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UNITED STATES – MEASURES AFFECTING THE IMPORTATION OF ANIMALS, MEAT AND OTHER ANIMAL PRODUCTS FROM ARGENTINA

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Panel Exhibit	Title
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ARG-9	USDA, Veterinary Services, National Center for Import and Export Regionalization Evaluation Services, *Risk Analysis: Risk of Exporting Foot-and-Mouth Disease (FMD) in FMD-Susceptible Species from Argentina, South of the 42 Parallel (Patagonia South), to the United States: Evaluation of the FMD Status of Argentina, South of the 42 Parallel* (June 2005)
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ARG-98	Communication by Argentina to the Committee on Sanitary and Phytosanitary Measures: *Foot And Mouth Disease Situation*, G/SPS/GEN/868 (21 July 2008)
ARG-99	Letter from Dr Miguez, SENASA to Dr Peter Fernandez, APHIS (13 July 2013)
ARG-100	OIE World Assembly, Resolution XX, *Recognition of the Foot and Mouth Disease Status of Member Countries*, 71st General Session (18-23 May 2003)
ARG-101	OIE World Assembly, Resolution XX, *Recognition of the Foot and Mouth Disease Status of Member Countries*, 72nd General Session (23-28 May 2004)
ARG-102	OIE World Assembly, Resolution XXVI, *Recognition of the Foot and Mouth Disease Status of Member Countries*, 74th General Session (21-26 May 2006)
ARG-103	OIE World Assembly, Resolution XVII, *Recognition of the Foot and Mouth Disease Status of Member Countries*, 69th General Session (27 May-1 June 2001)
ARG-107	Final Report Of A Mission Carried Out In Argentina From 18 To 29 November 2002 In Order To Evaluate The Controls In Place Over Foot And Mouth Disease And To Assess Public Health Controls Over The Production Of Fresh Meat. (DG(SANCO)/8715/2002 – MR Final)
ARG-108	Decision of the European Commission No. 2002/68/EC (30 January 2002)
ARG-109	Decision of the European Commission No. 2002/198/EC (7 March 2002)
ARG-110	Final Report Of A Mission Carried Out In Argentina From 19 To 30 April 2004 In Order To Evaluate Animal Health Controls In Place In Particular Over Foot And Mouth Disease, Public Health Control Systems And Certification Procedures. (DG(SANCO)/7184/2004 – MR Final)
ARG-111	Final Report Of A Mission Carried Out In Argentina From 3 To 13 July 2006 In Order To Evaluate Animal Health Controls In Place In Particular Over Foot And Mouth Disease, Public Health Control Systems And Certification Procedures. (DG(SANCO)/8203/2006 – MR Final)
ARG-114	Decision of the European Commission No. 2002/45/EC (22 January 2002)
ARG-118	2002 edition of 9 C.F.R. § 92.2
ARG-119	Report of the Meeting of the OIE Foot and Mouth Disease and Other Epizootics Commission (Paris, 16, 17 and 22 May 2003)
ARG-120	Decision of the European Commission No. 2008/642/EC (31 July 2008), amending Annex II to Council Decision 79/542/EEC as regards the entries for Argentina, Brazil and Paraguay in the list of third countries and parts thereof from which imports into the Community of certain fresh meat are authorized
ARG-124	SENASA Notice No. 4056 informing the minimum frequency of supervisory visits to all types of authorized establishments (4 January 2013)
ARG-126	9 C.F.R. § 94.1 (1-1-2012 ed.)
ARG-128	D.J. Paton, M. Sinclair, R. Rodríguez, Qualitative assessment of the commodity risk factor for spread of foot-and-mouth disease associated with international trade in deboned beef, OIE ad hoc Group on Trade in Animal Products (October 2009)
ARG-133	USDA/APHIS, *Site Visit Report: Uruguay – Foot and Mouth Disease* (September 2002)
ARG-134	Resolución SENASA 181/2010. Modificación de la estrategia de vacunación en relación con la erradicación de la fiebre aftosa
ARG-135	Resolución SENASA 540/2010. Créase el Sistema de Registro y Notificación de Enfermedades Denunciables de los Animales
ARG-136	Resolución SENASA 3/2007. Plan Nacional de Contención de la Fiebre Aftosa
ARG-137	Manual de Procedimientos para la Atención de un Foco. SENASA (October 2001)
ARG-138	Resolución SENASA 82/2013. Vacunación antiaftosa en la Zona Patagónica Norte A. Prohibición
ARG-139	Resolución SENASA 385/2008. Estrategias de Vacunación Antiaftosa para bovinos/bubalinos en todo el Territorio Nacional
ARG-142	Resolución SENASA 37/2002. Establécense medidas de prevención de difusión de la fiebre aftosa ante la aparición de casos clínicos de la enfermedad, o ante la existencia de factores de riesgo tales como el ingreso de animales, productos o fómites desde zonas infectadas o presuntamente infectadas, o deficiencias en la cobertura vacuna
ARG-143	Resolución SENASA 754/2006. Créase la Clave Unica de Identificación Ganadera, que identificará individualmente a cada productor pecuario del país en cada establecimiento agropecuario. Apruébase el "Procedimiento para Reidentificación de Bovinos

Panel Exhibit	Title
ARG-144	Resolución SENASA 563/2012. Identificación de las especies Bovino y Bubalino. Deróganse los Artículos 2°, 3° y 4° de la Resolución N° 370/2006 de la ex Secretaría de Agricultura, Ganadería, Pesca y Alimentos
ARG-145	Resolución SENASA 15/2003. Créase el "Sistema de Identificación de Ganado Bovino para Exportación", que deberá ser aplicado en forma obligatoria en todos los campos inscriptos en el "Registro de Establecimientos Rurales proveedores de ganado para Faena de Exportación" y por los Establecimientos que se inscriban en el "Registro de Establecimientos Pecuarios de Engorde a Corral proveedores de bovinos para faena con destino a exportación
ARG-146	Resolución SENASA 391/2003. Inscripción de "Establecimientos Rurales de Origen", que provean bovinos nacidos y criados en los mismos con destino a "Establecimientos Rurales Proveedores de Ganado para Faena de Exportación". Requisitos
ARG-147	Decreto 4238/68. Reglamento de Inspección de Productos, Subproductos y Derivados de Origen Animal
ARG-148	Resolución SAGPYA 310/2004. Exigencias a las que deberán ajustarse todos los establecimientos de faena y/o proceso y/o depósito interesados en exportar carnes frescas y/o menudencias. Deróganse las Resoluciones Nros. 1/2003 y 339/2003 – SENASA
ARG-149	Resolución SENASA 810/2009. Apruébase el Certificado Unico de Lavado y Desinfección de Vehículos para el Transporte de Animales Vivos
ARG-151	SENASA Circular No. 3307 (30 July 1997)
ARG-152	Resolución SENASA 178/2001. Reglaméntase el procedimiento que garantiza la identificación del origen de los animales que se movilicen con cualquier destino. Derógase la Resolución Nº 1991/2000
ARG-153	Resolución SENASA 33/2002. Apruébase la Guía de Procedimientos para Planes de Vacunación y el Formulario para la Auditoría de Planes de Vacunación
USA-25	Dr. Alberto E. Pecker, SENASA, Fiebre Aftosa: Su Paso Por La Argentina (October 2007)
USA-30	*Certification of Beef from Argentina*, 65 Fed. Reg. 82894 (29 December 2000)
USA-32	Information Provided by SENASA to Attain Recognition of Argentina as a Region, as defined in Section 92.2, Title 9, of the Code of Federal Regulations for Foot and Mouth Disease (FMD) (November 2002)
USA-33	SENASA, *National FMD Eradication Plan April, 2001: Report of 2000-2001 FMD Outbreaks, Actions adopted and Contingency Program in Case of FMD Risks* (February 2002)
USA-42	General Auditing Office of Argentina, *SENASA Program for the Fight Against Foot and Mouth Disease* (22 August 2003)
USA-49	"Cane Returns to Lead SENASA", La Nación (30 March 2001)
USA-50	SENASA Decreto 394/2001
USA-51	Facsimile from Jose Molina, Minister Embassy of Argentina, to Peter Fernandez, APHIS (5 September 2003)
USA-54	Veterinary Services (VS), *Foot and Mouth Disease Argentina Impact Worksheet* (15 February 2006)
USA-55	OIE World Assembly, 74th General Session, Final Report (2006)
USA-57	Report of the Meeting of the OIE Scientific Commission for Animal Diseases (February 2007)
USA-58	United States Department of Agriculture (USDA), Veterinary Services, National Center for Import and Export Regionalization Evaluation Services, *Risk Analysis: Risk of Exporting Foot-and-Mouth Disease (FMD) in FMD-Susceptible Species from Argentina, South of the 42 Parallel (Patagonia South), to the United States* (June 2005), p. 32
USA-59	Resolución SENASA 58/2001
USA-60	Resolución SENASA 1051/2002
USA-61	Resolución SENASA 725/2005
USA-62	Resolución SENASA 148/2008
USA-72	9 C.F.R. § 92.1 (2013)
USA-75	7 U.S.C. §8303 (2012)
USA-76	9 C.F.R. § 92.2 (2013), *Process for Foreign Animal Disease Status Evaluations, Regionalization, Risk Analysis, and Rulemaking*

Panel Exhibit	Title
USA-78	Facsimile from Donald Wimmer (United States Department of Agriculture, Animal and Plant Health Inspection Service (USDA, APHIS) Buenos Aires, Argentina Area Director) to Dr. Bernardo Cane (SENASA, President) (6 November 2002)
USA-79	Letter from Dr. Bernardo Cane (SENASA, President) to APHIS (30 December 2002)
USA-80	Facsimile from Rodolfo Acerbi (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Philip Schull (U.S. Embassy in Argentina) (29 April 2003)
USA-81	Report of the Meeting of the OIE Scientific Commission for Animal Diseases (December 2003)
USA-82	Letter from Pablo Kalnay (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Dr. Jorge N. Amaya (SENASA, President) (14 October 2003)
USA-83	Letter from Miguel Santiago Campos (SENASA) to United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS (29 August 2003)
USA-84	Letter from W. Ron DeHaven (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Deputy Administrator) to Dr. Jorge N. Amaya (SENASA, President) (3 October 2003)
USA-85	Facsimile from Thomas C. Schissel (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Assistant Area Director) to Jorge N. Amaya (SENASA, President) (23 October 2003)
USA-86	Facsimile from SENASA to Theresa Boyle (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Area Director) (18 February 2004)
USA-87	Facsimile from SENASA to Theresa Boyle (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Area Director) (30 July 2004)
USA-88	Report of the Meeting of the OIE Ad Hoc Group for Evaluation of Country Status for Foot and Mouth Disease (October 2004)
USA-90	Letter from John R. Clifford (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Dr. Jose Molina (SENASA, Minister) (17 March 2005)
USA-91	Letter from Thomas C. Schissel (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Arturo Ortiz (SENASA) (21 April 2005)
USA-92	Letter from John R. Clifford (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Jorge N. Amaya (SENASA, President) (7 July 2005)
USA-93	Letter from John R. Clifford (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Deputy Administrator) to Dr. Jorge N. Amaya (SENASA, President) (4 August 2005)
USA-94	Letter from Thomas Schissel (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Area Director) to Jorge N. Amaya (SENASA, President) (27 June 2006)
USA-96	Letter from Dr. Peter J. Fernandez (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Acting Associate Administrator) to Marcelo S. Miguez (SENASA, President) (13 March 2013)
USA-97	Letter from Kevin Shea (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Administrator) to Marcelo S. Miguez (SENASA, President) (15 July 2013)
USA-98	Information Provided by SENASA to Attain Recognition of Patagonia as a Region, as Defined in Section 92.2, Title 9 of the Code of Federal Regulations for Foot and Mouth Disease (FMD) (July 2003)
USA-99	Facsimile from Theresa Boyle (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Area Director) to Dr. Jorge N. Amaya (SENASA, President) (6 November 2003)
USA-100	Letter from W. Ron DeHaven (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Dr. Jorge N. Amaya (SENASA, President) (6 November 2003)
USA-102	Letter from W. Ron DeHaven (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Dr. Jorge Amaya (SENASA, President) (2 March 2004)

Panel Exhibit	Title
USA-103	Further Information Requested by the United States Department of Agriculture, Animal and Plant Health Inspection Service (USDA, APHIS) of the Information Provided by SENASA to Attain Recognition of Patagonia as a Region, as Defined in Section 92.2, Title 9 of the Code of Federal Regulations for Foot and Mouth Disease (FMD) (November 2004)
USA-105	OIE World Assembly, 75th General Session, Final Report (20-25 May 2007)
USA-106	Letter from Yvette Perez (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Oscar Astibia (SENASA) (15 October 2008)
USA-107	Facsimile from Oscar Astibia (SENASA) to Yvette Perez (USDA, APHIS) (22 October 2008)
USA-108	Facsimile from Oscar Astibia, SENASA, to Yvette Perez, USDA, APHIS (11 November 2008)
USA-109	Resolución SENASA 1282/2008
USA-132	*Notice of Availability of Evaluations of the Foot-and-Mouth Disease and Rinderpest Status of a Region of Patagonia, Argentina*, 79 Fed. Reg. 3775 (23 January 2014) (Notice of availability)
USA-133	USDA/APHIS, *Risk Analysis: Risk of Importing Foot-and-Mouth Disease in Susceptible Species and Products from a region of Patagonia, Argentina* (updated January 2014)
USA-149	Dr. Alberto E. Pecker, SENASA, Fiebra Aftosa: Su Paso Por La Argentina (October 2007)
USA-151	Final Report Of A Mission Carried Out In Argentina From 3 To 13 July 2006 In Order To Evaluate Animal Health Controls In Place In Particular Over Foot And Mouth Disease, Public Health Control Systems And Certification Procedures (DG(SANCO)/7590/2005 – MR Final)
USA-167	*Notice of Determination of the Foot-and-Mouth Disease and Rinderpest Status of a Region of Patagonia, Argentina*, 79 Fed. Reg. 51528 (29 August 2914) (Notice)
USA-168	*Importation of Beef From a Region in Argentina*, 79 Fed. Reg. 51508 (29 August 2014) (Proposed Rule)
USA-169	APHIS, Veterinary Services, National Import Export Services, *Risk Analysis: Foot-and-Mouth Disease Risk from Importation of Fresh (Chilled or Frozen), Matured, Deboned Beef from Northern Argentina into the United States* (April 2014)

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AHPA	Animal Health Protection Act
ALOP	Appropriate Level of Protection
APHIS	Animal and Plant Health Inspection Service
CFR	United States Code of Federal Regulations
Codex	Codex Alimentarius Commission
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Fed. Reg.	United States Federal Register
FMD	Foot-and-Mouth Disease
GATT 1994	General Agreement on Tariffs and Trade 1994
IPPC	International Plant Protection Convention
OIE	World Organization for Animal Health
SANCO	European Commission's Directorate-General for Health and Consumers
SENASA	*Servicio Nacional de Salud Animal* (National Animal Health Service)
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SPS Committee	Committee on Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
Terrestrial Code	Terrestrial Animal Health Code
Terrestrial Manual	Manual of Diagnostic Test and Vaccines for Terrestrial Animals
USC	United States Code
USDA	United States Department of Agriculture
VCLT	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Argentina

1.1. On 30 August 2012, Argentina requested consultations with the United States pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 18 and 19 October 2012.

1.2 Panel establishment and composition

1.3. On 6 December 2012, Argentina requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 28 January 2013, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Argentina in document WT/DS447/2, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered Agreements cited by the parties to the dispute, the matter referred to the DSB by Argentina in document WT/DS447/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those Agreements.[4]

1.5. On 29 July 2013, pursuant to Article 8.7 of the DSU, Argentina requested the Director-General to determine the composition of the panel. On 8 August 2013, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Eirik Glenne
Members:	Mr Jaime Coghi
	Mr David Evans

1.6. Australia, Brazil, China, the European Union, India, and the Republic of Korea notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[5] and timetable on 30 August 2013.

1.8. The Panel held a first substantive meeting with the parties on 28 and 29 January 2014. A session with the third parties took place on 28 January 2014. The Panel held a meeting with the parties and the experts on 2 September 2014 and a second substantive meeting with the parties on 4 and 5 September 2014.

1.9. On 4 November 2014, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 24 February 2015. The Panel issued its Final Report to the parties on 14 April 2015.

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[1] See WT/DS447/1 and WT/DS447/1/Corr.1.
[2] WT/DS447/2.
[3] See WT/DSB/M/328.
[4] WT/DS447/3.
[5] See the Panel's Working Procedures in Annex A-1.

1.10. In these panel proceedings, certain filings were not made in accordance with the Working Procedures and revised timetable adopted by the Panel.[6] The Panel acknowledges that parties experience a variety of pressures in seeking to make timely filings. We also observe that no party claimed that its rights were affected in this case and we are not suggesting this occurred here. Nevertheless, we are mindful that failures to file submissions in accordance with the requirements of the Working Procedures could affect parties' rights, especially when submissions are to be filed simultaneously, and that delays can be detrimental to the orderly conduct of panel proceedings. Furthermore, abiding by the Working Procedures is important to guard against such occurrences. Therefore, on 23 May 2014 the Panel adopted modified Working Procedures incorporating changes to the requirements regarding simultaneous filing of submissions.[7]

1.3.2 Consultation of experts

1.11. To facilitate the carrying out of its mandate, and in accordance with Article 11.2 of the SPS Agreement and Article 13 of the DSU, the Panel consulted with individual scientific experts and the World Organization for Animal Health (OIE).

1.12. The initially-adopted Working Procedures and the Timetable of the proceedings were drafted with a view to leaving open the possibility for the Panel to consult scientific experts and/or international organizations. After the first substantive meeting, the Panel asked the parties to indicate their views on whether the Panel should seek scientific and technical advice from experts and/or international organizations. If they were of the view that the Panel should do so, the Panel asked for their views on the following matters: (i) from which international organizations the Panel should seek advice; (ii) from which international organizations the Panel should request suggestions of possible experts; (iii) in what areas of scientific and/or technical expertise the Panel should seek expert advice; (iv) how many experts the Panel should consult in each area of expertise; and (v) whether the Panel should consult experts individually or as part of an expert review group as contemplated in Article 13 and Appendix 4 of the DSU.[8] The Panel also encouraged the parties to reach agreement on any specific scientific experts to be consulted by the Panel.

1.13. In their responses to the Panel questions on these matters, both the United States and Argentina responded that they did not consider it necessary for the Panel to consult individual experts. As for consulting relevant international organizations – the OIE – the United States stated that it was unable to see how the OIE would be able to assist the Panel.[9] Argentina indicated that it would not object to the Panel seeking advice from the OIE concerning its processes and decisions.[10] The parties did not reach agreement on any specific experts to be consulted by the Panel. After considering the responses of the parties, the Panel decided to seek advice from the

[6] In particular, the United States did not file the following documents by the 17:00 deadline specified in paragraph 23(e) of the Working Procedures: its first written submission; its responses to Panel questions in connection with the first substantive meeting; its comments on the Working Procedures and revised timetable; its second written submission; and its responses to the Panel's communications of 3 April and 15 May 2014 concerning the selection of experts. Argentina filed a corrigendum to its responses to Panel questions in connection with the first substantive meeting after the 17:00 deadline specified in paragraph 23(e) of the Working Procedures. Australia did not serve its third-party submission on the parties and the third parties according to the requirements under paragraphs 23(d) and 23(e) of the Working Procedures, and did not meet the 17:00 deadline specified in paragraph 23(e) thereof. Finally, Brazil did not submit the final version of its third-party statement by the deadline specified in paragraph 16(b) of the Working Procedures. With regard to its first written submission, on 10 October 2013 the United States requested an extension of the filing date from 22 October 2013 to 5 November 2013 due to the unforeseen shutdown of the United States Government; the Panel acceded to the United States' request. However, in other instances the parties and third parties did not request an extension even though their filings were late. Although a short grace period was applied to the various instances where filings were not received on time, the delays ranged from 30 minutes to several hours. On 20 May 2014, the Panel informed the parties that as a result of these late filings, the Panel was going to amend its working procedures with respect to filings of contemporaneous submissions.

[7] See paragraph 23(d) of the modified Working Procedures in Annex A-1, which provides that when submissions are to be filed contemporaneously, each party shall file the documents only with the DS Registrar and the DS Registrar will serve the documents on the other party only after having received the submissions of both parties.

[8] Panel question No. 76 following the first substantive meeting.

[9] United States' response to Panel question No. 76 following the first substantive meeting.

[10] Argentina's response to Panel question No. 76 following the first substantive meeting.

OIE with respect to the relevant provisions of the Terrestrial Animal Health Code (Terrestrial Code) as well as from individual experts with respect to, *inter alia*, risk assessment techniques, veterinary practices and surveillance.[11] The Panel adopted the Working Procedures for the consultation of experts and amended its timetable to take into account the various steps in the process of consulting the OIE and the individual experts.

1.3.2.1 Expert selection

1.14. Pursuant to the Working Procedures, on 6 March 2014 the Panel requested the OIE Secretariat to identify names of possible individual experts in the following fields: veterinary practice, surveillance, and risk assessment in the context of foot-and-mouth disease (FMD). At the same time, the Panel also informed the OIE that it might seek advice in writing from the OIE Secretariat with regard to the relevant provisions of the Terrestrial Code.

1.15. On 7 March 2014, the OIE Secretariat responded and provided the WTO with eight names. The WTO Secretariat contacted each of the individuals recommended by the OIE to determine whether they were willing and available to assist the Panel. On 3 April 2014, the Panel forwarded to the parties for comments the names and curricula vitae of those experts who indicated that they were willing to assist the Panel. For reasons of transparency, the Panel informed the parties of all the names proposed by the OIE Secretariat.

1.16. In accordance with paragraph 23 of the Working Procedures, the Panel invited the parties to comment on the available potential experts identified and to make known any compelling objections to any of the experts. The parties filed their comments on the proposed experts on 15 April 2014. Argentina considered the proposed experts to be well-suited for assisting the Panel, whereas the United States objected to all the proposed experts on the ground that each of them had been "closely involved in the OIE process for adopting Argentina's current OIE status".[12]

1.17. On 29 April 2014, the Panel contacted the OIE for a second time expressing its wish to enlarge the pool of potential experts. In particular, the Panel asked the OIE to provide additional names of potential experts who had not directly participated in the evaluation of the sanitary situation in Argentina with respect to FMD. On the same day, the Panel invited the parties to identify any experts they considered would be suitable to assist in the proceedings.

1.18. On 6 May 2014, the OIE Secretariat provided the names of another seven individuals. For reasons of transparency, the Panel informed the parties of the names of those seven additional experts. Argentina and the United States each provided the names of two experts who they viewed as appropriate to assist the Panel. The Panel contacted the 11 individuals to determine their availability and willingness to assist the Panel. The Panel forwarded to the parties for their comments in accordance with paragraph 23 of the Working Procedures the names and curricula vitae of the available experts. The parties commented on the proposed experts on 19 May 2014.

1.19. On 9 May 2014, the Panel sent to the OIE questions concerning the operation and interpretation of the OIE's standards, guidelines and recommendations as embodied in the Terrestrial Code, as well as any other relevant OIE documents. The parties' written submissions, oral statements and responses to questions were also provided to the OIE. The OIE provided its responses to the Panel's questions on 23 June 2014. The parties' provided their comments on the OIE's responses on 17 July 2014.

1.20. On 23 May 2014, the Panel informed the parties that it had selected the following experts to assist it: Dr Howard Batho, Dr Etienne Bonbon, Dr Andrew Cupit, and Dr Vitor Salvador Picão Gonçalves.[13] Of the experts selected, Dr Cupit was proposed by the United States and

[11] See Letter from the Panel to the parties (4 March 2014).

[12] Letter from the United States regarding proposed experts (15 April 2014).

[13] See Letter from the Panel to the parties selecting the experts (23 May 2014). Dr Howard Batho is a Member of the Royal College of Veterinary Surgeons. He retired from the European Commission's Directorate-General for Health and Consumers (SANCO) where he was a principle administrator responsible for the coordination and requirements of import policy in the area of animal health. He served in a variety of capacities relating to veterinary services in the European Commission and the United Kingdom from 1997 until his retirement in 2010. Dr Batho participated in a number of field missions to South America on behalf of the OIE,

Dr Gonçalves by Argentina. The Panel contacted the four selected experts and informed them that upon receipt of their signed disclosure forms confirming that they had no conflict of interest, the Panel would send them background material and a list of questions to which it wished to have written replies.

1.21. The Panel received responses to its questions by 30 June from Dr Batho, Dr Bonbon, and Dr Cupit. On 3 July 2014, the Panel received a letter from Dr Gonçalves stating that he was no longer able to assist as an expert in the dispute.[14] The parties' provided their comments on the individual experts' responses on 29 July 2014.

1.22. On 4 August 2014, the OIE informed the Panel of the members of its delegation who would attend the 2 September expert hearing with the Panel and the parties. By letter dated 11 August 2014, the United States expressed concern with one member of the OIE's delegation, noting that it had objected to this person when proposed by the OIE as an individual expert. The United States' objections were based on the fact that the proposed expert was a private consultant based in Buenos Aires and that this could give rise to the "appearance that [the expert's] opinions could be influenced by the need to maintain relationships with potential sources of consulting work in South America".[15] The United States also stated that as the individual was not an OIE employee, it was unclear how this person would be able to represent the OIE at the meeting.

1.23. On 14 August 2014, the Panel contacted the OIE and informed it of the United States' concerns regarding the individual. While acknowledging that the individual had an in-depth knowledge of the Terrestrial Code, the OIE and its processes, the Panel indicated that it considered that the individual's work as a private consultant based in Argentina could give rise to doubts as to the individual's independence or impartiality if that individual were to participate in the 2 September meeting. The Panel, noting this could affect the parties' due process rights and its ability to rely on the OIE's responses at the meeting, accordingly asked the OIE to limit its delegation to the two other persons mentioned in the OIE's 4 August communication.

1.24. On 19 August 2014, the OIE responded, clarifying that the member of its delegation had been continuously under contract with the OIE since 1 August 2012 for the performance of duties on behalf of the Organization. It also stated that as the majority of parties' comments on the responses submitted by the OIE to the Panel's questions were related to the OIE's interpretations, processes, procedures and transparency related to its standard setting, it had "an obligation to [its] 180 Member Countries who have adopted these procedures and norms that the OIE must be represented by the most qualified, knowledgeable and competent individuals at our disposal."[16] In the OIE's view, the person best placed to properly represent the OIE and provide valuable assistance to the Panel was the individual they had chosen.

1.25. On 26 August 2014, the Panel responded to the OIE's communication, emphasizing that it had an obligation to ensure that the parties' due process rights were respected at each stage and in every aspect of the proceedings. However, in light of the OIE's assurances that the individual was an OIE employee in the sense that the individual had been under contract with the OIE continuously since 1 August 2012 and in view of the comity owed to the OIE Secretariat, the Panel stated that it was prepared to reconsider the individual's attendance at the meeting. In this

including to Argentina. Dr Etienne Bonbon served in the French Ministry of Agriculture and Fisheries in a variety of capacities. He has also served as an advisor to the Director General of the OIE and the Vice President of the Terrestrial Animal Health Standard Commission. He is currently a counsellor with the European Union delegation to the OECD, UNESCO and international organisations in Paris with particular responsibility for following the European Union and its Agencies' relations with the OIE. Dr Andrew Cupit is Assistant Secretary, Animal Biosecurity Branch, Animal Division, Department of Agriculture, Government of Australia. Dr Vitor Salvador Picão Gonçalves is associate professor at the University of Brasília, Brazil and lectures on "Veterinary Epidemiology", "Planning of Animal Health Policies", "Methods for Epidemiological Investigation" and "Risk Analysis in Animal Health". He also acts as an adviser to the Animal Health Department, Ministry of Agriculture, in Brasilia, on a wide range of topics related to epidemiology and public policies, such as surveillance strategies, establishment of free zones and compartments, risk assessments, FMD and CSF eradication and control of endemic diseases.

[14] Dr Gonçalves stated that due to important and unforeseen personal reasons he would be unavailable to attend the meeting with the parties and the experts on 2 September.

[15] Letter from the United States to the Panel (11 August 2014).

[16] Letter from the Director-General of the OIE (19 August 2014).

regard, the Panel asked the OIE to confirm a number of matters relating to any potential conflict of interest arising from the individual's private professional activities in Argentina, and that it confirm that the individual as an OIE employee was governed by the OIE's Rules of Conduct and would also be guided by the WTO's Rules of Conduct for the Settlement of Disputes. The Panel indicated that if it received the requisite assurances and the individual were to participate in the meeting, the parties would be given a period of time to question the individual about any professional affiliation with the OIE, any private consulting activities outside the OIE, and whether those activities would have a bearing on the individual's ability to be impartial and independent when answering questions on behalf of the OIE.

1.26. On 28 August 2014, the Panel received the confirmation it was seeking with respect to the individual's private professional activities as well as the fact that although the individual was considered as a private consultant to the OIE, in the sense that the individual did not have the entitlements of an OIE staff member, the OIE Rules of Conduct and undertakings on confidentiality were explicitly stated in the individual's contract and were fully equivalent to those applicable to OIE staff.

1.27. In the context of assisting the Panel in determining the proper allocation of time for statements at the meeting, the United States indicated that it did not wish to avail itself of the opportunity to pose questions at the meeting with the experts to the individual on the OIE's delegation on the matter of impartiality and independence.[17]

2 FACTUAL ASPECTS

2.1 The relevant disease: Foot-and-mouth disease (FMD)

2.1. Foot-and-mouth disease (FMD) is a highly contagious viral disease that primarily affects cloven (divided)-hoofed livestock and wildlife. Although adult animals generally recover, the morbidity rate is very high in non-vaccinated populations, and significant pain and distress occur in some species. High mortality rates can be observed in non-vaccinated young animals. Complications or other pathological conditions resulting from FMD may include decreased milk yield, permanent hoof damage and chronic mastitis (inflammation of mammary glands and udders). Although FMD was once found worldwide, it has been eradicated from some regions including North America and most of Europe. Where it is endemic, this disease is a major constraint to the international livestock trade. Unless strict precautions are followed, FMD can be readily re-introduced into disease-free livestock. Once this occurs, the disease can spread rapidly through a region, particularly if detection is delayed.[18]

2.2. The FMD virus survives in living tissue and in the breath, saliva, urine, and other excretions of infected animals. It can also survive in contaminated materials and the environment for several months under certain conditions. In cattle, the incubation period varies from two to fourteen days, depending on the dose of the virus and route of infection. FMD can spread when infected animals bring the virus into physical contact with susceptible animals (i.e. cloven (divided) hoofed animals).[19]

2.3. The virus has a variety of potential pathways for disease transmission including transmission through beef, offal, and hides derived from infected animals. Given the virulence and the potential rapid spread of the disease, and the significant direct and indirect costs associated with eradication of an outbreak, most countries that have eradicated the disease impose strict sanitary measures on imports of animal products. Countries that are not FMD-free are usually limited in international markets to sales to other markets that are also not FMD-free or, in some cases, to exports of specific types of meat products (for example, processed meat). These restrictions thus create a

[17] Communication from the United States to the Panel (1 September 2014).

[18] See e.g. website of the World Organization for Animal Health (OIE website), *Foot & Mouth Disease: Questions & Answers*, http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/Q_A-FMD-EN.pdf (last accessed 21 February 2014).

[19] See e.g. OIE website, *Foot & Mouth Disease: Questions & Answers*, http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/Q_A-FMD-EN.pdf (last accessed 21 February 2014).

segmented market in which products from countries that are FMD-free sell at a premium (10 to 50 per cent) over products that do not have this designation.[20]

2.4. One of the tools countries or regions use to move towards eradication of the disease is to vaccinate cattle and other susceptible animals against FMD.

2.2 The measures at issue

2.5. In the present dispute, Argentina challenges two sets of measures: (a) the United States' prohibition on importation of fresh (chilled or frozen) beef from the portion of the Argentine territory located north of the Rio Negro (Northern Argentina) and on the importation of animals, meat and other animal products from the Patagonia region as a consequence of the failure to recognize Patagonia as an FMD-free region, contained in 9 CFR 94.1(b) and the 2001 Regulations, and in 9 CFR 94, respectively; and (b) the undue delay in the application of the procedures set forth in Title 9 of the United States' Code of Federal Regulations, Part 92.2 (9 CFR 92.2) to Argentina's requests for importation of fresh (chilled or frozen) beef from Northern Argentina and for the recognition of the Patagonia region as free from FMD.

2.2.1 Prohibition on importation of fresh (chilled or frozen) beef from Northern Argentina and animals, meat and other animal products from the Patagonia region

2.2.1.1 Title 9 of the Code of Federal Regulations, Part 94

2.6. The first measure at issue is Title 9 of the United States' Code of Federal Regulations, Part 94 (9 CFR 94)[21], which, in its application, effectively prohibits the importation of fresh (chilled or frozen) beef from Northern Argentina and animals, meat and other animal products[22] from the Patagonia region. 9 CFR 94 reads, in relevant part:

> 94.1 Regions where rinderpest or foot-and-mouth disease exists; importations prohibited.
>
> (a) APHIS considers rinderpest or foot-and-mouth disease to exist in all regions of the world except those declared free of one or both of these diseases by APHIS.
>
> (1) A list of regions that APHIS has declared free of … foot and mouth disease are maintained on the APHIS Web site at: http://www.aphis.usda.gov/import_export/animals/animal_disease_status.shtml. …
>
> (2) APHIS will add a region to the list of those it has declared free of rinderpest or foot-and-mouth disease, or both after it conducts an evaluation of the region in accordance with §92.2 and finds that the disease, or diseases, are not present. In the case of a region formerly on this list that is removed due to an outbreak, the region may be returned to the list in accordance with the procedures for reestablishment of a region's disease-free status in §92.4 of this subchapter. APHIS will remove a region from the list of those it has declared free of rinderpest or foot-and-mouth disease upon determining that the disease exists in the region based on reports APHIS receives of outbreaks of the disease from veterinary officials of the exporting country, from the World Organization for Animal

[20] See e.g. OIE website, *Foot & Mouth Disease: Questions & Answers*, http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/Q_A-FMD-EN.pdf (last accessed 21 February 2014).

[21] *Rinderpest, Foot-and-Mouth Disease, Exotic New-Castle Disease, African Swine Fever, Swine Vesicular Disease, and Bovine Spongiform Encephalopathy: Prohibited and Restricted Importations*, 9 CFR 94 (2013 version), (Exhibit ARG-64).

[22] We note, as will be discussed further below, that the measure at issue prohibits specifically ruminants and swine as these are the species that are susceptible to FMD.

Health (OIE), or from other sources the Administrator determines to be reliable.[23]

(b) The importation of any ruminant or swine or any fresh (chilled or frozen) meat of any ruminant or swine that originates in any region where rinderpest or foot-and-mouth disease exists, as designated in paragraph (a) of this section, or that enters a port in or otherwise transits a region in which rinderpest or foot-and-mouth disease exists, is prohibited … . (underlining added)

94.2 Fresh (chilled or frozen) products (other than meat), and milk and milk products of ruminants and swine.

(a) The importation of fresh (chilled or frozen) products (other than meat and milk and milk products) derived from ruminants or swine, originating in, shipped from, or transiting any region designated in §94.1(a) as a region infected with rinderpest or foot-and-mouth disease is prohibited, except as provided in §94.3 and parts 95 and 96 of this chapter.

(b) The importation of milk and milk products of ruminants and swine originating in, shipped from, or transiting any region designated in §94.1(a) as a region infected with rinderpest or foot-and-mouth disease is prohibited, except as provided in §94.16.

2.7. As the language above indicates, the Animal and Plant Health Inspection Service (APHIS) maintains a list of regions that it has declared free of FMD. Imports into the United States of FMD-susceptible animals and animal products from regions not included in the list are prohibited. Nevertheless, specific products originating in certain regions that do not appear on the list (i.e. regions that APHIS has not declared to be free from FMD) may be eligible for import into the United States' territory provided that they comply with sanitary protocols agreed to with APHIS and set forth in other sections of 9 CFR 94. Argentine fresh (chilled or frozen) beef was imported pursuant to such a provision (former 9 CFR 94.21) between 1997 and 2001. In 2001, in response to FMD outbreaks in Argentina, 9 CFR 94.21 was repealed and Argentine products were made

[23] The Panel notes that the measure cited is the version of 9 CFR 94 that was in force on the date of establishment of the Panel (28 January 2013). 9 CFR 94.1(a) was slightly different at the time Argentina applied for authorization to import. It read as follows:

94.1 Regions where rinderpest or foot-and-mouth disease exists; importations prohibited.

(a) Notice is hereby given that, in accordance with the Animal Health Protection Act (7 USC 8301 et seq.), it has been determined, and official notice has been given to the Secretary of the Treasury that:

(1) Rinderpest or foot-and-mouth disease exists in all regions of the world, except those listed in paragraph (a)(2) or (a)(3) of this section;

(2) The following regions are declared to be free of both rinderpest and foot-and-mouth disease: Australia, Austria, The Bahamas, Barbados, Belgium, Bermuda, the Brazilian State of Santa Catarina, British Honduras (Belize), Canada, Channel Islands, Chile, Costa Rica, Czech Republic, Denmark, Dominican Republic, El Salvador, Estonia, Fiji, Finland, France, Germany, Greece, Greenland, Guatemala, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Latvia, Liechtenstein, Lithuania, Luxembourg, Mexico, Namibia (excluding the region north of the Veterinary Cordon Fence), The Netherlands, New Caledonia, New Zealand, Nicaragua, Norway, Panama, Papua New Guinea, Poland, Portugal, Spain, Territory of St. Pierre and Miquelon, Sweden, Switzerland, Trinidad and Tobago, Trust Territory of the Pacific Islands, and the United Kingdom.

(3) The following regions are declared to be free of rinderpest: Japan, Namibia, the Republic of South Africa, and Uruguay.

9 CFR 94 (2012 version), (Exhibit ARG-126).

subject to the prohibitions under 9 CFR 94.1(b). At the time of the Panel's establishment, only Uruguay was listed under this category, and was permitted to export fresh (chilled or frozen) beef to the United States under the protocols contained in 9 CFR 94.22.[24]

2.8. As discussed below, Argentina also challenges the Interim and Final Rules that repealed 9 CFR 94.21 and had the effect of making imports from Argentina subject to the general prohibition in 9 CFR 94.1(b).

2.2.1.2 APHIS' 2001 Interim and Final Rules amending 9 CFR 94

2.9. Argentina experienced multiple FMD outbreaks between July 2000 and January 2002. In March 2001 Argentina suspended its exports of fresh (chilled or frozen) beef to the United States. Subsequently, APHIS issued: (a) an Interim Rule published in the Federal Register on 4 June 2001[25] and (b) a Final Rule published in the Federal Register on 11 December 2001.[26] The Panel refers to these Rules collectively as the "2001 Regulations". The effect of the Interim Rule was to amend 9 CFR 94 to prohibit the importation of fresh (chilled or frozen) beef from Argentina by removing 9 CFR 94.21 (which, as noted above, had allowed such importation). This amendment was maintained without change in the Final Rule. Thus, as a result of the adoption of the 2001 Regulations, the prohibitions under 9 CFR 94.1(b), which had applied prior to 1997, once again became applicable to FMD-susceptible animals and animal products from Argentina.[27]

2.10. From 2001 until the date of the establishment of the Panel, APHIS had not issued any further regulations affecting the legal status of imports of fresh (chilled or frozen) beef from Argentina, or on animals, meat and other animal products from the Patagonia region.[28] In other words, the version of the CFR in force on the date of establishment of the Panel reflects the amendments made as a result of the 2001 Regulations.

2.2.2 The United States' alleged undue delay in the application of the procedures set forth in 9 CFR 92.2 to Argentina's requests for imports of fresh (chilled or frozen) beef from Northern Argentina and for recognition of Patagonia as free from FMD

2.11. APHIS' approval procedures, detailed in 9 CFR 92.2, entitled "Requests for recognition of a region or for approval to export animals or animal products …", set forth the terms under which a region or country can be recognized as FMD-free or an authorization to import of FMD-susceptible animal products can be obtained. The procedure in 9 CFR 92.2 is the only procedure that permits an applicant to obtain import approval for FMD purposes, whether for a region recognized by APHIS as FMD-free or for a single commodity (i.e. beef) from a country or region.[29] This procedure begins when a country submits an application to APHIS for recognition of its entire territory, or a region thereof, as an FMD-free zone ("regionalization request"). 9 CFR 92.1 defines "region" as "[a]ny defined geographic land region identifiable by geological, political or surveyed boundaries". As such, a region for the purposes of APHIS' approval procedures may consist of: (a) a "national entity (country)"; (b) "[p]art of a national entity (zone, county, department, municipality, parish, Province, State, etc.)"; (c) "[p]arts of several national entities combined into an area"; or (d) a "group of national entities (countries) combined into a single area".[30]

2.12. The application process requires the applicant country to provide information on the following eleven factors:

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[24] 9 CFR 94.1(b)(4) (2013 Version), (Exhibit ARG-64).

[25] *Prohibition of Beef from Argentina*, 66 Fed. Reg. 29897 (4 June 2001) (Interim Rule), (2001 Interim Rule on Argentina), (Exhibit ARG-29).

[26] *Prohibition of Beef from Argentina*, 66 Fed. Reg. 63911 (11 December 2001) (Final Rule), (2001 Final Rule on Argentina), (Exhibit ARG-30).

[27] See para. 2.7 above.

[28] As will be discussed further in section 7 below, APHIS did issue a Proposed Rule with respect to Patagonia in 2007, but this was never finalized.

[29] These regulations were amended effective August 27, 2012. (See *Information From Foreign Regions Applying for Recognition of Animal Health Status: Final Rule*, 77 Fed. Reg. 44107 (USDA/APHIS, 27 July 2012) (Final Rule), (Exhibit ARG-16))

[30] 9 CFR 92.1 (Exhibit USA-72).

(1) The authority, organization, and infrastructure of the veterinary services organization in the region;

(2) Disease status—i.e., is the restricted disease agent known to exist in the region? If "yes," at what prevalence? If "no," when was the most recent diagnosis?

(3) The status of adjacent regions with respect to the agent;

(4) The extent of an active disease control program, if any, if the agent is known to exist in the region;

(5) The vaccination status of the region. When was the last vaccination? What is the extent of vaccination if it is currently used, and what vaccine is being used?

(6) The degree to which the region is separated from regions of higher risk through physical or other barriers;

(7) The extent to which movement of animals and animal products is controlled from regions of higher risk, and the level of biosecurity regarding such movements;

(8) Livestock demographics and marketing practices in the region;

(9) The type and extent of disease surveillance in the region—e.g., is it passive and/or active; what is the quantity and quality of sampling and testing?

(10) Diagnostic laboratory capabilities;

(11) Policies and infrastructure for animal disease control in the region—i.e., emergency response capacity.[31]

2.13. After an application is filed, APHIS evaluates the likelihood of entry, establishment, or spread of the disease. As part of the evaluation, APHIS requests the applicant country to provide detailed scientific information as necessary, and typically conducts one or more visits to the region covered by the regionalization request. Upon completion of its evaluation, APHIS communicates the evaluation and its results to the applicant country and other potentially affected and interested parties by publishing a proposed regulatory document in the Federal Register.[32] All potentially affected and interested parties are invited to respond to and submit comments on the proposed regulatory document. After the expiration of the public comment period, APHIS collects all the comments, reviews them, and prepares responses. It reviews the proposed regulatory document in light of these comments and revises it as appropriate.

2.14. As the last step of the process, APHIS issues the final regulatory decision on regionalization in the United States' Federal Register. The final decision sets forth the conditions under which imports are authorized in order to meet the appropriate level of protection (ALOP) of the United States.[33] The country or region thereof that is recognized as an FMD-free zone is then added to the list of regions that are considered free of FMD under 9 CFR 94.1(a)(1) and thus authorized to import. Certain regions listed in 94.1(a)(1) are nevertheless subject to additional

[31] See 9 CFR 92.2 (2002 version), (Exhibit ARG-118). We refer here to the version of 9 CFR 92.2 that was in force at the time of the filing of Argentina's requests for authorization of imports of fresh (chilled or frozen) beef and for the recognition of Patagonia as FMD-free. As a result of a 2012 amendment to 9 CFR 92.2, the 11 factors were consolidated into eight. However, we note that APHIS itself considers it appropriate to evaluate Argentina's requests in light of the pre-2012 version of 9 CFR 92.2. Indeed, the 2014 risk analyses for Northern Argentina and Patagonia both refer to the 11-factor list rather than the new 8-factor list. See USDA/APHIS, *Risk Analysis: Risk of Importing Foot-and-Mouth Disease in Susceptible Species and Products from a region of Patagonia, Argentina* (updated January 2014), (2014 Risk Analysis for Patagonia), (Exhibit USA-133), p. 9; APHIS, Veterinary Services, National Import Export Services, *Risk Analysis: Foot-and-Mouth Disease Risk from Importation of Fresh (Chilled or Frozen), Matured, Deboned Beef from Northern Argentina into the United States* (April 2014), (2014 Risk Analysis for Northern Argentina), (Exhibit USA-169), p. 9.

[32] See 9 CFR 92.2(e), (Exhibit ARG-69).

[33] See 9 CFR 92.2(f), (Exhibit ARG-69).

protocols set forth in 94.11 if they either (1) supplement their national meat supply through the importation of fresh, chilled or frozen meat of ruminants or swine from countries/regions that are not designated as free of FMD; or (2) they have a common land border with countries/regions that are not designated as free of FMD; or (3) they import ruminants or swine from countries/regions that are not designated as free of FMD.[34]

2.15. APHIS' approval procedures also contemplate that regions not included in APHIS' list are nevertheless entitled to apply for the right to import a particular product into the United States.[35] Until 27 August 2012, the application, evaluation, and approval process for the right to import a particular product into the United States was, *mutatis mutandis*, the same as that set forth for regionalization requests and described in paragraphs 2.11-2.14 above. However, APHIS amended its regulations on 27 August 2012 so as to limit the scope of its application, evaluation, and approval process to regionalization requests, and removed references to requests for approval of imports of a particular type of animal or animal product into the United States.[36] In its first written submission, the United States asserted that the changes to the regulations do not prevent product-specific requests and that "APHIS continues to work on and accept applications to permit product-specific requests".[37]

2.16. Argentina does not challenge APHIS' approval procedures under 9 CFR 92.2 as such.[38] Rather, Argentina takes issue with the alleged undue delay in the application of APHIS' approval procedures to its requests for authorization of imports of fresh (chilled or frozen) beef from Northern Argentina and for recognition of Patagonia as FMD-free. Argentina filed its request to import fresh (chilled or frozen) beef in November 2002.[39] It filed its request for the recognition of the portion of Patagonia located south of the 42nd parallel (Patagonia South) as FMD-free within the meaning of 9 CFR 94.1(a) in August 2003.[40] In December 2008, Argentina extended its request for the recognition of Patagonia as FMD-free to the portion of Patagonia located between the 42nd parallel and the Rio Negro (Patagonia North B).[41] As of the date of the establishment of the Panel (28 January 2013), APHIS had not issued a Proposed or Final Rule or Notice of Determination in either approval process.

2.17. A chronology of the events relating to the sanitary situation for FMD in Argentina as well as the evaluation of that situation by the OIE and APHIS is attached as Appendix 1 to this Report.[42]

2.2.2.1 Section 737 of the 2009 Omnibus Appropriations Act

2.18. As part of its arguments concerning alleged undue delays in APHIS' approval processes described in paragraphs 2.11-2.16 above, Argentina also takes issue with Section 737 of the

[34] See 9 CFR 94.11(a)(2), (Exhibit ARG-64).

[35] See para. 2.7 above. We note that under APHIS' terminology the definition of a "region" includes the entire territory of a country.

[36] See e.g. Argentina's first written submission, paras. 83, 607, 647, and 681.

[37] United States' first written submission, footnote 208 to para. 125.

[38] See Argentina's opening statement at the first meeting of the Panel, para. 57.

[39] Information Provided by SENASA to Attain Recognition of Argentina as a Region, as defined in Section 92.2, Title 9, of the Code of Federal Regulations for Foot and Mouth Disease (FMD) (November 2002), (Information Provided by SENASA (November 2002)), (Exhibit USA-32).

[40] Information Provided by SENASA to Attain Recognition of Patagonia as a Region, as Defined in Section 92.2, Title 9 of the Code of Federal Regulations for Foot and Mouth Disease (FMD) (July 2003), (Information Provided by SENASA (July 2003)), (Exhibit USA-98).

[41] See Letter from Oscar Astibia, Coordinator of International and Institutional Relations, SENASA, to Yvette Pérez, USDA/APHIS, Buenos Aires, CRI No. 7103/08 (17 December 2008), (SENASA's letter of 17 December 2008), (Exhibit ARG-59/USA-111); Letter from Oscar Astibia, Coordinator of International and Institutional Relations, SENASA, to Yvette Pérez, USDA/APHIS, Buenos Aires, URI No. 460/09 (30 January 2009), (SENASA's letter of 30 January 2009), (Exhibit ARG-60/USA-112).

[42] The Panel drafted the chronology based on the submissions of the parties. Prior to the first substantive meeting, the Panel circulated a draft version of the chronology, and asked the parties to comment on the document and provide supplemental information where relevant. The Panel incorporated the parties' comments into a revised version of the chronology and asked the parties to provide any further comments. See Panel question No. 78 following the first substantive meeting and the parties' responses thereto.

2009 Omnibus Appropriations Act adopted by the United States' Congress on 10 March 2009.[43] Section 737 reads, in relevant part:

> None of the funds made available by this Act may be used to pay the salaries and expenses of any individual to conduct any activities that would allow the importation into the United States of any ruminant or swine, or any fresh (including chilled or frozen) meat or product of any ruminant or swine, that is born, raised, or slaughtered in Argentina: *Provided*, That this section shall not prevent the Secretary from conducting all necessary activities to review this proposal and issue a report on the findings to the Committees on Appropriations of the House and Senate: *Provided further*, That this section shall only have effect until the Secretary of Agriculture has reviewed the domestic animal health aspects of the pending proposal to allow the importation of such products into the United States and has issued a report to the Committees on the findings of such review.

2.3 Products at issue

2.19. 9 CFR 94 applies to ruminants[44] and "swine"[45] and products derived from ruminants and swine such as: (i) fresh (chilled or frozen) meat; (ii) milk; (iii) milk products; and (iv) fresh (chilled or frozen) products other than meat, milk, and milk products. The product of relevance to Argentina's claims for Northern Argentina is fresh (chilled or frozen) beef. The products relevant to Argentina's claims for Patagonia are fresh (chilled or frozen) beef, other products of ruminants and swine, as well as the live animals themselves.

2.4 Relevant international standards, guidelines, and recommendations

2.4.1 The OIE and its mandate

2.20. The OIE is an intergovernmental organization that was created through an international agreement signed on 25 January 1924, as a response to the need to fight animal diseases at a global level. In May 2003, the OIE changed its name from Office International des Epizooties to World Organisation for Animal Health, but kept its historical acronym.[46] The OIE is tasked with improving animal health worldwide.[47] One of its stated objectives is "sanitary safety" for "international trade in animals and animal products".[48] The OIE's activities in this field focus on rules that OIE members "can use to protect themselves from the introduction of diseases and pathogens, without setting up unjustified sanitary barriers".[49]

2.21. As of October 2014, the OIE had 180 members[50] and their national delegates constitute a World Assembly of Delegates.[51] Both Argentina and the United States are members, as are the third parties to this dispute. In addition to its headquarters in Paris, the OIE has regional and sub-regional offices on every continent.[52]

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[43] *Omnibus Appropriations Act*, 2009, Pub. L. No. 111-8, §737, 123 Stat. 524, 559, (*2009 Omnibus Appropriations Act*), (Exhibit ARG-45/USA-95).

[44] The zoological suborder of "ruminants" ("*Ruminantia*") consists of even-toed ungulate mammals that chew the cud regurgitated from their rumen. For purposes of the United States' regulations, these include "cattle, buffaloes, sheep, goats, deer, antelopes, camels, llamas and giraffes."

[45] Swine refers to any of the animals in the zoological genus "*Sus*", including the domestic pig.

[46] OIE website, *About us*, http://www.oie.int/about-us/ (last accessed 6 October 2014).

[47] OIE website, *Objectives*, http://www.oie.int/index.php?id=53#c201 (last accessed 6 October 2014).

[48] OIE website, *Objectives*, http://www.oie.int/index.php?id=53#c201 (last accessed 6 October 2014).

[49] OIE website, *Objectives*, http://www.oie.int/index.php?id=53#c201 (last accessed 6 October 2014).

[50] OIE website, *The 180 OIE Members*, http://www.oie.int/about-us/our-members/member-countries/ (last accessed 6 October 2014).

[51] OIE website, *The World Assembly of Delegates*, http://www.oie.int/about-us/wo/world-assembly/ (last accessed 6 October 2014).

[52] OIE website, *OIE Regional Representations*, http://www.oie.int/en/about-us/wo/regional-representations/ (last accessed 6 October 2014).

2.4.2 The Terrestrial Code

2.22. The SPS Agreement defines the international standards, guidelines, or recommendations of the OIE as the relevant ones for animal health and zoonoses.[53] The international standards of the OIE are published in the form of the Terrestrial Code, the Aquatic Animal Health Code (the Aquatic Code), the Manual of Diagnostic Test and Vaccines for Terrestrial Animals (the Terrestrial Manual), and the Manual of Diagnostic Tests for Aquatic Animals (the Aquatic Manual). All new standards and revisions are adopted by the World Assembly, generally on a unanimous basis following consideration of proposals made by the relevant Specialist Commissions.[54]. Each OIE member casts one vote. The standard setting process of the OIE is driven by its Members and enables the continuous improvement of standards as new scientific information comes to light.[55]

2.23. This dispute covers trade in FMD-susceptible animals (i.e. ruminants and swine) and products thereof. Therefore, the relevant code is the Terrestrial Code, which contains standards, guidelines and recommendations designed to prevent the introduction of infectious agents and diseases pathogenic to terrestrial animals and humans into the importing country during trade in terrestrial animals, animal genetic material and animal products. It does this through recommendations on sanitary measures to be used by OIE members in establishing the health regulations applying to the import of animals, animal genetic material and animal products. Such recommendations are the result of the continuous work since 1960 of one of the OIE's Specialist Commissions, namely the OIE Terrestrial Animal Health Standards Commission. The Commission draws upon the expertise of internationally renowned specialists to prepare draft texts for new articles of the Terrestrial Code or to revise existing articles in the light of advances in veterinary science.[56]

2.24. The first edition of the Terrestrial Code was published in 1968. The Terrestrial Code is reviewed on an annual basis, with new editions adopted by the World Assembly of Delegates of OIE members each year in May. The twenty-first edition of the Terrestrial Code, which was adopted by the OIE International Committee at the eightieth General Assembly Session in May 2012, was the version in effect at the time of the establishment of the Panel, and thus is the version that the Panel will refer to in this report.[57]

2.4.2.1 Objectives and structure of the Terrestrial Code

2.25. The aim of the Terrestrial Code is to set international "standards for the improvement of terrestrial animal health and welfare and veterinary public health worldwide, including through standards for safe international trade in terrestrial animals (mammals, birds and bees) and their products".[58] According to the Terrestrial Code, these standards consist of health measures based on the latest available scientific evidence and "should be used" by the veterinary authorities of importing and exporting countries to, *inter alia*, prevent the transfer of agents pathogenic to terrestrial animals and/or humans via international trade in terrestrial animals and terrestrial animal products, while avoiding unjustified sanitary barriers to trade.[59] In sum, the Terrestrial Code aspires to assure sanitary safety of international trade in terrestrial animals while avoiding unjustified sanitary barriers to trade.[60]

2.26. The Terrestrial Code is divided into two volumes. Volume I, entitled "General provisions", contains horizontal standards that apply to a wide range of species, production sectors and

[53] Annex A(3)(b) of the SPS Agreement.

[54] According to the document "International Trade: Rights and Obligations of OIE Member Countries", referenced in the OIE's responses to the Panel's questions, the "*OIE standards are contained in the Terrestrial Animal Health Code (Terrestrial Code) and Aquatic Animal Health Code (Aquatic Code) and associated Manuals, for terrestrial and aquatic animals respectively, and in Resolutions of the World Assembly of OIE delegates*."

[55] OIE website, *International Standards*, http://www.oie.int/international-standard-setting/overview/ (last accessed 23 October 2014).

[56] OIE, *Terrestrial Animal Health Code* 21st edn (2012), Vol. 1, p. v.

[57] In their submissions, the parties have referred to different versions of the Terrestrial Code interchangeably. Throughout this Report, the Panel will use the twenty-first edition of the Terrestrial Code when referring to the parties' arguments.

[58] OIE, *Terrestrial Animal Health Code* 21st edn (2012), Vol. 1, p. v.

[59] OIE, *Terrestrial Animal Health Code* 21st edn (2012), Vol. 1, p. v.

[60] OIE, *Terrestrial Animal Health Code* 21st edn (2012), Vol. 1, p. v.

diseases, organized into seven Sections. For instance, this volume includes rules on animal disease diagnosis, surveillance and notification (Section 1), risk analysis (Section 2), quality of veterinary services (Section 3), disease prevention and control (Section 4), trade measures, import/export procedures and veterinary certification (Section 5). The general principles and specific procedures for recognition of official disease status are set out in Chapter 1.6 of the Terrestrial Code, with consolidation and updating of the procedures as set out in Resolutions XXII and XXIII, adopted at the seventy-sixth World Assembly in May 2008.[61]

2.27. Volume II, in turn, contains standards, guidelines and recommendations applicable to specific diseases, including the recommendations regarding disease surveillance, risk assessment, and zoning and compartmentalization. Specifically, Chapter 8.5 sets out international standards, guidelines and recommendations specific to FMD. It aims to provide for safe trade in FMD-susceptible animals and products thereof by recommending particular mitigating measures for both exporting and importing Members to be adopted depending on the FMD-status designation of the exporting country or zone.

2.28. In the OIE context, the term "sanitary measure" means "a measure, such as those described in the various chapters of the Terrestrial Code, destined to protect animal or human health or life within the territory of the OIE Member from risks arising from the entry, establishment and/or spread of a hazard".[62] According to the Terrestrial Code, "risk" refers to the likelihood of the occurrence and the likely magnitude of the biological and economic consequences of an adverse event or effect to animal or human health. "Risk analysis" means the process consisting of hazard identification, risk assessment, risk management and risk communication, while "risk assessment" means the evaluation of the likelihood and the biological and economic consequences of entry, establishment and spread of a hazard within a territory of an importing country.[63]

2.4.2.2 Official recognition of disease status

2.29. In light of the standards set forth in the Terrestrial Code, since 1994 the OIE has been recognizing the status of specific countries or zones with respect to a number of animal diseases. As of 2014, the OIE provides official recognitions for six diseases: African horse sickness (AHS), bovine spongiform encephalopathy (BSE), contagious bovine pleuropneumonia (CBPP), classical swine fever (CSF), *peste des petits ruminants* (PPR), and FMD.[64] The official recognition of the disease status of a country or zone is an "affirmation" that such country or zones "meets the standards set in the Terrestrial Code" with regard to the control of the disease concerned.[65]

2.30. The procedures the OIE uses to issue official recognitions are embodied in Chapter 1.6 of the Terrestrial Code. With respect to FMD specifically, detailed procedures are contained in Article 1.6.4. As a first step in the FMD-status recognition process, OIE members must apply for recognition for a country (i.e. the entire territory of a Member) or a zone as FMD-free where vaccination is or is not practised. To do so, they must provide the OIE with a "dossier" containing the information specified in Article 1.6.4.[66] Such information comprises, *inter alia*, detailed evidence concerning the following factors: geography of the country or zone concerned; livestock industry; organization of the veterinary system; FMD history and eradication strategies; vaccination; animal identification and movement controls; diagnostic capacity; FMD surveillance; prevention strategies, including at the international level; control measures and contingency

[61] OIE website, *Final Report of the 76th General Session, Paris, 25-30 May 2008*, http://www.oie.int/fileadmin/Home/eng/About_us/docs/pdf/A_RF_2008_webpub.pdf (last accessed 7 October 2014). See discussion in section 2.4.2.2 below.

[62] OIE, *Terrestrial Animal Health Code* 21st edn (2012), Vol. 1, p. xvii.

[63] OIE, *Terrestrial Animal Health Code* 21st edn (2012), Vol. 1, p. xvii.

[64] See OIE website, *Animal Health in the World – Overview*, http://www.oie.int/animal-health-in-the-world/ (last accessed 9 January 2015). Previously, the OIE also provided official recognitions for rinderpest. However, the world was officially declared free of rinderpest in 2011. See OIE website, *Animal Disease Information Summaries – Rinderpest*, http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/RINDERPEST-EN.pdf (last accessed 13 February 2015).

[65] OIE's response to Panel question No. 5 (emphasis omitted).

[66] OIE's response to Panel question No. 5.

planning; and compliance with the Terrestrial Code.[67] The OIE does not initiate the recognition procedure on its own initiative. Therefore, Members which do not apply or fail to meet the requirements for recognition do not have an official FMD-status determination.[68]

2.31. The applicant Member's dossier is evaluated by an *ad hoc* expert Group, usually composed of 2 or 3 individuals covering a broad range of relevant expertise.[69] The Group conducts an assessment of whether the Member complies with the requirements set forth in Chapter 8.5 of the Terrestrial Code, and provides the OIE Scientific Commission[70] with a document summarising their findings and recommendations.[71] In turn, the Scientific Commission reviews the *ad hoc* expert Group's document and issues a report listing the countries or zones that are proposed for official recognition of a particular disease status for consideration of OIE members at the annual World Assembly.[72] A 60-day "comment period" is provided and the comments expressed by OIE members are considered by the Scientific Commission before finalizing the decision proposal.[73] At any stage of the process, the Scientific Commission may ask the Director General to deploy a mission to the applicant Member.[74] As the last step, the OIE World Assembly adopts a resolution which officially recognizes the applicant country or zone as FMD-free where vaccination is or is not practised.[75] Members who have an official recognition must submit an updated dossier annually and the decision on official recognition is re-evaluated.[76]

2.32. When a country or zone previously recognized as FMD-free where vaccination is or is not practised experiences an FMD outbreak, its official disease status is suspended immediately.[77] In such a case, the Member concerned may apply for recovery of the status pursuant to the procedures set forth in Article 8.5.9 of the Terrestrial Code. The organ in charge of the recovery procedure is the Scientific Commission, which "has the mandate, on request, to reinstate official status" without "prior consultation with the World Assembly".[78] In order to reach its determination on a recovery request, the Commission may call for a new evaluation by the *ad hoc* expert Group or undertake the assessment itself.[79]

2.4.3 Relevant standards, guidelines or recommendations invoked by the parties

2.33. Argentina claims that the United States has acted inconsistently with Article 3.1 of the SPS Agreement because it has not based its measures on the following provisions of the OIE Terrestrial Code which it argues constitute relevant international standards, guidelines or recommendations: (a) Chapter 8.5 (in particular Articles 8.5.4, 8.5.5, 8.5.22, 8.5.23, and 8.5.25); (b) Chapters 4.1-4.4; and (c) Sections 1-5.[80]

[67] Article 1.6.4 of the Terrestrial Code. The information requirements differ partially depending on whether a Member is applying for FMD-free status with or without vaccination and whether its application covers its whole territory or only a zone therein.

[68] Transcript of the Panel's meeting with the scientific experts on 2 September 2014 ("Transcript of the meeting"), para. 1.20.

[69] OIE's response to Panel question No. 13.

[70] OIE's response to Panel question No. 5. Founded in 1946, the Scientific Commission is elected by the World Assembly for a 3-year term. In addition to evaluating Members' dossiers for disease recognition, the Commission assists in identifying the most appropriate strategies and measures for disease prevention and control. See OIE website, *Specialist Commissions*, http://www.oie.int/about-us/wo/commissions-master/ (last accessed 10 January 2015).

[71] OIE's response to Panel question No. 13.

[72] OIE's responses to Panel questions Nos. 5 and 13. The OIE explained that a list of those applications that do not meet the requirements set forth in Chapter 8.5 of the Terrestrial Code is not circulated to the Members. (See Transcript of the meeting, para. 1.24)

[73] OIE's response to Panel question No. 5. See also OIE's response to Panel question No. 13.

[74] OIE's response to Panel question No. 13.

[75] OIE's response to Panel question No. 5.

[76] OIE's response to Panel question No. 13.

[77] OIE's response to Panel question No. 10.

[78] OIE's response to Panel question No. 13.

[79] OIE's response to Panel question No. 13.

[80] Argentina's response to Panel question No. 13 following the first substantive meeting.

2.34. According to the United States, the relevant international standards, guidelines or recommendations in this dispute are contained in Article 1.6.5, Chapter 2.1, and Chapter 8.5 of the Terrestrial Code.[81]

2.5 The parties' domestic FMD situations

2.5.1 Argentina

2.35. To provide context for the various different regions of Argentina and the disease status thereof, we provide a map of Argentina and the neighbouring territories below.[82]

[81] United States' response to Panel question No. 13 following the first substantive meeting. Specifically, in comparing the procedures set forth in 9 CFR 92.2 and 9 CFR 92.4 with the Terrestrial Code, the United States refers to Articles 1.6.5, 8.5.2-8.5.5, 8.5.7, 8.5.9, 8.5.22, 8.5.23, 8.5.26, and 8.5.34 thereof. See United States' response to Panel question No. 13 following the first substantive meeting.

[82] The map is based on that provided by the United States in 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 47.

2.5.1.1 Northern Argentina

2.36. The OIE recognized the entire Argentine territory as FMD-free where vaccination is not practised in 2000.[83] This FMD-status determination was suspended in May 2001[84] in light of multiple FMD outbreaks in the Argentine territory between July 2000 and April 2001. In July 2003, the OIE recognized the Argentine territory located north of the Rio Negro (Northern Argentina) as FMD-free where vaccination is practised.[85] In August 2003, the recognition was suspended as a result of an FMD outbreak in the Province of Salta.[86] It was reinstated in 2005[87] and suspended again in 2006 as a result of one further FMD outbreak in the Province of Corrientes.[88] Northern Argentina's disease status of FMD-free where vaccination is practised was reinstated in 2007[89] and has been renewed annually thereafter. Finally, in 2011 the OIE recognized the border protection zone established along the Argentine border with Bolivia, Paraguay and Brazil as FMD-free where vaccination is practised.[90]

2.5.1.2 Patagonia

2.37. Patagonia South has not had an FMD outbreak since 1976, whereas Patagonia North B had its last outbreak in 1994.[91] In 2002, the OIE recognized Patagonia South as FMD-free where vaccination is not practised.[92] In 2007, the same recognition was extended to Patagonia North B.[93]

2.5.2 United States

2.38. The United States had its last FMD outbreak in 1929.[94] The United States has been FMD-free for over eighty years and does not vaccinate its cattle or other FMD-susceptible species.[95] The United States is designated by the OIE as an area that is FMD-free where vaccination is not practised.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Argentina argues that the measures at issue are SPS measures covered by Article 1.1 and Annex A(1)(a).

3.2. Argentina requests the Panel to find that the application of the prohibitions contained in 9 CFR 94.1(b) and the 2001 Regulations to importation of fresh (chilled or frozen) beef from Argentina:

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[83] OIE International Committee, Resolution XII, *Recognition of the Foot and Mouth Disease Status of Member Countries*, 68th General Session (22-26 May 2000), http://www.oie.int/doc/ged/D7926.PDF (last accessed 8 October 2014).

[84] OIE International Committee, Resolution XVII, *Recognition of the Foot and Mouth Disease Status of Member Countries*, 69th General Session (27 May-1 June 2001), (OIE Resolution XVII of 2001), (Exhibit ARG-103).

[85] OIE Foot and Mouth Disease and Other Epizootics Commission, *Report of the Meeting* (16, 17, and 22 May 2003), http://www.oie.int/fileadmin/Home/eng/Internationa_Standard_Setting/docs/pdf/SCAD/A_SCFM2003M.pdf (last accessed 8 October 2014).

[86] Report of the Meeting of the OIE Scientific Commission for Animal Diseases (December 2003), (Exhibit USA-81).

[87] OIE World Assembly, Resolution XX, *Recognition of the Foot and Mouth Disease Status of Member Countries*, 73rd General Session (22-27 May 2005), (OIE Resolution XX of 2005), (Exhibit ARG-95).

[88] OIE, Final Report, 74th General Session (2006), (Exhibit USA-55).

[89] OIE World Assembly, Resolution XXI, *Recognition of the Foot and Mouth Disease Status of Member Countries*, 75th General Session (20-25 May 2007), (OIE Resolution XXI of 2007), (Exhibit ARG-10).

[90] OIE World Assembly, Resolution No. 14, *Recognition of the Foot and Mouth Disease Status of Members*, 79th General Session (22-27 May 2011), (OIE Resolution 14 of 2011), (Exhibit ARG-12).

[91] Argentina's first written submission, para. 3.

[92] OIE World Assembly, Resolution XVII, *Recognition of the Foot and Mouth Disease Status of Member Countries*, 70th General Session (26-31 May 2002) (OIE Resolution XVII of 2002), (Exhibit ARG-89).

[93] OIE Resolution XXI of 2007, (Exhibit ARG-10).

[94] United States' first written submission, para. 67.

[95] United States' first written submission, para. 105.

- is inconsistent with the United States' obligations under Articles 1.1, 2.2, 2.3, 3.1, 3.3, 5.1, 5.2, 5.4, 5.6, and 10.1 of the SPS Agreement;

- is inconsistent with the United States' obligations under Articles I:1 and XI:1 of the GATT 1994.

3.3. Argentina requests that, to the extent the Panel were to find that the application of the prohibitions contained in 9 CFR 94.1(b) to importation of Argentine fresh (chilled or frozen) beef is inconsistent with any of the provisions of the covered Agreements, it also find that the 2001 Regulations are, by implication, inconsistent with the same provisions because they bear an "instrumental relationship" with the prohibitions under 9 CFR 94.1(b).[96]

3.4. Argentina further requests that the Panel find that the application of the prohibitions contained in 9 CFR 94 to importation of animals, meat and other animal products from the Patagonia region:

- is inconsistent with the United States' obligations under Articles 1.1, 2.2, 2.3, 3.1, 3.3, 5.1, 5.2, 5.4, 5.6, 6.1, 6.2, and 10.1 of the SPS Agreement;

- is inconsistent with the United States' obligations under Articles I:1 and XI:1 of the GATT 1994.

3.5. Argentina requests the Panel to find that the United States' application of the approval procedure detailed in 9 CFR 92.2 to imports of fresh (chilled or frozen) beef from Argentina was not undertaken and completed without undue delay and is thus inconsistent with the United States' obligations under Article 8 in conjunction with Annex C(1)(a) of the SPS Agreement. Argentina further requests the Panel to find that such an approval process is inconsistent with Article 8 in conjunction with Annex C(1)(b) of the SPS Agreement because the United States: (i) neither published the standard processing period of each procedure nor did it communicate the anticipated processing to Argentina upon request[97]; (ii) did not transmit as soon as possible the results of the procedures in a precise and complete manner to Argentina so that corrective action may be taken if necessary[98]; and (iii) did not inform Argentina, upon request, of the stage of the procedures, explaining any delay.[99]

3.6. Argentina requests the Panel to find that the United States' application of the approval procedure detailed in 9 CFR 92.2 to the request to recognize the Patagonia region as FMD-free was not undertaken and completed without undue delay and is thus inconsistent with the United States' obligations under Article 8 in conjunction with Annex C(1)(a) of the SPS Agreement. Argentina further requests the Panel to find that such an approval process is inconsistent with Article 8 in conjunction with Annex C(1)(b) of the SPS Agreement because United States: (i) neither published the standard processing period of each procedure nor did it communicate the anticipated processing to Argentina upon request[100]; (ii) did not transmit as soon as possible the results of the procedures in a precise and complete manner to Argentina so that corrective action may be taken if necessary[101]; and (iii) did not inform Argentina, upon request, of the stage of the procedures, explaining any delay.[102]

3.7. Finally, Argentina requests the Panel to find that Section 737 of the *2009 Omnibus Appropriations Act* contributed to the United States' undue delay in approving Argentina's requests by "effectively block[ing] any progress on [its] requests before APHIS"[103] and "impeding the

[96] Argentina's first written submission, para. 164.
[97] Argentina's first written submission, paras. 655-656.
[98] Argentina's first written submission, paras. 657-658.
[99] Argentina's first written submission, paras. 659-660.
[100] Argentina's first written submission, paras. 687-688.
[101] Argentina's first written submission, para. 689.
[102] Argentina's first written submission, paras. 690-691.
[103] Argentina's first written submission, para. 699.

completion of the approval process on Argentina's two pending applications"[104], inconsistently with Article 8 and Annex C(1)(a) of the SPS Agreement.[105]

3.8. In light of the above, Argentina requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the United States bring its measures into conformity with its WTO obligations.

3.9. The United States requests that the Panel reject Argentina' claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their integrated executive summaries, provided to the Panel in accordance with paragraph 18 of the Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3 and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, China, and the European Union are reflected in their integrated executive summaries, provided in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3 and C-4). Neither India nor the Republic of Korea submitted written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 24 February 2015, the Panel issued its Interim Report to the parties. On 10 March 2015, Argentina and the United States each submitted written requests for the review of the Interim Report. Neither party requested an interim review meeting. On 24 March 2015, both parties submitted comments on the other's requests for review.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out the Panel's response to the parties' requests for review of precise aspects of the Report made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. In addition, the Panel also corrected a number of clerical and other non-substantive errors throughout the Report, including those identified by the parties.[106]

6.1 Whether APHIS' review processes of Argentina's requests were undertaken and completed without undue delay

6.3. Argentina requests that the Panel clarify its reasoning in paragraph 7.117 that some indicators may be used to gauge the reasonableness of the timing of APHIS' review processes. In Argentina's view, the Panel should expressly refer to the absence of a point of reference in APHIS' regulations, thus implying that APHIS acted improperly by not publishing a standard practice. Argentina suggests adding a footnote to APHIS' 1997 policy document, submitted as Exhibit ARG-129, which provides "an overview of the actual processing times experienced by APHIS" in applying Section 92.2 to other Members.[107] The United States opposes Argentina's request because the timeframes of APHIS' review processes for countries or regions other than Northern Argentina and Patagonia, contained in Exhibit ARG-129, are "inapposite" to the question whether APHIS' processes incurred undue delays in this dispute.[108]

[104] Argentina's first written submission, para. 701.
[105] Argentina's first written submission, paras. 717 and 721.
[106] In particular, the Panel corrected the clerical errors Argentina identified in paras. 7.4, 7.94, 7.170, 7.237 and footnote 654 thereto, 7.350, 7.482, 7.522, 7.534, 7.542, 7.555, 7.629, 8.1, and 8.3. Argentina's request for a correction of a clerical error in para. 7.168 is discussed in para. 6.9 below. The Panel did not make the correction Argentina requested in para. 7.491 because the language concerned is a direct quotation from the relevant exhibit.
[107] Argentina's request for review of the Interim Report, p. 2.
[108] United States' comments on Argentina's request for review of the Interim Report, para. 2.

6.4. The Panel does not agree with Argentina that the discussion about the absence of a point of reference should be altered to read "absence of a point of reference in APHIS' regulations." A determination of whether a procedure incurs an undue delay under Annex C(1)(a) is not necessarily limited to an assessment of the procedures adopted by the importing Member. This is why the Panel also referred to the guidelines of the OIE in the subsequent sentence. Furthermore, Annex C(1)(b) contemplates that a Member will not publish a standard processing period, but may alternatively communicate the anticipated processing period to an applicant upon request. Therefore, we do not see the relevance of whether APHIS has a standard processing period in its own regulations. Moreover, the Panel notes that this is a general introductory paragraph to the discussion. When the Panel discusses the indicators in more detail in paragraphs 7.134 and 7.154, we refer specifically to the relevant APHIS policies and processing times experienced by other applicants. We therefore see no need to make the change Argentina requests.

6.5. Argentina also requests that the Panel revise its characterization of Section 737 of the *2009 Omnibus Appropriations Act* in paragraphs 7.139-7.140; to consider the measure's "dilatory effect" on APHIS' review processes of Argentina's requests, and to complete the analysis on Argentina's claims that Section 737 caused undue delay.[109] In particular, Argentina argues that the Secretary of Agriculture's evaluation and report to Congress referred to in Section 737 constitute "supplementary requirements" outside APHIS' review processes under 9 CFR 92.2, which lack a scientific basis and are applied solely on imports from Argentina.[110] Further, Argentina contends, the United States' representative at the SPS Committee repeatedly referred to the requirements in Section 737 to respond to Argentina's concerns concerning the timing of APHIS' review processes.[111] In light of the above, Argentina maintains that Section 737 did contribute to the alleged undue delays in APHIS' review processes.

6.6. The United States requests the Panel to reject Argentina's request, as the Panel's reasoning in paragraphs 7.139-7.140 accurately reflects the fact that Section 737 did not prevent APHIS from continuing with its risk assessments and, in any event, ceased to have legal force after 30 September 2009.[112]

6.7. The Panel notes that the implication of Argentina's argument is that because Section 737 is a "supplementary" requirement to APHIS' processes, it somehow *ipso facto* creates a "dilatory" effect on the review of Argentina's requests in a manner inconsistent with Article 8 and Annex C(1)(a). We have found that Section 737 is an SPS measure in its own right. We concur with the panel in *US – Poultry (China)* that such a measure is "Congress' way of exerting control over the activities of an Executive Branch agency responsible for implementing substantive laws and regulations on SPS matters."[113] We accept that in some cases the institution of such legislative review of administrative decisions *could* result in an undue delay. However, we do not consider that an undue delay occurs *automatically* whenever a legislature wishes to exert oversight authority over the executive.

6.8. Although the United States' representative's statements regarding the need to comply with an expired law might have been expressed more clearly, the fact remains that the law ceased to have any legal effect at the end of the 2009 fiscal year. Furthermore, as the Panel concluded, on the face of the law itself the Department of Agriculture was not prevented from completing the review process of Argentina's requests – it simply had to provide a report to Congress on the requisite factors. Based on the above, the Panel declines to make the changes requested by Argentina.

