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Recommended Citation

Laneville, Nicholas W. (2017) "Regional Disputes: It Is Not Just Ground Beef," *Sustainable Development Law & Policy*: Vol. 17 : Iss. 1 , Article 6.
Available at: <http://digitalcommons.wcl.american.edu/sdlp/vol17/iss1/6>

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REGIONAL DISPUTES: IT IS NOT JUST GROUND BEEF

Nicholas Laneville*

ABSTRACT

Members of the World Trade Organization are violating Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures by failing to adapt their sanitary and phytosanitary measures to regional conditions. Instead, they continue to impose broad, trade-restrictive measures that are based on national borders instead of on a regional basis. The sanitary and phytosanitary (pest and disease) status of a nation is unlikely to be uniform throughout a country, and, consequently, under Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, Members are required to adapt their restrictions on imports to conditions that prevail on a regional basis as opposed to on a national one. Failure to adhere to the obligations under Article 6 has a disproportionately large impact on developing and least developed countries because those countries are inherently more susceptible and less well equipped to deal with infections of disease and infestations of pests. The result is that a greater number developing and least developed countries are systematically precluded from effectively engaging in the international trade of their animal and plant products for no scientifically supported reason.

Article 6 of this Agreement has been the subject of multi-lateral discussion and confusion since its inception. It has only been formally interpreted at the Dispute Settlement Body three times (once in June 2015, once in July 2015, and once in August 2016). This confusion has led to a poor understanding of associated obligations and to Members' imposition of trade-restrictive measures which violate Article 6. It appears that some Members are taking advantage of the poor understanding of obligations under Article 6 to raise unnecessary and over-restrictive barriers to trade. These barriers include those protecting domestic industries at the expense of frustrated exporters, and barriers ill-tailored to regions affected by disease.

This Comment seeks to clarify the obligations under Article 6 and to illuminate current violations. It applies the legal analysis from the July 2015 WTO decision, *United States – Measures Affecting the Importation of Animals, Meat and other Animal Products from Argentina*, to current measures. Through that analysis, this Comment unveils some of the egregious violations of Article 6 that barricade sustainable development in developing and least developing countries today.

I. INTRODUCTION

On July 24, 2015, the Dispute Settlement Body (“DSB”) of the World Trade Organization (“WTO”) circulated a panel report interpreting Article 6, “Adaptation to Regional Conditions,” of the Agreement on the Application of Sanitary and Phytosanitary Measures¹ (“SPS Agreement”).² Article 6 of the SPS Agreement

mandates that Members adapt their measures governing the importation of consumable goods, plants, and animals to the Sanitary and Phytosanitary (“SPS”) conditions of the *regions* from which they are importing, rather than applying those measures broadly to entire *countries*.³ As diseases and infections do not abide by State lines, a regional approach is a safe and less trade-restrictive approach than a nation-based one, and therefore better conforms to the WTO’s goal of trade liberalization. Further, from a development standpoint, the effective implementation of Article 6 is paramount for less developed nations because they are more susceptible to SPS-related harms, and, therefore, more likely to needlessly suffer from the imposition of trade restrictions that are not adopted on a regional basis.⁴ The effect of failures to properly implement Article 6 into Members’ SPS regimes slows the growth of less developed economies by unnecessarily precluding trade in the name of non-existent health risks.⁵

A theoretical example of how this obligation applies is illustrative: imagine New Zealand wishes to export its lamb products to Germany. New Zealand is a nation comprised of two islands: the North Island and the South island. Lamb from the Southern Island is fraught with Foot-and-Mouth disease, but there is no scientific evidence that the lamb from the Northern Island suffers from the disease. In accordance with Article 6 of the SPS Agreement, Germany must tailor its border measures applicable to the importation of lamb from New Zealand to the regional conditions that exist in New Zealand, and, therefore, it may block imports of lamb from the South Island of New Zealand, but not from the North.

Yet, there has been some confusion as to the implications of Article 6. Namely, Members are unsure to what extent they must tailor their measures to accommodate for small regions in exporting countries when the majority of that country has been affected by pest or disease. Members (and the DSB)⁶ also struggle to define some practical applications of Article 6; how much time does a Member have to adapt its measures when conditions in previously infected exporting regions improve?

United States – Measures Affecting the Importation of Animals, Meat and other Animal Products from Argentina (“*United States – Animals*”) was the second occasion upon which a panel had the opportunity to formally interpret Article 6.⁷ The recent decision helped to clarify some of the above-mentioned confusions through the Panel’s incorporation of the obligations held within Articles 5.7⁸ and 8⁹ of the SPS Agreement to the

* American University Washington College of Law, J.D. candidate 2017. Thank you to Gina Colarusso for her diligent edits and unwavering support. Thank you, also, to Professors Padideh Ala’i, Sean Flynn, and Fernanda Nicola for your dedication to your students.

practical application of Article 6. The Panel recognized that the procedure for obtaining recognition of a region as pest or disease-free necessitates a *risk assessment*,¹⁰ which is governed by Article 5 of the SPS Agreement, and an *approval procedure*,¹¹ which is governed by Article 8 of the SPS Agreement. The Panel acknowledged that a Member imposing a barrier to trade based on SPS factors has an obligation to undertake a risk assessment “within a reasonable period of time” in accordance with Article 5,¹² and to proceed with approval procedures “without undue delay” in accordance with Article 8¹³ when dealing with requests for recognition of regional pest and disease conditions.¹⁴

By incorporating time constraints on the adaptation of relevant measures, this interpretation gives Article 6 teeth. It imposes an obligation not only to recognize regional conditions, but also to adapt measures in accordance with those conditions in a timely manner, thus effectively addressing the recurring issue where a Member has created a disease-free area within national borders, “only to face significant delays obtaining recognition by their trading partners.”¹⁵

Under the analysis that the Panel applied in *United States–Animals*, it is clear that some Members continue to violate Article 6 of the SPS Agreement by applying over-broad SPS measures and failing to adapt them to prevailing SPS conditions on a regional basis. This Comment highlights this phenomenon through a selection of case studies.¹⁶ Part II of this Comment discusses the principles behind SPS measures and pertinent facts of current scenarios where measures have not been tailored to regional conditions.¹⁷ Part III analyzes those facts under the legal framework propounded in *United States – Animals*.¹⁸ Part IV recommends that the analysis that was applied in *United States–Animals* be adopted by the WTO Membership as a useful and positive step in the effective implementation of Article 6.¹⁹ However, Part V concludes that while *United States – Animals* is useful, it does leave some important questions unanswered: what constitutes a “reasonable time” and “undue delay” in this context? These questions must be answered in order for Members to fully understand and implement this important Article and in order to mitigate the unnecessary harms and impediments that are falling particularly hard on developing economies.²⁰

II. BACKGROUND

The SPS Agreement is one of the covered agreements under the WTO.²¹ The Agreement governs the implementation of SPS measures, which are designed to protect human, animal, and plant life.²² The SPS Agreement emphasizes the importance of sound scientific evidence as the basis of implementation of such measures.²³

Today, as taxes, tariffs, and duties are continually lowered, Members employ alternative, more technical means to protect their domestic suppliers and restrict access to their markets.²⁴ One of the SPS Agreement’s mandates is to attempt to reduce the application of non-essential, over trade-restrictive measures that block goods from entering countries when there is no scientifically based reason for such restrictions.²⁵ Despite this mandate, at the 2015 “Committee on Sanitary and Phytosanitary

Measures” hearing, the WTO Membership voiced a record number of concerns relating to inappropriate and over-restrictive uses of SPS measures.²⁶ The nature of the measures in question brings to light concerns for sustainable development because of these measures’ disparate impact on developing economies. This Section first explains what Members’ obligations are under Article 6 of the SPS Agreement, and then relates the relevant facts of some regimes that are violating that Article.

A. THE SPS AGREEMENT’S FOUNDATION AND HOW IT PERTAINS TO ARTICLE 6, “ADAPTATION TO REGIONAL CONDITIONS”

The SPS Agreement is not a set of standards to which all Members must adhere, but rather a set of rules that governs the implementation of SPS measures.²⁷ It provides a set of principles under which SPS Measures must be adopted by Member States, affording them latitude in the specific Measures that they elect to adopt. One principle that is enshrined in the Agreement, for example, is the broad requirement that measures be based in science. This strikes the balance between allowing Members to enforce the health standards that they deem necessary and requiring that those standards be scientifically provably necessary.²⁸ Article 6 is a perfect reflection of that same balance. Thereunder, Members may adapt measures that limit or preclude imports from areas that have been affected by SPS-related diseases or infestations, as long as those measures are scientifically justified, and appropriately tailored to the affected area(s).²⁹

1. OBLIGATIONS UNDER ARTICLE 6, “ADAPTATION TO REGIONAL CONDITIONS”

Members have had difficulty understanding their obligations under Article 6 since the inception of the SPS Agreement. In 1999, the Committee on Sanitary and Phytosanitary Measures adopted the first Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures, which concluded that Article 6 required further development.³⁰ Further, Article 6 was an item on the agenda for that Committee in every meeting from 2003 through 2007,³¹ and has continued to be an issue through 2016.³² Limiting restrictions on trade to areas affected by disease or pests is a popular concept throughout the Membership of the WTO. However, the Membership seems to have difficulty agreeing on the implementation of this restriction. Some Members lobby for hard line rules on the length of the process for recognition of disease or pest-free areas, while others advocate for a more flexible approach.³³ As a result, Members continue to express frustrations with acquiring pest or disease-free status under Article 6 of the SPS Agreement.

