

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

(AB-2016-5 / DS475)

**THIRD PARTICIPANT SUBMISSION OF
THE UNITED STATES OF AMERICA**

October 14, 2016

SERVICE LIST

PARTICIPANTS

H.E. Mr. Marc Vanheukelen, Permanent Mission of the European Union

H.E. Mr. Gennady Ovechko, Permanent Mission of the Russian Federation

THIRD PARTIES

H.E. Mr. Hamish McCormick, Permanent Mission of Australia

H.E. Mr. Evandro de Sampaio Didonet, Permanent Mission of Brazil

H.E. Mr. Yu Jianhua, Permanent Mission of China

H.E. Ms. Anjali Prasad, Permanent Mission of India

H.E. Mr. Junichi Ihara, Permanent Mission of Japan

H.E. Mr. Choi Kyong-lim, Permanent Mission of the Republic of Korea

H.E. Mr. Harald Neple, Permanent Mission of Norway

H.E. Mr. Xavier Carim, Permanent Mission of South Africa

Dr. C. Y. Cyrus Chu, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

TABLE OF CONTENTS

I.	INTRODUCTION AND EXECUTIVE SUMMARY	1
II.	LEGAL ARGUMENT	1
A.	An Exporting Member’s Compliance with Article 6.3 is Not a Pre-requisite for Finding an Importing Member’s Breach of Article 6.1	2
B.	Russia is Incorrect that the Panel Erred in its Interpretation of Article 6.3 by not Taking Into Account in its Article 6.3 Analysis Evidence Relied Upon by the Importing Member	4
C.	The Panel Did Not Erroneously Interpret Article 6.3 of the SPS Agreement By Failing to Give Russia Time to Consider Evidence Following the Estonian ASF Outbreak.....	6
D.	Article 6.1, First Sentence Imposes Obligations with Respect to Measures, While Article 6.2, First Sentence, Requires Recognition of <i>Concepts</i>	7
III.	CONCLUSION	9

TABLE OF REPORTS

Short Form	Full Citation
<i>India – Agricultural Products (AB)</i>	Appellate Body Report, <i>India – Measures Concerning the of Certain Agricultural Products</i> , WT/DS430/AB/R, adopted 19 June 2015
<i>India – Agricultural Products (Panel)</i>	Panel Report, <i>India – Measures Concerning the of Certain Agricultural Products</i> , WT/DS430/R, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States welcomes the opportunity to present its views on certain findings raised on appeal by the Russian Federation (“Russia”) and the European Union (“EU”) in *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union* (DS475).

2. First, contrary to what Russia argues in its appellant submission, the text of Article 6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (“SPS Agreement”) does not support a categorical rule that a breach of Article 6.1 – on the basis of a failure to recognize particular disease free areas – can occur only after an exporting Member has satisfied its Article 6.3 obligation to provide information.

3. Second, contrary to what Russia argues, the Panel did not err in its interpretation of Article 6.3 by not taking into account in its Article 6.3 analysis evidence relied upon by Russia. Rather, both evidence supplied by the exporting Member pursuant to Article 6.3 and other evidence in the possession of the importing Member bear on the question of whether the importing Member has satisfied its Article 6.1 obligation to ensure that its SPS measures are adapted to the SPS characteristics of relevant areas.

4. Third, the Panel committed no error in its interpretation of Article 6.3 by failing to give Russia time to consider evidence following the Estonian ASF outbreak. This claim by Russia reflects its continued confusion between Article 6.1 and Article 6.3 analysis.

5. Fourth, Article 6.1 imposes obligations with respect to measures, while Article 6.2 requires recognition of concepts. Refusal to recognize specific areas as disease-free, standing alone, is unlikely to support a finding that the importing Member failed to recognize the concepts described in Article 6.2.

II. LEGAL ARGUMENT

6. In this submission, the United States will address certain issues of legal interpretation concerning Article 6 of the SPS Agreement that are implicated by the appeals in this dispute.

7. At the outset, the United States will address the general structure of Article 6. The three paragraphs of Article 6 set forth a set of inter-related obligations. To recall, Article 6 states:

1. 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.

2. 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.

3. 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.

