

**As delivered**

**In the World Trade Organization  
Panel Proceedings**

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

**(DS475)**

**European Union  
Opening Oral Statement**

**Geneva, 20 April 2015**

<b>1. INTRODUCTION .....</b>	<b>2</b>
<b>2. EU’S MEASURES REGARDING WILD BOAR.....</b>	<b>3</b>
<b>3. THE MEASURES AT ISSUE.....</b>	<b>8</b>
<b>4. ORDER OF ANALYSIS.....</b>	<b>11</b>
<b>5. HARMONIZATION CLAIMS .....</b>	<b>12</b>
<b>5.1 THE EU GOES BEYOND THE OIE STANDARDS .....</b>	<b>13</b>
<b>5.2 THE CONCEPT OF “CONTAINMENT ZONES” IS IRRELEVANT TO THE PRESENT CASE .....</b>	<b>14</b>
<b>5.3. THE EU DID NOT ESTABLISH COMPARTMENTS WITH REGARD TO ASF ...</b>	<b>16</b>
<b>5.4. ARTICLE 3.3 OF THE SPS AGREEMENT .....</b>	<b>18</b>
<b>6. RISK ASSESSMENT .....</b>	<b>19</b>
<b>6.1. ARTICLES 5.1 AND 5.2 AND 2.2 OF THE SPS AGREEMENT .....</b>	<b>19</b>
<b>6.2 ARTICLE 5.7 OF THE SPS AGREEMENT .....</b>	<b>19</b>
<b>7. REGIONALIZATION CLAIMS.....</b>	<b>22</b>
<b>8. RISK MANAGEMENT CLAIMS .....</b>	<b>28</b>
<b>9. DISCRIMINATION CLAIMS .....</b>	<b>29</b>
<b>10. CONTROL, INSPECTION AND APPROVAL PROCEDURES .....</b>	<b>30</b>
<b>11. CONCLUSIONS .....</b>	<b>31</b>

**LIST OF EXHIBITS**

<b>EU-101</b>	Eradication plan of African swine fever in feral pigs in certain areas of Lithuania (communicated to Russia on 24 March 2015)
<b>EU-102</b>	Eradication plan of African swine fever in feral pigs in certain areas of Poland (communicated to Russia on 24 March 2015)
<b>EU-103</b>	Commission Implementing Decision (EU) 2015/570 of 7 April 2015 approving the plans for the eradication of African swine fever in feral pigs in certain areas of Estonia and Latvia, OJ L93, p.80
<b>EU-104</b>	Eurostat, trade statistics on exports of meat of swine, fresh, chilled or frozen from Poland to US and Canada
<b>EU-105</b>	USDA Animal and Plant Health Inspection Service, <a href="http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalhealth/sa_import_into_us/">http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalhealth/sa_import_into_us/</a> <a href="http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalhealth/sa_import_into_us/ct_animal_disease_status/">ct_animal_disease_status/</a>
<b>EU-106</b>	Commission Implementing Decision 2013/498/EU of 10 October 2013 concerning a Union financial contribution towards surveillance and other emergency measures implemented in Estonia, Latvia, Lithuania and Poland against African swine fever in neighbouring third countries, OJ L272, p.47
<b>EU-107</b>	Commission Implementing Decision 2014/236/EU of 24 April 2014 concerning a Union financial contribution towards surveillance and other emergency measures implemented in Estonia, Latvia, Lithuania and Poland against African swine fever, OJ L125, p.86
<b>EU-108</b>	Standing Group of Experts on African swine fever in the Baltic and Eastern Europe region under the GF-TADs umbrella, First meeting (SGE1), Minsk, Belarus, December 1- 2 2014, <a href="http://web.oie.int/RR-Europe/eng/Regprog/docs/docs/SGE1%20-%20conclusions%20(EN).pdf">http://web.oie.int/RR-Europe/eng/Regprog/docs/docs/SGE1%20-%20conclusions%20(EN).pdf</a>
<b>EU-109</b>	EU Veterinary Emergency Team, Vilnius, 8 – 10 October 2014, <a href="http://ec.europa.eu/food/committees/regulatory/scfcah/animal_health/docs/2014110304_ah_asf-strategy_lt-pl-lv-ee_cvvet.pdf">http://ec.europa.eu/food/committees/regulatory/scfcah/animal_health/docs/2014110304_ah_asf-strategy_lt-pl-lv-ee_cvvet.pdf</a>
<b>EU-110</b>	ASF outbreaks/cases statistics for Lithuania, Poland, Latvia and Estonia, EU Animal Disease Notification System (ADNS)
<b>EU-111</b>	Ordonnance de l'OSAV instituant des mesures destinées à prévenir l'introduction de la peste porcine africaine présente dans certains Etats membres de l'Union européenne, Modification du 13 avril 2015

Mr. Chairman, distinguished Members of the Panel, ladies and gentlemen,

1. INTRODUCTION

1. The EU thanks you for serving on this Panel. We would also like to thank the members of the Secretariat for supporting you throughout these proceedings.
2. The EU has already shown in its first written submission why the SPS Agreement is applicable to the present case<sup>1</sup> and we notice that Russia does not dispute this in its first written submission.
3. There is no point in repeating the arguments that have already been developed in our first written submission. Instead, we will focus in this opening oral statement on issues raised by the Panel in its advance questions sent to the parties and we will also clarify several misrepresentations and inconsistencies contained in Russia's first written submission.
4. In the request for the establishment of the panel, the EU included among the legal bases for its complaint that the measures at issue breach Articles I:1, III:4 and XI:1 of the GATT 1994. However, in our first written submission, we did not advance any argument with respect to our claims under the GATT 1994 since we have decided not to pursue these claims.
5. The EU regretfully notices that Russia's first written submission contains factual misrepresentations, takes evidence out of context and tends rather to confuse the issues instead of clarifying the measures at issue and rebutting the *prima facie* case made by the EU.
6. One of the most striking examples is the repeated reference to the concept of "containment zones", which was never applied or invoked by the EU with regard to ASF. This seems crucial to Russia's attempted defence, as it seeks to rely upon such references throughout its argumentation.<sup>2</sup> We will revert to this issue later in this oral statement.

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<sup>1</sup> EU's first written submission, paras 98-106.

<sup>2</sup> E.g. Russia's first written submission, paras 65-68.

## 2. EU'S MEASURES REGARDING WILD BOAR

7. The EU would like to start by clarifying that wild boar is a category of feral pigs. The EU measures addressing ASF cases in feral pigs (including wild boar) are described in Directive 2002/60. According to Directive 2002/60 a feral pig is defined as “a pig which is not kept or bred on a holding”.<sup>3</sup> Thus, for ASF purposes there is no difference between feral pigs and wild boar.
8. In accordance with this Directive, once the competent authority of an EU Member State has information that feral pigs are suspected of being infected, it shall immediately take all appropriate measures to confirm or rule out the presence of the disease.<sup>4</sup>
9. As soon as there is a confirmation of a primary case of African swine fever in feral pigs, a number of measures are taken, in order to reduce the spread of disease: the placing under official surveillance of pig holdings in the defined infected area; the inspection of all feral pigs shot or found dead in the defined infected area; the isolation and identification of the ASFV type; and the establishment of an expert group to closely monitor the situation.<sup>5</sup>
10. Furthermore, within 90 days of the confirmation of a primary case of ASF in wild boar, EU Member States are required to submit to the European Commission a written eradication plan.<sup>6</sup> The European Commission received the compulsory eradication plans from the affected EU Member States on time, assessed those plans and finally approved them by Decision 2014/442<sup>7</sup> and Decision 2015/570.<sup>8</sup>
11. One of the main divergences between the EU and Russia is the approach to ASF eradication in wild boar. Russia believes that drastic increased hunting intended to achieve wild boar depopulation may produce positive results. However, the only

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<sup>3</sup> Article 2(b) of Directive 2002/60 (Exhibit EU-31).