Members’ frustrations stem from systems that are in place which may be deemed to violate Article 6 of the SPS Agreement.³⁴ Importing Members’ slow processing, or failure to process, requests for recognition of disease or pest-free areas causes regimes where importers do not recognize such areas in a timely manner, or worse, they do not recognize such areas at all.³⁵ This leads to vexation amongst exporters, and potential for claims at the DSB under Article 6.

a. The United States–Animals Panel’s framework for analysis under Article 6

The Panel in *United States – Animals* clarified how to approach an analysis under Article 6 of the SPS Agreement. The Panel first assessed, through textual analysis, the individual obligations under each of the three paragraphs of Article 6 (6.1, 6.2, and 6.3), and then analyzed the application of the Article as a whole.³⁶

Accordingly, the Panel began with an examination of the text of Article 6.1.³⁷ It determined that “adapt[ing]” a measure means the measure is calibrated to the prevailing food, animal, and plant health conditions in areas affected by the measure; the measure does not unnecessarily restrict goods from areas that do not pose health risks.”³⁸ The Panel also briefly considered the definition of an “area,” and adopted the definition in the text of the provision: “all of a country, part of a country, or all or parts of several countries.”³⁹ The Panel concluded that the second sentence of Article 6.1 “presupposes that Members undertake an assessment of the SPS characteristics of a region.”⁴⁰ It iterated that the list contained in the second sentence of Article 6.1, enumerating factors to be considered when a Member is conducting such an assessment, is not exhaustive because of the inclusion of the term “inter alia”⁴¹ in that sentence.⁴² Thus, once a Member has assessed the relevant factors to determine the SPS conditions of a region, then it must adapt its SPS measures in accordance with its findings.⁴³

The Panel also addressed the meaning of paragraph 2 of Article 6.⁴⁴ It determined that the terms “recognize” and “concepts” indicate that Members must accept the validity of ‘pest- or disease-free areas’, and that they must consider them in applying SPS measures.⁴⁵ Additionally, the Guidelines to Further the Practical Implementation of Article 6, adopted by the SPS Committee in 2008, emphasized that the procedure for gaining recognition of a pest or disease-free area should be publicized and accessible.⁴⁶ The Panel’s determination with regard to Article 6.2 effectively forces Members to consider SPS conditions on a regional basis from a conceptual standpoint, and to publicize their individual interpretations of that concept.

Article 6.3⁴⁷ is directed only at exporting Members. The Panel determined that an exporting Member must establish that the area that it seeks to have recognized as pest or disease-free is indeed pest or disease-free and is likely to remain an area of such characteristics. So, an exporting Member that is subject to an SPS-based trade barrier imposed by an importing Member carries the burden of adequately demonstrating that its area is and is likely to remain a pest and disease-free area in order to overcome the importing Member’s barrier.⁴⁸

Perhaps the most important determination in the Panel’s analysis was that Members’ obligations under Articles 5.7⁴⁹ and 8⁵⁰ of the SPS Agreement also applied to the obligations under Article 6⁵¹: The process of recognizing a region as a pest or disease-free area under Article 6 must be carried out without “undue delay,” and within “a reasonable period of time.”⁵²

b. The United States–Animals Panel’s framework applied

In *United States – Animals*, the allegedly offending measure was an American ban on Argentinian beef. Various regions of Argentina had suffered from infestations of foot and mouth disease for a number of years, and, accordingly, the United States maintained a ban on Argentinian Beef since 2001. Argentina did request recognition of Northern Argentina and the Patagonia region as FMD-free, but the relevant authority, the Animal and Plant Health Inspections Service (“APHIS”), did not grant recognition.⁵³

The Panel in *United States–Animals* considered Argentina’s claim that the United States was in violation of its obligations under Article 6.1 of the SPS Agreement because the United States had failed to adapt its measures to the SPS characteristics of the Patagonia region of Argentina, and instead banned beef products from all of Argentina.⁵⁴ Argentina’s successful claim was that under the United States’ framework for recognition of pest and disease-free regions⁵⁵, the United States failed to recognize Patagonia as a disease-free area despite Argentina’s requests for recognition Argentina having adequately demonstrated that Patagonia was, and was likely to remain, disease-free.⁵⁶

The *United States–Animals* Panel noted at the outset of its analysis that the Animals and Plant Health Inspection Service (“APHIS”)⁵⁷ had not yet recognized Patagonia as a region within Argentina, but, instead, viewed Argentina as one single region.⁵⁸ The Panel then endeavored to answer whether the United States’ failure to recognize Patagonia as a region within Argentina deserving different treatment amounted to a violation of the United States’ obligations under Article 6.1 of the SPS Agreement to adapt its measures to regional conditions.⁵⁹

The Panel assessed whether Argentina had objectively failed to demonstrate that Patagonia was FMD-free and likely to remain so.⁶⁰ The United States’ primary argument for not adapting its measure to Patagonian conditions was that APHIS had not yet completed its evaluation of the area, so it was unable to afford Patagonia disease-free status.⁶¹ This argument fell flat, as APHIS itself had declared that it was satisfied that it had sufficient information to proceed with finalization of its review, yet it did not complete that review.⁶² Further, the Panel conducted its own review of Patagonia’s conditions and concluded that Patagonia was indeed FMD-free. The Panel decided that Argentina had objectively demonstrated that Patagonia was and was likely to remain FMD-free in accordance with Article 6.1.⁶³

The Panel then assessed if Argentina had granted reasonable access to APHIS for it to conduct an inspection, testing, and other relevant procedures.⁶⁴ The Panel highlighted that Argentina had agreed to two site visits from APHIS: one in 2003 and one in 2009.⁶⁵ In light of its earlier findings under Articles 5.7 and 8,⁶⁶ the Panel determined that the United States had failed to complete its review of the prevailing SPS conditions in Patagonia without *undue delay* and to adapt its measure appropriately *within a reasonable period of time*.⁶⁷ This, in combination with the United States’ failure to adapt its measures accordingly, constituted a violation of Article 6.1 of the SPS Agreement.⁶⁸

B. REGIMES CURRENTLY IN VIOLATION: INDONESIA AND RUSSIA

The *United States–Animals* case will serve as a backdrop to analyze Chile’s concerns with respect to Indonesia’s restrictions on importation of fruits and the EU’s concerns with respect to Russia’s restrictions on importation of pigs and pork products, both of which will be discussed further below. These two cases are good examples for discussion in the context of violations of Article 6 of the SPS Agreement for three main reasons: First, the restrictive measures raised by Indonesia and Russia are necessarily based on SPS conditions, which enables a discussion of Article 6’s application to those measures. Second, the restrictions applied by Indonesia and Russia take different forms which permits an exploration of different types of SPS measures and Article 6’s application thereto. Finally, both of these examples are of ongoing trade restrictions that impact international trade across countries that are in different stages of development, and demonstrate the existing abuse and/or misunderstanding of Article 6 by WTO Members through their failure to adapt measures to regional conditions.

1. INDONESIA–FRUIT

In 2012, Indonesia notified the SPS committee of its intention to prohibit imports of fruits and vegetables into Tanjung Priok, one of the main ports for imports in the nation’s capital, Jakarta.⁶⁹ Indonesia claimed that this prohibition was to preserve plant health and human health due to plant pests or disease and to protect its territory from other damage from pests.⁷⁰ Indonesia’s trading partners, including Chile, were concerned about the consequences of this prohibition.⁷¹

Chile notified the SPS committee of its concerns regarding the Indonesian measure in July, 2014.⁷² By that time, the Indonesian measure had been in place for three years and was affecting trade considerably.⁷³ Considering Chile was the fourth largest importer of fruits to Indonesia in 2013,⁷⁴ and that fruit constitutes 7% of Chilean exports⁷⁵, it has a significant interest in Indonesia quickly recognizing it as fruit fly-free. Chile provided Indonesia with the necessary documents establishing it as a fruit-fly free region and invited Indonesia to perform a “technical visit” to Chile to conduct relevant risk-assessment procedures and to complete Indonesian’s recognition process.⁷⁶ The Indonesian authorities never visited Chile.⁷⁷

Indonesia expressed that its measure had been ratified to protect consumers from the spread of new pests and diseases.⁷⁸ It specified that it was free from Medfly⁷⁹ (a variety of fruit fly) and precautionary measures had been taken with respect to nations that it deemed contaminated with Medfly. Indonesia has argued that its maintenance of the ban on fruit products from Chile is justified because the Indonesian Quarantine Agency (“IQA”) determined that in 2013 Medfly was found in the Valparaíso region of Chile, so a prohibition is warranted.⁸⁰

Consequently, Chilean fruit has not been allowed through the Jakarta port.⁸¹ While Indonesian law in 2013 allowed for the retention of a Member’s pest-free status when outbreaks were quickly detected and controlled, Chile was not afforded an

opportunity to demonstrate that it had adequately dealt with its alleged infestation.⁸² Chile again invited Indonesia to conduct a technical visit in 2014 to ascertain if Chile’s expeditious eradication of the outbreak was complete, and, again, Indonesia did not come.⁸³ Chile also noted that other nations’ requests for recognition as fruit fly-free have been granted.⁸⁴ Chile did suffer a new (regional) outbreak of Medfly in July 2015.⁸⁵

2. RUSSIA–PIGS AND PORK PRODUCTS⁸⁶

In March, 2014, the European Union (“EU”) expressed its concerns about Russian measures raised in response to studies that found prevalence of African Swine Fever (“ASF”) in four wild boars in two of the EU’s Member states: Lithuania and Poland.⁸⁷ Russia noted that ever since the outbreak within its territory in 2008, ASF had caused significant harm to the Russian economy, so it deemed the measures to be a proportionate and necessary response.⁸⁸ Russia expressed specific concerns that the EU’s policy on ASF was not unified enough, and that it did not ensure adequate protection from affected Members within the Union.⁸⁹ It feared that ASF infected animals and animal products could pass between Members too freely.⁹⁰ As a result, Russia has banned the importation of pork products from Lithuania⁹¹, Poland⁹², and the rest of the EU.⁹³

The EU emphasized that it took immediate action to compartmentalize the affected areas and enacted stringent measures to control the spread of ASF.⁹⁴ The EU argued that in both the outbreak in Lithuania and Poland, it kept Russia informed of the situation and of the steps that were being taken.⁹⁵ In fact, in the case of the Lithuania outbreak, Russia, along with the Office of Epizootics (“OIE”—also known as the World Organization for Animal Health), partook in the expert mission to analyze the SPS conditions in the region of the outbreak.⁹⁶

The EU’s primary concern is that Russia’s approach to bans on Polish and Lithuanian pork products was not done on a regional basis but on a national one.⁹⁷ Further, the EU argues that the ban effectively is not contained to those two nations, but rather is imposed on the EU as a whole.⁹⁸

The European Union additionally expressed frustration at the different treatment that it received compared to Ukraine.⁹⁹ Ukraine suffered an outbreak of ASF in its Luhansk region, which caused Russia to implement measures restricting trade in pork products from that region but not from the whole country.¹⁰⁰

III. ANALYSIS

Under the analysis propounded in *United States – Animals*, some Members are violating Article 6 of the SPS Agreement.¹⁰¹ As it has been difficult for the Membership to agree on the practical implementation and significance of this Article, the consequence of the analysis promulgated in *United States–Animals* could be that some aspects of Article 6 have been effectively decided for the Membership, as WTO decisions have indeed affected international practices in the past.¹⁰² This has two implications: first, the Panel decision makes the trade-efficient, regional approach in Article 6 more concrete as precedent accumulates.¹⁰³ Second, this decision encourages Members to reform their SPS measures through a regional approach in order

to avoid claims against them that are supported by the analysis from *United States–Animals*.

