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**1 ARTICLE 6**

**1.1 Text of Article 6**

**Article 6**

*Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence*

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.

**1.2 General**

1. In *Australia – Salmon*, Australia claimed that the Panel made an implicit finding of inconsistency of the Australian measure with Article 6, although the Canadian request for the establishment of a panel had not included a claim under Article 6. The Appellate Body rejected Australia's argument:

"Canada's request for the establishment of a Panel did not include a claim of violation of Article 6 of the *SPS Agreement*. The Panel's terms of reference are determined by Canada's request for the establishment of a Panel. We, therefore, agree with Australia that Article 6 of the *SPS Agreement* is not within the terms of reference of the Panel. However, we disagree with Australia that the Panel exceeded its terms of reference in quoting Article 6.1 in a footnote, attached to a paragraph in which the Panel examined a violation of Article 5.5. More precisely, we reject Australia's contention that the

Panel, by merely referring to Article 6.1 in a footnote, made an implied finding of inconsistency with Article 6. In our view, the statement of the Panel with regard to Article 6, in footnote 430 of its Report, is similar in character to the statement of the Panel in *United States – Shirts and Blouses*, with regard to the powers of the Textile Monitoring Body ('TMB'). India appealed from this statement, but we found it to be 'purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions'. We did not consider that statement to be 'a legal finding or conclusion' which the Appellate Body 'may uphold, modify or reverse'. Likewise, we consider that in this case, the Panel's statement in footnote 430 of its Report regarding Article 6.1 of the *SPS Agreement* is a purely gratuitous comment and not 'a legal finding or conclusion'. By making such a comment, the Panel did not exceed its terms of reference."<sup>1</sup>

### 1.3 The relationship between paragraphs of Article 6

2. In addressing the relationship between different paragraphs of Article 6, the Panel in *India – Agricultural Products* noted that:

"[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')."<sup>2</sup>

3. On appeal, the Appellate Body observed that the Panel's findings relating to the relationship between the three paragraphs of Article 6 should be read with caution and through the prism of specific claims made by the parties in that particular dispute. The Appellate Body emphasized in this respect that "all three paragraphs of Article 6 are interconnected, addressing different aspects of the obligation to adapt SPS measure to regional conditions".<sup>3</sup>

4. In *US – Animals*, the Panel held that Article 6.1 has a broader scope of application than Articles 6.2 and 6.3, because the former "sets forth a general obligation for all Members to adapt their measures to the SPS characteristics of a given area ... [while] Articles 6.2 and 6.3 both focus on explicitly on 'pest- or disease-free areas' and 'areas of low pest or disease prevalence'".<sup>4</sup>

#### 1.3.1 Articles 6.1 and 6.2

5. With respect to the relationship between Articles 6.1 and 6.2, the Panel in *India – Agricultural Products* found that:

"[A] finding that a Member has failed to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence as required by Article 6.2, first sentence, leads inevitably to a finding that such Member also has failed to determine those areas based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls."<sup>5</sup>

6. On appeal, however, the Appellate Body cautioned that:

"To the extent that the Panel was suggesting that the obligation to ensure that a Member's SPS measures are 'adapted' within the meaning of Article 6.1 always presupposes that a Member must have recognized the concepts mentioned in Article

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<sup>1</sup> Appellate Body Report, *Australia – Salmon*, para. 110.

<sup>2</sup> Panel Report, *India – Agricultural Products*, para. 7.669.

<sup>3</sup> Appellate Body Report, *India – Agricultural Products*, paras. 5.140 and 5.152.

<sup>4</sup> Panel Report, *US – Animals*, para. 7.654.

<sup>5</sup> Panel Report, *India – Agricultural Products*, para. 7.689. In a similar vein, the Panel in *US – Animals* considered recognition of the concept of pest- or disease-free areas or areas of low pest or disease prevalence to constitute "a logical prerequisite" for the adaptation of a measure under Article 6.1. Panel Report, *US – Animals*, para. 7.657.