<sup>4</sup> Article 15(1) of Directive 2002/60 (Exhibit EU-31).

<sup>5</sup> Article 15(2) of Directive 2002/60 (Exhibit EU-31).

<sup>6</sup> Article 16(1) of Directive 2002/60 (Exhibit EU-31).

<sup>7</sup> 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).

<sup>8</sup> Commission Implementing Decision (EU) 2015/570 of 7 April 2015 approving the plans for the eradication of African swine fever in feral pigs in certain areas of Estonia and Latvia, OJ L93, p.80 (Exhibit EU-103).

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result that such increased hunting may bring is rapid further territorial spread of the disease, through the dispersal of infected animals. This is thought to be the most likely cause of ASF introduction into certain limited parts of the EU, from Belarus and from Russia.<sup>9</sup>

12. Russia refers to depopulation as an effective control strategy for wild boar.<sup>10</sup> However, the conclusions of the meeting in Minsk of the Standing Group of Experts on ASF in the Baltic and Eastern Europe region under the GF-TADs umbrella – at which both Russia and the EU participated - clearly indicate that depopulation is not the first choice for ASF control in wild boar, but only one option that may be considered when certain conditions are met. Those conclusions state that: “drastic reduction of the wild boars population (so-called depopulation) could be a management option when the threshold density of wild boar unable to sustain infection is known and it is reachable and feasible”.<sup>11</sup> In this context, the EU would be interested in learning from Russia if it knows the threshold density of wild boar unable to sustain infection in different parts of its territory and how reachable and feasible that threshold is.
13. The EU is not against hunting wild boar in the infected areas *per se*, but we do not favour *increased* hunting pressure or hunting *with means* which would favour *dispersal* of the animals.<sup>12</sup> In the case of the EU, Member States continue hunting at the same levels of previous years so as to keep the respective wild boar populations stable.<sup>13</sup> If the wild boar populations do not increase, then the risk of ASF spread not only does not increase but is *de facto* reduced as they will normally remain living within the same area.

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<sup>9</sup> EU’s first written submission, paras 62-63.

<sup>10</sup> Russia’s first written submission, para. 129.

<sup>11</sup> Standing Group of Experts on African swine fever in the Baltic and Eastern Europe region under the GF-TADs umbrella, First meeting (SGE1), Minsk, Belarus, December 1- 2 2014, [http://web.oie.int/RR-Europe/eng/Regprog/docs/docs/SGE1%20-%20conclusions%20\(EN\).pdf](http://web.oie.int/RR-Europe/eng/Regprog/docs/docs/SGE1%20-%20conclusions%20(EN).pdf) (Exhibit EU-108).

<sup>12</sup> EU’s first written submission, para 63.

<sup>13</sup> Eradication plan of African swine fever in feral pigs in certain areas of Lithuania, p. 10 (Exhibit EU-101), Eradication plan of African swine fever in feral pigs in certain areas of Poland, p. 9 (Exhibit EU-102).

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14. As explained in our submission, the EU approach on ASF eradication in wild boar is based on scientific grounds- the scientific advice received from EFSA in 2010 and 2014.<sup>14</sup>
15. It is useful to note that the EU Member States agreed the following strategy until April 2015, with the possibility of revision, if appropriate:
- no increased hunting with the purpose of reducing the wild boar population;
  - any hunting should be conducted so as to avoid excessive movement of animals in the Parts 2 and 3 regulated by Decision 2014/709;
  - baiting is allowed (that is, non-sustained feeding, or the use of limited food only for the purposes of attracting wild boar for hunting);
  - sustained feeding (foraging) is in principle forbidden in the Parts 1, 2 and 3 regulated by Decision 2014/709. Optionally, it is permitted to forage wild boar only inside a “hot spot” of infection to avoid movement of infected animals. A hot spot is the area of 4 km radius around infected cases of wild boar and is defined and approved by the veterinary service; and
  - wild boar management in areas outside the Parts regulated by Decision 2014/709 must be based on the specific decisions of the EU Member States.<sup>15</sup>
16. In its first written submission Russia claims that surveillance in Lithuania was inadequate, misleadingly illustrating its assertion with an example which pre-dates the first ASF case in wild boar. Russia asserts that "in November 2013, 18 wild boar carcasses were found and only seven were taken for ASF testing. While the results were negative, failure to test all the carcasses demonstrates inadequate surveillance".<sup>16</sup> The EU would like to recall that these facts are prior to the end of January 2014 (when the first ASF case occurred) and that in November 2013 Lithuania was ASF-free. Accordingly, by testing a very significant number of wild boar found dead (seven out of 18) the Lithuanian authorities used a sample size above the normal practice for detecting ASF in a previously free country.
17. For instance, the EU’s ASF diagnostic manual provides with respect to domestic pigs that the sample size in an ASF free holding is of five pigs. It states that: “if

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<sup>14</sup> Scientific Opinion on African Swine Fever, EFSA Panel on Animal Health and Welfare (AHAW), EFSA Journal 2010 8(3)1556 (Exhibit EU-24) and 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 (Exhibit EU-25).

<sup>15</sup> EU Veterinary Emergency Team, Vilnius, 8 – 10 October 2014:  
[http://ec.europa.eu/food/committees/regulatory/scfcah/animal\\_health/docs/2014110304\\_ah\\_asf-strategy\\_lt-pl-lv-ee\\_cvet.pdf](http://ec.europa.eu/food/committees/regulatory/scfcah/animal_health/docs/2014110304_ah_asf-strategy_lt-pl-lv-ee_cvet.pdf) (Exhibit EU-109).

<sup>16</sup> Russia’s first written submission, para. 153.

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- dead or moribund pigs are detected in a suspected holding, post-mortem examinations must be carried out, preferably on at least five of these pigs and in particular on pigs that have shown very evident signs of disease before death, high fever, or died recently”.<sup>17</sup>
18. Russia continues and states that the "Estonian Minister of Agriculture observed in September 2014, when the first ASF outbreak was confirmed, that ‘ASF might have been circulating in the country’s forest since summer’".<sup>18</sup> In this respect, the EU recalls that the ASF incubation period is 15 days according to the OIE Terrestrial Code and that the first case occurred in Estonia on 2 September 2014. It follows that the Estonian Minister is right to say that ASF was in the country in the summer, as the disease incubation would have started probably in August 2014, in order to produce mortality at the beginning of September 2014.
19. Currently *all* wild boars found dead (or hunted) are tested for ASF in the zones of the EU which are not ASF-free, as well as in the zones at high risk, as indicated in the eradication plans approved in accordance with the EU guidelines. Directive 2002/60 clearly states that if there are suspected cases of ASF in feral pigs, then *all* feral pigs shot or found dead should be subject to investigations, including laboratory testing.<sup>19</sup>
20. The Lithuanian eradication plan provides that: “the sampling strategy will be based on strict passive surveillance. All discovered sick, dead and killed in the road incident wild boars will be examined by official veterinarian, blood and organ samples will be taken and tested in accordance with diagnostic manual for the presence of ASF antibodies and genome using ELISA and RT-PCR<sup>20</sup>”.<sup>21</sup>
21. The Polish eradication plan contains a similar provision. It provides that: “Enhanced surveillance is the main measure implemented in the infected area and buffer zone. All wild boar found dead and sick, as well as all shot wild boar will be

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<sup>17</sup> Chapter IV.A.4, Annex to the Commission Decision 2003/422/EC of 26 May 2003 approving an African swine fever diagnostic manual, OJ L 143, p.35 (Exhibit EU-32).

<sup>18</sup> Russia’s first written submission, para. 154.

<sup>19</sup> Article 15(1) of Directive 2002/60 (Exhibit EU-31).

<sup>20</sup> Real time polymerase chain reaction.

<sup>21</sup> Eradication plan of African swine fever in feral pigs in certain areas of Lithuania, p. 2 (Exhibit EU-101).