The analysis from *United States – Animals* provides a clear and complete assessment of Members' obligations under Article 6.¹⁰⁴ In this section, that analysis is applied to reveal the violations that prevail in Indonesia and Russia. The objective of this analysis is to substantiate that in some countries, SPS measures are implemented in violation of Article 6, either due to a misunderstanding of the obligations under that Article or due to the unscrupulous intent of the implementing government wishing to protect domestic markets. The two examples explored here are the Indonesian ban on importation of fruits from Chile¹⁰⁵ and the Russian ban on importation of pigs and pork products from the European Union.¹⁰⁶ For clarity, a brief overview of the *United States – Animals*' Article 6 analysis is provided below preceding the application of that analysis to the abovementioned examples.

1. A CONCISE OVERVIEW OF THE UNITED STATES – ANIMALS ANALYSIS

The Analysis under *United States – Animals* proceeds as follows: the first prong is an assessment of the trade-restricting measure on its face.¹⁰⁷ The goal of this assessment is to determine if the measure allows for the recognition of areas affected by infestation or disease as separate from those that are not and to determine if the measures permit different treatment of those areas. It is a simple assessment of whether the measure recognizes unaffected areas and does not subject them to the same measures as the affected areas.¹⁰⁸ If the measure fails to do this, then we proceed to the second prong of the analysis.

The second prong seeks to assess if that failure to recognize pest and disease-free areas as separate from affected areas rises to the level of a violation of Article 6.1 by not accommodating for varied SPS conditions where accommodation is warranted.¹⁰⁹ This is done through an assessment of the Member seeking recognition's SPS characteristics¹¹⁰ to evaluate if a regional approach would be warranted. It is at this stage that the obligation under Article 5.7 of the SPS Agreement to seek relevant information in a timely manner begins to take effect.¹¹¹ If the Member that imposed the measure did not have good reason to treat the areas that its measure affects in a uniform manner, and it did not seek out or willingly accept information that would help to tailor the measure to the relevant areas, then there may be a violation of Article 6.1. However, the third prong of the analysis may still exonerate or condemn the measure-imposing Member.

The third and final prong is an assessment of whether the Member seeking recognition has made a convincing showing that the relevant region is, and is likely to remain pest or disease-free. If throughout the process of requesting recognition, the requesting Member fails to provide adequate evidence to objectively demonstrate that it is pest or disease-free, the failures of the enacting Member to adapt its measure to regional conditions may be forgiven.¹¹²

However, where the Member seeking recognition has provided evidence that adequately demonstrates its pest and disease-free status and it has requested recognition such status, the

measure-imposing Member is in a precarious situation. It is here that the obligations under Articles 5.7 and 8 truly come into full effect. Under Article 5.7, the enacting Member must have sought relevant information "in a timely manner"¹¹³ so as to enable its regional adaptation of its measure as appropriate. Under Article 8, the enacting Member must have proceeded with the Member requesting recognition's request for recognition "without undue delay."¹¹⁴ Failure to comply with those time requirements constitutes a violation of Article 6 of the SPS Agreement.

A. UNITED STATES – ANIMALS' ARTICLE 6 FRAMEWORK APPLIED TO INDONESIA'S BAN OF CHILEAN FRUIT

When applying the framework that the *United States – Animals* Panel used, it is important to recall that the claim in that case was not that the United States' law did not allow for recognition of pest and disease-free areas, but that "as applied," the United States had failed to follow Article 6-compliant procedures to recognize such regions.¹¹⁵ In addition, the Panel's application of the time constraints in Articles 5.7¹¹⁶ and 8¹¹⁷ to the review process of such applications for recognition¹¹⁸ is incorporated into the analysis below.

The first question to be answered is whether Indonesia recognized the area(s) that were affected by a pest infestation and the areas that were not, as separate.¹¹⁹ Indonesia's measure was applied to all of its trade partners, regardless of their pest-status, and the measure applied to all territories therein.¹²⁰ The port that Indonesia chose to close to fruit imports is one of its two main ports for imports, and, specifically, it is a notable port for importation of fruit products.¹²¹ Indonesia has the sovereign right to close ports or impose bans, but it justified its ban based on SPS characteristics, and therefore its measures must comply with the SPS Agreement.¹²² Contrary to Indonesia's obligations under Article 6.1 of the SPS Agreement, it imposed this ban without recognizing regions within its trading partners' territories as disease or pest-free areas. Further, this is contrary to Indonesia's obligation under the SPS Agreement to seek the least trade restrictive means to achieve its protective goals.¹²³

The next prong of the analysis is to establish if this failure to recognize Chile, or areas of Chile, as pest-free, can rise to the level of a violation of Article 6.1.¹²⁴ An assessment of Chile's fruit fly status and the prevalence of this unwanted pest¹²⁵ is needed to determine if Indonesia's measures are adapted to those characteristics. Indonesia argued that its measure was maintained with respect to Chile, because a relevant agency had information that the Valparaíso region of Chile had suffered an infestation of Medfly in 2013.¹²⁶ The Valparaíso region accounts for roughly two percent of Chile's surface area, and the ban effects all fruit products from Chile.¹²⁷ Chile expeditiously eradicated the infestation of Medfly¹²⁸ and invited Indonesia to conduct a technical visit to judge the efficaciousness of Chile's eradication program.¹²⁹ No such visit ever occurred.¹³⁰

In this light, Indonesia's ban was not tailored to the SPS conditions (fruit fly status) prevailing in Chile because it blocked all fruit products from entry to its port, when its information indicated that only two percent of Chile had a fruit fly problem.

However, this may be forgiven if Chile did not provide adequate access to materials that would prove that areas of Chile were free of pests.¹³¹ This requirement is unlikely to absolve Indonesia because in addition to inviting Indonesia to perform its technical visit, Chile has provided Indonesia with all relevant documentation for it to be declared a fruit fly-free nation and has requested formal recognition as such on several occasions.¹³²

Another important part of the Panel's consideration in *United States – Animals* was the time that the United States took to review Argentina's request for recognition.¹³³ In Chile's case, the Indonesian import ban has been in place for three years and seven months. Chile had been a fruit-fly free nation for two years until the outbreak in July 2015.¹³⁴ The new outbreak makes it difficult to determine if a panel would consider this to constitute an "undue delay"¹³⁵ of conducting a recognition process¹³⁶ because the delay may be considered a precautionary measure, and, given the outbreak, not "undue". However, an outbreak still does not necessitate an outright ban on fruit products; the United States, for example, has elected to ban fruit products that harbor medfly from affected regions in response to Chile's outbreak as opposed to all of Chile's fruit products.¹³⁷

Chile likely satisfied the third prong of the *United States – Animals* analysis and met the burden of proof of showing that it had fruit fly-free regions. The current infestation in Chile does raise the question as to whether it carried its burden of proving that areas in Chile are likely to remain fruit fly-free, but even the current infestation is not prevalent throughout the entirety of Chile.¹³⁸ Thus, Indonesia's failure to recognize the areas outside of the Valparaíso region (and now the Tarapaca and Coquimbo regions) and adapt its measure accordingly, likely constitutes a violation of Article 6.1 of the SPS Agreement.

Commentators have argued that the Indonesian economy could benefit from a reduction of supply of foreign fruit and vegetables, and thereby an increase in consumption of local produce, and that this may have been a factor in limiting imports through the measure at issue.¹³⁹ Arguably, the Chilean government used delay tactics to draw out the time it would take to get a region recognized and to maximize consumption of local fruits.¹⁴⁰ Obligations under Article 6 must be understood and adhered to reduce such abuses. Indonesia's ban on fruit exports from all of Chile is a prime example of an over-trade restrictive measure that must be seen as a violation of Article 6 of the SPS Agreement.

B. UNITED STATES – ANIMALS' ARTICLE 6 FRAMEWORK APPLIED TO RUSSIA'S BAN OF PIGS AND PORK PRODUCTS FROM THE EUROPEAN UNION

The European Union's claim, similar to the case above, is that as applied, Russia's ban on pigs and pork products from Poland, Lithuania, and the rest of the EU fails to recognize disease-free areas.¹⁴¹ The EU's claim is that Russia not only failed to recognize affected and unaffected areas as separate, but that the measure is applied in a vastly over-broad manner.¹⁴²

Russia's measure is in violation of Article 6.1 of the SPS Agreement because it treats areas affected by African Swine

Flu and unaffected areas uniformly. The territories affected by disease are parts of Poland and Lithuania, yet the measure as applied does not recognize disease-free areas within the EU. The scenarios in Lithuania and in Poland are very similar, and their treatment from Russia both had impacts on the EU as a whole, so they will be referenced interchangeably throughout this analysis.

Again, the first step of the analysis is to determine if Russia's ban recognizes areas that were affected by the outbreak and those that were not as separate and affords those two groups different treatment. Russia's measure amounts to an EU-wide ban on pork products. It does not recognize affected and unaffected areas as separate, and does not afford them different treatment.¹⁴³

The next step in the analysis is to determine whether Russia's failure to recognize the unaffected regions within Lithuania, Poland, and, more broadly the EU as disease-free rises to a violation of Article 6.1 of the SPS Agreement.¹⁴⁴ This is accomplished through an assessment of the prevailing SPS characteristics of the relevant regions and determining if Russia's measures were adapted therefore.¹⁴⁵ The relevant criteria listed within Article 6.1 are the level of prevalence of the disease and the measures that Lithuania, Poland, and the EU took to control and eradicate the outbreak of ASF.¹⁴⁶

The level of prevalence is demonstrative of the over-broad nature of Russia's measures.¹⁴⁷ A mere four ASF-infected wild boars that were detected in Lithuania and Poland were the foundation for Russia's EU-wide ban.¹⁴⁸ Additionally, the EU contended that scientific evidence showed that the disease found in the boars within the EU territories matched the disease that was found in boars in Russia, which would suggest that the risk of "spread" of the disease is greatly reduced because it would already be in Russia.¹⁴⁹ Banning imports of pork and pork products from all of the EU due to the discovery of four ASF-infected wild boars must be seen as overly broad, and not adapted to regional conditions.