6.9. Further, Argentina asks the Panel to modify its description of SENASA Resolution 1282/2008 in paragraph 7.168 by stating that it "did not relax" the controls between Patagonia North B and Patagonia South.[114]

[109] Argentina's request for review of the Interim Report, pp. 2-3.
[110] Argentina's request for review of the Interim Report, p. 3.
[111] Argentina's request for review of the Interim Report, p. 3.
[112] United States' comments on Argentina's request for review of the Interim Report, para. 4.
[113] Panel Report, *US – Poultry (China)*, para. 7.119.
[114] Argentina's request for review of the Interim Report, p. 9.

6.10. The United States opposes Argentina's request on the ground that Resolution 1282/2008 did relax controls between Patagonia North B and Patagonia South as "part of the process of merging the two separate areas into one Patagonia region".[115]

6.11. The Panel recognizes that the use of the term "relaxed" might cause confusion and imply that the border controls were somehow diminished in effectiveness. However, on its face, Resolution 1282/2008 did modify aspects of the controls between Patagonia North B and Patagonia South as part of the process of merging the two separate areas into one region.[116] In an effort to provide more clarity, the Panel will change paragraph 7.168 to state that "Resolution 1282/2008 modified the regime of controls between Patagonia North B and Patagonia South as part of the process of merging the two separate areas into one Patagonia region …".

6.12. Finally, Argentina requests that the Panel's analysis reflect Argentina's strong disagreement with the United States' reference to SENASA's "history of intentional concealment" of FMD outbreaks in paragraph 7.90. In particular, Argentina asks the Panel add language to the effect that Argentina considers the United States' allegations to be contradicted by the facts on record, statements made by APHIS before and after the initiation of the current proceedings, and the assessments made by the sanitary services of other Members. Furthermore, Argentina requests that the Panel add language from Argentina impugning the United States' motives in raising this issue.[117]

6.13. The United States opposes Argentina's request. In its view, paragraph 7.90 correctly presents the United States' arguments. Further, in its opinion, the factual statements to which Argentina objects are documented in the United States' submissions and supported by the evidence on the record.[118]

6.14. The Panel takes note of Argentina's disagreement with the characterizations made by the United States. In paragraph 7.136, the Panel has already found those characterizations to have no basis in the facts on the record. Similarly, the Panel does not believe there is a basis on the record for Argentina's characterization of the United States' motives. Furthermore, the Panel notes that paragraph 7.90 is a summary of the *United States'* arguments. It is not appropriate, in our view, to insert commentary from Argentina into this paragraph. However, in the interest of presenting a complete reflection of the views of the parties, the Panel will add language to paragraph 7.132 so as to reflect Argentina's strong disagreement.

6.15. For its part, the United States requests the Panel to modify its description, in paragraph 7.157, of documents APHIS published in 2014 with respect to Argentina's request for the recognition of Patagonia under 9 CFR 94.1(a) so as to reflect their formal names.[119] In particular, the United States asks the Panel to state that on 23 January 2014 APHIS "published a risk assessment for Patagonia in a Notice of Availability that recognized the region as FMD free", and that on 29 August 2014 "APHIS published a Notice of Determination recognizing Patagonia as FMD-free".[120]

6.16. Argentina asserts that the Panel should reject the United States' request, as the risk analysis is not "in" the Notice of Availability, but rather constitutes a "distinct and separate" document.[121]

6.17. The Panel wishes to ensure that its Report is clear and in that sense agrees with the United States that it should refer to the relevant documents by their official titles as published. Therefore, the Panel will make the requested changes to paragraph 7.157.

6.18. Further, the United States requests that the Panel modify entry 27 in Tables 1 and 2, contained in paragraphs 7.120 and 7.146 respectively, by adding that, during consultations carried

[115] United States' comments on Argentina's request for review of the Interim Report, para. 18.
[116] See para. 7.527 below.
[117] Argentina's request for review of the Interim Report, p. 8.
[118] United States' comments on Argentina's request for review of the Interim Report, para. 17.
[119] United States' request for review of the Interim Report, para. 3.
[120] United States' request for review of the Interim Report, para. 3.
[121] Argentina's comments on the United States' request for review of the Interim Report, p. 2.

out pursuant to Article 4 of the DSU, the United States informed Argentina that in order to move forward with APHIS' review processes of Argentina's requests, APHIS would need to schedule a new site visit to verify the FMD conditions in Northern Argentina and Patagonia. In the same vein, the United States requests that the Panel to modify entry 30 in Tables 1 and 2, contained in paragraphs 7.120 and 7.146 respectively, to the effect that on 13 March 2013 APHIS reiterated its request for authorization to conduct a site visit in Northern Argentina and Patagonia. The United States also asks the Panel to reflect such modifications in the chronology contained in Appendix 1 to the Report.

6.19. Argentina disagrees with the United States' requests, which it sees as "a new argument on a matter previously considered settled when the Panel issued its final timeline".[122] According to Argentina, the United States did not officially request a site visit during the consultations in November 2012, but rather did so in March 2013.[123] Further, Argentina argues, Article 4.6 of the DSU prevents the United States from basing legal arguments on the exchange between the parties during consultations.[124]

6.20. The United States' request entails that the Panel make a conclusion as to what took place during the consultations held pursuant to Article 4 of the DSU. We recall that, under Article 4.6 of the DSU consultations are confidential. A panel is not privy to the record of those discussions and should not attempt to create one.[125] In light of the above, the Panel will not make the changes the United States requests.

6.2 The United States' appropriate level of protection for foot-and-mouth disease

6.21. Argentina disagrees with the Panel's conclusion in paragraphs 7.377-7.387 that the language of 7 USC 8303(a), which authorizes the Secretary of Agriculture to prohibit or restrict importation or entry "of animals, articles, or means of conveyance" when this is necessary to "prevent the introduction into or dissemination within the United States of any pest or disease of livestock"[126], constitutes a valid ALOP.[127] This is because, Argentina asserts, such a statutory authorization is too "vague, formless and implicitly arbitrary".[128]

6.22. The United States observes that Argentina is not requesting any further review on the part of the Panel; therefore, the Panel should not change paragraphs 7.377-7.387.[129]

6.23. The Panel notes that Argentina makes its statements without making a specific request for review of the Panel's finding. Furthermore, the Panel notes that its determination of the United States' ALOP is based on arguments put forward in the United States' first written submission, its later citation to 7 USC 8303(a) as the source of the language in its first written submission, as well as an examination of the United States' actual measures. Therefore, the Panel will make no changes with respect to its conclusions on the United States' ALOP.

6.24. Next, Argentina requests that the Panel delete paragraph 7.383, which it considers as disconnected from the arguments of the parties and the facts in dispute.[130] In its view, the Panel failed to properly characterize Argentina's position, as Argentina never argued that "the measures applied to different Members need to be identical".[131] Moreover, according to Argentina, the Panel conflates the United States' lines of argument before and after the United States presented 7 USC 8303(a) as its ALOP.[132]

[122] Argentina's comments on the United States' request for review of the Interim Report, p. 4.
[123] Argentina's comments on the United States' request for review of the Interim Report, p. 4.
[124] Argentina's comments on the United States' request for review of the Interim Report, p. 4.
[125] See e.g. Appellate Body Report, *US – Upland Cotton*, para. 287.
[126] 7 USC § 8303(a), (Exhibit USA-75).
[127] Argentina's request for review of the Interim Report, p. 3.
[128] Argentina's request for review of the Interim Report, pp. 3-4.
[129] United States' comments on Argentina's request for review of the Interim Report, para. 5.
[130] Argentina's request for review of the Interim Report, p. 4.
[131] Argentina's request for review of the Interim Report, p. 4.
[132] Argentina's request for review of the Interim Report, p. 4.

6.25. The United States disagrees with Argentina and argues that the Panel's reasoning is correct and properly reflects Argentina's arguments.[133]

6.26. The Panel fails to see how paragraph 7.383 is inapposite to the arguments Argentina adduced. The Panel never implied that Argentina argued that measures applied to different Members need to be identical. However, Argentina did argue that APHIS' identification of different levels of *risk* in different Member territories had some bearing on the determination of the appropriate level of *protection*. It is this argument that the Panel is addressing in paragraph 7.383. In that vein, we find the paragraph and its citation to the panel report in *Australia – Salmon* relevant to our analysis. The Panel will not delete the paragraph.

6.27. Finally, Argentina requests that the Panel modify the language of footnote 919 (footnote 968 in the Final Report) in the part where it states that the Panel should take into account the guidance provided by the panel report in *India – Agricultural Products* on the legal interpretation of the SPS Agreement "as necessary". In particular, Argentina asks the Panel to replace the words "as necessary" with the words "as appropriate".[134]

6.28. The United States does not comment on Argentina's request.

6.29. The Panel agrees with Argentina with respect to the language used to refer to the panel report in *India – Agricultural Products.* However, upon review, the Panel feels it is appropriate to move this language to the first instance where we cite to that report. Therefore, we will delete the reference in footnote 968 and make the necessary change to footnote 171.

6.3 Whether the United States took into account the objective of minimizing negative trade effects when determining its appropriate level of sanitary protection

6.30. Argentina requests the Panel to "reconsider" its reasoning in paragraphs 7.405-7.408[135] that the United States has a right to impose a zero risk ALOP for FMD. Argentina maintains that the United States has explicitly rejected that it applies a general ALOP with zero risk; therefore, the Panel's reference is unnecessary.[136] Further, in Argentina's opinion, any suggestion on the Panel's part that a Member may adopt different ALOPs for different Members would sit at odds with prior jurisprudence on Articles 2.3, 5.5, and 5.6 of the SPS Agreement.[137] Finally, Argentina argues that the Appellate Body's finding in *Australia – Salmon* referred to by the Panel is a *dictum* that does not prevent a conclusion that a Member is required properly to articulate its ALOP under Article 5.4.[138]

6.31. The United States disagrees with Argentina, which, it argues, misunderstands the Panel's discussion in paragraphs 7.405-7-408. According to the United States, the Panel's central point in those paragraphs is not that the United States does not apply an ALOP with zero risk, but rather that Argentina has not demonstrated that the United States failed to take into consideration the objective of minimizing negative trade effects when determining its ALOP.[139] For the United States', the Panel correctly found that even the adoption of a zero ALOP is not sufficient to show that a Member failed to consider the objective of minimizing negative trade effects.[140]

6.32. Argentina's request for review misconstrues the Panel's reasoning. We recognize that the reasoning of the Appellate Body in *Australia – Salmon* is written in the context of explaining an un-appealed portion of the panel report in that case. We nevertheless find value in the Appellate Body's clarification that the reasoning of that panel should not be construed to mean that a Member may not adopt a "zero risk" ALOP. In that light, we continue to find the reasoning persuasive.

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[133] United States' comments on Argentina's request for review of the Interim Report, paras. 6-8.
[134] Argentina's request for review of the Interim Report, p. 4.
[135] Argentina's request for review of the Interim Report, p. 5.
[136] Argentina's request for review of the Interim Report, p. 5.
[137] Argentina's request for review of the Interim Report, p. 5.
[138] Argentina's request for review of the Interim Report, p. 5.
[139] United States' comments on Argentina's request for review of the Interim Report, para. 10.
[140] United States' comments on Argentina's request for review of the Interim Report, para. 11.

6.33. The reference to a Member's right to impose an ALOP with zero risk is not related specifically to the facts of this case or the United States' ALOP for FMD, which the Panel has concluded is not zero. Rather, the Panel is using this conclusion – the right of a Member to have a zero risk ALOP – as an interpretative tool to assist the Panel in understanding what is required to establish a *prima facie* case under Article 5.4. The Panel maintains its conclusion that, in light of the reasoning of the Appellate Body in *Australia – Salmon*, Argentina's allegation that the United States treats Argentina "as if" the United States' ALOP were zero is not sufficient, in and of itself, to establish a *prima facie* case of inconsistency with Article 5.4.

6.34. Finally, the Panel can find nowhere in paragraphs 7.405-7.408 where it suggests that a Member may adopt different ALOPs for different Members. Indeed, it is Argentina who claims, in its arguments, that this is what the United States has done and that such conduct somehow relates to the obligation in Article 5.4. Argentina is correct that accepting such ability would depart from the interpretations of prior panels of Article 5.5 – which is the provision of the SPS Agreement that deals with the consistent application of the concept of the ALOP. We note that Argentina did not make a claim under Article 5.5.

6.35. Based on the foregoing, the Panel will not reconsider its reasoning in these paragraphs.

6.4 Whether the United States' measures are more trade-restrictive than required to achieve the United States' ALOP

6.36. The United States request that the Panel modify its description of the United States' argument in paragraph 7.421 with respect to the relationship between Articles 5.6 and 5.7 of the SPS Agreement. Specifically, it asks the Panel to specify that, in the United States' view, an assessment of a less trade-restrictive alternative under Article 5.6 could not be completed as of the date of the Panel's establishment due to the insufficiency of the scientific evidence available at that time, which made the United States' measures fall within the scope of Article 5.7.[141]

6.37. Argentina opposes the United States' request on the ground that it contains "factually inaccurate statements and arguments … not previously made".[142] For Argentina, the United States' argument that the insufficiency of the evidence concerning Argentina's ability to mitigate and control FMD at the time of the Panel's establishment justified the adoption of a "valid provisional measure" under Article 5.7 constitutes a new argument.[143]

6.38. The Panel notes that the United States did make these arguments before the Panel and sees no reason not to include them in the summary of the United States' arguments. Therefore, we will make the requisite modifications to paragraph 7.421. The Panel takes no position on the United States' view.

6.39. The United States also requests that the Panel modify its description of the United States' argument in paragraph 7.426 with respect to the 2014 risk evaluations for Northern Argentina and Patagonia submitted by APHIS during these proceedings. In particular, the United States asserts that it did not argue that the documents in question were outside the Panel's consideration, but rather that since the information contained therein postdates the date of the Panel's establishment, it cannot be used to support Argentina's argument that the scientific evidence was sufficient on that date.[144]

6.40. Argentina requests that the Panel reject the United States' request, because the United States has not previously expressed that opinion. Argentina also notes that there is a great deal of information in those exhibits that pre-dated the Panel's establishment.[145]

6.41. As we understand it, the requested change is to add a summary of the United States' response to Panel question No. 53 following the second substantive meeting, and thus is not a new

[141] United States' request for review of the Interim Report, para. 4.
[142] Argentina's comments on the United States' request for review of the Interim Report, p. 2.
[143] Argentina's comments on the United States' request for review of the Interim Report, pp. 2-3.
[144] United States' request for review of the Interim Report, para. 5.
[145] Argentina's comments on the United States' request for review of the Interim Report, p. 3 (referring to United States' response to Panel question No. 53 following the second substantive meeting).

argument raised during the Interim Review stage. Therefore, we see no reason not to include the response in the summary of the United States' arguments and will make the appropriate modification to paragraph 7.426.

6.5 Special and differential treatment

6.42. Albeit agreeing with the Panel's conclusion in paragraphs 7.689-7.691 that Article 10.1 of the SPS Agreement imposes a positive obligation on Members, Argentina expresses the concern that the Panel's interpretation of said obligation "sets the bar so high" for a complaining Member that the provision may become *de facto* unenforceable.[146]

6.43. The United States observes that Argentina does not make any request for review; therefore, the Panel should not change the paragraphs in question.[147]

6.44. The Panel notes that Argentina makes no specific request for review with respect to these paragraphs. The Panel also recalls that it does not address the burden of proof under Article 10.1 in the paragraphs referred to by Argentina. Therefore, the Panel will not make any changes.

6.45. Argentina requests that the Panel reconsider its finding in paragraphs 7.695-7.700 that the Appellate Body's interpretation of the word "consider" in *China – GOES* does not provide guidance as to the allocation of the burden of proof under Article 10.1 and "adopt the standard and approach found in the Appellate Body Report in *China – GOES*".[148]. For Argentina, the fact that the Panel did not follow the Appellate Body's approach and relied instead on the panel in *EC – Approval and Marketing of Biotech Products* risks "setting an evidentiary basis that cannot be met" by most complaining Members.

6.46. The United States asks the Panel to reject Argentina's request, as it considers that the Panel properly relied on a "solidly reasoned panel report" relating to Article 10.1 instead of drawing upon "inapposite reasoning" in another report.[149]

6.47. The Panel disagrees with Argentina and will not accede to its request. First, as explained in paragraph 7.697, the reasoning of the panel in *EC – Approval and Marketing of Biotech Products* is directly relevant. This cannot be said of an Appellate Body report dealing with similar language but within the very specific context of the Anti-Dumping and SCM Agreements. Second, the Panel specifically stated in paragraph 7.698 that while the absence of documentation is not sufficient on its own to make a *prima facie* case of inconsistency with Article 10.1, it is relevant evidence and has probative value particularly when a developing country has brought its special need to the attention of the importing Member. The Panel does not view this as an insurmountable bar to establishing a claim under Article 10.1.

6.48. Finally, Argentina requests that the Panel delete the last three sentences of paragraph 7.710, where it states that Article 10.1 imposes an obligation not only on developed country Members, but indeed on all Members. In Argentina's view, the Panel's reading of the provision at issue is not supported by the plain meaning of its terms read in their context. Moreover, Argentina contends that the effect of the Panel's interpretation would be to "engender broader support for eviscerating the effectiveness of the provision by scaring developing country Members into thinking it would imply fiscal and resource commitments beyond their means".[150] Argentina accepts that the types of assistance it refers to might be "more of the nature" of what is covered by Article 9.2. However, Argentina argues that the Panel's reasoning would thus also implicitly undermine Article 9. [151]

[146] Argentina's request for review of the Interim Report, p. 6.
[147] United States' comments on Argentina's request for review of the Interim Report, para. 13.
[148] Argentina's request for review of the Interim Report, p. 6.
[149] United States' comments on Argentina's request for review of the Interim Report, para. 14.
[150] Argentina's request for review of the Interim Report, p. 7.
[151] Argentina's request for review of the Interim Report, p. 7.

6.49. The United States opposes Argentina's request. In its view, the language of Article 10.1 does not limit the applicability of the obligations therein to developed country Members.[152]

6.50. The Panel agrees with the United States that the language of Article 10.1 nowhere suggests that the obligations contained therein only attach to developed country Members. We disagree with Argentina's argument that it is the *Panel's reading* of the provision which would impose an obligation on developing countries to provide assistance to their trading partners. The Panel explicitly noted in paragraph 7.710 that "it would be difficult to find that Article 10.1 includes an obligation for the importing Member to take specific action such as correcting and overcoming failures of capacity in the exporting developing country." This language does not support Argentina's argument that the *Panel's* interpretation could lead to fiscal and resource commitments being imposed on developing and least developing country Members. However, in the interest of clarity the Panel will amend paragraph 7.710 to specify that the obligations relating to technical assistance fall under Article 9 and will delete the reference to which Members the obligation in Article 10.1 applies.

6.6 Argentina's claims under the GATT 1994

6.51. Without making a specific request for review, Argentina expresses its strong disagreement with the Panel's decision in paragraphs 7.730-7.732 to exercise judicial economy on its claims under Article XI:1 of the GATT 1994. In Argentina's opinion, the "outright prohibition" maintained by the United States on imports of FMD-susceptible animals and animal products constitutes a "flagran[t]" example of violation of Article XI:1.[153]

6.52. The United States observes that Argentina does not make any request for review; therefore, the Panel should not change the paragraphs in question.[154]

6.53. The Panel disagrees with Argentina that providing a finding on Articles I and XI of the GATT 1994 would aid in the resolution of this dispute. As noted in paragraph 7.730 of the Report, all prior panels, except one[155], before which claims have been raised under the SPS Agreement as well as the GATT 1994 have declined to rule on the GATT 1994 claims. All those panels considered that such rulings would not add anything more to the positive resolution of the dispute. The rulings of those panels are consistent with Article 2.4 of the SPS Agreement which states that all SPS measures which conform to the provisions of the SPS Agreement shall be presumed to be in accordance with the obligations in the GATT 1994. We will modify paragraph 7.730 to further clarify our decision in this regard by making specific reference to Article 2.4 of the SPS Agreement.

7 FINDINGS

7.1 Order of analysis

7.1. Before commencing the analysis of Argentina's legal claims, we first consider the order in which we will address such claims.

7.2. In this dispute, Argentina has made claims under Articles 1.1, 2.2, 2.3, 3.1, 3.3, 5.1, 5.2, 5.4, 5.6, 6.1, 6.2, 8, 10.1, and Annex C(1) of the SPS Agreement as well as under Articles I:1 and XI:1 of the GATT 1994.[156] Furthermore, when responding to Argentina's claims under the SPS Agreement, the United States raises Articles 5.7 and 6.3. Additionally, in response to Argentina's claims under the GATT 1994, the United States invokes the General Exception in Article XX(b) of the GATT 1994.

[152] United States' comments on Argentina's request for review of the Interim Report, para. 15.
[153] Argentina's request for review of the Interim Report, p. 8.
[154] United States' comments on Argentina's request for review of the Interim Report, para. 16.
[155] We note that the panel in *US – Poultry (China)* dealt with claims and defences under the GATT 1994 because there was a terms of reference issue with respect to the SPS claims. In that context, making findings on the GATT 1994 was relevant to providing a positive resolution to the dispute.
[156] Argentina's request for the establishment of a panel, pp. 4-5.

7.3. The Panel must decide in what order it will examine compliance with obligations under two separate covered agreements (SPS and GATT 1994) as well as the order in which it will examine the claims *within* the SPS Agreement and the GATT 1994.

7.1.1 Main arguments of the parties

7.4. Argentina challenges under the SPS Agreement the United States' measures that impose a prohibition on all ruminant and swine products. In particular, Argentina challenges the imposition of the prohibition on fresh (chilled or frozen) beef from Northern Argentina and on ruminants, swine, and products thereof from the Patagonia region (both Patagonia South and Patagonia North B). With the exception of claims with respect to regionalization under Article 6, the claims are the same for both sets of products. Argentina presents them in the following order: Articles 1.1, 3.1, 3.3, 5.1, 5.2, 2.2, 5.7, 5.4, 5.6, 2.3, 6.1 and 6.2 (for Patagonia) and 10.1. Furthermore, Argentina challenges, under Article 8 and Annex C(1), the alleged "undue delay" by the United States in reviewing Argentina's requests with respect to both Northern Argentina and Patagonia.

7.5. The United States, for its part, argues that the main point of Argentina's claims relates to the timeliness of APHIS' process for determining whether and under what conditions allowing imports from Argentina and/or Patagonia would satisfy the United States' ALOP for FMD.[157] The United States maintains that Argentina does not dispute that the import prohibition on FMD-susceptible animals and animal products from Argentina was warranted at the time of adoption.[158] Therefore, the United States argues that the Panel should begin its analysis with the two provisions of the SPS Agreement that it believes concern the timeliness of APHIS' process – namely Annex C(1)(a) and Article 5.7.[159]

7.6. The United States argues that an examination of these provisions is what is necessary to resolve this dispute[160], and maintains that even if the Panel were to see the need to further address Argentina's other claims, these two provisions should be placed first in the analysis to avoid "contorting procedural concerns into substantive ones."[161] Thus, the United States proposes the following order: Article 8 and Annex C(1), Article 5.7, if necessary Articles 5.1, 5.2, 2.2, 5.4, 5.6, 2.3, 3.1, 3.3, 6.1, 6.2, and 10.1, and GATT 1994 Articles I:1 and XI:1. [162]

7.1.2 Analysis by the Panel

7.7. With respect to the order between the claims under the GATT 1994 and the SPS Agreement, we note that the parties did not provide particular argumentation as to this sequencing. We do note that Argentina presented its claims under the SPS Agreement first and only then mentioned the GATT 1994. Furthermore, we note that one of the United States' defences to the claim under Articles I:1 and XI:1 of the GATT 1994 is that, in the light of Article 2.4 of the SPS Agreement, its measures are consistent with the GATT 1994 by virtue of being consistent with the SPS Agreement.[163]

7.8. We concur with the panel in *India – Autos* that it is important to consider, first, if a particular order of analysis is compelled by principles of valid interpretative methodology that, if not followed, might constitute an error of law.[164] That panel also noted that in considering the order

[157] United States' first written submission, paras. 2-3, 172; United States' response to Panel question No. 76 following the first substantive meeting.
[158] United States' first written submission, para. 172.
[159] United States' first written submission, para. 173.
[160] United States' first written submission, para. 173.
[161] United States' first written submission, para. 174.
[162] United States' first written submission, para. 174. We note that in its submission the United States refers to Article 3.2. However, the United States does not claim that its measures "conform" to international standards and thus benefit from the presumption of consistency in Article 3.2. Therefore, we conclude that this was a typographical error and the United States was referring to Article 3.3.
[163] United States' first written submission, paras. 368-373.
[164] Panel Report, *India – Autos*, para. 7.154.

selected for examination of the claims, a panel should be aware that the order of analysis may have an impact on the potential to apply judicial economy.[165]

7.9. The Appellate Body enunciated in *EC – Bananas III* the test that should be applied to determine the proper order of analysis where two or more provisions from different covered Agreements appear *a priori* to apply to the measure in question. According to the Appellate Body, the provision from the Agreement that "deals specifically, and in detail" with the measures at issue should be analysed first.[166]

7.10. In *EC – Hormones*, where claims under both the GATT 1994 and the SPS Agreement were raised by the complainant, the panel, in a finding not reviewed by the Appellate Body, considered that the SPS Agreement was to be addressed first because it "specifically addresses the type of measure in dispute".[167] This approach was also followed by the panels in *Australia – Salmon*[168]*, EC – Approval and Marketing of Biotech Products*[169]*, US – Poultry (China)*[170]*,* and *India – Agricultural Products.*[171]

7.11. The order of analysis of the claims before us therefore depends on whether the Panel finds that the United States' measures are SPS measures within the meaning of Article 1 and Annex A of the SPS Agreement. If so, pursuant to the reasoning in *EC – Hormones* and followed in *Australia – Salmon* and other disputes*,* the SPS Agreement would be considered to constitute *lex specialis* as it "deals specifically, and in detail" with the type of measure at issue and should thus be analysed first.[172]

7.12. In light of these considerations, we will commence our analysis by determining whether the United States' measures are SPS measures within the scope of the SPS Agreement. If they are, we will proceed to examine Argentina's claims under that Agreement before then turning to its claims under the GATT 1994.

7.13. With respect to the order of analysis of Argentina's claims under the SPS Agreement, the Panel sees potential problems with the orders of analyses proposed by both parties. We understand from the Appellate Body Report in *US – Zeroing (EC) (Article 21.5 – EC)* that in fulfilling their duties under Article 11 of the DSU, panels may "depart from the sequential order suggested by the complaining party, in particular, when this is required by the correct interpretation or application of the legal provisions at issue."[173] Indeed, the Appellate Body has stated that, as a general rule, panels are free to structure the order of their analysis as they see fit[174], provided that their analysis is consistent with the "structure and logic" of the provisions at issue in each dispute.[175]

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[165] Panel Report, *India – Autos*, para. 7.161. Furthermore, we note that Article 2.4 of the SPS Agreement provides that SPS measures that conform to the provisions of the SPS Agreement shall be presumed to be in accordance with the provisions of the GATT 1994 that relate to the use of SPS measures, in particular the provisions of Article XX(b). Therefore, a finding that the United States' measures are consistent with the SPS Agreement would yield a presumption that they are consistent with Article XX(b) of the GATT 1994, obviating the need for a substantive analysis of Argentina's claims under Articles I and XI of the GATT 1994, for they would in any event be presumed to be justified under Article XX.

[166] Appellate Body Report, *EC – Bananas III*, para. 204.

[167] Panel Reports, *EC – Hormones (Canada)*, paras. 8.44-8.45; *EC – Hormones (US)*, paras. 8.41-8.42.

[168] Panel Report, *Australia – Salmon*, para. 8.39.

[169] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1364.

[170] Panel Report, *US – Poultry (China)*, paras.7.67-7.68.

[171] Panel Report, *India – Agricultural Products*, paras. 7.115-7.120. We note that the Panel Report in *India – Agricultural Products* was circulated to Members on 14 October 2014 and was appealed on 26 January 2015. Therefore, the report was not yet adopted at the time of the writing of this Report. Therefore, the parties did not themselves present arguments referring to this Panel Report. Nevertheless, we believe that the Panel should examine all relevant guidance on the legal interpretation of the SPS Agreement and therefore will refer to that report as appropriate.

[172] Appellate Body Report, *EC – Bananas III*, para. 204.

[173] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277.

[174] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 126-129.

[175] Appellate Body Reports, *Canada – Autos*, para. 151; and *Canada – Wheat Exports and Grain Imports*, para. 109.

7.14. Argentina argues that the Panel should begin its analysis with Argentina's claims under Article 1.1. The Panel has already noted that it is crucial to begin the analysis with a determination of whether the SPS Agreement is applicable – and thus an examination of whether the challenged measures are SPS measures within the meaning of Article 1 must be the Panel's starting point.[176] However, Argentina focuses not on the applicability of the SPS Agreement set forth in the first sentence of Article 1.1, but rather on the obligation in the second sentence that SPS measures "shall be developed and applied in accordance with the provisions of this Agreement". As will be discussed further below, Argentina's claim under Article 1.1 can only be sustained if the challenged measures are found to be inconsistent with one of the provisions of the SPS Agreement. Therefore, it would make sense to address this claim after the Panel has completed its analysis of Argentina's other claims under the SPS Agreement.

7.15. The United States, for its part, argues that the Panel should begin with Article 8 and Annex C and then move to Article 5.7, and then, only if necessary, the rest of the provisions. The United States argues that determinations under these three provisions could resolve the entire dispute, without the Panel having to address Argentina's other claims, because in the United States' view Argentina's complaint is essentially about the timeliness of the United States' regulatory decision-making rather than the content of the decision. According to the United States, this "timeliness" issue is properly addressed under Article 8 and Annex C and Article 5.7.

7.16. We note that Argentina has challenged not only the length of the application process, but also the continued maintenance of the import prohibition itself. Furthermore, Argentina argues that the United States has discriminated between Argentina and other WTO Members with respect to the United States' processing of requests for authorization to import. Therefore, regardless of whether the United States' measures fall within the ambit of either Article 5.7 or Article 8 and Annex C, they would not be exempt from the other obligations cited by Argentina, including to apply those measures in a manner that does not arbitrarily or unjustifiably discriminate between Members[177], adaptation to regional conditions, and special and differential treatment. Under the circumstances, we cannot agree with the United States that the only provisions relevant to a positive resolution to this dispute are those that the United States identifies as the ones related to the "timeliness" of its review of Argentina's requests.

7.17. At the same time, we recognize that the analysis under Article 8 will involve many factual determinations that are relevant to the Panel's analysis under a number of the other provisions cited by Argentina and the United States. In particular, in the context of Argentina's claim under Article 8 and Annex C(1)(a), the Panel will have to examine the length of time taken to complete the relevant United States' approval procedures to determine if they were undertaken and completed without undue delay. This will require an analysis of the entire evaluation process conducted by APHIS and the sufficiency of the information the Argentine authorities provided.

7.18. In light of the above, the Panel will begin its analysis with whether the challenged measures are SPS measures within the meaning of Article 1 and thus subject to the disciplines of the SPS Agreement. If we find that the measures are subject to the SPS Agreement, we will then proceed to analyse Argentina's claims under Article 8 and Annex C(1)(a) and (b).

7.19. Once we have concluded our analysis under Article 8 and Annex C, we will turn to Argentina's other claims in the following order: harmonization (Articles 3.1 and 3.3);scientific evidence (Article 5.7 and, if necessary, Articles 5.1 and 5.2, and Article 2.2[178]), appropriate level of protection (Articles 5.4 and 5.6,); discrimination (Article 2.3); adaptation to regional conditions

[176] See para. 7.11 above. Furthermore, a determination of whether the measures are SPS measures within the meaning of Annex A is relevant for the determination of the applicable international standards for analysis of claims under Article 3 (Annex A(3)), as well as the type of risk assessment required under Article 5 (Annex A(4)).

[177] See Panel Report, *US – Poultry (China)*, para. 7.142 (where the panel found that, being entitled "Basic Rights and Obligations", Article 2 contains "overarching and encompassing" obligations which "inform all of the SPS Agreement").

[178] We note that the Appellate Body has interpreted Article 5.7 as being an exemption from the applicability of Articles 2.2 and 5.1. (See Appellate Body Report, *Japan – Agricultural Products II*, para. 80) As Article 5.2 sets forth what a Member must take into account when assessing the risks, it is inextricably linked to Article 5.1. (See e.g. Appellate Body Report, *Australia – Apples*, para. 208) Therefore, the Panel will only address Argentina's claims under Articles 2.2, 5.1, and 5.2 if it finds that Article 5.7 is not applicable.

(Articles 6.1 and 6.2); special and differential treatment (Article 10.1), and any consequential violations under Articles 1.1 and 3.3.

7.20. With respect to the order of analysis of Argentina's claims under the GATT 1994, the Panel will address them in the in the order in which the provisions appear in the GATT 1994 as well as the defence raised by the United States under Article XX(b) to both claims.

7.2 Whether the United States' measures are SPS measures

7.2.1 Relevant legal provisions

7.21. Article 1 of the SPS Agreement establishes the scope of application of the Agreement, and reads as follows:

> 1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.
>
> 2. For the purposes of this Agreement, the definitions provided in Annex A shall apply.

7.22. In turn, Annex A(1) of the SPS Agreement sets forth the definition of an SPS measure as "[a]ny 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;
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> (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; or
>
> (d) to prevent or limit damage within the territory of the Member from the entry, establishment or spread of pests.
>
> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria, processes and production methods, testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; packaging and labelling requirements directly related to food safety.

7.2.2 Main arguments of the parties

7.2.2.1 Argentina

7.23. Argentina argues that all the measures at issue in this dispute are sanitary measures within the meaning of Article 1.1 and Annex A of the SPS Agreement.

7.24. In particular, Argentina claims the application of the prohibitions contained in 9 CFR 94.1(b) to imports of fresh (chilled or frozen) beef from Argentina, as well as the 2001 Regulations through which APHIS imposed such prohibitions, are applied to protect the health and life of animals from

risks arising from the entry, establishment and spread of FMD within the United States territory.[179] Moreover, Argentina argues that because the United States' market has been closed to Argentine fresh (chilled or frozen) beef for more than 11 years, this directly affects international trade.[180] Accordingly, Argentina asserts that the measures at issue are sanitary measures covered by Article 1.1 and Annex A of the SPS Agreement.[181] Argentina maintains that the measures in question are inconsistent with Article 1.1 of the SPS Agreement because they are not applied in accordance with the provisions of that agreement.[182]

7.25. Further, in Argentina's opinion, the application of the prohibitions contained in 9 CFR 94 to imports of FMD-susceptible animals and animal products from Patagonia is an SPS measure because such a measure is applied to protect the health and life of animals within the United States from the risks arising from the entry, establishment and spread of FMD[183] and directly affects international trade in such products.[184] Argentina claims that the measure at issue violates Article 1.1 of the SPS Agreement because it is not applied in accordance with the provisions of that agreement.[185]

7.26. With respect to APHIS' application of the approval procedures set forth in 9 CFR 92.2 to Argentina's requests for importation of Argentine fresh (chilled or frozen) beef and for the recognition of Patagonia as FMD-free, Argentina notes that successfully completing such procedures is a prerequisite for obtaining authorization to import the relevant products into the United States.[186] In turn, Argentina argues, the procedures set forth in 9 CFR 92.2 are aimed at ensuring that the requirements under 9 CFR 94, which allow importation of animal and animal products only from those countries and regions that APHIS has declared free of FMD, are met.[187] Therefore, according to Argentina, such procedures are SPS measures within the meaning of Article 1.1 and Annex A.[188]

7.27. Argentina also claims that Section 737 of the *2009 Omnibus Appropriations Act* contributed to the undue delays in APHIS' review processes of its two requests.[189] For Argentina, the references in Section 737 to "domestic animal health aspects that are administered by APHIS" indicate that the stated objective of the Section is to protect animal life and health within the United States from the entry, establishment, or spread of FMD, thus constituting an SPS measure within the meaning of Article 1.1 and Annex A.[190] In Argentina's view, this is buttressed by the textual similarities between Section 737 and Section 727 of the *2009 Omnibus Appropriations Act* and by the fact that the latter was found to be an SPS measure under Article 1.1 and Annex A by the panel in *US – Poultry (China)*.[191]

7.2.2.2 United States

7.28. The United States does not disagree with Argentina that the measures at issue are SPS measures which fall within the ambit of the SPS Agreement.[192] Indeed, the United States confirms that its measures "are taken for a purpose set forth in Annex A(1)(a) of the SPS Agreement".[193]

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[179] Argentina's first written submission, para. 177. See also Argentina's response to Panel question No. 2 following the first substantive meeting.
[180] Argentina's first written submission, paras. 179-180.
[181] Argentina's first written submission, para. 174.
[182] Argentina's first written submission, para. 184.
[183] Argentina's first written submission, paras. 413-414.
[184] Argentina's first written submission, paras. 413-414.
[185] Argentina's first written submission, para. 414.
[186] Argentina's first written submission, para. 606; Argentina's response to Panel question No. 1 following the first substantive meeting; Argentina's second written submission, para. 80.
[187] Argentina's second written submission, para. 337.
[188] Argentina's second written submission, para. 337.
[189] Argentina's first written submission, para. 704.
[190] Argentina's first written submission, para. 711; Argentina's response to Panel question No. 2 following the first substantive meeting.
[191] Argentina's first written submission, paras. 709-710; Argentina's response to Panel question No. 2 following the first substantive meeting.
[192] United States' second written submission, Annex, para. 10.
[193] United States' response to Panel question No. 2 following the first substantive meeting.

7.29. The United States asserts that because Section 737 "ceased to exist before this dispute was initiated" it is not within the terms of reference of this dispute.[194] In the United States' view, to be a measure subject to the Panel's terms of reference, "the measure must be in force when the [DSB] established the panel".[195]

7.2.3 Analysis by the Panel

7.30. At the outset, we note that we bear an obligation, pursuant to Article 11 of the DSU, to make an objective assessment of the applicability of the relevant agreement. Thus, we proceed with an examination of Article 1 to establish whether we agree with the parties on this threshold issue. We concur with previous panels that Article 1 of the SPS Agreement provides for two requirements that must be fulfilled for the SPS Agreement to apply: (i) the measure at issue must be an SPS measure within the meaning of Article 1 and Annex A(1) of the SPS Agreement; and (ii) it must directly or indirectly affect trade.[196] The Panel will thus consider, in turn, whether the United States' measures comply with both requirements.

7.2.3.1 Whether the United States' measures are SPS measures within the meaning of Annex A(1)

7.31. The Appellate Body noted in its report in *Australia – Apples* that "[a] fundamental element of the definition of 'SPS measure' set out in Annex A(1) is that such a measure must be one 'applied to protect' at least one of the listed interests".[197] The Appellate Body further explained that the word "applied" points to the application of a measure, suggesting that a relationship between the measure and one of the objectives identified in Annex A(1) must be present in the measure itself, or otherwise evident from circumstances related to the application of the measure.[198] Consequently, the Appellate Body concluded by finding that "the purpose of a measure is to be ascertained on the basis of objective considerations"[199] and a clear and objective relationship must exist between the measure in question and the purposes identified in Annex A(1).[200] In particular, the Appellate Body clarified that whether a measure is "applied … to protect" in the sense of Annex A(1)(a) "must be ascertained not only from the objectives of the measure as expressed by the responding party, but also from the text and structure of the relevant measure, its surrounding regulatory context, and the way in which it is designed and applied."[201]

7.32. The second sentence of Annex A(1) sets forth that SPS measures may take the form of "laws, decrees, regulations, requirements and procedures". This list is modified by the terms "including" and "all relevant". The Appellate Body found that the use of these terms in the second sentence means that measures of a type not expressly listed may nevertheless constitute SPS measures when they are "'relevant', that is, when they are 'applied' for a purpose that corresponds to one of those listed in subparagraphs (a) through (d). Conversely, the fact that an instrument is of a type listed in the last sentence of Annex A(1) is not, in itself, sufficient to bring such an instrument within the ambit of the SPS Agreement."[202] With respect to the latter half of the second sentence, the Appellate Body concluded that:

> [I]t is a list of examples of measures that may fall within the definition of an SPS measure, provided always that the measure manifests a clear and objective relationship with (is "applied" for) at least one of the purposes set out in subparagraphs (a) through (d). The list thus serves to illustrate, through a set of concrete examples, the different types of measures that, when they exhibit the

[194] United States' second written submission, Annex, para. 11. See also United States' response to Panel question No. 2 following the first substantive meeting.
[195] United States' response to Panel question No. 2 following the first substantive meeting.
[196] Panel Reports, *EC – Hormones (United States)*, para. 8.36; *EC – Hormones (Canada)*, para. 8.39.
[197] Appellate Body Report, *Australia – Apples*, para. 172.
[198] Appellate Body Report, *Australia – Apples*, para. 172. See also Panel Report, *India – Agricultural Products*, para. 7.139.
[199] Appellate Body Report, *Australia – Apples*, para. 172. See also Panel Report, *India – Agricultural Products*, para. 7.139.
[200] Appellate Body Report, *Australia – Apples*, para. 173.
[201] Appellate Body Report, *Australia – Apples*, para. 173.
[202] Appellate Body Report, *Australia – Apples*, para. 175.

> appropriate nexus to one of the specified purposes, will constitute SPS measures and, accordingly, be subject to the disciplines set out in the SPS Agreement.[203]

7.33. Therefore, the determination of whether a measure is an SPS measure requires an inquiry into whether the measure is of the type that may fall within the definition of an SPS measure and whether it exhibits an appropriate nexus to one of the specified purposes in subparagraphs (a) through (d). The Panel will thus examine each of the challenged measures for these elements.

7.2.3.1.1 The 2001 Regulations and 9 CFR 94

7.34. The 2001 Regulations and 9 CFR 94 as published in the Federal Register of the United States and the Code of Federal Regulations, respectively, fall within the types of measures included in the indicative list of sanitary and phytosanitary measures set forth in the second sentence of Annex A(1).

7.35. Argentina has indicated, and the United States has not disagreed, that the purpose of the 2001 Regulations and of 9 CFR 94 is that identified in Annex A(1)(a) – i.e. to protect the health of susceptible animals (ruminants and swine) within the territory of the United States from risks arising from the entry, establishment or spread of FMD.[204] This purpose can be derived from the text of the measures itself. The 2001 Regulations both refer specifically to the recent outbreak of FMD in Argentina and to the need to "protect the livestock of the United States from foot-and-mouth disease".[205] Furthermore, the statutory authority for the Department of Agriculture to implement 9 CFR 94 derives from the permission to prohibit or restrict importation or entry "of animals, articles, or means of conveyance" set forth in 7 USC 8303(a) if such actions are necessary to prevent the introduction or dissemination of pests or diseases that affect livestock.[206] Thus, the 2001 Regulations and 9 CFR 94 manifest a clear and objective relationship with the purpose set forth in Annex A(1)(a).

7.36. As the 2001 Regulations and 9 CFR 94 fall within the indicative list of measures in the second sentence of Annex A(1) and are applied for the purpose described in Annex A(1)(a), we find that the 2001 Regulations and 9 CFR 94 are SPS measures as defined in Annex A(1).

7.2.3.1.2 Application of the procedures set forth in 9 CFR 92.2 to Argentina's requests

7.37. The procedure in 9 CFR 92.2 is part of the process to determine whether products from a country or region pose a particular risk of introduction or dissemination of a pest or livestock disease into the United States. The procedure is set forth in the United States' Code of Federal Regulations and thus could fall within the reference to either "regulations" or "procedures" in the second sentence of Annex A(1).

7.38. 9 CFR 92.2 describes the information APHIS requires and the process APHIS follows to determine which countries or regions will be authorized to import (those listed in 9 CFR 94.1(a)) and which countries or regions are subject to the prohibition (9 CFR 94.1(b)). As we have concluded that 9 CFR 94 is applied for the purpose set forth in Annex A(1)(a), we likewise conclude that 9 CFR 92.2 also manifests a clear and objective relationship with that purpose. Thus, 9 CFR 92.2 is an SPS measure as defined in Annex A(1).

7.39. However, although 9 CFR 92.2 is *de jure* applied to protect animal life or health from the entry, establishment or spread of FMD, we note that Argentina is not challenging the content of 9 CFR 92.2 "as such", but rather APHIS' application of these procedures to Argentina's requests for authorization to import. Therefore, the Panel must determine whether the measure "as applied" satisfies the definition in Annex A(1).

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[203] Appellate Body Report, *Australia – Apples*, para. 176.

[204] We note that the measures could arguably also fall within the scope of Annex A(1)(d) given the potential economic ramifications of the entry of FMD into the United States that the United States presents in its first written submission. See United States' first written submission, paras. 41-47. However, Argentina need only establish that the measures are applied to protect against one of the risks set forth in Annex A(1).

[205] 2001 Interim Rule on Argentina, (Exhibit ARG-29); 2001 Final Rule on Argentina, (Exhibit ARG-30).

[206] Although the terms are not identical, the Panel recognizes that preventing the "introduction or dissemination" of a disease falls within the scope of preventing its entry, establishment, and spread.

7.40. In our view, the reference to "procedures" in the second sentence of Annex A(1) is broad enough to encompass both procedures of general application as well as the specific implementation of a procedure in a particular instance.[207] Furthermore, we recall the consistent practice in WTO dispute settlement pursuant to Article 3.3 of the DSU that any act or omission attributable to a Member may be challenged as a "measure" for dispute settlement purposes.[208] Panels and the Appellate Body have in many instances permitted Members to challenge the specific application of particular laws, regulations, procedures or practices as measures.[209] We see no reason why this would be different in the context of the SPS Agreement.

7.41. Therefore, we find that the application of 9 CFR 92.2 to APHIS' review of Argentina's requests for authorization to import is an SPS measure as defined in Annex A(1).

7.2.3.1.3 Section 737 of the *2009 Omnibus Appropriations Act*

7.42. Turning to Section 737 of the *2009 Omnibus Appropriations Act* (Section 737), Argentina argued in its response to the Panel's questions that such provision is an SPS measure that falls within the scope of Annex A(1)(a).[210] We note that Section 737 directly regulates the authority of the Secretary of Agriculture to approve the importation of the relevant products from Argentina and that it prevents him from taking such action until he has "reviewed the domestic animal health aspects of the pending proposal to allow the importation of such products into the United States and has issued a report to the Committees on the findings of such review."[211] Thus, the purpose of Section 737 is directly linked to the risks to health of domestic animals in the United States from the potential importation of the relevant Argentine or Patagonian products pursuant to the *proposal pending* at the time, which was the Proposed Rule to designate Patagonia as FMD-free and to permit importation according to certain protocols.

7.43. With respect to the second sentence of Annex A(1), we note that Section 737 is a provision of a law enacted by Congress and signed by the President of the United States. As such, it falls within the scope of "laws, decrees, regulations, requirements and procedures" in Annex A(1).[212] Given the relationship between the operation of Section 737 and the requirement that the Secretary of Agriculture assure Congress through a specific report on the animal health aspects of permitting importation of ruminant and swine products from Argentina, we find that a sufficient nexus exists between this law and the purpose set forth in Annex A(1)(a). Therefore, the Panel finds that Section 737 is an SPS measure as defined in Annex A(1).

7.2.3.2 Whether the United States' measures directly or indirectly affect international trade

7.44. We now turn to whether the measures imposed by the United States constitute SPS measures that directly or indirectly affect international trade. As explained by the panel in *India – Agricultural Products*, an import ban, by its very nature, is intended to affect international trade.[213] The panels in *EC – Hormones* went further and concluded that "it cannot be contested that an import ban affects international trade".[214]

7.45. Although the United States argues that its measures are based on international standards and that it is diligently working to analyse Argentina's applications to import, it does not dispute that the measures in place at the time of establishment of the Panel were total import prohibitions on fresh (chilled or frozen) beef from Northern Argentina and on ruminant and swine products from Patagonia.

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[207] Our understanding is confirmed by the findings of the panel in *EC – Approval and Marketing of Biotech Products*, which found that the *application* of a general moratorium of approvals for placing GMOs on the market are inconsistent with Article 8 and Annex C(1)(a). (Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.1568-7.1569)

[208] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[209] See e.g. Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 167, 172; *US – Carbon Steel*, para. 171.

[210] Argentina's response to Panel question No. 2 following the first substantive meeting.

[211] Section 737 of the *2009 Omnibus Appropriations Act*, (Exhibit ARG-45/USA-95).

[212] Panel Report, *US – Poultry (China)*, para. 7.119.

[213] Panel Report, *India – Agricultural Products* para. 7.157.

[214] Panel Reports, *EC – Hormones (United States)*, para. 8.23; *EC – Hormones (Canada)*, para. 8.26.

7.46. In particular, we note that the 2001 Regulations and the current version of 9 CFR 94.1(b) specifically prohibit the importation of the relevant products from either Northern Argentina or Patagonia. Further, the application process in 9 CFR 92.2 specifically states that any existing prohibition remains in place unless and until the outcome of the process leads to a decision to authorize imports. Additionally, Section 737 prevents the Secretary of Agriculture from completing the process under 9 CFR 92.2 until he submits a report to Congress. Therefore, the extension of the time required for the review or the lack of any conclusion to the review of Argentina's applications for imports of fresh (chilled or frozen) beef from Northern Argentina and FMD-susceptible animals and animal products from Patagonia has the effect of keeping the prohibition in place.

7.47. Thus, consistent with the understandings of the panels in *India – Agricultural Products* and *EC – Hormones*, we conclude that the measures at issue directly or indirectly affect international trade.

7.2.4 Conclusion

7.48. The Panel has determined that the United States' measures are applied to achieve the purpose set forth in Annex A(1)(a), that they take one of the forms listed in the main paragraph of Annex A(1), and that they directly or indirectly affect international trade. Therefore, the Panel finds that the United States' measures are SPS measures subject to the disciplines of the SPS Agreement.

7.49. With respect to the consequential claim under Article 1.1, we will return to this after we have completed our analysis of Argentina's substantive claims.

7.3 Control, inspection and approval procedures

7.3.1 Relevant legal provisions

7.50. Article 8 of the SPS Agreement, entitled "Control, Inspection and Approval Procedures", reads as follows:

> Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

7.51. In turn, Annex C(1) of the SPS Agreement, which is also entitled "Control, Inspection and Approval Procedures", reads, in relevant part:

> 1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:
>
> (a) such procedures are undertaken and completed without undue delay … ;
>
> (b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained; …

7.52. Footnote 7 to Annex C(1) clarifies that "[c]ontrol, inspection and approval procedures include, *inter alia*, procedures for sampling, testing and certification".

7.53. As the United States has argued that the procedures at issue in this dispute are not of the type subject to the obligations in Article 8 and Annex C(1), the Panel will address, first, the question of whether Article 8 and Annex C(1) of the SPS Agreement are applicable to APHIS' review processes of Argentina's requests for imports of fresh (chilled or frozen) beef from Northern Argentina and for recognition of Patagonia as FMD-free. If the provisions in question are applicable, the Panel will assess Argentina's claims that the United States' measures at issue are inconsistent with Article 8 and Annex C(1)(a) and C(1)(b).

7.3.2 Whether the application of the procedures set forth in 9 CFR 92.2 to Argentina's requests falls within the scope of Article 8 and Annex C(1) of the SPS Agreement

7.3.2.1 Main arguments of the parties

7.3.2.1.1 Argentina

7.54. Argentina submits that the procedures set forth in 9 CFR 92.2 constitute an "approval procedure" within the meaning of Article 8 and Annex C of the SPS Agreement. It argues, in particular, that because imports of animals or animal products from a region or country are conditioned upon the evaluation of its FMD status under the procedures under 9 CFR 92.2[215], such procedures are "analogous to the types of procedures specifically articulated in Annex C", especially procedures for "sampling, testing and certification" listed in footnote 7 to Annex C.[216] Moreover, Argentina considers that the procedures set forth in 9 CFR 92.2 "are imposed to 'ensure'" compliance with the requirement under 9 CFR 94 that animal and animal products be imported "only from those countries and regions which APHIS has declared free of certain diseases, including FMD".[217] Therefore, the application of those procedures to Argentina's requests are subject to the obligations in Article 8 and Annex C(1).[218]

7.55. Argentina further argues that the reference in Annex C(1) to "any procedure", which aims to "check and ensure the fulfilment of sanitary and phytosanitary measures" suggests broad construction of the scope of coverage of Article 8 and Annex C.[219] Moreover, in Argentina's view, the fact that the lists of measures enumerated in Article 8 and Annex C are introduced by the words "including" and "include, *inter alia*", respectively, indicates that such lists are indicative and not exhaustive.[220] Moreover, Argentina observes that, according to the Appellate Body, "measures which are not, technically, 'procedures' but which impede the process of undertaking or completing procedures, may also give rise to a violation" of Annex C(1).[221]

7.56. Finally, Argentina takes issue with the United States' argument that the obligations in Article 8 and Annex C are limited to procedures that govern products or substances, as opposed to determinations of the FMD status of countries or regions. For Argentina, "nowhere in the text of the treaty are the words 'control, inspection and approval procedures' so narrowly qualified".[222]

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[215] Argentina's response to Panel question No. 2 following the first substantive meeting; Argentina' second written submission, para. 341.

[216] Argentina's first written submission, para. 610. See also Argentina's opening statement at the first meeting of the Panel, para. 85; Argentina's second written submission, para. 338.

[217] Argentina's first written submission, para. 610. See also Argentina's response to Panel question No. 58 following the first substantive meeting; Argentina's second written submission, para. 337.

[218] Argentina's first written submission, paras. 603-606; Argentina's response to Panel question No. 58 following the first substantive meeting.

[219] Argentina's opening statement at the first meeting of the Panel, para. 84; Argentina's response to Panel question No. 58 following the first substantive meeting; Argentina's second written submission, para. 331.

[220] Argentina's response to Panel question No. 58 following the first substantive meeting; Argentina's second written submission, paras. 332-334 (referring to Panel Report, *US – Poultry (China)*, para. 7.363).

[221] Argentina's second written submission, para. 335 (referring to Appellate Body Report, *Australia – Apples*, paras. 438-440).

[222] Argentina's second written submission, para. 345.

7.3.2.1.2 United States

7.57. The United States argues that Article 8 and Annex C do not apply to processes carried out pursuant to 9 CFR 92.2 because the provisions in question do not govern the determination of disease status for geographical areas, but rather address control, inspection and approval procedures for specific products.[223] In support of its contention, the United States points out that footnote 7 of Annex C makes no reference to examination of disease-free status.[224] The United States also notes that the illustrative examples in Annex C of the types of procedures covered do not include disease-free status determinations.[225] Finally, the United States argues that subparagraphs (a), (d), (e), (f), (g), and (h) of Annex C(1) provide support for its conclusion that the procedures covered by Annex C are those designed to check and ensure the fulfilment of SPS measures as applied to specific products rather than geographical areas.[226]

7.58. Furthermore, the United States contends that Article 8 on its face applies only to control, inspection or approval procedures, and not all SPS measures.[227] According to the United States, an understanding that Article 8 and Annex C govern any measures that impose conditions on import would make Annex C applicable to every SPS measure.[228]

7.3.2.2 Main arguments of the third parties

7.3.2.2.1 Brazil

7.59. Relying on the panel report in *Australia – Salmon (Article 21.5 – Canada)*, Brazil considers that Article 8 and Annex C(1) apply to procedures that have been implemented to ensure the fulfilment of SPS measures, but they do not cover the "substantive measures" themselves.[229] In its view, determinations of disease status for geographical areas fall within the ambit of such provisions as they are "part of the procedures to ensure the fulfilment and application of an SPS measure".[230]

7.3.2.2.2 China

7.60. In China's view, Article 8 and Annex C(1) of the SPS Agreement have broad coverage and do not specify or exclude any type of procedures from their application.[231] Indeed, China observes, the panel in *US – Poultry (China)* considered that Annex C(1) covers any procedure that is aimed at checking and ensuring the fulfilment of SPS measures.[232] China also notes that, according to the Appellate Body in *Australia – Apples*, Article 8 and Annex C(1) do not necessarily exclude measures other than control, inspection and approval procedures from their scope of application.[233]

7.3.2.2.3 European Union

7.61. The European Union disagrees with the United States' contention that the rules against undue delay contained in Article 8 and Annex C of the SPS Agreement apply only to products and

[223] United States' first written submission, paras. 176-178; United States' opening statement at the first meeting of the Panel, para. 28; United States' response to Panel question No. 58 following the first substantive meeting; United States' second written submission, paras. 51-59; United States' response to Panel question No. 50 following the second substantive meeting.
[224] United States' first written submission, para. 184.
[225] United States' first written submission, para.184.
[226] United States' first written submission, paras. 185-186.
[227] United States' first written submission, para. 181. United States' response to Panel question No. 58 following the first substantive meeting; United States' second written submission, paras. 52-54.
[228] United States' first written submission, para. 178.
[229] Brazil's third-party response to Panel question No. 24.
[230] Brazil's third-party response to Panel question No. 24.
[231] China's third-party submission, para. 69. See also China's third-party statement, paras. 7-9; China's third-party response to Panel question No. 24.
[232] China's third-party submission, para. 69. See also China's third-party response to Panel question No. 24.
[233] China's third-party submission, para. 69.

not to regions.[234] In the European Union's view, the language of such provisions does not contain any limitation in this regard[235] and indeed does not provide an exhaustive list of procedures that fall within their purview.[236]

7.3.2.3 Analysis by the Panel

7.62. Article 8 requires Members to "observe the provisions of Annex C in the operation of control, inspection and approval procedures", thereby incorporating the disciplines of Annex C into the operative part of the SPS Agreement. This is consistent with the language of Article 1.3, which states that "[t]he annexes are an integral part of th[e] Agreement". Hence, the non-observance of the obligations in Annex C(1) "implies a violation of Article 8".[237]

7.63. The parties do not disagree that the disciplines set out in 9 CFR 92.2 constitute "procedures", as they establish a specific course of action that both the applicant country or region and APHIS are required to follow in order for the latter to proceed with the "recognition of the animal health status" of that country or region.[238] We have already found that such disciplines fall within the reference to either "regulations" or "procedures" in the second sentence of Annex A(1) of the SPS Agreement.[239]

7.64. Therefore, the issue before us is whether the United States' application of 9 CFR 92.2 to Argentina's requests for imports of fresh (chilled or frozen) beef from Northern Argentina and for recognition of Patagonia as FMD-free within the meaning of 9 CFR 94.1(a) constitutes one of the procedures falling within the scope of Article 8 and Annex C(1).

7.3.2.3.1 "Any" procedure

7.65. Argentina maintains that the procedures set out in 9 CFR 92.2 fall within the scope of Article 8 and Annex C(1) because they are approval procedures and because they are aimed at checking and ensuring the fulfilment of an SPS measure.[240] The United States responds that Article 8 and Annex C(1), on their face, apply only to control, inspection or approval procedures for specific products[241], and do not govern the determination of the disease status of geographical areas.[242]

7.66. We observe first, that while both Article 8 and Annex C are entitled "Control, Inspection and Approval Procedures", the text of Annex C(1) imposes obligations on Members with respect to "any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures".[243] Thus in our opinion, a plain reading of Annex C(1) suggests that the title, while illustrative, does not confine the scope of the measures covered as the United States argues. Rather, it is necessary to examine the text of the provision itself to determine its scope, and thereby the scope of Article 8.

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[234] European Union's third-party submission, para. 106. See also European Union's third-party response to Panel question No. 24.

[235] European Union's third-party submission, para. 106.

[236] European Union's third-party submission, para. 107.

[237] Panel Report, *US – Poultry (China)*, para. 7.394.

[238] 9 CFR 92.2, (Exhibit ARG-69). The United States itself describes such disciplines as a "*Process* for Foreign Animal Disease Status Evaluations, Regionalization, Risk Analysis, and Rulemaking". (See 9 C.F.R. § 92.2 (2013), *Process for Foreign Animal Disease Status Evaluations, Regionalization, Risk Analysis, and Rulemaking*, (Exhibit USA-76), p. 1 (emphasis added); see also e.g. United States' first written submission, paras. 334-335)

[239] See para. 7.37 above.

[240] Argentina's first written submission, para. 610; Argentina's opening statement at the first meeting of the Panel, para. 85; Argentina's response to Panel question No. 58 following the first substantive meeting; Argentina's second written submission, paras. 337-338.

[241] United States' first written submission, para. 181. United States' response to Panel question No. 58 following the first substantive meeting; United States' second written submission, paras. 52-54.

[242] United States' first written submission, paras. 176-178; United States' opening statement at the first meeting of the Panel, para. 28; United States' response to Panel question No. 58 following the first substantive meeting; United States' second written submission, paras. 51-59; United States' response to Panel question No. 50 following the second substantive meeting.

[243] See Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1491; *US – Poultry (China)*, para. 7.352.

7.67. We note that the provision uses the word "any" to modify the word "procedure". "Any" has been interpreted as indicating that Annex C(1) "does not specify, nor exclude, any type of 'procedures'" from its scope of application, "so long as that 'procedure' is aimed at 'checking and ensuring the fulfilment of sanitary or phytosanitary measures', and is undertaken in the context of 'control, inspection, or approval'".[244] Further, the Appellate Body in *Australia – Apples* stated that while "procedures are the direct target" of Article 8 and Annex C(1), "it does not follow that other types of measures are precluded, *a priori*, from being an appropriate target of a claim of inconsistency" with such provisions.[245] According to the Appellate Body, the provisions in question "may be infringed through measures other than the control, inspection, and approval procedures themselves", such "as actions that prohibit, prevent, or impede undertaking and completing such procedures 'without undue delay', or omissions in the form of a failure to act 'without undue delay'".[246]

7.68. Article 8 and Annex C "cover a broad array of procedures, as the drafters of the *SPS Agreement* did not limit the scope of those 'procedures' to any specific type of 'approval procedures'".[247] We also note that while Article 8 and Annex C enumerate certain types of procedures as expressly falling within their ambit[248], they set forth lists introduced by the terms "including" (Article 8) and "include, *inter alia*" (footnote 7 to Annex C). In the context of Annex A(1) of the SPS Agreement, the Appellate Body stated that the use of such terms indicates that the list of measures contained in such a provision "is only indicative".[249] In our opinion, the same holds true for Article 8 and Annex C. The use of such terms by the drafters shows that the lists of measures contained in the two provisions at issue are merely illustrative and not exhaustive.[250]

7.69. Having determined, consistently with previous WTO adjudicators, that the drafters intended to include a broad variety of procedures under Annex C(1) and Article 8, we see no basis in the language of those provisions that would support the United States' argument that the covered procedures are limited to those addressing products, and thus that determinations of the disease status of certain geographic regions are excluded from the scope of Article 8 and Annex C. We consider that, by contrasting region-related and product-related determinations, the United States is attempting to make a distinction without a real difference. The ultimate effect of any procedure to designate a particular region with a "disease status" is to determine what SPS measures should be applied to the *products* originating from that region. We can see this in the link between the prohibition in 9 CFR 94 and the evaluation procedures set forth in 9 CFR 92.2. To recall, 9 CFR 94.1(b) and 9 CFR 94.2 expressly prohibit the importation of any FMD-susceptible animals or animal products that originate in any region where FMD is deemed to exist. In turn, under 9 CFR 94.1, FMD is deemed to exist "in all regions of the world except those declared free" by APHIS. The only way to be declared "FMD-free" by APHIS is to undergo the procedures set forth in 9 CFR 92.2.

7.70. Although the immediate object of the process in 9 CFR 92.2 is related to making a determination about the disease status of the region, the ultimate effect of the process within APHIS' regulatory framework is to determine whether imports will be authorized. In our view, focusing solely on the immediate object of an importing Member's procedures, while losing sight of the ultimate effect of the completion of such procedures, might enable Members to avoid the application of Article 8 and Annex C by simply parsing their regulatory processes between regional

[244] Panel Report, *US – Poultry (China)*, para. 7.363.
[245] Appellate Body Report, *Australia – Apples*, para. 438.
[246] Appellate Body Report, *Australia – Apples*, para. 438.
[247] Panel Report, *US – Poultry (China)*, para. 7.372.
[248] To recall, "national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs" (Article 8) and "procedures for sampling, testing and certification" (footnote 7 to Annex C).
[249] See, in the context of Annex A(1) of the SPS Agreement, Appellate Body Report, *Australia – Apples*, para. 176.
[250] For example, the panel in *US – Poultry (China)* found that equivalence determinations under Article 4 of the SPS Agreement constitute approval procedures within the meaning of Annex C(1). Panel Report, *US – Poultry (China)*, para. 7.370. Similarly, the Appellate Body in *Australia – Apples* intimated that, had Australia's risk assessment been challenged as one of the measures at issue, it might have violated Article 8 and Annex C(1) by virtue of the lengthy period of time it took Australian authorities to complete it. See Appellate Body Report, *Australia – Apples*, para. 441.

determinations and approvals to import.[251] Therefore, we conclude that the procedures in 9 CFR 92.2 are "any procedures" that fall within the scope of Article 8 and Annex C(1).

7.71. Having found that Article 8 and Annex C(1) do not exclude determinations of the disease status of certain geographic regions from their scope of application, we note that there is one express limitation on the type of procedures falling within the scope of Article 8 and Annex C(1) – that the procedures be ones aimed at "checking and ensuring the fulfilment of sanitary or phytosanitary measures". Therefore, we now turn to assess whether the procedures under 9 CFR 92.2 are such procedures.

7.3.2.3.2 To "check and ensure" the "fulfilment" of an SPS measure

7.72. The dictionary defines the verb "to check" as "[t]o control (a statement, account, etc.) by some method of comparison; to compare one account, observation, entry, etc., with another, or with certified data, with the object of ensuring accuracy and authenticity"; the related verb "to check on" is defined as "to examine carefully or in detail; to maintain a check on; to ascertain the truth about; … to check out, to investigate, examine for accuracy, authenticity, or a confirmation of fitness".[252] The definition of the verb "to ensure" is "[t]o make certain the occurrence or arrival of (an event), or the attainment of (a result)".[253] Finally, the verb "to fulfil" is defined as "[to p]rovide fully with what is wished for; satisfy the appetite or desire of; … Make complete, supply with what is lacking; replace (something); … Carry out, perform, do (something prescribed)".[254] In turn, as observed in paragraph 7.31 above, the Appellate Body defined an SPS measure as one "applied … to protect" at least one of the interests listed in Annex A(1) of the SPS Agreement.[255] According to the Appellate Body, the word "applied" suggests that a "clear and objective relationship" between the measure and one of the objectives identified in Annex A(1) must be present in the measure itself, or otherwise evident from circumstances related to the application of the measure, such as "its surrounding regulatory context", and the way in which it is designed and operates.[256]

7.73. As the above definitions indicate, Article 8 and Annex C cover any procedure to make certain that a measure applied to achieve one of the objectives in Annex A(1) is fully implemented.

7.74. We have already found above that the procedures in 9 CFR 92.2 are part of the process to determine whether products from a specific country or region pose a particular risk of introduction or dissemination of FMD into the United States.[257] Those procedures, in other words, are designed to ensure compliance with the requirement under 9 CFR 94 that FMD-susceptible animals or animal products be imported into the United States only from countries or regions that APHIS has determined to be FMD-free. We also found that such a requirement constitutes an SPS measure within the meaning of Annex A(1) of the SPS Agreement.[258] In turn, we note that 9 CFR 94.1 is implemented for the purpose of achieving the objective set forth in 7 USC 8303(a), to "prevent the introduction into or dissemination within the United States of any pest or disease of livestock."[259]

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[251] We find support for our interpretation in the reasoning of the panel in *US – Poultry (China)*. That panel observed that the successful completion of the equivalence determination process undertaken by the United States' authorities was the only means by which any WTO Member had to export the products at issue into the United States. (Panel Report, *US – Poultry (China)*, para. 7.368) The panel attached relevance to this fact in dismissing the United States' argument that Annex C does not cover equivalence determinations under Article 4 of the SPS Agreement. (Ibid. para. 7.359)

[252] *Online Oxford English Dictionary*, "check", http://www.oed.com/view/Entry/31082?rskey=V1iLGM&result=3#eid (last accessed November 2014).

[253] *Online Oxford English Dictionary*, "ensure", http://www.oed.com/view/Entry/62745?rskey=6qU6pb&result=2#eid (last accessed November 2014). See also Panel Report, *India – Agricultural Products*, para. 7.668.

[254] Appellate Body Report, *US – COOL*, para. 362 (referring to Panel Report, *US – COOL*, para. 7.692).

[255] Appellate Body Report, *Australia – Apples*, para. 172.

[256] Appellate Body Report, *Australia – Apples*, paras. 172-173. See also Panel Report, *India – Agricultural Products*, para. 7.139.

[257] See paras. 7.37-7.41 above.

[258] See paras. 7.37-7.41 above. We discuss the United States' ALOP for FMD more in detail in paras. 7.377-7.387 below.

[259] 7 USC § 8303(a), (Exhibit USA-75). We will discuss 7 USC 8303(a) in section 7.6.2 below.

7.75. In light of the above, we take the view that procedures carried out under 9 CFR 92.2 are aimed at checking and ensuring the fulfilment of another SPS measure, namely 9 CFR 94, which, in turn, is intended to achieve the objective set forth in 7 USC 8303(a).

7.3.2.3.3 Conclusion

7.76. Based on the foregoing, we conclude that the application of the disciplines of 9 CFR 92.2 to Argentina's requests for authorization to import fresh (chilled or frozen) beef from Northern Argentina and for recognition of Patagonia as FMD-free fall within the scope of Article 8 and Annex C(1) of the SPS Agreement. Having reached this conclusion, we move on to examine Argentina's claim that there was undue delay in the way the United States undertook and completed these processes contrary to the obligations in Article 8 and Annex (C)(1)(a).

7.3.3 Whether APHIS' review processes of Argentina's requests were undertaken and completed without undue delay

7.77. Given the length and complexity of the legal and factual arguments made with respect to this claim, the Panel will first set out the general arguments of the parties and third parties on the interpretation of the obligation in Article 8 and Annex C (1)(a) and then move on to address the arguments with respect to the alleged undue delay in the approval processes for Argentina's applications for authorization to import fresh (chilled or frozen) beef from Northern Argentina and for the Patagonia region to be designated FMD-free.

7.3.3.1 General arguments of the parties

7.3.3.1.1 Argentina

7.78. Argentina claims that APHIS' application of the procedures under 9 CFR 92.2 to Argentina's requests for imports of fresh (chilled or frozen) beef from Northern Argentina and for recognition of Patagonia as FMD-free incurred undue delays and is therefore inconsistent with the requirement under Article 8 and Annex C(1)(a) of the SPS Agreement that procedures under these provisions be "undertaken and completed without undue delay".[260] In its responses to Panel questions, Argentina clarified that, in its view, such delays do not concern APHIS' initiation of the approval processes upon reception of the two requests, but rather the completion of such approval processes.[261]

7.79. Argentina submits that, in determining whether a delay is undue, the Panel should examine the reasons for such a delay.[262] Relying on the panel report in *EC – Approval and Marketing of Biotech Products*, Argentina maintains that the relevant "delay" to be examined is not only one in undertaking an approval procedure, but also in finishing or concluding that procedure.[263] Moreover, in Argentina's view, amendments to approval procedures during the pendency of a request do not erase the delay incurred until that point, nor do they require that undue delay be established prior to and following such amendment.[264]

7.3.3.1.2 United States

7.80. The United States disagrees with Argentina's focus on the overall length of time of APHIS' approval processes of Argentina's requests rather than on specific periods of delay.[265] Relying on the panel report in *EC – Approval and Marketing of Biotech Products*, the United States argues that an assessment of whether a delay is undue must be conducted on a case-by-case basis, taking

[260] Argentina's first written submission, para. 596.
[261] Argentina's response to Panel question No. 68 following the first substantive meeting.
[262] Argentina's first written submission, para. 611 (citing Appellate Body Report, *Australia – Apples*, para. 437).
[263] Argentina's first written submission, para. 613 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494).
[264] Argentina's first written submission, para. 617 (referring to Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1535).
[265] United States' first written submission, para. 202.

into account all the relevant facts and circumstances.[266] The United States asserts that the length of time of the approval processes of imports of Argentine products conducted by other WTO Members is not a reliable benchmark against which to gauge APHIS' reviews, as different Members may differ in terms of the specific information they require to reach a decision and the ALOP they have determined for the risk at issue.[267]

7.81. In the United States' view, not every delay in undertaking or completing an approval procedure is contrary to the provisions of Annex C(1)(a), but only an unjustifiable one.[268] The United States considers that this standard is equivalent in nature to that applied to assess what constitutes a "reasonable period of time" under Article 5.7 of the SPS Agreement.[269] For the United States, possible factors justifying a delay include (i) delays attributable to the applicant itself rather than to the approving Member[270]; (ii) the necessity to reasonably determine with adequate confidence whether the relevant SPS requirements have been fulfilled[271]; and (iii) the submission or supervening availability of additional relevant information at a late stage of an approval procedure.[272]

7.82. In the United States' opinion, APHIS had the difficult task of conducting a thorough examination of Argentina's ability to prevent and control FMD within its territory.[273] It also stresses that obtaining the necessary information to proceed with the approval processes was not easy, as the data to be collected were (i) not in the United States; (ii) of substantial scope and breadth including geographical information, internal and cross-border animal movements, quarantine processes, and veterinary infrastructure; and (iii) only accessible with Argentina's cooperation.[274]

7.3.3.2 APHIS' review of Argentina's request for imports of fresh (chilled or frozen) beef from Northern Argentina

7.3.3.2.1 Argentina

7.83. Argentina notes that it filed its request for imports of fresh (chilled or frozen) beef in November 2002[275] and that at the time of the establishment of the Panel it had not received a decision on such request despite SENASA cooperating fully with all of APHIS' requests for information and site visits.[276] Argentina argues that the United States could not need more than 11 years to evaluate the FMD status of Argentina[277], especially as the request only sought to reinstate import rights previously granted during the period 1997-2001[278] and APHIS had already reviewed the history of FMD outbreaks and other scientific evidence pertaining to Northern Argentina.[279]

7.84. To provide a sense of what time-frame it views as reasonable for the conclusion of the process, Argentina refers to the Terrestrial Code, which provides that a period of 12 months since the most recent outbreak is a sufficient time, from an epidemiological perspective, to obtain

[266] United States' first written submission, para. 189 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1497); United States' opening statement at the first meeting of the Panel, para. 46; United States' second written submission, para. 40.
[267] United States' response to Panel question No. 59 following the first substantive meeting.
[268] United States' first written submission, para. 190 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495); United States' second written submission, para. 60.
[269] United States' first written submission, para. 244.
[270] United States' first written submission, para. 192 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1497).
[271] United States' first written submission, para. 194 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1498).
[272] United States' first written submission, para. 194 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1498).
[273] United States' second written submission, paras. 201, 320.
[274] United States' second written submission, para. 41.
[275] Argentina's first written submission, para. 620; Argentina's second written submission, para. 349.
[276] Argentina's first written submission, para. 632; Argentina's second written submission, para. 354.
[277] Argentina's first written submission, para. 639; Argentina's opening statement at the first meeting of the Panel, para. 80; Argentina's second written submission, para. 358.
[278] Argentina's first written submission, para. 639.
[279] Argentina's first written submission, para. 644.

FMD-free status.[280] Argentina also notes that the time it took to approve Uruguay from the time of its last outbreak was two years.[281] Argentina also argues that the FMD situation in Northern Argentina is similar to Uruguay's in terms of the timing of the last outbreak and because both regions are recognized by the OIE as FMD-free where vaccination is practised.[282] In this regard, Argentina also notes that while it had been previously authorized to export fresh (chilled or frozen) beef to the United States, Uruguay had no such previous authorization.[283] Argentina also considers that the fact that the European Union and Chile promptly reopened their markets to Argentine beef following the 2003 and 2006 FMD outbreaks is "indicative of the time reasonably necessary to conduct an evaluation for FMD".[284]

7.85. Argentina contends that, after its site visit to Northern Argentina following the 2006 FMD outbreak in the Province of Corrientes, APHIS did not request any further information from SENASA, nor did it take any further action.[285] It also submits that, in response to a letter from Argentina, APHIS stated in September 2010 that it was "currently drafting a proposed rule that would allow the importation of fresh, chilled or frozen Argentine beef under certain conditions".[286] Similarly, Argentina observes, at the June and October 2011 sessions of SPS Committee, the United States' representative stated that APHIS had completed a risk analysis for Northern Argentina.[287] In Argentina's view, the above statements by APHIS and the United States' representative at the SPS Committee indicate that, in September 2010, APHIS had already completed a risk assessment for Northern Argentina which it did not publish[288], or, at least, that APHIS had all the information needed to complete one.[289] In this regard, Argentina contends that, under the public international law rules on State responsibility, "the United States must be held to the evidence of statements" made by its officials.[290]

7.86. In Argentina's view, the above events reveal that APHIS had no scientific rationale for waiting over six years after the 2006 FMD outbreak to proceed with the review of its request.[291] Rather, in its view, the delay in APHIS' approval process is due to a number of elements extraneous to science.[292] Argentina also argues that Section 737 of the *2009 Omnibus Appropriations Act* contributed to the undue delay because it precluded any activity on APHIS' part in connection with Argentina's pending requests[293] at least from March 2009 to September 2009, and deterred APHIS from moving forward even after its expiration.[294] In this regard, Argentina also argues that Section 737 is very similar to Section 727 of the *2009 Omnibus Appropriations*

[280] Argentina's first written submission, para. 639 (citing Articles 8.5.45 and 8.5.46 of the Terrestrial Code). See also Argentina's response to Panel question No. 59 following the first substantive meeting.
[281] Argentina's first written submission, para. 640.
[282] Argentina's first written submission, para. 641; Argentina's opening statement at the first meeting of the Panel, para. 92; Argentina's second written submission, paras. 198, 364.
[283] Argentina's first written submission, para. 641; Argentina's opening statement at the first meeting of the Panel, para. 93.
[284] Argentina's response to Panel question No. 59 following the first substantive meeting.
[285] Argentina's second written submission, paras. 134, 197; Argentina's opening statement at the first meeting of the Panel, para. 86; Argentina's response to Panel question No. 68 following the first substantive meeting.
[286] Argentina's second written submission, para. 197.
[287] Argentina's second written submission, para. 262.
[288] Argentina's second written submission, para. 264.
[289] Argentina's second written submission, para. 264; Argentina's comments on the United States' response to Panel question No. 27 following the second substantive meeting.
[290] Argentina's second written submission, para. 265 (referring to Article 4 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles)).
[291] Argentina's first written submission, para. 642. Argentina's response to Panel question No. 68 following the first substantive meeting; Argentina's second written submission, paras. 30, 32.
[292] Argentina refers, *inter alia*, to a piece of proposed legislation, the *Foot and Mouth Disease Prevention Act* of 2008, which was introduced in the United States' Congress in 2008 but never adopted, as evidence of alleged political interference in APHIS' approval process. (Argentina's first written submission, para. 633).
[293] Argentina's first written submission, paras. 634, 701.
[294] Argentina's first written submission, para. 701; Argentina's opening statement at the first meeting of the Panel, para. 18; Argentina's second written submission, paras. 385-389.