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subject to sampling and testing for ASF. It is assumed that every year about 8000 wild boar will be shot in those areas.”<sup>22</sup>

22. At the meeting of the EU Veterinary Emergency Team in Vilnius in October 2014 it was agreed on the sampling of wild boar as follows:

- the principle of sampling in the whole country (areas regulated by Decision 2014/709 and free areas) should be based on enhanced passive surveillance: all found dead and sick wild boar have to be tested for ASF using quantitative real time polymerase chain reaction (qRT-PCR);
- additional sampling (active surveillance) from hunted animals has to be performed as regulated by Decision 2014/709/EU. In areas of Part 1 regulated by Decision 2014/709 all hunted animals which are foreseen to be taken out of that area must be tested for ASF (qRT-PCR). In areas of Part 2 and 3 regulated by Decision 2014/709 sampling of all hunted animals and of all found dead/sick animals has to be conducted (100% sampling and testing by qRT-PCR). The hunted animals of these areas should be tested additionally for antibodies against ASF virus; and
- from hunted animals only blood samples are requested (that is, no organ samples are required).<sup>23</sup>

23. Finally, the EU confirms that according to the available scientific sources wild boar is not present in the "northern parts of the European part" of Russia.<sup>24</sup> This is due to the specific climatic conditions close to the Arctic Circle, as wild boar is not an animal adapted to those conditions. In this context, the EU would welcome any information from Russia as to whether or not domestic pigs are raised at those latitudes. To the extent that this is not the case, the EU considers that Russia has failed to adapt its SPS measures with respect to the products at issue to the SPS characteristics of the areas to which the products are destined, within the meaning of Article 6.1 of the SPS Agreement.

### 3. THE MEASURES AT ISSUE

24. The EU identifies the measures at issue as individual SPS measures: the four measures with respect to the recently ASF affected regions of certain EU Member

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<sup>22</sup> Eradication plan of African swine fever in feral pigs in certain areas of Poland, p. 2 (Exhibit EU-102).

<sup>23</sup> EU Veterinary Emergency Team, Vilnius, 8 – 10 October 2014:

[http://ec.europa.eu/food/committees/regulatory/scfcah/animal\\_health/docs/2014110304\\_ah\\_asf-strategy\\_lt-pl-lv-ee\\_cvet.pdf](http://ec.europa.eu/food/committees/regulatory/scfcah/animal_health/docs/2014110304_ah_asf-strategy_lt-pl-lv-ee_cvet.pdf) (Exhibit EU-109).

<sup>24</sup> EU's first written submission, para. 50.

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- States and the EU-wide ban. These should be regarded as distinct measures although they are closely linked. For the purposes of our discrimination claims the measures at issue are the difference in treatment between the EU products and other products (Russian, Ukrainian) with respect to similar relevant situations.
25. The date when the panel request was filed was 27 June 2014. The Panel was subsequently established on 22 July 2014. The ASF occurrence in Latvia was notified by the EU on 25 June 2014 and the Russian ban with respect to the products at issue from Latvia was imposed on 27 June 2014 and notified to the WTO on 16 July 2014.<sup>25</sup> The first occurrence of ASF in Estonia was confirmed and notified on 8 September 2014. The Russian ban with respect to the products at issue from Estonia was imposed on 11 September 2014 and notified to the WTO on 16 September 2014.<sup>26</sup>
26. It follows that at the time the panel request was filed there were no individual Russian bans with respect to the products at issue coming from Latvia and Estonia. However, most of the products were already covered by the EU-wide ban imposed by Russia since the first case in Lithuania. In practice, the two individual measures extended the ban to heat treated and matured pig products: “ready to eat products, containing pork, except for cats and dog feed (which were heat treated no less than 70°C for at least 20 minutes)” and “sausages and similar products of meat, canned meat”.
27. However, the panel request clearly stated that it “relates to the measures at issue and to any amendments, supplements, extensions, replacement measures, renewal measures and implementing measures”. The individual Russian bans with respect to Latvia and Estonia fall within the category of amendments, supplements, extensions and implementing measures and are thus clearly covered by the panel request.
28. This understanding is confirmed by the fact that Russia did not raise any issue with respect to the inclusion in the terms of reference of the present Panel of the individual measures taken with regard to Latvia and Estonia.

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<sup>25</sup> G/SPS/N/RUS/64 (Exhibit EU-12).

<sup>26</sup> G/SPS/N/RUS/76 (Exhibit EU-13).

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29. Accordingly, all of the above measures fall within the Panel's terms of reference, even if they correspond to, or post-date the date of the panel request.
  30. The EU would particularly like to draw attention to Russia's argument with respect to the EU-wide ban, which we consider to be manifestly ill-founded. In our view, the statements in Exhibit RUS-53 confirm the existence of an EU-wide ban, under the guise of an alleged administrative problem relating to supposed compliance with the wording of the veterinary certificates, in light of the change in the epidemiological situation regarding ASF.
  31. While Russia introduced express bans with respect to the EU Member States that detected ASF cases in their territory, it seems to claim that the reason for not accepting the concerned commodities from the rest of the EU is related to the fact that the wording of the certificates does not correspond to the real situation with regard to ASF in the EU. In making this argument, Russia is merely attempting to obfuscate the existence of the *de facto* EU-wide ban, which was never notified to the WTO.
  32. The EU would like to recall that this issue could have been easily resolved, by accepting the appropriate formulation, as attached to the EU letter of 31 January 2014. This letter contained an appropriate formulation with respect to Annexes to the veterinary certificates for exports from the EU to Russia for (1) pork meat and raw meat preparations, (2) piglets for fattening, (3) pigs for breeding and (4) slaughter pigs.<sup>27</sup> The formulation reads: "African swine fever during the last 36 months in the EU Member State or administrative territory in accordance with regionalisation, or during the last 12 months in the EU Member State or administrative territory if the disease has not been present upon confirmation by the data of epizootic and entomological monitoring".
  33. However, when Russia replied to this letter it did not respond with respect to that formulation but instead referred to a preliminary assessment that the measures taken by the EU do not correspond to the OIE procedures.<sup>28</sup> With that letter the Russian authorities informed the EU that "in order to understand the situation objectively for further decisions whether ASF regionalisation was possible the

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<sup>27</sup> ARES(2014)226547, SANCO G7/JP/mh(2014)241111 (Exhibit EU-64).

<sup>28</sup> Letter of 5 February 2014 from Russia to the EU, FS-SD 8/1640 (Exhibit EU-84).

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Customs Union experts are agreeing a detailed list of questions". A preliminary list of questions was submitted with the same letter. On 18 February 2015 Russia informed the EU that the list of questions sent on 5 February had "...been coordinated with the member states of the Customs Union".

34. The approach of an annex to the certificate, modifying the wording as appropriate, or, alternatively, an appropriate adaptation of the wording of the certificates manually, by the official veterinarian signing the certificate, is frequently used in similar situations.
35. In light of the above, the issue with the wording of the veterinary certificates could have been resolved rapidly, as pointed out by the European Commission in the first days following the detection of the first ASF case in wild boar in Lithuania, in January 2014.
36. Instead, and contrary to the assertions that "the Russian Federation continues to be receptive to considering new ASF-free zones offered by the European Union",<sup>29</sup> Russia chose to obstruct the concurrent process of amendment of export certificates by referring to its arrangements within the framework of the Customs Union with Belarus and Kazakhstan.<sup>30</sup> These arguments should be rejected by the Panel, since by Decision of the Customs Union it is clearly provided that: "The competent agencies of the Parties may bilaterally agree with the competent agencies of third countries upon model veterinary certificates for goods subject to inspection imported into the common customs territory of the Customs Union. The model veterinary certificates referred to shall be submitted to the Customs Union Commission for distribution to the customs border checkpoints of the Customs Union or other places, as determined by the legislation of the Parties."<sup>31</sup>
37. Finally, the EU would like to respond to the Panel's questions regarding the difference between "pig products" and "pork products". "Pig products" is a broader category, which includes "pork products". "Pig products", when used alone and not part of an enunciation of products, is a synonym for the "products at

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<sup>29</sup> Russia's first written submission, para. 77.