6.2, we disagree. This is because, as explained above, we see pest- or disease-free areas and areas of low pest or disease prevalence as a subset of all the SPS characteristics of an area that may call for the adaptation of an SPS measure."<sup>6</sup>

### 1.3.2 Article 6.3 and the remainder of Article 6

7. As regards Article 6.3, the Panel in *India – Agricultural Products* held that this provision:

"[R]efers to a situation that is distinct from those in Articles 6.1 and 6.2. It is addressed not to Members generally, as are the first two paragraphs of Article 6, but to exporting Members that claim to have areas within their territory that are pest- or disease-free areas or areas of low pest or disease prevalence. Article 6.3 puts the onus on these Members to prove such claims to importing Members. This paragraph is not directly linked to the first two paragraphs of Article 6, or to what WTO Members must do generally with respect to adapting measures to SPS characteristics of certain areas, or in particular to recognizing specific area concepts."<sup>7</sup>

8. However, the Panel acknowledged some links between Articles 6.1 and 6.2 on the one hand and Article 6.3 on the other hand:

"We acknowledge that, under certain circumstances, a link may be made between the information required for the assessment of SPS characteristics envisaged by Article 6.1, second sentence, and the obligation of an exporting Member to provide 'the necessary evidence' under Article 6.3, first sentence, that an area within its territory is pest- or disease-free or is an area of low pest or disease prevalence. According to Article 6.3, if an importing Member receives a request for the recognition of a particular disease-free area in an exporting Member pursuant to Article 6.3, first sentence, an exporting Member that claims that an area within its territory is a pest- or disease-free area must 'provide the necessary evidence' to the importing Member in support of that contention. Article 6.3 does not specify what that 'necessary evidence' would be. However, Article 6.1, second sentence, provides a non-exhaustive list of factors that a Member could consider in assessing the SPS characteristics of the area in question. Thus although Article 6.1 may inform the inquiry that an importing Member may conduct in order to determine whether an exporting Member has 'objectively demonstrated' that there is an area within its territory that is pest- or disease-free or is an area of low pest or disease prevalence, there is nothing in the language of either provision that requires this particular approach.

What is also clear is that, logically, the importing Member must have already recognized in its SPS measures the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, as required under Article 6.2, in order for it to receive and consider a request for recognition under Article 6.3. To us, the recognition of the concepts of such areas must necessarily precede a request for recognition of a specific area within the territory of an exporting Member.

...

For the reasons explained above, our understanding of the interplay between the three paragraphs of Article 6 is that Members must adapt their SPS measures to the SPS characteristics of an area from which goods originate or to which they are destined and, logically, they must already have recognized as per Article 6.2 the 'concepts' of pest- or disease-free areas and areas of low pest or disease prevalence in order to do so. The steps in Article 6.3 are directed at exporting Members and presuppose that an importing Member from which they seek recognition that an area in its territory is pest- or disease-free or is an area of low pest or disease prevalence, is in compliance with its obligations under Articles 6.1 and 6.2. We thus conclude that

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<sup>6</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.143.

<sup>7</sup> Panel Report, *India – Agricultural Products*, para. 7.674.

the obligations in Articles 6.1 and Article 6.2 are not triggered by an invocation of Article 6.3, as argued by India."<sup>8</sup>

9. However, the Appellate Body considered the Panel's statement questionable "inasmuch as it suggests that an exporting Member will be in a position to make the objective demonstration provided for in Article 6.3 only once the Member adopting or maintaining the SPS measure at issue has already ensured that such measure is 'adapted' to the SPS characteristics of the relevant areas pursuant to Article 6.1."<sup>9</sup> In particular, the Appellate Body held that "adaptation may involve an *ex post facto* 'modification' of the SPS measure pursuant to an exporting Member's request and objective demonstration of the elements set out in Article 6.3".<sup>10</sup>

