

REGIONALIZATION

RECENT PANEL AND APPELLATE BODY DECISIONS



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DISCLAIMER

The following presentation summarises the main reasoning in three recent Panel and two Appellate Body reports that dealt with Article 6 of the SPS Agreement.

Citations to the full reasoning of the panels and the Appellate Body can be found in the Notes. Not all elements discussed by the panels or the Appellate Body are necessarily reflected in this handout.

This summary does not replace a thorough reading of the reports, nor does it purport to predict the outcome of any future disputes under Article 6.

DISPUTES WITH CLAIMS UNDER ARTICLE 6

India – Agricultural Products (DS430)

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds430_e.htm



US – Animals (DS447)

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds447_e.htm



Russia – Pigs (EU) (DS475)

https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds475_e.htm



NATURE OF THE OBLIGATION

- On-going
- Applies **generally** as well as to **specific SPS measures**
- Requires continual adjustment of SPS measures to maintain their suitability in respect of the relevant SPS characteristics

RELATIONSHIP BETWEEN THE 3 PARAGRAPHS

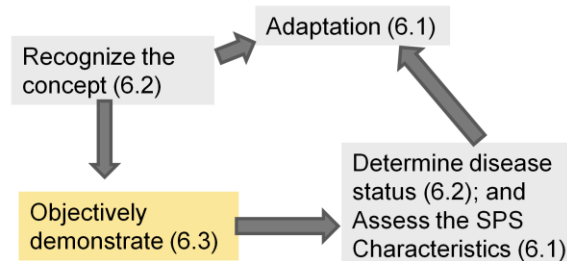
HIERARCHICAL

Article 6.1 provides an “overarching” obligation which is explained in the following paragraphs.

Within 6.1 and 6.2 you have a more general obligation in the first sentence and a more specific one in the second.

CYCLICAL

The three provisions are interlinked.



The Appellate Body has noted "the existence of important common elements throughout Article 6", which "reveal the interlinkages that exist among the paragraphs of this provision".¹⁸¹ The "main and overarching obligation" is set forth in the first sentence of Article 6.1, according to which Members shall ensure that their measures are "adapted" to the SPS characteristics of the areas from which the products at issue originate and to which they are destined. The remainder of Article 6 "elaborates" on aspects of that obligation and sets forth "the respective duties that apply to importing and exporting Members in this connection". Appellate Body Report, *India – Agricultural Products*, para. 5.141.

The second sentence of Article 6.1 indicates that "a Member must evaluate all the evidence relevant to "assessing" the SPS characteristics of an area. This assessment, in turn, provides the basis, and therefore constitutes a prerequisite, for the adaptation of that Member's measures to such SPS characteristics pursuant to the first sentence of Article 6.1." Appellate Body Report, *Russia – Pigs (EU)*, para. 5.59.

While "there is no *explicit* conditional language linking Article 6.1 and Article 6.3", all the provisions composing Article 6 "need to be read together", as they are all "linked to, and interact with, the overarching obligation to ensure that a Member's SPS measures are adapted to the SPS characteristics of the relevant areas". Appellate Body Report, *India – Agricultural Products*, para. 5.144.

WHO DOES WHAT?

EXPORTING MEMBER

- Objectively demonstrates with necessary evidence
- Provides access to its territory for inspection, testing and other relevant procedures

IMPORTING MEMBER

- Recognize the concept of pest- or disease free areas
- Assesses the SPS characteristics
- Determines whether an area is pest- or disease free or of low prevalence
- Adapt its SPS measures to the situation in the Exporting and in the Import Member

Article 6.3 does not address the obligations of the *importing* Member in the context of this process. Rather, the obligations on the importing Member in connection with the process of adapting measures to regional SPS characteristics are set forth in Articles 6.1 and 6.2. Appellate Body Report, *Russia –Pigs (EU)*, paras. 5.70-5.71.

REQUEST FOR REGIONAL RECOGNITION

6.2 requires **importing Member** to maintain a **practice of or process for receiving a claim**.