<sup>30</sup> Exhibit RUS-53.b.

<sup>31</sup> General Provisions, Decision by the Customs Union Commission on the Use of Veterinary-Sanitary Measures in the Customs Union, No. 317, 18 June 2010 (Exhibit RUS-25.b).

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issue”, as defined in the panel request. In this respect, the phrase “pig products” is simply used by the EU as a short-hand to refer to the products at issue.

38. The EU defined the “products at issue” in the panel request as “live pigs and their genetic material, pork and certain other pig products”, that is, those to which the Russian measures apply.<sup>32</sup>
39. In EU legislation reference is made to “pigs and certain pig products” when the intention is to cover all commodities from pigs that pose a risk.<sup>33</sup> When it was intended to make more explicit the prohibitions or restrictions, the commodities are described in more detail as “live pigs and their semen, ova and embryos, animal by-products of porcine origin as well as ... certain meat, meat preparations and meat products”.<sup>34</sup> Finally, even more detailed description of those commodities is provided in the main provisions: “live pigs, porcine semen, ova and embryo, pig meat, pig meat preparations, pig meat products and any other products containing pig meat as well as consignments of animal by-products from porcine animals”.<sup>35</sup>

#### 4. ORDER OF ANALYSIS

40. The EU started its presentation of the claims with those regarding harmonization because it seemed to result from the WTO notifications of the four measures concerning the recently ASF-affected regions of certain EU Member States that Russia alleges to “conform to” or at least to base its measures on international standards.
41. If a Member is found to conform to the international standards, then in principle it does not need a risk assessment, benefiting from a rebuttable presumption of conformity with the relevant provisions of the SPS Agreement.<sup>36</sup>

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<sup>32</sup> EU’s panel request, para 2.

<sup>33</sup> Recital 3 of Decision 2014/709 (Exhibit EU-44).

<sup>34</sup> Recital 9 of Decision 2014/709 (Exhibit EU-44).

<sup>35</sup> Article 2 of Decision 2014/709 (Exhibit EU-44).

<sup>36</sup> Appellate Body Report, *EC — Hormones*, para. 170.

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42. If the identity between a Member's measures and the international standards is partial, then the importing Member should provide a risk assessment for each element which differs from the said standards.
  43. The provisions of the SPS Agreement are interlinked and inform each other. For instance, an analysis of the international standards, which recommend trade in the products at issue following the process of regionalization, is linked to the claims presented by the EU under Article 6 of the SPS Agreement.
  44. This being said, it seems sensible to the EU that the Panel starts with the claims regarding harmonization and then continues with the claims regarding the lack of a risk assessment. Should the Panel find that Russia lacks a risk assessment, as appropriate to the present circumstances, then it should assess whether the conditions in Article 5.7 of the SPS Agreement are met.
  45. In any event, the EU respectfully draws the attention of the Panel to the fact that whichever order of analysis it may chose, given the absence of remand authority under the DSU, judicial economy may not be appropriate, especially if it prevents the Appellate Body from completing the legal analysis in the event of an appeal.<sup>37</sup>

## 5. HARMONIZATION CLAIMS

46. The OIE Terrestrial Code contains the only relevant standards for the purposes of the present dispute. It seems that there is an error in the various WTO notifications made by Russia, according to which some of the measures at issue related to food safety and the protection of humans from animal/ plant pest or disease.<sup>38</sup>

### 5.1 THE EU GOES BEYOND THE OIE STANDARDS

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<sup>37</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 405 (“Moreover, in our view, the Panel should have made additional findings under the GATT 1994 in the event that the Appellate Body were to disagree with its view that the measure at issue is a ‘technical regulation’ within the meaning of the *TBT Agreement*. As a result, it would have been necessary for the Panel to address Mexico's claims under the GATT 1994 given that the Panel found no violation under Article 2.1 of the *TBT Agreement*. By failing to do so, the Panel engaged, in our view, in an exercise of ‘false judicial economy’ and acted inconsistently with its obligations under Article 11 of the DSU”).

<sup>38</sup> EU's first written submission, para. 320.

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47. The EU recalls that the legal issue before the Panel relates to the question of whether or not the Russian measures at issue conform to the relevant international standards. Russia is not obliged to conform to the relevant international standards, but to the extent it fails to do so, certain legal consequences follow, as provided for in Article 3.3 of the SPS Agreement.
48. Thus, the question of whether or not the EU control measures conform to the relevant international standards is not the legal question that is before the Panel. Contrary to what Russia appears to believe, the SPS Agreement imposes no such obligation on the EU. That said, we have explained to the Panel that our measures in fact go beyond the relevant international standards, insofar as they provide for eradication measures.
49. In this respect, the EU observes that making a plain comparison between the OIE standards and the EU rules on ASF is a complex exercise as the starting points are different: the OIE does not issue recommendations on disease eradication and does not impose on OIE members any specific obligation to eradicate any disease in their territory, but rather provides standards for safe trade.
50. As we have explained, the EU goes beyond the OIE recommendations and applies stricter standards in certain circumstances.<sup>39</sup> In particular, the EU rules regarding restrictions on intra-EU trade as a result of ASF-related regionalization are stricter than the respective OIE standards as the EU rules also concern ASF eradication. This affirmation made by the EU does not concern the import requirements into the EU, as these requirements are not subject to the present dispute.
51. The OIE standards only relate to the safe trade in the products at issue and not to the eradication of the ASFV. In addition, the OIE standards refer to *imports* from ASF-free zones, while the EU rules also tackle *exports* from the different zones in the EU as established by the respective European Commission decisions.
52. However, the way that Russia "goes beyond" the OIE standards as an importing country is very different from the sense in which we use this phrase with regard to the EU. The Russian measures at issue differ from the OIE standards because they ban trade in circumstances under which the OIE recommends trade following

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<sup>39</sup> EU's first written submission, para. 80.

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regionalization. Thus, the Russian measures do not "conform to" the relevant international standard, within the meaning of Article 3.2 of the SPS Agreement.

## 5.2 THE CONCEPT OF "CONTAINMENT ZONES" IS IRRELEVANT TO THE PRESENT CASE

53. Article 4.3.3.3. of the OIE Terrestrial Code provides that in the case of limited outbreaks a containment zone *may* be established, when all cases are epidemiologically linked.
54. Establishment of a containment zone is a faculty and not the only option for regionalization under the OIE Terrestrial Code. This is a rather new model and it is not very often applied in practice by the Members when implementing regionalization.
55. Russia's assertion that EU establishes, following outbreaks, "containment zones" is factually and conceptually wrong, and unfortunately misleading.<sup>40</sup>
56. This assertion is factually wrong because the EU never claimed to use this concept and it never followed this approach with respect to ASF outbreaks. Instead, the EU applies a straightforward approach to regionalization which distinguishes between ASF-free and ASF infected zones. The main piece of legislation in this respect is Directive 2002/60.
57. Russia's assertion is also conceptually wrong because, for the establishment of containment zones, it is required that investigations reveal that all cases are epidemiologically linked.
58. While the cases in the affected regions of certain EU Member States are a consequence of cross-border transmission from Belarus and Russia, as demonstrated by the presence of the same virus strain, these cases are not epidemiologically linked within the meaning of Article 4.3.3.3.a) of the OIE Terrestrial Code. It was not a primary outbreak within the EU from which ASFV further spread. Rather, many cases, and all of the early cases, occurred very close to the borders with Belarus and Russia, in different locations, suggesting repeated introductions (and an ongoing threat) from those states.

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<sup>40</sup> Russia's first written submission, para. 42.