10. While the Appellate Body agreed with the Panel in *India – Agricultural Products* that "there is no explicit conditional language linking Article 6.1 and Article 6.3", both provisions need to be read together.<sup>11</sup> The Appellate Body understood the relationship between Article 6.3 and the remainder of Article 6 to mean that:

"[A]n 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 with Articles 6.1 or 6.2, unless that exporting Member can demonstrate its own compliance with Article 6.3."<sup>12</sup>

11. This, however, does not mean 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."<sup>13</sup>

12. The Panel in *US – Animals* noted that the obligations in Articles 6.1 and 6.2 are not contingent on the exporting Member's actions under Article 6.3. Article 6.1 requires adaptation of measures not only to the SPS characteristics of the area where the product originates, but also of the destination. In the latter case, there is no need for an action of the exporting Member. The Panel added that a Member can also adapt the measure without a specific claim of the exporting Member, if it applies the disease status designations of an international organization, such as the OIE.<sup>14</sup> The Panel recognized, however, that in some circumstances, the importing Member's ability to adapt a measure will depend on the exporting Member's compliance with Article 6.3.<sup>15</sup>

13. In *Russia – Pigs (EU)*, the Appellate Body further clarified that while a violation by the importing Member of Article 6.1 is not necessarily contingent on the exporting Member's compliance with Article 6.3, the latter will in many cases "have implications for the importing Member's ability to assess the SPS characteristics of areas located within the exporting Member's territory and to adapt its measures accordingly, as required by Article 6.1".<sup>16</sup>

#### **1.4 Article 6.1**

14. In interpreting Article 6.1, the Appellate Body noted in *India – Agricultural Products* that the relevant areas subject of the adaptation obligation can "vary, and may entail a territory that can be smaller than, the same size as, or bigger than, a country."<sup>17</sup> The Appellate Body further emphasized the continuing nature of the adaptation obligation, "requiring that SPS measures be

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<sup>8</sup> Panel Report, *India – Agricultural Products*, paras. 7.676-7.677 and 7.680.

<sup>9</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.153.

<sup>10</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.154.

<sup>11</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.155.

<sup>12</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.156.

<sup>13</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.157.

<sup>14</sup> Panel Report, *US – Animals*, para. 7.663.

<sup>15</sup> Panel Report, *US – Animals*, para. 7.664.

<sup>16</sup> Appellate Body Report, *Russia – Pigs (EU)*, para. 5.99.

<sup>17</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.132.

adjusted over time so as to establish and maintain their continued suitability in respect of the relevant SPS characteristics."<sup>18</sup> According to the Appellate Body:

"[T]he general 'adaptation' obligation in Article 6.1 may well encompass both a requirement to adapt appropriately at the time the SPS measure is adopted, as well as a requirement to adapt appropriately if and when relevant SPS characteristics in relevant areas in the territory of the importing or exporting Member change or are shown to warrant an adaptation of a specific SPS measure."<sup>19</sup>

15. With regard to the meaning of the term "adaptation", the Panel in *US – Animals* held that:

"'[A]daptation' of a measure entails that the measure in question must be tailored or calibrated to the specific SPS characteristics of the area concerned. If, for instance, the area from which a product originates presents a lower level of risk than the rest of the territory of an exporting Member, an importing Member would be required to impose less stringent conditions on imports of products therefrom. The contrary may also be true. If, indeed, the area from which a product originates presents a higher level of risk than the rest of the exporting Member's territory, such an SPS characteristic may warrant the imposition of particularly stringent import restrictions targeting that specific area. We also note that the first sentence of Article 6.1 refers to both the area 'from which the product originated' and the area 'to which the product is destined'. This indicates that the regulating Member is required to adapt its measure not only to the area of origin, but also to the area of destination of a product. If, for instance, a particular area within the territory of an importing Member has a similar SPS status as the area of origin of a product (e.g. has the same level of prevalence of a given disease), that Member may be required to tailor its measure by relaxing the restrictions on imports into that area."<sup>20</sup>