Act[295], which the panel in *US – Poultry (China)* found to impose undue delay in approval procedures inconsistently with Article 8 and Annex C(1)(a).[296]

7.87. Finally, Argentina maintains that APHIS' new request for a site visit to Northern Argentina in March 2013, followed by the actual visit in November 2013, "do not resolve a gap of six years during which there has been no progress on Argentina's application".[297]

7.3.3.2.2 United States

7.88. The United States argues that Argentina fails to offer any factual support for its claim of undue delay with respect to APHIS' approval process of imports of fresh (chilled or frozen) beef.[298] It maintains that, since the filing of Argentina's request in November 2002, APHIS engaged with SENASA by requesting information and conducting site visits to Northern Argentina.[299]

7.89. The United States asserts that the delays in the approval process are not attributable to APHIS, but rather to a "lag in informational response time" on the part of SENASA.[300] In particular, the United States observes that (i) SENASA took over one year to answer additional questions posed by APHIS in October 2003 concerning the FMD situation in Northern Argentina[301]; and (ii) when APHIS requested a new site visit to Northern Argentina in March 2013, SENASA delayed the visit until November 2013.[302]

7.90. Further, the United States argues that APHIS' delay in processing Argentina's request is due to the changing FMD conditions in the country. The 2003 and 2006 FMD outbreaks in Northern Argentina, for instance, "raise[d] obvious serious concerns" with respect to SENASA's ability to prevent and control FMD and required revised analysis.[303] Moreover, the United States asserts, SENASA suffered a labour strike in 2005, which gave rise to doubts as to its ability to control FMD.[304] The United States also argues that Argentina's "history of intentional concealment and delayed reporting of outbreaks" played a "significant role" in APHIS' verification of SENASA's information and capability, as it "called for greater diligence, and for more time", to conduct such an evaluation.[305]

7.91. The United States submits that, because the FMD situation on the ground kept evolving throughout the approval process, APHIS did not have all the information necessary to complete its risk assessment for Northern Argentina until it conducted its site visit to Northern Argentina in November 2013.[306] Specifically, according to the United States, the November 2013 visit was aimed at "re-confirm[ing] and updat[ing]" information in possession of APHIS as a result of the 2006 site visit to Northern Argentina and the 2009 site visit to Patagonia.[307]

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[295] Argentina's first written submission, para. 702; Argentina's second written submission, paras. 390-392.

[296] Argentina's first written submission, para. 702.

[297] Argentina's second written submission, para. 357; Argentina's opening statement at the first meeting of the Panel, para. 81.

[298] United States' first written submission, para. 195.

[299] United States' first written submission, paras. 132-143, 197-199; United States' second written submission, paras. 42-43.

[300] United States' response to Panel question No. 62 following the first substantive meeting (underlining omitted).

[301] United States' first written submission, para. 140; United States' response to Panel question No. 62 following the first substantive meeting.

[302] United States' first written submission, para. 200; United States' opening statement at the first meeting of the Panel, para. 14.

[303] United States' first written submission, para. 204; United States' opening statement at the first meeting of the Panel, para. 57; United States' response to Panel question No. 62 following the first substantive meeting.

[304] See United States' first written submission, para. 238; United States' response to Panel question No. 62 following the first substantive meeting.

[305] United States' response to Panel question No. 31 following the second substantive meeting.

[306] United States' response to Panel question No. 29 following the second substantive meeting.

[307] United States' response to Panel question No. 29 following the second substantive meeting. See also United States' first written submission, para. 204; United States' response to Panel question No. 30 following the second substantive meeting.

7.92. In this regard, the United States disagrees with Argentina's characterization of the statements by APHIS in April 2009 and September 2010 and by the United States' representative before the SPS Committee in June and October 2011. The United States contends that, at the time such statements were made, APHIS had not completed a risk assessment for Northern Argentina[308], nor did it have enough information to complete one.[309]

7.93. Finally, the United States disagrees with Argentina that Section 737 of the *2009 Omnibus Appropriations Act* contributed to delays in APHIS' review processes of Argentina's request. It contends that while Section 737 temporarily discontinued the funding necessary for authorizing meat imports from Argentina, it still preserved the Secretary of Agriculture's powers to review any requests to import meat from Argentina pursuant to 9 CFR 92.2.[310] Moreover, the United States argues that Section 737, together with the whole *2009 Omnibus Appropriations Act*, expired less than a year after it was adopted.[311] It adds that to the extent that the United States' representative's statements before the SPS Committee could be understood to suggest that Section 737 had a lingering effect on APHIS after its expiration, those statements were incorrect.[312] Hence, the United States takes issue with Argentina's assertion that Section 737 is similar to Section 727, which was found to be WTO-inconsistent by the panel in *US – Poultry (China)*, because the latter provision "completely foreclosed the possibility for 'completion'" of approval process and "was still in effect" at the time of that dispute.[313]

7.3.3.3 APHIS' review of Argentina's request for recognition of Patagonia as FMD-free

7.3.3.3.1 Argentina

7.94. Argentina complains that, despite having filed its request for the recognition of Patagonia as FMD-free in June 2003 and fully cooperating with APHIS throughout the approval process[314], APHIS had not issued a final determination at the time of the establishment of the Panel.[315] Argentina notes that there has been no FMD outbreak in Patagonia South since 1976 and in Patagonia North B since 1994[316], and that the OIE has continuously recognized Patagonia South as FMD-free where vaccination is not practised since 2002 and has extended the same recognition to Patagonia North B since 2007.[317] It also notes that APHIS published a favourable risk assessment for Patagonia South in July 2005 and a proposed rule to recognize Patagonia South as FMD-free in January 2007.[318]

7.95. Argentina points to several instances where it contends, APHIS' process incurred undue delays: (i) the two-year gap (2003-2005) between the filing of its request and the publication of the risk assessment for Patagonia South; (ii) the one-and-a-half year gap (2005-2007) between the publication of that risk assessment and the issuance of the Proposed Rule for the recognition of Patagonia South; (iii) APHIS' failure to proceed with a Final Rule for Patagonia South after the issuance of the Proposed Rule; and (iv) APHIS' failure to proceed with a risk assessment and determination for the entire Patagonia region, comprising both Patagonia South and Patagonia North B, after 2009 (date of APHIS' site visit to the region).[319]

[308] United States' response to Panel question No. 32 following the first substantive meeting.
[309] United States' response to Panel question No. 27 following the second substantive meeting.
[310] United States' first written submission, paras. 146, 223.
[311] United States' second written submission, Annex, para. 11.
[312] United States' response to Panel question No. 6 following the first substantive meeting.
[313] United States' first written submission, para. 226. See also United States' response to Panel question No. 2 following the first substantive meeting; United States' second written submission, Annex, para. 13.
[314] Argentina's first written submission, para. 672.
[315] Argentina's first written submission, para. 671.
[316] Argentina's first written submission, para. 671. See also Argentina's opening statement at the first meeting of the Panel, para. 94.
[317] Argentina's first written submission, para. 671.
[318] Argentina's first written submission, para. 664; Argentina's opening statement at the first meeting of the Panel, para. 94; Argentina's second written submission, paras. 367-368.
[319] Argentina's response to Panel question No. 68 following the first substantive meeting.

7.96. In this regard, Argentina submits that, after the 2009 site visit to Patagonia, APHIS did not request any further information from SENASA.[320] Rather, Argentina remarks, in April 2009 APHIS confirmed that it currently had all the information required, and in September 2010 it stated that it had made significant progress towards the recognition of Patagonia as FMD-free.[321] This was confirmed, according to Argentina, by the United States' representative at the SPS Committee in June and October 2011.[322] In Argentina's opinion, the above statements by APHIS and the United States' representative at the SPS Committee indicate that, by 2009-2010, APHIS had already completed a risk assessment for Patagonia as a whole which it did not publish[323], or, at least, that APHIS had all the information needed to complete one.[324]

7.97. As a benchmark for what constitutes a reasonable approval time, Argentina compares the duration of the recognition process for Patagonia with those for Japan, the United Kingdom, and Santa Catarina, which APHIS completed more expeditiously.[325] Argentina contends that the Final Rule recognizing Santa Catarina as FMD-free in 2010 was part of an agreement reached between the United States and Brazil to settle the *US – Upland Cotton* dispute.[326]

7.98. As with the approval process for fresh (chilled or frozen) beef, Argentina claims that the cause of the delay in the recognition of Patagonia was not supported by scientific considerations[327], but rather due to non-scientific factors.[328] Argentina points, in particular, to Section 737 of the *2009 Omnibus Appropriations Act* which, in its view, impeded the completion of APHIS' approval process for Patagonia.[329]

7.99. Finally, Argentina contends that the risk assessment and the Proposed Rule for Patagonia issued by APHIS in January 2014 "do not change the parameters" of the dispute, as these documents post-date the establishment of the Panel.[330]

7.3.3.3.2 United States

7.100. The United States rejects Argentina's allegations of undue delay with respect to APHIS' review process for recognition of Patagonia as FMD-free. It asserts that, since the filing of Argentina's request concerning Patagonia South in July 2003, APHIS continuously engaged with SENASA by requesting supplemental information and scheduling and conducting site visits.[331] According to the United States, this process resulted in the publication, in June 2005, of APHIS' risk analysis for Patagonia South and, in January 2007, of a Proposed Rule to recognize Patagonia South as FMD-free within the meaning of 9 CFR 94.1(a).[332] The United States further observes that the Proposed Rule was conditional, given that "FMD continued to pose a risk to Patagonia South because of its geography and trading activity".[333] It also explains that the one-and-a–half year gap between the publication of the risk assessment for Patagonia South and the publication of the Proposed Rule was due to APHIS' need to comply with the Regulatory Flexibility Act, Executive Order No. 12988, and the Paperwork Reduction Act.[334]

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[320] Argentina's second written submission, paras. 270, 375; Argentina's response to Panel question No. 32 following the second substantive meeting.
[321] Argentina's second written submission, paras. 270, 375; Argentina's response to Panel question No. 32 following the second substantive meeting.
[322] Argentina's second written submission, paras. 271-273, 375.
[323] Argentina's first written submission, para. 689.
[324] Argentina's response to Panel question No. 24 following the first substantive meeting.
[325] Argentina's first written submission, para. 674; Argentina's second written submission, para. 379.
[326] Argentina's first written submission, para. 677; Argentina's second written submission, para. 225.
[327] Argentina's first written submission, para. 672.
[328] Argentina's first written submission, para. 682. Argentina refers, *inter alia*, to a letter from four United States senators to the Administration urging not to adopt the final rule for the recognition of Patagonia South as FMD-free until the rule has been reviewed by the Office of Management and Budget. (Argentina's first written submission, para. 679; Argentina's opening statement at the first meeting of the Panel, para. 87).
[329] Argentina's first written submission, paras. 669, 701.
[330] Argentina's opening statement at the first meeting of the Panel, para. 98.
[331] United States' first written submission, paras. 150-153, 208-209.
[332] United States' first written submission, para. 209.
[333] United States' first written submission, para. 209.
[334] United States' response to Panel question No. 61 following the first substantive meeting.

7.101. The United States argues that any further delays in the processing of Argentina's request are not attributable to APHIS, but rather to changing FMD and regulatory conditions in Argentina throughout the review period, as well as to SENASA's inaction in responding to requests for information.[335] In particular, the United States contends that SENASA: (i) failed to provide some necessary information as part of its initial request for the recognition of Patagonia South in July 2003[336]; (ii) took almost one year to provide additional information requested by APHIS in March 2004 as a follow-up to its visit to Patagonia South[337]; and (iii) postponed APHIS' latest site visit to Patagonia, formally requested in March 2013[338], until November 2013.[339]

7.102. Moreover, the United States stresses that Argentina extended its request for recognition to Patagonia North B in December 2008, i.e. more than five years after its original request for Patagonia South, without providing the necessary supporting information to address the factors listed under 9 CFR 92.2.[340] The United States submits that this restructuring of Argentina's initial request altered and delayed the process by requiring APHIS to revise its evaluation to account for the distinct geographical differences between Patagonia South and Patagonia North B and to conduct a new site visit to Patagonia as a whole in February 2009.[341]

7.103. Finally, the United States points to Argentina's continuous "revisions to its surveillance regulations and slaughter establishment standards" throughout the approval process.[342] In particular, it refers to Resolution No. 148/2008, which modified the conditions on transport of commercial goods into Patagonia South[343], and Resolution No. 1282/2008, which "resulted in substantial changes to the methods of detecting and preventing the spread of the disease".[344] The United States claims that the modifications of border control measures such as those contained in Resolution No. 1282/2008, called into question SENASA's ability to prevent FMD from penetrating its borders.[345] Furthermore, the United States contends that at the time of APHIS' site visit to Patagonia in February 2009, Resolution No. 1282/2008 had not been fully implemented[346]; therefore, it could not adequately assess the impact of the revision on Patagonia's ability to control FMD.[347]

7.104. In light of the above, the United States maintains that APHIS did not have all the information necessary to complete its risk assessment for Patagonia as a whole (comprising both Patagonia South and Patagonia North B) until it conducted its site visit to the region in November 2013.[348] Specifically, according to the United States, the November 2013 visit was aimed at "re-confirm[ing] and updat[ing]" information in possession of APHIS as a result of the 2006 site visit to Northern Argentina and the 2009 site visit to Patagonia.[349] In this regard, the United States disagrees with Argentina's characterization of the statements by APHIS in September 2010 and by the United States' representative before the SPS Committee

[335] United States' first written submission, paras. 202, 217.
[336] United States' first written submission, paras. 151, 208; United States' response to Panel question No. 62 following the first substantive meeting.
[337] United States' first written submission, paras. 152, 208; United States' response to Panel question No. 62 following the first substantive meeting.
[338] We note that the United States refers to the fact that it orally mentioned the possibility of a site visit during consultations with Argentina in November 2012. However, the formal written request was sent in March 2013.
[339] United States' first written submission, para. 216; United States' opening statement at the first meeting of the Panel, para. 14; United States' response to Panel question No. 32 following the second substantive meeting.
[340] United States' first written submission, para. 215.
[341] United States' first written submission, para. 215. See also United States' response to Panel question No. 33 following the second substantive meeting.
[342] United States' first written submission, para. 213.
[343] United States' first written submission, para. 210.
[344] United States' first written submission, para. 210.
[345] United States' first written submission, para. 211.
[346] United States' first written submission, para. 212. United States' response to Panel question No. 34 following the second substantive meeting.
[347] United States' first written submission, para. 212. United States' response to Panel question No. 34 following the second substantive meeting.
[348] United States' response to Panel question No. 33 following the second substantive meeting.
[349] United States' response to Panel question No. 33 following the second substantive meeting.

in June and October 2011. The United States asserts that, at the time such statements were made, APHIS did not have enough information to complete a risk assessment for Patagonia.[350]

7.105. Finally, for the same reasons outlined in paragraph 7.93 above, the United States disagrees that Section 737 of the *2009 Omnibus Appropriations Act* contributed to delays in APHIS' review processes of Argentina's request.

7.3.3.4 Main arguments of the third parties

7.3.3.4.1 China

7.106. In China's view, Annex C(1)(a) is "essentially a good faith obligation requiring Members to proceed with their approval procedures as promptly as possible, taking account of the need to check and ensure the fulfilment of their relevant SPS requirements".[351] In addition, according to China, the terms "undertake and complete" in Annex C(1) indicate that approval procedures are not only to be undertaken, but are also to be finished, or concluded without undue delay.[352] Moreover, China relies on the panel report in *EC – Approval and Marketing of Biotech Products* in stating that an "undue delay" is determined not by the length of the delay, but by whether the delay is justified.[353]

7.107. China considers that a decade-long wait for approval "constitutes a delay" within the meaning of Annex C(1) of the SPS Agreement.[354] Therefore, the focus of the dispute should be on whether such delay is justifiable or not.[355] Furthermore, China takes the view that Section 737 of the *2009 Omnibus Appropriations Act* precluded the United States from issuing a risk assessment and from even initiating a rulemaking process to permit importation from Argentina.[356] For these reasons, China considers that Argentina's claims with respect to undue delay should prevail.

7.3.3.4.2 European Union

7.108. According to the European Union, the question arises whether a Member in receipt of an application that it does not yet find complete or convincing is necessarily required to adopt a negative decision or may rather postpone the decision until such time as it has established that products from the applicant Member are suitable for import.[357] In the European Union's view, postponing the decision until it can be favourable to imports may curtail the complaining Member's possibility to benefit from a full representation of the matter in the framework of dispute settlement.[358] Conversely, requiring the Member to adopt a negative determination would trigger the question as to when such a determination is due and would raise doubts as to its utility in case the circumstances subsequently change.[359] For the European Union, the answer to the question should depend on a case-by-case analysis by panels.[360]

7.109. The European Union takes the view that, especially in the absence of a specific negative decision, the complaining and defending Members should be expected to provide an exhaustive and duly evidenced description of any material relevant to the question of the passage of time.[361] Only then, the European Union argues, could a panel make an objective assessment of whether or not the passage of time is justified, based on all the facts and evidence.[362]

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[350] United States' response to Panel question No. 33 following the second substantive meeting.
[351] China's third-party submission, para. 70.
[352] China's third-party submission, para. 70.
[353] China's third-party submission, para. 71.
[354] China's third-party submission, para. 72.
[355] China's third-party submission, para. 72.
[356] China's third-party submission, para. 73. See also China's third-party statement, para. 10.
[357] European Union's third-party submission, para. 108.
[358] European Union's third-party submission, para. 109.
[359] European Union's third-party submission, para. 110.
[360] European Union's third-party submission, para. 111.
[361] European Union's third-party submission, para. 114.
[362] European Union's third-party submission, para. 114.

7.3.3.5 Analysis by the Panel

7.110. Annex C(1)(a) of the SPS Agreement requires Members to ensure that control, inspection, and approval procedures are "undertaken and completed without undue delay". We examine the meaning of each term of the provision in turn.

7.3.3.5.1 "Undertaken and completed"

7.111. We note that Annex C(1)(a) requires that procedures be "undertaken and completed without undue delay". Prior panels have focused on each term separately and as distinct obligations. In the past the term "undertake" has been understood to refer to the beginning[363] or commencement[364] of the approval procedure. In turn, panels and the Appellate Body have stated that the term "complete" indicates that "approval procedures are not only to be undertaken, but are also to be finished, or concluded".[365]

7.112. We agree with these interpretations. Moreover, we also believe that the term "undertaken and completed without undue delay" includes not only no undue delay in the commencement of the procedure and its completion, but also in the intervening process that leads from commencement to completion. We find support for this understanding from the definition of the verb "to undertake" which is "[t]o take upon oneself; to take in hand[;] … [t]o take in charge; to accept the duty of attending to or looking after"[366], as well as in the reasoning of the panels in *EC – Approval and Marketing of Biotech Products* and *US – Poultry (China)* that "once an application has been received, approval procedures must be started and then carried out from beginning to end".[367] The requirement to carry out an approval procedure to the end should not be confused with an obligation for the importing Member to *approve* the importation of the product(s) subject to the procedure. Pursuant to Annex C(1)(a), the importing Member is simply required to issue a final determination regardless of whether it be positive or negative.[368]

7.3.3.5.2 "Without undue delay"

7.113. We now turn to the interpretation of what constitutes an undue delay within the meaning of Annex C(1)(a). In our view, not every lapse of time amounts to a delay, as a certain period of time is usually necessary for a Member to undertake and complete a control, inspection or approval procedure. The panel in *EC – Approval and Marketing of Biotech Products* found that a "delay" is "(a period of) time lost by inaction or inability to proceed".[369] The requirements in Annex C(1)(b) provide context for this interpretation, particularly the requirements for the competent authorities to "promptly examine[] the completeness of the documentation" and to "inform[] the applicant in a precise and complete manner of all deficiencies". In our view, these requirements support an understanding that the normal course of a procedure requires competent authorities to actively engage with the applicant Member on the substance of its application. Thus, inaction or an inability to proceed on the substance of the application would constitute something

[363] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494 (explaining that "[t]he verb 'undertake' makes clear that Members are required to begin, or start, approval procedures after receiving an application for approval"). See also Panel Report, *EC – Seal Products*, para. 7.562. The panel in *EC – Seal Products* expressed its opinion in the context of Article 5.2.1 of the TBT Agreement. It also found that, "[g]iven the similarity in the text, we agree … that there are certain parallels in the terms and scope of Article 5.2.1 of the TBT Agreement and Annex C(1)(a) of the SPS Agreement". (Panel Report, *EC – Seal Products*, para. 7.561)

[364] Appellate Body Report, *Australia – Apples*, para. 438.

[365] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1494. See also Panel Reports, *US – Poultry (China)*, para. 7.383; *EC – Seal Products*, para. 7.562; Appellate Body Report, *Australia – Apples*, para. 438.

[366] *Online Oxford English Dictionary*, "undertake", http://www.oed.com/view/Entry/212141?isAdvanced=false&result=2&rskey=s7YzPE& (last accessed November 2014).

[367] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1494; *US – Poultry (China)*, para. 7.383.

[368] This interpretation finds support in the language of Annex C(1)(b), in the part where it requires that "the competent body transmit[] as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary".

[369] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495. See also Appellate Body Report, *Australia – Apples*, para. 437.

outside the normal course of the procedure and should be considered a delay within the meaning of Article 8 and Annex C(1)(a).

7.114. In our view, a determination of whether a delay exists should be made in light of the nature and complexity of the procedure to be undertaken and completed.[370] In certain instances, the ordinary or expected time to carry out a procedure may not be easily ascertained. For example, the relevant regulations governing the procedure may not establish a precise time-frame within which each step has to be conducted. In our view, this is the case with 9 CFR 92.2. Indeed, as the United States explained, APHIS does not have a standard or average time-period required for the completion of its review processes.[371] Rather, the length of time required for it to evaluate a request "depend[s] on the specific circumstances of each case", as applicant Members present different SPS circumstances that "may also affected by law, policy, governance, and veterinary infrastructures".[372] Therefore, in making our assessment of whether delays occurred with respect to Argentina's applications, the Panel cannot simply compare the time taken to review Argentina's applications to a standard processing time. Instead, the Panel must examine each of the time-periods identified by Argentina as delays to determine whether they were periods when the procedure did not move forward because of inaction or inability to proceed.

7.115. We recall that the panel in *EC – Approval and Marketing of Biotech Products* explained "not every delay in the undertaking or completion of approval procedures" is contrary to the provisions of Annex C(1)(a), but only one that is undue.[373] That panel found that the ordinary meaning of the term undue is "[g]oing beyond what is warranted" and "unjustifiable".[374] The panel in *US – Poultry (China)* similarly stated that the ordinary meaning of the phrase "without undue delay" requires that "approval procedures be undertaken and completed with no unjustifiable loss of time".[375] In other words, what matters is whether there is a legitimate reason, or justification, for a given delay, not the length of a delay as such.[376] Therefore, the analysis of a claim under Article 8 and Annex C(1)(a) requires two steps. First, the complainant must establish that there has been a delay. Second, the complainant must establish that the delay was undue.

7.116. The panels in *EC – Approval and Marketing of Biotech Products* and *US – Poultry (China)* explained that the determination of what constitutes an undue delay must be made "on a case-by-case basis, taking account of relevant facts and circumstances".[377] The panel in *EC – Approval and Marketing of Biotech Products* provided some guidance on the types of circumstances that might justify a delay taken in carrying out a procedure subject to the obligation in Annex C(1)(a). First, delays attributable to action or inaction of an applicant cannot be held against the Member carrying out the procedure.[378] Second, delays which "are justified in their entirety" by the Members' need "to determine with adequate confidence whether their relevant SPS requirements are fulfilled" should not be considered undue.[379] Third, if "new or additional information becomes available at a late stage in an approval procedure" and that information may reasonably be considered to "have a potential impact on a Member's determination", it "might be justifiable for

[370] In this regard, we note that, in determining an appropriate period of time for implementation of the DSB's recommendations or rulings under Article 21.3(c) of the DSU, the arbitrator in *US – Hot-Rolled Steel (Article 21.3(c))* stated that "[t]he degree of complexity of the contemplated implementing legislation may … bear[] upon the length of time that may reasonably be allocated to the enactment of such legislation". (Award of the Arbitrator, *US – Hot-Rolled Steel (Article 21.3(c))*, para. 30. See also Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 50)

[371] United States' response to Panel question No. 60 following the first substantive meeting.

[372] United States' response to Panel question No. 66 following the first substantive meeting.

[373] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.

[374] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495.

[375] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1495; *US – Poultry (China)*, para. 7.354. See also See also Appellate Body Report, *Australia – Apples*, para. 437.

[376] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1496; *US – Poultry (China)*, para. 7.354.

[377] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1497. See also Panel Report, *US – Poultry (China)*, para. 7.354; Appellate Body Report, *Australia – Apples*, para. 437.

[378] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1497; *US – Poultry (China)*, para. 7.354.

[379] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1498.

the Member concerned to delay the completion of the procedure" in order to assess the information.[380]

7.117. Applying this reasoning to the present dispute, we consider that the period of 11 years following Argentina's requests during which APHIS was conducting the procedure is not, in and of itself, conclusive as to whether such procedures incurred undue delay inconsistently with Article 8 and Annex C(1)(a). Rather, we shall conduct our analysis based on all the relevant facts and circumstances presented by the parties. That being said, it would be difficult for us to gauge the reasonableness of the length of time of APHIS' review processes in the absence of a point of reference. Therefore, we find it useful to rely on a number of indicators that, without being dispositive of our assessment, may nonetheless assist us in our analysis. Such indicators include the standard processing time reflected in APHIS' own policy and practice as well as guidelines provided by the OIE.

7.118. We note that a claim of undue delay necessarily refers to acts or omissions over a period of time. In order to precisely define the scope of our review, we consider it necessary to identify an end-date for the period of time we take into account for the purpose of assessing the alleged undue delays in the conduct of APHIS' procedures. The Appellate Body stated in *EC – Chicken Cuts* that, as a general rule, the measures subject to a panel's review "must be measures that are in existence at the time of the establishment of the panel".[381] Further, the panel in *EC – Approval and Marketing of Biotech Products* conducted its analysis of the parties' claims and arguments under Article 8 and Annex C(1)(a) based on the situation that existed up to the date of its establishment.[382] In light of the above, we take the view that the appropriate end-date of the period of time to be considered in order to examine Argentina's claims is the date of the establishment of the Panel, namely 28 January 2013.[383]

7.119. With these considerations in mind, we now turn to Argentina's claims that APHIS' review processes of its requests incurred undue delays inconsistently with Article 8 and Annex C(1)(a).

7.3.3.5.3 APHIS' review process of Argentina's request concerning imports of fresh (chilled or frozen) beef from Northern Argentina

7.120. We shall assess, first, whether APHIS' review process of Argentina's request concerning imports of fresh (chilled or frozen) beef from Northern Argentina incurred a delay. If so, we shall turn to determining whether such a delay was undue. For ease of reference, we include the events relevant to Argentina's request for market access including APHIS' review and the Panel proceedings in Table 1 below. We also refer to the more comprehensive chronology contained in Appendix 1 to this Report for further information.

Table 1: Chronology of events relating to APHIS' review of Argentina's request for imports of fresh (chilled or frozen) beef from Northern Argentina and the Panel proceedings

No.	Event	Date	Interval (approx.)
1.	SENASA submitted a request for authorization of imports of Argentine fresh (chilled or frozen) beef into the United States pursuant to 9 CFR 92.[384]	**Nov. 2002**	
2.	Officials from the United States met with Argentina officials and requested technical documents to allow for the initiation of a risk analysis.[385]	**16 Dec. 2002**	1 month

[380] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1498.
[381] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[382] See Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.456. Indeed, the panel disregarded arguments put forward by the defendant in justification for its delays when those arguments referred to events which occurred after its establishment. See Ibid. paras. 7.1034, 7.1081, 7.1083.
[383] WT/DS447/3.
[384] Information Provided by SENASA (November 2002), (Exhibit USA-32).
[385] Letter from Dr. Bernardo Cane (SENASA, President) to APHIS (30 December 2002), (SENASA's letter of 30 December 2002), (Exhibit USA-79). In the communication, Argentina confirms that it submitted the technical documents the United States requested during the course of the 16 December meeting.

No.	Event	Date	Interval (approx.)
3.	Officials from the United States and Argentina animal health officials met to discuss a range of issues.[386] During the meeting, the countries confirmed that a technical team would visit Argentina in September 2003 to discuss the status of FMD.[387]	**23 Apr. 2003**	4 months
4.	SENASA notified the OIE of the presence of animals with symptoms similar to FMD in the city of Tartagal, Department of San Martin, Province of Salta.[388]	**28 Aug. 2003**	4 months
5.	Suspicion of an FMD outbreak in the city of Tartagal, Department of San Martin, Province of Salta.[389] SENASA notified APHIS of the situation on the same day.[390]	**29 Aug. 2003**	1 day
6.	Outbreak of Type "O" confirmed in the city of Tartagal, Department of San Martin, Province of Salta. A SENASA epidemiological report performed on pigs in the establishment concerned revealed that 16 pigs were infected, 2 of which died.[391]	**2 Sep. 2003**	4 days
7.	APHIS arranged to perform a site visit in September 2003 to the Argentina region bordering Bolivia. However, the visit was cancelled by SENASA.[392]	**Sep. 2003**	1 month
8.	APHIS requested additional information from SENASA with respect to the FMD outbreak in Salta and notified SENASA of the model APHIS would use to assess the risk of FMD and the ensuing requests for additional information to develop input parameters.[393]	**3 Oct. 2003**	1 month
9.	An additional APHIS site visit was scheduled to occur on 6 October 2003; however, SENASA notified APHIS of the FMD outbreak.[394] APHIS cancelled the visit.[395]	**6 Oct. 2003**	3 days
10.	APHIS reiterated its desire to conduct the site review because the visit was important to further its evaluation of FMD in Argentina.[396]	**14 Oct. 2003**	8 days
11.	SENASA submitted its response to APHIS' October 2003 request for additional information in connection with Argentina's request for imports of fresh (chilled or frozen) beef.[397]	**Nov. 2004**	11 months

[386] Facsimile from Rodolfo Acerbi (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Philip Schull (U.S. Embassy in Argentina) (29 April 2003), (APHIS' facsimile of 29 April 2003), (Exhibit USA-80).

[387] APHIS' facsimile of 29 April 2003, (Exhibit USA-80).

[388] Argentina's first written submission, para. 112.

[389] Report of the Meeting of the OIE Scientific Commission for Animal Diseases (December 2003), (Exhibit USA-81).

[390] Letter from Miguel Santiago Campos (SENASA) to United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS (29 August 2003), (SENASA's letter of 29 August 2003), (Exhibit USA-83).

[391] Facsimile from Jose Molina, Minister Embassy of Argentina, to Peter Fernandez, APHIS (5 September 2003), (Argentina's facsimile of 5 September 2003), (Exhibit USA-51); SENASA's letter of 29 August 2003, (Exhibit USA-83).

[392] Letter from Pablo Kalnay (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Dr. Jorge N. Amaya (SENASA, President) (14 October 2003), (APHIS' letter of 14 October 2003), (Exhibit USA-82).

[393] Letter from W. Ron DeHaven (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Deputy Administrator) to Dr. Jorge N. Amaya (SENASA, President) (3 October 2003), (APHIS' letter of 3 October 2003), (Exhibit USA-84).

[394] SENASA's letter of 29 August 2003, (Exhibit USA-83).

[395] APHIS' letter of 3 October 2003, (Exhibit USA-84).

[396] APHIS' letter of 14 October 2003, (Exhibit USA-82).

[397] Further information requested by USDA-APHIS of the information provided by SENASA to attain recognition of Argentina as a region, as defined in Section 92.2, Title 9, of the Code of Federal Regulations for

No.	Event	Date	Interval (approx.)
12.	Prior to the scheduled visit to Northern Argentina, APHIS requested additional information from SENASA to assist in compiling data to be used in the quantitative and qualitative risk analysis of the Argentine region north of the 42nd parallel.[398]	**21 Apr. 2005**	5 months
13.	APHIS conducted the scheduled site visit to the Argentina territory north of the 42nd parallel.[399]	**30 May 2005- 3 Jun. 2005**	1 month
14.	APHIS requested additional information from SENASA in light of a strike by SENASA personnel.[400]	**4 Aug. 2005**	1 month
15.	SENASA sent a letter to APHIS reporting about SENASA strikes, and stating that such strikes did not affect emergency services.[401]	**5 Dec. 2005**	5 months
16.	Two outbreaks of "type O" FMD occurred in San Luis del Palmar, Province of CORRIENTES.[402]	**5 Feb. 2006**	2 months
17.	The president of SENASA notified the FMD outbreaks in San Luis del Palmar, Province of CORRIENTES to the OIE.[403] SENASA enacted Resolution 35/2006 establishing a sanitary alert which covered a zone comprising the affected department i.e. San Luis del Palmar, and the seven neighbouring departments i.e.: Capital; San Cosme; Itatí; Berón de Astrada; General Paz; Mburucuya; and Empedrado.[404]	**8 Feb. 2006**	3 days
18.	APHIS requested information regarding the outbreak in the Province of CORRIENTES.[405]	**10 Feb. 2006**	2 days
19.	APHIS contacted SENASA in connection with Argentina's request for authorization of imports of fresh (chilled or frozen) beef. APHIS informed SENASA that, in order to conclude its risk analysis, APHIS considered it necessary to arrange a visit to the Province of CORRIENTES to evaluate the area affected by the FMD outbreaks. APHIS proposed to conduct the visit in August.[406]	**27 Jun. 2006**	1 month

Foot and Mouth Disease (FMD) (November 2004), (Information on Northern Argentina provided by SENASA) (November 2004), (Exhibit ARG-86).

[398] Letter from Thomas C. Schissel (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Arturo Ortiz (SENASA) (21 April 2005), (APHIS' letter of 21 April 2005), (Exhibit USA-91).

[399] Letter from John R. Clifford (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Jorge N. Amaya (SENASA, President) (7 July 2005), (APHIS' letter of 7 July 2005), (Exhibit USA-92).

[400] Letter from John R. Clifford (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Deputy Administrator) to Dr. Jorge N. Amaya (SENASA, President) (4 August 2005), (APHIS' letter of 4 August 2005), (Exhibit USA-93).

[401] Letter from SENASA to APHIS reporting about SENASA strike, CRI 1968/05 (5 December 2005), (SENASA's letter of 5 December 2005), (Exhibit ARG-96).

[402] Veterinary Services (VS), *Foot and Mouth Disease Argentina Impact Worksheet* (15 February 2006), (FMD Impact Worksheet), (Exhibit USA-54). See also OIE Disease Information, Vol. 19, No. 6, p. 96.

[403] OIE, Final Report, 74th General Session (2006), (Exhibit USA-55), pp. 45, 144.

[404] Argentina's first written submission, para. 117; Resolución SENASA Nº 35/06, (Resolución SENASA 35/2006), (Exhibit ARG-5).

[405] Letter from John R. Clifford, Deputy Administrator, Veterinary Services, APHIS, to Jorge N. Amaya, President, SENASA (10 February 2006), (APHIS' letter of 10 February 2006), (Exhibit ARG-38).

[406] Letter from Thomas Schissel (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Area Director) to Jorge N. Amaya (SENASA, President) (27 June 2006), (APHIS' letter of 27 June 2006), (Exhibit USA-94).

No.	Event	Date	Interval (approx.)
20.	In response to APHIS' request for information of 10 February 2006, SENASA submitted a report to APHIS detailing the actions taken by SENASA in response to the FMD outbreaks in the Province of CORRIENTES and to ensure the preservation of the FMD-free where vaccination is not practised status of Patagonia South.[407]	**26 Jul. 2006**	1 month
21.	APHIS visited the areas affected by the FMD outbreaks and performed an audit.[408]	**6-8 Sep. 2006**	1.5 months
22.	SENASA sent APHIS a letter detailing the information exchange with respect to Argentina's request for authorization to import fresh (chilled or frozen) beef, highlighting its concern at APHIS not being able to reopen access to beef from Argentine territory located North of Rio Negro, and asking that the outcome foreseen for Argentina's request be elucidated in a timely fashion.[409]	**19 Jul. 2010**	4 years
23.	APHIS responded to SENASA's letter of 19 July 2010 stating that APHIS was "currently drafting a proposed rule that would allow the importation of fresh, chilled, or frozen Argentine beef under certain conditions".[410]	**24 Sep. 2010**	2 months
24.	The United States stated before the SPS Committee that APHIS had "completed the risk analysis regarding the region north of the 42nd parallel and would subsequently draft a proposal to allow the importation of beef under certain conditions".[411]	**30 Jun. 2011**	9 months
25.	The United States reiterated before the SPS Committee that APHIS had "completed the assessment and was drafting a proposal to allow the importation of beef under certain conditions. When the assessment and rules were completed in the near future, the United States would be able to provide market access for Argentine beef".[412]	**19 Oct. 2011**	3.5 months
26.	Argentina requested consultations with the United States at the WTO.[413]	**30 Aug. 2012**	10 months
27.	The United States and Argentina met in Washington DC in the framework of the Consultations being held pursuant to Article 4 of the DSU.	**28 Nov. 2012**	3 months
28.	Argentina requested the establishment of a panel.[414]	**6 Dec. 2012**	8 days
29.	The DSB established the Panel with standard terms of reference.[415]	**28 Jan. 2013**	2 months

[407] Letter from Dr Jorge Amaya, SENASA, to Dr John Clifford, APHIS, concerning the eradication of the San Luis del Palmar (Corrientes) outbreak (26 July 2006), (SENASA's letter of 26 July 2006), (Exhibit ARG-97).
[408] Letter from Jorge N. Amaya, President, SENASA, to John R. Clifford, Deputy Administrator, Veterinary Services, APHIS, Note No. 150/2010 (19 July 2010), (SENASA's letter of 19 July 2010, Note No. 150/2010), (Exhibit ARG-46).
[409] SENASA's letter of 19 July 2010, Note No. 150/2010, (Exhibit ARG-46).
[410] Letter from John R. Clifford, Deputy Administrator, Veterinary Services, APHIS to Jorge N. Amaya, President, SENASA (24 September 2010), (APHIS' letter of 24 September 2010), (Exhibit ARG-47).
[411] Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting of 30 June-1 July 2011*, Note by the Secretariat, G/SPS/R/63 (12 September 2011), (G/SPS/R/63), (Exhibit ARG-22), paras. 17-18.
[412] Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting of 19-20 October 2011*, Note by the Secretariat, G/SPS/R/64 (17 January 2012), (G/SPS/R/64), (Exhibit ARG-48), paras. 96-97.
[413] Argentina's request for consultations, WT/DS447/1.
[414] Argentina's request for the establishment of a panel, WT/DS447/2.
[415] Argentina's first written submission, para. 21.

No.	Event	Date	Interval (approx.)
30.	APHIS wrote to SENASA summarizing the issues discussed in the Consultations on 28 November 2012 between Argentina and United States officials, including APHIS' suggestion to conduct a new site visit to Northern Argentina and Patagonia. In the letter, APHIS formally requested permission from SENASA to conduct the site visit in order to progress with the review of Argentina's request.[416]	**13 Mar. 2013**	1.5 months
31.	SENASA agreed to the visit proposed by APHIS on 13 March 2013, but stated that the sanitary situation in Argentina had not changed.[417]	**3 Jul. 2013**	3.5 months
32.	APHIS replied to SENASA's 3 July 2013 letter stating that it was ready to schedule the agreed visit to Argentina as soon as possible. APHIS also stated its understanding that Argentina preferred that the site visit occur during the last week of October or the first week of November 2013.[418]	**15 Jul. 2013**	10 days
33.	The Panel was composed by the Director-General on 8 August 2013.	**8 Aug. 2013**	Add time
34.	APHIS visited Argentina to conduct the site review with regard to the approval of imports of Argentine fresh (chilled or frozen) beef under certain conditions.[419]	**1st week of Nov. 2013**	4 months
35.	The Panel held the first substantive meeting with the parties.	**28-29 Jan. 2014**	3 months
36.	APHIS published a risk assessment for Northern Argentina, dated April 2014, stating that the risk of introduction of FMD stemming from imports of fresh (chilled or frozen) beef from the region was "low"[420], as well as a Proposed Rule to allow imports of such product under the same protocols as those applied to fresh (chilled or frozen) beef from Uruguay.[421]	**29 Aug. 2014**	7 months
37.	The Panel held the meeting with the parties and the experts on 2 September 2014 and the second substantive meeting with the parties on 4-5 September 2014.	**1st week of Sep. 2014**	3 days

7.3.3.5.3.1 Whether the procedure incurred delays

7.121. In order to determine whether APHIS' review of Argentina's request for authorization of imports of fresh (chilled or frozen) beef from Northern Argentina incurred a delay, we must conduct an assessment of the facts relevant to such procedure. We recall that a "delay" is a period of time lost by inaction or inability to proceed on the part of the authority carrying out the procedure.[422]

7.122. The United States asserts, and Argentina does not disagree, that APHIS began its review process promptly upon receiving Argentina's request for imports of fresh (chilled or frozen) beef in

[416] Letter from Dr. Peter J. Fernandez (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Acting Associate Administrator) to Marcelo S. Miguez (SENASA, President) (13 March 2013), (APHIS' letter of 13 March 2013), (Exhibit USA-96).
[417] Letter from Dr Miguez, SENASA to Dr Peter Fernandez, APHIS (13 July 2013), (SENASA's letter of 13 July 2013), (Exhibit ARG-99).
[418] Letter from Kevin Shea (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Administrator) to Marcelo S. Miguez (SENASA, President) (15 July 2013), (APHIS' letter of 15 July 2013), (Exhibit USA-97).
[419] United States' first written submission, para. 162.
[420] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169).
[421] *Importation of Beef From a Region in Argentina*, 79 Fed. Reg. 51508 (29 August 2014) (Proposed Rule), (2014 Proposed Rule on Northern Argentina), (Exhibit USA-168).
[422] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495. See also Appellate Body Report, *Australia – Apples*, para. 437.

November 2002.[423] Indeed, the first meeting between the United States and Argentina with respect to Argentina's request took place one month after the application. At that meeting, APHIS requested SENASA to provide relevant documentation in order to initiate the risk analysis.[424]

7.123. From that moment until September 2006, exchanges occurred between APHIS and SENASA. APHIS asked SENASA to provide further information concerning the FMD situation in Northern Argentina on several occasions, namely in October 2003, April 2005 and February 2006.[425] APHIS also conducted two site visits to Northern Argentina in May-June 2005 and September 2006, in accordance with its approval practice.[426] These follow-up requests for additional information and the two site visits were in the context of events subsequent to Argentina's initial application, including FMD outbreaks in different parts of Northern Argentina in September 2003 and February 2006[427] and a labour strike at SENASA in 2005. [428] The evidence on record shows that SENASA complied with APHIS' requests by submitting the additional information and by agreeing to the proposed site visits to Northern Argentina.[429] On one occasion, SENASA took over one year (i.e. from October 2003 to November 2004) to answer additional questions posed by APHIS.[430]

7.124. Based on the foregoing, we consider that, at this stage of the procedure, matters progressed at a reasonable pace and the only delay between the initial application and September 2006 was the 13 months between APHIS' request in October 2003 and SENASA's answer in November 2004.

7.125. Following APHIS' site visit to Northern Argentina in September 2006, APHIS did not communicate with SENASA on the application for almost four years. In July 2010, SENASA sent a letter expressing concern regarding APHIS' silence and requesting that the "outcome foreseen for the request made by Argentina" be "elucidated in a timely time-frame."[431] On 24 September 2010, APHIS replied that APHIS was "currently drafting a proposed rule that would allow the importation of fresh, chilled, or frozen Argentine beef under certain conditions".[432] APHIS added that the time required to complete the procedure was necessary to ensure the thoroughness and transparency of APHIS' decision-making.[433] In June and October 2011, the United States' representative at the SPS Committee sessions, responding to a specific trade concern raised by Argentina, stated that APHIS had "completed the risk analysis regarding the region north of the 42nd parallel and would subsequently draft a proposal to allow the importation of beef under certain conditions".[434] Despite these statements concerning the progress on Argentina's request, APHIS did not issue a determination concerning imports of fresh (chilled or frozen) beef from Northern Argentina, nor did it request any further information from SENASA until it suggested a new site visit in November 2012 during the consultations related to these proceedings.

7.126. In March 2013, when these dispute settlement proceedings were already under way, APHIS formally requested permission from SENASA to conduct a new site visit to Northern Argentina in order to progress with the review of Argentina's request.[435] SENASA agreed that the

[423] See United States' first written submission, para. 197; Argentina's response to Panel question No. 68 following the first substantive meeting.

[424] SENASA's letter of 30 December 2002, (Exhibit USA-79).

[425] SENASA's letter of 30 December 2002, (Exhibit USA-79); APHIS' letter of 3 October 2003, (Exhibit USA-84); APHIS' letter of 21 April 2005, (Exhibit USA-91); APHIS' letter of 10 February 2006, (Exhibit ARG-38).

[426] APHIS' letter of 7 July 2005, (Exhibit USA-92); SENASA's letter of 19 July 2010, Note No. 150/2010, (Exhibit ARG-46).

[427] Argentina's facsimile of 5 September 2003, (Exhibit USA-51); SENASA's letter of 29 August 2003, (Exhibit USA-83); FMD Impact Worksheet, (Exhibit USA-54). See also OIE Disease Information, Vol. 19, No. 6, p. 96.

[428] APHIS' letter of 4 August 2005, (Exhibit USA-93).

[429] APHIS' facsimile of 29 April 2003, (Exhibit USA-80); SENASA's letter of 5 December 2005, (Exhibit ARG-96); SENASA's letter of 26 July 2006, (Exhibit ARG-97).

[430] See APHIS' letter of 3 October 2003, (Exhibit USA-84); Information on Northern Argentina provided by SENASA (November 2004), (Exhibit ARG-86).

[431] SENASA's letter of 19 July 2010, Note No. 150/2010, (Exhibit ARG-46).

[432] APHIS' letter of 24 September 2010, (Exhibit ARG-47).

[433] APHIS' letter of 24 September 2010, (Exhibit ARG-47).

[434] G/SPS/R/63, (Exhibit ARG-22), paras. 17-18. See also G/SPS/R/64, (Exhibit ARG-48), paras. 96-97.

[435] APHIS' letter of 13 March 2013, (Exhibit USA-96).

site visit should take place in November 2013.[436] APHIS conducted the site visit as scheduled. On 29 August 2014, a few days before the second substantive meeting with the parties in these dispute settlement proceedings, APHIS published a risk analysis for Northern Argentina and a Proposed Rule to allow imports of fresh (chilled or frozen) beef from the region under protocols similar to those applied to fresh (chilled or frozen) beef from Uruguay.[437]

7.127. Based on the above, we consider that, during the course of APHIS' review of Argentina's request for authorization of imports of fresh (chilled or frozen) beef from Northern Argentina, there were two periods of inaction which constitute delays within the meaning of Annex C(1)(a):

a. one from October 2003 until November 2004; and

b. the other from September 2006 until March 2013. However, as indicated in paragraph 7.118 above, the Panel will not consider the period after the date of establishment of the Panel in January 2013. Thus, for the purposes of this dispute, the second delay is from September 2006 until January 2013.

7.128. We shall now assess whether such delays are undue within the meaning of Annex C(1)(a).

7.3.3.5.3.2 Whether the delays are undue

7.129. We recall that a delay is undue if it is "unwarranted, or otherwise excessive, disproportionate or unjustifiable".[438]

7.130. As noted in paragraphs 7.123-7.124 above, the delay from October 2003 to November 2004 was attributable to SENASA not providing APHIS with the additional information requested. APHIS had made such a request in connection with the FMD outbreak in the province of Salta in late August 2003 aimed at checking that the situation in the area had stabilized, that the disease had not spread, and that the outbreak was adequately controlled or eliminated.[439] Given that the information requested from SENASA in this instance was reasonable under the circumstances, this delay cannot be attributed to the United States.[440]

7.131. Therefore, we are left to assess whether the delay in APHIS' review process between September 2006 and January 2013 is undue. Argentina relies on the statements from APHIS in its letters and of the United States' representative to the SPS Committee as evidence that there was no justifiable reason for the delay. The United States, for its part, argues that Argentina misconstrues the statements and it offers several justifications to explain the delay.

7.132. Specifically, the United States points to the outbreaks in Argentina in 2003 and 2006, the labour strike at SENASA in 2005, SENASA's alleged "history of intentional concealment" of outbreaks, and the need for additional information that was not received until the November 2013 site visits. Argentina strongly disputes the United States' statements regarding the alleged history of intentional concealment and asserts that they are belied by the facts on record and APHIS' own conclusions.[441]

7.133. With respect to the United States' argument that the 2003 and 2006 FMD outbreaks in Northern Argentina and the 2005 labour strike at SENASA raised concerns about Argentina's ability to prevent and control FMD[442], we are persuaded that such occurrences reasonably justified APHIS'

[436] SENASA's letter of 13 July 2013, (Exhibit ARG-99); APHIS' letter of 15 July 2013, (Exhibit USA-97).
[437] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169); 2014 Proposed Rule on Northern Argentina, (Exhibit USA-168).
[438] Appellate Body Report, *Australia – Apples*, para. 437 (referring to Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495).
[439] See APHIS' letter of 3 October 2003, (Exhibit USA-84).
[440] See Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1498 (where the panel stated that if a request for information is not justified by the importing Member's need to check and ensure the fulfilment of an SPS measure, that request may cause an undue delay within the meaning of Annex C(1)(a)).
[441] Argentina's opening statement at the first meeting of the Panel, para. 3.
[442] United States' first written submission, paras. 204, 238; United States' opening statement at the first meeting of the Panel, para. 57; United States' response to Panel question No. 62 following the first substantive meeting.

requests for additional information and the need for APHIS to conduct two separate site visits to Northern Argentina in 2005 and 2006.[443] We understand that, from an epidemiological perspective, after a region has experienced an FMD outbreak, time is required before the importing Member can reliably commence an evaluation of whether the region is free of FMD. According to Article 8.5.9(c) of the Terrestrial Code, such waiting period is six months from the last outbreak where the authorities of the region affected adopted a stamping-out policy, emergency vaccination and serological surveillance.[444]

7.134. APHIS itself recognized a general range of time from the last outbreak to when an evaluation is possible when it stated that it "[did] not consider a 3 to 5 year disease-free waiting period to be either necessary or required by international requirements or standards".[445] Furthermore, APHIS noted in a policy document dating October 1997 that, in order to determine the level of risk presented by products originating from a given region, it takes into account a number of factors, including whether "[t]he restricted agent has not been diagnosed within the region for a period of time appropriate for that agent".[446] The length of that period of time varies according to the disease and the level of risk. In order to attribute a "negligible", "slight" or "low" level of risk to a region, the period of time for FMD is "1 year".[447] We recognize that the policy document is from 1997 and that there have been advances in diagnostic and serological surveillance that have led the OIE to conclude a six-month waiting period between outbreak and consideration for re-gaining "free" status is sufficient. However, we note that the document in question still constitutes the basis on which APHIS operates in evaluating the FMD conditions of applicant countries or regions. Furthermore, as will be seen in more detail below[448], the United States' claims that its ALOP for FMD is higher than that of the OIE. Therefore, we take the view that while a Member could begin a review within six months of an outbreak, APHIS' 1997 policy provides useful guidance as to the *maximum* reasonable time for the United States to wait after an outbreak before commencing its review of whether the FMD situation in a country or region has changed.

7.135. Read together, the above indicators suggest that APHIS should have been able to commence its assessment of the FMD situation in Northern Argentina after waiting a period ranging from six months to one year following the 2006 outbreak, that is, by February 2007 at the latest. We observe that APHIS did not make any requests for information from SENASA after the September 2006 outbreak and the process did not move forward. Therefore, we are not convinced that the above factors justify APHIS' inaction *after* February 2007.

7.136. As to the United States' argument that SENASA's "history of intentional concealment and delayed reporting of outbreaks" justifies the 2007-2013 delay[449], we note that despite the United States' view that Argentina intentionally concealed the full extent of its FMD outbreaks in 2000-2002[450], the United States could not identify any subsequent instances in which SENASA failed to promptly notify the OIE and APHIS about FMD outbreaks in Argentina.[451] Based on the evidence on record, we find that since Argentina filed its request in November 2002, SENASA has been diligent and timely in disclosing the presence of FMD outbreaks in its territory.[452] APHIS itself recognized SENASA's diligence when, in 2005, it expressed "confidence" that "delayed reporting"

[443] See para. 7.123 above.

[444] We note that Argentina's actions in response to the 2006 outbreak follow the recommendations of Article 8.5.9 of the Terrestrial Code. See Resolución SENASA 35/2006, (Exhibit ARG-5); Resolución SENASA 36/2006 (Exhibit ARG-6); SENASA's letter of 26 July 2006, (Exhibit ARG-97); 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 24.

[445] *Importation of Beef from Uruguay*, 68 Fed. Reg. 31940 (USDA/APHIS May 29, 2003) (Final Rule), (2003 Final Rule on beef from Uruguay), (Exhibit ARG-8), p. 31946.

[446] *APHIS Policy Regarding Importation of Animals and Animal Products*, 62 Fed. Reg. 56027 (USDA/APHIS, 28 October 1997) (Notice), (1997 APHIS Policy), (Exhibit ARG-63), p. 56029.

[447] 1997 APHIS Policy, (Exhibit ARG-63), pp. 56029-56030. While the waiting period is the same for all three levels of risk, other factors, such as vaccination, movement and border controls, etc., justify APHIS' distinction between regions.

[448] See section 7.6.2 below.

[449] United States' response to Panel question No. 31 following the second substantive meeting.

[450] United States' first written submission, para. 204.

[451] See United States' response to Panel question No. 31 following the second substantive meeting.

[452] SENASA's letter of 29 August 2003, (Exhibit USA-83); Argentina's facsimile of 5 September 2003, (Exhibit USA-51); OIE, Final Report, 74th General Session (2006), (Exhibit USA-55), pp. 45, 144.

like that in 2001 would not happen again.[453] Therefore, we do not consider that the United States can validly invoke SENASA's shortcomings – which the United States itself concluded were remedied prior to February 2007 – as a justification for APHIS' inaction after that date.

7.137. We next address Argentina's claim that Section 737 of the *2009 Omnibus Appropriations Act* is a non-scientific and undue reason for the delay in the process.[454] In support of its argument, Argentina draws a parallel between Section 737 and the measure found to be inconsistent by the panel in *US – Poultry (China),* which prohibited the Secretary of Agriculture from spending any budgetary resources towards the approval of Chinese poultry for import into the United States. The United States first argues that because Section 737 expired prior to the establishment of the Panel, it is outside the Panel's terms of reference. Substantively, the United States responds that Section 737 did not affect the Secretary of Agriculture's authority to review Argentina's requests.[455]

7.138. We note that the panel in *EC – Approval and Marketing of Biotech Products* took into account approval procedures relating to requests that had been withdrawn at the time of its establishment, on the grounds that such procedures "constitute[d] factual evidence" which the panel was "not only entitled to take into account", but indeed "required to take into account in view of its obligation to make an objective assessment of the facts of the case".[456] In our view, this is the correct approach. Regardless of whether Section 737 is considered a "measure at issue" in that the Panel could make specific findings or recommendations on its consistency with Article 8 and Annex C – a matter we turn to below – it can serve as factual evidence as to whether the delay in the processing of Argentina's application was undue. Therefore, we find it useful to examine whether Section 737 had the impact Argentina alleges before turning to address the United States' arguments that the measure cannot be a measure at issue within the Panel's terms of reference.

7.139. Argentina claims that Section 737 is directly analogous to the legislative measure considered by the panel in *US – Poultry (China).* We do not agree with Argentina. Section 737 did not have the effect of completely blocking all progress on Argentina's application, as was the case for the measure at issue in *US – Poultry (China)*. Rather, Section 737 appears to permit the Secretary of Agriculture to move forward with a review of the "domestic animal health aspects" of Argentina's requests and to provide "a report on the findings to the Committees on Appropriations of the House and Senate".[457] A review of the impact of a potential entry or spread of FMD on domestic animal health is consistent with the requirements for a risk assessment set forth in the SPS Agreement. Indeed, the risk being protected against is a risk to the health of domestic animals. In particular, Annex A(4) refers to evaluating the "potential biological and economic consequences" of the entry, establishment or spread of a pest or disease, whereas Article 5.3 lists "the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease" and "the costs of control or eradication in the territory of the importing Member" as factors that must be taken into account in assessing the risk to animal health. Therefore, given that Section 737 appeared to permit the conduct of such an analysis, the effect of the provision does not appear, in and of itself, to amount to an undue delay in an approval process. Furthermore, the United States argued that the failure of the Secretary of Agriculture to produce such a report was not due to any hindrance of authority brought about by Section 737; according to the United States, the report was not produced because the Secretary's review of Argentina's requests had not yet been finalized.[458]

7.140. Based on the evidence before us, we are not convinced that completion of the evaluation required in Section 737 caused undue delay in the APHIS approval procedures. Having reached

[453] USDA, Veterinary Services, National Center for Import and Export Regionalization Evaluation Services, *Risk Analysis: Risk of Exporting Foot-and-Mouth Disease (FMD) in FMD-Susceptible Species from Argentina, South of the 42 Parallel (Patagonia South), to the United States: Evaluation of the FMD Status of Argentina, South of the 42 Parallel* (June 2005), (2005 Risk Analysis for Patagonia South), (Exhibit ARG-9), p. 23.

[454] Argentina's first written submission, para. 701; Argentina's opening statement at the first meeting of the Panel, para. 18; Argentina's second written submission, paras. 385-389.

[455] United States' first written submission, paras. 146, 223.

[456] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.548.

[457] *2009 Omnibus Appropriations Act*, (Exhibit ARG-45/USA-95).

[458] United States' response to Panel question No. 7 following the first substantive meeting.

this conclusion, we need not determine whether Section 737, considered as a measure rather than relevant evidence, is within our terms of reference.[459]

7.141. We now turn to the United States' argument that APHIS did not have all the information necessary to complete its risk assessment for Northern Argentina until the site visit of November 2013.[460] This argument also raises the issue of the weight to be placed on the statements in the letter from APHIS and those made to the SPS Committee of the WTO. APHIS' letter to SENASA of September 2010[461] and the United States' representative's statements before the SPS Committee in June and October 2011[462] suggest that APHIS had enough information to progress with its risk assessment at the time those statements were made. Indeed, APHIS stated that it was "currently drafting a proposed rule that would allow the importation of fresh, chilled, or frozen Argentine beef under certain conditions"[463], while the United States' representative at the SPS Committee stated that APHIS had "completed the risk analysis regarding the region north of the 42nd parallel and would subsequently draft a proposal to allow the importation of beef under certain conditions".[464]

7.142. The United States asserts that the above-mentioned statements should not be understood to suggest that APHIS was ready to finalize the process in 2010-2011.[465] Accepting for the moment the United States' interpretation of such statements, this does not deprive them of all value for our purposes. It seems to us that even if the statements in question should not be construed to imply that the risk analysis was complete, they may nevertheless serve as an indication that there was no reason for the continued delay in the finalization of the procedure. The record shows that APHIS did not request SENASA to provide any additional information concerning the FMD situation in Northern Argentina following its site visit of September 2006 until March 2013. Moreover, the United States has not pointed to any specific information that APHIS was missing prior to the November 2013 visit, except for the need to "re-confirm and update" information already in its possession as the result of prior site visits.[466] Read together, these facts indicate to us that APHIS had collected sufficient information concerning the FMD situation in Northern Argentina well before the November 2013 site visit took place. If that were not the case, one would expect APHIS to have communicated to SENASA to request any missing information in order to progress towards the completion of the process. It did not do so.

7.143. Moreover, we disagree with the United States that the need to "re-confirm and update" pre-existing information constitutes, in and of itself, a justification for the delay in the completion of a control, inspection or approval procedure. We note that the panel in *EC – Approval and Marketing of Biotech Products* found that when "*new* or *additional*" relevant information becomes available, a Member may reasonably "delay the completion of the procedure" in order to assess it.[467] However, taking time to assess *relevant* new or additional information is not the same as taking time to re-confirm and update information already received. It is inevitable that the situation in any Member or region will change and cannot remain static; the longer the evaluation process takes, the more likely the need to "re-confirm and update" the submitted information. In

[459] As we see it, this approach is consistent with that of the Appellate Body in *US – Shrimp (Thailand) / US – Customs Bond Directive*. In that dispute, the Appellate Body conducted an analysis of whether a measure at issue was justified under Article XX(d) of the GATT 1994 on an *arguendo* basis, i.e. assuming that the general exceptions under Article XX were available to the defendant to vis-à-vis claim under Article 18.1 of the Anti-Dumping Agreement. (See Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 310) Having found that the measure was not justified under Article XX(d), the Appellate Body did not find it necessary to express a view on the question of whether a defence under Article XX was available to the defendant. (See Ibid. para. 319)

[460] United States' response to Panel question No. 29 following the second substantive meeting.

[461] APHIS' letter of 24 September 2010, (Exhibit ARG-47).

[462] G/SPS/R/63, (Exhibit ARG-22), paras. 17-18. See also G/SPS/R/64, (Exhibit ARG-48), paras. 96-97.

[463] APHIS' letter of 24 September 2010, (Exhibit ARG-47).

[464] G/SPS/R/63, (Exhibit ARG-22), paras. 17-18. See also G/SPS/R/64, (Exhibit ARG-48), paras. 96-97.

[465] See e.g. United States' response to Panel question No. 32 following the first substantive meeting.

[466] United States' response to Panel question No. 29 following the second substantive meeting. See also United States' response to Panel question No. 30 following the second substantive meeting. This is confirmed in the 2014 risk assessment for Northern Argentina that the United States placed on the record on 1 September 2014. A review of the document shows that the information APHIS collected during the November 2013 site visit was aimed at updating pre-existing information. (See e.g. 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 10, 30-33, 55, 74-75)

[467] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1498 (emphasis added).

our view, to accept the United States' argument as justifying the delay in this case would seriously undermine the obligations in Annex C(1)(a), for if a WTO Member could indefinitely postpone the completion of a procedure by invoking the need to reconfirm information that had become outdated by virtue of its own inaction, this would create a dangerous loophole in the disciplines of that provision and would reward behaviour opposite to the diligence called for by Annex C(1).

7.144. Finally, we address the United States' argument that, by postponing APHIS' latest site visit to Northern Argentina until November 2013, SENASA contributed to APHIS' delay.[468] We note that Argentina is not seeking to support its claim of undue delay with the period between March and November 2013, but rather only up to the date of the establishment of the Panel (28 January 2013). Therefore, whether any delay in that period is attributable to either the United States or Argentina is immaterial to the task before us.

7.145. Based on the foregoing, we conclude that the United States did not undertake and complete the procedure to review Argentina's request for imports of fresh (chilled or frozen) beef from Northern Argentina without undue delay and has therefore acted in a manner inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement with respect to that request.

7.3.3.5.4 APHIS' review process of Argentina's request for the recognition of Patagonia as FMD-free

7.146. As with our findings in the previous section, we shall assess, first, whether APHIS' review process of Argentina's request for the recognition of Patagonia as FMD-free incurred a delay. If so, we shall turn to determining whether such a delay was undue. For ease of reference, we include the events relevant to APHIS' review and the Panel proceedings in Table 2 below. We also refer to the chronology contained in Appendix 1 to this Report for further information.

Table 2: Chronology of events relating to APHIS' review of Argentina's request for the recognition of Patagonia as FMD-free

No.	Event	Date	Interval (approx.)
1.	SENASA submitted a formal request to APHIS requesting the recognition of Patagonia as a region free of FMD.[469]	**28 Aug. 2003**	-
2.	APHIS contacted SENASA regarding a 1 December 2003 site visit to Patagonia.[470] APHIS also requested additional information from SENASA regarding the request for regional recognition of Patagonia as FMD-free.[471]	**6 Nov. 2003**	2 months
3.	APHIS, together with the Canadian Food Inspection Agency, conducted a site visit to Patagonia South and the Patagonia buffer zone consisting of Patagonia North A and B to continue its assessment of the status of FMD in the area.[472]	**1-5 Dec. 2003**	1 month
4.	In a follow-up letter sent to SENASA after APHIS' site visit to Patagonia of 1-5 December 2003, APHIS informed SENASA that it would need to provide additional information to allow APHIS to proceed with the risk assessment.[473]	**2 Mar. 2004**	3 months

[468] United States' first written submission, para. 200.
[469] Information Provided by SENASA (July 2003), (Exhibit USA-98).
[470] Facsimile from Theresa Boyle (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Area Director) to Dr. Jorge N. Amaya (SENASA, President) (6 November 2003), (APHIS' facsimile of 6 November 2003), (Exhibit USA-99).
[471] United States first written submission, para. 151 (referring to Letter from W. Ron DeHaven (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Dr. Jorge N. Amaya (SENASA, President) (6 November 2003), (APHIS' letter of 6 November 2003), (Exhibit USA-100)).
[472] Letter from W. Ron DeHaven (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Dr. Jorge Amaya (SENASA, President) (2 March 2004), (APHIS' letter of 2 March 2004), (Exhibit USA-102).
[473] APHIS' letter of 2 March 2004 (Exhibit USA-102).

No.	Event	Date	Interval (approx.)
5.	SENASA responded to the 2 March 2004 letter, providing additional information concerning Patagonia in response to APHIS' request.[474]	**16 Nov. 2004**	8 months
6.	APHIS concluded and produced the risk analysis evaluating Patagonia South as a region free of FMD.[475]	**Jun. 2005**	7 months
7.	APHIS published a proposed rule in the Federal Register to change the disease status of Patagonia South to FMD-free.[476] During the ensuing 60-day period, APHIS received comments on the proposed rule from interested parties.	**5 Jan. 2007**	1.5 years
8.	The United States Cattlemen's Association, the National Farmers Union, and American Agri-Women sent a letter to the House Committee on Agriculture with regard to the 2007 proposed rule for Patagonia South, in which they called for further discussion on the matter before APHIS finalize the process.[477]	**22 Jan. 2008**	1 year
9.	The Embassy of Argentina in Washington sent a letter to US Senator Jon Tester expressing the view that the Proposed Rule recognizing Patagonia South as FMD-free should be finalized so that commercial relations between the region of Argentina and the United States could be normalized.[478]	**7 Mar. 2008**	1.5 months
10.	SENASA introduced Resolution 148/2008 to authorize transport of FMD-susceptible animals into Patagonia South from Patagonia North B under additional traceability requirements, in connection with EU regulations recognizing Patagonia South, but not yet Patagonia North B, as FMD-free where vaccination is not practised.[479]	**11 Mar. 2008**	4 days
11.	Several US senators urged the Administration not to adopt the final rule for the recognition of Patagonia South as FMD-free until the rule has been reviewed by the Office of Management and Budget.[480]	**14 Mar. 2008**	3 days
12.	The Embassy of Argentina in Washington sent a letter to US Senator Max Baucus (insert what committee he chaired at time) expressing the view that the Proposed Rule recognizing Patagonia South as FMD-free should be finalized so that commercial relations between the region of Argentina and the United States could be normalized.[481]	**20 Mar. 2008**	6 days

[474] Further Information Requested by the United States Department of Agriculture, Animal and Plant Health Inspection Service (USDA, APHIS) of the Information Provided by SENASA to Attain Recognition of Patagonia as a Region, as Defined in Section 92.2, Title 9 of the Code of Federal Regulations for Foot and Mouth Disease (FMD) (November 2004), (Information on Patagonia Provided by SENASA (November 2004)), (Exhibit USA-103).

[475] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 32.

[476] *Change in Disease Status of the Patagonia South Region of Argentina With Regard to Rinderpest and Food- and-Mouth Disease,* 72 Fed. Reg. 475 (5 January 2007) (Proposed Rule), (2007 Proposed Rule on Patagonia South), (Exhibit ARG-56/USA-104).

[477] Letter dated 22 January 2008 from various legislators of the Agriculture Commission of the House of Representatives, requesting a hearing review into the proposed rule of the United States Department of Agriculture to recognize Patagonia as a region free of foot-and-mouth disease (22 January 2008), (Exhibit ARG-39).

[478] Letter from Minister José Pérez Gabilondo to Senator Tester in response to his concern over the access of beef from Argentina (7 March 2008), (Exhibit ARG-41).

[479] Resolución SENASA 148/2008, (Exhibit USA-62).

[480] Letter from Senator Baucus et al. to Edward Schafer, Secretary, US Department of Agriculture and Jim Nussle, Director, Office of Management and Budget regarding proposed USDA rule on Patagonia South (14 March 2008), (Exhibit ARG-40).

[481] Letter from Ambassador Héctor Timerman to Senator Baucus in response to his 14 March 2008 letter (20 March 2008), (Exhibit ARG-42).

No.	Event	Date	Interval (approx.)
13.	APHIS contacted SENASA with a view to fixing the agenda for a site visit by APHIS, aimed at updating the assessment of the risk for Patagonia South in order to respond to the comments received in connection with the 2007 Proposed Rule for Patagonia South.[482]	**15 Oct. 2008**	7 months
14.	SENASA sent a letter to APHIS expressing displeasure with the duration of FMD assessment process and noting that, because the situation in Patagonia South had not changed, SENASA did not consider that there were sufficient grounds to accept APHIS' proposed visit schedule for 15-18 December 2008.[483]	**22 Oct. 2008**	7 days
15.	SENASA sent a new letter to APHIS reiterating its statements of 22 October 2008.[484]	**11 Nov. 2008**	20 days
16.	SENASA introduced Resolution 1282/2008 as a consequence of the EU's recognition of Patagonia North B as FMD-free where vaccination is not practised. The resolution allowed the movement of FMD-susceptible animals from Patagonia North B into Patagonia South for any purpose, subject to strengthened measures on transport and traceability. The Resolution did not modify the pre-existing requirements for entry of FMD-susceptible animals into the Patagonia region as a whole from FMD-free zones with vaccination.[485]	**16 Dec. 2008**	2 months
17.	SENASA also granted approval for APHIS to visit Patagonia South in February 2009.[486] In granting the site visit request, SENASA also requested that APHIS extend the mission to cover Patagonia North B because the zone was recognized by the OIE as a region free of FMD where vaccination is not practiced.[487] For this purpose, SENASA updated the information concerning Patagonia with APHIS, including the data on Patagonia North B that had led to the international recognition of the zone as FMD-free where vaccination is not practised.[488]	**17 Dec. 2008**	1 day
18.	APHIS conducted a site visit to Patagonia, including Patagonia South and Patagonia North B.[489]	**23-26 Feb. 2009**	2 months
19.	The US Congress passed the *2009 Omnibus Appropriations Act*.[490]	**26 Feb. 2009**	0 days
20.	APHIS sent SENASA a letter stating that no additional information was currently required to proceed with APHIS' rule-making.[491]	**27 Apr. 2009**	2 months
21.	The *2009 Omnibus Appropriations Act* expired.	**30 Sep. 2009**	5 months

[482] Letter from Yvette Perez (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Oscar Astibia (SENASA) (15 October 2008), (APHIS' letter of 15 October 2008), (Exhibit USA-106).

[483] Facsimile from Oscar Astibia (SENASA) to Yvette Perez (USDA, APHIS) (22 October 2008), (SENASA's facsimile of 22 October 2008), (Exhibit USA-107).

[484] Facsimile from Oscar Astibia, SENASA, to Yvette Perez, USDA, APHIS (11 November 2008), (SENASA's facsimile of 11 November 2008), (Exhibit USA-108).

[485] Resolución SENASA 1282/2008, (Exhibit USA-109).

[486] SENASA's letter of 17 December 2008, (Exhibit ARG-59/USA-111).

[487] SENASA's letter of 17 December 2008, (Exhibit ARG-59/USA-111); SENASA's letter of 30 January 2009, (Exhibit ARG-60/USA-112).

[488] SENASA's letter of 17 December 2008, (Exhibit ARG-59/USA-111).

[489] SENASA's letter of 30 January 2009, (Exhibit ARG-60/USA-112).

[490] H.R. Res. 1226, 111th Cong. (2009); S. Res. 337, 111th Cong (2009), (Exhibit ARG-44).

[491] Letter from John R. Clifford, Deputy Administrator, Veterinary Services, APHIS to Jorge N. Amaya, President, SENASA (27 April 2009), (APHIS' letter of 27 April 2009), (Exhibit ARG-79).

No.	Event	Date	Interval (approx.)
22.	SENASA sent APHIS a letter detailing the information exchange with regard to the recognition of Patagonia as FMD-free, highlighting its concerns over the fact that all the technical stages had been concluded on a scientific basis, and stating that there only remained to be completed the administrative procedures to secure the recognition of Patagonia.[492]	**19 Jul. 2010**	10 months
23.	APHIS responded to SENASA's 19 July 2010 letter with respect to Argentina's application for the recognition of Patagonia as FMD-free, stating that APHIS "had made significant progress towards recognizing the FMD-free status of southern Patagonia". APHIS further noted that because it needs to be thorough and transparent in its deliberations, the rule-making process could take time.[493]	**13 Sep. 2010**	2 months
24.	Argentina presented a specific trade concern (STC) in the SPS Committee, expressing its concern that the United States failed to recognize Patagonia South as a FMD-free, despite the OIE recognition of Patagonia South as FMD-free where vaccination is not practised since 2002. The United States replied that APHIS "had made significant progress in recognizing the FMD-free status of South Patagonia and that, in light of the information Argentina provided in 2009, which was used to update the 2005 risk analysis, it was able to conclude that the import of ruminants and ruminant products from this region presented a negligible risk of FMD".[494]	**30 Jun. 2011**	2 years
25.	Argentina raised the same STC at the 52nd Meeting of the SPS Committee. The United States reiterated that APHIS "had made significant progress in recognizing the FMD free status of South Patagonia".[495]	**19 Oct. 2011**	3.5 months
26.	Argentina requested consultations with the United States at the WTO.[496]	**30 Aug. 2012**	10 months
27.	The United States and Argentina met in Washington DC in the framework of the Consultations being held pursuant to Article 4 of the DSU.	**28 Nov. 2012**	3 months
28.	Argentina requested the establishment of a panel.[497]	**6 Dec. 2012**	8 days
29.	The DSB established the Panel with standard terms of reference.[498]	**28 Jan. 2013**	2 months
30.	APHIS wrote to SENASA summarizing the issues discussed in the Consultations on 28 November 2012 between Argentina and United States officials, including APHIS's desire to conduct a new site visit to Northern Argentina and Patagonia. APHIS formally requested permission from SENASA to conduct the site visit in order to progress with the review of Argentina's request.[499]	**13 Mar. 2013**	1.5 months

[492] Letter from Jorge N. Amaya, President, SENASA to John R. Clifford, Deputy Administrator, Veterinary Services, APHIS, Note No. 149/2010 (19 July 2010), (SENASA's letter of 19 July 2010, Note No. 149/2010), (Exhibit ARG-61/USA-56).

[493] Letter from John R. Clifford, Deputy Administrator, APHIS, to Jorge N. Amaya, President, SENASA (13 September 2010), (APHIS' letter of 13 September 2010), (Exhibit ARG-62). APHIS' letter refers to "southern Patagonia". We note, however, that by this time Argentina's request covered both Patagonia South and Patagonia North B.

[494] G/SPS/R/63, (Exhibit ARG-22), paras. 17-18.

[495] G/SPS/R/64, (Exhibit ARG-48), paras. 96-97.

[496] Argentina's request for consultations, WT/DS447/1.

[497] Argentina's request for the establishment of a panel, WT/DS447/2.

[498] Argentina's first written submission, para. 21.

[499] APHIS' letter of 13 March 2013, (Exhibit USA-96).

No.	Event	Date	Interval (approx.)
31.	SENASA agreed to the visit proposed by APHIS on 13 March 2013, but stated that the sanitary situation in Argentina had not changed.[500]	**3 Jul. 2013**	3.5 months
32.	APHIS replied to SENASA's 3 July 2013 letter stating that it was ready to schedule the agreed visit to Argentina as soon as possible. APHIS also stated its understanding that Argentina preferred that the site visit occur during the last week of October or the first week of November 2013.[501]	**15 Jul. 2013**	10 days
33.	The Panel was composed by the Director-General.	**8 Aug. 2013**	3 weeks
34.	APHIS visited Patagonia to conduct the site review with regard to the recognition of the region as FMD-free.[502]	**1st week of Nov. 2013**	4 months
35.	APHIS published a Proposed Rule for recognition of the Patagonia region (comprising both Patagonia South and Patagonia North B) as FMD-free, pursuant to an updated risk assessment completed in January 2014.[503]	**23 January 2014**	2 months
36.	The Panel held the first substantive meeting with the parties.	**28-29 Jan. 2014**	5 days
37.	APHIS published a Final Rule recognizing Patagonia (comprising both Patagonia South and Patagonia North B) as FMD-free within the meaning of 9 CFR 94.1(a)[504], entering into force as from 28 October 2014.	**29 Aug. 2014**	7 months
38.	The Panel held the meeting with the parties and the experts on 2 September 2014 and the second substantive meeting with the parties on 4-5 September 2014.	**1st week of Sep. 2014**	3 days
39.	APHIS' Final Rule recognizing Patagonia as FMD-free within the meaning of 9 CFR 94.1(a) entered into force.	**28 Oct. 2014**	2 months

7.3.3.5.4.1 Whether the procedure incurred delays

7.147. Consistent with our approach in paragraph 7.121 above, we begin our assessment of Argentina's claim under Article 8 and Annex C(1)(a) with a determination of whether APHIS' review of Argentina's request for the recognition of Patagonia as FMD-free incurred delays. We recall that a delay is a period of time lost by inaction or inability to proceed on the part of the authority carrying out the procedure.[505]

7.148. At the outset, we note that Argentina's request for the recognition of Patagonia as FMD-free was filed in two distinct steps. In August 2003, Argentina filed a request for recognition limited to Patagonia South (the area of Patagonia located south of the 42nd parallel).[506] In December 2008, Argentina extended the scope of its original request to encompass the recognition of Patagonia North B (the area of Patagonia between the 42nd parallel and the Rio Negro).[507] As discussed in further detail below, the two-step nature of Argentina's request is relevant in assessing whether and to what extent APHIS' review thereof incurred an undue delay.