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59. In addition, the concept of “containment zones” is only used in the following disease specific chapters of the OIE Terrestrial Code, which have undergone recent revision: FMD, Rinderpest, AHS, PPR and CSF.<sup>41</sup>
60. Finally, the establishment of “containment zones” is less suitable and even unfeasible in instances when wildlife transmission is involved. ASF entered the EU in 2014 through wild boar and wild boar was an important factor in its spread.
61. It follows from the above that the arguments presented by Russia with respect to the establishment of containment zones in the EU must fail as a clear misrepresentation and misunderstanding of how the EU measures operate.
62. The consequence is that all the related arguments used by Russia in defending their irrational and disproportionate measures should also fail.
63. In particular, Russia is wrong to argue that an OIE member should have a threshold on the number of outbreaks that constitute a “limited outbreak” for the purpose of the optional demarcation of a “containment zone”. It further states that “Article 4.3.3.3. of the OIE Terrestrial Code recognizes that it may be appropriate for an importing Member not to accept a proposed zone given the severity and extent of the outbreak of a disease within a particular country or within a particular zone”.<sup>42</sup> Again, this simply ignores the fact that the EU has never claimed to have established “containment zones” and the number and severity of outbreaks in an infected area does not constitute any obstacle for the regionalization mechanism that ensures that a disease free area is actually free from disease.
64. Russia continues in the same vein by equating “limited outbreaks” to “areas of low prevalence” within the meaning of Article 6 of the SPS Agreement.<sup>43</sup> However, once again, the EU has neither claimed to have established “containment zones” as a consequence of “limited outbreaks” within the meaning of the OIE Terrestrial Code, nor to have established “areas of low disease prevalence” within the meaning of the SPS Agreement. Instead, the EU clearly delimited disease-free areas from infected areas, using a straightforward concept of regionalization.

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<sup>41</sup> Chapters 8.7.(Foot and Mouth Disease), 8.14.(Infection with rinderpest virus), 12.1.(Infection with African horse sickness virus), 14.7.(Infection with peste des petits ruminants virus) and 15.2.(Infection with classical swine fever virus) of the OIE Terrestrial Code.

<sup>42</sup> Russia’s first written submission, para. 65.

<sup>43</sup> Russia’s first written submission, para. 66.

### 5.3. THE EU DID NOT ESTABLISH COMPARTMENTS WITH REGARD TO ASF

65. The EU recalls that, for the purposes of the OIE Terrestrial Code, zoning and regionalization have the same meaning. According to the OIE Terrestrial Code, a zone/region means a “clearly defined part of a territory containing an animal subpopulation with a distinct health status with respect to a specific disease for which required surveillance, control and biosecurity measures have been applied for the purpose of international trade”.<sup>44</sup>
66. The present dispute is about the disproportionate and discriminatory measures adopted by Russia, without taking into account the relevant international standards and without conducting any assessment of risk, be it “more” or “less” objective. Russia’s failure to take into account the regionalization measures adopted by the EU results in breaches of the key provisions of the SPS Agreement.
67. The OIE Terrestrial Code defines a compartment as “an animal subpopulation contained in one or more establishments under a common biosecurity management system with a distinct health status with respect to a specific disease or specific diseases for which required surveillance, control and biosecurity measures have been applied for the purpose of international trade.”<sup>45</sup>
68. The above definitions of zones and compartments are reiterated in the specific chapter of the OIE Terrestrial Code. It states that: “while zoning applies to an animal subpopulation defined primarily on a geographical basis (using natural, artificial or legal boundaries), compartmentalisation applies to an animal subpopulation defined primarily by management and husbandry practices related to biosecurity. In practice, spatial considerations and good management including biosecurity plans play important roles in the application of both concepts.”<sup>46</sup>
69. Indeed, the EU *neither* identified compartments *nor* requested Russia for recognition of compartments with high levels of biosecurity, *inter alia*, from the affected regions of Estonia, Latvia, Lithuania, or Poland.

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<sup>44</sup> Glossary of the OIE Terrestrial Code (Exhibit RUS-32).

<sup>45</sup> Glossary of the OIE Terrestrial Code (Exhibit RUS-32).

<sup>46</sup> Article 4.3.1.(3) of the OIE Terrestrial Code (Exhibit EU-4). More details about compartments are to be found in Chapter 4.4. of the OIE Terrestrial Code.

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70. Instead, the EU identified *zones* according to the different levels of risk and requested Russia to recognize ASF-free zones from Estonia, Latvia, Lithuania, Poland and the rest of the non-affected areas in the EU.
  71. Under the OIE Terrestrial Code there is no compulsory rule as to which method an exporting country may choose. The options of ASF-free zone or compartment are presented in the text of all the relevant standards in the alternative. One concept does not automatically take precedence over the other. Chapter 15.1 of the OIE Terrestrial Code recommends trade from ASF-free zones with respect to the same products it recommends trade from ASF-free compartments. Both options are equally possible and it is up to each exporting Member to choose its approach, in accordance with the provisions of Article 6 of the SPS Agreement.
  72. Furthermore, in a dispute such as the present one, the importing Member cannot simply impose a blanket ban on all products at issue from the exporting Member just because it subjectively claims to favour one option (compartmentalization) over the other (regionalization). Instead, the importing Member is under a legal obligation to take into account objective factors of the kind enunciated in Article 6.2 second sentence of the SPS Agreement. The SPS Agreement specifically refers to disease-free areas.
  73. Finally, compartments might rather be used when a disease is widespread, to almost the entirety of the territory of a country. This is neither the case of the recently ASF affected four EU Member States nor of the EU as a whole. Russia's persistence on the privileged use of the compartmentalization approach seems to suggest that limited ASF-infected areas at the borders with Belarus and Russia would somehow imply an infected status for the rest of the EU, including areas which are thousands of kilometres away. And because there is no scientific or legal basis for such an assertion, Russia attempts to rely on another construction, which only serves to obfuscate the real issues, namely the notion of containment zones. This is simply a further demonstration of the manifest disproportionality of the Russian measures.
  74. Quite to the contrary, regionalization distinguishes between ASF-free areas and ASF-infected areas, which may be hundreds or thousands of kilometres apart. This

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is the present case for the affected regions in the four EU Member States and of the rest of the EU (except the island of Sardinia).

75. The use of one approach (regionalization) does not necessarily exclude in totality the use of the other (compartmentalization). For instance, one may use as a general approach regionalization and within the infected areas one may at the same time establish compartments. However, it was EU's choice to opt for a straightforward application of the principle of regionalization, which would allow trade in the products at issue only from the disease free areas clearly outside the infected areas.

#### 5.4. ARTICLE 3.3 OF THE SPS AGREEMENT

76. A Member may depart from international standards according to Article 3.3 (i) if there is scientific justification or (ii) as a consequence of the level of sanitary protection it determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.
77. While Article 3.3 of the SPS Agreement is “not a model of clarity in drafting”,<sup>47</sup> the last sentence states that a measure which departs from the international standards shall not be inconsistent with any other provision of the SPS Agreement. It follows that the inconsistency of the measures at issue with several provisions of the SPS Agreement, notably those related to risk assessment, regionalization and non-discrimination, are relevant for a finding of inconsistency with Article 3.3.

### 6. RISK ASSESSMENT

#### 6.1. ARTICLES 5.1 AND 5.2 AND 2.2 OF THE SPS AGREEMENT

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

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<sup>47</sup> Appellate Body Report, *EC — Hormones*, para. 173.

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79. Article 2.2 of the SPS Agreement establishes that SPS measures shall be applied only to the extent necessary to protect animal life and health, shall be based on scientific principles and shall not be maintained without sufficient scientific evidence, except as provided in Article 5.7.
80. The more specific provisions are to be found in Articles 5.1, 5.2 and 5.6 of the SPS Agreement. A finding of violation with regard to the lack of a risk assessment in accordance with the provisions of Articles 5.1 and 5.2 of the SPS Agreement results in a consequential violation of Article 2.2 (with the exception of the cases when the conditions of Article 5.7 are fulfilled). Similarly, a finding of a violation of Article 5.6 with regard to risk management will consequentially result in a violation of Article 2.2 of the SPS Agreement.