16. The Panel went on to consider that:

"[T]he two sentences of Article 6.1 set forth a logical progression that those Members adopting and applying SPS measures are required to follow. According to the second sentence, a Member must 'assess' the SPS characteristics of a given area, taking 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 developed by the relevant international organizations. Once the SPS characteristics of the area have been assessed, the Member is required to 'adapt' its SPS measure to such characteristics."<sup>21</sup>

17. The Panel added that:

"[A] failure to ensure that SPS measures are adapted to the SPS characteristics of an area for the purpose of Article 6.1, first sentence, may warrant a concomitant finding that the Member has not taken into account the factors in Article 6.1, second sentence, in assessing the SPS characteristics of a region."<sup>22</sup>

18. The Panel in *Costa Rica – Avocados (Mexico)* pointed out that Article 6.1 contains "an ongoing obligation, and Members enjoy a degree of latitude in determining how to ensure the adaptation of their SPS measures to regional conditions[]" and that "[i]n order to assess these characteristics, Members must evaluate all the relevant evidence, taking into account, *inter alia*, the elements in the second sentence of Article 6.1."<sup>23</sup>

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<sup>18</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.132.

<sup>19</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.154.

<sup>20</sup> Panel Report, *US – Animals*, para. 7.642.

<sup>21</sup> Panel Report, *US – Animals*, para. 7.646.

<sup>22</sup> Panel Report, *India – Agricultural Products*, para. 7.685.

<sup>23</sup> Panel Report, *Costa Rica – Avocados (Mexico)*, paras. 7.2197-7.2198.

## 1.5 Article 6.2

19. In *India – Agricultural Products*, the Panel grappled with the meaning of the terms used in Article 6.2 and understood this provision as requiring Members to recognize "the idea or notion of pest- or disease-free areas and areas of low pest or disease prevalence in the abstract; the obligation under Article 6.2, first sentence, is not linked to specific areas of a given exporting Member."<sup>24</sup> According to the Panel, the provision did not prescribe any particular manner in which a Member should recognise the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.<sup>25</sup> The Panel thus analysed India's measures and the underlying legal instrument to determine whether they allowed recognizing such concepts.<sup>26</sup>

20. While the Appellate Body did not address on appeal the question of whether an importing Member can recognise the concepts in Article 6.2 in the abstract, it agreed with the Panel that Article 6 "does not specify any particular manner in which a Member must 'ensure' adaptation of its SPS measures within the meaning of Article 6.1 or 'recognize' the concepts set out in Article 6.2."<sup>27</sup> More specifically, the Appellate Body explained that adaptation of an SPS measure does not have to "consist of an affirmative act that is *distinct from* and *taken prior to* the adoption of an SPS measure".<sup>28</sup>

21. The Appellate Body further endorsed the Panel's observation "that SPS measures or regulatory schemes that explicitly foreclose the possibility of recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence cannot, when these concepts are relevant with respect to the diseases addressed by such SPS measures, be found to be consistent with Article 6.2."<sup>29</sup>

22. In *US – Animals*, the Panel interpreted the term "based on" in the second sentence of Article 6.2 as requiring an analysis of factors listed in that provision as sufficiently warranting or reasonably supporting the determination of pest- or disease-free areas or areas of low pest or disease prevalence.<sup>30</sup>

23. In *Russia – Pigs (EU)*, the Panel held that a general recognition of the concepts of pest- or disease-free areas or areas of low pest or disease prevalence in the importing Member's regulatory framework is sufficient to meet the requirement of Article 6.2, first sentence, regardless of whether such general recognition is reflected in the manner the SPS measures are applied.<sup>31</sup> This is because requiring a Panel under Article 6.2 to assess whether the SPS measures effectively recognize different pest or disease status of an area would conflate the Panel's assessment of adaptation of the measures under Article 6.1 with that under Article 6.2.<sup>32</sup>

24. On appeal, the Appellate Body disagreed with the Panel that Article 6.2 "requires merely an acknowledgement of the concept of regionalization" in abstract terms and reversed the Panel's finding in that regard.<sup>33</sup> This is because, in the Appellate Body's view, instances where the importing Member recognized the concept of pest- or disease-free status, or its low pest or disease prevalence, in relation to a particular area may be relevant for assessing a Member's compliance with Article 6.2.<sup>34</sup>

## 1.6 Article 6.3

25. In *US – Animals*, the Panel explained the obligations imposed by Article 6.3 on an exporting Member as requiring it to:

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<sup>24</sup> Panel Report, *India – Agricultural Products*, para. 7.695.