Analysis of the measures taken by Lithuania, Poland, and the EU to disrupt the spread of ASF reveals the unbalanced nature of Russia's approach. The EU, along with Lithuania and Poland, emphasized that they took immediate action to compartmentalize¹⁵⁰ the affected areas and enact stringent measures to control the spread of ASF.¹⁵¹ This approach is compliant with the World Organization for Animal Health (the body that sets international standards for animal health)¹⁵² and aims to isolate the disease. Russia's measure that bans the importation of pork and pork products from the entire EU is not tailored to the conditions prevailing in Lithuania and Poland, or the EU.

Again, under the third prong of the analysis, if Russia had implemented this broad measure as a safety precaution, and then the EU failed to demonstrate that any portion of the EU was going to remain ASF-free, then Russia's failure to adapt to regional conditions may have been excused.¹⁵³ Russia's expressed reasons for applying its ban to all of the EU was for fear that the internal measures in the EU were not stringent enough to prevent the spread of ASF contamination.¹⁵⁴ However, the EU undertook the protocol modeled by the OIE¹⁵⁵, the organization that is expressly mentioned by the SPS Agreement as

the relevant international standard setting body, to neutralize the four isolated cases of ASF.¹⁵⁶ It is likely that this process can be deemed adequate to deal with the presence of disease.

Pursuant to the completion of the EU's process to isolate these cases, it requested recognition of territories outside of the infected areas as disease-free.¹⁵⁷ That request was rejected.¹⁵⁸ Lithuania, Poland, and the EU gave reasonable access to Russia to demonstrate the EU's eradication of ASF and the likelihood that they would remain ASF-free. The EU argued that it kept Russia informed of all ASF-related action taken in both Poland and Lithuania.¹⁵⁹ The EU additionally emphasized that it had undergone extensive negotiations to come to a regionalized solution, but that was to no avail.¹⁶⁰ Russia unfoundedly rejected the EU's requests for regional recognition and the two parties could not come to an agreed upon approach through negotiations.¹⁶¹

Russia failed to take into account the information available to it, and failed to adapt its measure within a reasonable period of time under Article 5.7. It failed to process the EU's requests for recognition of disease-free areas without undue delay under Article 8, and continues to fail to recognize such areas. These failures establish Russia's inability to adapt its measure to regional conditions in accordance with Article 6.

2. WHY THE VIOLATIONS IN THESE CASE STUDIES AND THEIR PROGENY MATTER

The Indonesian ban on fruits from Chile and the Russian ban on pork and pork products from the EU are demonstrative of SPS measures that were implemented in a drastically over-broad manner and in violation of the SPS Agreement. These measures arguably may have been adopted in order to exploit economic opportunities and not for the protection of human, animal, and plant health. Regardless of the intent of the enacting party, these measures restricted, and continue to restrict trade in a serious manner. These cases elucidate the lack of understanding amongst the WTO Membership that the SPS Committee has been trying to resolve with respect to Article 6 of the SPS Agreement.¹⁶²

Nevertheless, difficulty with implementation should not cause a failure to implement. In the Committee's 2008 guidelines on the implementation of Article 6, it reiterated the importance of recognizing exporting Members' disease and pest-free areas in an expeditious manner throughout the thirty-five paragraphs of the document.¹⁶³ The Committee suggested that Members that have requested recognition multiple times, like Chile,¹⁶⁴ should be prioritized in the process, and that when the exporting Member quickly takes action in accordance with the relevant international standard and restores the area to a disease or pest-free area, like Poland, Lithuania, and the EU,¹⁶⁵ recognition should be granted quickly.¹⁶⁶ Yet, Members still fail to properly adhere to Article 6 obligations, and continue to abuse SPS measures by using them for economically protective ends.

The requirement to tailor measures to regional conditions is a logical one and one that has significant implications for trade.¹⁶⁷ Parts of a country with which safe trade can be conducted should be able to trade freely notwithstanding infections or infestations that prevail elsewhere within that country.¹⁶⁸ The

free flow of trade is a cornerstone of the WTO, and to obstruct trade where there is no sound reason to do so not only flies in the face of that goal, but has important negative impacts on global trade. Further, those negative impacts are concentrated on the less developed Members, who are more vulnerable to pests and disease.¹⁶⁹

IV. RECOMMENDATIONS

The implementation of Article 6 of the SPS Agreement has plagued the WTO Membership since the SPS Agreement's inception. By giving substantive effect to Article 6, the legal analysis set forth in *United States—Animals* addresses concerns that exporting Members have repeatedly expressed at SPS committee hearings.¹⁷⁰ This approach which properly incorporates a "reasonable period of time" requirement for importing Members to review their measures, and a requirement for Members to undertake and complete reviews of exporting Members' SPS conditions "without undue delay," should be permanently and expressly adopted.

A. THIS READING OF OBLIGATIONS UNDER ARTICLE 6 FOSTERS BASING MEASURES ON SOUND, SCIENTIFIC EVIDENCE AND REDUCING BARRIERS TO TRADE

The time constraints under Articles 5.7 and 8 encourage Members to adapt their measures to the actually prevailing SPS conditions in a timely manner, which is directly in line with the WTO objective of reducing trade barriers. Imposing an obligation to minimize the effects of measures in areas that have not been affected by pests or disease, and an obligation to do so in a timely manner ensures a logical reduction of unnecessary restrictions on trade.¹⁷¹ Because of the "reasonable period of time" and "without undue delay" requirements, Members wishing to impose barriers through SPS measures will be forced to actively assess whether their measures are based on scientific evidence¹⁷² of prevailing SPS conditions on a regional level. Under this approach, measures that are regionally adapted to actually prevailing SPS conditions will be the norm.

B. A READING WITHOUT TIME CONSTRAINTS WOULD BE GRATUITOUS

Article 6 does not merely require Members to recognize the concept of regionalization. In fact, to give Article 6 such little effect is indefensible because it erodes the separation between the obligations under paragraphs 6.1 and 6.2 of the SPS Agreement. While 6.2 does facially only require Members to recognize the concept of regionalization, 6.1 requires that Members "ensure that their sanitary or phytosanitary measures are adapted" to regional conditions, which inherently requires a maintenance of measures that are appropriately adapted even as conditions change. Imposing the time constraints imposed by the *United States – Animals* panel provides frustrated exporting Members with a viable course of action, and provides permissibly protective importers a "reasonable" period of time during which they can adjust their measures when conditions do change.¹⁷³

C. STRIKING THE BALANCE BETWEEN SOVEREIGN RIGHTS AND FREE TRADE

Another important goal of the SPS Agreement is to maintain Members' sovereign right to regulate imports to protect human, plant, and, animal health.¹⁷⁴ To some degree, it is a hazardous proposition to oblige Members to recognize pest-free or disease-free areas quickly when pests or diseases are in the surrounding areas.¹⁷⁵ Certainly a balance can be struck between the importing State's interest in protecting its populations and the exporting State's interest of being able to export goods from healthy areas without unwarranted restrictions on those goods.

A possible mechanism by which this balancing could be achieved would be to require the measure-imposing Member to reach out to the affected Member to attempt to better tailor the measure in accordance with the prevailing conditions within an established timeframe.¹⁷⁶ For example, a regime wherein the measure-imposing Members must work with the restricted Members to adapt the imposed measure within 90 days of its imposition would greatly increase the level of communication between these Members, and would significantly reduce the unnecessarily restrictive effects of these measures. This approach maintains the protective capacity of the restricting Member by enabling it to enact high barriers that it later tailors down as appropriate. Thus, the restricting Member can appropriately adapt its measure with adequate information thereby minimizing the restriction on trade caused by the measure while successfully protecting its plant, animal, and human populations.

As was demonstrated in the Indonesia and Russia case studies above,¹⁷⁷ under the current regime the restricting Member can elude communication or draw out recognition processes, thereby continuing to impose its restriction. By forcing the restricting

party to begin the process, that Member is automatically more involved than it is under the current system where that Member need only notify the WTO Members of new restrictions that it imposes.¹⁷⁸ Placing an obligation to begin the regionalization of a measure on the restricting Member incentivizes the appropriate party to take action because the restricted Member needs no further incentive to try to get the restriction reduced than the restriction itself, while the restricting Member may need the threat of WTO litigation to push it away from protectionism.¹⁷⁹

V. CONCLUSION

The legal framework from *United States – Animals* applied to current SPS measures confirms that violations of Article 6 of the SPS Agreement are present throughout the WTO Membership. That Panel's analysis highlights Members' obligations to expedite the recognition of regional SPS conditions and to adapt measures appropriately, constituting an important advancement in the development of logical and equitable trade regulation. This progress may indeed be a new bastion particularly for developing nations that have been subject to overly restrictive SPS measures by ensuring that they have reasonable market access despite regional sanitary or phytosanitary concerns.

While the analysis is useful and edifies the appropriate way to read Article 6 of the SPS Agreement, the questions still remain as to how small a "region" can be, what constitutes an "undue delay," and what constitutes a "reasonable period of time" for the purpose of this analysis. These questions represent the next phase of interpretation of this Article and likely the next phase of litigation at the Dispute Settlement Body. Further definition of these terms is required in order for the Membership to be able to properly implement this important Article and to further realize the WTO's goal of trade liberalization. 

ENDNOTES

¹ See generally Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1867 U.N.T.S. 493 [hereinafter SPS Agreement] (relating to the SPS Agreement).

² See Panel Report, *United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WT/DS447/R (July 24, 2015) [hereinafter *United States – Animals*] (ruling in favor of the claimant on its claim of a violation of Article 6 of the SPS Agreement).

³ See SPS Agreement, art. 6.

⁴ See Laura J. Loppacher, William A. Kerr & Richard R. Barichello, *The Debate on Improving Implementation of the Regionalization Chapter of the SPS Agreement: Real Problems or Disguised Protectionism*, 41 J. WORLD TRADE 667, 675 (2007) (discussing developing nations' plea for stringent a interpretation of Article 6).

⁵ See, e.g., Annual Report on the Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, G/SPS/GEN/1491, at Table 5.1, Table 5.2 (Jul. 6, 2016) (noting the Specific Trade Concerns of Members regarding regionalization over the last year, and identifying Guatemala, Mexico, Chile, the United States, and India as the Members complaining of improper implementation of Article 6).