[500] SENASA's letter of 13 July 2013, (Exhibit ARG-99).
[501] APHIS' letter of 15 July 2013, (Exhibit USA-97).
[502] United States' first written submission, para. 162.
[503] *Notice of Availability of Evaluations of the Foot-and-Mouth Disease and Rinderpest Status of a Region of Patagonia, Argentina*, 79 Fed. Reg. 3775 (23 January 2014) (Notice of availability), (2014 Notice of Availability of Risk Analysis for Patagonia), (Exhibit USA-132); 2014 Risk Analysis for Patagonia, (Exhibit USA-133).
[504] *Notice of Determination of the Foot-and-Mouth Disease and Rinderpest Status of a Region of Patagonia, Argentina*, 79 Fed. Reg. 51528 (29 August 2914) (Notice), (2014 Notice of Determination on Patagonia), (Exhibit USA-167).
[505] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495. See also Appellate Body Report, *Australia – Apples*, para. 437.
[506] Information Provided by SENASA (July 2003), (Exhibit USA-98).
[507] SENASA's letter of 17 December 2008, (Exhibit ARG-59/USA-111); SENASA's letter of 30 January 2009, (Exhibit ARG-60/USA-112).

7.149. The United States asserts, and Argentina does not disagree, that APHIS began its review process promptly upon receiving Argentina's request for recognition of Patagonia South in August 2003.[508] Indeed, APHIS and SENASA had a meeting on Argentina's request two months after it was filed. At that meeting, APHIS requested additional information from SENASA concerning the FMD situation in Patagonia South and requested to make a visit to the region to be conducted in December of that year.[509]

7.150. Throughout the period August 2003-November 2004, exchanges took place between APHIS and SENASA. As agreed by the two agencies, APHIS conducted its site visit to Patagonia South and Patagonia North A and B together with the Canadian Food Inspection Agency in December 2003.[510] Three months later, in March 2004, APHIS requested that SENASA provide additional information in order to progress on the risk analysis for Patagonia South.[511] SENASA took approximately eight months, i.e. until 16 November 2004, to provide the additional information APHIS requested.[512] In June 2005, i.e. approximately six months after SENASA submitted the additional information, APHIS published a risk analysis for Patagonia South, concluding that imports of FMD-susceptible animals and animal products from the region presented a "low" risk of introduction of FMD into the United States.[513]

7.151. Argentina claims that the two-year period between the filing of its request and the publication of the risk analysis for Patagonia South (2003-2005) constitutes an undue delay on the part of the United States.[514] However, the evidence on the record demonstrates that throughout that period APHIS had requested additional information from SENASA, analysed that information, and conducted a site visit to Patagonia. Based on the evidence, there was a period of inaction between March and November 2004 while APHIS was awaiting SENASA's response to APHIS' request for additional information.[515] Therefore, we disagree with Argentina that the whole 2003-2005 period constitutes a delay. In our view, the only delay in the procedure during the period 2003-2005 was the eight months between March and November 2004.

7.152. The evidence on the record does not show any further exchanges between APHIS and SENASA from the publication of the June 2005 risk analysis for Patagonia South and APHIS' publication in January 2007 of a Proposed Rule to change the disease status of Patagonia South to FMD-free and as a consequence to permit imports.[516] In Argentina's view, this one-and-a-half-year period of inactivity on APHIS' part constitutes a further undue delay in the approval procedure.[517] The United States claims that this was not a period of inactivity or inability to proceed, but rather during this period APHIS was taking steps to comply with the procedural obligations established in the Regulatory Flexibility Act, Executive Order No. 12988, and the Paperwork Reduction Act.[518] We do not discount that compliance with domestic legal obligations, such as the ones referenced by the United States, can be part of an ordinary or expected time-period to conduct an approval procedure. However, the United States did not submit the above-mentioned domestic legal instruments as evidence in these proceedings. Nor did the United States provide any evidence of specific actions APHIS took to comply with the aforementioned domestic legal obligations between June 2005 and January 2007. Therefore, in the absence of such evidence we can only conclude that there was inaction on the part of APHIS from June 2005 to January 2007 and hence a delay in the approval procedure.

7.153. The January 2007 Proposed Rule for Patagonia South provided for a 60-day period (i.e. until 6 March 2007) for comments to be submitted by interested parties.[519] During that

[508] See United States' first written submission, para. 208; Argentina's response to Panel question No. 68 following the first substantive meeting.
[509] APHIS' facsimile of 6 November 2003, (Exhibit USA-99); United States first written submission, para. 151 (referring to APHIS' letter of 6 November 2003, (Exhibit USA-100)).
[510] APHIS' letter of 2 March 2004, (Exhibit USA-102).
[511] APHIS' letter of 2 March 2004, (Exhibit USA-102).
[512] Information on Patagonia Provided by SENASA (November 2004), (Exhibit USA-103).
[513] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 76-77.
[514] Argentina's response to Panel question No. 68 following the first substantive meeting.
[515] Information on Patagonia Provided by SENASA (November 2004), (Exhibit USA-103).
[516] 2007 Proposed Rule on Patagonia South, (Exhibit ARG-56/USA-104).
[517] Argentina's response to Panel question No. 68 following the first substantive meeting.
[518] United States' response to Panel question No. 61 following the first substantive meeting.
[519] 2007 Proposed Rule on Patagonia South, (Exhibit ARG-56/USA-104).

period, APHIS received a total of 45 comments from the United States and the Argentine industries as well as from private citizens. Some of the comments expressed concerns as to whether Argentina was able to prevent and control FMD in Patagonia South and, therefore, about the risks to United States' livestock from allowing the importation of FMD-susceptible animals and products thereof from the region.[520] APHIS never finalized the approval for Patagonia South. Rather, almost two years after the publication of the 2007 Proposed Rule, in October 2008 APHIS contacted SENASA requesting a new site visit to Patagonia South.[521] The United States argues that the need for a new site visit was in response to the comments received.[522]

7.154. In our view, it is reasonable to expect that APHIS would need time to address the comments expressed during the 60-day period following the publication of the January 2007 Proposed Rule. However, we are not persuaded that responding to such comments would require over one and a half years (i.e. from March 2007 to October 2008). We recall that APHIS' reviews are case-specific and that there is no one particular time-frame in which comments must be analysed and acted upon. The time necessary will depend on the amount and nature of the comments. However, we note that during the course of these proceedings, APHIS published a Notice of availability of the evaluations of the FMD status of Patagonia (comprising both Patagonia South and Patagonia North B) in late January 2014.[523] The period for interested parties to submit comments on that document expired on 24 March 2014.[524] APHIS addressed the 33 comments received and issued a final Notice of determination on Patagonia on 29 August 2014, that is, five months after the expiration of the comment period.[525] Further, in its approval processes with respect to Uruguay, Santa Catarina and Japan, it took APHIS between four and 13 months to address comments on its proposed rule and issue a final determination.[526] The finalization of the proposed rule for the United Kingdom took approximately 28 months.[527] We recognize that we do not have the information on the specific circumstances that led to the varying times in the above-mentioned procedures. While not dispositive, they do indicate that, generally, a period of over one and a half years is neither ordinary nor expected.[528] Moreover, the United States has not provided evidence as to what, if anything, APHIS was doing with respect to Argentina's application during this time-period. In light of the above, we conclude that there was a delay in the procedure between the end of the comment period (6 March 2007) until APHIS wrote to SENASA in October 2008.

7.155. In December 2008, two months after APHIS requested a new site visit to Patagonia South, SENASA granted approval for the visit.[529] At the same time, Argentina extended its request for recognition to Patagonia North B. In making its request, Argentina noted that the OIE had recognized Patagonia North B as FMD-free where vaccination is not practised.[530] APHIS conducted the site visit to Patagonia as a whole (comprising both Patagonia South and Patagonia North B) in February 2009.[531] On 27 April 2009, APHIS sent a letter to SENASA stating that no additional information was "currently required to proceed with APHIS' rulemaking".[532] The letter also

[520] See United States' response to Panel question No. 63 following the first substantive meeting, para. 263.
[521] APHIS' letter of 15 October 2008, (Exhibit USA-106).
[522] See United States' response to Panel question No. 33 following the second substantive meeting.
[523] 2014 Notice of Availability of Risk Analysis for Patagonia, (Exhibit USA-132).
[524] 2014 Notice of Availability of Risk Analysis for Patagonia, (Exhibit USA-132), p. 3775.
[525] 2014 Notice of Determination on Patagonia, (Exhibit USA-167).
[526] See United States' response to Panel question No. 36 following the second substantive meeting.
[527] See United States' response to Panel question No. 36 following the second substantive meeting.
[528] We wish to stress that we are considering the time APHIS took between the publication of the 2014 Notice of Availability and the publication of the 2014 Notice of Determination only as a benchmark for what constitutes the ordinary or expected timeframe for APHIS to review comments on a proposed determination. This is necessary because, as observed in para. 7.114 above, APHIS does not have an express standard or average time-period required for the completion of the steps of its review processes. We are not addressing the substantive conclusions in either of the 2014 documents or using them to evaluate Argentina's claims with respect to the sanitary conditions in Patagonia prior to the establishment of the Panel.
[529] SENASA's letter of 17 December 2008, (Exhibit ARG-59/USA-111).
[530] SENASA's letter of 17 December 2008, (Exhibit ARG-59/USA-111) and Letter from Mr Oscar Astibia, Coordinator of International and Institutional Relations, SENASA, to Ms Yvette Pérez, USDA/APHIS, Buenos Aires, URI No. 460/09 (30 January 2009), (Exhibit ARG-60).
[531] SENASA's letter of 30 January 2009, (Exhibit ARG-60/USA-112).
[532] APHIS' letter of 27 April 2009, (Exhibit ARG-79).

established contact points for further discussions "if necessary".[533] However, APHIS did not make any requests for additional information of SENASA concerning the FMD situation in Patagonia for another three years.

7.156. After Argentina inquired into the status of the approval process in July 2010, APHIS sent SENASA a letter dated 13 September 2010 in which it stated that "APHIS had made significant progress towards recognizing the FMD-free status of southern Patagonia".[534] In June 2011, the United States' representative at the SPS Committee, responding to a specific trade concern (STC) raised by Argentina, stated that APHIS had "made significant progress in recognizing the FMD-free status of South Patagonia and that, in light of the information Argentina provided in 2009, which was used to update the 2005 risk analysis, it was able to conclude that the import of ruminants and ruminant products from this region presented a negligible risk of FMD".[535] The United States delegate reiterated this statement before the SPS Committee in October 2011.[536] However, APHIS did not issue a determination concerning the recognition of Patagonia as FMD-free, nor did it request any further information of SENASA, until after the Panel's establishment in January 2013.[537]

7.157. In March 2013, when the current proceedings were already under way, APHIS formally requested SENASA to accept a new site visit to Patagonia in order to progress with the review of Argentina's request.[538] SENASA agreed that the site visit should take place in November 2013.[539] APHIS conducted the site visit as scheduled. On 23 January 2014, a few days before the first substantive meeting of the Panel, APHIS published a risk analysis for Patagonia in a Notice of Availability that recognized the region as FMD-free.[540] On 29 August 2014, a few days before the second substantive meeting of the Panel, APHIS published a Notice of Determination recognizing Patagonia as FMD-free, which entered into force two months later.[541]

7.158. The facts described above indicate a period of inaction on the part of APHIS between the site visit to Patagonia in February 2009 and its formal request to conduct a new site visit in March 2013. Therefore, based on the evidence on the record, we take the view that such a period constitutes a delay in the procedure. As mentioned in paragraph 7.118 above, we will not consider time-periods after the Panel's establishment. Therefore, for the purposes of Argentina's claim, the delay is from February 2009 until 28 January 2013.

7.159. In sum, the facts outlined above indicate that, during the course of APHIS' review of Argentina's request for the recognition of Patagonia as FMD-free, there were a number of periods of inactivity which constitute "delays" within the meaning of Annex C(1)(a). In particular, with respect to the APHIS process for Patagonia South:

a. there was a delay of eight months between March and November 2004, during which APHIS was waiting for SENASA to submit additional information;

b. there was a one-and-a-half-year delay between the issuance of APHIS' risk analysis for Patagonia South in June 2005 and the publication of the Proposed Rule in January 2007;

c. there was a delay between March 2007 – the expiration of the comment period for the January 2007 Proposed Rule for Patagonia South – and October 2008, when APHIS requested a new site visit to the region.

[533] APHIS' letter of 27 April 2009, (Exhibit ARG-79).
[534] APHIS' letter of 13 September 2010, (Exhibit ARG-62). APHIS' letter refers to "southern Patagonia". We note, however, that by this time Argentina's request covered both Patagonia South and Patagonia North B.
[535] G/SPS/R/63, (Exhibit ARG-22), paras. 17-18.
[536] G/SPS/R/64, (Exhibit ARG-48), paras. 96-97.
[537] On 13 March 2013 APHIS sent a letter to SENASA indicating that during the Consultations conducted between the parties in November 2012, APHIS had proposed that a new site visit be scheduled. The letter served as a formal written request to schedule the previously discussed site visit. (See APHIS' letter of 13 March 2013, (Exhibit USA-96))
[538] APHIS' letter of 13 March 2013, (Exhibit USA-96).
[539] SENASA's letter of 13 July 2013, (Exhibit ARG-99); APHIS' letter of 15 July 2013, (Exhibit USA-97).
[540] 2014 Notice of Availability of Risk Analysis for Patagonia, (Exhibit USA-132); 2014 Risk Analysis for Patagonia, (Exhibit USA-133).
[541] 2014 Notice of Determination on Patagonia, (Exhibit USA-167).

7.160. With respect to APHIS' process for Patagonia as a whole (comprising both Patagonia South and Patagonia North B), there was a delay between February 2009, when APHIS conducted a site visit to the region, and January 2013, when the Panel was established. Thus, for the purpose of this dispute, the delay amounted to almost four years.

7.161. We now turn to assess whether the above-mentioned delays in APHIS' approval process are undue within the meaning of Annex C(1)(a).

7.3.3.5.5 Whether the delays are undue

7.162. In order to assess whether the delays in APHIS' review process outlined in the previous section are undue, we address the justifications offered by the United States to explain such delays. We recall that a delay is undue if it is "unwarranted, or otherwise excessive, disproportionate or unjustifiable".[542]

7.163. We begin our analysis with the delays in APHIS' review of Argentina's original request with respect to Patagonia South.[543] First, with respect to the delay between March and November 2004, we already found in paragraphs 7.150-7.151 above that, during that period, APHIS was waiting for SENASA to submit the additional information requested.[544] In turn, as explained by the United States, APHIS' request for additional information was justified by the deficiencies in SENASA's original request for Patagonia South of August 2003.[545] Given that the information requested of SENASA in this instance was reasonable in the circumstances, SENASA's delay in providing such information cannot be attributed to APHIS.[546] Therefore, with respect to this initial stage of the procedure, we do not find an undue delay that can be attributed to the United States.

7.164. Second, with respect to the delay between the publication of the 2005 risk analysis and the publication of the 2007 Proposed Rule for Patagonia South, the United States once again seeks to justify the delay with reference to a variety of domestic legal obligations governing the promulgation of regulations. We have already found in paragraph 7.152 above that the United States did not provide evidence to demonstrate that there was any activity during that period necessary for APHIS to comply with the cited legal instruments. Indeed, the evidence on the record only shows inactivity with no justification. Therefore, we find that the one-and-a-half-year delay is undue within the meaning of Annex C(1)(a).

7.165. Third, we address the delay between the expiration of the comment period for the January 2007 Proposed Rule for Patagonia South (March 2007) and APHIS' request to conduct a new site visit to the region (October 2008). The United States argues that the period in question was required for APHIS to address the 45 comments expressed by interested parties. In particular, according to the United States, such comments revealed that "the risk analysis underlying the proposed rule was missing current information and improperly relied on outdated information"[547], therefore "APHIS needed additional time to update and reconfirm its conclusions".[548]

7.166. We note that although the United States' asserts that it was the comments which precipitated the need for APHIS to seek additional information and reconfirm its conclusions, APHIS waited over one and a half years after the expiration of the comment period to request the new site visit to Patagonia. The United States has not offered any justification as to why this step of its review would require such a lengthy period of time. We have already found that the time it took APHIS to address the comments in question was longer than ordinarily expected.[549] We also took the view that, in the circumstances of this case, the need to re-confirm and update

[542] Appellate Body Report, *Australia – Apples*, para. 437 (referring to Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1495).
[543] See para. 7.159 above.
[544] Information on Patagonia Provided by SENASA (November 2004), (Exhibit USA-103).
[545] APHIS' facsimile of 6 November 2003, (Exhibit USA-99); United States first written submission, para. 151 (referring to APHIS' letter of 6 November 2003, (Exhibit USA-100)).
[546] See Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1498 (where the panel stated that if a request for information is not justified by the importing Member's need to check and ensure the fulfilment of an SPS measure, that request may cause an undue delay within the meaning of Annex C(1)(a)).
[547] United States' response to Panel question No. 33 following the second substantive meeting.
[548] United States' response to Panel question No. 63 following the first substantive meeting.
[549] See para. 7.154 above.

pre-existing information which became outdated because of APHIS' inaction does not constitute a justification for delay in the completion of a procedure.[550] Therefore, we conclude that the delay between March 2007 – the expiration of the comment period for the January 2007 Proposed Rule – and October 2008 – when APHIS' requested a new site visit – is undue within the meaning of Annex C(1)(a).

7.167. We now turn to the delay in APHIS' review of Argentina's request concerning Patagonia as a whole (i.e. comprising both Patagonia South and Patagonia North B).[551] In Argentina's view, APHIS' failure to finalize the process by the time of the establishment of the Panel (28 January 2013) constitutes an undue delay in the approval procedure.[552] For its part, the United States asserts that APHIS' review of the request was delayed because Argentina: (i) revised the application to include Patagonia North B[553]; and (ii) repeatedly revised the regulatory conditions for FMD surveillance, movement control and slaughter procedures in Patagonia.[554] As a result, according to the United States, APHIS did not have all the information necessary to complete its risk assessment for Patagonia prior to its site visit of November 2013.[555]

7.168. We agree with the United States that the expansion, in December 2008, of Argentina's original request to encompass both Patagonia South and Patagonia North B is relevant to our assessment of whether the portion of APHIS' review devoted to Patagonia incurred an undue delay. As to the changes in the regulatory framework for Patagonia, the United States argues that SENASA's new policy (Resolution 1282/2008) "posed potential obstacles to Argentina's ability to conform with APHIS' FMD sanitation requirements" and therefore justified APHIS' delay.[556] We note that Resolution 1282/2008 modified the regime of controls between Patagonia North B and Patagonia South as part of the process of merging the two separate areas into one Patagonia region[557], following the OIE's recognition of Patagonia North B as FMD-free where vaccination is not practised – the status already enjoyed by Patagonia South at that time. Although we do not necessarily agree with the United States' characterization of the potential effects of Resolution 1282/2008[558], we consider that it is reasonable that a change in the very borders of the region APHIS was being asked to recognize as FMD-free as well as the regulatory regime governing that region would require additional inquiries and hence additional time for evaluation. Thus, we find that it was reasonable for APHIS to conduct its site visit to Patagonia as a whole in February 2009 and that therefore, the delay between December 2008 and February 2009 was not undue.

7.169. However, we are not persuaded that the events referred to above justify APHIS' delay between the February 2009 site visit to Patagonia and the date of the establishment of the Panel. In particular, we are not convinced by the United States' argument that APHIS did not have all the information necessary to complete its risk assessment for Patagonia prior to November 2013. Indeed, we note the communications from APHIS to SENASA of 27 April 2009 and 13 September 2010 and the statements by the United States' representative before the SPS Committee in June and October 2011, discussed in paragraphs 7.153-7.156 above. According to Argentina, such communications show that APHIS had already gathered sufficient information to complete the approval process for Patagonia as a whole as a result of its site visit of February 2009.

[550] See para. 7.143 above.
[551] See para. 7.160 above.
[552] Argentina's response to Panel question No. 68 following the first substantive meeting. In its submissions, Argentina refers to Section 737 of the *2009 Omnibus Appropriations Act* as a non-scientific reason for the delay in the process. (See e.g. Argentina's first written submission, para. 701; Argentina's opening statement at the first meeting of the Panel, para. 18; Argentina's second written submission, paras. 385-389) For the reasons set out in paragraphs 7.139 above, we are not convinced that Section 737 caused APHIS' delay.
[553] United States' first written submission, para. 215. See also United States' response to Panel question No. 33 following the second substantive meeting.
[554] United States' first written submission, para. 213.
[555] United States' response to Panel question No. 33 following the second substantive meeting.
[556] United States' first written submission, para. 159.
[557] Resolución SENASA 1282/2008, (Exhibit USA-109), Article 1.5.
[558] See paras. 7.527-7.528 below.

7.170. We have taken note of the United States' argument that the letter from APHIS and the statements made to the SPS Committee should not be construed as an admission on the part of the United States that the risk analysis was in fact completed in 2009. Nevertheless, we do not think that the letter and statements are devoid of value for the purposes of determining whether there has been undue delay in conducting the procedure. Moreover, the record shows that APHIS did not request SENASA to provide any additional information concerning the FMD situation in Patagonia following its site visit of February 2009 until after the Panel was established. Finally, the United States has not pointed to any specific information that APHIS was missing prior to the November 2013 visit, except for the need to "re-confirm and update" information already in its possession as the result of prior site visits.[559] Based on an examination of the facts in their entirety, we conclude that APHIS had collected sufficient information concerning the FMD situation in Patagonia well before the November 2013 site visit took place. If that were not the case, one would expect APHIS to communicate to SENASA what information was missing in order to progress towards the completion of the process. It did not do so. Thus, we find that the delay subsequent to February 2009 was attributable to the United States. As we discussed in paragraph 7.143 above, circumstances such as those presented in this case, the need to "re-confirm and update" pre-existing information does not constitute, in and of itself, justification for delay in the completion of a procedure.

7.171. In light of the above, we find that APHIS' delay between the site visit to Patagonia in February 2009 and the date of the establishment of the Panel (28 January 2013) was undue within the meaning of Annex C(1)(a).

7.172. In sum, based on all the foregoing, we conclude that:

a. The delay between March and November 2004 is not undue, therefore the United States did not act inconsistently with Article 8 and Annex C(1)(a);

b. The delay between the issuance of APHIS' risk analysis for Patagonia South (June 2005) and the publication of the Proposed Rule (January 2007) is undue, therefore the United States acted inconsistently with Article 8 and Annex C(1)(a);

c. The delay between the expiration of the comment period for the January 2007 Proposed Rule (March 2007) and APHIS' request for a new site visit (October 2008) is undue, therefore the United States acted inconsistently with Article 8 and Annex C(1)(a);

d. The delay between the site visit to Patagonia in February 2009 and the date of the establishment of the Panel (28 January 2013) is undue, therefore the United States acted inconsistently with Article 8 and Annex C(1)(a).

7.3.4 Whether APHIS' review processes of Argentina's requests met the procedural requirements set forth in Annex C(1)(b) of the SPS Agreement

7.3.4.1 Arguments of the parties

7.3.4.1.1 Argentina

7.173. Argentina claims that APHIS' review processes of its two requests are inconsistent with Article 8 in conjunction with Annex C(1)(b).

7.174. First, Argentina submits that APHIS did not publish the standard processing period of each procedure. According to Argentina, the application procedures set forth in 9 CFR 92.2 do not indicate APHIS' standard processing period of requests.[560] Moreover, Argentina contends, APHIS never communicated to Argentina the anticipated processing time for its requests, despite Argentina's "specific inquiries on this matter".[561] For instance, Argentina points out, APHIS' letter of 24 September 2010, concerning Argentina's request for imports of fresh (chilled or frozen) beef,

[559] United States' response to Panel question No. 33 following the second substantive meeting.
[560] Argentina's first written submission, paras. 655, 687.
[561] Argentina's first written submission, paras. 656, 688.

merely stated that "it is important that APHIS follow the rulemaking process to ensure that our decision-making is thorough and transparent".[562] Similarly, according to Argentina, APHIS' letter of 13 September 2010, concerning Argentina's request for recognition of Patagonia as FMD-free, simply explained that "APHIS must be transparent and thorough in its deliberations, meaning that [its] rulemaking process can take time".[563]

7.175. Second, Argentina submits that APHIS failed to transmit as soon as possible the results of the procedures in a precise and complete manner to Argentina so that corrective action could be taken if necessary. According to Argentina, APHIS' letters of 27 April 2009 and 24 September 2010, coupled with the United States' representative's statements before the SPS Committee of June and October 2011, indicate that APHIS had completed risk assessments for Northern Argentina and for Patagonia as a whole (comprising both Patagonia South and Patagonia North B), which it did not publish or otherwise communicate to Argentina.[564]

7.176. Third, Argentina complains that APHIS did not inform Argentina of the stage of the procedures, explaining any delay, despite Argentina's "repeated inquiries" into the status of its requests.[565]

7.3.4.1.2 United States

7.177. The United States contends that out of the five obligations contained in Annex C(1)(b), only one was mentioned in Argentina's panel request and is therefore within the Panel's terms of reference: the obligation to inform the applicant of the stage of the procedure and to explain any delay upon request.[566]

7.178. Further, according to the United States, Argentina's claims must fail because APHIS promptly examined the completeness of Argentina's requests upon receipt and notified SENASA of deficiencies in such requests on multiple occasions, explaining that it would need to provide the necessary additional information.[567] Moreover, according to the United States, APHIS proceeded as far as practicable with its evaluation of Argentina's requests even when SENASA's applications had deficiencies.[568] Finally, the United States argues that Argentina's assertion that APHIS failed to transmit final results of the evaluation process must fail because there were no final "results" to transmit at the time Argentina requested them.[569] In this regard, the United States relies on the panel report in *EC – Approval and Marketing of Biotech Products* to state that the obligation to transmit the results of a procedure does not arise where there are no final results.[570]

7.3.4.2 Main arguments of the third parties

7.3.4.2.1 China

7.179. China observes that the panel in *EC – Approval and Marketing of Biotech Products* found that the obligation to transmit the results of the procedure to an applicant under Annex C(1)(b) did not apply because there were no final results which could have been communicated to applicants. However, in China's view, certain intermediate results should also be transmitted to the applicant, namely those pertaining to the conclusion of each step of a control, inspection or approval procedure.[571]

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[562] Argentina's first written submission, para. 656.
[563] Argentina's first written submission, para. 688.
[564] Argentina's first written submission, paras. 657-658, 689.
[565] Argentina's first written submission, paras. 659-660, 690-691.
[566] United States' second opening statement, para. 76.
[567] United States' response to Panel question No. 56 following the first substantive meeting; United States' statement at the second meeting of the Panel, para. 77.
[568] United States' response to Panel question No. 56 following the first substantive meeting; United States' statement at the second meeting of the Panel, para. 77.
[569] United States' statement at the second meeting of the Panel, para. 78.
[570] United States' response to Panel question No. 55 following the first substantive meeting.
[571] China's third-party response to Panel question No. 22.

7.3.4.2.2 European Union

7.180. The European Union takes the view that if there is no "result" of the procedure, then the specific obligation to transmit such a result cannot arise. In its opinion, a "result" is a decision on a request, whether definitive or provisional.[572]

7.3.4.3 Analysis by the Panel

7.181. Annex C(1)(b) contains five procedural requirements to be observed by Members in carrying out control, inspection or approval procedures[573]: (i) that the standard processing period of each procedure be published or that the anticipated processing period be communicated to the applicant upon request; (ii) that when receiving an application, the competent body promptly examine the completeness of the documentation and inform the applicant in a precise and complete manner of all deficiencies; (iii) that the competent body transmit as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; (iv) that even when the application has deficiencies, the competent body proceed as far as practicable with the procedure if the applicant so requests; and (v) that upon request, the applicant be informed of the stage of the procedure, with any delay being explained.

7.182. Argentina argues the United States did not comply with the first, third, and fifth requirements mentioned above. The United States asserts that Argentina's claims under the first and third requirements of Annex C(1)(b) are not within the Panel's terms of reference because they were not included in Argentina's request for the establishment of Panel.

7.183. First, we assess whether Argentina's claims under Article 8 and Annex C(1)(b) are within the terms of reference of the Panel. To the extent they are, we will then turn to assessing them on their merits.

7.3.4.3.1 Whether Argentina's claims under Article 8 and Annex C(1)(b) are within the terms of reference of the Panel

7.184. Article 6.2 of the DSU provides, in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.185. Article 6.2 sets out two key requirements that a complainant must satisfy in its panel request, namely, the "identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint (or the claims)".[574] Together, these two elements constitute the "matter referred to the DSB", so that, if either of them is not properly identified, the matter would not be within the panel's terms of reference.[575] As the Appellate Body has noted, a panel request forms the basis for the terms of reference of panels, in accordance with Article 7.1 of the DSU.[576] Moreover, it serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case.[577]

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[572] European Union's third-party response to Panel question No. 22.

[573] Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1574; *US – Poultry (China)*, para. 7.357.

[574] Appellate Body Reports, *US – Carbon Steel*, para. 125 (emphasis omitted); *China – Raw Materials*, para. 219.

[575] Appellate Body Reports, *US – Carbon Steel*, para. 125; *China – Raw Materials*, para. 219.

[576] Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; *US – Carbon Steel*, para. 125; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; *US – Continued Zeroing*, para. 160; *China – Raw Materials*, para. 219.

[577] Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 786; *US – Carbon Steel*, para. 126; *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167, at 186; *China – Raw Materials*, para. 219.

7.186. In *China – Raw Materials*, the Appellate Body stated that "[i]n order to determine whether a panel request is sufficiently precise to comply with Article 6.2 of the DSU, a panel must scrutinize carefully the language used in the panel request".[578] A panel should read the request as a whole and "in light of attendant circumstances".[579] The Appellate Body clarified that while the complainant's submissions "may be referenced in order to confirm the meaning of the words used in the panel request", the content of those submissions "cannot have the effect of curing the failings of a deficient panel request".[580] The Appellate Body also explained that, in order "to present the problem clearly", a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits."[581] As the Appellate Body has explained, only by such connection between the measure(s) and the relevant provision(s) can a respondent "know what case it has to answer, and … begin preparing its defence".[582] We also note that the Appellate Body has clarified that in situations where "a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged".[583]

7.187. We note that Section 3 of Argentina's panel request is entitled "Undue delays in approval procedures".[584] In the text of the Section, Argentina claims that the United States' application of the procedures set forth in 9 CFR 92.2, as well as Section 737 of the *2009 Omnibus Appropriations Act*, resulted in "undue delays".[585] In addition, Argentina claims that "[t]he United States has also failed to explain the delays that have occurred".[586] In connecting such omissions by the United States to specific provisions of the SPS Agreement, Argentina claims that the United States acted inconsistently with "Article 8, because the United States has not acted in accordance with the provisions of Annex C.1".[587]

7.188. Annex C(1) of the SPS Agreement contains a wide array of obligations, contained in subparagraphs (a) through (i). In turn, subparagraph (b) contains five distinct requirements to be observed by Members in carrying out control, inspection or approval procedures. Given the broad and diverse coverage of Annex C(1), we are of the view that, in order to comply with Article 6.2 of the DSU, Argentina was required to specify in a sufficiently clear manner which of the obligations contained in the provision it was challenging.

7.189. In our view, given the specific reference to "undue delay" in Annex C(1)(a), the multiple references to "undue delays" in the title and text of Section 3 of Argentina's panel request make it clear that Argentina was challenging the United States' measures under Annex C(1)(a). We further consider that the sentence in Section 3 that "[t]he United States has … failed to explain the delays that have occurred" clearly connects Argentina's claims to the fifth requirement of Annex C(1)(b), namely that "the applicant [be] informed of the stage of the procedure, with any delay being explained". However, we fail to see in Argentina's panel request any language indicating that it was also challenging the United States' failure to comply with the first requirement of

[578] Appellate Body Report, *China – Raw Materials*, para. 220. See also Appellate Body Report, *EC – Fasteners (China)*, para. 562.

[579] Panel Report, *China – Publications and Audiovisual Products*, para. 7.53-7.60. That panel found that the complainant's panel request did not meet the precision requirement under Article 6.2, *inter alia*, because it contained language suggesting to the respondent that a certain measure was only being challenged under one set of provisions, but not under provisions of the covered agreements to which the United States subsequently referred in its submissions. See Ibid. para. 7.60. See also Appellate Body Reports, *Korea – Dairy*, paras. 124-127; *US – Carbon Steel*, para. 127.

[580] Appellate Body Report, *China – Raw Materials*, para. 220. See also Appellate Body Reports, *EC – Fasteners (China)*, para. 562; *EC and certain member States – Large Civil Aircraft*, para. 642; *EC – Bananas III*, para. 143; *US – Carbon Steel*, para. 127.

[581] Appellate Body Report, *China – Raw Materials*, para. 220. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

[582] Appellate Body Report, *Thailand – H-Beams*, para. 88. See also Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Review*, para. 162; *Brazil – Dessicated Coconut*, p.20, DSR 1997:I, 167 at 186.

[583] Appellate Body Report, *China – Raw Materials*, para. 220. See also Appellate Body Reports, *Korea – Dairy*, para. 124; *EC – Fasteners (China)*, para. 598.

[584] Argentina's request for the establishment of a panel, WT/DS447/2, p. 3.

[585] Argentina's request for the establishment of a panel, WT/DS447/2, pp. 3-4.

[586] Argentina's request for the establishment of a panel, WT/DS447/2, p. 4.

[587] Argentina's request for the establishment of a panel, WT/DS447/2, p. 5.

Annex C(1)(b), namely that "the standard processing period of each procedure [be] published or that the anticipated processing period [be] communicated to the applicant upon request".

7.190. Nor do we consider that the language of Argentina's panel request clearly connects its claims to the third requirement of Annex C(1)(b), namely that "the competent body transmit[] as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary". In this respect, we note that Argentina does allege in the panel request that the United States has admitted at the WTO that the risk assessments were complete. As the United States never published or transmitted a risk assessment, such a statement could, arguably, be related to the third requirement in Annex C(1)(b). However, we note that Argentina makes claims under Articles 5.1 and 5.2 that there are no risk assessments. We also note that the final results of the procedure in question may not simply be a risk assessment, but could also include a change in 9 CFR 94.1 to permit imports. Therefore, reading the request as a whole and in light of the attendant circumstances, we find that the third requirement in Annex C(1)(b) was not identified sufficiently in Argentina's panel request to present the problem clearly.

7.191. The Panel is not suggesting that Article 6.2 requires in every instance a recitation of every single phrase or term found in a provision. However, in this instance given the broad reference to Annex C(1) which contains a broad array of obligations, more specificity is required, given that one of the key purposes of the panel request is to adequately notify the respondent of the case it has to defend. Referring specifically to the language in the fifth requirement in Annex C(1)(b) while omitting the language of the first and third requirements, Argentina was effectively notifying the United States that its claims concerned the fifth requirement, but that the other four requirements were not relevant.[588] Although Argentina may have formulated claims and arguments about the first and third requirements in its submissions, this will not assist Argentina, for it would be improper to allow Argentina to "cure" the deficiency in the specificity of its panel request through reference to additional requirements in its written submissions.[589]

7.192. Based on the foregoing, we find that, of Argentina's claims under Article 8 and Annex C(1)(b), only that relating to the fifth requirement is within the Panel's terms of reference.

7.3.4.3.2 Whether the United States informed SENASA, upon request, of the stage of APHIS' reviews of its requests, explaining any delay

7.193. The fifth requirement of Annex C(1)(b) obliges a Member carrying out an approval procedure to inform the applicant of the stage of the procedure and explain the reasons for any delay. This requirement is qualified by the words "upon request", which indicate that the applicant must have formally asked the Member to communicate the information before a claim can be brought alleging the Member's breach of the provision.

7.194. At the outset, we recall that APHIS' review processes of Argentina's requests for imports of fresh (chilled or frozen) beef from Northern Argentina and for the recognition of Patagonia as FMD-free incurred delays.[590] The evidence on the record shows that SENASA contacted APHIS on more than one occasion requesting explanations as to the state of progress of its two requests for imports of fresh (chilled or frozen) beef from Northern Argentina and for recognition of Patagonia as FMD-free. For instance, on 19 July 2010 SENASA sent APHIS two separate letters – one for each approval process – asking that the "outcomes foreseen for Argentina's request[s]" be "elucidated" in a timely fashion.[591] Thus, in our view, the United States was under an obligation to explain the delays in APHIS' approval processes upon Argentina's inquiries.

7.195. However, APHIS did not provide precise explanations as to the stage of the procedures or the reasons for the delays. Concerning the approval process for imports of fresh (chilled or frozen) beef, APHIS simply stated that it was "important that APHIS follow the rulemaking process to

[588] See Panel Report, *China – Publications and Audiovisual Products*, paras. 7.53-54.
[589] See Appellate Body Report, *EC – Bananas III*, para. 143.
[590] See paras. 7.127 and 7.159-7.160 above.
[591] SENASA's letter of 19 July 2010, Note No. 150/2010, (Exhibit ARG-46); SENASA's letter of 19 July 2010, Note No. 149/2010, (Exhibit ARG-61/USA-56).

ensure that [its] decisionmaking is thorough and transparent".[592] Similarly, with respect to the approval process for Patagonia, APHIS stated that since it needs to be "transparent and thorough" in its deliberations, its rulemaking process "can take time".[593] Further, throughout the period 2009-2011, a number of United States' officials made statements that suggested that APHIS had "made significant progress in reviewing Argentina's two requests".[594] In our opinion, such indications do not satisfy the United States' obligation to inform SENASA of the stage of APHIS' reviews and explain the reasons for the delays incurred.

7.196. Based on the foregoing, we take the view that the United States failed to inform Argentina, upon request, of the stage of APHIS' review processes of Argentina's request or to explain the delays incurred by such procedures. Therefore, we find that the United States has acted inconsistently with Article 8 and the fifth requirement of Annex C(1)(b).

7.4 Harmonization

7.4.1 Relevant legal provisions

7.197. Article 3 of the SPS Agreement, entitled "Harmonization" reads in relevant part:[595]

> 1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, an in particular in paragraph 3.
>
> 2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.
>
> 3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards guidelines or recommendations shall not be inconsistent with any other provision of this Agreement. (footnote omitted)

7.198. Annex A(3)(b) sets forth that "for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics (OIE)" shall be the source of the relevant international standards, guidelines and recommendations.

[592] APHIS' letter of 24 September 2010, (Exhibit ARG-47).
[593] APHIS' letter of 13 September 2010, (Exhibit ARG-62).
[594] See paras. 7.125 and 7.156 above.
[595] Article 3 includes two additional paragraphs: Article 3.4, which provides that "Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies"; and Article 3.5, which reads that the WTO SPS Committee "shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations". These paragraphs are not at issue in the present dispute.

7.4.2 Whether the United States' measures are based on relevant international standards, guidelines or recommendations

7.4.2.1 Main arguments of the parties

7.4.2.1.1 Argentina

7.199. Argentina argues that the United States' measures are not based on the relevant international standards, guidelines or recommendations contained in the Terrestrial Code. In particular, Argentina identifies Articles 8.5.22 (containing recommendations for imports of fresh meat of FMD-susceptible animals from FMD-free countries or zones where vaccination is not practised) and 8.5.23 (containing recommendations for imports of fresh meat of cattle and buffaloes from FMD-free countries or zones where vaccination is practised) as the relevant standards to which the United States' measures should be compared.[596] Argentina also identifies the provisions on regionalization in Chapters 4.1 and 4.3 of the Terrestrial Code and Articles 8.5.4 and 8.5.5 on FMD designations for zones and compartments with respect to its claims regarding the treatment of products from Patagonia.[597] Argentina further mentions Article 8.5.25, Chapter 4.4 and Sections 1-5 of the Terrestrial Code.[598] In addition, Argentina argues that the OIE designations of particular FMD status for identified countries or regions constitute relevant standards, guidelines or recommendations, as they are "official recognition[s]" issued by the World Assembly of Delegates, the "highest authority of the organization".[599] In Argentina's opinion, this conclusion is supported by the ordinary meaning of the words "guidelines" and "recommendations".[600] Argentina finds support for this view in the OIE's statement, in response to a question from the Panel, that the disease status determinations are adopted in a manner that is directly comparable to those used in developing standards in the Terrestrial Code.[601] Argentina argues that to conclude otherwise would have serious implications for Members who conform their measures to the OIE under Article 3.2. In its view, the necessary implication of the finding that the official recognitions of disease status are not guidelines or recommendations is that Members attempting to rely on the OIE official recognitions of disease status would not be protected by the presumption in Article 3.2 and would be subject to challenge for imposing measures without, for instance, conducting an independent risk assessment.[602]

7.200. Argentina approaches its claims from the standpoint that this is an "as applied" case rather than an "as such" one.[603] In other words, according to Argentina, the issue is not whether the United States' regulatory framework established by APHIS is "as such" based on the Terrestrial Code. Argentina argues that its claim is that the specific import measures applied to fresh (chilled or frozen) beef from Northern Argentina and on all animals, meat and other animal products from Patagonia – i.e. prohibitions – are not based on the OIE's standards, guidelines or recommendations.[604]

7.201. Argentina contends that the United States' measures are "almost entirely disconnected from" the Terrestrial Code[605] and that APHIS' regulatory system is "structured in a fundamentally different manner" from the OIE Terrestrial Code.[606] In particular, Argentina notes that while the OIE recognizes both regions where vaccination is practised and not practised as FMD-free, APHIS'

[596] Argentina's first written submission, paras. 185-206. See also Argentina's response to Panel question No. 13 following the first substantive meeting; Argentina's comments on the United States' response to Panel question No. 17 following the second substantive meeting.
[597] Argentina's first written submission, paras. 415-428.
[598] Argentina's response to Panel question No. 13 following the first substantive meeting.
[599] Argentina's response to Panel question No. 17 following the second substantive meeting.
[600] Argentina's response to Panel question No. 17 following the second substantive meeting. See also Argentina's second written submission, para. 96.
[601] Argentina's comments on the OIE's response to Panel question No. 12.
[602] Argentina's second written submission, para. 97. See also Argentina's response to Panel question No. 17 following the first substantive meeting.
[603] See e.g. Argentina's second written submission, para. 89; Argentina's opening statement at the second meeting of the Panel, para. 33; Argentina's response to Panel question No. 12 following the second substantive meeting.
[604] Argentina's second written submission, para. 89. See also Ibid. para. 92; Argentina's response to Panel question No. 12 following the second substantive meeting.
[605] Argentina's first written submission, para. 197.
[606] Argentina's response to Panel question No. 13 following the first substantive meeting.

classification does not recognize the former as being FMD-free.[607] Further, Argentina argues that Articles 8.5.22 and 8.5.23 both allow the importation of the relevant products under certain mitigating protocols. In its view, the mitigation protocols imposed by APHIS on products originating from countries where vaccination is practised, set forth in 9 CFR 94.22 are similar to those that the OIE prescribes for FMD-*infected* regions where a vaccination programme exists.[608] Conversely, Argentina contends, the United States' measures applied to its imports constitute "simple prohibition[s]".[609] Therefore, according to Argentina, the United States' measures cannot be said to be based on the Terrestrial Code, because a measure "that has the opposite meaning and effect of an international standard cannot be said to be 'built upon' an international standard."[610] In its view, had the United States based its SPS measures on these standards in the Terrestrial Code, imports from Argentina would have been authorized subject to different mitigating protocols depending on whether they originated from Patagonia or the rest of Argentina.[611] Similarly, Argentina argues that Articles 4.3.2 and 4.3.3 of the Terrestrial Code provide for regionalization decisions, but that as of the date of establishment of the Panel, the United States had not recognized Patagonia as a separate region nor applied import protocols specific to the region as foreseen in the Terrestrial Code.[612]

7.202. Addressing the relationship between Articles 3.1 and 3.3, Argentina argues that the Panel should not misinterpret the Appellate Body's reasoning in *EC – Hormones* to mean that Article 3.1 covers SPS measures with more extensive requirements than those found in international standards, so long as the standard served as the "foundation" of the measures. In Argentina's view, the term "except" in Article 3.1, as referred "in particular [to] paragraph 3", constitutes an "exclusive limitation" to the requirement to base one's measure on an international standard, guideline or recommendation.[613] In Argentina's view the language in Article 3.1 indicates a "binary choice" whereby a measure cannot, at one and the same time, be based on an international standard, guideline or recommendation and achieve a higher ALOP.[614] For Argentina, any other interpretation would render the term "except" meaningless, inconsistently with the principle of effective treaty interpretation.[615] Indeed, in its view, it would render Articles 3.1 and 3.3 "essentially redundant" and could lead to the result that "a Member could potentially establish higher standards without undertaking the rigors of a valid risk assessment pursuant to Article 5", which would be "an absurd reading of the treaty language".[616] Argentina notes that the United States claims to apply a higher ALOP than the Terrestrial Code. Pursuant to Argentina's understanding of Article 3, this means that the United States' measures are not consistent with Article 3.1 and must comply with Article 3.3, which in turn requires the United States to comply with the other provisions of the SPS Agreement.[617] Argentina contends that, because the United States' measures are inconsistent with Articles 5, 2, 6[618] and 10, they are thereby inconsistent with Article 3.3.[619]

7.203. Nevertheless, Argentina also argues that even if the Panel were to find the United States' measures were based on the relevant international standards, guidelines or recommendations, this would not be dispositive of the Panel's analysis under the other provisions of the SPS Agreement. Argentina argues that its claims under the other provisions are autonomous and continue to stand. According to Argentina, "it would be an absurd result if a Member could meet the lower threshold of Article 3.1 and still have some sort of safe harbour or other release from the obligations of the

[607] Argentina's response to Panel question No. 13 following the first substantive meeting. See also Argentina's second written submission, para. 98.
[608] Argentina's response to Panel question No. 13 following the first substantive meeting. See also Argentina's second written submission, paras. 89-91.
[609] Argentina's first written submission, para. 198. See also Ibid. para. 427.
[610] Argentina's first written submission, paras. 197 and 200. See also Argentina's opening statement at the second meeting of the Panel, para. 24.
[611] Argentina's first written submission, paras. 190-191.
[612] Argentina's first written submission, paras. 426-428.
[613] Argentina's response to Panel question No. 14 following the first substantive meeting.
[614] Argentina's response to Panel question No. 14 following the first substantive meeting. See also Argentina's opening statement at the first meeting of the Panel, paras. 33-34; Argentina's second written submission, para. 98; Argentina's opening statement at the second meeting of the Panel, para. 22.
[615] Argentina's response to Panel question No. 14 following the first substantive meeting.
[616] Argentina's first written submission, para. 196.
[617] Argentina's first written submission, para. 207.
[618] We recall that Argentina raises claims under Article 6 only with respect to Patagonia.
[619] Argentina's first written submission, paras. 226-227, 229.

remainder of the SPS Agreement."[620] Argentina notes that the United States is not seeking the safe harbour of conformity with the international standards, guidelines or recommendations in Article 3.2. Therefore, in its view the United States' measures must conform to the other provisions of the SPS Agreement, including Articles 2, 5, 6, 8 and 10. Argentina argues that "[t]here is not a single word or phrase in Article 3.1 that would remove this requirement from the United States' obligations."[621]

7.4.2.1.2 United States

7.204. The United States considers that Article 1.6.4 and Chapters 2.1 and 8.5 of the OIE Terrestrial Code constitute international standards, guidelines or recommendations relevant to this dispute within the meaning of Article 3 of the SPS Agreement.[622] However, the United States argues that the disease status designations for FMD do not in themselves constitute relevant international standards, guidelines or recommendations, but rather an application of the OIE Terrestrial Code to specific factual situations.[623] In particular, the United States takes issue with Argentina's claim that the term "recommendation" encompasses OIE FMD statuses and maintains that the word "recommendation" should be "read together with 'standard' and 'guideline'", whose common denominator is that they are not applications of "country-specific facts to rules or norms".[624] Furthermore, the United States argues that the fact that official recognition of FMD disease status is issued in the form of a resolution by the World Assembly of Delegates does not, in and of itself, show that they are standards, guidelines or recommendations.[625]

7.205. The United States maintains that, with respect to imports of FMD-susceptible animals and animal products from other countries or regions, the Terrestrial Code "lays out a system that is fundamentally the same in structure and approach to that of the APHIS application system" and that the two "mirror each other", so that APHIS' system can be said to be based on the Terrestrial Code.[626] In support of this contention, the United States compares APHIS' procedures with those for the recognition or reinstatement of a region as FMD-free under the Terrestrial Code. It states that under both the Terrestrial Code and APHIS' procedures, a country or region is not considered to be free of FMD until an application is filed by the Member concerned and a determination of FMD-freedom is reached by the OIE or APHIS, respectively.[627] For the United States, the factors applicant Members have to address in support of their requests to APHIS mirror those that they have to address when applying for OIE recognition.[628] Further, the United States argues, both the Terrestrial Code and APHIS' system provide that an FMD-outbreak in a country or region recognized as FMD-free entails the suspension of such a status, which the country or region affected can recover if a new application is filed and a new determination is reached by the OIE or APHIS, respectively.[629] In light of the above, the United States contends that APHIS' regulatory system "incorporates a substantial portion" of the Terrestrial Code.[630]

7.206. The United States observes, however, that some "notable differences" exist between the two systems, which stem from the United States' higher ALOP for FMD.[631] First, it contends, APHIS always performs site visits as part of its review process, whereas such a step is optional under the OIE system.[632] Second, the United States maintains, the OIE's evaluation of the FMD-status of an applicant Member "often relies entirely" on the information contained in that Member's dossier, as stated in Article 1.6.4 of the Terrestrial Code.[633] Third, the United States asserts that, unlike APHIS' procedures, the OIE's designation process "does not involve the preparation of a full risk

[620] Argentina's response to Panel question No. 15 following the first substantive meeting.
[621] Argentina's response to Panel question No. 15 following the first substantive meeting. See also Argentina's opening statement at the first meeting of the Panel, para. 36; Argentina's second written submission, para. 99.
[622] United States' response to Panel question No. 13 following the first substantive meeting.
[623] United States' response to Panel question No. 17 following the first substantive meeting.
[624] United States' second written submission, para. 90.
[625] United States' second written submission, para. 97.
[626] United States' first written submission, para. 321.
[627] United States' first written submission, paras. 333-334.
[628] United States' first written submission, para. 334.
[629] United States' first written submission, para. 335.
[630] United States' response to Panel question No. 13 following the first substantive meeting.
[631] United States' response to Panel question No. 13 following the first substantive meeting.
[632] United States' response to Panel question No. 13 following the first substantive meeting.
[633] United States' response to Panel question No. 13 following the first substantive meeting.

assessment" taking into account "the particularized situation of both the exporting and importing Members".[634] Fourth, in the United States' view, the process leading up to the FMD-status determination of a Member is not as transparent as APHIS', in that the OIE does not publish a "lengthy opinion" to the membership but simply informs the applicant Member of the outcome of the evaluation, with "a summary record" of the "reasons for a positive or negative outcome".[635] Finally, according to the United States, APHIS' system "diverges slightly from the OIE's approach" by not designating regions where vaccination is practised as "FMD-free".[636] However, according to the United States, the authorization of imports of fresh (chilled or frozen) beef from Uruguay under the protocols set forth in 9 CFR 94.22 shows that, in certain circumstances, APHIS authorizes imports from countries that are characterized by the OIE as FMD-free where vaccination is practised.[637]

7.207. The United States asserts that an SPS measure can be based on the relevant international standards, guidelines and recommendations and at the same time achieve a higher level of protection.[638] The United States argues that, in *EC – Hormones*, the Appellate Body found that an SPS measure may be based on an international standard by adopting "some, not necessarily all, of the elements of [that] standard".[639] For the United States, the "binary choice" between Articles 3.1 and 3.3 of the SPS Agreement set forth by Argentina erroneously conflates the based on requirement in Article 3.1 with the "conform to" requirement in Article 3.2.[640] Thus, the United States maintains that its measures are based on the Terrestrial Code even if APHIS reaches a different conclusion from the OIE on a particular application of the criteria for designating a country or zone disease free[641], or if the timing of the OIE designation of disease-free status is not "synchronized with the timeframes of the appropriate regulatory authorities in Member countries."[642]

7.208. The United States argues that even if the Panel were to find that its measures comply with Article 3.1, such a finding would not be dispositive of Argentina's other claims[643], because a measure consistent with Article 3.1 "does not enjoy a presumption of consistency" with the rest of the SPS Agreement and the GATT 1994. However, the United States notes that if the Panel were to find that the United States' measures comply with the obligations in Article 5, and thus the exception in Article 3.3, they would not be inconsistent with Article 3.1.[644] The United States nevertheless also maintains that Article 3.3 of the SPS Agreement does not apply to the United States' measures because APHIS "has not concluded its regulatory process and issued a final determination on Argentina's requests", whereas the provision in question only applies "when an SPS measure has been 'introduced and maintained' in a particular manner".[645]

7.4.2.2 Main arguments of the third parties

7.4.2.2.1 Australia

7.209. Relying on past Appellate Body reports, Australia notes that Article 3 of the SPS Agreement expressly recognizes the right of WTO Members to determine their own appropriate level of protection.[646] Based on the reasoning of the Appellate Body in *EC – Hormones*,

[634] United States' opening statement at the second meeting of the Panel, para. 14 (underlining omitted).
[635] United States' second written submission, para. 109.
[636] United States' response to Panel question No. 13 following the first substantive meeting.
[637] United States' response to Panel question No. 13 following the first substantive meeting.
[638] United States' response to Panel question No. 14 following the first substantive meeting.
[639] United States' second written submission, para. 73 (quoting Appellate Body Report, *EC – Hormones*, para. 171). See also United States' response to Panel question No. 14 following the first substantive meeting.
[640] United States' response to Panel question No. 14 following the first substantive meeting (referring to Appellate Body Report, *EC – Hormones*, paras. 165-171). See also United States' second written submission, para. 73.
[641] United States' first written submission, para. 321.
[642] United States' first written submission, para. 339.
[643] United States' response to Panel question No. 16 following the first substantive meeting.
[644] United States' response to Panel question No. 15 following the first substantive meeting.
[645] United States' second written submission, para. 99.
[646] Australia's third-party submission, paras. 9-12; Australia's third-party statement, paras. 10-13.

it also asserts that there is a distinction between the terms based on in Article 3.1 and "conform to" in Article 3.2, with the latter imposing a higher standard.[647]

7.4.2.2.2 Brazil

7.210. In Brazil's view, the architecture of Article 3 of the SPS Agreement does not preclude the possibility that a measure be based on an international standard and, at the same time, achieve a higher ALOP.[648] This is because, Brazil argues, the Appellate Body found that the words "based on" in Article 3.1 should be read differently from the words "conform to" in Article 3.2.[649] However, even if the United States' measures were found to be based on the OIE standards, guidelines or recommendations, they should still "be duly justified by a scientific reason" in order to be consistent with Article 3.3.[650] Finally, Brazil observes that the OIE's FMD-status designations for specific countries or regions are issued "according to the procedures applicable to the adoption of standards and recommendations".[651]

7.4.2.2.3 China

7.211. In China's opinion, the two parties are arguing different things, in that Argentina claims that the United States' "import ban" on Argentine and Patagonian products is not based on an international standard, whereas the United States argues that APHIS' "application system" is based on the international standard.[652] According to China, the relevant question is whether the United States' prohibitions on imports from Argentina and Patagonia are based on the OIE's standards.[653] In its view, the United States' measures are not based on the OIE standards because, unlike the APHIS regulatory scheme, the Terrestrial Code does not prohibit trade, but simply "require[s] the exporting country, transit country and importing countries to *consider* the animal health situation before determining the requirements for trade".[654] China further observes that, in *EC – Hormones*, the Appellate Body left open the question whether, for an SPS measure to be based on an international standard; the measure needs to reflect the same level of sanitary protection as the standard.[655] In China's view, the references in Article 3.3 to "measures which result in a level of sanitary or phytosanitary protection different from *that* which would be achieved by measures based on international standards, guidelines or recommendations" suggests that a particular ALOP is implied or reflected in every given international standard, and that in order to be based on such international standard, an SPS measure should achieve the same ALOP.[656]

7.212. China agrees with the United States that the OIE's FMD-status determinations for specific countries or regions do not constitute standards, guidelines or recommendations, but rather an application thereof.[657] However, China also submits that such determinations are "of value for an importing Member to develop an SPS measure" and "for a panel to evaluate whether the SPS measure is based on the OIE standard", in that they indicate that, in the OIE's view, the SPS characteristics of a specific country or region meet the OIE's standard for FMD.[658]

7.4.2.2.4 European Union

7.213. The European Union argues that Argentina has cited inapposite provisions of the Terrestrial Code in supporting its claims under Article 3.1. In particular, the European Union notes that

[647] Australia's third-party submission, paras. 14-17 (quoting Appellate Body Report, *EC – Hormones*, para. 163); Australia's third-party statement, paras. 17-18.
[648] Brazil's third-party response to Panel question No. 1.
[649] Brazil's third-party response to Panel question No. 1.
[650] Brazil's third-party response to Panel question No. 2. See also Brazil's third-party-submission, paras. 5-11.
[651] Brazil's third-party response to Panel question No. 2.
[652] China's third-party submission, para. 15 (emphasis omitted).
[653] China's third-party submission, para. 15.
[654] China's third-party submission, para. 16 (emphasis original); China's third-party statement, para. 11 (quoting Appellate Body Report, *EC – Hormones*, para. 163).
[655] China's third-party response to Panel question No. 1 (quoting Appellate Body Report, *EC – Hormones*, para. 168).
[656] China's third-party response to Panel question No. 1.
[657] China's third-party response to Panel question No. 3.
[658] China's third-party response to Panel question No. 3.

Argentina refers to the provisions of the Terrestrial Code dealing with countries that are FMD-free (either with vaccination or without), whereas the challenged measure [9 CFR 94.1(b)] deals with countries that are *not* FMD-free.[659] Furthermore, the European Union asserts that the two Articles of the Terrestrial Code to which Argentina refers (i.e. Articles 8.5.22 and 8.5.23) do not provide any recommendation as to the conditions that a country or region should fulfil in order to fall within one of the relevant FMD-free categories.[660] The European Union also notes that Argentina does not refer to the Articles of the Terrestrial Code that address procedures to be followed in relation to imports of meat from areas that are not considered to be FMD-free.[661] Therefore, the European Union contends that Argentina has not made a *prima facie* case for its claims under Article 3.1.[662]

7.214. Moreover, the European Union argues that because Article 3.3 only applies if a measure is not based on the relevant international standards, to make a *prima facie* case the complainant must show that the challenged measure is not based on the relevant identified international standard.[663] The European Union contends that the same deficiencies in Argentina's identification of the relevant international standards under Article 3.1 apply to its claims under Article 3.3; thus Argentina has also failed to make a *prima facie* case under Article 3.3.[664]

7.215. The European Union notes that the Appellate Body in *EC – Hormones* did not specify whether a measure achieving a higher ALOP than an international standard, guideline or recommendation may, nonetheless, be "based" thereupon.[665] In the European Union's opinion, finding that a measure is based on an international standard, guideline or recommendation only where it achieves the same ALOP would conflate the words based on in Article 3.1 and "conform to" in Article 3.2, contrary to the decision in *EC - Hormones*.[666] Moreover, the European Union also believes that the words "based on" are not dependent on the "level of protection achieved" by a measure because: (i) Article 3.1 does not refer to the "level of protection achieved"[667] and (ii) the reference in Article 3.1 to "except *as otherwise provided for in this Agreement* and in particular in paragraph 3" suggests that Article 3.3 is "just one of the possible legal bases that would allow a Member to adopt a measure that is not 'based on' an international standard".[668]

7.216. For the European Union, an SPS measure that selectively incorporates certain aspects of an international standard, guideline or recommendation, and thus "*re-casts* as a whole the balance of provisions" contained therein, does not "conform to" nor is it based on the international standard, guideline or recommendation in question.[669] In such a case, "Article 3.3 governs the entire measure".[670]

7.4.2.3 Analysis by the Panel

7.217. Article 3 specifies the path towards achieving one of the key purposes of the SPS Agreement as set forth in the Preamble of the SPS Agreement, which states that Members:

> Desir[e] to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of

[659] European Union's third-party submission, paras. 32-33.
[660] European Union's third-party submission, para. 34.
[661] European Union's third-party submission, para. 35.
[662] European Union's third-party submission, para. 37.
[663] European Union's third-party submission, para. 40.
[664] European Union's third-party submission, paras. 41-42.
[665] European Union's third-party response to Panel question No. 1.
[666] European Union's third-party response to Panel question No. 1.
[667] European Union's third-party response to Panel question No. 1.
[668] European Union's third-party response to Panel question No. 1 (emphasis original).
[669] European Union's third-party response to Panel question No. 1 (emphasis original).
[670] European Union's third-party response to Panel question No. 1 (emphasis omitted).

> the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health.[671]

7.218. Although only Articles 3.1 and 3.3 are raised in this dispute, we note that the Appellate Body set forth its understanding of the meaning of the term "based on" in Article 3.1 by contrasting it with the term "conform to" in Article 3.2. The Appellate Body recognized that a measure that "conforms to" and incorporates an international standard is, of course, based on that standard. However, the Appellate Body reasoned that the two provisions must have some distinction between their scopes of application. Thus, while the Appellate Body found the ordinary meaning of "conform to" to mean "'comply with', 'yield or show compliance' with the latter," it explained that "[a] thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter." Therefore, the Appellate Body also concluded that a measure might be based on a standard yet not conform to it if only some, not all, of the elements of the standard are incorporated into the measure.[672]

7.219. As the panel in *India – Agricultural Products* noted, the guidance from the Appellate Body implies that the "based on" threshold in Article 3.1 is lower than the "conform to" threshold in Article 3.2.[673] However, knowing that "based on" is less than "conform to" is not sufficient for understanding the concept. We find merit in the approach of the panel in *India – Agricultural Products* which found that an understanding of "based on" should be guided by the Appellate Body's interpretation of the term "as a basis for" in Article 2.4 of the TBT Agreement in *EC – Sardines.*[674] In *EC – Sardines,* the Appellate Body upheld the panel's finding that the ordinary meaning of the term "basis" was "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge".[675] The Appellate Body also concluded that there must be a very strong and very close relationship between two things in order to be able to say that one is "the basis for" the other.[676] Finally, while it declined to define "in general the nature of the relationship that must exist for an international standard to serve 'as a basis for' a technical regulation", the Appellate Body did note that "at a minimum … something cannot be considered a 'basis' for something else if the two are *contradictory*."[677]

7.220. Extrapolating from this reasoning, we find it equally viable to say that where an SPS measure and the relevant international standard, guideline or recommendation contradict each other, the SPS measure cannot be said to be based on that international standard, guideline or recommendation.[678]

7.221. The Panel will first determine whether the United States' measures are based on the relevant international standards, guidelines or recommendations within the meaning of Article 3.1, before turning to a discussion of Argentina's claim under Article 3.3.

7.222. Pursuant to the text of the provision and guidance from the Appellate Body, an assessment of consistency with Article 3.1 requires a two-step analysis. First, the Panel needs to determine whether one or more of the international standard-setting bodies identified in Annex A(3) have established standards, guidelines or recommendations relevant to the measure(s). If relevant international standards, guidelines or recommendations exist, the Panel must then compare the challenged measure(s) to the international standards, guidelines or recommendations and determine whether the measure(s) are based on the relevant international standard(s), guideline(s) or recommendation(s).

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[671] Preamble to the SPS Agreement, para. 6. We recall that the Appellate Body has determined that harmonization of SPS measures of Members on the basis of international standards is projected in the Agreement, as a *goal*, yet to be realized in the *future.* See Appellate Body Report, *EC – Hormones*, para. 165.

[672] Appellate Body Report, *EC – Hormones*, para. 163.

[673] Panel Report, *India – Agricultural Products*, para. 7.203.

[674] Panel Report, *India – Agricultural Products*, para. 7.266.

[675] Appellate Body Report, *EC – Sardines*, paras. 243-245. See also Panel Report, *EC – Sardines*, para. 7.110.

[676] Appellate Body Report, *EC – Sardines*, para. 245.

[677] Appellate Body Report, *EC – Sardines*, para. 248 (emphasis original).

[678] Panel Report, *India – Agricultural Products*, para. 7.269.

7.223. In making our determination, we will examine whether the United States' measures applicable to imports of fresh (chilled or frozen) beef from Northern Argentina are based on the relevant provisions of the international standard, guideline or recommendation. Then we will turn to perform a similar analysis with respect to the United States' measures applicable to Patagonia.

7.4.2.3.1 Fresh (chilled or frozen) beef from Northern Argentina

7.4.2.3.1.1 Whether a relevant international standard, guideline or recommendation exists

7.224. With respect to whether a relevant international standard, guideline or recommendation exists, we note that Annex A(3) of the SPS Agreement designates the OIE as the relevant source for standards, guidelines or recommendations for measures relating to animal health. Thus the relevant international standards, guidelines or recommendations for a measure taken pursuant to Annex A(1)(a) – that is, to protect animal health from the entry, establishment, or spread of a pest or disease – would be those promulgated by the OIE.[679]

7.225. Both parties identify the Terrestrial Code as the relevant international standards, guidelines or recommendations for the purpose of this dispute.[680] Both parties refer to Chapter 8.5 of the Terrestrial Code[681], which contains the specific provisions relating to FMD.[682] Argentina also references Articles 4.3.2 and 4.3.3 with respect to regionalization.[683] Furthermore, Argentina maintains that the OIE's official recognition of disease status is itself an international standard, guideline or recommendation.[684]

7.226. As noted in section 2.4.2.1, the Terrestrial Code is made up of numerous chapters. Some relate to general matters while others relate to specific diseases and the measures taken to combat them. Chapter 8.5 is the Chapter which specifically addresses FMD.

7.227. Articles 8.5.2 through 8.5.8 detail the different types of status available with respect to FMD and what is required of the exporting country or zone to achieve official recognition of a particular disease status.[685] Articles 8.5.12 through 8.5.33 list various recommendations on how to safely import FMD-susceptible animals or various products derived from them depending on whether the exporting country or zone has one of the disease statuses.[686]

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[679] Although not directly relevant in the SPS context, we note that a similar understanding is embodied in Annex 1.2 of the Agreement on Technical Barriers to Trade which defines a "standard" as "a document *approved by a recognized body* that provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory." (emphasis added) In interpreting this provision and the ISO/IEC Guide, the Appellate Body reasoned in *EC – Sardines* that the relevant issue is whether the document is *approved* by the recognized body and not how that approval comes about (i.e. consensus, voting, etc.).

[680] This is supported by the finding of the panel in *India – Agricultural Products* that the Terrestrial Code, in particular Chapter 10.4, contained relevant international standards, guidelines or recommendations. (Panel Report, *India – Agricultural Products*, para. 7.206)

[681] We note that the chapter numbers for the FMD provisions have changed from 8.5 in the 21st edition (2012) to 8.6 in the 22nd edition (2013) and now 8.7 in the 23rd edition (2014). The parties have cited various versions of the Terrestrial Code in their submissions. The Panel is aware that the latest edition of the Terrestrial Code is the one that contains the most up-to-date evaluation by the Code Commission reflecting the latest scientific knowledge. However, the text of the FMD provisions has remained largely the same. Furthermore, the Panel is mindful of its duty to protect the due process rights of the parties and not have the respondent answering a case based on information that did not exist at the time of the establishment of the Panel. Therefore, we concur with the panel in *India – Agricultural Products* that the appropriate version of the Terrestrial Code to serve as a reference point for analysing Argentina's claims under Article 3.1 is the version in force on the date of establishment of the Panel, the 21st edition (2012). Therefore, the Panel will refer to Chapter 8.5 throughout its findings. See e.g. Panel Report, *India – Agricultural Products*, para. 7.211-7.213.

[682] The United States also refers to Article 1.6.4 which sets forth the required information when applying for a status-designation for FMD.

[683] Argentina's first written submission, paras. 415-428.

[684] Argentina's response to Panel question No. 17 following the second substantive meeting.

[685] Article 8.5.5 details the criteria for achieving official recognition as an FMD-free zone where vaccination is practised.

[686] OIE's response to Panel question No. 10.

7.228. In order to determine the relevant provisions of the Terrestrial Code, we consider it useful to first recall the precise measures that are subject to Argentina's claims under Article 3.1. We note that Argentina has not claimed or argued that the APHIS' "application system" is not based on the Terrestrial Code. Indeed, Argentina argues that its claims under Article 3.1 do not relate to the United States' regulatory system "as such", but rather "as applied" to Northern Argentina for fresh (chilled or frozen beef).[687] Furthermore, our understanding is that Argentina is not challenging APHIS' application of the procedures in 9 CFR 92.2 to Northern Argentina under Article 3.1. Argentina only challenges the import measures imposed – i.e. a complete prohibition on imports of fresh (chilled or frozen) beef from Northern Argentina. Therefore, the United States' arguments that the application system that APHIS operates for authorization to import is based on the provisions of the Terrestrial Code related to granting a particular disease status because the two systems are "fundamentally the same in structure and approach"[688] is not relevant to the claims before us.

7.229. With respect to Argentina's claims, given that Northern Argentina is a zone that vaccinates[689], the relevant articles of the Terrestrial Code are the product-specific import recommendations to be applied to shipments of fresh (chilled or frozen) beef from countries or zones that vaccinate. Article 8.5.23 is the recommendation for the import measures to apply to fresh meat of cattle and buffaloes (excluding feet, head and viscera) from FMD-free countries or zones where vaccination is practised. Article 8.5.25 sets forth the recommendations for import measures applying to fresh meat of cattle and buffaloes (excluding feet, head and viscera) from FMD-infected countries or zones, where an official control programme for FMD, involving compulsory systematic vaccination of cattle exists.

7.230. Argentina argues that, in light of the relationship between the requirements for obtaining an official recognition of disease status described in Articles 8.5.4-8.5.8 and the import recommendations in Articles 8.5.23 and 8.5.25, the official recognitions of FMD disease status are themselves relevant international standards, guidelines or recommendations upon which the United States should base its measures. The United States counters that the official recognitions of disease status are not standards, guidelines or recommendations within the meaning of Article 3 of the SPS Agreement because they are not embodied in the Terrestrial Code[690] and they are not rules or norms, but rather the application of rules or norms to country- or region-specific facts.[691]

7.231. Annex A does not set forth a specific definition of any of the terms "standards", "guidelines", or "recommendations". No panel has yet been faced with determining the meaning of these terms in the context of the SPS Agreement. We agree with the parties that the SPS Agreement does not require a fine distinction between the three terms for its proper application.[692] The OIE seems to use the terms interchangeably, labelling the Terrestrial Code as part of its standard-setting activities, while the individual provisions within the Terrestrial Code are

[687] Argentina's first written submission, paras. 185-206; see also Argentina's response to Panel question Nos. 13(a) and (c) following the first substantive meeting.

[688] United States' first written submission, para. 321.

[689] This is evidenced by the OIE official disease status recognition of Northern Argentina as FMD-free where vaccination is practised. (See OIE Resolution XXI of 2007, (Exhibit ARG-10)) We also note that the European Commission's risk assessments of Northern Argentina refer to vaccination practices. (See e.g. Final Report Of A Mission Carried Out In Argentina From 3 To 13 July 2006 In Order To Evaluate Animal Health Controls In Place In Particular Over Foot And Mouth Disease, Public Health Control Systems And Certification Procedures. (DG(SANCO)/8203/2006 – MR Final), (European Commission's 2006 Report), (Exhibit ARG-111), pp. 11-12) Furthermore, the 2005 APHIS risk assessment of Patagonia South refers to Northern Argentina as an area where systematic vaccination occurs. (See generally 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9))

[690] The United States only refers to the Terrestrial Code, but we note that the OIE also promulgates standards in the Aquatic Code as well as the Terrestrial Manual and the Aquatic Manual.

[691] United States' response to Panel question No. 17 following the first substantive meeting. United States' second written submission, para. 88 citing Exhibit USA-152, Exhibit USA-130, and Exhibit USA-153.

[692] Argentina's response to Panel question No. 17 following the first substantive meeting; United States' response to Panel question No. 17 following the first substantive meeting. See also United States' second written submission, para. 87.

entitled "recommendations".[693] The Codex Alimentarius Commission adopts "standards", "guidelines" and "codes of practice".[694] At the time the SPS Agreement was negotiated, the International Plant Protection Convention (IPPC) did not yet develop international standards, and it was not yet clear how it would refer to their official documents.[695] The practices of the three organizations identified in Annex A(3) lends support to our understanding.

7.232. With respect to the official recognition of disease status, we note that it does not have any particular effect in and of itself, but rather serves two purposes. First, it is an affirmation that the exporting country has been determined by the OIE to have complied with the relevant provisions of the Terrestrial Code. Second, it is an important component in determining which of the import recommendations in Articles 8.5.12 through 8.5.33 is applicable to products from a particular exporting country or zone. The OIE strongly encourages its Members to apply those articles according to the official recognition of disease status.[696] However, we note that the Terrestrial Code is structured in the same manner for other diseases for which the OIE does not provide official recognition of the disease status.[697] Furthermore, the Terrestrial Code provides for the possibility of "self-declaration" of status for countries or zones that have not achieved official recognition.[698] It is also possible for an importing Member to make its own determination as to whether an exporting country or zone satisfies the criteria for a particular disease status.[699] Given that the relevant provisions of the Terrestrial Code can operate independently of any OIE official recognition of disease status, we believe it that it makes sense to first consider whether the United States measures are based on either Article 8.5.23 or 8.5.25 of the Terrestrial Code.

7.4.2.3.2 Whether the United States' import prohibitions are based on the Terrestrial Code

7.233. As noted above, our task is to determine whether the challenged measures are "founded" or "built" upon or "supported by" the relevant standards, guidelines or recommendations in the Terrestrial Code such that they serve as a principal constituent or fundamental principle of the United States' measures. Importantly, the United States' measures cannot be said to be based on the Terrestrial Code if they contradict it.

7.234. As noted above, the relevant provisions of the Terrestrial Code are Article 8.5.23 and Article 8.5.25. The recommended conditions for importation in both of these articles are compared to the provisions in 9 CFR 94 as applicable to fresh (chilled or frozen) beef from Northern Argentina in Table 3 below.

[693] The OIE notes that in its view "all resolutions adopted by its World Assembly (including those addressing the official recognition of disease status) have the same status. See OIE's response to Panel question No. 12(a). See also G/SPS/GEN/1256.

[694] Codex website, *Home*, http://www.codexalimentarius.org/codex-home/en/ (last accessed 3 February 2015).

[695] IPPC website, *History of the IPPC*, https://www.ippc.int/about/history (last accessed 3 February 2015), noting that the IPPC was designated in the draft of the SPS Agreement in 1989, but did not begin its international standard-setting programme until the IPPC Secretariat was established in 1992.

[696] The OIE explains that the achievement of an OIE-recognized status whether for a zone or for an entire country with or without vaccination is a critically important step on the path to disease eradication and supports safe trade in animals and animal products. (Transcript of the meeting, para. 1.8) Furthermore, in the OIE's view official recognition of a country or zone as FMD-free is an affirmation that the country has satisfied the standards contained in the Terrestrial Code. OIE's response to Panel question No. 5.

[697] For example see Chapter 10.4 of the Terrestrial Code on avian influenza which is fully discussed in Panel Report, *India – Agricultural Products*, paras. 7.228-7.253.

[698] Terrestrial Code Article 1.6.1. OIE's response to Panel question No. 21 explaining that for over 100 OIE listed diseases, freedom from disease in a country or zone is the subject of self-declaration. However, the OIE notes that the officially-granted disease free status has much greater weight than a self-declaration made by a Member country. OIE's response to Panel question No. 12(a).

[699] See Transcript of the meeting, para. 1.142.

Table 3: Comparison of Terrestrial Code to US Code of Federal Regulations for fresh (chilled or frozen) beef

Northern Argentina: Fresh (chilled or frozen) beef	
OIE Terrestrial Code	**9 CFR 94 as applied**
FMD-free where vaccination is practised	**FMD-infected**
8.5.23 (for fresh meat of cattle and buffaloes (excluding feet, head and viscera): Veterinary authorities should require the presentation of an international veterinary certificate attesting that that the entire consignment of meat comes from animals which: 1) have been kept in the FMD free country or zone where vaccination is practised, or which have been imported in accordance with Article 8.5.12, Article 8.5.13, or Article 8.5.14; 2) have been slaughtered in an approved abattoir and have been subjected to ante- and post-mortem inspections for FMD with favourable results.	Imports are prohibited.
FMD infected countries or zones, where an official control programme for FMD, involving compulsory systematic vaccination of cattle exists	**FMD-infected**
8.5.25 (for fresh meat of cattle and buffaloes (excluding feet, head and viscera): Veterinary authorities should require the presentation of an international veterinary certificate attesting that the entire consignment of meat: 1) comes from animals which: a) have remained in the exporting country for at least three months prior to slaughter; b) have remained, during this period, in a part of the country where cattle are regularly vaccinated against FMD and where official controls are in operation; c) have been vaccinated at least twice with the last vaccination not more than 12 months and not less than one month prior to slaughters; d) were kept for the past 30 days in an establishment, and that FMD has not occurred within a ten-kilometre radius of the establishment during that period; e) have been transported, in a vehicle which was cleansed and disinfected before the cattle were loaded directly from the establishment of origin to the approved abattoir without coming into contact with other animals which do not fulfil the required conditions for export; f) have been slaughtered in an approved abattoir. i) which is officially designated for export; ii) in which no FMD has been detected during the period between the last disinfection carried out before slaughter and the shipment for export has been dispatched; g) have been subjected to ante- and post-mortem inspections for FMD with favourable results within 24 hours before and after slaughter; 2) comes from deboned carcasses: a) from which the major lymphatic nodes have been removed; b) which, prior to deboning, have been submitted to maturation at a temperature above +2˚C for a minimum period of 24 hours following slaughter and in which the pH value was below 6.0 when tested in the middle of both the longissimus dorsi.	Imports are prohibited.

7.235. The United States argues that it need not apply Article 8.5.23 to Northern Argentina to have its measures be based on the Terrestrial Code, because the official disease status recognition of the OIE is not itself an international standard, guideline or recommendation. As discussed in paragraph 7.231 above, the issue before us is not whether the United States is required to follow the official recognition of disease status that the OIE has granted Northern Argentina, but whether the import measures it applies in 9 CFR 94.1, as amended by the 2001 Regulations, are based on the Terrestrial Code.