6.3 places an obligation on the **exporting Member** claiming that an area within its territory is pest or disease free to **objectively demonstrate** the situation with **necessary evidence**.

Compliance with 6.3 could trigger the obligation in 6.1 on the **importing Member** to **adapt** its measures after it **assesses** the SPS characteristics and makes a **determination** of the pest- or disease status



RECOGNIZING THE CONCEPT OF PEST-OR DISEASE-FREE AREAS (OR AREAS OF LOW PREVALENCE)

- Recognition is not merely accepting the abstract concept; but rather
- **maintaining a practice of, or process for, receiving regionalisation requests from an exporting Member.** This can be accomplished by:
 - establishing a **general regulatory framework** on the matter (which facilitates the panel's work); or
 - Through **individual decisions** – such as the very SPS measure at issue; or
 - A **practice**

Appellate Body Report, *Russia – Pigs (EU)*, para. 5.126 “we attach significance to the fact that Article 6.3 envisages that the exporting Member may make the claim that areas within its territory are pest- or disease-free or of low pest or disease prevalence. Taking into account the ongoing nature of the obligation to adapt SPS measures to regional conditions, we consider that Article 6.2 requires the importing Member to provide an effective opportunity for the exporting Member to make the claim, addressed to the importing Member, that areas within its territory are pest- or disease-free or of low pest or disease prevalence, by maintaining a practice of, or a process for, receiving such a claim by an exporting Member affected by a specific SPS measure. Accordingly, we see Article 6.2 not as an obligation to acknowledge the concept of regionalization as an abstract idea; rather, we see it as an obligation to render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.”

WHAT DOES IT MEAN TO OBJECTIVELY DEMONSTRATE WITH NECESSARY EVIDENCE?

Objectively demonstrate = to prove something in an impartial manner;

The factors to consider (*among others*) are those in the second sentences of **Articles 6.1 and 6.2;**

The importing Member's ALOP may also be relevant;

The definition of “*pest- or disease free area*” in **Annex A(6) is helpful for determining the type of evidence required for proof of pest- or disease-freedom e.g., that the **specific pest or disease does not occur;****

The Panel will not itself assess whether the area is pest- or disease free, but rather whether **the nature, quantity, and quality of the evidence provided was sufficient to enable the importing Member's authorities to make a determination**

❖ The term also appears in Article 4.1 of the SPS Agreement with respect to equivalence

As part of the overarching obligation to ensure adaptation of measures, when the level of pest or disease prevalence is relevant, a Member must, pursuant to the second sentence of Article 6.2 “as part of its assessment of the SPS characteristics of the relevant area, make a “determination” as to the pest or disease status of that area, based on factors such as those listed in the second sentence of Article 6.2.” Appellate Body Report, *Russia – Pigs (EU)*, para. 5.60.

The Appellate Body concluded that, “[g]iven the interlinkages between the various provisions of Article 6, an analysis of whether the evidence is “necessary” may be informed by what the second sentences of Articles 6.1 and 6.2 require for an assessment of the SPS characteristics of the relevant area. Moreover, an importing Member will usually design its SPS measures, as well as the modalities of their adaptation to regional SPS characteristics, on the basis of its ALOP.” Appellate Body Report, *Russia – Pigs (EU)*, para. 5.65.

See also Panel Report, *US – Animals*, finding that the second sentence of Article 6.2 provides a non-exhaustive list of factors that the importing Member shall consider in reaching a conclusion concerning the disease status of an area. Panel Report, *US – Animals*, para. 7.660.

The Panel in *Russia – Pigs (EU)* concluded that one must read Article 6.3 in the context of paragraph 6 of Annex A and thus an exporting Member seeking to objectively demonstrate the existence of a disease-free area has to objectively demonstrate that the pertinent disease does not occur in the relevant area (i.e. all of a country, part of a country, or all or parts of several countries.) Panel Report, *Russia – Pigs (EU)*, para. 7.399.

The Appellate Body clarified that “panel's review of compliance by the exporting Member with Article 6.3 must be limited to assessing whether the evidence provided by the exporting Member to the importing Member is of a nature, quantity, and quality sufficient to enable the importing Member's authorities ultimately to make a determination as to the pest or disease status of the relevant areas within the exporting Member's territory.” Appellate Body Report, *Russia – Pigs (EU)*, para. 5.66.