⁶ See generally, e.g., Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, W/DS430/R (Oct. 14, 2014) [hereinafter *India – Agricultural Products*]; *United States – Animals*, *supra* note 2; Panel Report, *Russian Federation – Measures on the Importation of Live*

Pigs, Pork and Other Pig Products from the European Union, WT/DS475/R, (Aug. 19 2016) [hereinafter *Russia – Pigs (EU)*] (analyzing the obligations held under Article 6 of the SPS Agreement for the first time, and finding that India's Avian Influenza measure was inconsistent with Articles 6.2 and 6.1 of the SPS Agreement because it did not recognize the concept of a disease-free area, and was not adapted to such areas).

⁷ See generally, e.g., Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, W/DS430/R (Oct. 14, 2014) [hereinafter *India – Agricultural Products*] (analyzing the obligations held under Article 6 of the SPS Agreement for the first time, and finding that India's Avian Influenza measure was inconsistent with Articles 6.2 and 6.1 of the SPS Agreement because it did not recognize the concept of a disease-free area, and was not adapted to such areas).

⁸ See SPS Agreement, art. 5.7 (requiring that Members review the necessary scientific information for an area "within a reasonable period of time" pursuant to implementing a barrier that impedes goods from that area); see also SPS Agreement, art. 2.2 (mandating that Members base their measures on scientific principles).

⁹ See SPS Agreement, art. 8 (referencing Annex C of the SPS agreement, and requiring Members to undertake and complete verification and approval procedures "without undue delay," which is applicable to requests for recognition of pest and disease-free regions).

investmentnews.com/article/20151007/BLOG12/151009946/investors-facing-the-dark-side-of-mlp-investing.

¹¹⁶ See I.R.C. § 7704.

¹¹⁷ See Pete Brush, *Big Wind Aims to Crash PE, Oil Cos. Partnership Party*, LAW 360 (Nov. 30, 2011), <http://www.law360.com/articles/286330/big-wind-aims-to-crash-pe-oil-cos-partnership-party>.

¹¹⁸ See H.R. REP. NO. 100-391, at 2313-683 (1987).

¹¹⁹ See Fleischer, *supra* note 75.

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² See Keith Goldberg, *Obama Tax Proposal Would Spell Doom for Oil, Gas MLPs*, LAW 360 (Feb. 4, 2015 5:03 PM), <http://www.law360.com/articles/618092/obama-tax-proposal-would-spell-doom-for-oil-gas-mlps>.

¹²³ See OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2016: BUDGET OF THE U.S. GOVERNMENT, <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf> (last accessed Nov. 13, 2016).

¹²⁴ See OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2017: BUDGET OF THE U.S. GOVERNMENT, <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/budget.pdf> (last accessed Nov. 13, 2016).

¹²⁵ See Stan Collender, *Final Obama Budget Will Be Worthless*, FORBES (Feb. 1, 2016, 12:01 AM), <http://www.forbes.com/sites/stancollender/2016/02/01/final-obama-budget-will-be-worthless/#667e877943ab> (stating that the craziness of the 2016 election will severely limit media interest in and coverage of what Obama proposes).

¹²⁶ See Michael Aneiro, *MLP Governance Structure Puts Investors at Risk – Moody’s*, BARRON’S (July 22, 2014, 11:04 AM), <http://blogs.barrons.com/incomeinvesting/2014/07/22/mlp-governance-structure-puts-investors-at-risk-moody/s/>.

¹²⁷ See John Goodgame, *Master Limited Partnership Governance*, 60 BUS. LAW. 471, 501-02 (2005).

¹²⁸ See Goldberg, *supra* note 123 (stating that President Obama has attempted this, but at this stage his ability to pass this proposal is a longshot).

¹²⁹ See *id.* (suggesting that this would effectively cause all MLPs to be taxed the same as yieldcos and renewable energy would achieve capital raising parity with the oil and gas industry).

¹³⁰ See Ashley Parker, *Tax Overhaul Plan Faces Key Hurdles*, N.Y. TIMES (Feb. 25, 2014), <http://www.nytimes.com/2014/02/26/us/politics/gop-tax-plan-seeks-cuts-in-rates-and-number-of-brackets.html>.

¹³¹ See *Master Limited Partnerships—101*, *supra* note 44.

¹³² See Christopher L. House & Matthew D. Shapiro, *Phased-In Tax Cuts and Economic Activity*, 96 AM. ECON. REV. 1835 (2006).

¹³³ See Thomas W. Downs and Hassan Tehrani, *Predicting Stock Price Responses to Tax Policy Changes*, 78 AM. ECON. REV. 1118, 1126 (1988).

¹³⁴ *Benefits of MLPs*, STOCKS 500 MORNINGSTAR, <http://news.morningstar.com/classroom2/course.asp?docId=145579&page=4> (stating that “[t]he absence of taxes at the company level gives MLPs a lower cost of capital than is typically available to corporations, allowing the MLPs to pursue projects that might not be feasible for a taxable entity.”).

¹³⁵ See Peter Stass, *MLP Equity Issuance: Past and Present*, ENERGY & INCOME ADVISOR (Jan. 28, 2016), <https://www.energyandincomeadvisor.com/mlp-equity-issuance-past-and-present/>.

¹³⁶ See Ben Liberman, *Correcting Mistakes of the 1990s Should Top the Energy Agenda for 2006*, BACKGROUND (Mar. 20, 2016), <http://www.heritage.org/research/reports/2006/03/correcting-mistakes-of-the-1990s-should-top-the-energy-agenda-for-2006>.

¹³⁷ See Rachael Salcido, *Rationing Environmental Law in a Time of Climate Change*, 46 LOY. U. CHI. L. J. 617, 660 (2015).

¹³⁸ See William A. Pizer, *The Economics of Improving Fuel Economy*, RESOURCES FOR THE FUTURE (Nov. 17, 2006), <http://www.rff.org/research/publications/economics-improving-fuel-economy>.

¹³⁹ See Editorial Board, *States Should Raise the Gas Tax*, N.Y. TIMES (Jan. 15, 2016), http://www.nytimes.com/2016/01/16/opinion/states-should-raise-the-gas-tax.html?_r=0.

¹⁴⁰ See Paul Waldman, *On Climate Change, Republicans are Truly Exceptional*, WASH. POST (Dec. 1, 2015), <https://www.washingtonpost.com/blogs/plum-line/wp/2015/12/01/on-climate-change-republicans-are-truly-exceptional/>.

¹⁴¹ See, e.g., League of Conservation Voters, *In Their Own Words, 2016 Presidential Candidates on Renewable Energy* (Oct. 5, 2016), <http://www.lcv.org/assets/docs/presidential-candidates-on-renewable.pdf>.

¹⁴² See Robert Rapier, *Gridlocked Congress No Threat to MLPs*, INVESTING DAILY (Aug. 5, 2013), <http://www.investingdaily.com/18020/gridlocked-congress-no-threat-to-mlps/>.

¹⁴³ See E. Cabell Massey, Comment, *Master Limited Partnerships*, 87 U. COLO. L. REV. 1011, 1029 (2016).

¹⁴⁴ See Cassandra Sweet, *Wind, Solar Companies Get Boost from Tax-Credit Extension*, WALL ST. J. (Dec. 16, 2015), <http://www.wsj.com/articles/wind-solar-companies-get-boost-from-tax-credit-extension-1450311501>.

ENDNOTES: REGIONAL DISPUTES: IT IS NOT JUST GROUND BEEF

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¹⁰ See SPS Agreement, Annex C(4) (defining “risk assessment” in relevant part as “[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied.”).

¹¹ See SPS Agreement, art. 8.

¹² See SPS Agreement, art. 5.7 (detailing the relevant obligations under Article 5.7).

¹³ See SPS Agreement, art. 8 (detailing the relevant obligations under Article 8).

¹⁴ See *United States – Animals*, *supra* note 2, at ¶¶ 7.672-673.

¹⁵ Loppacher, *supra* note 4, at 674.

¹⁶ See *infra* Part III (exemplifying some such violations); see generally Loppacher, *supra* note 4, at 667-68 (2007) (discussing “regionalism” and its economic impact, as well as frustrations with the implementation of Article 6 that have been voiced at the WTO).

¹⁷ See *infra* Part II.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part IV.

²⁰ See *infra* Part V.

²¹ See generally Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (comprising part of the law governed by the WTO).

²² See SPS Agreement, Annex A(1) (defining in relevant part “sanitary or phytosanitary measure” as “any measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; . . . (c) to protect human life or health within the

territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests”).

²³ See SPS Agreement art. 2.2; see also Warren H. Maruyama, *A New Pillar of the WTO: Sound Science*, 32 INT’L LAW, 651, 651 (1988) (dubbing “sound science” a new pillar of the WTO).

²⁴ See generally JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS CASES, MATERIALS AND TEXT 399-403, 697-700 (6th ed. 2013) (noting that technical barriers to trade including SPS measures have become increasingly significant); see also Loppacher, *supra* note 4, at 667, 668 (asserting that as tariff barriers fall, illegitimate barriers disguised as SPS measures, and others, are raised).

²⁵ See SPS Agreement Preamble, arts. 2.2, 2.3., 5.6 (explaining the limitations on applying SPS measures are founded in scientific evidence, non-discrimination, and avoidance of disguised restrictions on international trade).

²⁶ See *WTO Members Raise Record Number of Trade Concerns on Food Safety, Animal and Plant Health*, WORLD TRADE ORGANIZATION (July 15-16, 2015), https://www.wto.org/english/news_e/news15_e/sps_15jul15_e.htm.

²⁷ See James F. Smith, *From Frankenfood to Fruit Flies: Navigating the WTO/SPS*, 6 U.C. DAVIS J. INT’L & POL’Y 1, 10 (2000) (remarking that instead of creating SPS standards, the SPS Agreement provides rules for the adoption of sanitary and phytosanitary measures); see also *Understanding the WTO Agreement on Sanitary and Phytosanitary Measures*, WORLD TRADE ORGANIZATION (May 1998), https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm.

²⁸ See Maruyama, *supra* note 23, at 651-53 (commenting that the balance between states’ sovereign right to protect their citizens and requiring them to base those protections in demonstrable science is delicate and contentious).

²⁹ See SPS Agreement, art. 6.

³⁰ Committee on Sanitary and Phytosanitary Measures, Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures, ¶ 21, G/SPS/12 (Mar. 11 1999).

³¹ Loppacher, *supra* note 4, at 668.