#### 6.2 ARTICLE 5.7 OF THE SPS AGREEMENT

81. From the moment an ASF outbreak is notified to the OIE to the moment trade resumes between the respective Members, there may occur in practice a short suspension period, composed of the duration of the domestic procedures in the exporting Member and in the importing Member, respectively.
82. However, this is not the issue in the present case. Russia received abundant pertinent information with respect to the EU ASF regionalization measures in order to conduct a risk assessment and had sufficient time at its disposal in order to conduct its assessment and to reach a decision.
83. According to Article 5.7 of the SPS Agreement, an importing Member is not absolved of any obligation in an emergency situation. Instead, what Article 5.7 envisages is a “less” objective assessment of risk, as opposed to a “more objective assessment of risk”, which shall trigger the review of its sanitary measure within a reasonable period of time.
84. This “less” objective assessment of risk is not attributable to any bias, but is linked to the objective fact that the relevant scientific evidence is insufficient for the purposes of making a definitive decision. The Member has to rely solely on the available pertinent information. Thus, in an emergency situation the importing Member is not compelled to perform a risk assessment within the meaning of

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- Article 5.1, but rather to conduct a “less” *objective assessment of risk* within the meaning of Article 5.7.
85. The available pertinent information may fall within the categories described in Article 5.2: available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; existence of disease-free areas; relevant ecological and *environmental* conditions; and quarantine or other treatment. However, due to the time limitations, the importing Member is under no obligation to take into account these factors in a similar way as under Article 5.1 of the SPS Agreement.
86. With respect to the available pertinent information, it includes information *from* the relevant international organizations as well as *from* sanitary measures applied by other Members.
87. Information *from* the relevant international organizations in the present case would mean information on the specific outbreaks and cases in the four recently affected EU Member States.
88. It may very well be that with regard to the same ASF outbreaks and cases some WTO Members recognize the EU regionalization measures and allow trade from the ASF-free areas, while others impose a ban on the products at issue from the entire EU Member State affected. While this contradiction may be confusing at first sight, the EU recalls that the Appellate Body required the existence of a rational and objective relationship between the information concerning a certain risk and a Member’s provisional sanitary measure.<sup>48</sup>
89. It means that the measures as such adopted by other WTO Members are not relevant (some of them may very well be WTO inconsistent), but what matters is the risk assessment and the scientific evidence *underlying* those measures.
90. Furthermore, in the present case such rational and objective relationship exists with respect to information from Members which accepted the EU regionalization measures, allowed trade to continue, and as a consequence did not suffer any ASF introduction. Such measures can only confirm the robustness of the EU ASF regionalization measures.

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<sup>48</sup> Appellate Body Reports, *US/Canada — Continued Suspension*, para. 678.

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91. Several WTO Members such as the US, Canada and Switzerland<sup>49</sup> accepted the EU regionalization measures and continued to import the products at issue from the non-affected areas of the recently affected EU Member States, like Poland. None of the four recently affected EU Member States is listed as “affected country” on the website of the USDA Animal and Plant Health Inspection Service, meaning that there are no trade restrictions related to ASF.<sup>50</sup> This is confirmed by Eurostat data, according to which the US imported from Poland the following quantities of meat of swine, fresh, chilled or frozen in the first months following the first outbreak: approximately 578 tons in March 2014, 3080 tons in April 2014, 2488 tons in May 2014, 649 tons in June 2014 and 3060 tons in July 2014.<sup>51</sup>
92. As the EU has made a *prima facie* case of inconsistency with the provisions of Article 5.7, the burden of proof shifts to Russia, and it has failed so far to prove its compliance with the requirements of that provision.
93. With regard to what constitutes a reasonable period of time for the purposes of Article 5.7, the EU considers that the assessment of regionalization measures by an importing Member in the context of a geographically (very) limited ASF outbreaks and cases does not raise the same problems as the assessment of the effects of, for example, hormones or GMOs. The reasonable period of time thus naturally varies according to the complexity of the problem.
94. The EU considers that the question of a reasonable period of time should be assessed on a case by case basis. While the type of disease may be relevant, in the case of the same disease there may be different circumstances which would warrant different periods of time which would be “reasonable” for the review of the provisional measures within the meaning of Article 5.7.

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<sup>49</sup> Ordonnance de l’OSAV (Office fédéral de la sécurité alimentaire et des affaires vétérinaires) instituant des mesures destinées à prévenir l’introduction de la peste porcine africaine présente dans certains Etats Membres de l’Union européenne, Modification du 13 avril 2015, [http://www.blv.admin.ch/ein\\_ausfuhr/01183/01184/index.html?lang=fr](http://www.blv.admin.ch/ein_ausfuhr/01183/01184/index.html?lang=fr) (Exhibit EU-111).

<sup>50</sup> The ASF section was last modified on 6 March 2015: [http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalhealth/sa\\_import\\_into\\_us/ct\\_animal\\_disease\\_status/](http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalhealth/sa_import_into_us/ct_animal_disease_status/) (Exhibit EU-105).

<sup>51</sup> Eurostat, trade statistics on exports of meat of swine, fresh, chilled or frozen from Poland to US and Canada <http://ec.europa.eu/eurostat> (Exhibit EU-104).

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95. On the specific facts of this case, it is clear that Russia did not comply with the requirements of Article 5.7 of the SPS Agreement, by failing to review the measures at issue within a reasonable period of time.

#### 7. REGIONALIZATION CLAIMS

96. Article 6 of the SPS Agreement addresses the adaptation to regional conditions, including disease-free areas. Article 6.1 of the SPS Agreement is a more general provision which informs the following paragraphs. It interestingly requires that measures be adapted not only to the area from which a product originates, but also to the area to which it is destined.
97. This provision is relevant when there are particularities of the region of destination which distinguishes it from other regions within the same Member. WTO Members may adopt regional ALOPs due to objective characteristics of a certain region.
98. The EU will offer an example from a different context- that of a bee subspecies particular to a certain island and which required special protection. The EU would like to point out that in the framework of Article 36 of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice of the European Union (CJEU) ruled that:

From the point of view of such conservation of biodiversity, it is immaterial whether the object of protection is a separate subspecies, a distinct strain within any given species or merely a local colony, so long as the populations in question have characteristics distinguishing them from others and are therefore judged worthy of protection either to shelter them from a risk of extinction that is more or less imminent, or, even in the absence of such risk, on account of a scientific or other interest in preserving the pure population at the location concerned. [...]

The answer to be given must therefore be that a national legislative measure prohibiting the keeping on an island such as Læsø of any species of bee other than the subspecies *Apis mellifera mellifera* (Læsø brown bee) must be regarded as justified, [...] on the ground of the protection of the health and life of animals.<sup>52</sup>

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<sup>52</sup> Case C-67/97, *Bluhme*, EU:C:1998:584, paras 34-38.