8. These provisions must be read together in context so as to result in a coherent set of obligations with regard to regionalization of SPS measures. In particular:

- Article 6.2 differs from Article 6.1. Article 6.2 requires a recognition of *concepts*: namely, the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Article 6.1 requires Members to ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of two areas: the areas from which the product originated and to which the product is destined. Accordingly, it cannot be the case that a breach of the Article 6.1 obligation to ensure that measures are adopted to the SPS characteristics of specific areas necessarily would lead to a breach of Article 6.2’s obligation to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.
- The obligations in Article 6.1 are imposed on the importing Member, and are distinct from the obligations in Article 6.3 imposed on the exporting Member. Article 6.3 requires that an exporting Member claiming a specific area within its territory as a pest- or disease-free area or area of low pest or disease prevalence must provide necessary evidence. Article 6.1 obligations apply to the importing Member, and do not arise only following a request to recognize a specific area as a pest- or disease-free area or area of low pest or disease prevalence.
- Where Article 6.3 is satisfied by an exporting Member, the importing Member must review the information provided and respond accordingly. Article 6 does not contemplate that this process will be completed instantaneously, rather, the importing Member must have time to review the information provided and, when appropriate, to complete its domestic procedures.

A. An Exporting Member’s Compliance with Article 6.3 is Not a Pre-requisite for Finding an Importing Member’s Breach of Article 6.1

9. The Russian Federation argues in its Appellant’s Submission for a categorical rule that a breach of Article 6.1 on the basis of a failure to recognize particular disease free areas can occur only after an exporting Member has satisfied its Article 6.3 obligation with respect to the provision of information. This proposed rule is not contained in the text of the SPS Agreement, and should be rejected.

10. The United States considers that it will ordinarily be the case that an exporting Member's failure to provide information pursuant to Article 6.3 will result in a situation where the importing Member has no obligation pursuant to Article 6.1 with respect to the areas that exporting Member claims to be disease-free. However, the United States disagrees that an absolute rule would be consistent with the text of Article 6. Indeed, there could be situations where a Member's failure to recognize certain pest or disease-free areas could breach Article 6.1 in the absence of any evidentiary showing by the exporting Member under Article 6.3.

11. This view is consistent with the Appellate Body findings in *India – Agricultural Products*. In particular, the Appellate Body rejected the idea that:

a Member adopting or maintaining an SPS measure can only be found to have breached the obligation in the first sentence of Article 6.1 after an exporting Member has made the objective demonstration provided for in Article 6.3. Indeed, as noted above, even in the absence of such objective demonstration by an exporting Member, a Member may still be found to have failed to ensure that an SPS measure is adapted to regional conditions within the meaning of Article 6.1 in a situation where, for example, the concept of pest- and disease-free areas is relevant, but such Member's regulatory regime precludes the recognition of such concept. Moreover, as noted above, pest- or disease-free areas and areas of low pest or disease prevalence, which are specifically addressed in Articles 6.2 and 6.3, are only a subset of the SPS characteristics that may call for the adaptation of an SPS measure pursuant to the first sentence of Article 6.1.¹

12. The Appellate Body also explained that:

Article 6.1 expressly identifies “criteria or guidelines” developed by relevant organizations as relevant for the assessment of the SPS characteristics of regions, which suggests that, under certain circumstances, the adaptation of an SPS measure to regional SPS characteristics may be accomplished by taking into account relevant criteria and guidelines developed by such organizations, if any.²

These could include criteria or guidelines relevant to the existence of pest- or disease-free areas.

13. To be sure, the United States also agrees with the Appellate Body's assessment in *India – Agricultural Products* that, in light of “the relationship of Article 6.3 with the remainder of Article 6”:

in the context of WTO dispute settlement proceedings, an exporting Member claiming, for example, that an importing Member has failed to determine a specific area within that exporting Member's territory as “pest- or disease-free” – and ultimately adapt its SPS measures to that area – will have difficulties succeeding in a claim that the importing Member has thereby acted inconsistently

¹ *India – Agricultural Products (AB)*, para. 5.157.

² *India – Agricultural Products (AB)*, para. 5.157.

with Articles 6.1 or 6.2, unless that exporting Member can demonstrate its own compliance with Article 6.3.³

14. However, in the situation where, notwithstanding the exporting Member’s failure to supply information pursuant to Article 6.3, the importing Member’s knowledge of the information demonstrating the existence of disease-free areas in the exporting Member could be demonstrated, a breach of Article 6.1 could nonetheless be found. An interpretation of Article 6 that acknowledges the possibility of this situation is reflective of the absence in Article 6 of explicit conditional language linking Article 6.1 to Article 6.3.