³² See, e.g., WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Summary of Meeting of 26-27 March 2015, ¶¶ 3.4-.5, 3.44-.46, 7.1-.9, G/SPS/R/78 (Mar. 27, 2015) (demonstrating the continued struggle to implement Article 6, and the conflict that prevails over this Article amongst the Membership through multiple Article 6-related complaints).

³³ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns” G/SPS/GEN/204/REV.15 (Feb. 24, 2015) at Table 1 (citing “regionalization” trade concerns of the United States, Canada, the European Union, Brazil, Argentina); compare Loppacher, *supra* note 4, at 675 (expressing that some developing and less developed countries have suggested that Article 6 lacks hard line rules on time requirements for processing requests for approval of regions as pest or disease-free), with Loppacher, *supra* note 4, at 675 (iterating that some of the more developed nations, namely the United States, Canada, Japan, New Zealand, and Australia, suggest that the relevant standard setting bodies should research if hard line rules on time constraints would be effective and report their findings to the SPS Committee before any action should be taken).

³⁴ See *infra* Part III (detailing examples of such scenarios).

³⁵ See Loppacher, *supra* note 4, at 668; see also SPS Agreement, Art. 5(6) (requiring Members to “ensure that their SPS measures are no more trade restrictive than required to achieve their appropriate level of sanitary and phytosanitary protection”).

³⁶ See *infra* notes 38, 46, 49 (detailing the relevant parts of Article 6 of the SPS Agreement).

³⁷ See SPS Agreement, art. 6.1 (“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.”).

³⁸ See *United States – Animals*, *supra* note 2, at ¶ 7.642 (explaining this calibration applies to importing and exporting Members alike: if an area within an exporting Member’s boundaries presents a lower risk than the rest of that Member’s territory, the importing Member must impose less restrictive measures on goods from that area, and further, the importing Member may not require that imported goods be safer than the goods from within its own territory).

³⁹ See SPS Agreement, art. 6.1; see also *Russia – Pigs (EU)*, *supra* note 6 (discussing the definitions of “pest- or disease-free areas” and “areas of low pest or disease prevalence” in Annex A(6) and A(7) respectively).

⁴⁰ *United States – Animals*, *supra* note 2, at ¶ 7.643 (quoting *India – Agricultural Products*, *supra* note 6, at ¶ 7.657).

⁴¹ See SPS Agreement, art. 6.1 (“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.” (emphasis added)).

⁴² See *United States – Animals*, *supra* note 2, at ¶ 7.643 (agreeing with the panel from *India – Agricultural Products* that the list is non-exhaustive).

⁴³ See *id.*, *supra* note 2, at ¶ 7.647.

⁴⁴ See SPS Agreement art. 6.2 (“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.”).

⁴⁵ *United States – Animals*, *supra* note 2, at ¶ 7.647.

⁴⁶ See WORLD TRADE ORGANIZATION, SPS Committee, Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, G/SPS/48 (May 16, 2008).

⁴⁷ See SPS Agreement, art. 6.3 (“Exporting Members claiming that areas within their territories are pest- or disease-free areas . . . 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, [], to the importing Member for inspection, testing and other relevant procedures.”).

⁴⁸ *United States – Animals*, *supra* note 2, at ¶ 7.649.

⁴⁹ See SPS Agreement art. 5.7.

⁵⁰ See SPS Agreement art. 8.

⁵¹ See *United States – Animals*, *supra* note 2, at ¶¶ 7.673-75 (referencing the Panel’s findings under Articles 5.7 and 8 that the United States had not reviewed

its measures within a “reasonable period of time” and had not undertaken and completed a review of Patagonia’s disease status without “undue delay,” which was found to therefore be inconsistent with Article 6).

⁵² See *id.* at ¶¶ 7.673-75 (holding that the United States did not uphold its obligations to research and adapt to conditions in Argentina in a timely manner, not did it complete the review of Argentina’s requests for recognition of pest and disease-free areas with adequate gusto, which resulted in a violation of Article 6).

⁵³ See *id.* at ¶¶ 2.1-2.16.

⁵⁴ See *id.* at ¶ 7.668 (detailing Argentina’s claim).

⁵⁵ See generally 9 C.F.R. § 94 1(b) (“The importation of any [] swine or any fresh [] meat of any [] swine that originates in any region where rinderpest or foot-and-mouth disease exists . . . or that enters a port in or otherwise transits a region in which [] foot-and-mouth disease exists, is prohibited . . .”).

⁵⁶ See *United States – Animals*, *supra* note 2, at ¶ 7.657 (highlighting that Argentina did not contend that the United States had no framework by which to recognize pest and disease-free areas, but rather that through the United States’ framework, it failed to recognize Patagonia as disease-free).

⁵⁷ See *id.* at ¶ 7.669 (noting that APHIS is the body that maintains a list of regions under 9 C.F.R. 94 that it has declared “FMD-free”).

⁵⁸ See *id.* at ¶ 7.669.

⁵⁹ See *id.* at ¶ 7.670.

⁶⁰ See *id.* at ¶¶ 7.629, 7.760 (calling the failure of the exporting Member to carry the burden under Article 6.3 of the SPS Agreement by showing that its claimed area is FMD-free, and is likely to remain so, an affirmative defense for the importing Member).

⁶¹ See *id.* at ¶ 7.671 (“[T]he primary argument of the United States for why they have not adapted their measure is that APHIS has not yet determined that Patagonia is indeed disease-free.”).

⁶² See *id.* at ¶ 7.671 (referencing the Panel’s own analysis, *United States – Animals*, ¶¶ 7.168-69, of the United States’ Obligation under Article 8 and Annex C(1) of the SPS Agreement, wherein the Panel found that APHIS had manifested its acceptance of Patagonia’s provided information as sufficient by APHIS’ failing to request further information without undue delay after its site visit of Patagonia).

⁶³ See *id.* at ¶ 7.671.

⁶⁴ See *id.* at ¶¶ 6.671-673.

⁶⁵ See *id.* at ¶ 7.671 (holding for Argentina).

⁶⁶ See *id.* at ¶ 7.673 (referencing the Panel’s earlier findings under Articles 5.7 and 8 that the United States had not reviewed its measures within a “reasonable period of time,” and had not undertaken and completed a review of Patagonia’s disease status without “undue delay”).

⁶⁷ See *id.* at ¶ 7.673.

⁶⁸ See *id.* at ¶ 7.674 (“Therefore, we find that the United States’ failure to recognize Patagonia as FMD-free is a failure to adapt its general prohibition on imports of FMD-susceptible animals and animal products from Argentina to the specific SPS characteristics of the Patagonia region and is thus inconsistent with Article 6.1 of the SPS Agreement.”).

⁶⁹ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures – Notification from Indonesia, G/SPS/N/IDN/48 (May 7, 2012) (notifying the WTO of Indonesia’s intent to close Tanjung Priok); see also WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶ 2.114, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (calling Tanjung Priok in Jakarta a “main port”); *Indonesia: Exporting Products*, SANTANDER, <https://en.santandertrade.com/international-shipments/indonesia/exporting-products> (Nov. 2016) (indicating that Tanjung Priok is one of the two main importing hubs of Indonesia and that together with the other main port, Tanjung Perak, 69% of all imported goods pass through these two ports).

⁷⁰ See generally WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures – Notification from Indonesia, G/SPS/N/IDN/48 (May 7, 2012) (conveying Indonesia’s reasons for implementing its ban).

⁷¹ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶ 2.114-.117, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (detailing Chile, the United States, the European Union, and more Member’s concerns about Indonesia’s prohibition).

⁷² See *id.* at ¶ 2.142 (detailing Chile’s notification).

⁷³ See *id.*

⁷⁴ See also *Indonesia – Agriculture, Overview of Indonesia’s Horticulture Sector – Fruits and Vegetables*, GLOBAL BUS. GUIDE, [hereinafter *Indonesia’s Horticulture Sector*] http://www.gbgingonesia.com/en/agriculture/article/2012/overview_of_indonesia_s_horticulture_sector_fruit_vegetables.php (last visited

Nov. 28, 2016) (arguing that there is an increase in intake of fruit in the Indonesian diet, and thus the market for fruit has been steadily growing since 2007, and also arguing that there is a preference for imported fresh fruit amongst Indonesian consumers over locally grown fruit).

⁷⁵ *Chile Exports*, TRADING ECON. (Sep. 7, 2016), <http://www.tradingeconomics.com/chile/exports>.

⁷⁶ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶ 2.142, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (detaining Chile’s attempted recognition process and repeated attempts to invite Indonesia to recognize it as fruit fly-free).

⁷⁷ See *id.* at ¶ 2.141 (expressing Indonesia’s reasons for implementing and maintaining its measure).

⁷⁸ See *id.* at ¶ 2.144.

⁷⁹ See generally *The Mediterranean Fruit Fly*, ANIMAL AND PLANT HEALTH INSPECTION SERVICE, (Apr. 2015) (edifying that the Mediterranean fruit fly (*Ceratitidis capitata*) is commonly known as the Medfly).

⁸⁰ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶ 2.144, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (detailing Indonesia’s information on the Medfly status of the Valparaíso region).

⁸¹ See *id.* at ¶ 2.146 (expressing Chile’s concerns about the prohibition of its fruit products through Tanjung Priok).

⁸² See *id.* at ¶ 2.145 (noting that Indonesian law permits the recognition of pest and disease-free areas, and that nations other than Chile have availed themselves of that permission).

⁸³ See *id.* at 2.136; see also WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Summary of Meeting of 26-27 March 2015, ¶¶ 3.44-.46, G/SPS/R/78 (conveying Chile’s continued efforts to get its fruit-fly free areas recognized).

⁸⁴ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶ 2.144, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (iterating that Chile has not been afforded an unhindered opportunity to pursue recognition as fruit fly-free, while other nations have been afforded that opportunity).

⁸⁵ See generally APHIS Directive DA-2015-42, Import Restrictions on Mediterranean Fruit Fly Host Material from Quarantine Areas in Chile (July 31, 2015) [*hereinafter* APHIS Directive] (stating that Chile did have another outbreak of Medfly in July, and exemplifying a regionalized approach to that outbreak).

⁸⁶ See *Russia – Pigs (EU)*, *supra* note 6 (elaborating that panel’s August 19, 2016 decision on this case, and finding a violation of Article 6 through a similar analysis to that of the Panel in *United States – Animals*).

⁸⁷ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶ 2.164, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (stating the EU’s concerns of Russia’s measure); see also WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, G/SPS/GEN/1305 (Feb. 19, 2014); WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, G/SPS/GEN/1313 (Mar. 11, 2014) (explicating the process of Russia raising its barriers, and the EU’s response).