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99. The EU would like to be clear that this particular judgment related to the different issue of the control of invasive alien species, a matter that is not at issue in the present case. However, as a matter of principle, it does support the more general proposition that Members may adopt regional ALOPs.
100. Consistent with this, a particular region in a Member may not warrant a higher regional ALOP, but rather, due to its objective SPS characteristics, a lower regional ALOP. In the circumstances of the present case, the EU understands that there are regions in Russia where wild boars do not occur.<sup>53</sup> To the extent to which domestic pigs also do not occur in those regions, the introduction of the products at issue would not pose ASF-related sanitary risks to animals.
101. With regard to Article 6.2 of the SPS Agreement, Russia contends that this dispute can be distinguished from *India - Agricultural Products* due to the explicit recognition of regionalization in its measures.<sup>54</sup>
102. However, the EU observes that this explicit “recognition” of regionalization by Russia is contradicted by the facts of the case. It may be inferred from the unreasonable refusal to accept the regionalization measures of the exporting Member, including irrelevant questions (such as information on establishments in unaffected areas graded by production volume and biosecurity) asked pursuant to Article 6.3 of the SPS Agreement, that an importing Member does not, in fact, recognize the concept of disease-free areas.<sup>55</sup> Russia’s actions and inactions with respect to ASF-related regionalization in the EU do not match - and in fact contradict - the apparent explicit recognition.
103. The two provisions in Articles 6.2 and 6.3 are related to each other, in the sense that if the importing Member does not even recognize the concept of regionalization with respect to ASF, then any attempts by an exporting Member to prove that the conditions for safe trade in the products at issue from the non-affected areas are fulfilled would be rendered fruitless.

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<sup>53</sup> EFSA ASF Scientific Opinion 2010, p. 28 (Exhibit EU-24).

<sup>54</sup> Russia’s first written submission, para. 281.

<sup>55</sup> EU’s first written submission, para. 339.

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104. In the same vein, the EU agrees with the panel's finding in *India- Agricultural Products*<sup>56</sup> and with Australia's proposition<sup>57</sup> that for a measure to comply with Article 6.2 it must at least not deny or contradict the recognition of such areas.
  105. In light of the above, the situation in the present case is in fact similar to that in *India-Agricultural Products* and the EU respectfully requests the Panel to find that Russia does not recognize the concept of disease-free areas with respect to ASF in the EU.
  106. With regard to Article 6.3 of the SPS Agreement, an importing Member is under no obligation to automatically accept a regionalization proposal from the exporting Member. However, its decision must take into account objective factors such as those enunciated in Article 6.2, second sentence of the SPS Agreement: geography, ecosystems, epidemiological surveillance and the effectiveness of sanitary controls.
  107. In case of disagreement between the importing and the exporting Members, the exporting Member can defer the dispute to the WTO adjudicating bodies. A Panel presented with such a case has the duty to make an objective assessment of the matter before it according to Article 11 of the DSU.
  108. The EU has provided Russia with the necessary evidence in order to objectively demonstrate that the disease-free areas are and are likely to remain disease-free areas as required by Article 6.3 of the SPS Agreement.
  109. The EU formally requested that Russia recognize the ASF disease-free status of regions other than those where ASF outbreaks have occurred as early as the end of January 2014.<sup>58</sup>
  110. It is correct that, since the first isolated cases of ASF in wild boar, the situation in the EU changed, including a few outbreaks in domestic pigs, but the geographical spread nevertheless remains very limited, largely confined to the border regions with Belarus and Russia, from which most probably wild boars are thought to have continued to cross into EU territory, thus reintroducing the ASFV into the EU. The

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<sup>56</sup> Panel Report, *India- Agricultural Products*, paras 7.698, 7.699 and 7.701.

<sup>57</sup> Australia's third party written submission, paras 19-20.

<sup>58</sup> Letter of 31 January 2014 (Exhibit EU-64).

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number of reported cases in these limited geographical regions proves the robustness of the EU surveillance measures.

111. In total, in 2014 there were 2 notified ASF outbreaks in domestic pigs in Poland, 32 in Latvia, 6 in Lithuania and none in Estonia. In 2015 there was 1 reported outbreak in domestic pigs in Poland. With respect to wild boar, in 2014 there were 30 cases notified in Poland, 148 in Latvia, 45 in Lithuania and 41 in Estonia. In 2015 there were 22 cases in wild boar notified in Poland, 72 in Latvia, 26 in Lithuania and 47 in Estonia.<sup>59</sup>
112. The number of outbreaks in domestic pigs is certainly limited and after the first wave of infections the situation has improved radically. In Lithuania and Latvia no outbreak in domestic pigs has occurred since September 2014. In Poland a single outbreak has occurred in 2015 since the two first holdings infected in the summer 2014.
113. The location of the vast majority of outbreaks in domestic pigs very close to the border with the neighbouring countries that were the source of the virus indicate that the control measures are effective in avoiding geographical ASF spread. The case of a commercial farm in Lithuania and the hotspot in Northern Latvia are isolated cases, due to human mistakes or illegal activities.<sup>60</sup>
114. With regard to the additional high biosecurity requirements, these are described in Decision 2014/709 or in the approved national eradication plans. For instance, pigs should come from a holding that has been subjected at least twice a year, with an interval of at least 4 months, to inspections by the competent veterinary authority, which: (i) followed the guidelines and procedures laid down in Chapter IV of the Annex to Decision 2003/422; (ii) included a clinical examination and sampling in which the pigs over the age of 60 days have been subjected to laboratory testing in accordance with the checking and sampling procedures laid down in Part A of Chapter IV of the Annex to Decision 2003/422 and (iii) checked the effective application of the measures provided for in the second indent and in the fourth to seventh indents of Article 15(2)(b) of Directive 2002/60. In addition, the holding is

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<sup>59</sup> EU Animal Disease Notification System (ADNS), as of 17 April 2015 (Exhibit EU-110).

<sup>60</sup> Exhibit EU-95.

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- required to implement bio-security requirements for African swine fever as established by the competent authority.<sup>61</sup>
115. Another example consists of the requirement that the pigs have been resident for a period of at least 30 days or since birth on the holding and no live pigs have been introduced into that holding from the areas listed in Parts II, III and IV of the Annex to Decision 2014/709 during a period of at least 30 days prior to the date of the movement.<sup>62</sup>
116. The information supplied to the Russian authorities aimed at providing assurances that the distance between the detected cases and the limits of the restricted areas is sufficient to limit the risk of the disease being spread through the movement of wild boar. According to the 2010 EFSA scientific opinion the home range of wild boar is very limited and it is not a migratory species.<sup>63</sup>
117. The EU surveillance measures are robust so as to ensure that the disease is absent outside the restricted areas and that in case of spread it can be rapidly detected and followed by appropriate action.
118. Russia did not explicitly require justification for the definition of the areas following each modification of the restricted areas in the EU. However, Russia specifically requested justification for the identification of the limits of zones by its letter of 16 May 2014.<sup>64</sup> The European Commission provided the justification in its letter of 13 June 2014. It mentioned natural (rivers) and artificial (fenced motorways) barriers, forest limits, and administrative boundaries.<sup>65</sup>
119. In March 2015 the European Commission provided Russia with copies of the eradication plans of Lithuania and Poland. The Lithuanian eradication plan provides that “the infected area in the Eastern part has a natural barrier – the river Neris, which partially separates the infected area from the risk area. In the Northern part the infected area has another natural barrier – the biggest Lithuanian

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<sup>61</sup> Article 3.3 of Decision 2014/709 (Exhibit EU-44).

<sup>62</sup> Article 4.1 of Decision 2014/709 (Exhibit EU-44).

<sup>63</sup> Scientific Opinion on African Swine Fever, EFSA Panel on Animal Health and Welfare (AHAW), EFSA Journal 2010 8(3)1556 (Exhibit EU-24).

<sup>64</sup> Letter dated 16 May 2014 from Russia to the EU (received on 4 June 2014), FS-EN-8/7999 (Exhibit EU-93.b)

<sup>65</sup> Letter of 13 June 2014 from the EU to Russia, ARES(2014)1941949, SANCO/G7/PD/mh(2014)2038505 (Exhibit EU-94).