B. Russia is Incorrect that the Panel Erred in its Interpretation of Article 6.3 by not Taking Into Account in its Article 6.3 Analysis Evidence Relied Upon by the Importing Member

15. The United States disagrees with the Russian Federation that Article 6.3 provides the relevant framework for assessing evidence supplied by an exporting Member against potentially contradictory evidence in the possession of the importing Member.⁴ Rather, both evidence supplied by the exporting Member pursuant to Article 6.3 and other evidence in the possession of the importing Member bear on the question of whether the importing Member has satisfied its Article 6.1 obligation to ensure that its SPS measures are adapted to the SPS characteristics of relevant areas. Russia’s argument that the Panel committed legal error in its interpretation of Article 6.3 by not finding a requirement to take into account evidence relied upon by the importing Member misunderstands the nature of Article 6.3 and its relationship with Article 6.1.

16. Article 6.3 imposes an obligation on exporting Members claiming that areas within their territories are disease-free to support that contention with the “necessary evidence in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain,” disease-free. Depending on the circumstances, the “necessary evidence” could touch on different questions, and more or less evidence might be necessary with respect to a particular issue in one situation than is necessary with respect to that same issue in another.

17. As the Panel indicates, the factors mentioned in the second sentences of Articles 6.1 and 6.2 will be relevant to determinations of disease-free areas in many cases.⁵ Yet while the “necessary evidence” to support a claim of a disease-free area’s existence will touch on many of these factors, evidence touching on each need not be supplied in all circumstances.⁶ As the Panel also indicates, moreover, there may be circumstances in which evidence on other questions may be required.⁷ Article 6.3, moreover, specifies that the evidence must support an objective demonstration “to the importing Member.” This reflects the fact that evidence necessary to satisfy an importing Member may legitimately vary depending on, for instance, that Member’s

³ *India – Agricultural Products (AB)*, para. 5.156.

⁴ *See* Russia’s Appellant Submission, section IV.B.

⁵ Panel Report, para. 7.388.

⁶ Panel Report, para. 7.389, 7.395-7.397.

⁷ *See* Panel Report, para. 7.395-7.397, 7.401-7.409.

appropriate level of protection (ALOP) or criteria established through a science-based risk assessment.

18. Viewed in the context of the entire agreement, Article 6.3 thus constitutes a requirement to provide the information needed to meet requirements used by the importing Member, consistently with the remainder of the SPS Agreement, for the recognition of disease-free areas. Accordingly, where an importing Member has a low ALOP and has established minimal requirements for regionalization, for instance, the “necessary evidence” for purposes of Article 6.3 would constitute the evidence needed to meet those requirements. Where a Member has a high ALOP and has established stringent requirements on the basis of a risk assessment, the “necessary evidence” could be greater.

19. Article 6.1, by contrast, provides that Members “shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area ... from which the product originated and to which the product is destined.” There could be a variety of ways that such an obligation could be breached, including failing to grant recognition in response to a showing under Article 6.3 meeting requirements set by the importing Member, and setting requirements for recognition of disease-free areas that do not ensure that SPS measures are adapted to the “characteristics of the area ... from which the product originated and to which the product is destined.” In each of these circumstances, an importing Member would not have met the plain text of the requirement: “*ensur[ing]* .. that [its SPS] measures are adapted” (emphasis added).

20. Ascertaining whether a Member has “ensure[d] that [its SPS] measures are adapted” accordingly requires an assessment of the totality of the evidence and circumstances surrounding the request for recognition, including the content of any requirements for recognition of disease-free areas put forward by the importing Member, the evidence that the exporting Member supplied pursuant to Article 6.3, evidence from other sources that was considered by the importing Member, and the importing Member’s reaction to, and response to the exporting Member concerning, evidence that the exporting Member had supplied. Similarly, whether evidence of disease-free areas supplied by the exporting Member can support a finding of failure to “ensure that [SPS] measures are adapted” if recognition is not provided may well hinge on other considerations and evidence.

21. Indeed, the existence in the possession of the importing Member of evidence that would call into question an exporting Member’s assertion that an area would likely remain disease-free does not necessarily render the exporting Member’s showing insufficient under Article 6.3. For instance, an exporting Member could have satisfied its Article 6.3 obligation by supplying evidence requested by the importing Member, and the importing Member could, consistently with Article 6.1, take the time needed to review of that evidence against other information it had obtained. Depending the outcome of that review, the importing Member might deny the request for regionalization. Accordingly, evidence in the importing Member’s possession that was not supplied by the exporting Member bears on the importing Member’s compliance with Article 6.1, but not necessarily on the subsidiary question of the exporting Member’s compliance with Article 6.3. Thus, in considering claims under Article 6, Panels should focus on the core question of whether – under Article 6.1 – the importing Member has “ensure[d] that [its SPS]

measures are adapted to the sanitary or phytosanitary characteristics of the area ... from which the product originated and to which the product is destined.”