⁸⁸ WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶ 2.165, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (arguing the defense of Russia’s measure).

⁸⁹ See *id.* (detailing Russia’s relevant concerns).

⁹⁰ See *id.* (noting Russia’s claim that there are insufficient guarantees that zones or compartments can be effectively established, and that the movement of goods within the EU is properly controlled).

⁹¹ See WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, ¶ 1, G/SPS/N/RUS/48 (Feb. 18, 2014) (stating Russia’s ban on Lithuanian pork).

⁹² See WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, G/SPS/N/RUS/49 at ¶ 1 (Mar. 4, 2014) (stating Russia’s ban on Polish pork).

⁹³ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, ¶ 2.164, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (claiming that the ban is effectively on pork products from the entire EU); see also *Brussels Plans Help for Pork Sector Hit by Russian Ban*, EURACTIV.COM, www.euractiv.com/sections/agriculture-food/brussels-plans-help-pork-sector-hit-russian-ban-312328 (Feb. 23, 2015) (iterating that the approximate value of pork meat exports from the EU to Russia in 2013 was 1 billion euros, and discussing the harm that the ban on EU imports is causing).

⁹⁴ See WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, ¶ 4, G/SPS/GEN/1305 (Feb. 19, 2014) (“[s]tringent measures to prevent any possible spread of the disease were taken by Lithuania promptly, in close cooperation with the European Commission as provided for in EU legislation and in accordance with international standards.”); see also WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶ 2.164, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (mentioning the EU’s response to the outbreak).

⁹⁵ See WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, ¶ 5, G/SPS/GEN/1305 (Feb. 19, 2014); see also WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, ¶ 6, G/SPS/GEN/1313 (Mar. 11, 2014) (remarking communication from the EU to Russia of ASF status updates for both countries).

⁹⁶ See WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, ¶ 5 G/SPS/GEN/1305 (Feb. 19, 2014) (noting Russia’s involvement in the assessment of the outbreak).

⁹⁷ See *id.* (expressing that a nation-wide ban is contrary to Article 6 of the SPS agreement).

⁹⁸ See *id.* (complaining that the Russian measure affects all of the EU); but see WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the Russian Federation, ¶ 7, G/SPS/N/GEN/1315 (Mar. 14, 2014) (maintaining that the Russian restrictions on pork products is applied only to Lithuania and Poland and not to the EU as a whole).

⁹⁹ See WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, ¶ 14, G/SPS/N/RUS/48 (Feb. 18, 2014) (observing that Russia undertook a regional prohibition approach in Ukraine, only restricting trade in pork product from the affected area).

¹⁰⁰ See WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, ¶ 14, G/SPS/GEN/1305 (Feb. 19, 2014); see also WORLD TRADE ORGANIZATION, Notification of Emergency Measures to the SPS Committee, Communication from the Russian Federation, G/SPS/N/RUS/46 (Jan. 15, 2014) (notifying the SPS committee of Russia’s intent to ban imports of pork products from the Ukrainian region of Luhansk due to an outbreak of ASF).

¹⁰¹ *United States – Animals*, *supra* note 2 (clarifying that Members that raise SPS-based measures must pursue information regarding areas which their measure will effect in a timely manner and adapt such measures in accordance with available information, and additionally clarifying that Members are required to process requests for recognition of such unnecessarily affected areas as disease or pest-free without undue delay in order to avoid violations of Article 6).

¹⁰² See, e.g., JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 35-55 (2009) (discussing the interplay of WTO law and international law, and positing that Dispute Settlement Body rulings and other legal instruments under the auspices of the WTO can impact the associated International practices).

¹⁰³ See, e.g., *Russia – Pigs (EU)*, *supra* note 6.

¹⁰⁴ See *United States – Animals*, *supra* note 2, at ¶¶ 7.641-.675 (applying that analysis).

¹⁰⁵ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures – Notification from Indonesia, G/SPS/N/IDN/48 (May 7, 2012).

¹⁰⁶ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶¶ 2.164-.165, G/SPS/GEN/204/Rev.15 (Feb. 24, 2015).

¹⁰⁷ See *United States – Animals*, *supra* note 2, at ¶¶ 7.652, 7.659, 7.657 (debating whether a nation’s measure simply includes provisions that would permit for recognition of pest and disease-free regions satisfies the obligation to adapt measures to regional conditions, and concluding that it does not).

¹⁰⁸ See *id.* at ¶ 7.657 (noting that a Member’s regulatory framework that does not allow for recognition of areas of low pest or disease prevalence or pest and disease-free areas would likely be precluded at the outset).

¹⁰⁹ See *id.* at ¶¶ 7.659-.661 (outlining that Members must accommodate for pest and disease-free areas where appropriate).

¹¹⁰ See SPS Agreement, art. 6.1 (listing non-exhaustively “*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” as factors to consider in this assessment).

¹¹¹ See SPS Agreement art. 5.7 (requiring that Members who impose measures seek relevant information and adapt its measure accordingly within a reasonable period of time).

¹¹² See SPS Agreement art. 6.3 (imposing an obligation on the Member seeking recognition to “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. . . .”); see also *United States – Animals*, *supra* note 2, at ¶ 7.652 (calling a failure to satisfy obligations under Article 6.3 of the SPS Agreement a possible affirmative defense to claims under Articles 6.1 and 6.2).

¹¹³ SPS Agreement art. 5.7.

¹¹⁴ SPS Agreement art. 8, Annex C.

¹¹⁵ See *United States – Animals*, *supra* note 2, at ¶ 7.657 (discussing that Argentina’s claim was not that the United States’ law failed to recognize the concept of pest and disease-free areas “as such” but rather that “as applied” it failed to properly recognize Patagonia as disease-free).

¹¹⁶ See SPS Agreement, art. 5.7 (stating that when Members raise barriers, they must seek to obtain relevant information that will enable them to better tailor their measure to the prevailing SPS conditions “within a reasonable period of time”).

¹¹⁷ See SPS Agreement, art. 8, Annex C (requiring Members to undertake all “approval procedures” “without undue delay”).

¹¹⁸ See *infra* note 66.

¹¹⁹ See *infra* note 106 and accompanying text.

¹²⁰ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures – Notification from Indonesia, G/SPS/N/IDN/48 (May 7, 2012) (indicating that the new trade restriction was to apply to all trading partners).

¹²¹ See, e.g., WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶ 2.129, G/SPS/GEN/204/Rev.15 (Feb. 24, 2015) (indicating that 90% of Chinese fruits and vegetables are imported through the Jakarta port, and arguing that this regulation has caused their imports to be less competitive due to the increased cost of importing to minor ports).

¹²² See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures – Notification from Indonesia, G/SPS/N/IDN/48 (May 7, 2012) (noting that the reason for the ban on fruit imports into the Jakarta port was to preserve plant and human health due to plant pest or disease, and to protect its territory from other damage from pests).

¹²³ See generally SPS Agreement, art. 5.4 (“Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.”).

¹²⁴ See *infra* note 108 and accompanying text.

¹²⁵ See SPS Agreement, art. 6.1 (listing factors that should be taken into account when making an assessment of a country or area’s SPS characteristics).

¹²⁶ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶ 2.164, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (citing to information that the Indonesian Quarantine Agency had obtained about an infestation in 2013).

¹²⁷ Compare Valparaiso, ENCYCLOPEDIA BRITANNICA, www.britannica.com/place/Valparaiso-region-Chile (last updated June 2, 2009) (indicating that the Valparaiso region is 16,040 square kilometers squared), with *Chile Facts*, NAT’L GEOGRAPHIC, travel.nationalgeographic.com/travel/countries/chile-facts/ (last visited Nov. 28, 2016) (noting that the total area of Chile is 756,096 kilometers squared).

¹²⁸ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, ¶ 2.145, G/SPS/GEN/204/REV.15 (Feb. 24, 2015); but see APHIS Directive (raising restrictions on specific goods from specific areas of Chile as a result of the July, 2015 outbreak of Medfly).

¹²⁹ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶ 2.145, G/SPS/GEN/204/REV.15 (Feb. 24, 2015).

¹³⁰ See *id.*

¹³¹ See *infra* note 111 and accompanying text.

¹³² WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, ¶ 2.146, G/SPS/GEN/204/REV.15 (Feb. 24, 2015); compare WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, G/SPS/GEN/204/REV.15 at ¶ 2.142 (Feb. 24, 2015) (revealing that Chile had provided Indonesia with documentation proving that it had successfully eradicated Medfly from its territories and invited Indonesia to verify that fact); with *United States – Animals*, *supra* note 2, at ¶ 7.671 (expressing that because Argentina had provided the United States with the relevant documents demonstrating Patagonia as FMD-free and invited the United States verify that fact, Argentina had carried its burden of providing the United States with adequate information under Article 6).

¹³³ See *infra* note 50-1 (detailing the relevant portion of the Panel’s analysis).

¹³⁴ See APHIS Directive (notifying of the United States’ measures in response to the Medfly outbreak in July, 2015).

¹³⁵ See SPS Agreement, art. 8, Annex C(1)(a).

¹³⁶ Compare *infra* note 64 and accompanying text (suggesting that the view that is most generous to the United States would say that Patagonia was considered to be FMD free only since 2009 by the relevant agencies), with *Indonesia’s Horticulture Sector*, *supra* note 74 (indicating that Chile had eradicated its fruit fly problem in 2013); but see APHIS Directive (issuing a directive that specifies measures for the areas that have been affected by this infestation, but does not impose them on Chile as a whole; thus, this is an example of a restriction that is compliant with the obligations under Article 6 of the SPS Agreement).

¹³⁷ See APHIS Directive (banning only relevant products from the relevant regions).

¹³⁸ See *id.* (listing the infected regions of Chile as Tarapaca, Coquimbo, Valparaiso).

¹³⁹ See *Indonesia’s Horticulture Sector*, *supra* note 74 (“The government’s efforts to tighten their grip over agricultural imports are making life more difficult for importers and local distributors due to the inadequate infrastructure available in Java and Jakarta as the country’s main economic hub and trade gateway. The intent of such measures is clear; locally produced Indonesian products must be competitive in their domestic market[.]”).