7.236. The Terrestrial Code provides in Articles 8.5.23 and 8.5.25 that imports from countries or zones that vaccinate cattle can be safely traded and should be permitted subject to the mitigating protocols set forth in those articles. It is undisputed that Northern Argentina vaccinates its

cattle.[700] Argentina maintains that Northern Argentina satisfies the criteria for the status of FMD-free region where vaccination is practised.[701] The United States explains the distinction between its measures and those recommended by the Terrestrial Code by noting that under 9 CFR 94, the United States does not recognize regions where vaccination is practised as "FMD-free": rather it considers such countries or zone to be "FMD-infected".[702] However, as noted above, under the relevant international standards, guidelines or recommendations a country or zone that is FMD-infected and vaccinating would be subject to the protocols in Article 8.5.25, which allow trade in fresh (chilled or frozen) beef under certain conditions.[703]

7.237. The United States applies neither Article 8.5.23 nor 8.5.25 to Northern Argentina: instead, it prohibits imports of fresh (chilled or frozen) beef.[704] A measure that prohibits trade cannot be said to be based on a measure that allows trade under certain conditions. Indeed, in that sense, the two can be said to be *contradictory*.

7.238. We note that the United States argues that even though its measures diverge from the Terrestrial Code because the United States has a higher level of protection than that implicit in the relevant provisions of the Terrestrial Code, they are still based on the Terrestrial Code. In support of its understanding, the United States relies on the reasoning of the Appellate Body that a measure might be based on a standard "if only some, not all, of the elements of the standard are incorporated into the measure".[705]

7.239. We agree that "based on" does not require the wholesale adoption of the international standard, guideline or recommendation into the measure of the importing Member. As the Appellate Body noted, this would wipe out any distinction between the scope of coverage of Articles 3.1 and 3.2. However, we do not believe that the Appellate Body's conclusion in *EC – Hormones* stands for the proposition that Members can contradict the international standard, guideline or recommendation and nevertheless be deemed compliant with Article 3.1.[706]

7.240. We take note of the United States' argument that the difference between the measures that it applies to Northern Argentina and the OIE's standard, guidelines or recommendations is a result of its higher level of protection. We recognize that it is an open question whether a measure that achieves a higher level of protection could in some circumstances nevertheless be based on an international standard, guideline, or recommendation that embodies a lower level of protection.[707] It is not necessary for the Panel to answer this broader interpretative question.

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[700] This is evidenced by the OIE official disease status recognition of Northern Argentina as FMD-free where vaccination is practised. (See OIE Resolution XXI of 2007, (Exhibit ARG-10)) We also note that the European Commission's risk assessments of Northern Argentina refer to vaccination practices. (See e.g. European Commission's 2006 Report, (Exhibit ARG-111), pp. 11-12) Furthermore, the 2005 APHIS risk assessment of Patagonia South refers to Northern Argentina as an area where systematic vaccination occurs. (See generally 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9))

[701] See e.g. Argentina's first written submission, para. 191. The criteria for a zone or compartment that is FMD-free where vaccination is practised can be found in Article 8.5.5 of the Terrestrial Code.

[702] United States' response to Panel question No. 13 following the first substantive meeting. The United States notes that it does, in the unique circumstance of Uruguay, permit a country that has been recognized by the OIE as FMD-free where vaccination is practised to import under the protocols set forth in 9 CFR 94.22. However, the United States argues that, contrary to the position of Argentina the mere fact that the United States has accepted imports from one country that is recognized by the OIE as FMD-free where vaccination is practised cannot be dispositive of whether the measures the United States applies to Northern Argentina are based on the Terrestrial Code.

[703] The OIE noted that "in the situation of a country that has had a recognized status from the OIE which is based on compulsory systematic vaccination and it has an outbreak and it loses it status due to that outbreak it certainly continues its vaccination. So the Article 8.5.25 would apply." (Transcript of the meeting, para. 1.43) In our view, this confirms our understanding that if Argentina were considered to be "infected" – as the United States does – Article 8.5.25 would be the applicable import recommendation.

[704] See e.g. United States' first written submission, para. 299; United States' response to Panel question No. 19 following the first substantive meeting.

[705] Appellate Body Report, *EC – Hormones*, para. 163.

[706] In this sense, see Appellate Body Report, *EC – Sardines*, para. 248; Panel Report, *India – Agricultural Products*, para. 7.269.

[707] Appellate Body Report, *EC – Hormones*, para. 168 where the Appellate Body noted that the question of whether a measure needs to reflect the same level of protection as the standard to be based on that standard was "to be left for another day and another case".

Irrespective of the appropriate level of protection, a measure that contradicts the international standard, guideline or recommendation cannot be said to be based on it.

7.241. As noted above, the OIE considers that fresh (chilled or frozen) beef from countries or zones which vaccinate can be safely traded subject to the specific recommendations in Articles 8.5.23 and 8.5.25.[708] In our view, prohibiting trade in fresh (chilled or frozen) beef from a region that vaccinates contradicts these provisions of the Terrestrial Code.[709] Therefore, we conclude that 9 CFR 94.1, as amended by the 2001 Regulations, is not based on the relevant provisions of the Terrestrial Code and is thus inconsistent with Article 3.1 of the SPS Agreement. Having reached this conclusion, we need not decide whether the OIE's official recognition of Argentina as FMD-free where vaccination is practised is itself an international standard, guideline, or recommendation.

7.4.2.3.3 FMD susceptible animals and products thereof from Patagonia

7.4.2.3.3.1 Whether a relevant international standard, guideline or recommendation exists

7.242. Argentina also identifies the Terrestrial Code as the source of the international standard, guideline or recommendation relevant to its claims with respect to animals, meat, and animal products from Patagonia. However, Argentina raises not only the specific import measures recommended for FMD-free zones where vaccination is not practised, but also the provisions on regionalization and on establishing an FMD-free zone where vaccination is not practised.

7.243. The general principles for regionalization – also referred to interchangeably in the Terrestrial Code with "zoning" – are set forth in Chapter 4.3 of the Terrestrial Code. With respect to its claims, Argentina argues that the United States' import prohibitions on animals, meat and animal products from Patagonia are not based on the general considerations set forth in Article 4.3.2 that:

> The exporting country should be able to demonstrate, through detailed documentation provided to the importing country that it has implemented the recommendations in the Terrestrial Code for establishing and maintaining such a zone or compartment.
>
> The importing country should recognise the existence of this zone or compartment when the appropriate measures recommended in the Terrestrial Code are applied and the Veterinary Authority of the exporting country certifies that this is the case.

7.244. Article 4.3.3 sets forth the principles that an exporting Member should apply when defining a zone or compartment.

[708] The United States has presented a variety of concerns about vaccination and the potential risks associated with it. Indeed, the United States has identified these as the reasons why it believes its ALOP is higher than the level of protection embodied in the Terrestrial Code. The OIE, for its part stresses the importance of vaccination as a tool in disease eradication campaigns and that the mitigating measures in Articles 8.5.23 (excluding feet, head and viscera) and 8.5.25 (excluding feet, head and viscera and requiring deboning and maturation) render the products safe and that science does not justify banning these products. (See OIE's responses to Panel question Nos. 20 and 26; and Transcript of the meeting, paras. 1.8, 1.162-1.163)

[709] The panel in *India – Agricultural Products* reach a similar conclusion with respect to Chapter 10.4 of the Terrestrial Code and India's prohibition on poultry products. (See Panel Report, *India – Agricultural Products*, paras. 7.270-7.272)

Article 4.3.3 of the Terrestrial Code in relevant part:

1. The extent of a zone and its geographical limits should be established by the Veterinary Authority on the basis of natural, artificial and/or legal boundaries, and made public through official channels.

5. Animals and herds belonging to such subpopulations need to be recognisable as such through a clear epidemiological separation from other animals and all things presenting a disease risk. For a zone or compartment, the Veterinary Authority should document in detail the measures taken to ensure the identification of the subpopulation and the establishment and maintenance of its health status through a biosecurity plan. The measures used to establish and maintain the distinct animal health status of a zone or compartment should be appropriate to the particular circumstances, and will depend on the epidemiology of the disease, environmental factors, the health status of animals in adjacent areas, applicable biosecurity measures (including movement controls, use of natural and artificial boundaries, the spatial separation of animals, and commercial management and husbandry practices), and surveillance.

6. Relevant animals within the zone or compartment should be identified in such a way that their movements are traceable. Depending on the system of production, identification may be done at the herd, flock lot or individual animal level. Relevant animal movements into and out of the zone or compartment should be well documented and controlled. The existence of a valid animal identification system is a prerequisite to assess the integrity of the zone or compartment.

7.245. With respect to how to define a zone seeking the official recognition of its disease status as being FMD-free where vaccination is not practised, the relevant provision of the Terrestrial Code is Article 8.5.4.[710] Article 8.5.4 provides that:

Article 8.5.4 of the Terrestrial Code

A zone seeking this status should
1) have a record of regular and prompt animal disease reporting;
2) send a declaration to the OIE stating that within the proposed FMD free zone:
a. there has been no outbreak of FMD during the past 12 months;
b. no evidence of FMDV infection has been found during the past 12 months;
c. no vaccination against FMD has been carried out during the past 12 months;
d. no vaccinated animal has been introduced into the zone since the cessation of vaccination, except in accordance with Article 8.5.10;
3) supply documented evidence that:
a. surveillance for FMD and FMDV infection in accordance with Articles 8.5.42 to 8.5.47 and Article 8.5.49 is in operation;
b. regulatory measures for the early detection, prevention and control of FMD have been implemented;
4) describe in detail and supply documented evidence that these are properly implemented and supervised:
c. the boundaries of the proposed FMD free zone;
d. the boundaries and measures of a protection zone, if applicable;
e. the system for preventing the entry of the virus (including the control of the movement of susceptible animals) into the proposed FMD free zone (in particular if the procedure described in Article 8.5.10 is implemented).
The proposed free zone will be included in the list of FMD free zones where vaccination is not practised only after the submitted evidence has been accepted by the OIE.
The information required in points 2, 3 and 4b)-c) above should be re-submitted annually and changes in the epidemiological situation or other significant events including those relevant to points 3b) and 4 should be reported to the OIE according to the requirements in Chapter 1.1.

7.4.2.3.3.2 Whether the United States' prohibitions are based on the Terrestrial Code

7.246. In Argentina's view, for an importing Member's measures to be based on the Terrestrial Code that Member must recognize that there can be a zone that is FMD-free where vaccination is not practised within a country that vaccinates and apply the relevant import recommendations for that disease status to that zone. Therefore, according to Argentina, the United States' country-wide prohibition on products from Argentina, including those from Patagonia, cannot be said to be based on the Terrestrial Code.

[710] We note that Argentina also refers to Article 8.5.5 of the Terrestrial Code in its first written submission with respect to the Patagonia claim. See Argentina's first written submission, para. 423. However, as this article deals with the requirements for achieving recognition as an FMD-free zone where vaccination is practised we do not see the relevance to the Patagonia claim which is regarding an area where vaccination is not practised.

7.247. As noted above, Chapter 8.5 of the Terrestrial Code is based on the premise of differentiating the FMD status of a country, zone or compartment according to certain criteria. For a zone that is FMD-free where vaccination is not practised, the criteria are those described in Article 8.5.4. In addition to the general provisions on establishing disease status, Chapter 8.5 contains numerous product-specific recommendations (Articles 8.5.12 through 8.5.33) foreseeing the measures to be applied by importing countries depending on the FMD-status of the country, zone or compartment from which the products originate. The relevant one for fresh (chilled or frozen) beef from zones that are FMD-free where vaccination is not practised is Article 8.5.22.[711] A comparison between the conditions for importation set forth in Article 8.5.22 and those in 9 CFR 94.1 for Patagonia are set forth below:

OIE Terrestrial Code	9 CFR 94.1 as applied
8.5.22: Veterinary authorities should require the presentation of an international veterinary certificate attesting that the entire consignment of meat comes from animals which: 1) have been kept in the FMD free country or zone where vaccination is not practised or a FMD free compartment, or which have been imported in accordance with Article 8.5.12, Article 8.5.13, or Article 8.5.14; 2) have been slaughtered in an approved abattoir and have been subjected to ante- and post-mortem inspections for FMD with favourable results.	No separate zone recognized. Treatment is the same as for the rest of Argentina. Therefore, imports are prohibited.

7.248. The OIE explained that providing for zoning and compartmentalization is an important element in promoting the goal of the Terrestrial Code, which is to provide for safe trade while avoiding unjustified sanitary barriers to trade.[712] The purpose of establishing zones is to maintain separation in terms of the health status of two distinct populations of animals so that the appropriate health measures can be targeted to the appropriate population.[713] Zoning and compartmentalization accomplish this goal by recognizing that disease status may not be country-wide and that the application of import measures should be tailored to the status of the exporting area. This general principle is embodied in Articles 4.3.2 and 4.3.3. Article 4.3.2 provides that the importing country should recognize the existence of a zone or compartment: (i) when the appropriate measures recommended in the Terrestrial Code are applied; and (ii) the Veterinary Authority of the exporting country certifies that this is the case. Furthermore, Article 4.3.3 sets forth principles for defining and establishing a zone or compartment.

7.249. In our view, the text of Chapter 8.5, read in conjunction with the general obligations on zoning and compartmentalization in Article 4.3.2, indicates that the import recommendations contained therein are not only intended for country-wide purposes, but are intended to apply to zones and compartments. The application by an importing Member of the product-specific recommendations to zones or compartments presupposes that the exporting Member has established such zones or compartments within its territory according to the Terrestrial Code (in this case Articles 4.3.3 and 8.5.4). If an exporting country does so, Article 8.5.22 envisages that the importing Member allow the importation from that zone or compartment subject to the specific recommendations therein. This means that the Terrestrial Code envisages that importing Members, when applying measures to address the risk of entry, establishment or spread of FMD, will recognize that if an exporting Member is not entirely free of FMD without vaccination, it may have zones or compartments that are FMD-free where vaccination is not practised.[714]

7.250. We noted above that a Member is not necessarily bound to follow the official recognitions of disease status to be determined to have based its measures on the Terrestrial Code. This does not mean, however, that if a Member wishes to base its measures on the Terrestrial Code, it can

[711] We note that even though Argentina's request to APHIS for authorization of imports from Patagonia includes all products of FMD susceptible animals, including the animals themselves, Argentina has not referenced the articles of the Terrestrial Code that deal with products other than fresh (chilled or frozen) beef in respect of its claim regarding Patagonia under Article 3.1. With respect to specific import recommendations, Argentina has only mentioned 8.5.22.

[712] Terrestrial Code, Foreword.

[713] Transcript of the meeting, para. 1.18.

[714] This approach is consistent with that taken by the panel in *India – Agricultural Products* with respect to Chapter 10.4 of the Terrestrial Code. See Panel Report, *India – Agricultural Products*, paras. 7.254-7.263.

decline to recognize that an exporting Member has within it zones or compartments that may have a different FMD disease status than the rest of the exporting Member's territory.

7.251. Prior to the date of establishment of the Panel, the United States applied its measures to imports of animals, meat and other animal products from Argentina on a country-wide basis and did not apply the import conditions recommended in Article 8.5.22 for zones or compartments that are FMD-free where vaccination is not practised. As 9 CFR 94.1, as amended by the 2001 Regulations, prohibits imports of the relevant products from the entire territory of Argentina, thus not allowing importation of products from a zone (namely, Patagonia), we find that the measures are not based on the Terrestrial Code within the meaning of Article 3.1.

7.252. We understand that the United States has an established process pursuant to 9 CFR 92.2 for the recognition of particular regions – even those within the territory of a country – as being FMD-free. Argentina submitted an application to achieve recognition of Patagonia South as FMD-free in 2003. Subsequently, in 2008, Argentina expanded its application to cover an enlarged region that includes both Patagonia South and Patagonia North B – the Patagonia region. As of the date of the establishment of the Panel, the United States had not completed its review of Argentina's applications. The United States is entitled to conduct its own risk analysis and reach its own conclusions as to whether the Patagonia region is a zone that is FMD-free where vaccination is not practised. However, if the United States applies the current measures on a country-wide basis without any recognition of a zone within Argentina that could be FMD-free where vaccination is not practised, it is not basing those measures on the relevant provisions of the Terrestrial Code.

7.4.2.3.4 Conclusion

7.253. We have found that the import prohibitions on fresh (chilled or frozen) beef from Northern Argentina contradict the Terrestrial Code. We have also found that the non-recognition of Patagonia as a zone that is FMD-free where vaccination is not practised and to prohibit imports of animals, meat and animal products from that zone also contradicts the Terrestrial Code. Therefore, both measures are not based on the relevant international standards, guidelines or recommendations within the meaning of Article 3.1.

7.254. Therefore, we now turn to the question of whether the United States' measures are consistent with Article 3.3.

7.4.3 Whether the United States' measures are introduced or maintained consistently with Article 3.3

7.255. The United States argues that Article 3.3 is inapplicable in the present dispute because that provision only applies to the introduction or maintenance of SPS measures and APHIS has not yet finished its evaluation of either Northern Argentina or Patagonia.[715] The Panel asked the United States to clarify its argument in light of the text of Article 3.3[716] and in particular with respect to the factual matter of whether 9 CFR 94.1, as amended by the 2001 Regulations, is an SPS measure that is currently being maintained.[717] In response, the United States, maintaining its position that the appropriate provision for examining its measures is Article 5.7, did not address the Panel's questions with respect to the nature of the obligation in Article 3.3 or the factual situation vis-à-vis the maintenance of the import prohibitions in 9 CFR 94.1, as amended by the 2001 regulations.[718] Given that the United States cannot demonstrate the underlying premise of its

[715] United States' second written submission, para. 99. United States' response to Panel question No. 17 following the second substantive meeting.

[716] The Panel notes that Article 3.3 refers generally to any provision of this agreement, which includes Article 5.7. It also specifically refers to paragraphs 1 through 8 of Article 5 which also includes Article 5.7.

[717] Panel question No. 17 following the second substantive meeting.

[718] United States' response to Panel question No. 17 following the second substantive meeting. We also note that the United States seemed to have altered its understanding of Article 3.3 when it argued that "Article 3.3 is not itself an independent obligation. Rather, Article 3.3 serves to foreclose a finding of a breach of Article 3.1 in circumstances in which an importing Member chooses not to base its SPS measures on an international standard."

own interpretation – i.e. the absence of an SPS measure – we see no need to substantively address this argument.[719]

7.256. We recall that Article 3.3 codifies Members' autonomous right to establish their own ALOP and to adopt SPS measures that achieve a higher level of protection than would be achieved by a measure based on international standards, guidelines or recommendations.[720] In this case, the United States has asserted that its measures achieve a higher level of protection than would be achieved by application of the Terrestrial Code. However, the right under Article 3.3 is not absolute or unqualified.[721] Pursuant to Article 3.3 the United States' measures must not be inconsistent with any other provision of the SPS Agreement.[722]

7.257. We have already found that the United States has acted inconsistently with Article 8 and Annex C(1)(a) and (b). Therefore, we find that the United States has acted inconsistently with Article 3.3. However, we note that Argentina also argues that the United States measures are inconsistent with Article 3.3 because they are also inconsistent with Articles 5.1, 5.2, 5.4, 5.6, 2.2, 2.3, 6.1, 6.2 and 10 of the SPS Agreement.[723] Therefore, we will return to the issue of whether there are additional inconsistencies with Article 3.3 after we have concluded our analysis of the rest of Argentina's claims.

7.5 Whether the United States' measures are based on scientific principles and maintained with sufficient scientific evidence

7.5.1 Relevant legal provisions

7.258. Article 2.2 of the SPS Agreement sets forth the basic obligation that:

> Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5. (emphasis added)

7.259. Article 5.7 reads:

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

7.260. Article 5.1 reads:

> Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

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[719] While making no specific finding, the Panel does note that the implications of the United States' argument could be far reaching to a coherent application of the SPS Agreement. If accepted, it could mean that a Member could simply avoid the applicability of Article 3.3 and other provisions of the SPS Agreement (other than Article 8 and Annex C(1)(a)) by refusing to reach a determination and finalize a measure, leaving exporting Members with no recourse to dispute settlement on the substantive obligations in the SPS Agreement while an import prohibition remained in place.

[720] Appellate Body Report, *EC – Hormones*, paras. 104 and 172.

[721] Appellate Body Report, *EC – Hormones*, para. 173.

[722] Appellate Body Report, *EC – Hormones*, paras. 175-177 finding that the requirement to comply with all the other provisions of the SPS Agreement (including Article 5) applies both to measures adopted either (a) if there is a scientific justification, or (b) as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate. See also Appellate Body Report, *Canada/US – Continued Suspension*, para. 685.

[723] Argentina's first written submission, paras. 227 and 449.

7.261. Articles 5.2 and 5.3 lists various factors that Members shall take into account when conducting risk assessments. In particular, Article 5.2 reads:

> In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease- free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

7.262. Article 5.3 provides that:

> In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

7.263. Finally, Annex A(4) of the SPS Agreement defines "risk assessment" as:

> The 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, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

7.264. The Appellate Body has observed that Article 2.2 informs, imparts meaning to, and is made operative in other provisions of the SPS Agreement including specific obligations set out in Article 5.[724] Thus, in *EC – Hormones,* the Appellate Body stated that "Articles 2.2 and 5.1 should constantly be read together. Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1."[725] In *Australia – Apples,* the Appellate Body concluded that the same type of relationship exists between Articles 2.2 and 5.2.[726] Likewise, panels and the Appellate Body have examined the reference to Article 5.7 in Article 2.2 and reasoned that the ability to adopt measures as described in Article 5.7 is a "qualified exemption" to the obligation in Article 2.2.[727] The panel in *EC – Approval and Marketing of Biotech Products* reached the conclusion that Article 5.7 is a "qualified right", finding that Article 5.7 confers a right to maintain a measure otherwise inconsistent with Article 5.1.[728] Regardless of the specific terminology, panels and the Appellate Body have consistently found that Article 5.1 is applicable only if Article 5.7 is not. Therefore, in analysing Argentina's claims and the United States' position that its measures fall within the scope of Article 5.7, we agree with the panel in *EC – Approval and Marketing of Biotech Products* that a panel is bound to examine

[724] See Appellate Body Report, *EC – Hormones*, para. 180 and Appellate Body Reports, *US/Canada – Continued Suspension*, para. 674. See also Appellate Body Report, *Australia – Salmon*, para. 138; Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.85 and 7.161; and Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3399; Panel Report, *US – Poultry (China)*, para. 7.157.

[725] Appellate Body Report, *EC – Hormones*, para. 180.

[726] Appellate Body Report, *Australia – Apples*, para. 339.

[727] Appellate Body Report, *Japan – Agricultural Products II*, para. 80; see also Panel Report, *Japan – Apples*, paras. 8.210-8.212 (referring to Article 5.7 as a "defence"). See also, the Appellate Body conclusion in *US/Canada – Continued Suspension*, that Article 2.2 excludes from its scope situations where relevant scientific evidence is insufficient and that the applicable provision is Article 5.7. Appellate Body Report, *US/Canada – Continued Suspension*, para. 674.

[728] Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.2939, 7.2945 and 7.2969 (finding that Article 5.7 is a "right" to maintain a measure otherwise inconsistent with Article 2.2) and paras. 7.2996-7.2998 and para. 7.3004.

whether a measure falls within the scope of the exemption in Article 5.7 *before* turning to an analysis of Article 5.1.[729]

7.265. Therefore, we will begin our analysis with Article 5.7 and only turn to Articles 5.1, 5.2, and 2.2 if necessary.

7.5.2 Whether the United States' measures fall within the scope of the exemption in Article 5.7

7.5.2.1 Main arguments of the parties

7.5.2.1.1 Argentina

7.266. Argentina argues that the United States' measures are not justified by Article 5.7 of the SPS Agreement as they fail to meet at least three of the four cumulative steps required under that provision.[730] Accordingly, Argentina contends, the Panel should analyse such measures within the framework of Articles 5.1 and 5.2 of the SPS Agreement.[731]

7.267. First, Argentina argues that 9 CFR 94.1(b) is a permanent rather than provisional measure.[732] According to Argentina, the application of the 2001 Regulations and the prohibitions under 9 CFR 94.1 was never provisional in nature, as they would have been maintained indefinitely had Argentina not submitted its applications.[733] In Argentina's view, an SPS measure adopted pursuant to Article 5.1 "cannot turn into a provisional measure as described in Article 5.7 "upon receipt of an application from the exporting Member.[734] In its opinion, the adoption of a provisional measure under Article 5.7 "requires some vote or other formal approval process".[735] Conversely, according to Argentina, a permanent measure adopted under Article 5.1 can only be maintained under the conditions set forth in that provision, "i.e. pursuant to a valid risk assessment".[736] For Argentina, the United States did not "adopt" any provisional measures at the time of the filing of Argentina's applications, the only change in circumstances being the applications themselves.[737] In its view, accepting the United States' interpretation would "completely writ[e] out" the words "provisionally adopt" from the text of Article 5.7.[738]

7.268. Second, Argentina maintains that, with respect to the sufficiency of relevant scientific evidence, Articles 5.1 and 5.7 are "mutually exclusive".[739] Indeed, it maintains, if at the time of the adoption of a provisional measure there is sufficient scientific evidence to conduct a valid risk assessment, then "by definition there cannot be the requisite lack of scientific evidence required to invoke Article 5.7".[740] Argentina takes issue with the United States' argument that the 2001 Regulations, through which APHIS imposed its prohibitions on imports of fresh (chilled or

[729] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3005-7.3007. However, the panel then proceeded to begin its analysis with Article 5.1, because, in its view, "in the specific circumstances of [the] case, the critical legal issue [was] whether the relevant safeguard measures m[e]t the requirements set out in the text of Article 5.1, not whether they [were] consistent with Article 5.7. Ibid. para. 7.3006.

[730] Argentina's first written submission, paras. 282, 287 (referring to Appellate Body Report, *Japan – Agricultural Products II*, para. 89).

[731] Argentina's response to Panel question No. 24 following the second substantive meeting.

[732] Argentina's first written submission, para. 283; Argentina's response to Panel question No. 24 following the first substantive meeting.

[733] Argentina's second written submission, para. 194; Argentina's response to Panel question No. 24 following the first substantive meeting.

[734] Argentina's response to Panel question No. 29 following the first substantive meeting.

[735] Argentina's response to Panel question No. 18 following the second substantive meeting (referring to Panel Report, *EC – IT Products*, paras. 7.1043 and 7.1048).

[736] Argentina's response to Panel question No. 29 following the first substantive meeting.

[737] Argentina's second written submission, paras. 115, 187. See also Argentina's response to Panel question No. 24 following the first substantive meeting; Argentina's responses to Panel questions Nos. 18, 24, and 25 following the second substantive meeting.

[738] Argentina's second written submission, para. 116.

[739] Argentina's response to Panel question No. 24 following the second substantive meeting.

[740] Argentina's response to Panel question No. 24 following the second substantive meeting. See also Argentina's second written submission, para. 117. Argentina acknowledges that the terms "scientific evidence" in Article 5.7 are "broad enough to encompass evidence associated with products originating in a specific country". (Argentina's response to Panel question No. 21 following the first substantive meeting)

frozen) beef from Northern Argentina and of FMD-susceptible animals and animal products from Patagonia, were based on a risk assessment. In its view, if such regulations were really based on a risk assessment "then it necessarily follows that there was sufficient information to conduct such an assessment", this excluding the applicability of Article 5.7.[741]

7.269. Third, Argentina argues that even assuming that relevant scientific information was insufficient in 2001, such insufficiency had ceased by the time of the establishment of the Panel in January 2013.[742] In its view, SENASA has provided APHIS with all the scientific information necessary for the United States to complete its risk assessments. This, Argentina contends, is evidenced by the fact that APHIS has not requested any additional information of SENASA concerning the FMD situation in Northern Argentina since 2006[743], nor has it asked for any additional information concerning Patagonia since 2009.[744] In light of the above, Argentina maintains that the United States failed to seek additional scientific information within a reasonable period of time.[745] Moreover, according to Argentina, the United States' argument about the application of the exporting Member under Article 6.3 transforming the pre-existing measure into one covered by Article 5.7 improperly places the burden of providing additional information onto the exporting Member instead of placing the burden of seeking additional information and to review an SPS measure on the importing Member.[746]

7.270. Fourth, Argentina argues that the United States failed to review its measures within a reasonable period of time. Specifically, Argentina argues, in 2009-2010 APHIS confirmed that it had all the information required to proceed with the risk assessments for Argentine fresh beef and Patagonian FMD-susceptible products.[747] In its view, throughout these proceedings, the United States failed to identify any pieces of information that APHIS was still missing after 2006 (concerning Northern Argentina) and 2009 (concerning Patagonia) in order to complete its risk assessments.[748] Argentina contends that the interpretation of "undue delay" under Article 8 and Annex C(1) of the SPS Agreement "should inform" the analysis of the reasonableness of the time taken by the importing Member to review a measure under Article 5.7.[749] Argentina asserts that the United States maintained its measures for thirteen years without conducting a risk assessment, which cannot "be considered consistent with the requirement that it be done within a reasonable period of time".[750] In support of its argument, Argentina compares the period during which its requests have been under review since its last FMD outbreak with that of Uruguay, which re-gained access to the United States' market less than two years after its last outbreak.[751] Furthermore, Argentina cites APHIS' statement in the rulemaking for Uruguay that a three to five year waiting period is not necessary for reauthorizing imports after an FMD outbreak.[752] Finally, Argentina refers to the Appellate Body's statement in *Japan – Agricultural Products II* that a period of less than three years was reasonable under Article 5.7.[753]

7.271. Furthermore, Argentina does not agree with the United States' argument that when circumstances warrant a new risk assessment the measure must fall within the scope of Article 5.7 to prevent the importing Member from being considered inconsistent with Article 5.1. In Argentina's view, the requirement under Article 5.1 that an SPS measure be based on a risk assessment "as appropriate to the circumstances" encompasses the time flexibility needed for the

[741] Argentina's second written submission, para. 186.
[742] Argentina's response to Panel question No. 25 following the second substantive meeting.
[743] Argentina's second written submission, para. 197.
[744] Argentina's second written submission, paras. 195-196.
[745] Argentina's second written submission, para. 195.
[746] Argentina's second written submission, para. 194. See also Ibid. para. 190; Argentina's response to Panel question No. 25 following the second substantive meeting.
[747] Argentina's response to Panel question No. 48 following the first substantive meeting; Argentina's second written submission, paras. 196-197.
[748] Argentina's responses to Panel questions Nos. 22 and 48 following the first substantive meeting; Argentina's second written submission, paras. 196-197.
[749] Argentina's response to Panel question No. 24 following the first substantive meeting.
[750] Argentina's response to Panel question No. 24 following the first substantive meeting.
[751] Argentina's first written submission, paras. 282-287.
[752] Argentina's first written submission, paras. 282-287.
[753] Argentina's response to Panel question No. 24 following the first substantive meeting.

importing Member to carry out such a risk assessment.[754] Moreover, Argentina argues that the implication of the United States' interpretation would be that so long as the importing Member is conducting its review, the exporting Member "would be prohibited from access to the dispute settlement system"[755] and thus "a provisional measure would always be maintained indefinitely".

7.5.2.1.2 United States

7.272. The United States argues that Article 5.7 is the relevant provision of the SPS Agreement applicable to the timeliness of APHIS' reviews of Argentina's requests, which, in its view, constitutes the core issue of this dispute.[756] According to the United States, the disciplines of Article 5.7 are informed and complemented by the obligations under Article 6.3, according to which a Member asserting that all or part of its territory is free of a disease "is obligated to bring forth the necessary evidence to show that it is and is 'likely to remain' free of disease".[757] The United States contends that, upon receipt of a claim of disease freedom, the importing Member usually does not have all the scientific information it needs to review its existing measure[758], and is therefore "provisionally permitted to maintain and adopt measures" pursuant to Article 5.7[759], provided it seeks to obtain from the exporting Member the additional information necessary for a more objective risk assessment within a reasonable period of time.[760] In turn, the United States argues, a determination of the "reasonableness" of the period of time under Article 5.7 is similar to a determination of whether a delay is undue under Article 8 and Annex C(1)(a).

7.273. The United States takes the view that as long as the importing Member is engaged in the process of evaluating the exporting Member's application for recognition of its territory as a disease-free area within a reasonable period of time, "there is no legal basis for challenging the importing Member's decision to maintain its existing measure".[761] Moreover, it asserts that with "each change in circumstance" in the exporting Member in terms of its disease situation and regulatory regime, time is required for the importing Member to evaluate such change.[762] For the United States, any interpretation to the contrary would imply that "importing Members must modify their measures immediately upon an exporting Member's assertion" concerning its disease freedom or low disease prevalence[763], thereby bearing "the risk of disease transmission pending the completion of the risk assessment".[764] In this respect, the United States disagrees with Argentina that Article 5.1 provides for reasonable time flexibility for an importing Member to conduct its risk assessment. In its opinion, such "undefined 'reasonable man' standard" has "no apparent basis in the text of the SPS Agreement"[765]; rather, the time for the importing Member to conduct its assessment resides in Article 5.7.[766]

7.274. With respect to the particular measures at issue in this dispute, the United States argues that the 2001 Regulations, which amended 9 CFR 94.1(b) and removed Argentina's authorization to import, were justified at the time of imposition and are currently justified under Article 5.7 "while the United States' review of Argentina's requests for recognition as disease-free is

[754] Argentina's response to Panel question No. 24 following the second substantive meeting (citing Appellate Body Report, *EC – Hormones*, para. 129; Panel Reports, *Australia – Salmon*, para. 8.56; *EC – Approval and Marketing of Biotech Products*, para. 7.3031).
[755] Argentina's second written submission, para. 70.
[756] United States' first written submission, para. 228.
[757] United States' response to Panel question No. 22 following the first substantive meeting. See also United States' opening statement at the first meeting of the Panel, paras. 24-25; United States' second written submission, para. 10.
[758] United States' second written submission, para. 10. See also United States' response to Panel question No. 24 following the first substantive meeting.
[759] United States' second written submission, para. 13.
[760] United States' second written submission, para. 11.
[761] United States' opening statement at the first meeting of the Panel, para. 48. See also United States' response to Panel question No. 27 following the first substantive meeting.
[762] United States' response to Panel question No. 26 following the first substantive meeting.
[763] United States' second written submission, paras. 13, 31. See also United States' opening statement at the second meeting of the Panel, para. 30; United States' response to Panel question No. 21 following the first substantive meeting.
[764] United States' second written submission, paras. 14. See also Ibid. paras. 2, 13; United States' opening statement at the first meeting of the Panel, para. 25.
[765] United States' response to Panel question No. 20 following the second substantive meeting.
[766] United States' response to Panel question No. 20 following the second substantive meeting.

ongoing."[767] According to the United States, from the moment Argentina filed its applications for approval of imports of FMD-susceptible products, the pre-existing prohibition on such products "can be viewed as provisional until additional necessary information is gathered to accept or reject the application[s]", thereby falling within the purview of Article 5.7 of the SPS Agreement.[768] In that vein, the United States takes issue with Argentina's interpretation of the word "adopt" in Article 5.7 as requiring some explicit approval process, which it sees as unduly "formalistic".[769] It also disagrees with Argentina's qualification of the June 2001 Interim Regulation as a "provisional measure" and the December 2001 Final Regulation as a "permanent ban" on imports of fresh (chilled or frozen) beef from Argentina.[770] For the United States, Argentina's distinction is "misleading"[771], because the qualification of the December 2001 Regulation as "final" is only relevant to United States' domestic law and does not imply that the United States is permanently prohibiting Argentina from regaining its import authorization.[772]

7.275. The United States argues that the requirement that there be "insufficient scientific evidence to conduct a risk assessment" in Article 5.7 is satisfied, because the scientific evidence required to accept or reject Argentina's requests evolved over time[773] and had to be evaluated by APHIS.[774] In particular, the United States argues that at the time of the filing of Argentina's requests there was uncertainty as to the FMD situation in the country and SENASA's "ability to impose and maintain internal controls so as to prevent FMD incidents".[775] At that time, the United States contends, APHIS "took action to choose to receive and review" Argentina's applications within a reasonable period of time[776], and "is seeking to obtain the additional information necessary".[777] The United States considers that the time-length of APHIS' approval processes is due to the fact that it is "so thorough and deliberate".[778] Moreover, it takes the view that the delay in the approval process is reasonable given the delays in SENASA's responses to APHIS' requests for additional information, the FMD outbreaks that occurred in Northern Argentina in 2003 and 2006, and Argentina's intentional concealment of the full extent of the 2000-2002 outbreaks.[779]

7.276. The United States also contends that the application of the review procedures under 9 CFR 92.2 for Patagonia is also justified because, prior to the filing of Argentina's request, that region was treated as part of the Argentine territory as a whole. The United States maintains that it is undertaking the review and seeking additional information (such as the site visit in November 2013) to finish its review within a reasonable period of time given the delays in granting access to that information from Argentina.[780]

7.5.2.2 Main arguments of the third parties

7.5.2.2.1 Brazil

7.277. In Brazil's opinion, the United States' prohibition on Argentine imports was not a measure based on Article 5.1 as "there was no risk assessment on which these SPS measures were based on".[781] Brazil maintains that while Article 5.7 establishes an exception to the rule in Article 5.1, international standards or recommendations regarding the same situation, together with available and completed risk assessments, may provide levels of scientific information sufficient to exclude

[767] United States' first written submission, para. 233.
[768] United States' opening statement at the first meeting of the Panel, para. 30. See also United States' response to Panel question No. 18 following the second substantive meeting.
[769] United States' opening statement at the second meeting of the Panel, para. 39.
[770] United States' first written submission, para. 254 (referring to Argentina's first written submission, paras. 250-252).
[771] United States' first written submission, para. 254.
[772] United States' first written submission, para. 255.
[773] United States' opening statement at the second meeting of the Panel, para. 30.
[774] United States' first written submission, para. 235.
[775] United States' second written submission, para. 26.
[776] United States' second written submission, para. 32.
[777] United States' first written submission, para. 237. See also United States' second written submission, heading 4.a; United States' opening statement at the second meeting of the Panel, paras. 41-42.
[778] United States' opening statement at the second meeting of the Panel, para. 48.
[779] United States' first written submission, paras. 238-240.
[780] United States' first written submission, paras. 242-244.
[781] Brazil's response to Panel question No. 6.

the applicability of Article 5.7.[782] Brazil further notes that case law concerning the allocation of the burden of proof under Article 5.7 is "divergent", depending on whether the provision in question is interpreted as a "qualified exemption" or as an "autonomous right" vis-à-vis Articles 2.2 and 5.1.[783]

7.278. Finally, according to Brazil, the main provisions regulating the time required for an importing Member to complete its review of an exporting Member's applications for import are Article 8 in conjunction with Annex C(1) of the SPS Agreement. Read together, such provisions aim, in Brazil's view, "to prevent Members from using lengthy and unjustified SPS procedures as a trade barrier to other Members' imports".[784]

7.5.2.2.2 China

7.279. China argues that Article 5.7 requires that there be insufficient scientific evidence to conduct a risk assessment at the time of imposition of a measure. According to China, such information could not be sufficient at one point and insufficient at a later point. China contends that it is illogical to argue that a permanent measure becomes provisional because insufficient scientific evidence arose from the process of assessment under the exception rules.[785]

7.280. China submits that Articles 5.1 and 5.7 are "applied in a mutually exclusive manner, depending on whether the relevant scientific evidence is sufficient or not".[786] China states that an overly broad application of Article 5.7 would render it meaningless.[787] According to China, whether "relevant scientific evidence" is "insufficient" to conduct a risk assessment should be determined on a case-by-case basis.[788] China acknowledges that while the existence of international standards and/or other risk assessments may point to the "sufficiency" of relevant scientific evidence, it is not conclusive of the question whether a Member has enough information to conduct a risk assessment.[789] For China, where a proposed SPS measure targets imports from a specific country or region, the underlying risk assessment must address both the risk present in the disease itself and the potential risk that may be carried by the product originating from said country or region.[790]

7.281. China sees the United States' arguments as contradictory in that scientific information that was "sufficient" to conduct a risk assessment could not become "insufficient" when Argentina applied for re-authorization to export.[791] For China, when a measure is provisionally adopted pursuant to Article 5.7 the scientific information must be in some aspects insufficient.[792] China further notes that although there is no official definition of a "provisional measure" in the SPS Agreement, it should be interpreted to mean a temporary measure[793] based on available, relevant information.[794] China views the United States' argument that it had sufficient scientific evidence and made the appropriate risk assessment before adopting the import prohibition as suggesting that the United States' measures were not adopted temporarily.[795] Thus, China suggests that the Panel evaluate the post-adoption actions of the United States to determine whether the United States' measures are provisional or not.[796]

[782] Brazil's response to Panel question No. 8.
[783] Brazil's response to Panel question No. 9.
[784] Brazil's response to Panel question No. 7.
[785] China's third-party submission, para. 31.
[786] China's response to Panel question No. 10.
[787] China's third-party statement, para. 2.
[788] China's response to Panel question No. 4.
[789] China's response to Panel question No. 8.
[790] China's response to Panel question No. 5.
[791] China's third-party statement, para. 5.
[792] China's third-party statement, para. 6. See also China's response to Panel question No. 10.
[793] China's response to Panel question No. 6.
[794] China's response to Panel question No. 8.
[795] China's third-party statement, para. 6. See also China's response to Panel question No. 6.
[796] China's response to Panel question No. 10a.

7.5.2.3 European Union

7.282. The European Union urges the Panel to search for a harmonious interpretation of the various provisions within the SPS Agreement in general and Article 5 in particular. The European Union points out that the provisions inform each other.[797]

7.283. The European Union urges the Panel not to focus on distinctions between "definitive" and "provisional" measures, but rather to seek to answer the question of whether the information adduced supports the position of the importing or exporting Member.[798] The European Union also argues that in dispute settlement, panels should take a "reasonably flexible approach to burden of proof and related issues" in this context as well as consider "early use of Article 13 of the DSU."[799]

7.284. With respect to the present dispute, the European Union notes that the situation is different from other disputes – namely *EC – Hormones, EC – Approval and Marketing of Biotech Products* – where there was controversy about the science. Instead, the European Union notes that the dispute is rather about whether the particular facts in Argentina support or do not support the maintenance of the measure. The European Union does not suggest that Article 5.7 could not be invoked in this type of case, but does argue that this distinction could affect the analysis of whether the measure has been reviewed in a reasonable period of time. In particular, the European Union notes that one might expect the situation of incomplete information to be rectified sooner rather than later when the issue does not relate to the science being insufficient.[800]

7.285. The European Union submits that this dispute should not be decided based on the applicability of Article 5.1 or Article 5.7, but rather on whether there is undue delay on the part of the United States and whether the maintenance of the measure against Argentina is justified or not.[801] The European Union recognizes that there should be no undue delay on the part of the importing Member and that a reasonable period of time in conducting an assessment must be decided on an *ad-hoc* basis.[802] However, it considers that a provisional measure in terms of Article 5.7 could last for many years or even indefinitely.[803]

7.286. According to the European Union, it would be erroneous to consider Article 5.7 as applying only when a risk assessment does not exist; rather, a risk assessment under Article 5.7 may be less objective than a risk assessment conducted under Article 5.1 owing to insufficient evidence.[804] For the European Union, the real difference between an Article 5.1 situation and an Article 5.7 situation turns on the amount of scientific information available to conduct a risk assessment[805], meaning that Article 5.7 measures may be adopted on the basis of a hypothesis based on insufficient, but still relevant, scientific evidence.[806] For the European Union, a measure initially adopted under Article 5.1 can be withdrawn and immediately replaced with a measure under Article 5.7 if the initial scientific information about the underlying situation changes.[807] According to the European Union, the existence of information from the relevant scientific organisations does not in and of itself exclude the possibility to adopt an Article 5.7 measure, because such information may be insufficient for the purposes of adopting measures that achieve a higher ALOP.[808]

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[797] European Union's third-party submission, paras. 60-62.
[798] European Union's third-party submission, para. 61.
[799] European Union's third-party submission, paras. 64-65. Article 13 of the DSU refers to the panel's right to seek information from experts and others.
[800] European Union's third-party submission, paras. 65-66.
[801] European Union's response to Panel question No. 6.
[802] European Union's response to Panel question No. 7. See also European Union's response to Panel question No. 10.
[803] European Union's response to Panel question No. 7. See also European Union's response to Panel question No. 10.
[804] European Union's response to Panel question No. 4.
[805] European Union's response to Panel question No. 4.
[806] European Union's response to Panel question No. 4. See also European Union's response to Panel question No. 5.
[807] European Union's response to Panel question No. 10.
[808] European Union's response to Panel question No. 8.

7.5.2.4 Analysis by the Panel

7.287. The Appellate Body has explained that Article 5.7 operates as a "qualified exemption" from the obligation under Article 2.2 "not to maintain SPS measures without sufficient scientific evidence".[809] In turn, Article 5.1 is "a specific application of the basic obligations contained in Article 2.2".[810] Thus, if a measure meets all the requirements of Article 5.7, Articles 2.2 and 5.1 do not apply. The requirements in question have been described by the Appellate Body as follows:

> Article 5.7 of the SPS Agreement sets out four requirements which must be met in order to adopt and maintain a provisional SPS measure. Pursuant to the first sentence of Article 5.7, a Member may provisionally adopt an SPS measure if this measure is:
>
> (1) imposed in respect of a situation where "relevant scientific information is insufficient"; and
>
> (2) adopted "on the basis of available pertinent information".
>
> Pursuant to the second sentence of Article 5.7, such a provisional measure may not be maintained unless the Member which adopted the measure:
>
> (1) "seek[s] to obtain the additional information necessary for a more objective assessment of risk"; and
>
> (2) "review[s] the … measure accordingly within a reasonable period of time".
>
> These four requirements are clearly cumulative in nature and are equally important for the purpose of determining consistency with this provision. Whenever one of these four requirements is not met, the measure at issue is inconsistent with Article 5.7.[811]

7.288. The Appellate Body has explained that the first two requirements relate to the *adoption* of the measure while the latter two requirements "relate to the *maintenance* of a provisional SPS measure and highlight the *provisional* nature of measures adopted pursuant to Article 5.7."[812]

7.289. In this respect, we note that although the parties have addressed all four requirements in their arguments, Argentina's concerns relate fundamentally to the continued application, or maintenance, of the measure at issue. Therefore, the Panel finds it appropriate to begin by examining the two requirements to seek to obtain additional information necessary for a more objective assessment of risk and to review the measure accordingly within a reasonable period of time.

7.290. As these requirements are cumulative, if we find that the United States has failed to comply with either of the latter two requirements it would be precluded from relying on Article 5.7 to exclude the applicability of other provisions of the SPS Agreement.[813] Therefore, we will only turn to the requirements related to the initial adoption of the measure if necessary. Our approach is consistent with the Appellate Body's finding in *Japan – Agricultural Products II* that it was proper for the panel to begin its evaluation with whether the importing Member had complied with the requirements in the second sentence and, once it had concluded that the Member had not complied therewith, to decline to examine the other requirements.[814]

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[809] Appellate Body Report, *Japan – Agricultural Products II*, para. 80. We note that the panel in *EC – Approval and Marketing of Biotech Products* referred to it as a "qualified right". Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.2939, 7.2945, and 7.2969 (finding that Article 5.7 is a "right" to maintain a measure otherwise inconsistent with Article 2.2) and paras. 7.2996-7.2998 (finding that Article 5.7 is a right to maintain a measure otherwise inconsistent with Article 5.1), and para. 7.3004.

[810] Appellate Body Report, *EC – Hormones*, para. 180.

[811] Appellate Body Report, *Japan-Agricultural Products II*, para. 89; see also Appellate Body Report *Japan – Apples*, para. 179.

[812] Appellate Body Report, *Japan – Apples*, fn 318 to para. 176 (emphasis original).

[813] Appellate Body Report, *Japan – Agricultural Products II*, para. 91.

[814] Appellate Body Report, *Japan – Agricultural Products II*, para. 91.

7.291. Before moving forward with our analysis, we must first address which party bears the burden of proof.

7.292. The panel in *EC – Approval and Marketing of Biotech Products,* operating under the premise that Article 5.7 is a "qualified right", concluded that because Article 5.1 is only applicable if Article 5.7 is not, "when a complaining party presents a claim of violation under Article 5.1, the burden is on the complaining party to establish a prima facie case of inconsistency with both Articles 5.1 and 5.7."[815] We observe, however, that nothing in the case law on Article 5.7 or other provisions which establish exemptions or provide the ability to derogate from certain WTO obligations supersedes the basic premise that the party asserting something bears the burden of proving it.[816]

7.293. In light of the above, the Panel finds that the initial burden was on Argentina as part of its case under Article 5.1 to raise the inapplicability of Article 5.7 – which it did in its first written submission. As the United States has chosen to assert that its measures fall within the scope of Article 5.7, it carries the burden to prove that each of the four cumulative requirements have been satisfied.[817]

7.5.2.4.1 "Members shall seek to obtain the additional information necessary for a more objective assessment of risk"

7.294. Article 5.7 places the burden of seeking to obtain the additional scientific information necessary to perform a more objective risk assessment on the importing Member.[818]

7.295. Although Article 5.7 does not impose explicit prerequisites regarding the additional information to be collected or a specific collection procedure[819], the Appellate Body has concluded that:

> the WTO Member adopting a provisional SPS measure should be able to identify the insufficiencies in the relevant scientific evidence, and the steps that it intends to take to obtain the additional information that will be necessary to address these deficiencies in order to make a more objective assessment and review the provisional measure within a reasonable period of time. The additional information to be collected must be "germane" to conducting the assessment of the specific risk.[820]

7.296. As the Appellate Body stated in *US/Canada – Continued Suspension*, a Member maintaining a provisional measure under Article 5.7 has a duty to actively "make best efforts to remedy the insufficiencies in the relevant scientific evidence" with "additional scientific research" or "by gathering information from relevant international organizations or other sources".[821] However, the Member "is not expected to guarantee specific results", nor "to predict the actual results of its efforts to collect additional information at the time when it adopts the

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[815] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3000. We note that the panel in *EC – Approval and Marketing of Biotech Products* based its reasoning on the Appellate Body decision in *EC – Tariff Preferences* on similar language in the Enabling Clause, which was issued later in time than the Appellate Body decision that discussed Article 5.7 of the SPS Agreement. The Appellate Body in *EC – Tariff Preferences* stated that where the permissive provision constitutes a right rather than an exception, "the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour". Appellate Body Report, *EC – Tariff Preferences*, para. 88.

[816] See e.g. Appellate Body Report, *Japan – Apples*, para. 157 ("the party that asserts a fact is responsible for providing proof thereof."). Our view is confirmed by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* (where the Appellate Body concluded that "the characterization of [a] provision as a derogation does not pre-determine the question as to which party bears the burden of proof with regard to the requirements stipulated in the provision.") (Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.56 (referring to Appellate Body Report, *China – Raw Materials*, para. 334))

[817] We note that the United States argued that it bore the burden of proof to demonstrate the applicability of Article 5.7. See United States' response to Panel question No. 22 following the first substantive meeting.

[818] See e.g. Appellate Body Repot, *US/Canada – Continued Suspension*, para. 679.

[819] Appellate Body Report, *Japan* – Agricultural *Products II*, para. 92.

[820] Appellate Body Report, *US/Canada – Continued Suspension*, para. 679 (original footnote omitted).

[821] Appellate Body Repot, *US/Canada – Continued Suspension*, para. 679.

SPS measure".[822] Thus, the duty to seek additional information in order to review a provisional SPS measure constitutes an "obligation of means".

7.297. The United States seems to argue that the obligation in Article 6.3 on the exporting Member to "objectively demonstrate" its disease freedom would somehow trump the obligation in Article 5.7 to seek to obtain the additional information. Although the risk assessment process entails a dynamic exchange between the two Members, in accordance with the general principles of good faith[823] and mutual cooperation[824], we do not believe that an application from the exporting Member can absolve the importing Member of the obligation to be "able to *identify the insufficiencies* in the relevant scientific evidence"[825] and communicate them to the exporting Member. A plain reading of the provisions supports our view and the United States has not been able to persuade us of its approach.

7.298. Upon direct questioning from the Panel, the United States was unable to identify any specific deficiencies other than the need to update information that had become outdated due to the United States' own inaction.[826] We recall our finding in paragraph 7.127b above, that the United States made no efforts after its site visit in September 2006 to seek information from SENASA on the situation in Northern Argentina until after this Panel was established. We also recall our finding in paragraph 7.160 above that with respect to Patagonia (including both Patagonia South and Patagonia North B) the United States made no efforts to seek information after its site visit in February 2009 until after the establishment of this Panel.

7.299. In light of the above, we find that the United States has not sought to obtain the additional information necessary for a more objective assessment of the risk as required by Article 5.7.

7.5.2.4.2 "... review the measure accordingly within a reasonable period of time"

7.300. In *Japan – Agricultural Products II*, the Appellate Body stated that what constitutes a "reasonable period of time" within the meaning of Article 5.7 depends, *inter alia*, on the difficulty of obtaining the information necessary for a more objective assessment of risk.[827]

7.301. The panel in *EC – Approval and Marketing of Biotech Products* interpreted the terms "reasonable period of time" in Article 5.7 in a manner similar to the terms "undue delay" in Annex C(1)(a).[828] We recall that this concept is not dependent on the length of the delay, but rather whether any delay was legitimate and justifiable[829] as opposed to unwarranted or excessive.[830] Additionally, in the context of Article 21.3(c) arbitrations – which determine the reasonable period of time for Members to implement the rulings and recommendations of the DSB – arbitrators have interpreted the term "reasonable period of time" to mean "the shortest period possible within the legal system of the [implementing] Member".[831] While not directly applicable in these circumstances, it does suggest an understanding that when WTO Members must take legislative or regulatory actions involving complex legal processes to bring their measures into conformity with their WTO obligations reasonableness can be understood to mean as quickly as legally possible while accepting legitimate reasons for delay.

7.302. Furthermore, the panel in *EC – Approval and Marketing of Biotech Products* explained that the review of the measure cannot be delayed simply because an assessment incorporating new information would not allow the importing Member to determine "with a sufficient degree of

[822] Appellate Body Repot, *US/Canada – Continued Suspension*, para. 679.
[823] See e.g., albeit in a different context, Panel Report, *US/Canada – Continued Suspension*, para. 7.357.
[824] Appellate Body Report, *US/Canada – Continued Suspension*, para. 310. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 96.
[825] Appellate Body Report, *US/Canada – Continued Suspension*, para. 679 (emphasis added).
[826] See generally United States' response to Panel question No. 26.
[827] Appellate Body Report, *Japan – Agricultural Products II*, para. 93.
[828] Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.1495-7.1497 (concerning Annex C(1)(a)) and 7.3245 (concerning Article 5.7).
[829] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1496.
[830] Appellate Body Report, *Australia – Apples*, para. 437.
[831] Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 26.

precision" whether a measure different, and presumably less trade-restrictive, than its provisional measure would achieve its appropriate level of protection.[832]

7.303. With respect to whether the United States reviewed the measures within a reasonable period of time, we recall that the United States argues that the measure was "adopted" for purposes of Article 5.7 when Argentina initially filed its request for authorization to import fresh (chilled or frozen) beef from Northern Argentina in 2002.[833] Accepting, for the sake of argument, that 2002 is the relevant date for the purpose of determining whether the United States reviewed the measure within a reasonable period of time, we recall our findings in paragraphs 7.131-7.145 above, that APHIS incurred undue delays in its review of Argentina's application for Northern Argentina from September 2006 until the time the Panel was established (28 January 2013). We further recall that Argentina filed its request for recognition of Patagonia South as FMD-free in 2003[834], and extended it to include Patagonia North B in 2008.[835] In paragraphs 7.162-7.172 above, we found that APHIS incurred undue delays in reviewing its measure as applied to Patagonia from June 2005 to January 2007, from March 2007 to October 2008, and from February 2009 until the establishment of the Panel. We see no reason not to apply our reasoning and findings outlined above to our assessment here. Therefore, we find that the United States has not reviewed its measures within a reasonable period of time as required under Article 5.7.

7.5.2.5 Conclusion

7.304. We have found that the United States did not seek to obtain additional information nor did it review the measure within a reasonable period of time. Having found that the United States did not satisfy either the third or the fourth requirement, there is no need to consider whether the measures were provisionally adopted based on available pertinent information in a case where relevant scientific evidence is insufficient.[836] On the basis of our findings with respect to the third and fourth requirements, the measures do not fall within the scope of Article 5.7 and the qualified exemption to the obligations in Articles 5.1, 5.2 and 2.2 is not available to the United States. Thus, we now turn to assess the conformity of the United States' measures with Articles 5.1, 5.2 and 2.2 of the SPS Agreement.

7.5.3 Whether the United States' measures are based on a risk assessment

7.5.3.1 Main arguments of the parties

7.5.3.1.1 Argentina

7.305. Argentina claims that the United States' measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement because they are not based on a valid risk assessment.[837]

7.306. Argentina argues that the 2001 Regulations, withdrawing authorization of imports of fresh (chilled or frozen) beef from Northern Argentina and FMD-susceptible animals and animal products from Patagonia, do not contain a "risk assessment" within the meaning of Article 5.1, but rather "nothing more than a recitation of facts, as well as a statement of the potential negative economic impact of an FMD outbreak in the United States."[838] According to Argentina, this means that the prohibition as applied to Argentina is therefore inconsistent with Article 5.2, which requires a

[832] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3245.

[833] Information Provided by SENASA (November 2002), (Exhibit USA-32). The Panel takes no position on whether this constitutes "adoption" of a measure within the meaning of Article 5.7 of the SPS Agreement. We simply use this point as a point of reference for our analysis under this requirement.

[834] Information Provided by SENASA (July 2003), (Exhibit USA-98).

[835] SENASA's letter of 17 December 2008, (Exhibit ARG-59/USA-111); SENASA's letter of 30 January 2009, (Exhibit ARG-60/USA-112).

[836] We note that the parties have provided argumentation on these issues that raises important interpretative questions about when Article 5.7 is applicable and the scope of the qualified exemption in Article 5.7 – in particular in respect of the relationship between Article 5.7 and Article 6. However, given the circumstances of the present dispute these questions are better left for another day and another case.

[837] Argentina's first written submission, paras. 231 and 255.

[838] Argentina's first written submission, para. 251; Argentina's response to Panel question No. 24 following the second substantive meeting.

Member to take into account *inter alia* scientific evidence in the assessment of risk.[839] Moreover, Argentina contends that even if the interim rule adopted in June 2001 was a valid provisional measure, the final regulation adopted in December 2001 has been maintained for over 11 years.[840] For Argentina, "reliance on facts from more than eleven years ago does not suffice either as a provisional measure or as a valid risk assessment".[841]

7.307. Argentina notes that the panel in *US – Poultry (China)* reasoned that an analysis under Article 5.1 necessarily begins with a determination whether a risk assessment was conducted at all.[842] Argentina argues that the United States cannot demonstrate that its measures are "rationally related to a risk assessment" because one does not exist.[843]

7.308. Regarding the United States' prohibition on imports of fresh (chilled or frozen) beef originating in the Argentine territory as a whole, Argentina states that "there is no current valid risk assessment" underlying the measure in question.[844] According to Argentina, the only publicly available risk assessments regarding Argentina as a whole – from 1997 and 2000, respectively – and for Patagonia South specifically – from 2005 – were all favourable to imports of Argentine fresh (chilled or frozen) beef subject to certain mitigating protocols.[845]

7.309. Argentina argues that the sanitary conditions in Argentina have improved radically since imposition of the prohibition in 2001 and thus even if the measure was based on a risk assessment at the time or justified as an emergency measure, it no longer can be considered "appropriate to the circumstances" because it bears no rational or objective relationship to Argentina's current sanitary conditions. [846]

7.310. With regard to the United States' prohibition on imports of FMD-susceptible animals and animal products from Patagonia, Argentina argues that, to the extent that APHIS consulted scientific evidence, "such evidence supported the opposite conclusion from the prohibitive measure" actually applied.[847] In Argentina's opinion, the United States' measures as applied to Patagonia South are "obvious[ly]" rationally disconnected from the favourable risk assessment conducted in the region, and are therefore inconsistent with Article 5.1.[848] With respect to Patagonia North B, Argentina notes that "[t]here has never been a risk assessment publicly available" on Patagonia North B even though Argentina provided to APHIS the relevant scientific information in December 2008, prior to an APHIS fact-finding trip to the region in early 2009.[849] Therefore, Argentina concludes, the United States' measures as applied to imports from Patagonia North B are "not rationally and objectively related" to a risk assessment that "does not legally exist", and hence are inconsistent with Article 5.1.[850] Argentina maintains that the "rational disconnect" between the underlying scientific evidence and the prohibition imposed indicates that the United States' measures as applied to Patagonia are also inconsistent with Article 5.2.[851]

7.5.3.1.2 United States

7.311. The United States argues that the 2001 Regulations – through which it withdrew authorization of imports of fresh (chilled or frozen) beef from Argentina – were based on a risk

[839] Argentina's first written submission, paras. 253-256.
[840] Argentina's first written submission, para. 251.
[841] Argentina's first written submission, para. 251.
[842] Argentina's first written submission, para. 243 (referring to Panel Report, *US – Poultry (China)*, para. 7.174).
[843] Argentina's first written submission, para. 241.
[844] Argentina's first written submission, para. 234.
[845] Argentina's first written submission, paras. 237-239.
[846] Argentina's first written submission, paras. 244-246. To support its contention that Argentina's sanitary condition has "improved radically" since 2001, Argentina refers to the OIE designations of both Argentina and Patagonia, the time that has passed since the most recent outbreaks, and the limitation and quick containment and elimination of the last outbreak.
[847] Argentina's first written submission, para. 462.
[848] Argentina's first written submission, para. 454.
[849] Argentina's first written submission, para. 456.
[850] Argentina's first written submission, para. 457.
[851] Argentina's first written submission, para. 463.

assessment as appropriate to the circumstances.[852] According to the United States, the risk assessment in question was grounded on the "well-established body of scientific evidence" showing that FMD "is one of the most highly contagious and devastating animal disease[s]"[853], as well as an evaluation of the dangers posed by Argentine products in light of the 2000-2001 FMD outbreaks in the country.[854] In this regard, the United States observes that, at the time of the outbreaks, Argentina itself recognized the gravity of the situation by voluntarily ceasing exports and the OIE removed Argentina from its list of FMD-free regions.[855]

7.312. According to the United States, after APHIS withdrew import authorization from Argentina in 2001, "there was no reason to believe that it needed to actively revisit that decision"[856] until Argentina filed its requests pursuant to the procedures set forth in 9 CFR 92.2. Since the filing of Argentina's requests, the United States argues that its prohibitions can be viewed as provisional measures falling within the scope of Article 5.7.[857] Indeed, the thrust of the United States' argument with respect to the maintenance of the measures at issue is that since such measures are justified under Article 5.7, they are also consistent with Articles 5.1 and 5.2.[858]

7.313. According to the United States, APHIS is in the process of conducting a risk assessment that will take a substantial amount of time and that has been complicated by further FMD outbreaks in Argentina, delays in Argentina responding to requests for information, the changing nature of Argentina's application with respect to Patagonia[859], and Argentina's changing OIE status in the intervening years.[860] In sum, the United States concludes, the perceived length of the rulemaking process is due to the fact that APHIS has been working "with a moving target on the Argentina side".[861]

7.5.3.2 Main arguments of the third parties

7.5.3.2.1 Brazil

7.314. In Brazil's opinion, the United States' prohibition on Argentine imports was not a measure consistent with Article 5.1 as "there was no risk assessment on which these SPS measures were based on".[862] Brazil maintains that while Article 5.7 establishes an exception to the rule in Article 5.1, international standards or recommendations regarding the same situation, together with available and completed risk assessments, may provide levels of scientific information sufficient to exclude the applicability of Article 5.7.[863]

7.5.3.2.2 China

7.315. China submits that Articles 5.1 and 5.7 are "applied in a mutually exclusive manner, depending on whether the relevant scientific evidence is sufficient or not".[864]

7.316. China points to the panel report in *US – Poultry (China), which* set forth a two-step analytical process under Article 5.1 of the SPS Agreement. The report stated that a panel must assess whether: (a) a risk assessment, appropriate to the circumstances, takes into account risk

[852] United States' first written submission, para. 253; United States' response to Panel question No. 24 following the first substantive meeting.
[853] United States' first written submission, para. 253. See also United States' response to Panel question No. 24 following the first substantive meeting.
[854] United States' first written submission, paras. 247, 262. See also United States' response to Panel question No. 24 following the first substantive meeting.
[855] United States' first written submission, para. 251.
[856] United States' response to Panel question No. 24 following the first substantive meeting.
[857] United States' opening statement at the first meeting of the Panel, para. 30. See also United States' response to Panel question No. 18 following the second substantive meeting.
[858] United States' first written submission, para. 246. For a more comprehensive account of the United States' arguments in connection with Article 5.7, see paras. 7.272-7.276 above.
[859] United States' first written submission, para. 263.
[860] United States' first written submission, paras. 258-260.
[861] United States' first written submission, para. 264.
[862] Brazil's response to Panel question No. 6.
[863] Brazil's response to Panel question No. 8.
[864] China's response to Panel question No. 10.

assessment techniques developed by the relevant international organizations; and (b) whether the SPS measure at issue is based on that risk assessment.[865] Further, China argues, relying on the Appellate Body report in *Japan – Agricultural Products*, that if the Panel were to find that Argentina established a presumption that no scientific evidence or valid risk assessment exists at all, Argentina should prevail unless the United States rebuts such a presumption.[866]

7.5.3.2.3 European Union

7.317. The European Union contends that the general import prohibition on imports of animals and products thereof from FMD-infected regions is consistent with Article 5.1 of the SPS Agreement if, at the time of its adoption[867], it was supported by a risk assessment showing that: (i) FMD poses risks to human or animal health or life; and (ii) preventing the introduction of infected animals or products thereof is a proper response to the risks posed by FMD.[868] According to the European Union, the risk assessment need not include an analysis of which specific regions of the world are actually FMD-infected.[869]

7.318. For the European Union, the real difference between an Article 5.1 situation and an Article 5.7 situation turns on the amount of scientific information available to conduct a risk assessment[870], meaning that Article 5.7 measures may be adopted on the basis of a hypothesis based on insufficient, but still relevant, scientific evidence.[871] For the European Union, a measure initially adopted under Article 5.1 can be withdrawn and immediately replaced with a measure under Article 5.7 if the initial scientific information about the underlying situation changes.[872]

7.5.3.3 Analysis by the Panel

7.319. In this dispute, Argentina has argued two independent reasons why the United States' measures are inconsistent with Article 5.1. First, that the measures adopted in 2001 that removed Argentina's authorization to import were not based on a risk assessment at the time of their adoption. Second, Argentina argues that even if the measures were based on a risk assessment when they were adopted, they were not maintained based on a valid risk assessment as of the date of establishment of the Panel. The Panel will address each argument in turn.

7.320. Argentina has also argued that the United States has acted inconsistently with Article 5.2. The panel in *Japan – Apples* clarified that the requirements in Articles 5.1 and 5.2 inform the understanding of what is required for a risk assessment to be consistent with Article 5.1.[873] That panel explained that Articles 5.1 and 5.2 "directly inform each other, in that paragraph 2 sheds light on the elements that are of relevance in the assessment of risks foreseen in paragraph 1".[874] The same panel further explained that Article 5.2 "imparts meaning"[875] to the general obligation in Article 5.1 to base measures on an "assessment … of risks". We agree with that panel and the panel in *Australia – Apples* which explained that Article 5.2 should be considered when looking at Article 5.1.[876] Therefore, we will conduct our analysis of Argentina's claims under Article 5.2 within the context of our analysis of its claims under Article 5.1.

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[865] China's third-party submission, para. 34 (citing Panel Report, *US – Poultry (China)*, para. 7.173.

[866] China's third-party submission, paras. 35-36 (citing Appellate Body Report, *Japan – Agricultural Products II*, para. 137).

[867] European Union's third-party submission, para. 48.

[868] European Union's third-party submission, para. 46.

[869] European Union's third-party submission, para. 47.

[870] European Union's response to Panel question No. 4.

[871] European Union's response to Panel question No. 4. See also European Union's response to Panel question No. 5.

[872] European Union's response to Panel question No. 10.

[873] Panel Report, *Japan – Apples*, para. 8.230.

[874] Panel Report, *Japan – Apples*, para. 8.230. Similarly, the panel in *Australia – Applies* stated that "Article 5.2 is inextricably linked to Article 5.1" and that Article 5.2 should be "considered when looking at Article 5.1". (Panel Report, *Australia – Apples*, para. 7.211)

[875] Panel Report, *Japan – Apples*, para. 8.232.

[876] Panel Report, *Australia – Apples*, para. 7.211 (citing Panel Report in *Japan – Apples*, para. 8.230). See also Panel Report, *US – Poultry (China)*, para. 7.172

7.321. As we begin our analysis, we bear in mind that the Panel's role is not to conduct its own risk assessment based on scientific evidence gathered by the Panel or submitted by the parties during the Panel proceedings.[877] Similarly, the Panel will not impose its own scientific opinion on the United States.[878] Our task is not to substitute our own judgement for that of the United States or determine whether the science relied upon was actually "correct".[879] Instead, our task – pursuant to the clarification of the Appellate Body in *US/Canada – Continued Suspension* – is to determine the following: (i) whether there is a risk assessment; (ii) if that risk assessment is "appropriate to the circumstances"; (iii) whether the science supports the conclusions in the risk assessment; and finally (iv) whether the importing Member's measures are based on that risk assessment.[880]

7.322. Article 5.1 requires Members to base their measures on a risk assessment "appropriate to the circumstances". We understand that the first step of the analysis for determining whether the risk assessment is appropriate to the circumstances is to decide which of the two types of risk assessment set forth in Annex A(4) should be conducted. Annex A(4) provides for two distinct types of risk assessment: (i) the 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; and (ii) the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins, or disease-causing organisms in food, beverages or feedstuffs. While there is no explicit reference in Annex A(4) directing which types of measures fit within which of the two types of risk assessment, concluding which is appropriate can be deduced from the similarities in the texts of the subparagraphs of Annex A(1) and of Annex A(4). Moreover, in the past, panels examining measures taken pursuant to Annex A(1)(a) (such as the measures at issue in the present dispute) have stated that such measures must be based on the first type of risk assessment.[881] In *Australia – Salmon,* the Appellate Body observed that the "likelihood" type of risk assessment requires an analysis of the disease "according to the SPS measures which might be applied", and also requires an evaluation "of the associated potential biological and economic consequences" of the entry, establishment or spread of the pest or disease.[882]

7.323. Another element that should be considered when determining whether a risk assessment is "appropriate to the circumstances" is whether the requirement in Article 5.1 that Members "tak[e] into account risk assessment techniques developed by the relevant international organizations" has been adhered to.[883] Additionally, whether the elements set forth in Articles 5.2 and 5.3[884] were taken into account is also relevant to a determination of whether the risk assessment was "appropriate to the circumstances." The Panel is also mindful that the phrase "appropriate to the circumstances" provides some flexibility for Members in the conduct of their risk assessments

[877] Panel Reports, *EC – Hormones (Canada)*, para. 8.104; *EC – Hormones (US)*, para. 8.101.

[878] Panel Report, *Australia – Salmon*, para. 8.41. See also Panel Report, *Japan – Agricultural Products II*, para. 8.32.

[879] Appellate Body Report, *US/Canada – Continued Suspension*, para. 590.

[880] In conducting this analysis, the Appellate Body has explained that the role of the Panel is to determine (a) whether the views upon which an SPS measure is based are from qualified and respected sources; (b) whether the reasoning articulated on the basis of scientific evidence is objective and coherent; (c) whether the particular conclusions drawn by the Member assessing the risk find sufficient support in the scientific evidence relied upon; and (d) whether the results of the risk's assessment sufficiently warrant the SPS measure at issue. (Appellate Body Report, *US/Canada – Continued Suspension*, para. 591. See also Appellate Body Report, *Australia – Apples*, paras. 213–214)

[881] Appellate Body Report, *Australia – Salmon*, para. 120 and fns 67 and 69.

[882] Appellate Body Report, *Australia – Salmon*, para. 121 (emphasis omitted), and fn 69 to para. 123.

[883] We recall that the panel in *Japan – Apples*, in examining the obligation in 5.1, reasoned that the requirement to "take into account" risk assessment techniques developed by the relevant international organizations means that such techniques "should be considered relevant" for a Member's assessment, but that a "failure to respect every aspect" thereof "would not necessarily, *per se*, signal" an inconsistency with the SPS Agreement. (Panel Report, *Japan – Apples*, para. 8.241 (emphasis original). See also Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1620)

[884] In *Australia – Apples*, the Appellate Body stated that "[w]hether a risk assessor has taken into account the available scientific evidence" must be "determined by assessing the relationship between the conclusions of the risk assessor and the relevant available scientific evidence." (Appellate Body Report, *Australia – Apples*, para. 208)

without absolving them of their duty to base their measures on a risk assessment.[885] The Appellate Body has also recognized that the appropriate level of protection of the importing Member may affect the scope or method of the risk assessment.[886]

7.324. To the extent the Panel is satisfied that a risk assessment exists and is appropriate to the circumstances, the Panel should next turn to addressing whether the scientific information taken into account by the United States supports the conclusions in its risk assessment[887] and whether the resulting measures are based on that risk assessment. To that end, we recall that the Appellate Body has clarified that a "rational or objective relationship"[888] that "persists and is observable"[889] must exist between an SPS measure and a risk assessment. We also recall our conclusion in section 7.4.2.3 that the reasoning of the Appellate Body in *EC – Sardines,* that "at a minimum … something cannot be considered a 'basis' for something else if the two are contradictory"[890] is equally applicable in the SPS context. In that vein, a measure that contradicts the conclusions of a risk assessment cannot be said to be based upon it. However, the Appellate Body has clarified that while Article 5.1 requires that SPS measures be based on a risk assessment, this does not mean that the SPS measures have to "conform to" the risk assessment.[891]

7.325. In light of the above, the Panel will assess whether a rational or objective relationship that persists and is observable exists between, on the one hand, the United States' imposition and maintenance of its prohibition on the importation of Argentinian fresh (frozen or chilled) bovine meat and Patagonian ruminant and swine products and, on the other hand, the document or documents it has put forward as its "risk assessment".

7.326. As noted above, we will conduct this analysis for the 2001 Regulations amending 9 CFR 94.1 at the time of adoption as well as for the maintenance of the measures.

7.5.3.3.1 9 CFR 94.1 as amended by the 2001 Regulations at the time of adoption

7.327. Our first task is to ascertain whether a risk assessment exists as a basis for the adoption of the prohibition on imports from Argentina, first on an interim basis in June 2001 and then as a final rule in December 2001.

7.328. Argentina argues that the 2001 Regulations are not based on a risk assessment primarily because they were adopted without the typical step of the publication of a lengthy risk analysis document separate from the notice in the Federal Register of the amendment of 9 CFR 94.1. We do not find this argument convincing. We recall the conclusion of the panel in *Japan – Apples (Article 21.5 – United States)* that the relevant consideration is not limited to a procedural review as to whether the risk assessment followed a certain form, but is more importantly focused on whether the substance of the risk assessment, that is the scientific evidence which is being evaluated, supports the conclusions of the risk assessment.[892] In this instance, the United States has identified the June 2001 Interim Rule as containing both the measure and the risk assessment. We see nothing in the Agreement that would prohibit them from doing this.[893] Therefore, we

[885] Appellate Body Report, *EC – Hormones*, para. 129 and Panel Report, *Australia – Salmon*, para. 8.57. See also Appellate Body Reports, *Australia – Salmon*, para. 130; *US/Canada – Continued Suspension*, para. 562 and *Australia – Apples*, paras. 237 and 244.

[886] Appellate Body Report, *US/Canada – Continued Suspension*, para. 685.

[887] The Appellate Body in *EC – Hormones* explained that "Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2 of the *SPS Agreement*, requires that the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measure at stake." (Appellate Body Report, *EC – Hormones*, paras. 193-194)

[888] Appellate Body Report, *Japan – Agricultural Products II*, para. 84. See also Appellate Body Report, *Japan – Apples*, paras. 162 and 163. We also recall that, in the context of its analysis of Article 3.1 of the SPS Agreement the Appellate Body stated that "a thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter." (Appellate Body Report, *EC – Hormones*, paras. 163, 189 and 193)

[889] Appellate Body Report, *EC – Hormones*, para. 189.

[890] Appellate Body Report, *EC – Sardines*, para. 248.

[891] Appellate Body Report, *US/Canada – Continued Suspension*, para. 528.

[892] Panel Report, *Japan – Apples (Article 21.5 – United States)*, para. 8.129.

[893] Indeed, the Appellate Body explained in *EC – Hormones* that "Article 5.1 does not insist that a Member that adopts a sanitary measure shall have carried out its own risk assessment … [t]he SPS measure

accept that the United States has identified the June 2001 Interim Rule as the risk assessment underpinning its measure.

7.329. On this basis we move on to examine the remaining three questions -if that risk assessment is "appropriate to the circumstances"; whether the science supports the conclusions in the risk assessment; and finally whether the importing Member's measures are based on that risk assessment.