22. Accordingly, to the extent Russia’s argument about the Panel’s failure to assess certain evidence is supported by the record, that argument would not support a claim of legal error in the Panel’s interpretation of Article 6.3. Rather, this would seem to be an argument that the Panel, in evaluating Russia’s compliance with Article 6.1, did not make an objective assessment of the relevant evidence introduced in the dispute. The claim raised in section IV of Russia’s Appellant Submission should thus be rejected.

C. The Panel Did Not Erroneously Interpret Article 6.3 of the SPS Agreement By Failing to Give Russia Time to Consider Evidence Following the Estonian ASF Outbreak

23. Russia asserts that the Panel improperly interpreted Article 6.3 by failing to “recognize that under Article 6.3 of the SPS Agreement, importing Members have a reasonable period of time to assess the necessary evidence.”⁸ The United States does not consider the Panel to have erroneously interpreted Article 6.3 in the manner alleged.

24. With respect to the specific point raised by the Russian Federation on the time period from which evidence was considered, the United States believes that Russia’s argument continues the confusion in Russia’s Appellant Submission between the Article 6.3 analysis and the Article 6.1 analysis. According to Russia, the Panel should not have found the EU to have satisfied Article 6.3 with respect to Estonia because, according to Russia, there was insufficient time between the September 2014 ASF outbreak in Estonia and September 11, 2014 – when Russia imposed its ban on products from Estonia – for Russia to have examined the EU’s evidence and conducted follow-up evaluation with Estonian authorities.⁹ The question of whether Russia had sufficient time to consider the evidence, however, does not relate to the sufficiency of the EU’s showing under Article 6.3. Rather, it is appropriately examined under Article 6.1 – the article that Russia was accused of breaching – as a consideration bearing on whether Russia had “ensure[d] that [its] ... measures are adapted” to the SPS characteristics of areas from which products originated.

25. As noted above, the United States considers that it is not consistent with the plain meaning of the obligation in Article 6.1 to suggest that a Member breaches this obligation by taking appropriate time to review information submitted by an exporting Member claiming that areas are disease-free, and to conduct relevant and appropriate follow-up inquires and verification. Such activities form a part of the process of “ensur[ing] that” SPS “measures are adapted” to relevant characteristics. Article 6.1 does not state that disease-free areas must be immediately recognized following the presentation of a request with supporting evidence pursuant to Article 6.3. However, Russia does not allege any error in the Panel’s interpretation of Article 6.1. Moreover, while Russia criticizes the Panel’s Article 6.3 interpretation for

⁸ Russia’s Appellant Submission, section V.C.

⁹ Russia’s Appellant Submission, para. 202.

ostensibly failing to give Russia time after the Estonian outbreak to consider the EU’s evidence,¹⁰ the Panel also found that the European Union had provided certain information to Russia regarding ASF control in Estonia prior to the outbreak.¹¹ The United States takes no position on the question – not raised in this appeal – of whether, in light of the information provided by the EU at points prior to the Estonian outbreak, and the timing of the provision of that information, Russia’s decision to impose a country-wide ban on products from Estonia was consistent with Russia’s obligations under Article 6.1.

26. On the question of the specific alleged legal error actually asserted by Russia, however – an alleged failure by the Panel to properly interpret Article 6.3 of the SPS Agreement by not recognizing that importing Members have a reasonable period of time to assess necessary evidence provided by an exporting Member – the United States does not consider the Panel’s legal analysis to be erroneous in the manner that Russia asserts. Accordingly, the claim raised in section V of Russia’s Appellant Submission should be rejected.

D. Article 6.1, First Sentence Imposes Obligations with Respect to Measures, While Article 6.2, First Sentence, Requires Recognition of Concepts

27. The United States would recall that Articles 6.1 and 6.2 have different thrusts – Article 6.1 governs a Member’s measures while Article 6.2 requires the recognition of concepts and does not express a requirement for any particular relationship between this recognition and a Member’s measures. More specifically, Article 6.1, first sentence, obligates Members to “ensure that their [SPS] *measures are adapted* to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated and to which the product is destined” (emphasis added). On the other hand, Article 6.2, first sentence, obligates Members to “*recognize the concepts* of pest- or disease-free areas and areas of low pest or disease prevalence” (emphasis added).