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river Nemunas. The artificial obstacle to stop the movement of wild boars is the road No A16, which links Vilnius and Marijampole and practically separates the infected area from the risk area and it is fenced to stop the wild animal movement”.<sup>66</sup>

120. The situation in Poland is different: “in the infected area and buffer zone there are no natural or artificial barriers that would limit wild boar movements. Although wild boar are not migrating animals (the radius of their home range is about 5-10 km), some expert opinions indicate that there is a possibility that wild boar may move at the distances of several dozen kilometers. Taking the above into account, the area of application of measures as regards wild boar should be greater than the area of application of measures on holdings and consequently the measures concerning the wild boar population should encompass both the infected area and the buffer zone”.<sup>67</sup>

121. Finally, Russia also claims that “the European Union failed to take significant actions to eliminate backyard pork production in the four ASF-infected EU Member States”.<sup>68</sup> This allegation is inaccurate, as demonstrated by Decision 2013/498, which allocates EU funds to Lithuania to establish a buffer zone of 10 kilometres along the border with Belarus, in which the density of susceptible hosts is decreased by promoting slaughter of pigs and preventing restocking of pig holdings.<sup>69</sup> In addition, Decision 2014/236 grants EU support to Lithuania and Poland in order to decrease the density of susceptible hosts in low bio-security pig holdings of the infected area by promoting the slaughter of pigs and preventing restocking of pig holdings for at least one year.<sup>70</sup> At the same time, the EU supported awareness campaigns in the respective regions.<sup>71</sup>

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<sup>66</sup> Eradication plan of African swine fever in feral pigs in certain areas of Lithuania, p. 8 (Exhibit EU-101).

<sup>67</sup> Eradication plan of African swine fever in feral pigs in certain areas of Poland, p. 8 (Exhibit EU-102).

<sup>68</sup> Russia’s first written submission, para. 125.

<sup>69</sup> Article 5 and recital 5 of the Commission Implementing Decision 2013/498/EU of 10 October 2013 concerning a Union financial contribution towards surveillance and other emergency measures implemented in Estonia, Latvia, Lithuania and Poland against African swine fever in neighbouring third countries, OJ L272, p.47 (Exhibit EU-106).

<sup>70</sup> Article 1(3) and recital 10 of the Commission Implementing Decision 2014/236/EU of 24 April 2014 concerning a Union financial contribution towards surveillance and other emergency measures implemented in Estonia, Latvia, Lithuania and Poland against African swine fever, OJ L125, p.86 (Exhibit EU-107).

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8. RISK MANAGEMENT CLAIMS

122. Russia relies on its repeated misleading invocation of “containment” zones in order to support the proposition that its measures conform to the international standards. However, contrary to what Russia asserts, this does not mean that Russia complies with the less trade restrictive alternative measure suggested by the EU.<sup>72</sup>
123. As the EU has explained in detail above, it never relied on the concept of containment zones. Russia not only does not follow the OIE recommendations, but its measures ban all trade in the products at issue instead of allowing trade from ASF-free areas in the EU.
124. It clearly follows that Russia fails to rebut the *prima facie* case made by the EU and to show why compliance with the OIE standards is not the alternative reasonably available within the meaning of footnote 3 and Article 5.6 of the SPS Agreement.
125. The EU does not agree with Russia’s statement according to which if an ALOP is derived from the challenged measure, then the measure by definition can never be more trade restrictive than required to achieve the ALOP.<sup>73</sup> First, the measure at issue may contain several elements, some of which may reveal a purely protectionist objective. Evidently, the ALOP is inferred only from those elements that are not overtly protectionist. Second, in any event, a conclusion about necessity can only ultimately be reached on the basis of a consideration of the alternatives.
126. With regard to an Article 5.7 scenario, the importing Member may not even have the opportunity to precisely determine and quantify its ALOP. It is an emergency situation. However, as already explained above, the invoking Member is not exempted from *any* obligation under the SPS Agreement. Instead, it is required to conduct a “less” objective assessment of risk, on the basis of the available pertinent information. It is in that context that it is necessary to construe the relationship between Article 5.7 and Articles 5.2 and 5.3.

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<sup>71</sup> Article 3 of the Decision 2013/498 and Article 1(2) of the Decision 2014/236 (Exhibits EU-106 and EU-107).

<sup>72</sup> Russia’s first written submission, para. 337.

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127. In addition, the existence of unjustifiable discrimination and a disguised restriction on international trade may also play a role in the Article 5.7 analysis. For instance, the different treatment of Ukraine and of the EU with respect to similar relevant situations is pertinent in the context of the Article 5.7.<sup>74</sup>

#### 9. DISCRIMINATION CLAIMS

128. Only similar relevant conditions can be considered comparable for the purposes of Articles 2.3 and 5.5 of the SPS Agreement. In this case the comparable condition, which triggered the application of the import ban, is the presence of the ASF in the EU.<sup>75</sup>
129. As repeatedly explained in our statement, Russia's starting point is that of a containment zones scenario, while the EU measures did not operate with that concept.
130. Russia maintains that "for purposes of assessing any 'discrimination', the comparison is between the treatment of products from the entire territory of the infected EU Member States and the treatment of the same products from ASF-infected zones within the Russian Federation".<sup>76</sup>
131. However, as already explained in our submission, the proper comparison is between Russia's country-wide/EU-wide bans and the intra-Russian trade from non-affected areas outside the first and second endangered zones.
132. With regard to the relationship between Articles 5.5 and 2.3 of the SPS Agreement, as already explained, Article 2 is entitled "basic rights and obligations" and constitutes a more general expression of principles which are further detailed in more specific legal texts. The elements of the analysis of the concept of "disguised restriction on international trade" in Articles 5.5 and 2.3 of the SPS Agreement are similar.

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<sup>73</sup> Russia's first written submission, para. 336.

<sup>74</sup> EU's first written submission, paras 189-190.

<sup>75</sup> Panel Report, *India- Agricultural Products*, para. 7.463.

<sup>76</sup> Russia's first written submission, para. 284.

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133. Finally, Russia’s notifications are imprecise, contradictory and reflect a misunderstanding of the OIE Code.<sup>77</sup> They are relevant to the Panel's scrutiny of substantive claims under the SPS Agreement, including Articles 2.3 and 5.5. Russia invokes different provisions of the OIE Terrestrial Code as the international standards it alleges to follow.<sup>78</sup> It claims that the measures are taken to protect food safety and the life of humans.<sup>79</sup> It varies different temperatures for the processing of meat from one EU Member State to another, while keeping or changing the processing duration, without an apparent scientific basis.<sup>80</sup>

#### 10. CONTROL, INSPECTION AND APPROVAL PROCEDURES

134. Russia wrongfully considers that the EU’s claims under Annex C and Article 8 of the SPS Agreement fall outside the scope of the mentioned provisions.<sup>81</sup> This assertion is also supported by the US in its third party submission.<sup>82</sup>
135. According to Russia, the type of procedures covered by Article 8 refers only to the approval of a product or the use of additives. They do not cover “negotiations between Members leading to the adoption of a procedure”.<sup>83</sup>
136. The Russian assertions are wrong for a number of reasons. First, the language used in Article 6.3 of the SPS Agreement, referring to “inspection and...other relevant procedures” is very similar to the language used in Annex C and Article 8, which also refer to “inspection, control and approval procedures”. Against this background, the EU does not see any reason why there should be a different meaning attached to the type of procedures envisaged by Article 8 so as to exclude the type of inspections and other relevant procedures mentioned in Article 6.3. Second, the EU does not view the acceptance of the regionalization measures as a “negotiation” between two different Members. It is rather an objective exchange of information and the decision of the importing Member is to be taken with

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<sup>77</sup> EU’s first written submission, para. 331.

<sup>78</sup> EU’s first written submission, para. 121.

<sup>79</sup> EU’s first written submission, para. 100.

<sup>80</sup> EU’s first written submission, paras 83-86.

<sup>81</sup> Russia’s first written submission, paras 420-425.

<sup>82</sup> US third party submission, paras 13 and following.

<sup>83</sup> Russia’s first written submission, para. 423.

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

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

#### 11. CONCLUSIONS

138. With that, the EU thanks you for your attention and looks forward to any questions you may have.