214.

domestically to take effective measures in order to eradicate and contain the ASFV, which spread thousands of kilometres from the Caucasus to the North.

329. It follows that 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.

330. 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".[250] In the present case the situations are comparable in the sense that they involve the same virus and the same health effects.

331. The differences exhibited by the Russian measures are arbitrary and unjustifiable. Russia's WTO notifications concerning the EU MS bans are imprecise, contradictory and prove a profound misunderstanding of the OIE Code. The Russian measures not only do not "conform to" and are not "based on" international standards, but they go against the relevant OIE standards. Moreover, Russia did not conduct any risk assessment. Consequently, the measures at issue should be considered to amount to a disguised restriction on international trade.

332. 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

333. Article 8 of the SPS Agreement 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.

334. Annex C(1) of the SPS Agreement further states in its relevant part that:

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[250] Appellate Body Report, *EC - Hormones*, paras 216- 217.

> Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:
>
> (a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;
>
> (b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;
>
> (c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs;

335. 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".[251]

336. 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:

> We recall that the United States and Canada seek to establish an inconsistency with Article 8 of the SPS Agreement on the basis of an inconsistency with Annex C(1)(a). Article 8 requires, inter alia, that Members observe the provisions of Annex C in the operation of their approval procedures. It follows that a failure to observe the provisions of Annex C(1)(a) implies a breach of Article 8. We have determined above that, as a result of the general de facto moratorium on approvals, the European Communities has failed, in at least one approval procedure conducted under Directives 90/220 and 2001/18, to observe the provisions of Annex C(1)(a), first clause. Accordingly, we conclude that in respect of the aforementioned approval procedure, the European Communities has, by implication, also acted inconsistently with the provisions of Article 8.[252]

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251 Panel Report, *US — Poultry (China)*, para. 7.356.

252 Panel Report, *EC — Approval and Marketing of Biotech Products*, para. 7.1569.

337. 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.

338. The EU repeatedly approached Russia since early February 2014 in order to achieve an adaptation of the measures at issue to the regional conditions in the EU. Russia was provided with all requested information, in addition to further information, provided at the EU's own initiative. Furthermore, a series of bilateral meetings were held between the EU authorities and the Russian authorities between February and June 2014, at which further information and explanations were provided.

339. The resulting undue delay is reflected, *inter alia*, in:

- the letter of the FSVPS of 12 March 2014, referring to the "absence of any proof of non-existence of ASF in the territory of other EU member states" and to the "absence of any proof of impossibility of getting meat of animals infected by ASF virus in the production cycle of pork from other EU member states";[253]

- the failure to reply to invitations by EU authorities of 31 January 2014[254] and 14 February 2014[255] for urgent meetings;

- the failure to reply to additional information and explanations provided by the EU, with letter of 21 May 2014;[256]

- requesting answers to questions where the EU already provided exhaustive replies – with a letter dated 16 May 2014, which however reached the EU only on 4 June 2014;[257]

- the request of answers to questions irrelevant to the case (e.g. information on establishments in unaffected areas graded by production volume and biosecurity);

253 FS-SD-4/3620 (Exhibit EU-90).
254 ARES(2014)226547, SANCO G7/JP/mh(2014)241111 (Exhibit EU-64).
255 ARES(2014)398065, SANCO/G7/PD(2014)428299 (Exhibit EU-85).
256 ARES(2014)1658269, SANCO/G6/AB(2014)1782253 (Exhibit EU-92).
257 FS-EN-8/7999 (Exhibit EU-93).

- the belated provisions of invitations for visas for a technical meeting agreed on 21 February to take place 24-25 February 2014, which finally only took place on 7 March 2014.

340. Accordingly, Russia failed to observe the provisions of Annex C of the SPS Agreement on the operation of control, inspection and approval procedures and otherwise failed to ensure that its procedures are not inconsistent with the provisions of the SPS Agreement, as required by Article 8 of the SPS Agreement.

341. Furthermore, Russia failed to ensure, with respect to its procedures for checking and ensuring the fulfilment of sanitary measures, that such procedures have been undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products, as required by Annex C(1)(a) to the SPS Agreement.

342. With respect to Annex C(1)(b) of the SPS Agreement, Russia failed to ensure that the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; that when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; that the competent body transmits, as soon as possible, the results of the procedure in a precise and complete manner to the applicant, so that corrective action may be taken if necessary; that even when the application has deficiencies, the competent body proceeds, as far as practicable, with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained.

343. Finally, as regards Annex C(1)(c) of the SPS Agreement, Russia failed to ensure that information requirements are limited to what is necessary for appropriate control, inspection and approval procedures.

344. In light of the foregoing Russia has breached the provisions of Annex C(1)(a), (b) and (c) of the SPS Agreement and consequently Article 8 of the SPS Agreement.

G. Transparency claims

345. Article 7 of the SPS Agreement provides that:

> Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

346. Annex B reads in its relevant part:

> 2. Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member. […]
>
> 5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:
>
> (a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;
>
> (b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;
>
> (c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;
>
> (d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.
>
> 6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:
>
> (a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief

> indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);
>
> (b) provides, upon request, copies of the regulation to other Members;
>
> (c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

347. 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.[258] This approach was later followed by the panel in *Japan – Apples*.[259]

348. 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.[260]

349. 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 on 25 January 2014 (ref. FS-EN-8/1032), but only notified to the WTO on 10 February 2014, that is, 16 days after their imposition.[261]

350. 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.

351. Specifically, Russia failed to notify changes in its sanitary measures and to provide information on such sanitary measures in accordance with the provisions of Annex B of the SPS Agreement.

352. With respect to the ban concerning Lithuania on the products at issue, Russia failed to immediately notify other Members, through the WTO Secretariat, of the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem. Russia also failed to provide copies of

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258 Appellate Body Report, *Japan — Agricultural Products II*, paras. 104 and 105.
259 Panel Report, *Japan — Apples*, paras. 8.23 and 8.24.
260 Appellate Body Report, *Japan — Agricultural Products II*, para. 108.
261 G/SPS/N/RUS/48 (exhibit EU-7).

the regulation to other Members and to allow other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account. It took more than two weeks for Russia to notify the measure to the WTO after its adoption.[262]

353. With regard to the EU-wide ban, Russia failed to ensure that the relevant measure was published promptly in such a manner as to enable the EU and its Member States to become acquainted with it. It also failed to allow Members a reasonable interval between the publication and the entry into force of the ban to allow time for producers in exporting Members to adapt their products and method of production to the requirements of the importing Member.

354. Further, given that the measure was not substantially the same as the content of the international standards, guidelines or recommendations and given that it 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; to notify at an early stage other Members, through the Secretariat, of the products to be covered together with a brief indication of the objective and rationale of the proposed regulation so that amendments could still be introduced and comments taken into account; to provide upon request to other Members copies of the proposed regulation and identify the parts which in substance deviate from international standards, guidelines or recommendations; without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

355. 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.

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262 G/SPS/N/RUS/48 (Exhibit EU-7).

356. Russia also failed to provide copies of the regulation to other Members and to allow other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

357. 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

358. 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.

359. 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.