WHAT DOES THAT MEAN IN DISPUTE SETTLEMENT?

- Failure of the other Member to comply with Article 6.3 is not necessarily a **defence**;
- The Appellate Body explained that if an exporting Member claims that the importing Member failed to recognize and determine a disease-free area and adapt its measure accordingly inconsistently with Articles 6.1 and 6.2, it will have difficulties succeeding in its claims **if the exporting Member cannot also** establish that it took the steps prescribed in Article 6.3;
- Nevertheless, an inconsistency with Article 6.1 can be established **without** an exporting Member successfully proving compliance with Article 6.3.

“However, and again depending on the nature of the claims raised and the circumstances of the case, a panel may be called upon to scrutinize whether a Member has determined that a specific area is free of disease and adapted its SPS measures accordingly. This may involve examining whether the importing Member received a request from an exporting Member to recognize an area within its territory as "disease-free". In such cases, an exporting Member will be able to establish that the importing Member's failure to recognize and determine that disease-free area, and to adapt its SPS measure accordingly, is inconsistent with Articles 6.1 and 6.2 only if that exporting Member can also establish that it took the steps prescribed in Article 6.3. In other words, we understand the relationship of Article 6.3 with the remainder of Article 6 to mean that, 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 with Articles 6.1 or 6.2, unless that exporting Member can demonstrate its own compliance with Article 6.3.” Appellate Body Report, *India – Agricultural Products*, para. 5.156.

INDEPENDENT VIOLATIONS OF ARTICLE 6.1

Appellate Body in *India – Agricultural Products* and Panel in *US – Animals* gave some guidance on the types of situations where a violation of Article 6.1 would be irrespective of any demonstration under Article 6.3. Appellate Body recognized in *Russia – Pigs (EU)* that other situations might also exist.

- **The importing Member does not recognize the concept of pest- and disease-free areas (or low prevalence)**
- **The adaptation relates to a different SPS characteristic**
- **Adaptation could be accomplished by taking into account guidelines from the relevant IOs**
- **It could relate to the SPS characteristics *inside* the Importing Member**

"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." Appellate Body Report, *India – Agricultural Products*, para. 5.157.

Panel Report, *US – Animals*, para. 7.654 "Accordingly, we consider that, by its own terms, Article 6.1 has a broader scope of application than Articles 6.2 and 6.3, in that it covers not only pest- or disease-free areas or areas of low pest or disease prevalence, but indeed all potential SPS characteristics of areas that may warrant the "adaptation" of an SPS measure."

Appellate Body Report, *Russia – Pigs (EU)*, para. 5.98 "One such situation is, for instance, where "the concept of pest- and disease-free areas is relevant, but a Member's regulatory regime precludes the recognition of such concept." Second, pest- or disease-free areas and areas of low pest or disease prevalence "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". Third, under certain circumstances, the adaptation of a measure to regional SPS characteristics "may be accomplished by taking into account relevant criteria and guidelines developed by [the relevant international] organizations, if any". Finally, the Appellate Body recalled that "the overarching requirement under Article 6.1 to ensure the adaptation of SPS measures is an ongoing obligation that applies *upon* adoption of an SPS measure as well as thereafter." The Appellate Body concluded that all of these considerations reinforce that a Member may be found to have acted inconsistently with the obligation under the first sentence of Article 6.1 even in the absence of the exporting Member providing the necessary evidence for an objective demonstration under Article 6.3." (internal citations omitted)

RELATIONSHIP OF ARTICLE 6 TO OTHER PROVISIONS OF THE SPS AGREEMENT?

- a regionalisation determination can be a control, inspection and approval procedure within the meaning of **Article 8 and Annex C**;
 - Therefore, the time it takes to evaluate evidence provided under Article 6.3 is to be understood in light of the concept of “undue delay” in undertaking and completing procedures in Annex C(1)(a)
- In light of **Articles 5.2 and 5.3**, a determination under Article 6 could be done in the context of a risk assessment under **Article 5.1**;
- A request for regionalisation does not *automatically* mean that there is insufficient scientific evidence within the meaning of **Article 5.7**; and
- Depending on the international standard, guideline or recommendation – there could be implications for **Article 3**.