<sup>25</sup> Panel Report, *India – Agricultural Products*, para. 7.698.

<sup>26</sup> Panel Report, *India – Agricultural Products*, para. 7.699.

<sup>27</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.136.

<sup>28</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.143.

<sup>29</sup> Appellate Body Report, *India – Agricultural Products*, para. 5.138.

<sup>30</sup> Panel Report, *US – Animals*, para. 7.648.

<sup>31</sup> Panel Report, *Russia – Pigs (EU)*, paras. 7.375-7.376.

<sup>32</sup> Panel Report, *Russia – Pigs (EU)*, para. 7.378.

<sup>33</sup> Appellate Body Report, *Russia – Pigs (EU)*, para. 5.135.

<sup>34</sup> Appellate Body Report, *Russia – Pigs (EU)*, para. 5.126.

"[P]rovide evidence to the importing Member to objectively demonstrate that its areas are, and are likely to remain, pest- or disease-free or areas of low pest or disease prevalence. The Member shall also provide reasonable access to the importing Member for inspection, testing and other relevant procedures. As the plain language of Article 6.3 indicates, the exporting Member is not only required to objectively demonstrate that areas within its territory are pest- or disease-free or of low pest or disease prevalence at a given point in time, but also that such areas are 'likely to remain' in the same pest- or disease-condition."<sup>35</sup>

26. The Panel in *Russia – Pigs (EU)* emphasized that the categories and amount of evidence required to objectively demonstrate the disease status of a particular area can vary from one case to another, depending on the circumstances. However, the Panel found that the relevant evidence should include information relating to "(i) geography; (ii) ecosystems; (iii) epidemiological surveillance; (iv) effectiveness of sanitary or phytosanitary controls; (v) level of prevalence of specific diseases or pests; (vi) existence of eradication or control programmes; and (vii) information corresponding to appropriate criteria or guidelines developed by the relevant international organizations."<sup>36</sup>

27. The Panel further recognized that it may be "impossible for any Member to provide a laboratory-type scientific proof that a particular disease is not present in certain area."<sup>37</sup> As a result, the Panel acknowledged that under certain circumstances, an objective demonstration that a territory is disease-free "may include that evidence of the existence of the disease has been sought and not found, that monitoring, surveillance and reporting systems are in place to ensure that any evidence of the existence of the disease would be promptly reported, that measures to prevent the entry of the disease are in place, among other aspects."<sup>38</sup>

28. As regards the likelihood of an area remaining free of a disease, the Panel in *Russia – Pigs (EU)* held that demonstrating it requires the exporting Member to substantiate with evidence a "'probability' that the disease-free status will be maintained in a particular area".<sup>39</sup> Regarding the type of the necessary evidence, the Panel found that:

"[I]n addition to the evidence that we have already identified with respect to the demonstration of an area being disease-free, an exporting Member should provide evidence of the effectiveness of its control measures. We consider that this evidence should at least include evidence with respect to measures to prevent the entry and spread of the disease, the emergency actions adopted in case of an outbreak of the disease, and, when relevant, the eradication programmes of the disease in areas where it occurs."<sup>40</sup>

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One useful element for the assessment of the effectiveness of these control measures, to the extent it is available, is data regarding the actual spread of a disease within a given time frame. If such data is available to the exporting Member at the time it claims that disease-free areas within its territory are likely to remain free, this real world evidence could support – or undermine – its claims of the likelihood of a designated area remaining disease free."<sup>41</sup>

29. The Appellate Body agreed with the Panel in *Russia – Pigs (EU)* that the type of evidence required under Article 6.3 may depend on the circumstances of a particular case, although it considered generic information provided by the exporting Member or unsubstantiated assertion to be insufficient for that purpose.<sup>42</sup> The Appellate Body added that "the importing Member's ALOP

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<sup>35</sup> Panel Report, *US – Animals*, para. 7.649.