7.330. With respect to the June 2001 Interim Rule we note that the document refers to Argentina's notification to the OIE and the United States of the confirmation of outbreaks of FMD in a number of Argentine provinces in March 2001. APHIS also notes that SENASA was investigating the outbreaks, conducting extensive serological surveillance and implementing a vaccination programme to attempt to confine the virus. APHIS notes that it is taking the action to prohibit imports "because the existence of FMD has been confirmed" in Argentina. APHIS concludes that "imports of infected animal products pose the greatest risk of entry for FMD into the United States." APHIS also notes that with the exception of North and Central America (north of Panama), Australia and New Zealand, FMD is still present in many areas of the world.[894]

7.331. We note that these conclusions are consistent with the OIE's guidance in the Terrestrial Code, namely that once a country experiences an outbreak its disease status is suspended and it is treated as infected. In the case of FMD, it is reasonable to conclude that the science on the disease is sufficiently settled and that the SPS measures applicable to a country or region can be determined on the basis of the existence of an outbreak without the need for additional extensive studies. As the OIE explained at the meeting with the Panel, "as soon as it has an outbreak [a country] can no longer qualify for being free from FMD" and suspension of the status is immediate.[895] Argentina itself seems to have recognized this when it suspended exports on its own initiative. Moreover, the OIE clarified that given the epidemiology of FMD, a "cut and dry" assessment of whether the country meets the conditions that are specified in the Terrestrial Code is what is appropriate.[896] In particular, the OIE noted that "we all know that the impact of FMD is high, we are not really in any doubt about that. It is a high impact disease, a trans- boundary animal disease, highly contagious and has serious impact."[897] Therefore, the relevant issue in assessing the FMD "risk" in a particular country or region relates to "the probability of the virus being present in the animals and their meat."[898]

7.332. Furthermore, the June 2001 Interim Rule reaches conclusions about the economic impact of the entry, establishment or spread of the disease and the impact of the SPS measures that might be applied. In particular, APHIS notes that after an outbreak of FMD "[p]roduction losses are substantial, and costs to eradicate the disease are high." APHIS concludes that "[a] single outbreak of FMD in the United States has the potential to close our major livestock export markets overnight. During the eradication process, most exports of meat, animals, and animal byproducts would be curtailed." APHIS also notes that if an outbreak were not immediately recognized "eradication could take years." APHIS contrasts the potential loss of export markets with the available data on total earnings from exports of live cattle, swine, beef and veal, pork and dairy products from the United States for the last year of available data (1999). APHIS also notes the limited market share of Argentine beef products in the United States – 1.7 per cent of total beef imports and that the amount of imports had been declining. APHIS concludes that the prohibition will have little to no effect on supply or consumer prices.[899]

7.333. The Panel finds that the June 2001 Interim Rule contains references to the standard scientific understanding of FMD as it was known at the time. It also contains information on the situation on the ground in Argentina as well as examines the economic impact of the measures

might well find its objective justification in a risk assessment carried out by another Member, or an international organization." (Appellate Body Report, *EC – Hormones*, para. 190, followed by Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3024)

[894] 2001 Interim Rule on Argentina, (Exhibit ARG-29).

[895] Transcript of the meeting, para. 1.16; see also Ibid. para. 1.110.

[896] Transcript of the meeting, para. 1.107 (comparing the evaluation for FMD to one for BSE that requires more of an analysis of the effectiveness of certain control measures).

[897] Transcript of the meeting, para. 1.128.

[898] Transcript of the meeting, para. 1.128.

[899] 2001 Interim Rule on Argentina, (Exhibit ARG-29).

that might be applied consistently with Annex A(4) and Article 5.3. Therefore, we conclude that the risk assessment contained in the June 2001 Interim Rule is "appropriate to the circumstances" within the meaning of Article 5.1.

7.334. We also find that the undisputed science supports the conclusion in the June 2001 Interim Rule that Argentine products posed a significant risk for introduction of FMD into the United States.[900] While the Terrestrial Code provides for continued trade in some products even after an outbreak, we recall our conclusion that the United States has a higher appropriate level of protection than that embodied in the Terrestrial Code. Therefore, we find that the 2001 amendments to 9 CFR 94.1 to rescind Argentina's authorization to import and to prohibit the importation of animal, meat and animal products from Argentina was rationally related to the science and that the measure was based on the risk assessment.

7.335. Therefore, we find that, at the time they were adopted, the 2001 Regulations and the subsequent amendment to 9 CFR 94.1 were based on a risk assessment "appropriate to the circumstances" in keeping with the obligations of Article 5.1 of the SPS Agreement.

7.5.3.3.2 The maintenance of the measures

7.336. Argentina argues that, even if a risk assessment had in fact been conducted for Argentina as a whole at the time of the imposition of the original prohibition, such risk assessment would bear no "rational or objective relationship" with the series of favourable changes in circumstances in Argentina. Furthermore, Argentina points to the long periods without an outbreak in Patagonia (1976 for Patagonia South and 1994 for Patagonia North B) as well as APHIS' favourable risk assessment published in 2005 with respect to Patagonia South. [901]

7.337. The United States for its part does not seek to rebut Argentina's factual allegations, but rather argues that its prohibition "continue[s] to be justified by the assessment made at the time" of its adoption while APHIS "is in the process of reviewing and evaluating" Argentina's application for imports.[902] The United States also argues with respect to the risk assessment on the Patagonia region that it could not be completed because of the changing nature of Argentina's application and regulatory practice with respect to that region.[903]

7.338. We recall that the Appellate Body has clarified that Articles 2.2 and 5.1 must constantly be read together[904], including the obligation that measures not be *maintained* without sufficient scientific evidence. In light of that guidance, the Panel in *Japan – Apples* explained that:

> One must not lose sight of the purpose of a risk assessment, which is to serve as a basis for regulatory actions. If the scientific evidence evolves, this may be an indication that the risk assessment should be reviewed or a new assessment undertaken. It would be also legally inconsistent to require, on the one hand, that phytosanitary measures not be maintained without sufficient scientific evidence pursuant to Article 2.2 while, on the other hand, accepting that risk assessments not be renewed in the face of new scientific evidence.[905]

7.339. The obligation to "maintain" a measure based on scientific evidence has a continuing dimension. Indeed, the panel in *EC – Approval and Marketing of Biotech Products* stated that, since "relevant circumstances may change over time", it follows that "at any given time, SPS measures must be based on an assessment of risks which is appropriate to the circumstances existing at that time".[906] In other words, the ordinary variations in the underlying factual circumstances are to be taken into account by continuously updating the risk assessment and

[900] We note that at the time the measures were adopted the United States did not treat Patagonia as a separate region from the rest of Argentina and Argentina had not requested such treatment.
[901] Argentina's first written submission, para. 463.
[902] United States' first written submission, para. 257.
[903] United States' first written submission, para. 263.
[904] Appellate Body Report, *EC – Hormones*, para. 180.
[905] Panel Report, *Japan – Apples*, para. 7.12.
[906] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3031; see also Panel Report, *Japan – Agricultural Products II*, paras. 8.28-8.31.

reviewing the measure based thereon accordingly.[907] The panel in *EC – Approval and Marketing of Biotech Products* reasoned that when the complainant is challenging the maintenance of a particular measure the relevant question becomes "whether on the date of establishment of this Panel, each [SPS] measure was based on an assessment of risks which was appropriate to the circumstances existing at that time."[908]

7.340. The United States admits that it was provided with significant new scientific information about the sanitary situation in Argentina and the likelihood of the FMD virus being present in Patagonia and Northern Argentina in 2002 and in subsequent years until it ceased asking for new information in 2009. Therefore, as discussed by the panel in *Japan – Apples,* the scientific information indicates that the risk assessment from 2001 should be reviewed or a new assessment undertaken. The fact that the United States contends that APHIS is and has been in the process of conducting a new risk assessment indicates that it agrees.

7.341. According to the United States, if a Member is presented with new scientific evidence that justifies the updating of the risk assessment or the undertaking of a new procedure, the measure falls within the scope of Article 5.7 while that review is taking place. The United States argues that its interpretation presents the only coherent approach to the SPS Agreement because otherwise an importing Member would be instantly in breach of Articles 2.2 and 5.1 any time new scientific information was put forward requiring a new risk assessment unless that measure falls within the scope of Article 5.7.

7.342. We recall that in the present case we have found that Article 5.7 is not applicable. However, we do not consider that it necessarily follows that there is an automatic and immediate breach of Article 2.2 and 5.1. In this regard, we agree with the United States that this would be an illogical reading of Articles 2.2, 5.1, 5.2, and 5.3. We note that the text of Article 5.1 states that what is required is a risk assessment that is "appropriate to the circumstances". We recall the guidance of the Appellate Body that "WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world."[909] In our view, the language "appropriate to the circumstances" provides the flexibility referred to by the Appellate Body. Furthermore, we find context for our interpretation in Article 8 and Annex C(1)(a). In particular, we recall our understanding in paragraph 7.68 above that Article 8 and Annex C(1) have a broad scope of application[910] and the guidance of the Appellate Body that the time taken to conduct a risk assessment could be challenged under Article 8 and Annex C(1).[911] Thus, a finding of whether a measure is maintained based on a risk assessment pursuant to Article 5.1 could be informed by whether the risk assessment procedure had been undertaken and completed without undue delay.

7.343. In light of the above, we consider that a Member is not immediately in breach of the obligations in Articles 2.2 and 5.1 to *maintain* a measure based on a risk assessment when new scientific information arises that requires a revision or updating of the risk assessment that the measure was based on at the time of adoption. In such a situation, an importing Member enjoys a certain reasonable margin of time to conduct the new analysis.

7.344. In the present case, we have determined that the United States had scientific information that warranted either a review of the pre-existing risk assessment or the conduct of a new one.

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[907] Indeed, the panel in EC – Approval and Marketing of Biotech Products did recognize that a measure might be "maintained" on a different basis from the one originally imposed and therefore the appropriate point of analysis would be the risk assessment currently being relied upon. Therefore, that panel concluded that, for the purposes of the dispute, it would examine any risk assessment existing prior to the establishment of the panel for conformity with Article 5.1. (Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3034)

[908] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3034.

[909] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 34, DSR 1996:I, p. 97 at 122-123.

[910] Appellate Body Report, *Australia – Apples*, para. 438; see also Panel Report, *US – Poultry (China)*, paras. 7.370-7.378.

[911] Appellate Body Report, *Australia – Apples*, para. 441. The United States acknowledges that, in certain circumstances, risk assessments could constitute a procedure covered by Annex C(1)(a). (See United States' response to Panel question No. 58 following the first substantive meeting) The United States, however, contends that risk assessments aimed at recognizing territories as disease-free do not fall within the scope of such a provision. In paras. 7.69-7.70 above, we disagreed with the United States' argument.

While we have determined that the United States' measures do not fall within the scope of Article 5.7, we have also found that the United States does enjoy a certain reasonable margin of time to review the pre-existing risk assessment or conduct a new one. However, we also found in paragraphs 7.145-7.172, that the delays incurred in the reviews of Argentina's applications pursuant to 9 CFR 92.2 were undue within the meaning of Annex C(1)(a). Therefore, even though the United States was still in the process of conducting its risk assessment as of the date of establishment of the Panel, this cannot excuse failure to comply with the obligation in Article 5.1.[912]

7.345. In light of the scientific information available to the United States on the sanitary conditions in Northern Argentina and Patagonia, which meant that the 2001 risk assessment was no longer sufficient to maintain the measures and the undue delay in APHIS' conclusion of the risk assessment, we find that the United States is maintaining the measures on fresh (chilled or frozen) beef from Northern Argentina and on animals, meat and animal products from Patagonia without basing them on a risk assessment. Therefore, the United States' measures are inconsistent with Article 5.1 of the SPS Agreement because they are maintained without being based on a risk assessment appropriate to the circumstances.

7.346. With respect to Argentina's claims under Article 5.2, we recall that Article 5.2 informs the requirements for a risk assessment under Article 5.1. Having concluded that the United States' measures are maintained without being based on a risk assessment, there is no basis to make any findings with respect to whether the United States could have taken into account in the assessment of the risks the factors set out in Article 5.2.

7.5.3.3.3 Conclusion

7.347. The Panel finds that the June 2001 Interim Rule is a risk assessment "appropriate to the circumstances" within the meaning of Articles 5.1, 5.2, 5.3 and Annex A(4). The Panel also finds that at the time the measures were adopted in 2001 they were based on that risk assessment. With respect to the *maintenance* of the measures, the Panel finds that the scientific evidence required a review or new risk assessment. As of the date of establishment of the Panel the United States had not completed that new risk assessment but was nevertheless maintaining the measures. Recalling that we found the United States to have acted inconsistently with Article 8 and Annex C(1)(a) in the conduct of the risk assessment in that the process incurred undue delays, we also conclude that the measures are not maintained based on a risk assessment as required by Article 5.1 of the SPS Agreement.

7.5.4 Article 2.2 of the SPS Agreement

7.5.4.1 Main arguments of the parties

7.5.4.1.1 Argentina

7.348. In Argentina's opinion, "where an SPS measure is not based on a risk assessment as required in Articles 5.1 and 5.2 of the SPS Agreement, this measure is presumed not to be based on scientific principles and to be maintained without sufficient scientific evidence."[913] Accordingly, Argentina asserts that the United States' violation of Articles 5.1 and 5.2 of the SPS Agreement entails an automatic violation of Article 2.2.[914] Alternatively, Argentina details its claim that the application of the United States' measures is not based on scientific principles and they are maintained without sufficient scientific evidence.

[912] As noted above, the findings under Article 8 and Annex C(1)(a) inform our finding under Article 5.1. We reached this conclusion based on the particular circumstances of this case. Our conclusion should not be interpreted to mean that every inconsistency with Annex C(1)(a) would automatically imply a failure to comply with the obligation to maintain a measure based on a risk assessment in Article 5.1.

[913] Argentina's first written submission, para. 472 (citing Panel Report, *US – Poultry (China)*, para. 7.201).

[914] Argentina's first written submission, paras. 258-259 (referring to Appellate Body Report, *Australia – Apples*, para. 262, in turn referring to Appellate Body Report, *Australia – Salmon*, para. 138).

7.349. In particular, with regard to the United States' prohibition on imports of fresh (chilled or frozen) beef originating in the Argentine territory as a whole, Argentina refers again to the favourable risk assessments conducted in 1997 and 2000 and the statements of the United States' delegate to the SPS Committee in 2010 concerning the existence of a "recent favourable risk assessment."[915]

7.350. Argentina states that the maintenance of such a prohibition is not based on a valid risk assessment.[916] It observes that the two publicly available risk assessments conducted with respect to Argentina in 1997 and 2000 both permitted imports of fresh (chilled or frozen) meat from Argentina under certain conditions.[917] While recognizing that the 1997 and 2000 risk assessments were superseded by FMD outbreaks in 2001, Argentina notes that no risk assessment has been issued since 2001, when APHIS withdrew approval to import Argentine fresh beef from the Argentine territory as a whole.[918] Finally, Argentina notes that certain statements made by the United States' delegate to the SPS Committee in 2011 suggested that "a recent favourable risk assessment might have been conducted (or at least information was collected and analyzed)", but not been made publicly available.[919] Further, Argentina claims that, while the United States "provided a roadmap of the scientific principles it purportedly relies on" in the policy implementation rulemaking of October 1997, it "has not articulated what scientific principles" underlie the "prohibition" as applied to Argentine fresh beef.[920]

7.351. Argentina cites to the Appellate Body report in *Japan – Agricultural Products II* and states that Article 2.2 of the SPS Agreement requires that there be a "rational or objective" relationship between an SPS measure and the underlying scientific evidence.[921] As for the meaning of "sufficient" as referred to evidence, Argentina posits that "'[s]ufficiency requires the existence of a sufficient or adequate relationship" between an SPS measure and the scientific evidence.[922] In its opinion, in order for a measure to be maintained with sufficient evidence, "there must be at least *some* evidence (derived from the risk assessments)".[923] Because the United States has maintained the "prohibition" on imports of Argentine fresh beef "without having a risk assessment at all", its measure is inconsistent with Article 2.2.[924]

7.352. In light of the above, Argentina asserts that the 2001 Regulations repealing 9 CFR 94.21 and hence withdrawing authorization of imports of fresh (chilled or frozen) beef from Argentina are, by implication, inconsistent with Article 2.2.[925]

7.353. As for the United States' prohibition on imports of ruminants, swine and products thereof from Patagonia, Argentina refers to APHIS' favourable 2005 risk assessment for Patagonia South and the 2007 proposed rulemaking[926] as well as the United States' suggestion that "there is a favorable risk assessment for Patagonia North B."[927] Accordingly, Argentina contends that the United States' violation of Articles 5.1 and 5.2 with respect to Patagonia also entails an inconsistency with Article 2.2.

7.5.4.1.2 United States

7.354. The United States argues that Argentina has not met its burden of establishing a prima facie case that the United States' measures prohibiting imports of Argentine fresh (chilled or

[915] Argentina's first written submission, para. 264.
[916] Argentina's first written submission, para. 263.
[917] Argentina's first written submission, para. 263.
[918] Argentina's first written submission, para. 264.
[919] Argentina's first written submission, para. 264.
[920] Argentina's first written submission, para. 272.
[921] Argentina's first written submission, para. 274 (citing Appellate Body Report, *Japan – Agricultural Products II*, para. 84).
[922] Argentina's first written submission, para. 275 (citing Appellate Body Report, *Japan – Agricultural Products II*, para. 73).
[923] Argentina's first written submission, para. 276 (emphasis original).
[924] Argentina's first written submission, para. 277.
[925] Argentina's first written submission, para. 289.
[926] Argentina's first written submission, para. 473.
[927] Argentina's first written submission, para. 473.

frozen) beef are inconsistent with Article 2.2 of the SPS Agreement.[928] In particular, Argentina "has presented no argument or evidence different" from that submitted under Articles 5.7, 5.1, and 5.2.[929]

7.355. As to the requirement under Article 2.2 that an SPS measure be based and maintained on scientific principles, the United States maintains that the 2001 Regulations and the requirement that Argentina re-apply for authorization for importation bear a "rational [and] objective relationship" to the scientific evidence. Firstly, all parties "agree with the OIE that FMD is an extremely dangerous, contagious and debilitating animal disease".[930] Secondly, the OIE Terrestrial Code provides that before trade in animals or their products may occur, "an importing country must be satisfied that its animal health status will be appropriately protected".[931] Accordingly, maintaining the 2001 Regulations while conducting the risk assessment on Argentine fresh beef "is based on scientific principles related to the transmissibility and consequences" of FMD.[932]

7.356. As to the requirement under Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence, the United States refers back to its position that the measures are justified under Article 5.7 and thus Article 2.2 is inapplicable.[933]

7.357. With regard to the aspect of the United States' measures prohibiting imports of ruminants, swine and products thereof from Patagonia, the United States adds that Argentina has "altered the sanitary conditions in Patagonia South and Patagonia North B", thereby requiring APHIS to "reassess the situation"[934] prior to completing its rulemaking process. In particular, the 2007 proposed regulation was issued with respect to Patagonia South based on information from 2003 but, since 2008, Argentina started altering the sanitary conditions between that area and Patagonia North B. The United States argues that, because of the "many changing variables" with respect to Patagonia South and Patagonia North B, APHIS measures "were based and maintained on science".[935]

7.5.4.2 Main arguments of the third parties

7.5.4.2.1 China

7.358. China recalls that when an SPS measure is not based on a risk assessment as required under Article 5.1 of the SPS Agreement, that measure "can be presumed to be, more generally, neither based on scientific principles nor maintained with sufficient scientific evidence within the meaning of Article 2.2".[936] Further, China recalls that, according to the panel in *EC – Approval and Marketing of Biotech Products*, Article 2.2 requires that: (a) SPS measures be based on scientific principles; and (b) SPS measures not be maintained without sufficient scientific evidence.[937]

7.5.4.3 Analysis by the Panel

7.359. The Panel needs to determine whether the United States' measures are based on scientific principles and are not maintained without sufficient scientific evidence as required by Article 2.2 of the SPS Agreement. Argentina claims that a finding that Article 5.1 or 5.2 has been breached also entails an automatic violation of Article 2.2 of the SPS Agreement. The United States disagrees and asserts that Argentina has not made a *prima facie* case that the United States' measures are inconsistent with Article 2.2.

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[928] United States' first written submission, para. 271.
[929] United States' first written submission, para. 274.
[930] United States' first written submission, para. 274.
[931] United States' first written submission, para. 274.
[932] United States' first written submission, para. 274.
[933] United States' first written submission, para. 275.
[934] United States' first written submission, para. 278.
[935] United States' first written submission, para. 280.
[936] China's third-party submission, para. 33 (referring to Appellate Body Report, *Australia – Salmon*, para. 138; and Panel Report, *US – Poultry (China)*, para. 7.201), and para. 38.
[937] China's third-party submission, para. 37 (referring to Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1424). No other third party argued specifically on this point.

7.360. As noted in paragraph 7.264 above, Articles 2.2 and 5.1 should constantly be read together[938], because Article 5.1 constitutes "a specific application of the basic obligations contained in Article 2.2"[939] of the SPS Agreement. The same relationship exists between Articles 2.2 and 5.2.[940] Furthermore, Article 5.7 serves as a "qualified exemption" to the obligation in Article 2.2.[941]

7.361. Given the relationship between the specific sub-paragraphs of Article 5 and the obligations in Article 2.2, the Appellate Body and prior panels have accepted that in the event an SPS measure is not based on a risk assessment as required in Articles 5.1 and 5.2 this measure can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence.[942]

7.362. We have found that the United States' measures are not maintained based on a risk assessment and are inconsistent with Article 5.1 of the SPS Agreement and are not within the scope of the qualified exemption in Article 5.7 of the SPS Agreement. Therefore, we further find that the United States' measures are inconsistent with Article 2.2 of the SPS Agreement.

7.6 Appropriate level of protection

7.6.1 Relevant legal provisions

7.363. Annex A(5) of the SPS Agreement defines the appropriate level of sanitary or phytosanitary protection (ALOP) as:

> The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.
>
> NOTE: Many Members otherwise refer to this concept as the "acceptable level of risk".

7.364. Argentina makes claims with respect to two of the three provisions in Article 5 of the SPS Agreement that relate to the ALOP: Articles 5.4 and 5.6.[943]

7.365. Article 5.4 relates to the determination of the ALOP and states that:

> Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

7.366. Article 5.6 relates to the relationship between the measures applied and the achievement of the ALOP. In particular, Article 5.6 provides that:

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

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[938] Appellate Body Report, *EC – Hormones*, para. 180.
[939] Appellate Body Reports, *EC – Hormones*, para. 180; and *Australia – Apples*, para. 209.
[940] Appellate Body Report, *Australia – Apples*, para. 339.
[941] Appellate Body Report, *Japan – Agricultural Products II*, para. 80; see also Panel Report, *Japan – Apples*, paras. 8.210-8.212 (referring to Article 5.7 as a "defence"). See also, the Appellate Body conclusion in *US/Canada – Continued Suspension*, that Article 2.2 excludes from its scope situations where relevant scientific evidence is insufficient and that the applicable provision is Article 5.7. Appellate Body Report, *US/Canada – Continued Suspension*, para. 674.
[942] Appellate Body Report, *Australia – Salmon*, para. 138; Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.85 and 7.161; Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3399; *India – Agricultural Products*, para. 7.332.
[943] Argentina does not make a claim under Article 5.5 which relates to the objective of achieving consistency in the application of the concept of the ALOP.

> *Footnote 3* For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

7.367. The Appellate Body has found that the obligation in Article 5.6 is closely related to the first obligation set forth in Article 2.2[944] that "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health".

7.368. Argentina has made claims under both Articles 5.4 and 5.6 as well as under the first obligation in Article 2.2. An analysis of all these claims requires an identification of the level of protection that the United States has set as appropriate. With respect to a claim under Article 5.6, the Appellate Body has reasoned that when analysing a claim under Article 5.6, a panel first has to identify the level of protection that the importing Member has set as appropriate.[945] Furthermore, the panel in *EC – Approval and Marketing of Biotech Products* explained that Articles 2.2 and 5.6 are to be read together and that Article 5.6 is a specific application of the first obligation in Article 2.2.[946] Therefore, an understanding of the ALOP is also required for an analysis of Argentina's claim under Article 2.2. Finally, it would be difficult to make a finding as to what the United States took into account in determining its ALOP if we do not know what the United States' ALOP is.

7.369. Therefore, before turning to the substance of Argentina's claims, the Panel will first identify the United States' ALOP. Subsequently, we will examine whether Argentina has established the elements of each of its claims under Articles 5.4 and 5.6 and the first obligation in Article 2.2.

7.6.2 The United States' appropriate level of protection for foot-and-mouth disease

7.6.2.1 Main arguments of the parties

7.6.2.1.1 Argentina

7.370. Argentina argues that the United States' ALOP is difficult to determine. Argentina cites an APHIS policy document that notes the purpose of the authorization process is "to determine on a case-by-case basis what import conditions will reduce the risk associated with importations from a particular region to a negligible level."[947] Argentina argues that APHIS assigns a number of different risk levels to products or country/region and that the import measures associated with the different risk levels indicate an incoherent application of an ALOP. In particular, Argentina notes:

> In the June 1997 rulemaking allowing imports from Argentina, APHIS referred to low risk with the possibility to achieve a "negligible level of risk;"[948] the 2005 risk assessment by APHIS regarding Patagonia South stated that the risk level was

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[944] Appellate Body Report, *Australia – Apples*, para. 339.

[945] Appellate Body Report, *Australia – Apples*, para. 344 (citing Appellate Body Report, *Australia – Salmon*, para. 208).

[946] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1433. In *Australia – Apples*, the Appellate Body noted that the relationship between Articles 2.2 and 5.6 had not been squarely decided, but noted that its ruling in *Australia – Salmon* suggested such a relationship. In particular, the Appellate Body recalled:

> After pointing to the phrase 'only to the extent necessary' in Article 2.2 of the *SPS Agreement*, the Appellate Body observed, in a footnote in its report in *Australia – Salmon*, that:
>
> > [t]he establishment or maintenance of an SPS measure which implies or reflects a higher level of protection than the appropriate level of protection determined by an importing Member, could constitute a violation of the necessity requirement of Article 2.2. (Appellate Body Report, *Australia – Salmon*, footnote 166 to para. 213)

(Appellate Body Report, *Australia – Apples*, fn 504 to para. 340)

[947] Argentina's first written submission, para. 295 (citing *Importation of Animals and Animal Products*, 62 Fed. Reg. 56000 (USDA/APHIS October 28, 1997) (Final Rule), (Exhibit ARG-15)).

[948] (footnote original) See the June 26, 1997 Final rulemaking at 62 FR 34385 at 34387 and 34389. (Exhibit ARG-26)

> "low."[949] And yet low risk in 1997 meant imports were allowed, while low risk in 2005 meant a continued ban even as applied to the FMD-free region of Patagonia. Moreover, the 2003 rulemaking for Uruguay did not mention a level of risk, while a 2002 risk analysis performed on Uruguay suggested a "low" risk rating.[950] The rulemaking regarding the Brazilian State of Santa Catarina considered the level risk to be "very low" and therefore acceptable for imports to commence,[951] even though "very low" is not one of the levels identified in the rulemaking.[952]

7.371. Argentina disputes the United States' contention that its ALOP for FMD is expressed in 7 USC 8303. In particular, Argentina argues that the section does not express an ALOP, but rather grants the Secretary of Agriculture unfettered discretion to adopt whatever measures he deems necessary.[953]

7.372. Furthermore, Argentina argues that regardless of whether the United States has a determined ALOP for FMD, it acts *as if* there is a unique ALOP for Argentine products which is zero.[954] However, in the context of its arguments relating to Article 5.6 of the SPS Agreement, Argentina argues that the United States' ALOP for fresh (chilled or frozen) beef can be derived from the measures that apply to Uruguay as well as the expected issuance of a proposed rule permitting imports from 13 Brazilian states that are FMD-free where vaccination is practised.[955] Similarly, for its claim relating to all ruminant and swine products from Patagonia, Argentina derives the United States' ALOP by reference to the 2005 risk assessment of Patagonia and the treatment of the Brazilian state of Santa Catarina.[956]

7.6.2.1.2 United States

7.373. In its first written submission the United States argues that the goal of the authorization process set forth in 9 CFR 92.2 is "to prevent the introduction into or dissemination within the United States of FMD."[957] In response to a specific question as to its ALOP for FMD, the United States replied that the ALOP of the United States is set out in the Animal Health Protection Act ("AHPA") in 7 USC 8303, which is the main statutory basis for 9 CFR 92 and 9 CFR 94.[958]

7.374. In particular, 7 USC 8303(a), provides:

> [T]he Secretary may prohibit or restrict - (1) the importation or entry of any animal, article, or means of conveyance, or use of any means of conveyance or facility, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into or dissemination within the United States of any pest or disease of livestock ... .[959]

7.375. The United States argues that this ALOP requires that "[i]mports of FMD-susceptible animals and animal products into the United States must be safe."[960]

7.376. The United States maintains that APHIS' evaluation of a country's application is to determine "whether, and under what import conditions, if any, specified products from a particular region may be safely exported to the United States without introducing into or disseminating within the United States the FMD virus."[961] The United States also argues that its ALOP is higher

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[949] (footnote original) Risk Assessment for Patagonia at pp 76-77. (Exhibit ARG-9)
[950] (footnote original) 68 Fed. Reg. 31940, May 29, 2003.
[951] (footnote original) 75 Fed. Reg. 69851, November 16, 2010; *see* APHIS Evaluation of the Status of the Brazilian State of Santa Catarina Regarding Foot-and-Mouth Disease, Classical Swine Fever, Swine Vesicular Disease and African Swine Fever, USDA APHIS Report, August 16, 2010.
[952] Argentina's first written submission, para. 222.
[953] Argentina's second written submission, paras. 153-154.
[954] Argentina's first written submission, paras. 223, 299.
[955] Argentina's first written submission, paras. 312-313.
[956] Argentina's first written submission, paras. 501-503.
[957] United States' first written submission, para. 120.
[958] United States' response to Panel question No. 42 after the first substantive meeting.
[959] 7 USC § 8303(a), (Exhibit USA-75).
[960] United States' response to Panel question No. 42 after the first substantive meeting.
[961] United States' first written submission, para. 125 (citing 7 USC § 8303(a), (Exhibit USA-75)).

than that achieved by applying the OIE standards. In particular, the United States focuses on the differences in its treatment of imports from countries that practice vaccination. In the United States' view, a country that vaccinates for FMD is not free of the disease. [962] According to the United States, importation of beef from areas that are designated as FMD-free where vaccination is practised could result in importation of beef derived from infected animals, which "would not satisfy the United States' standard of safe importation."[963] Therefore, the United States contends that the OIE guidelines for importation of products from countries or zones that are FMD-free where vaccination is practised do not meet its ALOP. [964] The United States also maintains that it is not seeking to achieve a zero ALOP—indeed, the United States argued in its comments on Dr Bonbon's answers that zero risk is not achievable.[965]

7.6.2.2 Analysis by the Panel

7.377. The Appellate Body explained in *Australia – Salmon* that there is an implicit obligation in the SPS Agreement for Members to determine their appropriate level of protection.[966] The Appellate Body has confirmed that the ALOP need not be determined in quantitative terms. However, the level of protection cannot be determined "with such vagueness or equivocation that the application of the relevant provisions of the *SPS Agreement* … becomes impossible".[967]

7.378. The United States maintains that its ALOP for all animal diseases, including FMD, is set forth in 7 USC 8303(a). We disagree with Argentina that Section 8303(a) does not express an ALOP, but is merely a delegation of authority to the Secretary of Agriculture. It is true that the provision provides the Secretary with the discretion to take all necessary measures, but only those measures *necessary to prevent the introduction into or dissemination within the United States of any pest or disease of livestock.* It is this portion of Section 8303(a) that expresses the United States' ALOP for animal pests or diseases. We also note that the regulations in 9 CFR 94 and 9 CFR 92.2 specifically derive APHIS' authority from, among other sources, this statutory provision. We have no reason to disagree with the United States' assertion that this is its ALOP for animal pests and diseases, including FMD.

7.379. The panel in *India – Agricultural Products* recently held that a similarly expressed ALOP by India – the prevention of ingress of the disease in question – did not satisfy the definition in Annex (5), because it did not express a "level".[968] While acknowledging that a Member's ALOP need not be expressed in quantitative terms, that panel concluded that an ALOP will "express a certain threshold that denotes the position of the relevant Member in relation to the intensity, extent, or relative amount of protection or risk that the Member deems to be tolerable or suitable."[969]

7.380. We recall that the Appellate Body in *Australia – Salmon* reasoned that the ALOP "is an objective, and that the SPS measure is an instrument chosen to attain or implement that objective."[970] As expressions of a general objective, ALOPs are often set forth in a qualitative and generic manner. The ALOP put forward by the United States in this dispute is formulated in a similar qualitative manner to that accepted by the panel in *US – Poultry (China).*[971] Furthermore, the OIE itself, an acknowledged expert in determining appropriate mitigating measures to respond to animal health risks, does not refer to the ALOP achieved by the measures in the Terrestrial Code

[962] United States' first written submission, para.299.
[963] United States' first written submission, para.299.
[964] United States' first written submission, para.299.
[965] United States' comments on the experts' responses to Panel question No. 12.
[966] Appellate Body Report, *Australia – Salmon*, para. 206.
[967] Appellate Body Report, *Australia – Salmon*, para. 203.
[968] Panel Report, *India – Agricultural Products*, para. 7.565.
[969] Panel Report, *India – Agricultural Products*, para. 7.562.
[970] Appellate Body Report, *Australia – Salmon*, para. 200.
[971] In that case the United States' ALOP for poultry products was accepted to be "healthful, wholesome, fit for human food, not adulterated, and contain no dye, chemical, preservative or ingredient which renders them unhealthful, un wholesome, adulterated, or unfit for human food." See Panel Report, *US – Poultry (China)*, para. 7.242 (citing Poultry Products Inspection Act 21 USC 466). We also note that the ALOP was implemented in a similar way – an agency of the United States' Department of Agriculture (in that case the Food Safety Inspection Service) making specific determinations about the admissibility of products from particular countries or regions.

in terms of specific levels of tolerance. Indeed, in response to a question from the Panel, the OIE explained the level of protection achieved by the measures in Chapter 8.5 of the Terrestrial Code as follows:

> The measures in Chapter 8.5 provide for safe international trade in animals and derived products. As stated in Part A point 2 of the User's Guide to the Terrestrial Code: "The recommendations in each of the disease chapters … are designed *to prevent the disease in question being introduced into the importing country* (emphasis added), taking into account the nature of the commodity and the animal health status of the exporting country. Correctly applied, OIE recommendations provide for trade in animals and animal products to take place with an *optimal level of animal health security* (emphasis added), based on the most up to date scientific information and available techniques." This applies to all products and all measures in Chapter 8.5 and in other disease chapters. No attempt is made to quantify or differentiate the levels of protection provided in the disease chapters or in the horizontal texts of the Terrestrial Code.[972]

7.381. That being said, the Appellate Body has concluded that if a Member determines its appropriate level of protection with insufficient precision, then "the appropriate level of protection may be established by [the panel] on the basis of the level of protection reflected in the SPS measure actually applied."[973] This is consistent with the recognition of prior panels that "any sanitary measure applied to a given situation inherently reflects and achieves a certain level of protection."[974] In light of the findings of the panel in *India – Agricultural Products* and to confirm the threshold of risk the United States is prepared to accept, we will examine the measures the United States applies with respect to FMD as well as compare these to the Terrestrial Code, which the United States argues achieves a lower ALOP with respect to FMD and the particular products at issue in this dispute.

7.382. The United States does not provide for a complete import prohibition on all livestock or products thereof. The United States permits imports from countries or regions that have had outbreaks in the past. As Argentina observes, APHIS permits imports from several countries or regions whose products it has determined present a "low" or lower ("very low" or "negligible") risk.[975] Indeed, the United States even permits imports from one country that vaccinates against FMD under certain protocols. However, the United States does not determine who may import based on the official recognitions of disease status of the OIE. The United States does not recognize the disease status of "FMD-free where vaccination is practised". Furthermore, as discussed in section 7.4 above, the protocols the United States applies to imports are not based on and are more stringent than those set forth in the Terrestrial Code. In particular, the United States places additional mitigating measures in 9 CFR 94.11 on regions that border regions that are FMD-infected or that import products from such regions. Similarly in 9 CFR 94.22 the United States imposes mitigating protocols on one country that it determines to be FMD-infected, but that vaccinates.[976] Therefore, it would be reasonable to conclude that the qualitative ALOP expressed in 7 USC 8303(a) can be approximately described as being higher than that achieved by the Terrestrial Code and somewhere between "low risk" and "zero".

7.383. Argentina refers to the varying manners in which APHIS has characterized the risk associated with products from particular countries or regions. According to Argentina, the fact that APHIS determined that particular countries or regions had different risk levels but nevertheless allowed them to import products demonstrates that the United States' ALOP is confused. While we acknowledge that there may be more precise ways to express an ALOP than the one before us in

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[972] OIE's response to Panel question No. 8(a).

[973] Appellate Body Report, *Australia – Salmon*, para. 207.

[974] Panel Report, *Australia – Salmon*, para. 8.107; see also Panel Reports, *EC – Hormones (US)*, para. 8.168; *EC – Hormones (Canada)*, para. 8.171; and *Australia – Apples*, para. 7.975.

[975] We note that it is unremarkable that three countries or regions presenting these differing levels of risk would all be allowed to import while achieving the same ALOP – this is because if the risk presented is *negligible*, then permitting those shipments would achieve an ALOP of "low". The same is true with products that present a "very low" risk.

[976] The protocols in 94.11 and 94.22 will be discussed in greater detail in respect of Argentina's claims under Article 5.6 as they are the alternative, less trade-restrictive measures that Argentina proposes the United States could apply to its products.

the current case, we do not agree that the fact that APHIS uses different terms to identify the levels of risk posed by different products from different countries or regions, in and of itself, necessarily means that the appropriate level of protection being achieved is not sufficiently articulated, or that it is different from that expressed in 7 USC 8303(a). Rather, one must look at the level of risk identified in combination with the measures applied to determine the level of protection achieved. The panel in *Australia – Salmon* explained that:

> [T]he level of protection achieved by a specific sanitary measure will also depend on the degree of risk against which that measure is intended to protect. In that sense,… imposing the same sanitary measure for different situations does not necessarily result in the same level of protection. Indeed, in many situations (e.g. situations representing different risks) the same sanitary measure might result in different levels of protection. On the other hand, different sanitary measures for different situations might ensure the same level of protection. Indeed, one given situation might only represent a small risk for which a lenient sanitary measure will achieve a high level of protection, whereas another situation might pose very high risks requiring a very strict and different sanitary measure in order to meet that same high level of protection.[977] (emphasis added)

7.384. The reasoning of the panel is also confirmed with reference to the Terrestrial Code which sets forth different mitigating measures depending on the disease status of an exporting country or zone, but maintains that all measures achieve the same level of protection: "safe trade".

7.385. Finally, we address Argentina's argument that regardless of any statutory United States' ALOP for animal pests and diseases, the United States applies its measures *as if* it has a zero ALOP for products from Argentina. We understand Argentina's argument to be that because the measures currently applied – i.e. an import prohibition – achieve a zero level of protection this must be the United States' ALOP for Argentina. First, we note that ALOPs are applied to risks (such as pests, diseases, contaminants, toxins, zoonoses, etc.) that may be transmitted through particular products. ALOPs are not applied to countries or regions. We also recall that the Appellate Body has clarified that the establishment of the level of protection "is an element in the decision-making process which logically precedes and is separate from the establishment or maintenance of the SPS measure."[978]

7.386. It may or may not be the case that the United States applies measures to Argentine products that are more restrictive than necessary to achieve its ALOP; we address this possibility in the context of Argentina's claim under Article 5.6.[979] However, accepting Argentina's argument that the measures applied to a particular product from a particular country determines a country specific ALOP for that product would be contrary to the guidance of the Appellate Body that the appropriate level of protection determines the SPS measure to be introduced or maintained, rather than the appropriate level of protection being determined by the SPS measure.[980] In our view, assuming that the level of protection *achieved* by a challenged measure is *always* the same as the appropriate level of protection *determined* by the importing Member could have implications for a proper application of Article 5.6 and could thereby increase the possibility for importing Members to evade their obligations.[981] Therefore, we cannot agree that even if the application of the import prohibition *to Argentina* achieved a "zero" level of protection this should lead us to conclude that the United States' ALOP for FMD is zero.

7.387. For the reasons set forth above, we conclude that the United States ALOP is "to prevent the introduction or dissemination of foot-and-mouth disease within the United States", which can be described as being higher than that achieved by the Terrestrial Code and somewhere between low and zero risk.

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[977] Panel Report, *Australia – Salmon*, para. 8.123.

[978] Appellate Body Report, *Australia – Salmon*, para. 203 (emphasis omitted).

[979] Similarly a claim that the United States was applying more than one level of protection would be the subject of a claim under Article 5.5. However, Argentina has not raised a claim under Article 5.5.

[980] Appellate Body Report, *Australia – Salmon*, para. 203.

[981] Such a manner for determining the ALOP is precisely the type of situation the Appellate Body warned about in its report in *Australia – Salmon*. See Appellate Body Report, *Australia – Salmon*, para. 203.

7.6.3 Whether the United States took into account the objective of minimizing negative trade effects when determining its appropriate level of sanitary protection

7.6.4 Main arguments of the parties

7.6.4.1 Argentina

7.388. Argentina argues that the application by the United States of the prohibition on imports of fresh (chilled or frozen) bovine meat from Argentina, as contained in 9 CFR 94.1(b), is inconsistent with the United States' obligations under Article 5.4 of the SPS Agreement. According to Argentina, this is because, in the imposition of the prohibition, the United States did not take into account the objective of minimizing negative trade effects.

7.389. Argentina acknowledges the conclusion of the only panel so far to have substantively considered this provision – *EC – Hormones* – that Article 5.4 does not impose an affirmative obligation. In particular, Argentina accepts that the *EC – Hormones* panel focused on the use of the term "should" rather than "shall" in the provision and the reference to an "objective", but argues nonetheless that the drafters would not have inserted a paragraph in the middle of Article 5 that had no operative effect.[982]

7.390. According to Argentina, the United States fails to meet the Article 5.4 requirement of taking into account the objective of minimizing negative trade effects because it does not establish its ALOP in a coherent manner.[983] This is because, according to Argentina, it assigns one of five different categories of risk to a country/region and/or product on the basis of a number of different factors.[984]

7.391. In addition, Argentina submits that the United States' ALOP process maximizes negative trade effects for Argentina because the United States singles out Argentine beef and imposes a zero risk ALOP just for Argentine beef[985], whereas, the United States "has demonstrated by actions that it can take actual steps to reduce the negative trade effects of its approach by adopting an appropriate level of protection in regard to other countries in the region, such as Uruguay".[986] According to Argentina, the United States has assigned risk levels and protocols and provided Uruguay with permission to import, even though APHIS does not recognize Uruguay as FMD-free. All of this is despite the fact that the OIE has classified both Argentina and Uruguay as FMD-free where vaccination is practised which, in Argentina's view, means that their situations are similar.[987] As for the United States' ALOP – 7 USC 8303(a) – Argentina argues that this is not an ALOP, but rather a statute that accords "unfettered discretion" to the Secretary of Agriculture with respect to acceptable levels of FMD risk and its related ALOP.[988]

7.6.4.2 United States

7.392. The United States disagrees with Argentina's contention that Article 5.4 imposes an affirmative obligation.[989] First, it contends that the verb "should", unlike "shall", expresses exhortation and not an obligation.[990] Second, "take into account" relates to a consideration and not an outcome of that consideration.[991] Third, "should" "be take[n] into account" indicates a goal or aim and not an outcome.[992]

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[982] Argentina's first written submission, paras. 292-293.
[983] Argentina's first written submission, para. 295.
[984] Argentina's first written submission, para. 295.
[985] Argentina's first written submission, para. 299.
[986] Argentina's first written submission, para. 300.
[987] Argentina's first written submission, para. 299.
[988] Argentina's response to Panel question No. 40 following the first substantive meeting. See also Argentina's second written submission, para. 153.
[989] United States' first written submission, para. 282.
[990] United States' first written submission, para. 283.
[991] United States' first written submission, para. 283.
[992] United States' first written submission, para. 283.

7.393. The United States also contends that Argentina's argument that Article 5.4 must have operative meaning[993] and its consequent urging the Panel to disagree with the conclusions of the panel in *EC – Hormones* is "mere assertion, without basis in reasoning or law".[994] The United States dismisses Argentina's argument that review of regulations for economic effects in a rulemaking process makes it "susceptible to non-science-based political and economic pressures".[995] The United States also maintains that Argentina has not connected its allegations to the purpose of Article 5.4: determining the ALOP.[996]

7.6.5 Main arguments of the third parties

7.6.5.1 Australia

7.394. Australia agrees with the United States that Article 5.4 of the SPS Agreement does not impose an affirmative obligation.[997]

7.6.5.2 European Union

7.395. The European Union requests the Panel to reject the Article 5.4 claims, considering that the panel's conclusion in *EC – Hormones* is correct, for the reasons discussed in that panel's report.[998]

7.6.6 Analysis by the Panel

7.396. Argentina claims that the United States failed to take into account the objective of minimizing negative trade effects when determining its ALOP and that this is inconsistent with Article 5.4 of the SPS Agreement. The Panel recalls that Article 5.4 provides that "Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects."

7.397. The only other panel to address a claim under Article 5.4 was the panel in *EC – Hormones.* That panel examined the language in Article 5.4 of the SPS Agreement and concluded that Article 5.4 does not impose an affirmative obligation on Members.[999] The panel's analysis was centred on the use of the words "should" (as opposed to "shall") and "objective"[1000] in the provision.

7.398. Argentina contends that this Panel should depart from the reasoning of the panel in *EC – Hormones* because a proper interpretation of the word "should" would impart a stronger connotation and thus a positive obligation on the part of importing Members. In particular, Argentina relies on the Appellate Body Report in *Canada – Aircraft,* which was adopted after the panel report in *EC – Hormones*, in which the Appellate Body said that the word "should" is not always used to imply an exhortation, but can also be used "to express a duty [or] obligation".[1001] In that case, the Appellate Body examined the word "should" in the context of the whole of the provision at issue (Article 13 of the DSU) and concluded that it was used in a normative rather than exhortative sense. [1002] The Appellate Body reached a similar conclusion about the meaning of the word "should" in Article 11 of the DSU in its report on *Mexico – Taxes on Soft Drinks*. [1003]

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[993] Argentina's first written submission, para. 294.
[994] United States' first written submission, para. 284.
[995] United States' first written submission, para. 285, citing Argentina's first written submission, para. 297.
[996] United States' first written submission, para. 285.
[997] Australia's third-party submission, para. 21.
[998] European Union's third-party submission, para. 51.
[999] Panel Reports, *EC – Hormones (Canada)*, para. 8.169; *EC – Hormones (US)*, para. 8.166. However, the panel explained that the objective of minimizing negative trade effects is nonetheless to be taken into account in the interpretation of other provisions of the SPS Agreement.
[1000] Panel Reports, *EC – Hormones (Canada)*, para. 8.169; *EC – Hormones (US)*, para. 8.166.
[1001] Appellate Body Report, *Canada – Aircraft*, para. 187.
[1002] Appellate Body Report, *Canada – Aircraft*, para. 187.
[1003] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51 (citing Appellate Body Report, *Canada – Aircraft*, para. 187). See also Panel Report, *Guatemala – Cement II*, fn 854 to para. 8.196 ("Although

7.399. The Appellate Body acknowledged in both of these reports that the word "should" may be used in *either* the exhortative or normative sense. Therefore, just as the use of the word "should" is not always used to imply an exhortation, it is also not always used to express a duty or obligation. Indeed, in *Canada – Aircraft,* the Appellate Body explained that its conclusion as to the meaning of the word "should" in Article 13.1 was based on the context of Article 13 as a whole.

7.400. Applying the guidance of the Appellate Body from *Canada – Aircraft* and *Mexico – Taxes on Soft Drinks* does not mandate a conclusion that the panel in *EC – Hormones* was incorrect and that Article 5.4 imposes an affirmative obligation. Rather, the Panel must undertake a similar contextual analysis to the use of the word "should" in Article 5.4.

7.401. Article 5.4 states that WTO Members *should* "take into account the objective of minimizing negative trade effects" when determining the ALOP. Prior panels and the Appellate Body have interpreted the phrase "take into account"[1004] to mean "take into consideration, notice"[1005]. The panel in *US – COOL* also clarified that an obligation to take something into account does not require any particular result of that consideration.[1006] In the case of Article 5.4, it is the "objective of minimizing negative trade effects" that must be taken into account or considered. The Appellate Body in *US – Tuna II (Mexico)* noted that an "objective" is an aim or goal.[1007]

7.402. Following the guidance in *Canada – Aircraft* and *Mexico – Taxes on Soft Drinks*, we examine the use of the word "should" in the context of Article 5.4 as a whole, a provision that refers to consideration of a goal without needing to arrive at a particular result. It is difficult in this light to conclude that the word "should" as used in Article 5.4 is intended to impose a positive obligation on Members.

7.403. This understanding is reinforced by examining the broader context of the rest of the SPS Agreement. The SPS Agreement contains five instances of the use the word "should", whereas the word "shall" is used 37 times, illustrating to us that the use of "should" as opposed to "shall" in any particular provision of this Agreement was a deliberate choice. Moreover, the word "shall" appears in Article 5.5[1008] and Article 5.6[1009] – provisions immediately following Article 5.4 and also dealing with the ALOP. The decision of the negotiators to use the word "should" in Article 5.4 and then "shall" in Articles 5.5 and 5.6 must be given meaning. We consider that to impart the word "should" in this context with other than an exhortative meaning would frustrate the intention of the negotiators of the SPS Agreement and could result in the Panel adding to the rights and obligations provided in the covered agreements, contrary to the requirements of Article 3.2 of the DSU.

7.404. In sum, having regard to the language of the whole provision as well as the context of the other provisions on the ALOP and the rest of the SPS Agreement, the Panel concludes that the use of the word "should" cannot be read as imposing an affirmative obligation on WTO Members such that they must or shall take into account the objective of minimizing negative trade effects when

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the word 'should' is often used colloquially to imply an exhortation, it can also be used 'to express a duty [or] obligation.'")

[1004] Or similar phrases such as "taking into account" and "taking account of".

[1005] Appellate Body Report, *Korea – Various Measures on Beef*, para. 111; see also Panel Report, *US – COOL*, para. 7.776.

[1006] Panel Report, *US – COOL*, para. 7.776.

[1007] Appellate Body Report, *US – Tuna II (Mexico)*, para. 313

[1008] Article 5.5 provides:

> With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member *shall* avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members *shall* cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee *shall* take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves. (emphasis added)

[1009] Article 5.6 provides:

> …Members *shall* ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility. (footnote omitted, emphasis added)

determining their appropriate level of protection. Therefore, we see no compelling reasons to depart from the reasoning of the panel in *EC – Hormones*, and conclude that Article 5.4 does not impose a positive obligation. Thus, the Panel will not make findings with respect to whether the United States has complied with Article 5.4.

7.405. Assuming, however, for the sake of argument that Article 5.4 does impose a positive obligation, in our view Argentina's claim must nevertheless fail because it has not made a *prima facie* case that the United States failed to consider the objective of minimizing negative trade effects when determining its ALOP.

7.406. In this regard, we recall that the Appellate Body has concluded that generally accepted canons of evidence (in civil law, common law, and, in fact, in most jurisdictions) apply in WTO dispute settlement, i.e. that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[1010] To make a *prima facie* case, a complaining party must present sufficient evidence that, "in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case."[1011] Pursuant to this understanding, it is Argentina that bears the burden of proving that the United States did not take into account the objective of minimizing negative trade effects when it determined its ALOP for FMD.[1012]

7.407. In support of its claims, the only evidence Argentina offers with a view to proving that the United States failed to consider the objective of minimizing negative trade effects is to point out that the United States did not in fact adopt an ALOP that, in Argentina's view, actually minimizes negative trade effects.[1013] As noted above, we disagree with Argentina that the United States' ALOP for FMD is not sufficiently clear to apply the SPS Agreement, and that the United States applies an ALOP for Argentina that is "as if" it were zero. Even assuming that Argentina is correct that the United States' ALOP is "as if" it were zero, this is not sufficient to prove that the United States did not take into account the objective of minimizing negative trade effects when it determined that ALOP. The Appellate Body confirmed in *Australia – Salmon* that a WTO Member may set its ALOP at zero.[1014] As a zero ALOP would permit the most highly-trade restrictive measures possible, we do not see how a coherent reading of the SPS Agreement could permit a zero ALOP and yet allow another Member to use the adoption of that ALOP as the only evidence in support of a claim of violation of Article 5.4.

7.408. Furthermore, we recall that the concept of "take into account" does not mandate a particular result. Thus, the adoption of the least trade-restrictive ALOP is not required by Article 5.4. Our understanding is confirmed by the right of Members to determine their own ALOP, which has been re-affirmed by multiple panels and the Appellate Body.[1015] We find that Argentina has not made a *prima facie* case that the United States failed to take into account the objective of minimizing negative trade effects when determining its ALOP.

7.6.6.1 Conclusion

7.409. In sum, the Panel agrees with the panel in *EC – Hormones* that Article 5.4 does not impose a positive obligation on Members. Our conclusion was reached following an analysis of the use of the term "should" in the context of Article 5.4 as a whole and in the rest of the SPS Agreement. Even assuming, for the sake of the argument, that Argentina could raise a claim under Article 5.4, we find that it has not made a *prima facie* case as the only evidence and argumentation it has put forward in support of its position is the deduction that because, in Argentina's view, the United States adopted a trade-restrictive ALOP, it must not have considered the objective of minimizing negative trade effects when determining that ALOP.

[1010] Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66; see also Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323 at 335-337.

[1011] Appellate Body Report, *EC – Hormones*, para. 104.

[1012] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[1013] Argentina's second written submission, para. 152; Argentina argues that "[t]he United States *should* have adopted an ALOP which minimizes negative trade effects".

[1014] Appellate Body Report, *Australia – Salmon*, para. 125.

[1015] See Appellate Body Reports, *EC – Hormones*, para. 172; *US/Canada – Continued Suspension*, para. 692; and Panel Report, *US – Poultry (China)*, para. 7.244.

7.6.7 Whether the United States' measures are more trade-restrictive than required to achieve the United States' ALOP

7.6.7.1 Relevant legal provisions

7.410. The SPS Agreement contains two provisions that relate to the obligation of ensuring that SPS measures are applied only to the extent required to achieve the regulating Member's ALOP. Article 2.2 of the SPS Agreement, setting forth the basic obligation at issue, reads:

> Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

7.411. Article 5.6 of the SPS Agreement reads:

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

7.412. In turn, footnote 3 to Article 5.6 reads:

> For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

7.413. As explained by the panel in *EC – Hormones*, Article 5.6 constitutes a "specific application" of the basic obligation provided in the first requirement of Article 2.2.[1016] Therefore, we first address whether the United States' measures at issue are consistent with Article 5.6 before moving to an analysis of such measures under the first requirement of Article 2.2.

7.6.7.2 Main arguments of the parties

7.6.7.2.1 Argentina

7.414. Argentina claims that the United States' measures are inconsistent with Article 5.6 because alternative measures are reasonably available to the United States, taking into account technical and economic feasibility, which would achieve its ALOP for FMD while being significantly less trade restrictive than the measures in force as of the time of the establishment of the Panel.[1017]

7.415. With respect to the United States' prohibition on imports of fresh (chilled or frozen) beef, Argentina identifies the following alternative measures: (i) the import protocols set forth in Article 8.5.23 of the Terrestrial Code, which contains recommendations concerning the importation of meat from countries or zones where vaccination is practised[1018]; and (ii) the import protocols set forth in 9 CFR 94.22.[1019]

[1016] Panel Reports, *EC – Hormones (Canada)*, para. 8.99; *EC – Hormones (US)*, para. 8.96.

[1017] Argentina's first written submission, para. 305.

[1018] Argentina's first written submission, para. 307. Argentina also refers to Article 8.5.22 of the Terrestrial Code, containing recommendations for importation of meat from countries or zones where vaccination is not practiced. We understand that such a provision is not relevant to Argentina's claim, as vaccination against FMD is practised in Northern Argentina. Our understanding finds support in Argentina's second written submission, where Argentina clarifies that the provision of the Terrestrial Code whose application it considers to be an alternative measure is that "for imports of fresh beef from areas that are FMD-free *with* vaccination". (Argentina's second written submission, para. 155 (emphasis added))

[1019] Argentina's first written submission, para. 308. See also Argentina's second written submission, para. 155.

7.416. Argentina contends that both sets of protocols are reasonably available to the United States, as evidenced by the fact that the former are recommended by the OIE[1020], while the latter are currently applied by APHIS to imports of fresh (chilled or frozen) beef from Uruguay and are similar to those APHIS applied to Argentine fresh beef in 1997.[1021] According to Argentina, the approval of imports of Argentine fresh (chilled or frozen) beef under either set of mitigating protocols would be "far less restrictive" than the "total ban" currently in place.[1022] As to the ability of the proposed alternatives to achieve the United States' ALOP, Argentina notes that the United States has "rejected" the protocols under Article 8.5.23 of the Terrestrial Code because it claims to have a higher ALOP.[1023] However, according to Argentina, the application of the protocols under 9 CFR 94.22 would achieve the United States' ALOP. In its view, such protocols are similar to the protocols under Article 8.5.25 of the Terrestrial Code for fresh beef from FMD-*infected* areas where vaccination is practiced[1024], and are therefore "safe and redundant" when applied to products originating from regions that, like Northern Argentina, are FMD-free where vaccination is practised.[1025] Moreover, Argentina contends, with respect to FMD, that Uruguay has essentially the same sanitary condition as Northern Argentina, as both regions share the same OIE designation as FMD-free regions where vaccination is practised.[1026] Hence, Argentina argues, the same protocols applied to imports from Uruguay would achieve the United States' ALOP if extended to imports from Northern Argentina.

7.417. With respect to the United States' prohibition on imports of FMD-susceptible animals and animal products from Patagonia, the alternative measure identified by Argentina is the addition of Patagonia to the list of FMD-free countries or regions under 9 CFR 94.1(a) and the consequent application of the general protocols under 9 CFR 94.11 for such countries or regions that share land borders with regions not included in the list.[1027]

7.418. In Argentina's opinion, the fact that APHIS recognized Santa Catarina, which has "a sanitary situation similar to Patagonia", as FMD-free indicates that the measure in question is reasonably available to the United States.[1028] Further, Argentina argues that the authorization of imports from Patagonia under the protocols in 9 CFR 94.11 would be significantly less trade-restrictive than the "outright prohibitions" maintained by the United States.[1029] As to the ability of the proposed alternative to achieve the United States' ALOP, Argentina maintains that APHIS' 2005 favourable risk assessment and 2007 Proposed Rule for Patagonia South both indicate that allowing imports of FMD-susceptible animals and animal products from that region present a level of risk that meets the United States' ALOP.[1030] The same conditions, Argentina contends, prevail in Patagonia North B, as evidenced, *inter alia*, by the OIE's recognition of the region as FMD-free where vaccination is not practised in 2007 based on Chapters 4.3 and 8.5 of the Terrestrial Code.[1031] Moreover, in Argentina's opinion, the fact that Patagonia and Santa Catarina have a

[1020] Argentina's first written submission, para. 307.
[1021] Argentina's first written submission, para. 308; Argentina's response to Panel question No. 44 following the first substantive meeting; Argentina's second written submission, paras. 162, 164.
[1022] Argentina's first written submission, para. 320 (quoting Panel Report, *Australia – Salmon*, para. 8.182). See also Argentina's response to Panel question No. 44 following the first substantive meeting; Argentina's second written submission, para. 164.
[1023] Argentina's second written submission, para. 155 (referring to United States' first written submission, para. 299). Argentina does not offer any arguments concerning the ability of the recommendations under Article 8.5.23 of the Terrestrial Code to achieve the United States' ALOP.
[1024] Argentina's response to Panel question No. 44 following the first substantive meeting; Argentina's second written submission, paras. 156-161.
[1025] Argentina' first written submission, paras. 315-316; Argentina's second written submission, para. 177.
[1026] Argentina' first written submission, paras. 312-316; Argentina's opening statement at the first meeting of the Panel, para. 46; Argentina's second written submission, para. 173.
[1027] Argentina's second written submission, para. 182. See also Argentina's first written submission, paras. 502-503; Argentina's response to Panel question No. 44 following the first substantive meeting.
[1028] Argentina's first written submission, para. 498.
[1029] Argentina's first written submission, para. 506 (quoting Panel Report, *Australia – Salmon*, para. 8.182).
[1030] Argentina's first written submission, para. 501; Argentina's second written submission, para. 182.
[1031] Argentina's first written submission, paras. 497, 501; see also Argentina's opening statement at the second meeting of the Panel, para. 93.

similar sanitary situation and share the same OIE FMD-status designation indicates that imports from the two regions should be treated "in the same manner".[1032]

7.419. Argentina argues that APHIS' 2014 risk analyses for Patagonia and Northern Argentina submitted by the United States as Exhibits USA-133 and USA-169, respectively, "confirm" and "corroborate" its claims that the above-mentioned alternative measures would achieve the United States' ALOP if applied to imports of the relevant products from the two regions.[1033] In Argentina's opinion, the Panel is "authorized to consider and rely upon this evidence to the extent it deems necessary to discharge its duty under Article 11 of the DSU".[1034]

7.420. Argentina takes issue with the United States' argument that if the importing Member has a higher ALOP than would be achieved by measures based on an international standard, a panel cannot conduct its own assessment of the level of protection achieved by an alternative measure unless the importing Member conducts its own risk assessment.[1035] According to Argentina, such an argument is "completely circular", in that it allows the importing Member to eschew a panel review simply by failing to conduct a risk assessment, thus reading Article 5.6 out of the SPS Agreement.[1036] Moreover, Argentina asserts that Article 5.7 of the SPS Agreement cannot be invoked as a qualified exemption to the obligations set forth in Article 5.6.[1037] In its view, there is "no textual or conceptual reason" to consider that the obligation to ensure that SPS measures are not more trade-restrictive than required to achieve the ALOP under Article 5.6 would apply only to measures based on risk assessments under Article 5.1 and not to provisionally adopted measures applied pursuant to Article 5.7.[1038]

7.6.7.2.2 United States

7.421. The United States submits that, because of the insufficiency of scientific evidence available at the time of the Panel's establishment, an assessment of a less trade restrictive alternative under Article 5.6 would not be possible to complete. The United States argues that its adoption of a valid provisional measure in accordance with Article 5.7 reflects the core issue of the insufficiency of scientific evidence in connection with Argentina's ability to control and to mitigate FMD within its borders. The United States asserts that, because APHIS was still conducting its evaluation of the credibility of the sanitary structures in Northern Argentina and Patagonia, its measures should not be examined under Article 5.6, but rather under Article 5.7.[1039] In this regard, the United States disagrees with Argentina's depiction of APHIS' review of its requests as a "total ban" because, in its view, APHIS is simply "implementing due diligence" vis-à-vis Northern Argentina and Patagonia in light of their FMD history[1040], consistently with the OIE's approach.[1041] The United States takes the view that a provisional measure validly maintained by a Member under Article 5.7 while reviewing the level of risks posed by imports from another Member cannot be more trade-restrictive than required to achieve that Member's ALOP[1042], because the insufficiency of the evidence justifying the maintenance of such a measure prevents a "full, scientific assessment of risks"[1043] and thus leaves the determination of the level of risk an "open scientific question".[1044] In the United States' opinion, it is incumbent upon the exporting Member seeking market access to submit the scientific evidence necessary for such a full assessment of risks, and a panel cannot fill any scientific lacunae left by that Member.[1045] For this reason, the United States argues that even

[1032] Argentina's first written submission, para. 502. See also Argentina's second written submission, para. 182.
[1033] See Argentina's opening statement at the second meeting of the Panel, paras. 14, 93, 102; Argentina's response to Panel question No. 53 following the second substantive meeting.
[1034] Argentina's response to Panel question No. 53 following the second substantive meeting.
[1035] Argentina's second written submission, para. 167.
[1036] Argentina's second written submission, paras. 167-169; see also Argentina's opening statement at the second meeting of the Panel, para. 16.
[1037] Argentina's response to Panel question No. 39 following the second substantive meeting.
[1038] Argentina's response to Panel question No. 39 following the second substantive meeting.
[1039] United States' first written submission, para. 292.
[1040] United States' first written submission, para. 293.
[1041] United States' first written submission, para. 294.
[1042] United States' second written submission, para. 104. See also United States' response to Panel question No. 39 following the second substantive meeting.
[1043] United States' response to Panel question No. 39 following the second substantive meeting.
[1044] United States' response to Panel question No. 46 following the first substantive meeting.
[1045] United States' response to Panel question No. 39 following the second substantive meeting.

if the Panel were to find that its measures are not covered by the disciplines of Article 5.7, it should refrain from making findings under Article 5.6, lest it rule on "complex regulatory issues without the benefit of a full record".[1046]

7.422. Further, the United States argues that Argentina failed to demonstrate that the identified alternative measures would achieve the United States' ALOP.[1047] In the United States' view, a determination of whether such alternatives would meet its ALOP depends not only on the geography and the OIE FMD-status of Northern Argentina and Patagonia, but also on the credibility of the sanitary measures in place in such regions to prevent and control FMD.[1048]

7.423. With respect to Argentina's proposed alternatives to the United States' prohibition on imports of fresh (chilled or frozen) beef, the United States argues, first, that the application of the protocols under Article 8.5.23 of the Terrestrial Code would not meet its ALOP, which is higher than that of the OIE.[1049] In particular, the United States asserts that it does not accept the OIE category of FMD-free countries or region where vaccination is practised.[1050] This is because, the United States explains, the vaccination of cattle against FMD "introduces risks related to the immunological response within the vaccinated herd", as "some individual animals in the herd may have a limited response" resulting in "partial or no immunity". In addition, the United States is concerned that current FMD vaccines may have residual Non Structural Proteins (NSP) that "could result in the detection of NSP antibodies in vaccinated animals", thereby not allowing the differentiation between vaccinated and infected animals.[1051]

7.424. The United States disagrees with Argentina that the protocols under 9 CFR 94.22 are similar to those recommended by the OIE for imports of meat from FMD-infected countries or regions, as the former are more stringent than the latter on several scores.[1052] The United States also takes issue with Argentina's argument that because Northern Argentina and Uruguay have similar FMD situations, the protocols applied to Uruguay under 9 CFR 94.22 would achieve the United States' ALOP if applied to imports from Northern Argentina.[1053] For the United States, the fact that the two regions share the same OIE FMD-status designation is not dispositive of whether products therefrom pose the same level of risk[1054], because such designations only provide broad indications of the level of risk and the underlying process is mostly confidential and based on the applicant Member's dossier.[1055] According to the United States, differences between Northern Argentina and Uruguay in terms of surface area, cattle population in relation to the number of veterinarians, borders with regions of higher FMD risk, and the credibility of sanitary authorities distinguish the FMD situations in the two regions.[1056] In its view, Argentina has not effectively addressed such factors, nor has it provided any scientific evidence concerning similarities between Northern Argentina and Uruguay, thereby failing to meet the burden set forth by the Appellate Body in *Australia – Apples*.[1057]

7.425. Similarly, with respect to Argentina's proposed alternatives to the United States' prohibition on imports of FMD-susceptible animals and animal products from Patagonia, the United States argues that Argentina's claim must fail because Argentina failed to substantiate the underlying premise that Patagonia has a similar FMD situation as Santa Catarina.[1058] In the United States' view, the "key differentiation" between Patagonia and Santa Catarina is the fact that APHIS was able to "draw a conclusion as to the appropriateness of the import authorization terms"

[1046] United States' response to Panel question No. 57 following the first substantive meeting.
[1047] United States' first written submission, paras. 297-298.
[1048] United States' first written submission, para. 296.
[1049] United States' first written submission, para. 299; United States' response to Panel question No. 45 following the first substantive meeting; United States' second written submission, paras. 105-106.
[1050] United States' first written submission, para. 299.
[1051] United States' first written submission, para. 299.
[1052] United States' second written submission, paras. 112-114.
[1053] United States' first written submission, para. 297; United States' second written submission, para. 107.
[1054] United States' first written submission, para. 297; United States' second written submission, paras. 108-109.
[1055] United States' second written submission, paras. 109-110. See also Ibid. paras. 118-123.
[1056] United States' first written submission, para. 297 (referring to paras. 308-310).
[1057] United States' response to Panel question No. 44 following the first substantive meeting (quoting Appellate Body Report, *Australia – Apples*, para. 364).
[1058] United States' first written submission, para. 298.

applied to imports from Santa Catarina, whereas at the time of the Panel's establishment it had not reached such a determination with respect to imports from Patagonia.[1059] This is because, the United States contends, in 2008 SENASA extended its original request for the recognition of Patagonia South to Patagonia North B and introduced "changes to the sanitary boundaries" between the two areas.[1060]

7.426. Finally, the United States asserts that the 2014 risk analyses for Patagonia and Northern Argentina, submitted as Exhibits USA-133 and USA-169 respectively, cannot cure Argentina's failure to meet its burden of providing sufficient scientific evidence to show that its proposed alternatives would meet the United States' ALOP, as such documents were submitted after the Panel's establishment.[1061] In the United States' opinion, the information submitted reflects data collected by APHIS after the date of the Panel's establishment, and thus cannot be used by Argentina in an attempt to show that scientific evidence was sufficient on that date. The United States further asserts that the Panel may rely on such documents only for a finding as to "the significant effort and substantial work done by APHIS to ensure that its review of Argentina's application is thorough and well documented".[1062]

7.6.7.3 Main arguments of the third parties

7.6.7.3.1 China

7.427. In China's opinion, because the United States' claims that the Terrestrial Code is not sufficient to achieve its ALOP, it could be reasonably assumed that the measures currently applying to other WTO Members (such as Uruguay and Santa Catarina) have properly achieved the United States' ALOP. For China, the salient factual question centres on whether the sanitary situation of Northern Argentina and Patagonia is comparable to those of Uruguay and Santa Catarina.[1063] China notes the Appellate Body's statement in *Australia – Apples* that, in conducting an analysis under Article 5.6, a panel must independently assess whether the less trade-restrictive alternatives proposed by the complainant would achieve the respondent's ALOP.[1064] Accordingly, in China's opinion, this Panel should reach a determination based on the totality of scientific evidence identified by Argentina.[1065]

7.6.7.3.2 European Union

7.428. In the European Union's view, an SPS measure is more trade restrictive than necessary to achieve the importing Member's ALOP only "if there is another measure reasonably available taking into account technical and economic feasibility that achieves the ALOP and is significantly less restrictive of trade".[1066] The European Union notes that Argentina does not contest that the United States is FMD-free where vaccination is not practised; nor does Argentina challenge Section 94.1(a), which provides that Argentina is *not* a region that is FMD-free. The European Union believes that Argentina bears the onus of proving the existence of such an alternative measure by relying on "evidence that is scientific in nature, in keeping with the overall design and architecture of the SPS Agreement".[1067] The European Union further considers that the Panel should accept Argentina's claims under Article 5.6 only if the facts of the case establish that a prohibition on imports from territories where FMD exists is not an acceptable measure to prevent the introduction of FMD into the protected territories, taking into consideration the guidance provided by the recommendations in the Terrestrial Code.[1068]

[1059] United States' first written submission, para. 298.
[1060] United States' first written submission, para. 318. See also Ibid. para. 298.
[1061] United States' opening statement at the second meeting of the Panel, para. 67.
[1062] United States' response to Panel question No. 53 following the second substantive meeting.
[1063] China's third-party submission, para. 45.
[1064] China's third-party response to Panel question No. 14.
[1065] China's third-party response to Panel question No. 14.
[1066] European Union's third-party response to Panel question No. 14.
[1067] European Union's third-party response to Panel question No. 14.
[1068] European Union's third-party submission, para. 55.

7.6.7.4 Analysis by the Panel

7.429. The issue before the Panel is whether the maintenance of the United States' prohibitions on imports of fresh (chilled or frozen) beef from Northern Argentina and of FMD-susceptible animals and animal products from Patagonia is more restrictive than required to achieve the United States' ALOP for FMD.

7.430. In *Australia – Salmon*, the Appellate Body confirmed the panel's reasoning that footnote 3 to Article 5.6 provides a three-pronged test to establish a violation of Article 5.6. Specifically, the Appellate Body held that:

> [T]he three elements of this test under Article 5.6 are that there is an SPS measure which:
>
> (1) is reasonably available taking into account technical and economic feasibility;
>
> (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and
>
> (3) is significantly less restrictive to trade than the SPS measure contested.[1069]

7.431. The burden rests on the complaining party to demonstrate that there is an alternative measure that meets all three requirements in Article 5.6.[1070] In the Appellate Body's view, the above-mentioned elements "are cumulative in the sense that, to establish inconsistency with Article 5.6, all of them have to be met".[1071] Therefore, "[i]f any of these elements is not fulfilled, the measure in dispute would be consistent with Article 5.6".[1072] The panel in *India – Agricultural Products* considered that the cumulative nature of the three elements entails that a panel may address them in any order it considers appropriate.[1073]

7.432. In this dispute, Argentina argues that alternative measures are reasonably available to the United States which would achieve the United States' ALOP for FMD and would be significantly less trade restrictive than the prohibitions in place as of the time of the establishment of the Panel. With respect to the United States' prohibition on imports of fresh (chilled or frozen) beef from Northern Argentina, the alternative measures put forward by Argentina are:

a. The OIE's recommendations for importation of fresh meat of cattle and buffaloes (excluding feet, head and viscera) from FMD-free countries or zones where vaccination is practised, contained in Article 8.5.23 of the Terrestrial Code; and

b. The mitigating protocols contained in 9 CFR 94.22.[1074]

7.433. With respect to the United States' prohibitions on imports of FMD-susceptible animals and animal products from Patagonia, the alternative measure identified by Argentina is the addition of the region to the list of FMD-free regions in 9 CFR 94.1(a), coupled with the application of the mitigating protocols set forth in 9 CFR 94.11 for regions included in that list that share a land border with a region not recognized by APHIS as FMD-free.[1075]

7.434. Argentina contends[1076], and the United States does not disagree[1077], that the above-mentioned measures are reasonably available to APHIS. Similarly, the United States does not

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[1069] Appellate Body Report, *Australia – Salmon*, para. 194.
[1070] Appellate Body Report, *Japan – Agricultural Products II*, para. 126. See also Panel Report, *India – Agricultural Products*, para. 7.525.
[1071] Appellate Body Report, *Australia – Salmon*, para. 194.
[1072] Appellate Body Report, *Australia – Salmon*, para. 194. See also Appellate Body Report, *Australia – Apples*, para. 337.
[1073] Panel Report, *India – Agricultural Products*, para. 7.524. See also Panel Report, *Australia – Apples*, para. 7.1106.
[1074] Argentina's second written submission, para. 155.
[1075] Argentina's second written submission, para. 182.
[1076] See e.g. Argentina's first written submission, paras. 307-309, 496-499.

contest that allowing imports of fresh (chilled or frozen) beef from Northern Argentina and of FMD-susceptible animals and animal products from Patagonia under certain mitigating protocols would be significantly less trade-restrictive than the challenged prohibitions. The element lying at the core of the parties' disagreement – and the crux of the matter before the Panel – is therefore whether the alternative measures identified by Argentina would meet the United States' ALOP for FMD.

7.435. In *Australia – Apples*, the Appellate Body explained that, in order to assess whether a less trade-restrictive alternative measure would meet an importing Member's ALOP, a panel must make a number of "factual findings".[1078] Specifically:

> [The] panel must identify both the level of protection that the importing Member has set as its appropriate level, and the level of protection that would be achieved by the alternative measure put forth by the complainant. Thereupon the panel will be able to make the requisite comparison between the level of protection that would be achieved by the alternative measure and the importing Member's appropriate level of protection. If the level of protection achieved by the proposed alternative meets or exceeds the appropriate level of protection, then (assuming that the other two conditions in Article 5.6 are met) the importing Member's SPS measure is more trade restrictive than necessary to achieve its desired level of protection.[1079]

7.436. In that dispute, the Appellate Body also clarified that Members' obligations under Article 5.6 are distinct from those under Article 5.1.[1080] Indeed, according to the Appellate Body, "Article 5.1 seeks to ensure that a Member's SPS measure has an appropriate scientific basis, whereas Article 5.6 seeks to ensure that appropriate limits are placed on the trade-restrictiveness of a Member's SPS measure."[1081] Thus, the Appellate Body found that it would not be appropriate for a panel to find a measure to be inconsistent of Article 5.6 solely on the ground that the same measure is in breach of Article 5.1.[1082]

7.437. Rather, according to the Appellate Body, Article 5.6 "requires the panel itself to objectively assess, *inter alia*, whether the alternative measure proposed by the complainant would achieve the importing Member's appropriate level of protection."[1083] In the Appellate Body's view, such an assessment is to be conducted on the basis of the scientific evidence on the record.[1084] Relevant evidence may include an exporting Member's "risk assessment …, if such a risk assessment exists".[1085] Moreover, "elements of the importing Members' risk assessment as well as other factual elements outside that risk assessment may be relevant in seeking to establish that an alternative measure meets the appropriate level of protection".[1086]

7.438. In light of the guidance from the Appellate Body set out above, we disagree with the United States that we are precluded from carrying out our assessment of Argentina's claims under Article 5.6 because, at the time of the establishment of the Panel, APHIS had not completed its own risk analyses for Northern Argentina and Patagonia. Whether the United States' measures are based on a risk assessment as appropriate to the circumstances is a question distinct from whether the alternative measures identified by Argentina would achieve the United States' ALOP. We answered the former question in section 7.5.3.3 above, and we must now address the latter.

[1077] See e.g. United States' first written submission, para. 292.
[1078] Appellate Body Report, *Australia – Apples*, para. 368.
[1079] Appellate Body Report, *Australia – Apples*, para. 344 (referring to Appellate Body Report, *Australia – Salmon*, para. 208).
[1080] Appellate Body Report, *Australia – Apples*, para. 341 (referring to Appellate Body Report, *Australia – Salmon*, para. 224).
[1081] Appellate Body Report, *Australia – Apples*, para. 341.
[1082] Appellate Body Report, *Australia – Apples*, para. 358.
[1083] Appellate Body Report, *Australia – Apples*, para. 356.
[1084] Appellate Body Report, *Australia – Apples*, paras. 364-365 (referring to Appellate Body Report, *Australia – Salmon*, paras. 209-213).
[1085] Appellate Body Report, *Australia – Apples*, para. 365 (referring to Appellate Body Report, *Australia – Salmon*, paras. 209-213).
[1086] Appellate Body Report, *Australia – Apples*, para. 365 (referring to Appellate Body Report, *Australia – Salmon*, paras. 209-213).

7.439. We note the United States' argument that the maintenance of a provisional measure under Article 5.7 would preclude the applicability of Article 5.6 as well as of Article 5.1. In paragraph 7.304 above, we have concluded that the United States' measures are not covered by the exemption in Article 5.7. Therefore, we see no need to consider the United States' argument further, and find that Article 5.6 is applicable to the measures at issue.

7.440. According to the standard set forth by the Appellate Body, our first task is to determine the United States' ALOP with respect to FMD. In paragraph 7.387 above, we have already concluded that the United States' ALOP for FMD is to prevent the introduction into or dissemination of FMD in the United States' territory. We noted that the United States' ALOP is higher than that of the OIE and we have described this ALOP as being somewhere between low and zero risk.[1087]

7.441. Next, we must assess the level of protection achieved by Argentina's alternative measures, with a view to determining whether such a level of protection is equal to, or higher than, the United States' ALOP. Before we undertake such an assessment, we find it useful to make a few preliminary observations.