¹⁴⁰ See, e.g., WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, ¶2.129, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (recounting China’s experience attempting to gain recognition as pest-free from Indonesia, wherein Indonesia requested that China demonstrate that its garlic exports were fruit fly-free, when garlic is known to not house or attract fruit flies); see also, e.g., Barbara von Tigerstrom, *The Revised International Health Regulations and Restraint of National Health Measures*, 13 HEALTH L.J. 35, 43 (2005) (citing to several instances where bans on beef due to “Bovine Spongiform Encephalopathy” were used under dishonest pretexts; one referenced article called a Canadian ban on beef from Brazil a “shameless ruse prompted by the ongoing trade dispute between the two countries over [aircraft subsidies]”).

¹⁴¹ See *infra* Part III(A); see also *Russia – Pigs (EU)*, *supra* note 6, at ¶ 2.9.

¹⁴² See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, ¶ 2.164, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (notifying that the European Union deems that the measures implemented by the Russian Federation impact not only Lithuania and Poland, but rather the entirety of the European Union).

¹⁴³ See Commission Press Release, EU Challenges Russia in the WTO Over Pork Import Ban (Apr. 8, 2014) [*hereinafter* Commission Press Release] (stating “Russia’s blanket ban on European pork is clearly disproportionate and goes against WTO rules. This was a very minor case of a few infected wild boars at the borders with Belarus which was immediately contained by the relevant European authorities.”).

¹⁴⁴ See *infra* note 97 and accompanying text.

¹⁴⁵ See SPS Agreement, art. 6.1.

¹⁴⁶ See *id.*

¹⁴⁷ See generally Laura J. Loppacher & William A. Kerr, *The Efficacy of World Trade Organization Rules on Sanitary Barriers: Bovine Spongiform Encephalopathy in North America*, 39 J. WORLD TRADE 427, 429-35 (2005) (exploring the “one cow” quandary and how it is that the discovery of one diseased animal takes such a significant toll on an entire national industry).

¹⁴⁸ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, ¶ 2.164, G/SPS/GEN/204/REV.15 (Feb. 24, 2015); see also WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union G/SPS/GEN/1305; WORLD TRADE ORGANIZATION Notification to the SPS Committee, Communication from the European Union G/SPS/GEN/1313; Commission Press Release, *supra* note 143 (“It based its decision on four isolated cases of African swine fever (ASF) detected in wild boar at the Lithuanian and Polish borders with Belarus.”); cf. WORLD TRADE ORGANIZATION, Notification of Emergency Measures to the SPS Committee, Communication from the Russian Federation G/SPS/N/RUS/46 (Jan. 15, 2014) (notifying the SPS committee of Russia’s intent to ban imports of pigs and pork products from the Ukrainian region of Luhansk due to a recent outbreak of ASF that was contained to that region).

¹⁴⁹ WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, ¶ 2.164, G/SPS/GEN/204/REV.15 (Feb. 24, 2015) (“Scientific studies showed that the virus found in Lithuania and Poland originated in Russia. The European Union thus contended that Russia’s measure was disproportionate [and] more trade restrictive than necessary.”); see also Mel Annad, *Regionalization of Trade in Livestock and Livestock Products* 7 LAW & BUS. REV. AM. 17, 21 (arguing that the obligation under Article 6.1 of the SPS Agreement is to

consider the SPS conditions in the relevant areas to include both the area from which the goods are being imported, and the area to which they are destined).

¹⁵⁰ See WORLD TRADE ORGANIZATION FOR ANIMAL HEALTH, *Terrestrial Animal Health Code*, 4.3.1 “zoning and compartmentalization” (20th ed. 2011) (noting that for the purpose of the terrestrial code, “zoning and regionalization have the same meaning, and defining Zoning and compartmentalisation as “procedures implemented by a Member . . . with a view to defining sub populations of distinct health status within its territory for the purpose of disease control and/or international trade”).

¹⁵¹ See WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, G/SPS/GEN/1305 at ¶ 4 (Feb. 19, 2014) (“Stringent measures to prevent any possible spread of the disease were taken by Lithuania promptly, in close cooperation with the European Commission as provided for in EU legislation and in accordance with international standards.”); see also WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, ¶ 3, G/SPS/GEN/13013 (Mar. 11, 2014) (“These measures confirmed the demarcation of an infected area in Poland, which was secured in order to prevent the spread of the disease in strict accordance with the internationally recognised principle of regionalisation, as provided for by the OIE.”).

¹⁵² See SPS Agreement, Annex A(3)(b) (naming the International Office of Epizootics, which is also known as the World Organization for Animal Health, the relevant body for international standards pertaining to animal health).

¹⁵³ See SPS Agreement, art. 3.

¹⁵⁴ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” ¶¶ 2.164-.165, G/SPS/GEN/204/Rev.15 (Feb. 24, 2015) (relating Russia’s concern that the EU’s effort of containment was lackluster and that “there [are] currently insufficient guarantees that a zone or compartment had been effectively established and that the movement of goods within the EU territory was fully controlled.”).

¹⁵⁵ See *infra* note 151.

¹⁵⁶ See SPS Agreement, Preamble, art. 3.4, 12.3, Annex A(3)(b) (listing the International Organization of Epizootics (now World Organization for Animal Health) as the relevant international organization); see also World Organization for Animal Health, *Terrestrial Animal Health Code*, 4.3 “zoning and compartmentalization” (20th ed. 2011).

¹⁵⁷ EU Lodges WTO Challenge Against Russia Pork Import Ban, INT’L CENTRE FOR TRADE AND SUSTAINABLE DEV. (Apr. 10 2014), <http://www.ictsd.org/bridges-news/bridges/news/eu-lodges-wto-challenge-against-russia-pork-import-ban> (conveying the EU’s efforts to come to a regionalized solution, and Moscow’s position that a regionalized solution was not possible and its statement that the EU-wide ban would remain in place until the EU could demonstrate that the EU as a whole is free from ASF).

¹⁵⁸ See *id.* (noting the initiation of a WTO panel dispute pursuant to this affair).

¹⁵⁹ See WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, ¶ 5, G/SPS/GEN/1305 (Feb. 18, 2014) (“Russia has been kept fully informed of all steps taken and indeed, has also participated in an EU and OIE expert mission on the spot to analyse the situation”); see also WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union G/SPS/GEN/1313 at ¶ 6 (Mar. 11, 2014) (“Russia has been kept fully informed of all steps taken through an ongoing and open exchange of information. The dialogue indeed remains open. It is thus not only impossible to understand Russia’s actions; its approach is also completely unsubstantiated.”).

¹⁶⁰ See Commission Press Release, *supra* note 143 (Detailing the measures that the EU has taken to contain the spread of ASF and the EU’s frustrated efforts at coming to a solution that is satisfactory to both the EU and Russia).

¹⁶¹ See *infra* note 142 and accompanying text; see also *infra* note 147 and accompanying text.

¹⁶² See, e.g., WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, ¶¶ 4,7,14(d), 15, G/SPS/48 (May 16, 2008) (suggesting that the importing Member take on a greater burden throughout the regionalization process of pest and disease-free areas, in terms of transparency, expedition, and communication).

¹⁶³ See *id.* (emphasizing the importance of undertaking the process to recognize Member’s disease and pest-free regions, and even proposing an “expedited process” be implemented when Members repeatedly request recognition, or when the importing Member is familiar with the international standard adopted by the exporter).

¹⁶⁴ See, e.g., *infra* note 76 and accompanying text (noting Chile’s multiple requests for recognition).

¹⁶⁵ See, e.g., *infra* note 93.

¹⁶⁶ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, G/SPS/48 at Part IV (May 16, 2008).

¹⁶⁷ See generally WORLD TRADE ORGANIZATION, “Understanding the WTO – What We Stand For,” https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm (last visited Nov. 28, 2016) (listing opening trade, predictability and transparency, increased competition, and increased benefit to less developed countries as key goals of the WTO).

¹⁶⁸ Simonetta Zarrilli, *WTO Agreement on Sanitary and Phytosanitary Measures: Issues for Developing Countries*, UNCTAD (1999) (noting the particularly important role that Article 6 could play for developing nations as the most susceptible to disease and pest infestations and the least capable at overcoming the contemporary hurdles of acquiring recognition of pest or disease-free areas).

¹⁶⁹ See generally *United States – Animals*, *supra* note 2 (ending the United States’ fourteen-year embargo on Argentinian beef).

¹⁷⁰ See WORLD TRADE ORGANIZATION, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, “Specific Trade Concerns,” G/SPS/GEN/204/Rev.15 (Feb. 24, 2015) (summarizing an aggregate of Members’ concerns regarding the implementation of Article 6 of the SPS Agreement); see also Loppacher, *supra* note 4, at 668 (marking that some Members’ main concern with the implementation of Article 6 of the SPS Agreement is the lack of a time constraint under which Importing Members must accommodate for Exporters’ regional conditions).

¹⁷¹ See, e.g., *infra* note 126 (demonstrating that an area or region could be as small as two percent of a nation’s surface area).

¹⁷² See Maruyama, *supra* note 23 (highlighting the importance of founding SPS measures on a scientific basis).

¹⁷³ Compare WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, ¶ 1, G/SPS/N/RUS/48 (Feb. 18, 2014) and WORLD TRADE ORGANIZATION, Notification to the SPS Committee, Communication from the European Union, ¶ 1, G/SPS/N/RUS/49 (Mar. 4, 2014) (notifying the SPS committee that Russia intended to ban pork exports from Poland, Lithuania, and the European Union generally,) with WORLD TRADE ORGANIZATION, Notification of Emergency Measures to the SPS Committee, Communication from the Russian Federation G/SPS/N/RUS/46 (Jan. 15, 2014) (notifying the SPS committee of Russia’s ban of exports from the Luhansk region of the Ukraine due to an outbreak of ASF in that region), and APHIS Directive (restricting exports from Chile only in the areas that were impacted by the July, 2015 outbreak of Medfly).

¹⁷⁴ See generally SPS Agreement, art. 2 (expressing the basic rights and obligations under the SPS Agreement).

¹⁷⁵ See SPS Agreement, Annex B(6) (indicating that a Member may enact protective measures “where urgent problems of health protection arise or threaten to arise for a Member”).

¹⁷⁶ See generally SPS Agreement, art. 6 (citing no firm timeline for obligations under this Article).

¹⁷⁷ See *infra* Part III (A), (B).

¹⁷⁸ See SPS Agreement, Annex B(6)(a).

¹⁷⁹ See Loppacher, *supra* note 4, at 675 (noting that some developing nations and less developed nations would appreciate the development of more stringent time requirements for processing of regional recognition requests).