<sup>36</sup> Panel Report, *Russia – Pigs (EU)*, para. 7.389.

<sup>37</sup> Panel Report, *Russia – Pigs (EU)*, para. 7.400.

<sup>38</sup> Panel Report, *Russia – Pigs (EU)*, para. 7.400.

<sup>39</sup> Panel Report, *Russia – Pigs (EU)*, para. 7.406.

<sup>40</sup> Panel Report, *Russia – Pigs (EU)*, para. 7.408.

<sup>41</sup> Panel Report, *Russia – Pigs (EU)*, para. 7.411.

<sup>42</sup> Appellate Body Report, *Russia – Pigs (EU)*, para. 5.63.

may inform the nature, quantity, and quality of the evidence that an exporting Member is expected to provide" under Article 6.3.<sup>43</sup>

30. Regarding the Panel's assessment under Article 6.3, the Appellate Body in *Russia – Pigs (EU)* noted that the Panel's role is limited to verifying whether the evidence provided by the exporting Member "is of nature, quantity and quality" allowing the importing Member's authorities to make a determination regarding the pest or disease status of a particular area. In other words, a Panel is not called upon to determine itself, based on the furnished evidence, the pest and disease status of the given areas.<sup>44</sup> The Appellate Body also rejected the proposition that in its analysis under Article 6.3, a Panel has to factor in the time needed to evaluate and verify evidence provided by the exporting Member.<sup>45</sup>

31. The Panel in *US – Animals* noted that while Article 6.3 does not specify what is the "necessary evidence" mentioned in that provision, the list of factors to be analysed by the importing Member identified in Article 6.2 could provide an indication of the information that should be addressed when demonstrating that an area is pest- or disease-free or that it has a low pest or disease prevalence, in addition to any other information that may assist the importing Member in making that determination.<sup>46</sup>

## **1.7 Relationship with other provisions of the SPS Agreement**

### **1.7.1 Article 5**

32. In *US – Animals*, the Panel accepted an argument that non-compliance with the second sentence of Article 6.1, i.e. the factors that must be taken into account in determining the SPS characteristics of a region, "would be relevant for a determination of whether the Member complied with Article 5.1 and had taken into account the factors in Article 5.2 as required."<sup>47</sup><sup>48</sup>

33. In *Russia – Pigs (EU)*, the Appellate Body noted that because Article 5.2 requires Members conducting risk assessment to take into account, among other things, the prevalence of specific diseases or pests and the existence of pest- and disease-free areas, a panel can determine the SPS characteristics of an area within the meaning of Article 6.1, second sentence, as part of its risk assessment process.<sup>49</sup>

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<sup>43</sup> Appellate Body Report, *Russia – Pigs (EU)*, para. 5.65.

<sup>44</sup> Appellate Body Report, *Russia – Pigs (EU)*, para. 5.66.

<sup>45</sup> Appellate Body Report, *Russia – Pigs (EU)*, para. 5.82.

<sup>46</sup> Panel Report, *US – Animals*, para. 7.660.

<sup>47</sup> (*footnote original*) This understanding does not preclude the possibility that an importing Member could adapt its SPS measures to regional conditions even in the absence of a risk assessment, such as in a situation where a measure falls within the scope of Article 5.7 or the Member is basing the measures on the Terrestrial Code.

<sup>48</sup> Panel Report, *US – Animals*, para. 7.644.

<sup>49</sup> Appellate Body Report, *Russia – Pigs (EU)*, para. 5.59.