7.442. First, our determination as to the level of protection achieved by the alternative measures identified by Argentina should not be reached in the abstract, but rather proceed from the specific level of risk posed by imports of the relevant products from Northern Argentina and Patagonia. Indeed, according to the Appellate Body, "imposing the same sanitary measure for different situations does not necessarily result in the same level of protection", as in "situations representing different risks … the same sanitary measure might result in different levels of protection".[1088] Therefore, we must determine whether applying the alternative measures identified by Argentina to its products would achieve the United States' ALOP, in light of the level of risk posed by those products.

7.443. Second, as explained by the Appellate Body, we must conduct our assessment based on the relevant scientific evidence on the record. In this respect, we note that, during the course of these proceedings, the United States placed on the record two documents containing scientific information with regard to the FMD situation in Northern Argentina and Patagonia. In particular, at the first substantive meeting of the Panel in January 2014, the United States submitted a risk analysis[1089] concerning the Patagonia region as a whole (comprising both Patagonia South and Patagonia North B), which is dated January 2014. Moreover, shortly before the Panel's meeting with the experts in September 2014, the United States published a risk analysis[1090] concerning Northern Argentina, which is dated 1 April 2014. The United States then submitted the risk analysis to the Panel.

7.444. The parties disagree as to the use the Panel should make of the above-referenced documents. According to Argentina, the documents in question are part of the evidence submitted to the Panel, and therefore the Panel should feel "authorized to consider and rely upon this evidence to the extent it deems necessary to discharge its duty under Article 11 of the DSU".[1091] Conversely, according to the United States, Argentina did not meet its burden of proof, which requires it to show that its proposed alternatives would meet the United States' ALOP; and APHIS' production of the documents at hand after the Panel's establishment cannot cure such a deficiency.[1092] If anything, according to the United States, the Panel may rely on the documents for a finding as to "the significant effort and substantial work done by APHIS to ensure that its review of Argentina's application is thorough and well documented".[1093]

7.445. We note that a panel's functions under Article 11 of the DSU include the duty to make "an objective assessment of the facts of the case". As we see it, the only way a panel can properly

[1087] See para. 7.387 above.
[1088] Panel Report, *Australia – Salmon*, para. 8.123.
[1089] 2014 Risk Analysis for Patagonia, (Exhibit USA-133).
[1090] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169). We note that, although not published until 29 August 2014, this document has been in the United States' possession since April 2014 (see front-page). At that time, the Panel was preparing its written questions to the experts selected to assist it in this dispute.
[1091] Argentina's response to Panel question No. 53 following the second substantive meeting.
[1092] United States' opening statement at the second meeting of the Panel, para. 67.
[1093] United States' response to Panel question No. 53 following the second substantive meeting.

discharge such a duty is by relying on the evidence placed on the record by the parties – and, in certain circumstances, by exercising its powers under Article 13.1 of the DSU to "seek information and technical advice from any individual or body which it deems appropriate". We recall that, prior to the first substantive meeting, we asked the parties to provide any risk assessment in their possession that might be relevant to our assessment of Argentina's claims.[1094]

7.446. We consider that once a piece of evidence has been placed on the record, it is a panel's duty to evaluate its content irrespective of which party has submitted it and determine whether that supports the claims or defences relevant to the legal provisions at issue. Doing so does not amount to a panel overstepping its authority to make a case for the complainant.[1095] The practice of panels and the Appellate Body lends support to this interpretation. For instance, in *Japan – Apples*, the Appellate Body stated that a panel "has the authority to make findings and draw conclusions on arguments and allegations of fact that are made by the respondent and relevant to a claim pursued by the complainant".[1096] As another example, in *India – Quantitative Restrictions*, the Appellate Body did not object to the panel's reliance on the defendant's responses to the complainant's arguments in establishing whether the complainant had made a *prima facie* case.[1097]

7.447. Further, the fact that the documents submitted by the United States post-date the establishment of the Panel does not, in our view, prevent us from evaluating their content. As the Appellate Body stated in *Canada – Aircraft*, "a panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs".[1098] More specifically, in *EC – Selected Customs Matters*, the Appellate Body explained that "[e]vidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel", therefore a panel "is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment".[1099] That being said, as we discussed in paragraph 7.118 above, we consider that the appropriate point in time to be taken into account in assessing the sanitary situation in Argentina for purposes of evaluating the consistency of the United States' measures with the covered agreements is the date of the establishment of the Panel. Therefore, in these circumstances, we do not consider it appropriate to consider factual evidence relating to the period post-dating the establishment of the Panel.

7.448. We are aware that the conclusions reached by APHIS in the risk analyses submitted by the United States concerning the FMD situation in Northern Argentina and Patagonia refer to the circumstances that existed at the time such analyses were completed, i.e. January and April 2014, respectively. However, they also refer to documents produced by Argentina that cover the time-period from 2005 until APHIS' site visit in November 2013. Thus, the conclusions APHIS reached are based on information that both *pre-dates* and *post-dates* the establishment of the Panel. Therefore, APHIS' conclusions cannot be dispositive of our assessment of the situation in Northern Argentina and Patagonia as it existed *at the time of the establishment of the Panel*, i.e. 28 January 2013. Consequently, in evaluating the content of the exhibits in question, it would not be appropriate for us to retrospectively apply the *conclusions* APHIS reached to the question before us, namely whether, at the time of the Panel's establishment, Argentina's proposed alternative measures would achieve the United States' ALOP.[1100] However, to the extent that we are relying on the information that pre-dates the establishment of the Panel – such as citation to information submitted by Argentina on the sanitary situations in Northern Argentina or Patagonia - and not on

[1094] Panel question No. 27 in advance of the first substantive meeting.

[1095] See e.g. Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.215 ("While a panel cannot make the case for a complainant, it has the competence 'freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration.") (quoting Appellate Body Report, *EC – Hormones*, para. 156).

[1096] Appellate Body Report, *Japan – Apples*, para. 135 (emphasis omitted). See also Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1138-1140, where the Appellate Body clarified that a panel may, and should, have recourse to its powers under Article 13.1 of the DSU to request relevant evidence in possession of the respondent that is necessary to objectively assess the complainant's claims.

[1097] Appellate Body Report, *India – Quantitative Restrictions*, para. 142.

[1098] Appellate Body Report, *Canada – Aircraft*, para. 192 (emphasis original).

[1099] Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

[1100] See Appellate Body Report, *US – Cotton Yarn*, para. 78.

the conclusions APHIS drew from that information, we see no problem in including that information in our analysis.

7.449. Third, we want to clarify the role of individual experts in these proceedings. The United States refers to the Appellate Body's statement in *US/Canada – Continued Suspension* that a panel's consultations with experts "should not seek to test whether the experts would have done a risk assessment in the same way and would have reached the same conclusions as the risk assessor".[1101] In our view, the situation in this dispute is different from that with which the Appellate Body was confronted in *US/Canada – Continued Suspension* and is directly comparable to that presented in *Australia – Apples*.[1102] Indeed, the experts consulted by the Panel were not tasked with reviewing any risk analysis produced by APHIS with respect to the FMD situations in Northern Argentina and Patagonia for the purpose of evaluating the compliance of the United States' measures with Article 5.1. Rather, the role of the experts here is to assist us in our own assessment of the scientific evidence on the record, consistently with the guidance from the Appellate Body to panels under Article 5.6. In this respect, the Appellate Body distinguished the obligation in Article 5.6 from that under Article 5.1 in the following terms:

> Caution not to conduct a *de novo* review is appropriate where a panel reviews a risk assessment conducted by the importing Member's authorities in the context of Article 5.1. However, the situation is different in the context of an Article 5.6 claim. The legal question under Article 5.6 is not whether the authorities of the importing Member have, in conducting the risk assessment, acted in accordance with the obligations of the *SPS Agreement*. Rather, the legal question is whether the importing Member could have adopted a less trade-restrictive measure.[1103]

7.450. Finally, we are mindful that the task before us, as described by the Appellate Body in *Australia – Apples*, is to determine whether the alternative measures identified by Argentina achieve the *United States'* ALOP. Therefore, in carrying out our analysis, we find it useful to consider the 11 factors that APHIS takes into account when it makes its determinations pursuant to 9 CFR 92.2:

> (1) The authority, organization, and infrastructure of the veterinary services organization in the region;
>
> (2) Disease status (i.e., is the restricted disease agent known to exist in the region?);
>
> (3) The extent of an active disease control program, if any, if the agent is known to exist in the region;
>
> (4) The vaccination status of the region;
>
> (5) The status of adjacent regions with respect to the agent;
>
> (6) The degree to which the region is separated from adjacent regions of higher risk through physical or other barriers;
>
> (7) The extent to which movement of animals and animal products is controlled from regions of higher risk, and the level of biosecurity regarding such movements;

[1101] United States' comments on the experts responses to Panel questions, para. 3 (quoting Appellate Body Report, *US/Canada – Continued Suspension*, para. 592).

[1102] In *US/Canada – Continued Suspension*, the measure at issue was aimed at protecting human life or health "from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs". (See Panel Reports, *US – Continued Suspension*, para. 7.434; *Canada – Continued Suspension*, para. 7.425) Conversely, in both *Australia – Apples* and the present dispute, the measures at issue aim to protect animal life or health "from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms". (See Panel Report, *Australia – Apples*, para. 7.139. See also para. 7.48 above)

[1103] Appellate Body Report, *Australia – Apples*, para. 356.

(8) Livestock demographics and marketing practices in the region;

(9) The type and extent of disease surveillance in the region;

(10) Diagnostic laboratory capacity; and

(11) Policies and infrastructure for animal disease control in the region.[1104]

7.451. We note that these factors are similar to those used by the OIE when it makes its determinations of official recognition of disease status.[1105]

7.452. Where relevant, we also find it useful to refer to the standards, guidelines and recommendations developed by the OIE and embodied in the Terrestrial Code and the Terrestrial Manual. We note that this is consistent with the United States own view. In particular, we recall that APHIS attaches weight to the exporting country's compliance with the relevant provisions of the Terrestrial Code and Terrestrial Manual when reviewing requests filed under 9 CFR 92.2.[1106] Finally, while our review is not bound by the disciplines of Article 5.1, we draw guidance from the requirement in that provision that the "risk assessment techniques developed by the relevant international organizations" be taken into account.

7.453. With these considerations in mind, we now turn to our assessment of whether the alternative measures identified by Argentina would have achieved the United States' ALOP for FMD as of the date of the establishment of the Panel. First, we examine the proposed alternatives for fresh (chilled or frozen) beef from Northern Argentina. Next, we turn to the proposed alternatives for FMD-susceptible animals and animal products from Patagonia.

7.6.7.4.1 The proposed alternatives to the United States' prohibition on imports of fresh (chilled or frozen) beef from Northern Argentina

7.454. To determine whether the mitigating effects of the proposed measures would permit fresh (chilled or frozen) beef from Northern Argentina to achieve the United States' ALOP, we find it useful to examine the evidence on the record in light of the 11 factors APHIS used to evaluate the FMD-status of an applicant country or region at the time Argentina filed its request.

7.6.7.4.1.1 The authority, organization and infrastructure of the veterinary services organization in the region

7.455. In its 2005 risk analysis for Patagonia South, APHIS examined numerous aspects relating to SENASA's authority, organization, infrastructure and capacity to prevent and control FMD in the whole Argentine territory. With regard to these factors, APHIS' 2005 findings on SENASA are not limited to the Patagonia region but, cover SENASA's policies and actions in the whole Argentine territory. Further, in Drs Batho and Bonbon's views, there is no reason to believe that SENASA's authority, organization and infrastructure in Northern Argentina would be different from those in Patagonia.[1107] Dr Cupit did note key relevant differences between SENASA's activities in the two regions in that vaccination of cattle, serological surveillance, and maturation and deboning of fresh

[1104] See e.g. 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 9. As discussed in fn 31 above, we refer here to the version of 9 CFR 92.2 that was in force at the time of the filing of Argentina's request for authorization of imports of fresh (chilled or frozen) beef, submitted as Exhibit ARG-118.

[1105] Such factors are enumerated in Articles 1.6.4 of the Terrestrial Code, and include: (i) geographical factors; (ii) livestock industry; (iii) relevant veterinary legislation; (iv) veterinary services; (v) the role of farmers, industry, private veterinarians and other relevant groups in FMD surveillance and control; (vi) FMD history in the region; (vii) FMD control and eradication strategies; (viii) vaccines and vaccination; (ix) animal identification and movement controls; (x) FMD laboratory diagnosis carried out in the region; (xi) organization and capacity of approved laboratories; (xii) serological surveillance; (xiii) slaughterhouses and markets; (xiv) coordination with neighbouring countries; (xv) controls in place for swill feeding; (xvi) import control procedures; and (xvii) control measures and contingency planning.

[1106] United States' comment on the OIE's response to Panel question No. 31.

[1107] Dr Batho's response to Panel question No. 31; Dr Bonbon's response to Panel question No. 31. Dr Cupit concurred that the 2005 risk assessment for Patagonia South "could form the basis of the risk assessment for the Argentine territory as a whole" with respect to SENASA's capacity. (Dr Cupit's response to Panel question No. 31)

(chilled or frozen) beef are conducted only in Northern Argentina.[1108] We specifically look at the evidence concerning vaccination (paragraphs 7.468-7.473), serological surveillance (paragraphs 7.489-7.491 and maturation and deboning (paragraphs 7.492-7.493 below.

7.456. APHIS reviewed the legal and administrative sources of SENASA's authority. It observed that a number of laws, decrees and resolutions from the period 1903-2001 enable SENASA to take action to prevent and control FMD.[1109] Most of APHIS' assessment in this regard focused on the reorganization of SENASA in 2001-2002, which was intended "to increase the efficiency of the existing geopolitical system and address international perception that SENASA had not been transparent with its trading partners about its FMD situation".[1110] SENASA' reorganization included: the centralization of command and control of the animal health programs[1111]; enhanced internal monitoring, accountability, and compliance with national policies[1112]; an increased emphasis on border controls[1113]; the redefinition of the boundaries of regional units in order to achieve a more efficient distribution of personnel according to the level of activity occurring in each region[1114]; the repartition of tasks between SENASA's central and regional offices in terms of, *inter alia*, preventive, control, and eradication actions, monitoring of compliance with SENASA's policies, investigation of suspected outbreaks, movement controls, updating of registries and databases, assessment of field staff performance, inspection of slaughtering and processing plants and storage facilities, and the establishment of the methods and test protocols used in laboratories.[1115] The laws and regulations governing SENASA and its structure have remained unchanged since the 2005 risk assessment.[1116]

7.457. APHIS then reviewed SENASA's financial and human resources. It found that SENASA's 2003 budget was of 117 million pesos (equivalent to approximately USD 39 million), and noted that, according to SENASA officials, the system was "self-sufficient" because of the fees required for SENASA's services.[1117] It also found that, in 2005, SENASA employed 3,479 people, out of which 2,558 were permanent staff and 572 were veterinarians.[1118] It also observed that SENASA could hire contract staff if need be.[1119] In terms of the veterinarians' licensure and training, APHIS noted that official SENASA veterinarians must renew their professional registration on a yearly basis and must comply with training requirements in line with the main strategies of the 2001 National Eradication Plan for FMD.[1120] The laws and regulations governing the licensure, qualifications, and training of veterinarians are unchanged from the 2005 risk assessment.[1121]

7.458. Next, APHIS turned to the role of SENASA's field offices in the identification of premises and the census of FMD-susceptible animals. It found that all premises with agricultural animal production must register with the National Sanitary Registry of Ag-Producers (RENSPA) and obtain an identification number.[1122] Each RENSPA number provides information as to the location, ownership or rental status, and number of FMD-susceptible animals on the premises concerned.[1123] It also includes the name of a SENASA veterinarian, who, according to the law, is in charge of reporting problems that he or she may observe on the premises.[1124] Failure to report animal health problems observed on the premises entails a fine for the owner, the responsible veterinarian, or both, as well as the forfeiture of the indemnity normally paid by SENASA to cattle owners in case of stamping-out following an FMD outbreak.[1125] A centralized database containing information on the census of all animals on the premises and the FMD test status of each premise is maintained

[1108] See Dr Cupit's response to Panel question No. 31.
[1109] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 9-10.
[1110] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 10-11.
[1111] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 11.
[1112] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 11.
[1113] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 11.
[1114] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 11.
[1115] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 12-14.
[1116] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 10-16.
[1117] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 15.
[1118] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 15.
[1119] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 15.
[1120] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 17.
[1121] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 17-18.
[1122] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 18.
[1123] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 18-19.
[1124] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 18.
[1125] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 18.

and updated by SENASA's field officials. Monthly statistical reports are generated from this database.[1126] Argentina submitted information to APHIS covering the period between 2002 and 2009, which indicated that identification of premises and the census of FMD-susceptible animals by SENASA had not essentially changed since the 2005 risk assessment.[1127]

7.459. APHIS further reviewed the controls on the movement of FMD-susceptible animals throughout the Argentine territory. It observed that a movement permit (DTA) is required when animals go to slaughter, go to market, cross provincial lines or are exported internationally and, generally, if an animal is moved from one farm to another.[1128] Movement permits record the RENSPA numbers of both the premises of origin and the premises of destination of every single animal, and allow SENASA to detect unlawful attempts to ship more animals than the census would predict.[1129] The animals being moved must carry visible identification marks and be transported in vehicles approved by SENASA upon checking compliance with the washing and disinfection requirements.[1130] SENASA officials must inspect the animals concerned on the premises of origin and verify official documents before shipment.[1131] When animals are shipped from farm to farm, the DTA must be returned within 15 days to the local office of destination, and that office will contact the local office of origin of the shipment arrival.[1132] SENASA's staff, the owners of or persons responsible for the animals, the shippers and the slaughter plants are all jointly liable for failure to comply with the above-referenced requirements.[1133] SENASA provided information to APHIS covering the period between 2003 and 2007, which indicated that movement controls in Argentina remained essentially unchanged since the 2005 risk assessment.[1134]

7.460. Finally, APHIS reviewed SENASA's regulations concerning swill feeding. It found that the only form of swill feeding permitted in Argentina is the feeding of pigs with leftovers of food substances of animal origin coming from stores approved by the competent authority to manufacture or sell food.[1135] Authorization is conditioned on compliance with the requirement that the swill be subjected to a cooking process guaranteeing destruction of pathogenic organisms.[1136] The laws and regulations governing swill feeding remain unchanged since 2005.[1137]

7.461. Based on all the foregoing, APHIS concluded in 2005 that "Argentina has the veterinary and regulatory infrastructure to adequately monitor and control any incursion of FMD into the country".[1138] Specifically, APHIS considered that "[t]here is sufficient monitoring of animal premises and movements to permit effective surveillance and detection programs that would result in sufficient administration of eradication efforts, if needed".[1139] APHIS also "expressed confidence" that SENASA's delays in reporting the 2000-2001 FMD outbreaks would not occur again if analogous events were to occur today.[1140]

7.462. We do not see any evidence on the record indicating that, throughout the period leading up to the Panel's establishment, SENASA's authority, organization, infrastructure, and capacity to prevent and control FMD in the Argentine territory changed in a manner that would contradict APHIS' conclusions in 2005. Indeed, as Dr Batho noted, SENASA's infrastructure "improved

[1126] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 19.
[1127] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 18-19, 52-54. Although APHIS also refers to some additional information SENASA provided in November 2013, as stated in para. 7.447 above, the Panel does not rely on this evidence.
[1128] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 21.
[1129] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 21.
[1130] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 21-22.
[1131] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 22.
[1132] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 22.
[1133] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 21.
[1134] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 54-56. Although APHIS also refers to some additional information SENASA provided in November 2013, as stated in para. 7.447 above, the Panel does not rely on this evidence.
[1135] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 22-23.
[1136] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 23.
[1137] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 18-19.
[1138] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 23.
[1139] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 23.
[1140] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 23.

dramatically" during that period in several respects.[1141] For instance, SENASA's 2013 annual budget was 1.3 billion pesos (equivalent to approximately USD 200 million)[1142], i.e. over five times more than in 2005. Further, in 2013 SENASA employed 5,500 people, of which 1,054 are veterinarians.[1143] Thus, SENASA's personnel doubled from 2005 to 2013. Also, in order to improve animal tracking and movement controls throughout the Argentine territory, in 2006 SENASA instituted a compulsory cattle identification program, requiring that all calves born after September 2007 carry official tags.[1144]

7.463. Other evidence on the record is consistent with APHIS' 2005 conclusions. The European Commission's most recent evaluation of the FMD situation in Argentina available on the record (dated 2006) concludes that the Argentine veterinary authority "is well organised".[1145] In its evaluations over the period 2002-2006, the Commission did identify some "deficiencies" with respect e.g. to animal identification and movement controls.[1146] Despite such deficiencies, the Commission concluded that SENASA's ability to prevent and control FMD was "satisfactory"[1147] and progressively reopened its market to fresh (chilled or frozen) beef from Northern Argentina according to the disease history of each province.[1148] In his responses to Panel questions, Dr Cupit confirmed that SENASA imposes "strict movement controls that operate within Argentina especially between the FMD-free areas with and without vaccination and also the buffer/border region with Paraguay and Bolivia".[1149] Further, in Dr Bonbon's view, the evidence on the record shows that "the capacities of the Argentinian veterinary services … have improved since 1997", when Argentina was authorized to export fresh (chilled or frozen) beef to the United States.[1150]

7.464. The evidence on the record indicates that, at the time of the establishment of the Panel, SENASA had the necessary veterinary and regulatory infrastructure to adequately monitor and control FMD in Northern Argentina.

7.6.7.4.1.2 Disease status of the region

7.465. Northern Argentina experienced multiple outbreaks in several provinces throughout the period 2000-2001[1151] and an outbreak in the province of Salta in September 2003.[1152] Further, in February 2006, a number of infected animals were detected in a farm in the northern province of Corrientes[1153], close to the border with Paraguay. SENASA promptly notified the outbreak to the OIE and to Argentina's trading partners[1154] and immediately took action by adopting

[1141] See Dr Batho's response to Panel question No. 57. Dr Bonbon added that, in light of such improvements, the risk of FMD-transmission from imports of fresh (chilled or frozen) beef from Northern Argentina is "lower than it was in 1997". (Dr Bonbon's response to Panel question No. 57)

[1142] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 16.

[1143] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 16.

[1144] Resolución SENASA 754/2006. Créase la Clave Unica de Identificación Ganadera, que identificará individualmente a cada productor pecuario del país en cada establecimiento agropecuario. Apruébase el "Procedimiento para Reidentificación de Bovinos, (Resolución SENASA 754/2006), (Exhibit ARG-143).

[1145] European Commission's 2006 Report, (Exhibit ARG-111), p. 21.

[1146] See e.g. Final Report Of A Mission Carried Out In Argentina From 18 To 29 November 2002 In Order To Evaluate The Controls In Place Over Foot And Mouth Disease And To Assess Public Health Controls Over The Production Of Fresh Meat. (DG(SANCO)/8715/2002 – MR Final), (European Commission's 2002 Report), (Exhibit ARG-107), p. 27; European Commission's 2006 Report, (Exhibit ARG-111), p. 21.

[1147] Dr Cupit's response to Panel question No. 31.

[1148] See e.g. Decision of the European Commission No. 2002/45/EC (22 January 2002), (Exhibit ARG-114); Decision of the European Commission No. 2002/68/EC (30 January 2002), (Exhibit ARG-108); Decision of the European Commission No. 2002/198/EC (7 March 2002), (Exhibit ARG-109); Commission Regulation (EU) N° 206/2010 of 12 March, 2010, laying down lists of third countries, territories or parts thereof authorized for the introduction into the European Union of certain animals and fresh meat and the veterinary certification requirements, 2010 O.J. (L 073) 1-121, (Commission Regulation No. 206/2010), (Exhibit ARG-1).

[1149] Dr Cupit's response to Panel question No. 36.

[1150] Dr Bonbon's response to Panel question No. 44.

[1151] See United States' first written submission, paras. 78-80.

[1152] Argentina's facsimile of 5 September 2003, (Exhibit USA-51); SENASA's letter of 29 August 2003, (Exhibit USA-83).

[1153] See FMD Impact Worksheet, (Exhibit USA-54).

[1154] OIE, Final Report, 74th General Session (2006), (Exhibit USA-55), pp. 45, 144.

Resolutions 35/2006 and 36/2006.[1155] Measures adopted by SENASA included the stamping-out of the infected animals and susceptible species that had been in contact therewith, the imposition of movement restrictions in all the departments sharing borders with the department affected, the establishment of control and disinfection posts around the restricted areas, ring vaccination, and active surveillance of susceptible animals in an area of 13 kilometres surrounding the affected premises.[1156] According to APHIS, such measures were effective and the February 2006 outbreak was "quickly contained and eliminated".[1157] These conclusions were shared by the European Commission which, in its 2006 evaluation of the FMD situation in Northern Argentina, stated that, overall, "the FMD outbreak in the province of Corrientes was controlled in a rapid, transparent and effective manner".[1158] There have not been any further FMD outbreaks in Northern Argentina since 2006 .

7.466. As part of the process for the reinstatement of Northern Argentina's status as FMD-free where vaccination is practised, the OIE conducted a site visit to the region in 2006.[1159] The FMD-free where vaccination is practised status was reinstated in 2007[1160] and has been confirmed every year thereafter. In 2011, the OIE also recognized the border protection zone established along the Argentine border with Bolivia, Paraguay and Brazil as FMD-free where vaccination is practised.[1161]

7.6.7.4.1.3 The extent of an active disease control program, if any, if FMD is known to exist in the region

7.467. Numerous laws, decrees and regulations adopted between 1968 and 2013 establish a number of requirements and procedures aimed at preventing outbreaks of FMD in Northern Argentina and at controlling the disease should an outbreak occur.[1162] The National Eradication Plan for FMD adopted by SENASA in 2001 as a response to the multiple FMD outbreaks experienced throughout the period July 2000-April 2001 sets out SENASA's general objectives and the measures to be put in place in order to eradicate FMD from the Argentine territory.[1163] The Plan is complemented by a number of subsequent regulations detailing SENASA's actions for the prevention and control of FMD. Table 4 below provides an overview of the content of such regulations by broad topic.

[1155] Resolución SENASA 35/2006, (Exhibit ARG-5); Resolución SENASA Nº 36/06, (Resolución SENASA 36/2006), (Exhibit ARG-6).
[1156] Resolución SENASA 35/2006, (Exhibit ARG-5); Resolución SENASA 36/2006, (Exhibit ARG-6); SENASA's letter of 26 July 2006, (Exhibit ARG-97).
[1157] USDA/APHIS, Veterinary Services, *APHIS Evaluation of the Status of the Brazilian State of Santa Catarina Regarding Foot-and-Mouth Disease, Classical Swine Fever, Swine Vesicular Disease, and African Swine Fever* (revised 16 August 2010), (2010 Risk Evaluation for Santa Catarina), (Exhibit ARG-7), p. 24.
[1158] European Commission's 2006 Report, (Exhibit ARG-111), p. 20.
[1159] OIE's response to Panel question No. 13.
[1160] OIE Resolution XXI of 2007, (Exhibit ARG-10).
[1161] OIE Resolution 14 of 2011, (Exhibit ARG-12).
[1162] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 29-31.
[1163] Plan de Erradicación de la Fiebre Aftosa: Resolución SENASA 5/01, (Resolución SENASA 5/2001), (Exhibit ARG-4/USA-37).

Table 4: Overview of the regulations in force in Argentina to prevent and control FMD

Action by SENASA	Relevant regulations on the record
Regionalization of the Argentine territory and implementation of domestic sanitary barriers	2001 National Eradication Plan[1164]; SENASA Resolution 25/2001[1165]; SENASA Resolution 58/2001[1166]; SENASA Resolution 112/2002[1167]; SENASA Resolution 1051/2002[1168]; SENASA Resolution 725/2005[1169]; SENASA Resolution 148/2008[1170]; SENASA Resolution 1282/2008.[1171]
Strategic and systematic vaccination	2001 National Eradication Plan[1172]; SENASA Resolution 33/2002[1173]; SENASA Resolution 385/2008[1174]; SENASA Resolution 181/2010[1175]; SENASA Resolution 82/2013.[1176]
Epidemiological and serological surveillance	2001 National Eradication Plan[1177]; SENASA Resolution 540/2010.[1178]
Vaccine quality control	SENASA Resolution 351/2006.[1179]
Identification of premises and tracking of FMD-susceptible animals	2001 National Eradication Plan[1180]; SENASA Resolution 754/2006[1181]; SENASA Resolution 540/2010[1182]; SENASA Resolution 563/2012.[1183]
Immediate and mandatory reporting of FMD cases by authorities and private citizens	2001 National Eradication Plan[1184]; SENASA Resolution 540/2010.[1185]
International border controls on movement of FMD-susceptible animal and animal products	1968 Decree on the inspection of products and sub-products of animal origin[1186]; SENASA Resolution 58/2001[1187]; SENASA Resolution 178/2001[1188]; SENASA Resolution 37/2002[1189]; SENASA Resolution 112/2002[1190]; SENASA Resolution 15/2003 (imposing special requirements for export of FMD-susceptible products to the European Union)[1191]; SENASA Resolution 391/2003 (imposing special requirements for export of FMD-susceptible products to the European Union)[1192]; SENASA Resolution 725/2005[1193]; SENASA Resolution 754/2006[1194]; SENASA Resolution 148/2008[1195]; SENASA Resolution 810/2009[1196]; SENASA Resolution 563/2012[1197]; SENASA Resolution 82/2013[1198]; SENASA Resolution 238/2013.[1199]

[1164] Resolución SENASA 5/2001, (Exhibit ARG-4/USA-37).
[1165] Resolución SENASA Nº 25/01, (Resolución SENASA 25/2001), (Exhibit ARG-92).
[1166] Resolución SENASA 58/2001, (Exhibit USA-59).
[1167] Resolución SENASA Nº 112/02, (Resolución SENASA 112/2002), (Exhibit ARG-94).
[1168] Resolución SENASA 1051/2002, (Exhibit USA-60).
[1169] Resolución SENASA 725/2005, (Exhibit USA-61).
[1170] Resolución SENASA 148/2008, (Exhibit USA-62).
[1171] Resolución SENASA 1282/2008, (Exhibit USA-109).
[1172] Resolución SENASA 5/2001, (Exhibit ARG-4/USA-37).
[1173] Resolución SENASA 33/2002. Apruébase la Guía de Procedimientos para Planes de Vacunación y el Formulario para la Auditoría de Planes de Vacunación, (Exhibit ARG-153).
[1174] Resolución SENASA 385/2008. Estrategias de Vacunación Antiaftosa para bovinos/bubalinos en todo el Territorio Nacional, (Exhibit ARG-139).
[1175] Resolución SENASA 181/2010. Modificación de la estrategia de vacunación en relación con la erradicación de la fiebre aftosa, (Resolución SENASA 181/2010), (Exhibit ARG-134).
[1176] Resolución SENASA 82/2013. Vacunación antiaftosa en la Zona Patagónica Norte A. Prohibición, (Resolución SENASA 82/2013), (Exhibit ARG-138).
[1177] Resolución SENASA 5/2001, (Exhibit ARG-4/USA-37).
[1178] Resolución SENASA 5/2001, (Exhibit ARG-4/USA-37); Resolución SENASA 540/2010, (Exhibit ARG-135).
[1179] Resolución SENASA Nº 351/06, (Exhibit ARG-18).
[1180] Resolución SENASA 5/2001, (Exhibit ARG-4/USA-37).
[1181] Resolución SENASA 754/2006, (Exhibit ARG-143).
[1182] Resolución SENASA 5/2001, (Exhibit ARG-4/USA-37); Resolución SENASA 540/2010, (Exhibit ARG-135).
[1183] Resolución SENASA 563/2012. Identificación de las especies Bovino y Bubalino. Deróganse los Artículos 2°, 3° y 4° de la Resolución N° 370/2006 de la ex Secretaría de Agricultura, Ganadería, Pesca y Alimentos, (Resolución SENASA 563/2012), (Exhibit ARG-144).
[1184] Resolución SENASA 5/2001, (Exhibit ARG-4/USA-37).
[1185] Resolución SENASA 5/2001, (Exhibit ARG-4/USA-37); Resolución SENASA 540/2010, (Exhibit ARG-135).
[1186] Decreto 4238/68. Reglamento de Inspección de Productos, Subproductos y Derivados de Origen Animal, (Decreto 4238/68), (Exhibit ARG-147).
[1187] Resolución SENASA 58/2001, (Exhibit USA-59).
[1188] Resolución SENASA 178/2001. Reglaméntase el procedimiento que garantiza la identificación del origen de los animales que se movilicen con cualquier destino. Derógase la Resolución Nº 1991/2000, (Exhibit ARG-152).

Action by SENASA	Relevant regulations on the record
Slaughterhouse practices (ante- and post-mortem inspections, deboning and maturation, disinfection requirements, etc.)	1968 Decree on the inspection of products and sub-products of animal origin[1200]; SENASA Circular No. 3307/1997[1201]; SENASA Resolution 15/2003 (imposing special requirements for export of FMD-susceptible products to the European Union)[1202]; SENASA Resolution 391/2003 (imposing special requirements for export of FMD-susceptible products to the European Union)[1203]; SAGPYA Resolution 310/2004[1204]; SENASA Notice No. 4056/2013.[1205]
Sanitary steps concerning susceptible, infected, and contact animals in case of an outbreak	2001 Manual of procedures for the handling of outbreaks[1206]; SENASA Resolution 35/2002[1207]; SENASA Resolution 37/2002[1208]; SENASA Resolution 35/2006 (setting forth measures to contain the outbreak in the Province of Corrientes)[1209]; SENASA Resolution 36/2006 (establishing stamping-out to contain the outbreak in the Province of Corrientes)[1210]; 2007 National Plan for the Containment of FMD.[1211]

7.6.7.4.1.4 The vaccination status of the region

7.468. In Northern Argentina, the entire cattle population is currently required to be vaccinated on a yearly basis. Cattle between 6 and 24 months of age and animals to be moved from one facility to another are vaccinated twice a year.[1212] In the border protection zone, vaccination is conducted twice a year for all categories of cattle, as well as buffaloes.[1213]

[1189] Resolución SENASA 37/2002. Establécense medidas de prevención de difusión de la fiebre aftosa ante la aparición de casos clínicos de la enfermedad, o ante la existencia de factores de riesgo tales como el ingreso de animales, productos o fómites desde zonas infectadas o presuntamente infectadas, o deficiencias en la cobertura vacuna, (Resolución SENASA 37/2002), (Exhibit ARG-142).
[1190] Resolución SENASA 112/2002, (Exhibit ARG-94).
[1191] Resolución SENASA 15/2003. Créase el "Sistema de Identificación de Ganado Bovino para Exportación", que deberá ser aplicado en forma obligatoria en todos los campos inscriptos en el "Registro de Establecimientos Rurales proveedores de ganado para Faena de Exportación" y por los Establecimientos que se inscriban en el "Registro de Establecimientos Pecuarios de Engorde a Corral proveedores de bovinos para faena con destino a exportación, (Resolución SENASA 15/2003), (Exhibit ARG-145).
[1192] Resolución SENASA 391/2003. Inscripción de "Establecimientos Rurales de Origen", que provean bovinos nacidos y criados en los mismos con destino a "Establecimientos Rurales Proveedores de Ganado para Faena de Exportación". Requisitos, (Resolución SENASA 391/2003), (Exhibit ARG-146).
[1193] Resolución SENASA 725/2005, (Exhibit USA-61).
[1194] Resolución SENASA 754/2006, (Exhibit ARG-143).
[1195] Resolución SENASA 148/2008, (Exhibit USA-62).
[1196] Resolución SENASA 810/2009. Apruébase el Certificado Unico de Lavado y Desinfección de Vehículos para el Transporte de Animales Vivos, (Exhibit ARG-149).
[1197] Resolución SENASA 563/2012, (Exhibit ARG-144).
[1198] Resolución SENASA 82/2013, (Exhibit ARG-138).
[1199] SENASA, *Certificado Unico de Lavado y Desinfección. Resolución N° 810/2009. Modificación*, Resolución 238/2013 (28 May 2013).
[1200] Decreto 4238/68, (Exhibit ARG-147).
[1201] SENASA Circular No. 3307 (30 July 1997), (Exhibit ARG-151).
[1202] Resolución SENASA 15/2003, (Exhibit ARG-145).
[1203] Resolución SENASA 391/2003, (Exhibit ARG-146).
[1204] Resolución SAGPYA 310/2004. Exigencias a las que deberán ajustarse todos los establecimientos de faena y/o proceso y/o depósito interesados en exportar carnes frescas y/o menudencias. Deróganse las Resoluciones Nros. 1/2003 y 339/2003 – SENASA, (Exhibit ARG-148).
[1205] SENASA Notice No. 4056 informing the minimum frequency of supervisory visits to all types of authorized establishments (4 January 2013), (Exhibit ARG-124).
[1206] Manual de Procedimientos para la Atención de un Foco. SENASA (October 2001), (Exhibit ARG-137).
[1207] SENASA, *Aprueba el Programa para Investigaciones Epidemiológicas y Acciones de Contención ante la Presencia de Sospecha de Foco de Fiebre Aftosa*, Resolución 35/2002 (4 January 2002).
[1208] Resolución SENASA 37/2002, (Exhibit ARG-142).
[1209] Resolución SENASA 35/2006, (Exhibit ARG-5).
[1210] Resolución SENASA 36/2006, (Exhibit ARG-6).
[1211] Resolución SENASA 3/2007. Plan Nacional de Contención de la Fiebre Aftosa, (Exhibit ARG-136).
[1212] Resolución SENASA 181/2010, (Exhibit ARG-134); 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 32-33.
[1213] Resolución SENASA 181/2010, (Exhibit ARG-134). In its 2006 Report, the European Commission referred to the special vaccination regime in force in the border protection zone as "enhanced vaccination". (European Commission's 2006 Report, (Exhibit ARG-111), p. 12) See also, generally, 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 32-33.

7.469. Between 2001 and 2010, pursuant to the 2001 National Eradication Program for FMD, a nation-wide vaccination campaign was put in place and reflected differences between Argentine regions in terms of ecosystems, production systems, animal movement patterns, livestock population density and commercial circuits.[1214] In areas with higher livestock production, cattle density and animal movements, vaccination was undertaken twice a year for all age groups of the bovine population.[1215] In "marginal areas", vaccination was undertaken once a year and a second annual vaccination was undertaken only in identified risk farms.[1216]

7.470. SENASA uses tetravalent vaccines covering serotypes O_1/Campos, A_{24}/Cruzeiro, A/Argentina/2001 and C_3/Indaial.[1217] These serotypes are similar to those covered by the vaccines administered by Uruguayan authorities in 2002.[1218] The vaccines produced and administered by SENASA are checked by a national biosafety committee[1219], and comply with the safety and efficacy tests established by the OIE's Regional Reference Agency at the *Centro Panamericano de Fiebre Aftosa* (PANAFTOSA).[1220] The experts noted that the fact that Northern Argentina is recognized by the OIE as FMD-free where vaccination is practised means that the OIE has determined that the vaccines used are in compliance with the requirements set forth in the Terrestrial Manual.[1221] Moreover, the fact that SENASA's Animal Laboratory is recognized as an OIE Reference Laboratory for FMD has been described by the OIE as a "very positive factor" with respect to the "surveillance element [of] the vaccination campaign".[1222]

7.471. The United States has stated that one of the reasons it does not accept the OIE categorisation of FMD-free regions with vaccination is that current FMD vaccines may have residual Non Structural Proteins (NSP) that "could result in the detection of NSP antibodies in vaccinated animals", thereby not allowing the differentiation between vaccinated and infected animals.[1223] With respect to the likelihood that vaccines used by SENASA in Northern Argentina contain residual NSP, Dr Cupit stated that the evidence on the record is insufficient to draw conclusions as to the manufacture and quality assurance of such vaccines.[1224] He added, however, that the fact that a country or region is recognized by the OIE as FMD-free where vaccination is practised means that the vaccines in use there meet the requirement that they "be purified to reduce NSP content".[1225] Further, in his view, "[w]ith current manufacturing techniques it is possible to exclude the majority of NSPs so that they induce little, if any, NSP-specific antibody".[1226] Thus, Dr Cupit concluded that while the level of NSP in SENASA's vaccines cannot be assumed to be "zero", it is reasonable to expect that such vaccines contain "little" quantities of such proteins.[1227] In Dr Batho's view, SENASA's current vaccines "would not cause problems for

[1214] Resolución SENASA 5/2001, (Exhibit ARG-4/USA-37).

[1215] Agri-Food Health & Quality National Service, *Information provided by SENASA for the recognition of Argentina as a Region comprised in Article 92.2 Title 9, Code of Federal Regulations in regards to FMD* (August 2002), (Information provided by SENASA (August 2002)), (Exhibit ARG-31), pp. 25, 35; Information Provided by SENASA (November 2002), (Exhibit USA-32); Argentina's response to Panel question No. 1 following the second substantive meeting,.

[1216] Information provided by SENASA (August 2002), (Exhibit ARG-31), pp. 25, 35; Information Provided by SENASA (November 2002), (Exhibit USA-32); Argentina's response to Panel question No. 1 following the second substantive meeting.

[1217] Argentina's response to Panel question No. 10, paras. 26-28; 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 34.

[1218] USDA/APHIS, *Risk assessment: Importation of fresh (chilled or frozen) beef from Uruguay* (November 2002), (2002 Risk Assessment for Uruguay), (Exhibit ARG-65), p. 26.

[1219] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 34.

[1220] See Dr Cupit's response to Panel question No. 13, para. 120. PANAFTOSA is a regional scientific centre of the Pan-American Health Organization and the World Health Organization. It was established in 1951 with a view to developing a programme for the control and eradication of FMD in the region. See PANAFTOSA website, *Acerca de PANAFTOSA-OPS/OMS*, http://www.paho.org/panaftosa/index.php?option=com_content&view=article&id=24&Itemid=122 (last accessed 5 December 2014).

[1221] OIE's response to Panel question No. 11, pp. 11-12. This was confirmed by Dr Bonbon in his responses to Panel questions. (See Dr Bonbon's response to Panel question No. 13)

[1222] Transcript of the meeting, para. 1.62.

[1223] United States' first written submission, para. 299.

[1224] Dr Cupit's response to Panel question No. 13.

[1225] Dr Cupit's response to Panel question No. 13.

[1226] Dr Cupit's response to Panel question No. 13.

[1227] Dr Cupit's response to Panel question No. 13.

differentiating between vaccinated and infected animals".[1228] Dr Bonbon stated that he does not know the vaccines used in Northern Argentina, but expressed the view that the fact that the region is recognized by the OIE as FMD-free where vaccination is practised means that the vaccines used "allow for appropriate surveillance of viral circulation".[1229]

7.472. The coverage of vaccination has consistently exceeded 97% of all the subject population since 2001, and was close to or greater than 99% from 2008 to 2012.[1230] In Northern Argentina, only authorized staff trained, registered, accredited, supervised and/or audited by SENASA can administer vaccines.[1231]

7.473. All of the evidence before us thus indicates that SENASA has systematic and compulsory vaccination practices, uses vaccines in line with the requirements of the Terrestrial Manual, and covers virtually all of the bovine population in the region.

7.474. As to the effectiveness of vaccination in reducing the likelihood of transmission of FMD, the United States argues that the vaccination of cattle against FMD "introduces risks related to the immunological response within the vaccinated herd", as "some individual animals in the herd may have a limited response" resulting in "partial or no immunity".[1232] The experts consulted by the panel noted that imports of fresh meat derived from correctly vaccinated animals "have never caused a transmission of FMD in international trade".[1233] According to Dr Cupit, the chain of events that might, in theory, lead to FMD transmission from meat derived from vaccinated cattle is as follows: (a) a vaccinated animal is FMD-infected, but the disease is not detected through ante- and post-mortem inspections; (b) the amount of FMD virus in the animal's meat is sufficient to cause transmission; and (c) the meat is consumed by FMD-susceptible animals.[1234] In Dr Cupit's opinion, the likelihood that event (a) described above could occur in a region that, like Northern Argentina, has been vaccinating for a number of years without an FMD outbreak is "quite low, if not negligible".[1235] Dr Bonbon concurred that the likelihood of such an event occurring in Northern Argentina is "very, very, very low", as vaccination has been practiced in the region for a long time.[1236] He added that the probability that the entire chain of events leading to FMD-transmission occur is "remote".[1237] The OIE also indicated that vaccination is an effective tool for the prevention, control and eradication of FMD.[1238]

7.475. Based on the evidence, we consider that the systematic and compulsory vaccination programme in Northern Argentina effectively reduces the likelihood that an animal in Northern Argentina would become infected with FMD or that if an animal became infected it would transmit the disease to others.

7.6.7.4.1.5 The status of adjacent regions with respect to FMD

7.476. Northern Argentina shares borders with five regions that are recognized by the OIE as FMD-free where vaccination is practised: (i) 765 kilometres with Bolivia (last FMD outbreak in 2007); (ii) 1,570 kilometres with Paraguay (FMD outbreaks in 2003 and 2011); (iii) circa 980 kilometres with the Brazilian States of Paraná (last FMD outbreak in 2005) and Rio Grande do Sul (last FMD outbreak in 2000); and (iv) 866 kilometres with Uruguay (last FMD outbreak in

[1228] Dr Batho's response to Panel question No. 13.
[1229] Dr Bonbon's response to Panel question No. 13.
[1230] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 33-34.
[1231] Final Report Of A Mission Carried Out In Argentina From 3 To 13 July 2006 In Order To Evaluate Animal Health Controls In Place In Particular Over Foot And Mouth Disease, Public Health Control Systems And Certification Procedures (DG(SANCO)/7590/2005 – MR Final), (Exhibit USA-151), pp. 10-11; European Commission's 2006 Report, (Exhibit ARG-111) p. 10; 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 33. We note that this constitutes a significant difference vis-à-vis other regions, such as Uruguay in 2002, where vaccines were distributed free of charge to farmers, who would then administer them directly. (See 2002 Risk Assessment for Uruguay, (Exhibit ARG-65), pp. 26-27)
[1232] United States' first written submission, para. 299.
[1233] Transcript of the meeting, para. 1.259.
[1234] Dr Cupit's response to Panel question No. 6.
[1235] Transcript of the meeting, para. 1.274. See also Ibid. para. 1.279.
[1236] Transcript of the meeting, para. 1.277.
[1237] Transcript of the meeting, para. 1.259.
[1238] Transcript of the meeting, para. 1.65.

2001).[1239] APHIS allows imports of fresh (chilled or frozen) beef from Uruguay into the United States under the protocols contained in 9 CFR 94.22. It also considers the area located in Paraguay near the Argentine border to be "endemic" with respect to FMD.[1240] In 2004, SENASA established a 25 kilometre-wide border protection zone (cordón fronterizo A) along the border with Bolivia and Paraguay. In 2006, it extended the zone to cover the entirety of the border with Paraguay and part of the border with Brazil (cordón fronterizo B).[1241] The border protection zones are subject to special sanitary controls[1242], described in more detail in paragraph 7.483 below, and are recognized by the OIE as FMD-free where vaccination is practised since 2011.[1243]

7.477. We are aware that the fact that Northern Argentina and the other regions mentioned above are all recognized by the OIE as FMD-free where vaccination is practised does not mean that the OIE conducted a comparative analysis between these regions when determining their FMD-statuses.[1244] However, the OIE expressed the view that regions that have the same officially recognized FMD status "should have the same risk mitigation requirements applied to them"[1245] in order to achieve the level of protection achieved by the recommendations set forth in the Terrestrial Code, i.e. preventing the disease in question from being introduced into the importing country in light of the sanitary conditions in the exporting country – what the OIE describes as an "optimal level of animal health security".[1246]

7.478. Northern Argentina also borders three regions that are recognized by the OIE as FMD-free where vaccination is not practised: (i) Chile; (ii) the Brazilian State of Santa Catarina; and (iii) Patagonia.[1247] At the time of the establishment of the Panel, APHIS recognized both Chile and Santa Catarina as FMD-free within the meaning of 9 CFR 94.1(a)[1248] subject to the mitigation protocols under 9 CFR 94.11. APHIS has been applying the same treatment to Patagonia since October 2014.[1249]

7.6.7.4.1.6 The degree to which the region is separated from adjacent regions of higher FMD risk through physical or other barriers

7.479. As noted above, Argentina shares in total circa 4,180 kilometres of borders with regions that are considered by the OIE to be FMD-free where vaccination is practised.[1250] Out of those, approximately 757 kilometres of borders are not marked by rivers: 380 kilometres with Bolivia, 350 kilometres with Paraguay (deviated course of the Pilcomayo river), and 27 kilometres with the Brazilian State of Paraná.[1251] APHIS observed that some of the rivers along the border with Paraguay and Bolivia are navigable; therefore animals could be shipped across.[1252] It also found that some other rivers are dry, so animals may cross on foot.[1253] Finally, we note that Northern Argentina's other border is with Chile a country that is recognized as FMD-free where vaccination is not practised. Furthermore, the border with Chile runs along the Andes mountains, which constitute an effective natural barrier against the cross-border movement of cattle.

[1239] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 27.
[1240] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 23.
[1241] Argentina's first written submission, para. 52; SENASA Resolution 748/2004, referred to in 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 23; Final Report Of A Mission Carried Out In Argentina From 19 To 30 April 2004 In Order To Evaluate Animal Health Controls In Place In Particular Over Foot And Mouth Disease, Public Health Control Systems And Certification Procedures. (DG(SANCO)/7184/2004 – MR Final), (European Commission's 2004 Report), (Exhibit ARG-110), pp. 14, 16; European Commission's 2006 Report, (Exhibit ARG-111), p. 12.
[1242] See European Commission's 2006 Report, (Exhibit ARG-111), p. 12.
[1243] OIE Resolution 14 of 2011, (Exhibit ARG-12)
[1244] Transcript of the meeting, para. 1.123.
[1245] OIE's response to Panel question No. 19.
[1246] Terrestrial Code, Foreword. See also OIE's response to Panel question No. 10.
[1247] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 27.
[1248] See APHIS website, *Foot-And-Mouth and Rinderpest*, available at http://www.aphis.usda.gov/import_export/animals/animal_disease_status.shtml (last accessed 27 November 2014), incorporated in 9 CFR 94.1(a), (Exhibit ARG-64).
[1249] 2014 Notice of Determination on Patagonia, (Exhibit USA-167).
[1250] See para. 7.476 above.
[1251] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 28-30.
[1252] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 42.
[1253] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 42.

7.480. APHIS concluded in 2005 that "[m]ost of the Argentine border is adequately protected by effective natural barriers to reduce the unrestricted flow of animals and animal products from areas of higher risk".[1254]

7.6.7.4.1.7 The extent to which movement of animals and animal products is controlled from regions of higher risk, and the level of biosecurity regarding such movements

7.481. Imports of FMD-susceptible animals and animal products into Northern Argentina occur through 45 international authorized border stations, which include terrestrial, maritime and fluvial ports, and airports.[1255] SENASA officials are assisted at border control points by various security forces, including the National Border Patrol, the Coast Guard, and the National Aeronautical Police.[1256] In total, some 14,000 agents are assigned to managing the international border stations.[1257]

7.482. APHIS also addressed the management of those entry points. It noted that Argentine authorities follow the OIE guidelines regarding imports of products of animal origin considered as possible carriers of FMD.[1258] In particular, they evaluate the level of risk posed by such products and impose mitigating measures accordingly.[1259] In order to be lawfully imported into Argentina, all products derived from FMD-susceptible animals must meet the following requirements: (i) an import permit issued by Argentine authorities; (ii) verification of the health certificate issued by the country of origin; (iii) physical inspection, document control and verification identity of the imported products; (iv) a Restricted Transit Permit for shipments of animal products to processing plants with official SENASA veterinary inspection; (v) quarantine of live animals; (vi) sampling of the products by the National Residue Control in Food Products and Hygiene.[1260] In turn, an import permit is issued upon an analysis of: (i) the type of product that will be imported; (ii) the health status of the exporting region; (iii) the conditions of the slaughtering or processing plant in the region of origin; (iv) the type of shipment; (v) the possible transit of products through other countries; (vi) the efficiency of the border posts at the point of entry into Argentina; and (vii) the expected use of the products.[1261] Inspections are carried out on all products under SENASA's jurisdiction, and consist of questioning, observation, manual inspection of luggage and vehicles.[1262] Auxiliary means such as organic material scanners and dog squads may also be used.[1263] As for non-commercial traffic, travellers are checked at control posts, including airports. Penalties for non-compliance with luggage restrictions include the confiscation of property.[1264]

7.483. With regards to Northern Argentina's shared borders with Bolivia and Paraguay, the evidence before us indicates that in the border protection zone additional measures are in force, including more frequent vaccination[1265], enhanced surveillance, stricter movement controls, and cross-border audits and exchange of information.[1266] Moreover, Argentina participates in bilateral cooperation with Bolivia and Paraguay and in regional efforts under the auspices of PANAFTOSA. In this framework, according to APHIS, "Argentina incorporated border programs, guaranteeing full notification of the epidemiological situation in the country, development of the vaccination campaigns, joint training and reciprocal guarantees strengthening the Regional and National Epidemiological Surveillance Systems".[1267]

[1254] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 30-31.
[1255] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 31-32.
[1256] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 32.
[1257] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 39; 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 37.
[1258] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 33.
[1259] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 33.
[1260] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 34.
[1261] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 33-34.
[1262] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 34.
[1263] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 34.
[1264] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 35-39.
[1265] See para. 7.468 above.
[1266] See European Commission's 2006 Report, (Exhibit ARG-111), p. 12; 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 45.
[1267] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 26.

7.484. SENASA adopted precautionary measures vis-à-vis FMD outbreaks in neighbouring countries a number of times over the last decade. For instance, in 2005, in response to an FMD outbreak in the Brazilian States of Paraná and Mato Grosso do Sul, SENASA implemented a number of preventive measures, including a sanitary alert in the national territory, an import prohibition on FMD-susceptible products from all of Brazil, strengthened epidemiological surveillance, enhanced biosecurity measures, reinforced vaccination and increased border controls.[1268] Further, upon receiving notice of an FMD outbreak in Paraguay in 2001, SENASA "immediately mobilized into action declaring a state of animal health alert throughout the country and strengthening all existing border crossing points to prevent the entry of the FMD virus into Argentina."[1269]

7.485. In light of the above, Dr Batho expressed the view that shared borders with countries that had more recent FMD outbreaks are "well-managed".[1270] Dr Cupit added that Northern Argentina has "strict movement controls" along the "buffer/border region with Paraguay and Bolivia".[1271] Dr Bonbon stated that, because Northern Argentina is recognized by the OIE as FMD-free where vaccination is practised, "one can assume" that its movement control measures are of an adequate efficacy.[1272] In 2005, APHIS concluded that in those areas on the Argentine border "where natural barriers do not exist, government control measures compensate".[1273] The evidence on the record shows that, during the period leading up to the Panel's establishment, the facts underlying APHIS' conclusions in 2005 have not changed to an extent that would warrant a reversal of such conclusions. Indeed, Argentina submitted evidence to APHIS dating between 2001 and 2012 which indicated that the administration of international land border controls and checks on non-commercial traffic remained essentially the same since APHIS' 2005 risk analysis.[1274]

7.486. Based on the evidence, we consider that the movement controls and other measures applied by the Argentine authorities to prevent the incursion of FMD into Northern Argentina effectively protect the region from ingress of animals and animal products from regions of higher FMD-risk.

7.6.7.4.1.8 Livestock demographics and marketing practices in the region

7.487. As the experts have indicated, concentration of cattle is a relevant factor for the risk of spread of FMD[1275]; the lower the density of the susceptible animal population, the lower the risk of spread of the disease.[1276] Northern Argentina has a surface area of approximately 1,106,800 square kilometres and a cattle population of circa 55,000,000.[1277] Thus, the average density of cattle in Northern Argentina is about 49.6 animals per square kilometre. By comparison, Uruguay has a surface area of circa 176,200 square kilometres and a cattle population of approximately 10,400,000.[1278] Thus, Uruguay has a cattle density of about 59 animals per square kilometre. The experts noted that Northern Argentina also has larger herds than Uruguay, meaning that cattle in the region are clustered in larger groups.[1279] While the concentration of animals in a herd may make it easier for FMD to spread within that herd, a greater geographical dispersal of herds facilitates veterinary control and containment in the event of an FMD outbreak.[1280] In light of the above, we consider that the cattle demographics in the region do not constitute a factor of increased risk of spread of FMD in and of themselves or as compared to other regions such as Uruguay.

[1268] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 27.
[1269] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 82.
[1270] Dr Batho's response to Panel question No. 63.
[1271] Dr Cupit's response to Panel question No. 36.
[1272] Dr Bonbon's response to Panel question No. 36 (referring to his response to Panel question No. 34).
[1273] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 30-31.
[1274] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 36-50.
[1275] Dr Bonbon's response to Panel question No. 63.
[1276] Dr Batho's response to Panel question No. 50.
[1277] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 51; Argentina's first written submission, para. 23.
[1278] United States' first written submission, para. 308.
[1279] Dr Batho's response to Panel question No. 63; Dr Bonbon's response to Panel question No. 63.
[1280] For instance, as noted by Dr Cupit, active surveillance is properly performed at the herd level. (See Dr Cupit's reponse to Panel question No. 27) Further, according to Dr Bonbon, containment measures in the case of an FMD outbreak are aimed, *inter alia*, at preventing "herd to herd transmission through aerosols or direct or indirect contacts". (Dr Bonbon's response to Panel question No. 1)

7.488. As to market practices in Northern Argentina, there are over 150 SENASA-approved slaughterhouses in Northern Argentina.[1281] In 2005, APHIS reviewed the biosecurity controls established by SENASA in order to accredit a facility. Such controls include that: (i) animals be kept in pens and not be allowed to exit the facility once they have entered it; (ii) all effluent be treated by separating solids, fats, liquids, and chlorinates out before releasing them to the general sewage system; (iii) effluents from the sanitary complex be individually treated by disinfection before being dumped with the rest of the common, treated effluents; and (iv) raw slaughter and slaughter pathology wastes be processed into nonedible by-products.[1282]

7.489. APHIS further observed that all animals receive an ante-mortem inspection by a SENASA technician upon arrival at the slaughter facility, as well as a post-mortem inspection after slaughter by SENASA field veterinarians and plant staff.[1283] Further, all carcasses are subject to deboning, consisting of the removal of bone and blood clots, under the supervision of the quality control personnel.[1284] They are then matured for a minimum of 24 hours at a temperature of 2 to 10° C. In the event that, at the end of the process, the pH is above 5.9, the carcass is separated from the export beef and only used for domestic consumption.[1285] According to the European Commission's 2006 Report, "[t]he maturation of beef was correctly carried out and well documented in the establishments visited"[1286], and "[t]he official controls and records for ante-mortem, post-mortem and maturation were completed and adequate".[1287]

7.490. In its 1997 risk assessment for Argentina, APHIS assumed that fresh beef deboned and matured to pH 5.8 poses "negligible risk", as the FMD virus does not survive such processes.[1288] Dr Cupit observed that, based on the evidence on the record, slaughterhouse procedures used in Northern Argentina, in particular requirements for deboning, maturation, and ante- and post-mortem inspections, conform to OIE requirements[1289] and "should be as efficacious today as they were in 1997".[1290] Dr Batho stated that there is no reason to believe that such procedures were any less effective at the time of the establishment of the Panel than they were in 1997, when Argentina was allowed to export fresh (chilled or frozen) beef to the United States.[1291] Dr Bonbon took the view that the evidence on the record shows that "the capacities of the Argentinian veterinary services, includ[ing] at slaughterhouse[s], have improved since 1997".[1292]

7.491. We note that, as of 2005, deboned fresh (chilled or frozen) beef was being imported into Patagonia South from areas in Northern Argentina for local consumption. APHIS found that such beef presented "a low risk of introducing the FMD virus into the export region" because, *inter alia*, "it must go through a maturation process that kills the FMD virus".[1293] Dr Cupit observed that "matured, deboned fresh beef from [N]orthern Argentina [has] a very low risk of introducing the FMDV to other export markets as it does to Patagonia", and "would pose a similar or identical risk" irrespective of the market of destination.[1294] This further supports a conclusion that

[1281] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 58.
[1282] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 46-47; 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 58-59.
[1283] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 47. In 2005, APHIS found that no one was specifically assigned to check the feet post-mortem. In 2014, conversely, APHIS found that veterinarians specifically check the feet, muzzle, and tongue for vesicular lesions. (See 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 60)
[1284] See Resolución SENASA 58/2001, (Exhibit USA-59), Article 2.5. See also 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 60.
[1285] See Resolución SENASA 58/2001, (Exhibit USA-59), Article 2.5. See also 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 60.
[1286] European Commission's 2006 Report, (Exhibit ARG-111), p. 15. See also European Commission's 2004 Report, (Exhibit ARG-110), p. 27.
[1287] European Commission's 2006 Report, (Exhibit ARG-111), p. 16. See also European Commission's 2004 Report, (Exhibit ARG-110), p. 27.
[1288] USDA/APHIS, *Risk Assessment: Argentine Beef* (June 1997), (Exhibit ARG-27), p. 5.
[1289] Dr Cupit's response to Panel question No. 44.
[1290] Dr Cupit's response to Panel question No. 44.
[1291] Dr Batho's response to Panel question No. 44.
[1292] Dr Bonbon's response to Panel question No. 44.
[1293] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 71. See also Dr Batho's response to Panel question No. 40.
[1294] Dr Cupit's response to Panel question No. 46. We do note that Dr Cupit was privy to both the 2005 Risk Assessment for Patagonia South and the 2014 Risk Assessment for Patagonia when he answered this question. However, we also note that APHIS' findings from 2005 are identical to those in the 2014 document

slaughterhouse practices in Northern Argentina, and in particular deboning, maturation, and ante- and post-mortem inspections, are effective tools which significantly reduce of the risk of FMD-transmission from fresh (chilled or frozen) beef.

7.6.7.4.1.9 The type and extent of disease surveillance in the region

7.492. Since the July 2000 FMD outbreaks, serological sampling (active surveillance) in Argentina has been conducted at least once a year, pursuant to the 2001 National Eradication Plan for FMD.[1295] The sampling is conducted according to a two-stage strategy at the herd level and the individual animal level, tailored to each region's number and type of herds, animal movement patterns, geographical and climatic conditions, and disease history.[1296] The system allows the early detection of FMDV at a statistical confidence level of 95%.[1297] In 2005, APHIS considered the sampling design to be "both valid and efficient".[1298] Although, the objectives, approaches, and intensity may change slightly from year to year, the basic sampling approach is defined in the National Eradication Plan, which remains the same since it was adopted.[1299]

7.493. Dr Cupit observed that Argentina has "a well-developed passive and active surveillance plan for FMD that has been constantly developed and modified since the FMD outbreaks of 2000-2002".[1300] Further, according to Dr Cupit, "[t]he testing system and sampling design of Argentina's passive and active surveillance system for FMD appear to conform to the guidelines in the [Terrestrial] Code and Manual".[1301] Indeed, the fact that the OIE recognized Northern Argentina as FMD-free where vaccination is practised means that the active and passive surveillance measures in force in the region meet the requirements set forth in Articles 8.5.42-8.5.47 and 8.5.49 of the Terrestrial Code.[1302] This was confirmed by Dr Bonbon in his responses to Panel questions.[1303] Other evidence on the record does not contradict such conclusions. The European Commission's reports from 2004-2006 noted some shortcomings in the serological surveillance conducted by SENASA in Northern Argentina.[1304] Despite such deficiencies, the Commission concluded that SENASA's ability to prevent and control FMD was "satisfactory"[1305] and progressively reopened its market to imports of fresh (chilled or frozen) beef from Northern Argentina according the FMD history of each region.[1306]

7.6.7.4.1.10 Diagnostic laboratory capacity

7.494. In its 2005 risk assessment, APHIS reviewed a number of elements in connection with the organization, structure, and capacity of laboratories in Argentina. It found, *inter alia*, that Argentine laboratories use an information management system for recording samples and for typing laboratory results to be analysed by epidemiologists. APHIS described the system as "effective and adequate" and the staff as "very capable" in managing it.[1307] It also observed that the National Reference Laboratory was, at that time, working towards accreditation under

(see 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 71 and 2014 Risk Analysis for Patagonia, (Exhibit USA-133), pp. 30, 69.) Thus, we have no reason to believe that Dr Cupit's evaluation would be any different for the period from 2005 up to the date of establishment of the Panel.

[1295] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 49; Resolución SENASA 5/2001, (Exhibit ARG-4/USA-37).

[1296] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 49; 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 51.

[1297] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 49; 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 64.

[1298] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 49.

[1299] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 64.

[1300] Dr Cupit's response to Panel question No. 34.

[1301] Dr Cupit's response to Panel question No. 34.

[1302] See OIE's response to Panel question No. 17.

[1303] See Dr Bonbon's response to Panel question No. 34, para. 280.

[1304] See e.g. European Commission's 2004 Report, (Exhibit ARG-110), pp. 13-16; European Commission's 2006 Report, (Exhibit ARG-111), p. 11.

[1305] Dr Cupit's response to Panel question No. 31.

[1306] See e.g. Decision of the European Commission No. 2002/45/EC (22 January 2002), (Exhibit ARG-114); Decision of the European Commission No. 2002/68/EC (30 January 2002), (Exhibit ARG-108); Decision of the European Commission No. 2002/198/EC (7 March 2002), (Exhibit ARG-109); Commission Regulation No. 206/2010, (Exhibit ARG-1).

[1307] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 65.

international standard ISO 17025.[1308] APHIS also reviewed the collection, treatment, and analysis of diagnostic samples, as well as the technological capability of the laboratories to conduct diagnostic tests.[1309]

7.495. APHIS concluded that "Argentina has the diagnostic capabilities to adequately test samples for the presence of the FMD virus", that "quality control activities within the laboratories are sufficient", that "laboratory equipment is routinely monitored and calibrated", that "sufficient staff is available", and that "there is an effective and efficient recordkeeping system for storage and retrieval of data".[1310] We do not see any evidence on the record indicating that the facts underlying APHIS' 2005 conclusions changed in a way that would warrant a reversal of such conclusions during the period leading up to the Panel's establishment. Rather, in 2006, the National Reference Laboratory was accredited under international standard ISO 17025[1311] and the laboratory network acquired the capacity to run Polymerase Chain Reaction (PCR) tests for FMD[1312] – the lack of which APHIS had found to be a gap in 2005.[1313] Finally, the fact that SENASA's Animal Laboratory is recognized as an OIE Reference Laboratory for FMD has been described by the OIE as a "very positive factor".[1314] Indeed, in the OIE's view, such a recognition entails that the laboratory "is capable of providing diagnostic services of a … world level" and to "provide a service at no charge to other countries".[1315]

7.6.7.4.1.11 Policies and infrastructure for animal disease control

7.496. Finally, in its 2005 risk assessment, APHIS reviewed several aspects of the regulatory framework in force in Northern Argentina to ensure disease surveillance and the ability to deal with possible FMD outbreaks in the region. It observed that the law requires immediate and mandatory reporting of FMD, under penalty of severe fines applied by SENASA to any individual or company that fails to comply.[1316] Producers, animal caretakers, transporters and other people observing animals on a daily basis were found to bewell aware of FMD symptoms and reporting requirements.[1317] Veterinarians also take part in passive surveillance by conducting routine examinations of livestock during wool-industry related tasks, fairs, and after slaughter.[1318] APHIS then proceeded to review SENASA's authority to take prompt action in case of an FMD outbreak, including stamping-out of all the affected and contact animals[1319], as well as training of SENASA officials.[1320]

7.497. Based on the above, APHIS concluded that SENASA "has the infrastructure and legal authority to declare an emergency and take appropriate action in case of an [FMD] outbreak".[1321] We note that these conclusions mirror those reached by APHIS with respect to SENASA's capacity to prevent and control FMD discussed in paragraph 7.461 above.[1322] Further, the European Commission's 2006 Report confirms that the procedures in place "permit[] a rapid and effective response to [an] FMD outbreak".[1323]

7.6.7.4.1.12 Conclusions on the scientific evidence on the record

7.498. The evidence on the record demonstrates that Northern Argentina has the necessary veterinary capacity and infrastructure to prevent and control FMD in its own territory and the

[1308] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 65.
[1309] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 67.
[1310] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 68.
[1311] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 76.
[1312] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 76.
[1313] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 66-67.
[1314] Transcript of the meeting, para. 1.62.
[1315] Transcript of the meeting, para. 1.62.
[1316] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 68.
[1317] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 68.
[1318] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 68.
[1319] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 68-69.
[1320] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 70.
[1321] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 70.
[1322] APHIS' 2014 risk analysis updates and confirms, for the most part, its findings made in 2005. (See 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 78-82)
[1323] European Commission's 2006 Report, (Exhibit ARG-111), p. 20.

capacity to prevent incursions of the disease from neighbouring regions. Such capacity stems from a panoply of interlocking and overlapping sanitary measures aimed at reducing the risk of entry of FMD in the region, including, *inter alia*: adequate active and passive surveillance programmes, systemic and compulsory vaccination, accurate tracking and identification of animals, effective controls on the movement of FMD-susceptible animals from regions of higher FMD risk, appropriate collection of samples and laboratory capacity, efficacious mitigating measures at slaughterhouses such as deboning and maturation, and comprehensive control policies in case of an outbreak.

7.499. We now turn to assessing whether the alternative measures identified by Argentina, if applied to imports of fresh (chilled or frozen) beef from Northern Argentina, would achieve the United States' ALOP for FMD, recalling that we have found that the ALOP is between low and zero.

7.6.7.4.1.13 Whether the recommendations under Article 8.5.23 of the Terrestrial Code would achieve the United States' ALOP if applied to imports from Northern Argentina

7.500. The first alternative measure identified by Argentina is the application of Article 8.5.23 of the Terrestrial Code, which recommends that for importation of fresh meat of cattle and buffaloes (excluding feet, head and viscera) from FMD-free countries or zones where vaccination is practised, the veterinary authorities of the importing Member:

> [R]equire the presentation of an international veterinary certificate attesting that the entire consignment of meat comes from animals which:
>
> (1) have been kept in the FMD free country or zone where vaccination is practised, or which have been imported in accordance with Article 8.5.12, Article 8.5.13 or Article 8.5.14;
>
> (2) have been slaughtered in an approved abattoir and have been subjected to ante- and post-mortem inspections for FMD with favourable results.

7.501. As the language above indicates Article 8.5.23 recommends that imports of fresh (chilled or frozen) beef be allowed, subject to mitigating protocols centred on movement controls, the approval of slaughter facilities, and ante- and post-mortem inspections.

7.502. Argentina does not put forward any specific arguments supporting its position that the recommendations contained in Article 8.5.23, if applied to imports from Northern Argentina, would achieve the United States' ALOP.[1324] Moreover, Argentina itself appears to accept that the recommendations contained in Article 8.5.23 of the Terrestrial Code would not achieve the United States' ALOP when it states that the United States has rejected the alternative because it claims to apply a higher level ALOP and accepts the United States' right to apply a higher standard that the OIE protocol for fresh beef from areas that are FMD-free where vaccination is practised.[1325]

7.503. To recall, the United States stated that its ALOP for FMD is higher than that achieved by the Terrestrial Code.[1326] We concluded that the United States measures are not based on the Terrestrial Code precisely because the United States does not consider regions recognized by the OIE as FMD-free where vaccination is practised to be FMD-free within the meaning of 9 CFR 94.1(a), and therefore does not allow imports of fresh (chilled or frozen) beef from such regions.[1327] Although the United States makes an exception to this general rule for Uruguay, those imports are subject to the mitigating protocols under 9 CFR 94.22, which Argentina has raised as

[1324] Argentina's first written submission, paras. 310-317 in the section entitled "Alternative Measures Would Achieve the Appropriate Level of Sanitary Protection" contains no reference to Article 8.5.23. See also Argentina's response to Panel question No. 44 following the first substantive meeting; and Argentina's second written submission, para. 156.

[1325] Argentina's second written submission, paras. 155 and 158.

[1326] See e.g. United States' first written submission, para. 299; United States' response to Panel question No. 19 following the first substantive meeting.

[1327] See para. 7.241 above.

its second proposed alternative measure. Furthermore, Argentina acknowledges that the protocols applied to Uruguay are more stringent than Article 8.5.23 and are substantively similar to the protocols in Article 8.5.25 for imports of fresh beef from areas that are FMD-infected but undergoing a vaccination program. Such measures are designed to mitigate a risk higher than that of products from an FMD-free region which practises vaccination.

7.504. In light of the above, and absent any specific arguments on Argentina's part, we consider that Argentina failed to demonstrate that such recommendations would achieve the United States' ALOP for FMD if applied to imports of fresh (chilled or frozen) beef from Northern Argentina.

7.6.7.4.1.14 Whether the mitigating protocols set forth in 9 CFR 94.22 would achieve the United States' ALOP if applied to imports from Northern Argentina

7.505. The second alternative measure Argentina identified is the application of the mitigating protocols set forth under 9 CFR 94.22 to its imports of fresh (chilled or frozen) beef. Argentina contends that because APHIS applies the protocols under 9 CFR 94.22 to imports of fresh (chilled or frozen) beef from Uruguay, the same protocols would achieve the United States' ALOP if applied to Northern Argentina, as the two regions have "essentially the same" FMD situation.[1328] The United States responds that the fact that the two regions share the same OIE FMD-status is not dispositive of whether products therefrom pose the same level of risk.[1329]

7.506. We agree with the United States that the mere fact that the OIE recognizes both Northern Argentina and Uruguay as FMD-free where vaccination is practised is not, in and of itself, dispositive as to whether the protocols applied to Uruguay under 9 CFR 94.22 would achieve the United States' ALOP if applied to Northern Argentina.[1330] Rather, mindful of the Appellate Body's guidance in *Australia – Apples*, we must conduct our own assessment of whether the protocols under 9 CFR 94.22 would bring the risk posed by imports of fresh (chilled or frozen) beef from Northern Argentina down to a level that achieves the United States' ALOP.

7.507. Table 5 below lists the protocols under 9 CFR 94.22 and provides a description, based on the evidence on the record where relevant, of the effectiveness of each mitigating measure in reducing the risk of FMD-introduction.

Table 5: Protocols under 9 CFR 94.22 and their effectiveness in mitigating FMD risk

Protocols under 9 CFR 94.22[1331]	Effectiveness in reducing risk
The meat is beef from bovines that have been born, raised, and slaughtered in the region constituting the object of the exporting Member's request.	This requirement reduces the likelihood of fresh beef from other regions that are FMD-infected being imported into the region subject to the exporting Member's request, and from the latter region into the United States.[1332]
Foot-and-mouth disease has not been diagnosed in in the region subject to the exporting Member's request within the previous 12 months.	This requirement reduces the likelihood of FMD being present in the territory of the region subject to the exporting Member's request, and therefore in animals slaughtered for the production of fresh beef that is then exported to the United States.[1333]

[1328] Argentina' first written submission, paras. 312-316; Argentina's opening statement at the first meeting of the Panel, para. 46; Argentina's second written submission, para. 173.

[1329] United States' first written submission, para. 297; United States' second written submission, paras. 108-109.

[1330] This is in line with our finding that the import measures and mitigating protocols recommended by the Terrestrial Code exist and can operate independently of the OIE's official recognition of disease status for a certain country or region. (See para. 7.238 above).

[1331] 9 CFR 94.22, (Exhibit ARG-64).

[1332] Dr Cupit's response to Panel question No. 61; Dr Batho's response to Panel question No. 61, para. 488; Dr Bonbon's response to Panel question No. 61.

[1333] Dr Cupit's response to Panel question No. 61; Dr Bonbon's response to Panel question No. 61

Protocols under 9 CFR 94.22[1331]	Effectiveness in reducing risk
The meat comes from bovines that originated from premises where foot-and-mouth disease has not been present during the lifetime of any bovines slaughtered for the export of beef to the United States.	Provided that the surveillance system is appropriate to detect cases of FMD and accurate records are kept, this requirement reduces the likelihood of cattle being sourced from properties where FMD is present, thus reducing the risk that FMD-infected cattle be slaughtered for export to the United States.[1334]
The beef came from bovines that were moved directly from the premises of origin to the slaughtering establishment without any contact with other animals.	This requirement reduces the likelihood of cattle destined to slaughter for export coming in contact with other cattle of higher potential risk, thus reducing the likelihood of FMD-infected beef being imported into the United States.[1335]
The beef came from bovines that received ante-mortem and post-mortem veterinary inspections, paying particular attention to the head and feet, at the slaughtering establishment, with no evidence found of vesicular disease.	Ante-mortem inspections allow the detection of early FMD symptoms (such as dullness, poor appetite, a rise in temperature to 40-41° C, salivation, lethargy, and lameness) as well as advanced symptoms (such as vesicles appearing inside the mouth, on the tongue, cheeks, gums, lips, palate, between the claws of the feet and along the coronary band).[1336] Post-mortem inspections at slaughterhouses provide further confidence that slaughtered animals do not present vesicular signs of FMD.[1337] However, ante- and post-mortem inspections are not likely to allow detection of FMD in asymptomatic animals.[1338]
The beef consists only of bovine parts that are, by standard practice, part of the animal's carcass that is placed in a chiller for maturation after slaughter. Bovine parts that may not be imported include all parts of bovine heads, feet, hump, hooves, and internal organs.	The sites of localisation of the FMD virus in carrier animals are the feet, throat and viscera. Therefore, removing such tissues reduces the risk that FMD virus will be present in exported fresh meat.[1339] The removal of feet, head and viscera is a requirement under both Articles 8.5.23 and 8.5.25 of the Terrestrial Code.[1340]
Deboning: All bone and visually identifiable blood clots and lymphoid tissue have been removed from the beef. *Maturation*: The beef came from bovine carcasses that were allowed to maturate at 40 to 50° F (4 to 10° C) for a minimum of 36 hours after slaughter and that reached a pH of 5.8 or less in the loin muscle at the end of the maturation period. Measurements for pH must be taken at the middle of both *longissimus dorsi* muscles. Any carcass in which the pH does not reach 5.8 or less may be allowed to maturate an additional 24 hours and be retested, and, if the carcass still has not reached a pH of 5.8 or less after 60 hours, the meat from the carcass may not be exported to the United States.	The parties agree that, if properly conducted, deboning and maturation greatly reduce the risk of FMD being transmitted through trade of fresh (chilled or frozen) beef.[1341] The experts consider that the risk of FMD-introduction from imports of deboned and matured beef is negligible. According to Dr Cupit, deboning and maturation of beef is "extremely effective", as evidenced by the fact that, between 2004 and 2013, the European Union imported 535,000 tonnes of such beef from Argentina with no FDM outbreaks.[1342] Drs Batho and Bonbon noted that, to their knowledge, there is no evidence that imports of deboned and matured fresh beef ever resulted in the transmission of FMD.[1343] In Dr Bonbon's view, deboning and maturation, if properly performed, are sufficient, in and of themselves, to "completely eliminate [the] virus from [the] meat of an infected animal".[1344]

[1334] Dr Cupit's response to Panel question No. 61; Dr Bonbon's response to Panel question No. 61.
[1335] Dr Cupit's response to Panel question No. 61; Dr Bonbon's response to Panel question No. 61.
[1336] Dr Cupit's response to Panel question No. 9; Dr Bonbon's response to Panel question No. 61.
[1337] Dr Cupit's response to Panel question No. 61; Dr Bonbon's response to Panel question No. 61.
[1338] Dr Cupit's response to Panel question No. 31; Dr Bonbon's response to Panel question No. 16.
[1339] OIE's response to Panel question No. 26; Dr Cupit's response to Panel question No. 61; Dr Batho's response to Panel question No. 61; Dr Bonbon's response to Panel question No. 61.
[1340] OIE's response to Panel question No. 26.
[1341] Argentina's response to Panel question No. 9 following the first substantive meeting; United States' response to Panel question No. 8 following the first substantive meeting.
[1342] Transcript of the meeting, para. 1.197. See also D.J. Paton, M. Sinclair, R. Rodríguez, Qualitative assessment of the commodity risk factor for spread of foot-and-mouth disease associated with international trade in deboned beef, OIE ad hoc Group on Trade in Animal Products (October 2009), (Exhibit ARG-128), p. 19.
[1343] Dr Batho's response to Panel question No. 7; Dr Bonbon's response to Panel question No. 7.
[1344] Dr Bonbon's response to Panel question No. 41.