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

[T]he use of different wording in these subparagraphs suggests that the paragraphs are intended to have distinctive effects. Whereas the obligation to ensure that SPS measures are “adapted” in Article 6.1, first sentence, denotes that a Member must make certain of its measures’ suitability (in this case, suitable for the SPS characteristics of the area), Article 6.2, first sentence, requires that a Member make a particular acknowledgement (in this case, of the concepts of “pest- or disease-free areas” and “areas of low pest or disease prevalence”).¹²

29. That panel further explained:

¹⁰ Russia’s Appellant Submission, para. 202.

¹¹ Panel Report, para. 7.998.

¹² *India – Agricultural Products (Panel)*, para. 7.669.

That these respective sentences refer to different subjects (“SPS measures” in Article 6.1, and the “concepts” of “pest- or disease-free areas” and “areas of low pest or disease prevalence” in Article 6.2) is also of significance in terms of their import. Article 6.1, first sentence, requires Members to ensure that [their] SPS measures are suitable for the SPS characteristics of an area. Notwithstanding the fact that “pest- or disease-free areas” and “areas of low pest or disease prevalence” are defined, respectively, in Annex A(6) and A(7) of the SPS Agreement, the Panel notes that, in the context of the first sentence of Article 6.2, these terms are referred to as concepts for the purpose of that provision. A concept is an “abstract idea” or “an idea of a class of objects; a general notion or idea”. Hence, Article 6.2, first sentence, requires Members to acknowledge particular abstract ideas.¹³

30. In *India – Agricultural Products*, the Appellate Body upheld the panel’s finding of a breach of Article 6.2, explaining that the panel had not found a breach due to India’s failure to implement the concepts of disease-free areas (i.e., a matter covered by Article 6.1), but that the panel had found a failure under Article 6.2 to recognize the concepts themselves, due to India’s maintenance of measures that contradict the requirement of disease-free areas.¹⁴

31. In this dispute, the Appellate Body should continue to ascribe meaning to the difference in wording between Article 6.1 and Article 6.2. Article 6.2 requires *recognition* of the *concepts* of certain types of areas: pest- or disease-free areas and areas of low pest or disease prevalence. By contrast, Article 6.1 imposes obligations on Members with respect to measures: Members must ensure that “their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of” both the area from which the product originated and to which the product is destined.

32. This is not to say that formal or de jure recognition of the concepts of pest- or disease-free areas should necessarily be taken to establish conclusively that a Member has satisfied its obligation to recognize the concepts of pest- or disease-free areas. Where a Member’s formal measure recognizes these concepts, it may be that the recognition is nonetheless illusory.

33. However, the structure of Article 6 demonstrates that mere denial of a particular request for recognition by an exporting Member, standing alone, is unlikely to be sufficient to support a finding that the importing Member failed to recognize the concepts described in Article 6.2 of the SPS Agreement. This would conflate the Article 6.1 obligation to ensure that measures are adopted to the SPS characteristics of relevant areas with the Article 6.2 obligation to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. The obligation in Article 6.2 must have meaning independent of Article 6.1.

34. In this dispute, the United States understands the European Union’s position to be that Article 6.2 was breached by virtue of the Russian Federation’s use of country-wide bans (and an EU-wide ban) notwithstanding requests by the EU for regional treatment. This amounts, not to

¹³ *India – Agricultural Products (Panel)*, para. 7.670 (quoting the Oxford English Dictionary, OED Online).

¹⁴ *India – Agricultural Products (AB)*, paras. 5.174-5.175.

issuance of measures that contradict the recognition of the concept of disease-free areas found in other legislation, but to a measure rejecting a specific request for regional treatment. It is therefore different from the measures found by to breach Article 6.2 in *India – Agricultural Products*, which rejected the possibility of any Member achieving regionalized treatment for avian influenza, and therefore amounted to a rejection of the concept of disease-free areas with respect to avian influenza. The United States thus agrees with the Panel in this dispute that such a claim should be examined under Article 6.1, and does not articulate an alleged breach of Article 6.2 of the SPS Agreement.¹⁵

III. CONCLUSION

35. The United States wishes to thank the Appellate Body for its consideration of the views set out in this submission. The United States also may take the opportunity of its oral statement to address other issues of systemic importance raised in the appeals of the Panel Report in this dispute.

¹⁵ Panel Report, paras. 7.376, 7.379.