“the time that may be taken by the importing Member for its evaluation of evidence concerning the pest or disease status of the relevant areas is not left to that Member’s unfettered discretion. In fact, we note that Annex C(1)(a) to the SPS Agreement requires Members to “ensure, with respect to any procedure to check and ensure the fulfilment of [SPS] measures, that ... such procedures are undertaken and completed without undue delay”.²⁴⁵ This obligation to proceed without undue delay helps shed light on the appropriateness of the period of time that the importing Member enjoys to evaluate the relevant evidence concerning the pest or disease status of a given area in the context of its assessment and determination pursuant to the second sentences of Articles 6.1 and 6.2, and adapt its measures to the SPS characteristics of the relevant areas pursuant to the first sentence of Article 6.1.” Appellate Body Report, *Russia – Pigs (EU)*, para. 5.81.

See also, Panel Report, *US – Animals*, paras. 7.65-7.70 finding that a procedure to determine the disease status of a region is a control, inspection and approval procedure within the meaning of Article 8 and Annex C.

The Appellate Body noted that “certain parallels exist between the assessment of the SPS characteristics of an area and the assessment of risks pursuant to Articles 5.1 through 5.3 of the SPS Agreement. In particular, Article 5.2 requires Members conducting a risk assessment to take into account, inter alia, the “prevalence of specific diseases or pests” and the “existence of pest- or disease-free areas”. In light of these parallels, we consider that the assessment of the SPS characteristics of an area within the meaning of the second sentence of Article 6.1 may be conducted as part of a Member’s risk assessment pursuant to Articles 5.1 through 5.3.” Appellate Body Report, *Russia – Pigs (EU)*, para. 5.59. See also Panel Report, *US – Animals*, para. 7.644.

See Panel Report, *US – Animals*, paras. 7.650-7.651

“The United States argues that an exporting Member's claim that an area within its territory is pest- or disease-free or of low pest or disease prevalence under Article 6.3 triggers the application of Article 5.7. In such a situation, according to the United States, the importing Member is allowed to maintain a provisional measure vis-à-vis the area concerned for the time reasonably necessary to evaluate the exporting Member's claim.

The implication of the United States' argument is that, so long as a measure falls within the scope of Article 5.7, they would not be inconsistent with Article 6.1 and 6.2. In our view, an exporting Member's claim under Article 6.3 may, in certain circumstances, give rise to a situation whereby the importing Member does not have enough information to conduct a risk assessment taking into account whether the area subject to the claim is pest- or disease-free or of low pest or disease prevalence. This might be the case, for example, where the exporting Member does not provide the scientific information necessary to substantiate its assertion. In such instances, if the other three requirements of Article 5.7 are also satisfied, then the measure governing the imports subject to the claim under Article 6.3 would fall within the scope of Article 5.7. In that situation, a panel may have to determine whether the qualified exemption in Article 5.7 extends to the obligations in Articles 6.1 and 6.2. However, as noted in section 7.5.2.4 above, we have found that the United States' measures do not fall within the scope of Article 5.7 and do not benefit from the qualified exemption therein. Therefore, we do not need to address the United States' arguments with respect to the relationship between Articles 6.3 and 5.7.” (internal citations omitted)

RELATIONSHIP OF ARTICLE 6 TO INTERNATIONAL STANDARDS, GUIDELINES OR RECOMMENDATIONS

- The OIE recognizes the concept of regionalisation in its standards, guidelines and recommendations – in past disputes this involved the **Terrestrial Code** (equally true for the **Aquatic Code**)
- The OIE also provides **disease-status recognition** for countries, zones or compartments.
- Panels have found not recognizing the concept of regionalisation or a particular region could mean that a Member's measures are not based on international standards, guidelines or recommendations within the meaning of **Article 3.1**.