Protocols under 9 CFR 94.22[1331]	Effectiveness in reducing risk
The beef has not been in contact with meat from regions other than those listed in 9 CFR 94.1(a)(2).	This requirement reduces the likelihood that, after slaughter, fresh beef destined for export to the United States is commingled with beef from other regions that are FMD-infected, thus reducing the likelihood of cross-contamination.[1345]
An authorized veterinary official of the authorities of the region certifies on the foreign meat inspection certificate that the above conditions have been met.	For Dr Cupit, this requirement is aimed at strengthening the oversight of control processes in order "to ensure compliance".[1346] According to Dr Batho, the requirement is "normal practice" and is supported by the OIE, in that it "gives trust and confidence to the importing country".[1347] In Dr Bonbon's view, the requirement is aimed at "guaranteeing the correctness of certification and reducing the risk of non-implementation of the measures".[1348]
The establishment in which the bovines are slaughtered allows periodic on-site evaluation and subsequent inspection of its facilities, records, and operations by an APHIS representative.	The possibility for the importing Member to conduct periodical audits ensures that the mitigating measures in force in the region of origin are properly implemented.[1349]

7.508. The protocols set forth in 9 CFR 94.22 provide several layers of mitigating measures covering virtually all the stages of the production of fresh (chilled or frozen) beef, from the birth and raising of cattle to the processing (deboning and maturation) of the final product. If properly implemented by the authorities of the exporting Member, such measures operate in concert to effectively minimize the risk of FMD-introduction from imports of fresh (chilled or frozen) beef into the territory of the United States.[1350] Indeed, according to the experts, some of the protocols under 9 CFR 94.22, most notably those relating to the deboning and maturation of carcasses in slaughterhouses, are highly effective in reducing the risk of FMD-introduction from imports of fresh (chilled or frozen) beef even if considered in isolation from the other measures.

7.509. In paragraph 7.498 above, we found, based on the evidence on the record, that Northern Argentina has the necessary veterinary capacity and infrastructure to prevent and control FMD in its own territory and the capacity to prevent incursions of the disease from neighbouring regions. Such capacity stems from a panoply of interlocking and overlapping sanitary measures, some of which mirror the protocols set forth in 9 CFR 94.22 (e.g. insulation of cattle from FMD-susceptible animals at a higher risk, ante- and post-mortem inspections, deboning and maturation). Given the credibility of Northern Argentina's sanitary structures, we see no evidence on the record indicating that SENASA would be unable to adopt and properly implement the protocols in question.

7.510. Based on the foregoing, we conclude, as a matter of fact, that applying the protocols in 9 CFR 94.22, to imports of fresh (chilled or frozen) beef from Northern Argentina, would achieve the United States' ALOP for FMD, which we described as being between low and zero risk.[1351]

[1345] Dr Cupit's response to Panel question No. 61; Dr Batho's response to Panel question No. 61; Dr Bonbon's response to Panel question No. 61.
[1346] Dr Cupit's response to Panel question No. 61.
[1347] Dr Batho's response to Panel question No. 61.
[1348] Dr Bonbon's response to Panel question No. 61.
[1349] Dr Cupit's response to Panel question No. 61; Dr Batho's response to Panel question No. 61; Dr Bonbon's response to Panel question No. 61.
[1350] In this respect, we note that the protocols in 9 CFR 94.22 do not include requirements as to the vaccination of FMD-susceptible animals. This is because, the United States explained, vaccination alone is not sufficient to reduce the risk of FMD-introduction from imports of fresh (chilled or frozen) beef. (See e.g. United States' first written submission, para. 299; United States' response to Panel question No. 19 following the first substantive meeting)
[1351] See para. 7.387 above.

7.6.7.4.1.15 Conclusions on whether the United States' prohibitions on imports of fresh (chilled or frozen) beef from Northern Argentina are more restrictive than required to meet the United States' ALOP

7.511. The United States does not dispute that the protocols set forth in 9 CFR 94.22 are reasonably available to the United States taking into account technical and economic feasibility. There is also no dispute that they would be significantly less trade-restrictive than the United States' prohibitions in place at the time of the establishment of the Panel. Furthermore, we have concluded that the application of the protocols set forth in 9 CFR 94.22 to imports of fresh (chilled or frozen) beef from Northern Argentina would achieve the United States' ALOP. Therefore, the United States' prohibitions challenged by Argentina are more restrictive than required to achieve the United States' ALOP, and thus are inconsistent with Article 5.6 of the SPS Agreement.

7.6.7.4.2 The proposed alternatives to the United States' prohibition on imports of FMD-susceptible animals and animal products from Patagonia

7.512. Similar to our approach in paragraph 7.454 above, we find it useful to begin our assessment of whether the mitigating effects of the proposed measures would permit imports of FMD-susceptible animals and animal products from Patagonia to achieve the United States' ALOP by reviewing the evidence on the record in light of the 11 factors APHIS used to evaluate the FMD-status of an applicant country or region at the time Argentina filed its request.

7.6.7.4.2.1 The authority, organization and infrastructure of the veterinary services organization in the region

7.513. As discussed in paragraphs 7.455-7.460 above, in its 2005 risk analysis for Patagonia South APHIS reviewed numerous aspects relating to SENASA's authority, organization, infrastructure and capacity to prevent and control FMD in the whole Argentine territory, including Patagonia. Its review focused, in particular, on the legal and administrative sources of SENASA's authority, SENASA's financial and human resources, the role of regional offices and local veterinarians in the identification of premises and the tracking of FMD-susceptible animals, the controls on the movement of FMD-susceptible animals throughout the Argentine territory, and SENASA's regulations concerning swill feeding.

7.514. Based on its analysis of such factors, APHIS concluded that "Argentina has the veterinary and regulatory infrastructure to adequately monitor and control any incursion of FMD into the country".[1352] Specifically, APHIS considered that "[t]here is sufficient monitoring of animal premises and movements to permit effective surveillance and detection programs that would result in sufficient administration of eradication efforts, if needed".[1353] APHIS also "expressed confidence" that SENASA's delays in reporting the 2000-2001 FMD outbreaks would not occur again if analogous events were to occur today.[1354]

7.515. The facts underlying laws and regulations governing SENASA's authority, organization, infrastructure, and capacity to prevent and control FMD in the Argentine territory did not change from 2005 until the Panel's establishment.[1355] Dr Batho noted, that SENASA's infrastructure

[1352] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 23.
[1353] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 23.
[1354] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 23.
[1355] APHIS' 2014 risk analysis for Patagonia as a whole (comprising of both Patagonia South and Patagonia North B) acknowledged that the laws and regulations governing SENASA and its structure have remained unchanged since the 2005 risk assessment. (2014 Risk Analysis for Patagonia, (Exhibit USA-133), pp. 10-17) Further, APHIS noted that the laws and regulations governing the licensure, qualifications, and training of veterinarians are unchanged from the 2005 risk assessment. (See Ibid. pp. 19-20) Argentina also submitted information to APHIS dating between 2002 and 2009, which indicated that identification of premises and the census of FMD-susceptible animals by SENASA had not essentially changed since the 2005 risk assessment. (See Ibid. p. 41) Moreover, SENASA provided information to APHIS covering the period between 2003 and 2007, which indicated that movement controls in Argentina remained essentially unchanged since the 2005 risk assessment. (See Ibid. pp. 43-44) Finally, APHIS' 2014 risk analysis for Patagonia indicates that the laws and regulations governing swill feeding are unchanged from the 2005 risk analysis. (See Ibid. pp. 21-22)

"improved dramatically" since 2005 in several respects.[1356] For instance, SENASA's 2013 annual budget was 1.3 billion pesos (equivalent to approximately USD 200 million)[1357], i.e. over five times more than in 2005. SENASA's personnel doubled from 2005 to 2013. [1358] Further, in 2006 SENASA instituted a compulsory cattle identification programme, requiring that all calves born after September 2007 carry official tags.[1359]

7.516. Other evidence on the record is consistent with APHIS' 2005 conclusions. The European Commission's most recent evaluation of the FMD situation Argentina available on the record (dated 2006) concludes that the Argentine veterinary authority "is well organised".[1360] In its evaluations over the period 2002-2006, the Commission did identify some "deficiencies" with respect e.g. to animal identification and movement controls.[1361] Despite such deficiencies, the Commission concluded that SENASA's ability to prevent and control FMD was "satisfactory"[1362] and reopened its market to imports of FMD-susceptible animals and animal products from Patagonia North B in 2008.[1363] In his responses to Panel questions, Dr Cupit confirmed that SENASA imposes "strict movement controls that operate within Argentina especially between the FMD-free areas with and without vaccination"[1364], i.e. Northern Argentina and Patagonia.

7.517. Thus, the evidence on the record indicates that, at the time of the establishment of the Panel, SENASA had the necessary veterinary and regulatory infrastructure to adequately monitor and control FMD in the Patagonia region.

7.6.7.4.2.2 Disease status of the region

7.518. The last FMD outbreak in Patagonia South occurred in 1976.[1365] In 2002, the OIE recognized the region as FMD-free where vaccination is not practised.[1366] The last FMD outbreak in Patagonia North B took place in 1994.[1367] The region was recognized by the OIE as FMD-free where vaccination is not practised in 2007.[1368]

7.6.7.4.2.3 The extent of an active disease control program, if any, if FMD is known to exist in the region

7.519. As FMD is not known to exist in Patagonia, there is currently no active disease control programme in the region.[1369] Passive surveillance includes the obligation for any citizen to report an outbreak, compliance with which is incentivized through compensation in case of accurate reporting.[1370]

[1356] See Dr Batho's response to Panel question No. 57. Dr Bonbon added that, in light of such improvements, the risk of FMD-transmission from imports of fresh (chilled or frozen) beef from Northern Argentina is "lower than it was in 1997". (Dr Bonbon's response to Panel question No. 57)

[1357] 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 17.

[1358] 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 17.

[1359] Resolución SENASA 754/2006, (Exhibit ARG-143).

[1360] European Commission's 2006 Report, (Exhibit ARG-111), p. 21.

[1361] See e.g. European Commission's 2002 Report, (Exhibit ARG-107), p. 27; European Commission's 2006 Report, (Exhibit ARG-111), p. 21.

[1362] Dr Cupit's response to Panel question No. 31.

[1363] Decision of the European Commission No. 2008/642/EC (31 July 2008), amending Annex II to Council Decision 79/542/EEC as regards the entries for Argentina, Brazil and Paraguay in the list of third countries and parts thereof from which imports into the Community of certain fresh meat are authorized, (Exhibit ARG-120). We understand that the European Union had already reopened its market to imports of FMD-susceptible animals and animal products from Patagonia South prior to August 2003. See Argentina's response to Panel question No. 25 following the first substantive meeting.

[1364] Dr Cupit's response to Panel question No. 36.

[1365] Argentina's first written submission, para. 3.

[1366] OIE Resolution XVII of 2002, (Exhibit ARG-89).

[1367] Argentina's first written submission, para. 3.

[1368] OIE Resolution XXI of 2007, (Exhibit ARG-10).

[1369] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 27; 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 26.

[1370] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 27; 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 26.

7.520. Most of the laws, decrees and regulations setting forth the measures to be put in place in order to eradicate FMD from the Argentine territory, discussed in paragraph 7.467 above, apply to Patagonia as well as to Northern Argentina.[1371] Since Patagonia as a whole has not had an FMD outbreak in about 20 years and does not vaccinate against the disease, the most relevant regulations applicable to the region are those aimed at implementing sanitary barriers and movement controls to insulate Patagonia from the entry of FMD-susceptible animals and animal products from regions of higher risk. We analyse such regulations more in detail in paragraphs 7.525-7.528 below.

7.6.7.4.2.4 The vaccination status of the region

7.521. Because FMD is not known to be present in Patagonia, no vaccination is practiced in the region.[1372] APHIS considered in 2005 that this being the case, "any cattle or swine in that region exposed to the FMD virus would act as good sentinels of an outbreak".[1373]

7.6.7.4.2.5 The status of adjacent regions with respect to FMD

7.522. Patagonia shares its Northern land border with one region recognized by the OIE as FMD-free where vaccination is practised, namely Northern Argentina. On the West, it borders a region recognized by the OIE as FMD-free where vaccination is not practised, i.e. Chile. On the East, the region is bordered by the Atlantic Ocean.

7.6.7.4.2.6 The degree to which the region is separated from adjacent regions of higher FMD risk through physical or other barriers

7.523. Patagonia is separated from Northern Argentina by the Rio Negro, a constantly flowing watercourse that "make[s] crossing difficult".[1374] The climate of the region is mostly dry and windy in the summer and cold, windy, and snowy in the winter.[1375] In APHIS' view, "the terrain and desolate nature of the area act as an effective barrier to disease incursion through illegal trafficking of prohibited products".[1376] Dr Cupit confirmed that "climatic factors such as humidity, rainfall, temperature and prevailing winds" reduce "the ability and rate of spread of FMD".[1377] Furthermore, the border with Chile runs along the Andes mountains, which constitute an effective natural barrier against the cross-border movement of cattle.

7.524. In light of the above, we agree with APHIS that Patagonia is "adequately protected by effective natural barriers to reduce the unrestricted flow of animals and animal products from areas of higher risk".[1378]

7.6.7.4.2.7 The extent to which movement of animals and animal products is controlled from regions of higher risk, and the level of biosecurity regarding such movements

7.525. As discussed in paragraphs 7.481-7.485 above, in 2005 APHIS reviewed the movement controls and sanitary barriers in place in Argentina as a whole vis-à-vis incursions of FMD from the entry of susceptible animals and animal products from other countries. APHIS' findings concerned, *inter alia*: the management of international authorized border stations, which include terrestrial, maritime and fluvial ports, and airports; the conditions under which the relevant products may lawfully be imported into Argentina; inspections and controls carried out on the relevant products; and the special measures in force in the area bordering Bolivia, Paraguay, and Brazil. Based on the evidence on the record, we found that the movement controls and other measures applied by

[1371] Amongst the regulations that do *not* apply to Patagonia are those relating to vaccination of FMD-susceptible species and vaccine quality control. See Table 5 above.
[1372] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 27; 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 26.
[1373] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 25.
[1374] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 30.
[1375] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 30.
[1376] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 30.
[1377] Dr Cupit's response to Panel question No. 50.
[1378] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 30.

SENASA to prevent the incursion of FMD into Argentina effectively protect the region from ingress of animals and animal products from regions of higher FMD-risk.

7.526. We now turn to a more specific examination of the movement controls and sanitary barriers aimed at preventing the entry of FMD-susceptible animals and animal products into Patagonia. As a result of the multiple FMD outbreaks in Northern Argentina which occurred throughout 2000 and 2001, SENASA adopted a number of resolutions creating a sanitary barrier aimed at insulating Patagonia South from entry of FMD from the rest of the national territory.[1379] In 2002, SENASA established a prohibition on the entry into Patagonia of FMD-susceptible animals except from regions recognized by the OIE as FMD-free where vaccination is not practised.[1380] In 2005, SENASA recognized Patagonia South and Patagonia North B as having the same FMD status, and imposed a number of traceability requirements and controls on the movement of FMD-susceptible animals between the two areas. Specifically, in order to obtain authorization for movement from Patagonia North B to Patagonia South, FMD-susceptible animals: (i) had to remain in the premises of origin for at least 90 days prior to movement application; (ii) had to undergo two FMD serological tests (for cattle and sheep, also two Probang tests), during which they had to be kept in quarantine; (iii) could be moved to destination on condition of obtaining an official dispatch; and (iv) had to be transported in sealed trucks which could not move through zones where FMD vaccination is practiced.[1381]

7.527. The United States argues that a "key" factor casting doubts as to SENASA's capacity to prevent the ingress of FMD-susceptible animals into the region from Northern Argentina is the changes in the regulatory barriers between Patagonia South and Patagonia North B that occurred in 2008 through the adoption of SENASA Regulations Nos. 148/2008 and 1282/2008.[1382] The resolutions in question were adopted in order to meet the import protocols established by the European Union as part of its recognition of Patagonia North B as FMD-free where vaccination is not practised. Resolution 148/2008 imposed additional tracking requirements and movement controls between Patagonia North B and Patagonia South for animals destined to immediate slaughter, including the following: (i) that FMD-susceptible animals be transported in SENASA-authorized trucks with a valid disinfection certificate; (ii) that the owner of the premises of origin submit to SENASA the itinerary that the truck would follow; (iii) that trucks be sealed and not move through zones where FMD vaccination is practiced; (iv) that if the animals are destined to slaughter, the shipment be authorized only to slaughterhouses inspected and authorized by SENASA; (v) that the owner of the premises of destination communicate the reception of the animals to SENASA within 48 hours of arrival; and (vi) that upon arrival at destination, the animals remain separated from all other animals of FMD susceptible species for 21 days, during which they may be sent to slaughter only if authorized by the local SENASA veterinarian.[1383] Resolution 1282/2008 extended such requirements to all movement of FMD-susceptible animals from Patagonia North B to Patagonia South for whatever destination and purpose.[1384]

7.528. Neither Resolution 148/2008 nor Resolution 1282/2008 modified the pre-existing prohibitions on movement of FMD-susceptible animals between Patagonia as a whole and Northern Argentina. Moreover, the Resolutions imposed a set of transportation, reporting, and traceability requirements that strengthened, rather than weakened, SENASA's pre-existing controls on movement of cattle throughout the Patagonia region. Our understanding finds support in the experts' responses to Panel questions. According to Dr Cupit, the movement controls and traceability requirements in Resolution 1282/2008 "should improve SENASA's FMD surveillance and control measures" in comparison to the situation that existed in 2000, when Argentina was allowed to export the relevant products to the United States.[1385] In his opinion, there are "strict movement controls" especially "between the FMD-free areas with and without vaccination"[1386], i.e. Northern Argentina and Patagonia. Similarly, in Dr Bonbon's view, Resolutions 148/2008 and

[1379] See e.g. Resolución SENASA 5/2001, (Exhibit ARG-4/USA-37); Resolución SENASA 25/2001, (Exhibit ARG-92); Resolución SENASA 58/2001, (Exhibit USA-59). See also 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 29.
[1380] Resolución SENASA 1051/2002, (Exhibit USA-60).
[1381] Resolución SENASA 725/2005, (Exhibit USA-61).
[1382] United States' first written submission, para. 318. See also Ibid. para. 298.
[1383] Resolución SENASA 148/2008, (Exhibit USA-62).
[1384] Resolución SENASA 1282/2008, (Exhibit USA-109).
[1385] Dr Cupit's response to Panel question No. 32.
[1386] Dr Cupit's response to Panel question No. 36.

1282/2008 "are examples of the improved legal capacity of SENASA" as compared to the situation in 2000.[1387] More generally, Dr Batho stated that surveillance and movement controls "are much improved now" compared to 2000.[1388] He added that, in his view, the adoption of Resolution 1282/2008 did not "create uncertainty over the status of the different regions" because it did not alter the regulatory barriers between Northern Argentina, where vaccination is practiced, and Patagonia, where vaccination is not practiced.[1389]

7.529. The evidence on the record indicates that SENASA has adequate sanitary barriers and movement controls in place to prevent the ingress of FMD-susceptible animals and animal products into Patagonia from regions of higher FMD-risk, including Northern Argentina.

7.6.7.4.2.8 Livestock demographics and marketing practices in the region

7.530. Due to its cold and arid climate, the Patagonia region has low cattle density. Bovine production is secondary, and beef produced in the region is mostly consumed locally.[1390] As noted in paragraph 7.491 above, Patagonia imports deboned and matured fresh (chilled or frozen) beef from Northern to meet its consumption demand.[1391] Conversely, Patagonia contains almost 60% of the entire sheep population of Argentina, with an average population density of 14 sheep per square kilometre.[1392] In 2005 Argentina was exporting 10,000 tons/year of sheep meat to the European Union, of which 90% came from the Patagonia South region.[1393]

7.531. Movements of livestock within the Patagonia region are limited and there are no fairs or livestock concentration markets. Annual auctions for breeding rams occur once a year, each selling about 400 animals. Also, large farms carry out their annual breeder auctions on their own premises so breeding livestock transport is limited mainly from farm to farm. Trade in FMD-susceptible animal products is carried out directly from the farm to the slaughterhouse with direct selling of cull animals and lambs to coldstore plants. Lambs are usually destined for export.[1394] Animals are transported in special vehicles used for this purpose only. The vehicles must comply with SENASA Resolution 97/1999, which requires the official approval of the vehicle, and SENASA Resolution 809/1982, which prescribes, hygiene and sanitation requirements.[1395] The transportation of FMD-susceptible animals from farm to farm and to slaughterhouses is subject to the same traceability requirements and movement controls discussed in paragraph 7.459 above.

7.532. As for slaughterhouse practices, there are 19 facilities in the Patagonia region that are approved by SENASA, three of which are approved for export of sheep meat to the European Union.[1396] In 2005, APHIS reviewed the biosecurity controls established by SENASA in order to accredit a facility. Such controls include that: (i) animals be kept in pens and not be allowed to exit the facility once they have entered it; (ii) all effluent be treated by separating solids, fats, liquids, and chlorinates out before releasing them to the general sewage system; (iii) effluents from the sanitary complex be individually treated by disinfection before being dumped with the rest of the common, treated effluents; and (iv) raw slaughter and slaughter pathology wastes be processed into nonedible by-products.[1397] APHIS further observed that all animals receive an ante-mortem inspection by a SENASA technician upon arrival at the slaughterhouse, as well as a post-mortem inspection after slaughter by SENASA field veterinarians and plant staff.[1398] Deboning and

[1387] Dr Bonbon's response to Panel question No. 32.
[1388] Dr Batho's response to Panel question No. 32.
[1389] Dr Batho's response to Panel question No. 33.
[1390] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 44; 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 40.
[1391] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 44; 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 40.
[1392] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 44; 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 40.
[1393] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 44; 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 40.
[1394] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 45.
[1395] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 45.
[1396] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 46; 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 44.
[1397] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 46-47; 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), pp. 58-59.
[1398] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 47.

maturation of fresh meat are not practised in Patagonian slaughterhouses. In this respect, Dr Batho observed that the European Union does not require such processes to take place in order for the meat to be imported into its territory from Patagonia South.[1399]

7.533. Based on the foregoing, APHIS concluded in 2005 that "[t]he livestock industry in Patagonia South appears to be well-organized" and "aware of necessary biosecurity precautions", which in turn are "effective in the prevention of FMD outbreaks"[1400]. Specifically, with respect to sheep products, APHIS "did not identify significant risk pathways to consider commercial sheep operations as a likely source for introducing FMD into the United States".[1401] We do not see any evidence on the record indicating that, throughout the period between 2005 and the date of the Panel's establishment, the facts underlying APHIS' conclusions changed to an extent that would reverse such conclusions.

7.6.7.4.2.9 The type and extent of disease surveillance in the region

7.534. As discussed in paragraphs 7.492-7.493 above, in 2005 APHIS reviewed active and passive surveillance conducted by SENASA in the Argentine territory as a whole. This is because, already at that time, "[s]urveillance activities in the Patagonia Region [were] conducted only under the national surveillance design", and there were no Patagonia-specific measures in place in that respect.[1402] This element had not changed by the time the Panel was established.[1403] As discussed, APHIS considered that the two-stage sampling strategy at the herd level and the individual animal level allows the early detection of FMDV at a statistical confidence level of 95% and is "both valid and efficient".[1404] Although, the objectives, approaches, and intensity may change slightly from year to year, the basic sampling approach is defined in the National Eradication Plan, which remains the same since it was adopted.[1405]

7.535. APHIS also reviewed several rounds of serological sampling conducted in the Patagonia region between 2001 and 2003, involving bovine, ovine, goats, farm deer, and wild biungulates.[1406] It concluded that such sampling activities, as would "continue in the future", were "adequate to detect disease and/or identify and measure viral activity in the area".[1407] Further, APHIS stated that the fact that serological sampling in the area resulted in no animals ever testing positive to FMD and no viral activity ever found demonstrates "the absence of disease in Patagonia".[1408] The Panel sees no evidence on the record to indicate the situation changed from 2005 until the date of the Panel's establishment.

7.6.7.4.2.10 Diagnostic laboratory capacity

7.536. As discussed in paragraphs 7.494-7.495 above, in its 2005 risk assessment APHIS reviewed a number of elements in connection with the organization, structure, and capacity of laboratories in Argentina. It found, *inter alia*, that Argentine laboratories use an information management system for recording samples and for typing laboratory results to be analysed by epidemiologists. APHIS described the system as "effective and adequate" and the staff as "very capable" in managing it.[1409] It also observed that the National Reference Laboratory was, at that time, working towards accreditation under international standard ISO 17025.[1410] APHIS also reviewed the collection, treatment, and analysis of diagnostic samples, as well as the technological capability of the laboratories to conduct diagnostic tests.[1411]

[1399] Transcript of the meeting, para. 1.287.
[1400] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 47.
[1401] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 47-48.
[1402] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 48.
[1403] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169), p. 46.
[1404] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 49.
[1405] 2014 Risk Analysis for Patagonia, (Exhibit USA-133), pp. 50-51.
[1406] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 55-63.
[1407] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 63.
[1408] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 63.
[1409] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 65.
[1410] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 65.
[1411] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 67.

7.537. APHIS concluded that "Argentina has the diagnostic capabilities to adequately test samples for the presence of the FMD virus", that "quality control activities within the laboratories are sufficient", that "laboratory equipment is routinely monitored and calibrated", that "sufficient staff is available", and that "there is an effective and efficient recordkeeping system for storage and retrieval of data".[1412] We do not see any evidence on the record indicating that the facts underlying APHIS' 2005 conclusions changed in a way that would warrant a reversal of such conclusions during the period leading up to the Panel's establishment. Rather, in 2006, the National Reference Laboratory was accredited under international standard ISO 17025[1413] and the laboratory network acquired the capacity to run Polymerase Chain Reaction (PCR) tests for FMD[1414] – the lack of which APHIS had found to be a gap in 2005.[1415] Finally, the fact that SENASA's Animal Laboratory is recognized as an OIE Reference Laboratory for FMD has been described by the OIE as a "very positive factor".[1416] Indeed, in the OIE's view, such a recognition entails that the laboratory "is capable of providing diagnostic services of a … world level" and to "provide a service at no charge to other countries".[1417]

7.6.7.4.2.11 Policies and infrastructure for animal disease control

7.538. As discussed in paragraphs 7.496-7.497 above, in its 2005 risk assessment APHIS reviewed several aspects of the regulatory framework in force in Argentina as a whole to ensure disease surveillance and the ability to deal with possible FMD outbreaks in the region. It concluded that SENASA "has the infrastructure and legal authority to declare an emergency and take appropriate action in case of an [FMD] outbreak".[1418] The European Commission's 2006 Report confirms that the procedures in place "permit[] a rapid and effective response to [an] FMD outbreak".[1419]

7.6.7.4.2.12 Conclusions on the scientific evidence on the record

7.539. The evidence on the record demonstrates that Patagonia has the necessary veterinary capacity and infrastructure to prevent and control FMD in its own territory and the capacity to prevent incursions of the disease from regions of higher FMD-risk. Such capacity stems from a panoply of interlocking and overlapping sanitary measures aimed at reducing the risk of entry of FMD in the region, including, *inter alia*: accurate tracking and identification of animals, effective controls on the movement of FMD-susceptible animals from regions of higher FMD risk, appropriate collection of samples and laboratory capacity, efficacious mitigating measures at slaughterhouses such as ante- and post-mortem inspections, and comprehensive control policies in case of an outbreak. Such measures are effective tools to ensure that the region remains free of FMD as it has been since 1994.

7.540. We now turn to assessing whether the alternative measures identified by Argentina, if applied to imports of FMD-susceptible animals and animal products from Patagonia, would achieve the United States' ALOP for FMD, recalling that we have found that the ALOP is between low and zero.

7.6.7.4.2.13 Whether the inclusion of Patagonia in the list of FMD-free regions under 9 CFR 94.1(a) and the application of the protocols in 9 CFR 94.11 to imports therefrom would achieve the United States' ALOP

7.541. In support of its Article 5.6 claim concerning the United States' prohibition on imports of FMD-susceptible animals and animal products from Patagonia, Argentina identified one alternative measure: namely, the inclusion of Patagonia to the list of FMD-free countries or regions under 9 CFR 94.1(a).[1420] Further, as Argentina observes, the mitigating protocols set forth in

[1412] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 68.
[1413] 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 62.
[1414] 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 63.
[1415] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), pp. 66-67.
[1416] Transcript of the meeting, para. 1.62.
[1417] Transcript of the meeting, para. 1.62.
[1418] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9), p. 70.
[1419] European Commission's 2006 Report, (Exhibit ARG-111), p. 20.
[1420] Argentina's second written submission, para. 182. See also Argentina's first written submission, paras. 502-503; Argentina's response to Panel question No. 44 following the first substantive meeting.

9 CFR 94.11 apply to imports of FMD-susceptible animal products from some of the regions included in the list, namely regions which: (i) supplement their national meat supply through the importation of fresh, chilled, or frozen meat of ruminants or swine from regions that are not included in the list; (ii) have a common land border with regions that are not included in the list; or (iii) import ruminants or swine from regions that are included in the list under conditions less restrictive than would be acceptable for importation into the United States.[1421] Because Patagonia borders a region not included in the list, i.e. Northern Argentina, and imports deboned and matured fresh (chilled or frozen) beef therefrom, its inclusion to the list in 9 CFR 94.1(a) would be coupled with the application to imports of animal products therefrom of the general protocols under 9 CFR 94.11.[1422]

7.542. In Argentina's view, the fact that Patagonia shares the same OIE status-recognition as Santa Catarina means that the two regions are in a similar sanitary situation.[1423] Indeed, according to Argentina, both regions are FMD-free where vaccination is not practised, but border a region that is not included in APHIS' list under 9 CFR 94.1(a). Therefore, in Argentina' opinion, the fact that Santa Catarina is included in the list in 9 CFR 94.1(a) and is subject to the protocols under 9 CFR 94.11 shows that the addition of Patagonia to the same list and the application of the same protocols to imports from the region would achieve the United States' ALOP.[1424] The United States responds that Argentina failed to substantiate its claim that Patagonia has a similar FMD situation as Santa Catarina.[1425]

7.543. We consider that the mere fact that the OIE recognizes both Patagonia and Santa Catarina as FMD-free where vaccination is not practised is not, in and of itself, dispositive as to whether the inclusion of the former in the list under 9 CFR 94.1(a) and the application to products therefrom of the protocols under 9 CFR 94.11 would achieve the United States' ALOP.[1426] Rather, mindful of the Appellate Body's guidance in *Australia – Apples*, we must conduct our own assessment of whether the application of such measures to Patagonia would bring the risk posed by imports of FMD-susceptible animals and animal products from the region down to a level that achieves the United States' ALOP.

7.544. The protocols set forth in 9 CFR 94.11 impose a twofold certification requirement on imports of FMD-susceptible animal products into the United States. First, all meat or other animal product from the relevant region, whether in personal-use amounts or commercial lots, shall have been prepared only in an inspected establishment that is eligible to have its products imported into the United States under the relevant United States' regulations, and shall be accompanied by a Department-approved meat inspection certificate or similar certificate approved by the Administrator.[1427] Second, meat of ruminants or swine or other animal products from the relevant region must be accompanied by additional certification by a fulltime salaried veterinary official of the agency in the national government of origin. The certificate must give the name and official establishment number of the establishment where the animals were slaughtered, and shall state that:

a. The slaughtering establishment is not permitted to receive animals that originated in, or have ever been in, or that have been aboard a means of conveyance at the time such means of conveyance called at, or landed at a port in, a region not included in the list under 9 CFR 94.1(a) and therefore considered to be FMD-affected;

[1421] 9 CFR 94.11, (Exhibit ARG-64).

[1422] Argentina's second written submission, para. 182. See also Argentina's first written submission, paras. 502-503; Argentina's response to Panel question No. 44 following the first substantive meeting; 9 CFR 94.11, (Exhibit ARG-64). We note that under 9 CFR 94.11, imports of live FMD-susceptible animals are not subject to any restrictions or protocols. Our findings in this section are without prejudice to any general requirements concerning the importation of live animals imposed under other relevant United States' regulations.

[1423] Argentina's first written submission, para. 502. See also Argentina's second written submission, para. 182.

[1424] Argentina's first written submission, para. 502. See also Argentina's second written submission, para. 182.

[1425] United States' first written submission, para. 298.

[1426] This is in line with our finding that the import measures and mitigating protocols recommended by the Terrestrial Code can operate independently of the OIE's official recognition of disease status for a certain country or region. (See para. 7.238 above).

[1427] Exhibit ARG-64.

b. The slaughtering establishment is not permitted to receive meat or other animal products derived from ruminants or swine which originated in such a FMD-affected region, or meat or other animal products from an FMD-free region transported through an FMD-affected region except in containers sealed with serially numbered seals of the National Government of the non-affected region of origin; and

c. The meat or other animal product covered by the certificate was derived from animals born and raised in the region of origin and the meat or other animal product has never been in any region in which FMD existed; and

d. The meat or other animal product has been processed, stored, and transported to the means of conveyance that will bring the article to the United States in a manner to preclude its being commingled or otherwise in contact with meat or other animal products that do not comply with the conditions contained in this certificate.[1428]

7.545. As the language above indicates, the protocols under 9 CFR 94.11 set forth a number additional guarantees for the United States' authorities that the measures in force in the region of origin in order to prevent and control FMD are properly implemented, thus reducing the risk that imports of FMD-susceptible animal products from that region cause the introduction of FMD into the United States' territory.

7.546. In paragraph 7.539 above, we found, based on the evidence on the record, that Patagonia has the necessary veterinary capacity and infrastructure to prevent and control FMD in its own territory and the capacity to prevent incursions of the disease from regions of higher FMD-risk. We also noted that such capacity is adequate to ensure that Patagonia maintains its freedom from the disease. Given the credibility of the sanitary structures of Patagonia, we see no evidence on the record indicating that SENASA would be unable to adopt and properly implement the protocols set forth in 9 CFR 94.11.

7.547. Based on the foregoing, we conclude, as a matter of fact, that the addition of Patagonia to the list of FMD-free countries or regions under 9 CFR 94.1(a), coupled with the application to imports of animal products therefrom of the protocols under 9 CFR 94.11, would achieve the United States' ALOP for FMD, which we described as being between low and zero risk.[1429]

7.6.7.4.2.14 Conclusions on whether the United States' prohibitions on imports of FMD-susceptible animals and animal products from Patagonia are more restrictive than required to meet the United States' ALOP

7.548. Based on all the foregoing, we conclude that the addition of Patagonia to the list of FMD-free countries or regions under 9 CFR 94.1(a), coupled with the application to imports of animal products therefrom of the protocols set forth in 9 CFR 94.11, (i) is reasonably available to the United States and technically and economically feasible; (ii) would achieve the United States' ALOP; and (iii) would be significantly less trade-restrictive than the United States' prohibitions in place at the time of the establishment of the Panel. Therefore, the United States' prohibitions challenged by Argentina are more restrictive than required to achieve the United States' ALOP, and thus are inconsistent with Article 5.6 of the SPS Agreement.

7.7 Whether the United States' measures arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail or are applied in a manner which constitutes a disguised restriction on international trade

7.7.1 Relevant legal provisions

7.549. Article 2.3 of the SPS Agreement reads, in relevant part:

> Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar

[1428] Exhibit ARG-64.
[1429] See para. 7.387 above.

conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

7.550. The Appellate Body has clarified that Article 2.3 of the SPS Agreement contains two primary obligations, each of which corresponds to one of the sentences of Article 2.3.[1430] The first obligation is contained in the first sentence: "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail ". The second obligation is contained in the second sentence: "Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade".

7.7.2 Main arguments of the parties

7.7.2.1 Argentina

7.551. Argentina claims that the United States' measures arbitrarily and unjustifiably discriminate between Members where identical or similar situations prevail and operate as a disguised restriction on international trade, inconsistently with Article 2.3 of the SPS Agreement.

7.552. Beginning with arbitrary or unjustifiable discrimination, Argentina notes that the Appellate Body has found similarities between Article 2.3 and the chapeau of Article XX of the GATT 1994.[1431] Thus, in Argentina's view, the chapeau of Article XX constitutes relevant context for the interpretation of the phrase "arbitrary or unjustifiable discrimination" under Article 2.3.[1432] Relying on prior panel and Appellate Body reports on the chapeau of Article XX, Argentina argues that the discrimination stemming from the United States' measures "bears no rational connection" to their stated objective of protecting the United States' against the introduction, establishment or spread of FMD.[1433] Argentina claims that the United States' measures discriminate both substantively and procedurally.[1434]

7.553. As for "substantive discrimination"[1435], Argentina submits, first, that by imposing a prohibition on imports of fresh (chilled or frozen) beef from Northern Argentina, while allowing imports of the same products from Uruguay under the mitigating protocols of 9 CFR 94.22, the United States discriminates between the two regions, which are "in essentially the same situation".[1436] In Argentina's view, the similarities between Northern Argentina and Uruguay are evidenced by the fact both regions had FMD outbreaks at roughly the same time and are both recognized by the OIE as FMD-free where vaccination is practised.[1437] Moreover, Argentina relies on APHIS' statement that "Uruguay, Argentina and Brazil have an effective cooperative, regional approach to FMD surveillance and control programs".[1438] Finally, Argentina claims that the two regions present similar physical situations and institutional structures for dealing with FMD[1439], including "sampling methodologies", "procedural guidelines for handling outbreaks or suspected situations", regionally harmonized "border controls", "vaccines", "registries/records of producers,

[1430] Appellate Body Report, *Australia – Salmon*, para. 252. See also Panel Report, *India – Agricultural Products*, para. 7.388.
[1431] Argentina' first written submission, para. 327 (citing Appellate Body Report, *Australia – Salmon*, para. 251).
[1432] Argentina' first written submission, para. 328 (citing Panel Report, *US – Poultry (China)*, para. 7.260).
[1433] Argentina' first written submission, paras. 329 and 522.
[1434] Argentina's second written submission, para. 205.
[1435] Argentina's second written submission, p. 60, subheading E.1.
[1436] Argentina's first written submission, para. 268. See also Ibid. para. 326; Argentina's opening statement at the first meeting of the Panel, para. 51; Argentina's second written submission, para. 206; Argentina's opening statement at the second meeting of the Panel, para. 97.
[1437] Argentina's first written submission, para. 330; Argentina's second written submission, para. 213; Argentina's response to Panel question No. 37 following the first substantive meeting.
[1438] Argentina's first written submission, para. 333; Argentina's opening statement at the first meeting of the Panel, para. 52; Argentina's response to Panel question No. 37 following the first substantive meeting; Argentina's second written submission, para. 206.
[1439] Argentina's first written submission, para. 334.

vaccination and movement control", "sanitary services", and "programs for the eradication and control of FMD".[1440]

7.554. Second, Argentina claims that, by prohibiting imports of FMD-susceptible animals and animal products from Patagonia, while recognizing Santa Catarina and Chile as FMD-free under 9 CFR 94.1(a) and allowing imports therefrom under the mitigating protocols in 9 CFR 94.11, the United States discriminates between the two regions, which present a "high degree of similarity" in terms of sanitary conditions.[1441] In Argentina's view, the similarities between Patagonia and Santa Catarina are evidenced by the fact that the two regions have had their last FMD outbreaks around the same time[1442], are recognized by the OIE as FMD-free where vaccination is not practised [1443], and are part of countries recognized as FMD-free where vaccination is practised.[1444] Moreover, Argentina observes that the last FMD outbreak in Brazil occurred in 2006 and did not affect Santa Catarina, similar to the 2006 FMD outbreak in the Argentine province of Corrientes, which did not affect Patagonia.[1445] Argentina further refers to APHIS' focus on regional efforts for the eradication and control of FMD, especially in relation to the risk of reintroducing FMD from neighbouring countries.[1446] With respect to Chile, Argentina refers to APHIS' 2007 statement that "the animal health status of Chile and Patagonia South are equivalent".[1447]

7.555. As for "procedural discrimination"[1448], Argentina claims that United States' prohibitions as applied to the relevant products from Northern Argentina and Patagonia have been "maintained for more than a decade without any current valid risk assessment" taking into account "the radical improvement on Argentina's sanitary condition".[1449] Conversely, according to Argentina, other Members "were given risk assessments quite rapidly after significant outbreaks and were moved through the rulemaking process and given import permission accordingly".[1450] For instance, Argentina observes that Uruguay, which had an FMD outbreak in 2001, was allowed to export fresh (chilled or frozen) beef to the United States again in 2003.[1451] Moreover, Argentina notes, the United Kingdom is included in APHIS' list of FMD-free regions under 9 CFR 94.1(a) despite having experienced a "truly massive" FMD outbreak in 2000-2001 and another outbreak in 2008.[1452] Similarly, Japan is back on APHIS' list despite having suffered an FMD outbreak in 2010, by virtue of a favourable risk assessment conducted "one year" after the outbreak.[1453] Argentina concedes that the FMD situations in the United Kingdom and Japan are not necessarily identical to those in Northern Argentina and Patagonia.[1454] However, in its view, the condition that is relevant to its procedural discrimination claims is that all the above-mentioned regions "had FMD outbreaks" and have an interest in having "their export rights provided by the [United States] through full access to the United States' regulatory system".[1455] In other words, Argentina claims that it "has been denied equal access to the US regulatory processes" enjoyed by other Members.[1456]

7.556. Next, Argentina claims that the United States measures are applied in a manner constituting a disguised restriction on international trade. Indeed, it contends, "there could be no

[1440] Argentina's second written submission, para. 209.
[1441] Argentina's first written submission, para. 514.
[1442] Argentina's first written submission, para. 520; Argentina's second written submission, para. 223.
[1443] Argentina's first written submission, para. 509; Argentina's second written submission, para. 223.
[1444] Argentina's first written submission, para. 520.
[1445] Argentina's first written submission, paras. 509-510.
[1446] Argentina's second written submission, para. 224. See also Argentina's responses to Panel questions Nos. 11 and 37 following the first substantive meeting.
[1447] Argentina's first written submission, para. 512 (quoting 2007 Proposed Rule on Patagonia South, (Exhibit ARG-56/USA-104)).
[1448] Argentina's second written submission, p. 66, subheading E.2.
[1449] Argentina's first written submission, para. 336.
[1450] Argentina's first written submission, para. 344. See also Ibid. para. 336; Argentina's opening statement at the first meeting of the Panel, paras. 54-55.
[1451] Argentina's second written submission, paras. 227-228. See also Ibid. para. 340.
[1452] Argentina's first written submission, paras. 342-344.
[1453] Argentina's first written submission, paras. 342-344.
[1454] Argentina's second written submission, para. 230.
[1455] Argentina's second written submission, para. 231. See also Argentina's response to Panel question No. 35 following the second substantive meeting.
[1456] Argentina's first written submission, para. 336.

greater restriction on international trade than a measure banning imports"[1457] continuously maintained "for eleven years" without any "rational, logical or scientific basis".[1458] In particular, Argentina maintains that the treatment of Patagonia as opposed to that of Santa Catarina "is not based on sound science"[1459], but rather on non-scientific domestic interests[1460], as evidenced in particular by the adoption of the ban in Section 737 of the *2009 Omnibus Appropriations Act* "which restricted the ability of APHIS to proceed to a final rulemaking".[1461] Moreover, Argentina asserts that the 2010 inclusion of Santa Catarina in APHIS' list under 9 CFR 94.1(a) was part of the "concessions in settlement of the wholly unrelated cotton subsidies dispute with the United States".[1462]

7.7.2.2 United States

7.557. The United States disagrees with Argentina that its measures arbitrarily and unjustifiably discriminate between Members where identical or similar situations prevail. In its view, APHIS' review of applications for the authorization of imports – that is, "the process of seeking additional information" – is not an SPS measure falling within the purview of Article 2.3 of the SPS Agreement.[1463] This is because SPS measures are "applied" to "protect animal … life or health" and may include "provisions on … methods of risk assessment"[1464], whereas Argentina "is not challenging a method of risk assessment that discriminates against it", as "there is nothing in United States' law or regulations on risk assessment that discriminates".[1465] For the United States, it is only the measure that will be adopted following APHIS' review of Argentina's requests that is "applied" to "protect animal … life or health".[1466]

7.558. If the Panel were to find that Article 2.3 does, indeed, apply to APHIS' review processes, the United States maintains that Argentina failed to substantiate its discrimination claims.[1467] In particular, the United States takes issue with Argentina's argument that, Northern Argentina and Uruguay on the one hand and Patagonia and Santa Catarina on the other, are identical or similar because they share the same OIE FMD disease status. In the United States' opinion, although APHIS considers the OIE's official recognitions of disease status in performing its own risk assessments, such recognitions are not, per se, sufficient to conclude that identical or similar FMD conditions prevail in two or more Members.[1468] This is because, the United States argues, the OIE official recognition of FMD disease status for a given region does not take into account important factors, including "whether the region accepts imports from FMD-infected regions", the region's "veterinary services' capacity to detect, prevent and control" FMD, and the specific SPS measures which are required to meet the United States' ALOP for that region.[1469]

7.559. The United States highlights differences between the regions identified by Argentina which, in its view, exclude their identity or similarity under Article 2.3. Concerning Northern Argentina and Uruguay, the United States asserts that, at the time of the establishment of the Panel, APHIS had completed a risk analysis for Uruguay and concluded that imports of its products under the protocols in 9 CFR 94.22 would achieve the United States' ALOP.[1470] Conversely, at that time APHIS had not yet concluded its risk analysis for Northern Argentina and thus had not reached

[1457] Argentina's first written submission, para. 345.
[1458] Argentina's first written submission, para. 350.
[1459] Argentina's first written submission, para. 530.
[1460] Argentina's first written submission, para. 528.
[1461] Argentina's first written submission, para. 525. Argentina also refers to a number of statements made by the United States before the SPS Committee that allegedly reveal the existence of non-scientific concerns with respect to imports from Patagonia. (Ibid. paras. 525-527 (referring to G/SPS/R/64, paras. 96-97; and G/SPS/R/67, para. 44).
[1462] Argentina's first written submission, para. 529.
[1463] United States' first written submission, para. 303. See also United States' opening statement at the second meeting of the Panel, para. 74.
[1464] United States' first written submission, para. 303.
[1465] United States' first written submission, para. 303.
[1466] United States' first written submission, para. 303.
[1467] United States' second written submission, para. 117; United States' opening statement at the first meeting of the Panel, para. 70; United States' second written submission, para. 123; United States' opening statement at the second meeting of the Panel, para. 72.
[1468] United States' second written submission, para. 119.
[1469] United States' second written submission, para. 121.
[1470] United States' response to Panel question No. 42 following the first substantive meeting.

conclusions as to the appropriateness of the application of the same mitigating protocols to imports from Northern Argentina.[1471] In the United States' view, the difference between the time taken to conduct the two reviews is justified by the fact that the two regions are not similarly situated in terms of geography and cross-border FMD introduction, populations of livestock susceptible to FMD, volume of veterinary resources, and recent FMD history. The United States notes that Uruguay is a "small country" and shares only two terrestrial borders with Brazil and Argentina; it has a "relatively small population of animals susceptible to FMD"; and "has infrastructure to carry out FMD control and eradication programs", with "105,051 heads of cattle for every veterinarian".[1472] Further, the United States argues, Uruguay did not have FMD outbreaks from 1990 to 2000-2001; it promptly reported the 2001 outbreak, which was "traceable to a strain of FMD virus in Argentina", and "was transparent to APHIS authorities".[1473] Conversely, the United States observes, Argentina is "15 times larger than Uruguay", and shares longer terrestrial borders with Chile, Bolivia, Paraguay, Brazil, and Uruguay; two of Argentina's neighbouring countries "have had recent FMD outbreaks"; Argentina has a livestock population "significantly larger" than does Uruguay, and is less equipped to carry out FMD control and eradication programs, with "221,519 heads of cattle for every veterinarian".[1474] Finally, according to the United States, the Argentine authorities intentionally kept the full extent of its 2000-2001 FMD outbreaks confidential.[1475] In its view, Argentina has not effectively addressed such factors, nor has it provided any scientific evidence concerning similarities between Northern Argentina and Uruguay.[1476]

7.560. Similarly, the United States takes issue with the alleged similarities between the conditions prevailing in Patagonia, Santa Catarina, and Chile. It contends that the "key differentiation"[1477] between Patagonia and Santa Catarina is the fact that APHIS was able to "draw a conclusion as to the appropriateness of the import authorization terms" applied to imports from the latter region, whereas at the time of the Panel's establishment it had not reached such a determination with respect to imports from the former.[1478] This is because, the United States contends, in December 2008 SENASA extended its original request for the recognition of Patagonia South to Patagonia North B.[1479] Moreover, the United States maintains that while Santa Catarina "had no sanitary boundary changes" during APHIS' review of Brazil's application, Argentina "introduced new changes to the sanitary boundaries between Patagonia South and Patagonia North B in 2008".[1480] In its view, such changes added a "confounding element" to APHIS' review, which was initially "premised on certain controls with Patagonia North B"[1481], therefore explaining the "difference in review periods".[1482] With respect to Chile, the United States maintains that APHIS' 2007 statement regarding its equivalence with Patagonia South simply referred to the fact that the two regions "had the same OIE animal health status recognition".[1483] In its view, such a statement alone does not prove identity or similarity between the two regions "unless and until APHIS makes a final determination regarding Patagonia South".[1484]

7.561. Concerning Argentina's allegations of procedural discrimination, the United States maintains that "differences in time" in APHIS' review of Argentina's requests as compared to the requests of other Members are "not a sufficient basis" to substantiate Argentina's claims.[1485] In its view, the process for reaching conclusions as to the FMD status of a region "depends upon a variety of factors"[1486], including "the comprehensiveness of the submission of the applicant" and the applicant's "responsiveness" in "providing answers to follow up questions".[1487] The

[1471] United States' response to Panel question No. 46 following the first substantive meeting.
[1472] United States' first written submission, para. 307.
[1473] United States' first written submission, para. 310.
[1474] United States' first written submission, para. 309.
[1475] United States' first written submission, para. 310.
[1476] United States' response to Panel question No. 44 following the first substantive meeting.
[1477] United States' first written submission, para. 318.
[1478] United States' first written submission, para. 298.
[1479] United States' first written submission, para. 318. See also Ibid. para. 298.
[1480] United States' first written submission, para. 318.
[1481] United States' first written submission, para. 318.
[1482] United States' first written submission, para. 318.
[1483] United States' response to Panel question No. 39 following the first substantive meeting.
[1484] United States' response to Panel question No. 39 following the first substantive meeting.
[1485] United States' first written submission, para. 304.
[1486] United States' first written submission, para. 304.
[1487] United States' first written submission, para. 305.

United States maintains that the perceived length of the review of Argentina's requests was due to "individualized circumstances"[1488], such as SENASA's delays in responding to APHIS' requests for information[1489] and the 2003 and 2006 FMD outbreaks which occurred in Northern Argentina "during the course of the application process".[1490] Accordingly, the United States concludes, Argentina "has not established, merely by asserting a difference in review time, that discrimination occurred in relation to any of its applications".[1491]

7.562. Moreover, the United States contends that, as admitted by Argentina, the substantive FMD conditions in Northern Argentina, Patagonia, Japan, and the United Kingdom "are [not] identical".[1492] It notes that both Japan and the United Kingdom are island chains; therefore land crossing of FMD-infected animals over a long border "is not possible".[1493] Further, it observes that Japan and the United Kingdom have a different FMD history from that of Argentina and Patagonia.[1494] In light of the above, the United States considers it "reasonable" that APHIS' assessment of regions such as Japan and the United Kingdom would be "less complex", and therefore would require less time than that of Argentina.[1495]

7.563. Finally, the United States disagrees with Argentina that its measures are applied in a manner constituting a disguised restriction on international trade. In its view, the word "disguised" as referred to a restriction on international trade "may mean 'hidden' or 'dissimulated'". According to the United States, that "is not the case" with respect to APHIS' review of Argentina's applications,[1496] which took into account "objective concerns" such as "Argentina's FMD history, the series of outbreaks since 2000, the deliberate cover-up of outbreaks, and shifting sanitary boundaries within the country".[1497] In its opinion, APHIS' review process, motivated by the fact that "an FMD outbreak in the United States would lead to severe economic and social damage", is in accordance with "the principle of good faith"[1498] and consistent with the United States' obligations under the SPS Agreement.

7.7.3 Main arguments of the third parties

7.7.3.1 China

7.564. China notes that the parties disagree as to the measure at issue under Article 2.3 of the SPS Agreement. In its view, Argentina defines such a measure as an "import prohibition", whereas the United States defines it as its "regulatory process". For China, there is no doubt that the "import prohibition" is an SPS measure subject to the disciplines of Article 2.3, irrespective of whether the "regulatory process" is an SPS measure.[1499]

7.565. China recalls that "the chapeau of Article XX of the GATT 1994 is relevant and provides guidance in interpreting the 'arbitrary or unjustifiable discrimination' under Article 2.3".[1500] In particular, the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[1501] In other words, an assessment of whether discrimination is "arbitrary or

[1488] United States' first written submission, para. 306.
[1489] United States' first written submission, para. 305.
[1490] United States' first written submission, para. 305.
[1491] United States' first written submission, para. 306.
[1492] United States' first written submission, paras. 312, 314 (citing Argentina's first written submission, para. 344). See also United States' response to Panel question No. 36 following the second substantive meeting.
[1493] United States' first written submission, paras. 313 and 315.
[1494] United States' first written submission, paras. 313 and 315.
[1495] United States' first written submission, paras. 313 and 316.
[1496] United States' first written submission, para. 320.
[1497] United States' first written submission, para. 320.
[1498] United States' first written submission, para. 320 (citing Panel Report, *Brazil – Retreaded Tyres*, para. 7.321).
[1499] We understand China to be referring to the distinction between 9 CFR 94.1(b) and the application of the regulatory process under 9 CFR 92.2 to Argentina.
[1500] China's third-party submission, para. 51 (citing Panel Report, *US – Poultry (China)*, paras. 7.260-7.261).
[1501] China's third-party submission, para. 51 (citing Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226).

unjustifiable" should be made "in light of the objectives of the measure and whether the discrimination bears a rational connection to the stated objective of the measure".[1502] Finally, China stresses that "not all discrimination in the application of measures is necessarily 'arbitrary or unjustifiable' and it is only the arbitrary or unjustifiable inconsistencies that are to be avoided".[1503]

7.7.3.2 European Union

7.566. The European Union notes that, when confronted with discrimination claims arising under the SPS Agreement, panels "have generally focused their analysis on Article 5.5, finding a violation of Article 2.3 only where there was also a violation of Article 5.5".[1504] In the present dispute, Argentina "does not raise a claim under Article 5.5".[1505]

7.567. The European Union goes on to observe that the thrust of Argentina's claims under Article 2.3 is a "comparison of its own status" with "the status of other countries or regions" under United States' domestic rules.[1506] However, 9 CFR 94.1(b) only contains a general prohibition of imports from regions that are not FMD-free, whereas the determination of whether a particular region is FMD-free or not is contained in 9 CFR 94.1(a), which Argentina does not challenge.[1507] Accordingly, the European Union "does not see how Argentina's claims under Article 2.3 of the SPS Agreement could be successful".[1508]

7.7.4 Analysis by the Panel

7.568. According to the Appellate Body, Article 2.3 is a provision of "fundamental importance" in the context of the SPS Agreement.[1509] Indeed, it is contained in Article 2, entitled "Basic Rights and Obligations", and mirrors the first recital in the Preamble of the SPS Agreement.[1510] We note that Argentina links its claims under Article 2.3 to its claims under Article 5.6. Although the Appellate Body has considered that Article 5.5, "may be seen to be marking out and elaborating a particular route leading to the same destination" as Article 2.3[1511], no similar decision has been made with respect to Article 5.6. Furthermore, we note that the panel in *India – Agricultural Products* explained that Article 2.3 "is of a more general character" than the specific paragraphs of Article 5.[1512]

7.569. The Appellate Body noted that the language of Article 2.3 incorporates, *inter alia,* part of the chapeau to Article XX of the GATT 1994.[1513] The chapeau of Article XX of the GATT 1994 reads, in relevant part:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between *countries where the same conditions prevail*, or a *disguised restriction on international trade*, … nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [enacted for the purposes listed in the subparagraphs of Article XX]. (emphasis added)

[1502] China's third-party submission, para. 51 (citing Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227).
[1503] China's third-party submission, para. 51 (citing Appellate Body Report, *EC – Hormones*, para. 213).
[1504] European Union's third-party submission, para. 68.
[1505] European Union's third-party submission, para. 68.
[1506] European Union's third-party submission, para. 69.
[1507] European Union's third-party submission, paras. 69 and 70.
[1508] European Union's third-party submission, para. 71.
[1509] Appellate Body Report, *Australia – Salmon*, para. 251.
[1510] Appellate Body Report, *Australia – Salmon*, para. 251.
[1511] Appellate Body Report, *EC – Hormones*, para. 212. This approach was followed, *inter alia*, in Panel Reports, *Australia – Salmon (Article 21.5 - Canada)*, paras. 7.112-7.114; *EC – Approval and Marketing of Biotech Products*, paras. 7.1446-7.1448, 7.1765-7.1766 and 7.3405-7.3406; *US – Poultry (China)*, paras. 7.318-7.319; and *Australia – Apples*, para. 7.1095.
[1512] Panel Report, *India – Agricultural Products*, paras. 7.344-7.355.
[1513] Appellate Body Report, *Australia – Salmon*, para. 251. See also Panel Report, *US – Poultry (China)*, para. 7.260.

7.570. We agree that the language of the chapeau of Article XX of the GATT 1994 presents a number of similarities with that of Article 2.3. As noted by the panel in *India – Agricultural Products*, both provisions speak of arbitrary and unjustifiable discrimination, and a comparison between the "conditions" prevailing in different Members.[1514] We also observe that the last recital of the Preamble of the SPS Agreement states that the Agreement "elaborate[s] rules for the application of the provisions of GATT 1994 which relate to the use of [SPS] measures, in particular the provisions of Article XX(b)", which includes the chapeau.[1515] Therefore, we consider that the chapeau of Article XX provides useful context for our interpretation of the terms of Article 2.3.

7.571. With respect to the obligation in the first sentence of Article 2.3, we recall that the panel in *Australia – Salmon (Article 21.5 – Canada)* found that three cumulative requirements must be met in order to establish a violation of that provision: (i) that identical or similar conditions prevail in the territory of the Members compared; (ii) that the measure discriminates between the territories of such Members; and (iii) that the discrimination is arbitrary or unjustifiable.[1516] We address each of these requirements in turn.

7.572. As to the requirement that identical or similar conditions prevail in the Members compared, we note that the term "identical" is defined as "designating a proposition whose terms express an identity or denote the same thing; of a thing or set of things viewed at different times – the very same; or of two or more separate things; agreeing in every detail".[1517] In turn, the term "similar" is defined as "of the same substance or structure throughout – homogenous; having a resemblance or likeness; of the same nature or kind".[1518] Finally, the term "condition" is defined as "a way of living or existing"; "the state of something"; "the physical state of something"; and "the physical or mental state of a person or thing".[1519] In the context of the chapeau of Article XX, the Appellate Body stated in *EC – Seal Products* that "only 'conditions' that are *relevant* for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case" should be considered.[1520] It further observed that the regulatory objective pursued by the measure at issue may also provide useful guidance on the question of which "conditions" prevailing in different Members are "relevant".[1521]

7.573. Turning to the requirement that the measures discriminate between Members that are in identical or similar conditions, the Appellate Body consistently stated that different treatment does not necessarily amount to discrimination. The focus of a discrimination analysis is whether the measure at issue alters the conditions of competition to the detriment of products originating in the territories of Members other than the Member imposing the measure or between the territory of the Member imposing the measure and that of another Member.[1522] In *US – Shrimp*, the Appellate Body found that "discrimination" in the context of the chapeau of Article XX may result not only when Members in which the same conditions prevail are treated differently, but also where the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country.[1523] Further, according to the Appellate Body, discrimination may arise not only from "the detailed operating provisions" of a measure, but also from the application of a measure "otherwise fair and just on its face".[1524] Finally, the panel in *US – Poultry (China)* stated that discrimination

[1514] Panel Report, *India – Agricultural Products*, para. 7.400.
[1515] See Panel Report, *India – Agricultural Products*, para. 7.400.
[1516] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.
[1517] *Shorter Oxford English Dictionary on Historical Principles*, 6th ed. (Oxford University Press, 2007) Vol. 1, p. 1319.
[1518] *Shorter Oxford English Dictionary on Historical Principles*, 6th ed. (Oxford University Press, 2007), Vol. 2, p. 2838.
[1519] *Merriam-Webster*, available at http://www.merriam-webster.com/dictionary/condition (last accessed 9 December 2014).
[1520] Appellate Body Report, *EC – Seal Products*, para. 5.299 (emphasis added).
[1521] Appellate Body Report, *EC – Seal Products*, para. 5.300.
[1522] See e.g. Appellate Body Reports, *EC – Asbestos*, paras. 98-99; *Dominican Republic – Import and Sale of Cigarettes*, para. 96; *Philippines – Distilled Spirits*, para. 256.
[1523] Appellate Body Report, *US – Shrimp*, para. 165. See also Panel Report, *India – Agricultural Products*, para. 7.400; Panel Report, *US – Poultry (China)*, para. 7.292.
[1524] Appellate Body Report, *US – Shrimp*, para. 160.

may stem from both "'substantive' SPS measures" and "procedural and information requirements".[1525]

7.574. Finally, we turn to the requirement that discrimination be "arbitrary or unjustifiable". The Appellate Body found in *Brazil – Retreaded Tyres* that an analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the chapeau of Article XX "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[1526] Relying on the Appellate Body's reasoning, the panel in *US – Poultry (China)* concluded that the meaning of "arbitrary or unjustifiable discrimination" in Article 2.3 of the SPS Agreement involves a consideration of whether there is a "rational connection" between the reasons given for the discriminatory treatment and "the stated objective of the measure".[1527]

7.575. Concerning the meaning of "disguised restriction on international trade", the Appellate Body in *US – Gasoline* stated that such a notion, as contained in the chapeau of Article XX of the GATT 1994, "includes disguised discrimination in international trade".[1528] More specifically, the Appellate Body found that "'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination".[1529] The panel in *India – Agricultural Products* applied the same reasoning in its interpretation of "disguised restriction on international trade" in Article 2.3 of the SPS Agreement, and stated that such terms "encompass measures that constitute arbitrary or unjustifiable discrimination".[1530] We see no reason to depart from the above-mentioned approach in our assessment of Argentina's claims in this dispute. We thus consider that a finding that the United States' measures result in arbitrary or unjustifiable discrimination would necessarily entail a finding that they are applied in a manner which would constitute a disguised restriction on international trade.

7.576. With these considerations in mind, we turn to Argentina's claims that the United States' measures arbitrarily and unjustifiably discriminate between Members where identical or similar conditions prevail. We recall that Argentina submits three distinct claims under the first sentence of Article 2.3, each concerning different regions. In particular, Argentina takes issue with three forms of alleged arbitrary or unjustifiable discrimination stemming from the United States' measures:

a. Discrimination between Northern Argentina and Uruguay: The United States allows imports of fresh (chilled or frozen) beef from Uruguay whereas it does not allow imports of the same products from Northern Argentina, despite the fact that the two regions are in "essentially the same" FMD situation; moreover, the United States conducted a risk analysis and issued a positive determination for Uruguay within a reasonable period of time, whereas it has maintained its prohibition on imports of products from Northern Argentina without a risk assessment since 2001;

b. Discrimination between Patagonia and Santa Catarina and Chile: The United States recognizes Santa Catarina and Chile as FMD-free within the meaning of 94.1(a) and therefore allows imports of FMD-susceptible animals and animal products therefrom under the mitigating protocols in 9 CFR 94.11, whereas it does not allow imports of the same products from Patagonia, despite the fact that the three regions are highly similar; moreover, the United States conducted a risk analysis and issued positive determination for Santa Catarina within a reasonable period of time, whereas it has maintained its prohibition on imports of products from Patagonia without a risk assessment since 2001; and

[1525] Panel Report, *US – Poultry (China)*, para. 7.147. In the context of the chapeau of Article XX of the GATT 1994, see Appellate Body Reports, *US – Shrimp*, para. 160; *EC – Seal Products*, para. 5.302.

[1526] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226 (referring to Appellate Body Reports, *US – Gasoline*; *US – Shrimp*; and *US – Shrimp (Article 21.5 – Malaysia)*). See also Appellate Body Report, *EC – Seal Products*, para. 5.303; and Panel Report, *US – Poultry (China)*, para. 7.261.

[1527] Panel Report, *US – Poultry (China)*, para. 7.261. See also Panel Report, *India – Agricultural Products*, para. 7.429.

[1528] Appellate Body Report, *US – Gasoline*, DSR 1996:I, 3, p. 25.

[1529] Appellate Body Report, *US – Gasoline*, DSR 1996:I, 3, p. 25.

[1530] Panel Report, *India – Agricultural Products*, para. 7.476.

c. Discrimination between Northern Argentina, Patagonia, Japan and the United Kingdom: That United States conducted risk analyses and issued positive determinations on the applications for imports of Japan and the United Kingdom, whereas it maintained its prohibition on imports of products from Northern Argentina and Patagonia without a risk assessment since 2001.

7.577. We address each of Argentina's claims in turn.

7.7.4.1 Discrimination between Northern Argentina and Uruguay

7.578. First, we assess Argentina's claim that, by allowing imports of fresh (chilled or frozen) beef from Uruguay under the protocols in 9 CFR 94.22 and prohibiting imports of the same products from Northern Argentina, the United States arbitrarily or unjustifiably discriminates between the two regions, which it describes as "essentially the same". Pursuant to the guidance from the panel in *Australia – Salmon (Article 21.5 – Canada)* we must answer the following questions in order to determine whether Argentina has established its claim: (i) Do similar or identical conditions prevail in Northern Argentina and Uruguay? (ii) If so, do the United States' measures discriminate between the two regions? and (iii) If so, is the discrimination arbitrary or unjustifiable?

7.7.4.1.1 Do similar or identical conditions prevail in Northern Argentina and Uruguay?

7.579. Beginning with the first question, we must determine what conditions prevailing in Northern Argentina and Uruguay are relevant for the purposes of our comparison. As stated by the Appellate Body, the regulatory objective of the measure, as well as its "design", "architecture", and "revealing structure", inform the interpretation of the relevant conditions prevailing in the territory of a Member.[1531] As noted above, APHIS' regulatory scheme, contained in 9 CFR 94 and 9 CFR 92.2, is designed to ensure that FMD-susceptible animals or animal products be imported into the United States only from countries or regions that APHIS has determined to be FMD-free.[1532] In turn, we noted that the regulatory scheme in question is implemented for the purpose of achieving the objective set forth in 7 USC 8303(a), namely to "prevent the introduction into or dissemination within the United States of any pest or disease of livestock."[1533] Finally, we note that APHIS allows imports of fresh (chilled or frozen) beef from Uruguay subject to the mitigating protocols in 9 CFR 94.22, despite the fact that Uruguay is not recognized as FMD-free within the meaning of 9 CFR 94.1(a). The United States describes the protocols applied to Uruguay as "scientifically justified" requirements without which "import of beef from Uruguay would not meet the United States' ALOP".[1534]

7.580. Based on the above, we consider that APHIS' regulatory framework aims at ensuring that imports of FMD-susceptible animals and animal products into the United States are allowed only if the level of risk posed by such imports, possibly after the application of certain scientifically justified mitigating protocols, achieves the United States' ALOP for FMD. Hence, we consider that the condition that must be identical or similar in Northern Argentina and Uruguay in order to meet the first prong of the test is the level of risk of FMD-introduction posed by imports of fresh (chilled or frozen) beef from the two regions, as well as their ability to meet the United States' ALOP if subjected to similar mitigating protocols. This is consistent with the findings of prior panels. For instance, the panel in *Australia – Salmon (Article 21.5 – Canada)* concluded that similar or identical conditions did not prevail in the territories of the two Members it compared because of "substantial difference[s] of disease status" between the two.[1535] Similarly, the panel in *India – Agricultural Products* considered that the relevant conditions in its analysis referred to the presence of a certain disease in the territories of the Members compared.[1536]

7.581. We are mindful that, in comparing the levels of FMD-risk posed by imports of fresh (chilled or frozen) beef from Northern Argentina and Uruguay, we are not simply required to assess whether FMD is present in the territory of either region or to take note of the OIE FMD-status

[1531] See para. 7.572 above.
[1532] See paras. 7.37-7.41 and 7.74 above.
[1533] 7 USC § 8303(a), (Exhibit USA-75).
[1534] United States' response to Panel question No. 45 following the first substantive meeting.
[1535] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.113-7.114.
[1536] Panel Report, *India – Agricultural Products*, paras. 7.463 and 7.468.

assigned to such regions. Indeed, as the United States correctly observes, the level of risk posed by imports from the two regions is not only a function of their disease-prevalence in a given point in time, but also, and most importantly, of the credibility of the sanitary measures in place in such regions to prevent and control FMD.[1537] Thus, our assessment must include a comparison of the effectiveness and credibility of the sanitary measures in place in the two regions to prevent and control FMD, as well as the ability of imports from the two regions to meet the United States' ALOP – with or without the application of certain mitigating protocols.

7.582. In section 7.6.7.4.1 above, we found that Northern Argentina has the necessary veterinary capacity and infrastructure to prevent and control FMD in its territory and the capacity to prevent incursions of the disease from neighbouring regions, and concluded that, if applied to imports of fresh (chilled or frozen) beef from that region, the protocols set forth in 9 CFR 94.22 would achieve the United States' ALOP for FMD.

7.583. We are not in a position to make specific findings as to the FMD situation and the credibility of the sanitary structures in Uruguay, as the scientific evidence on the record, in particular APHIS' 2002 risk analysis[1538], does not allow us to conduct such an assessment. This understanding finds support in the opinions of the experts, who stated that the information contained in APHIS' 2002 risk analysis for Uruguay does not permit a proper comparison of the prevention and control measures in force in the two regions.[1539] We note, however, that upon concluding its risk analysis in 2002, APHIS was satisfied that the measures in place in Uruguay were adequate to prevent and control the disease, and concluded that imports of fresh (chilled or frozen) beef from that region would achieve the United States' ALOP if the protocols set forth in 9 CFR 94.22 were applied.[1540] APHIS thus decided to reopen its market to such imports.[1541]

7.584. Based on the foregoing, we take the view that imports of fresh (chilled or frozen) beef from both Northern Argentina and Uruguay, if subject to the protocols under 9 CFR 94.22, would achieve the United States' ALOP for FMD. In light of this similarity, the relevant conditions in Northern Argentina and Uruguay do have "a resemblance or likeness" and are "of the same nature or kind".[1542] Therefore, we conclude that the relevant conditions in the two regions are "similar" within the meaning of Article 2.3.

7.7.4.1.2 Do the United States' measures discriminate between the two regions?

7.585. Turning to the second prong of the test, we recall that discrimination may arise when Members in which the same conditions prevail are treated differently.[1543] The Appellate Body found, in the context of Article 5.5 of the SPS Agreement, that one of the "warning signals" pointing to the existence of discrimination was the "rather substantial difference" between the "import prohibition" on the relevant products originating in the territory of one Member and the "tolerance for imports" of another product, presenting a similar level of risk, originating in the territory of another Member.[1544] We agree with the Appellate Body and consider that the same reasoning applies to the notion of discrimination under Article 2.3, of which Article 5.5 is a specification.

7.586. Both parties acknowledge, and we agree, that imports of fresh (chilled or frozen) beef from Uruguay are treated differently from imports of the same products from Northern Argentina. Indeed, the former are allowed into the United States under the mitigating protocols in 9 CFR 94.22, whereas the latter are prohibited. As observed by the panel in *Australia – Salmon*, "even … the most stringent" import conditions "would still be significantly less restrictive to trade

[1537] United States' first written submission, para. 296.
[1538] 2002 Risk Assessment for Uruguay, (Exhibit ARG-65).
[1539] See e.g. Dr Cupit's responses to Panel questions Nos. 34, 35, 36, and 37; Dr Batho's responses to Panel questions Nos. 35 and 36; Dr Bonbon's response to Panel question No. 34.
[1540] 2003 Final Rule on beef from Uruguay, (Exhibit ARG-8).
[1541] 2003 Final Rule on beef from Uruguay, (Exhibit ARG-8).
[1542] *Shorter Oxford English Dictionary on Historical Principles*, 6th ed. (Oxford University Press, 2007), Vol. 2, p. 2838.
[1543] Appellate Body Report, *US – Shrimp*, para. 165.
[1544] Appellate Body Report, *Australia – Salmon*, para. 163. See also Panel Report, *US – Poultry (China)*, para. 7.285.

than an outright prohibition".[1545] We agree that the difference in treatment between Northern Argentine and Uruguayan products is "rather substantial". Therefore, we find that the United States' measures discriminate between Northern Argentina and Uruguay.

7.7.4.1.3 Is the discrimination arbitrary or unjustifiable?

7.587. Finally, we must assess whether the discrimination entailed by the United States' measures is arbitrary or unjustifiable. The dictionary definition of the term "arbitrary" is "based on mere opinion or preference as opp[osed] to the real nature of things, capricious, unpredictable, inconsistent".[1546] In turn, the term "unjustifiable" is defined as "not justifiable, indefensible"[1547], with "justifiable" meaning "[c]apable of being legally or morally justified or shown to be just, righteous, or innocent; defensible" and "[c]apable of being maintained, defended, or made good".[1548]

7.588. In *US – Gasoline*, *US – Shrimp*, *US – Shrimp (Article 21.5 – Malaysia)*, and *Brazil – Retreaded Tyres*, the Appellate Body explained that an analysis of whether discrimination is arbitrary or unjustifiable within the meaning of the chapeau of Article XX "should focus on the cause of the discrimination, or the rationale put forward to explain its existence".[1549] In particular, in *Brazil – Retreaded Tyres* the Appellate Body focused its analysis on whether the measure at issue borne a "rational connection to" its stated objective of protecting human life or health under subparagraph (b) of Article XX.[1550] This approach was adopted by the panel in *US – Poultry (China)* in its analysis under Article 2.3 of the SPS Agreement.[1551] Finally, in the context of Article 5.5 of the SPS Agreement, which constitutes a specification of the basic obligation contained in Article 2.3, the Appellate Body upheld the panel's finding that the measure at issue was arbitrarily and unjustifiably discriminatory because it treated differently two products that presented the same level of risk.[1552]

7.589. Based on the foregoing, we consider that, in our assessment of whether the discrimination between imports of fresh (chilled or frozen) beef from Northern Argentina and Uruguay stemming from the United States' measures is "arbitrary or unjustifiable", we must determine whether the regulatory distinction between the two sets of imports bears a rational connection to the stated objective of the measures. To recall[1553], the objective of the measures at issue is to ensure that imports of FMD-susceptible animals and animal products into the United States are allowed only if the level of risk posed by such imports, possibly after the application of certain "scientifically justified" mitigating protocols, achieves the United States' ALOP for FMD. We already found that imports of fresh (chilled or frozen) beef from Northern Argentina have a similar ability to achieve the United States' ALOP as those from Uruguay, subject to the application of the protocols set forth in 9 CFR 94.22.[1554] We also found that, while imports from Uruguay are permitted under the protocols in question, imports from Northern Argentina are prohibited.[1555]

7.590. Taken together, these findings constitute strong indicators, or warning signals, that the United States' measures arbitrarily or unjustifiably discriminate between the two regions. However, before reaching our conclusions, we find it appropriate to consider the United States' explanations as to the rationale underlying the regulatory distinction between Northern Argentina and Uruguay.

[1545] Panel Report, *Australia – Salmon*, para. 8.182.
[1546] *Online Oxford English Dictionary* (as quoted in Panel Report, *US – Poultry (China)*, para. 7.259).
[1547] *Online Oxford English Dictionary* (as quoted in Panel Report, *US – Poultry (China)*, para. 7.259).
[1548] *Online Oxford English Dictionary* (as quoted in Panel Report, *US – Poultry (China)*, para. 7.259).
[1549] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226 (in turn referring to Appellate Body Reports, *US – Gasoline*; *US – Shrimp*; and *US – Shrimp (Article 21.5 – Malaysia)*)). See also Appellate Body Report, *EC – Seal Products*, para. 5.303. See also Panel Report, *US – Poultry (China)*, para. 7.261.
[1550] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.
[1551] Panel Report, *US – Poultry (China)*, para. 7.261. See also Panel Report, *India – Agricultural Products*, para. 7.429.
[1552] Appellate Body Report, *Australia – Salmon*, para. 158. Further, the Appellate Body suggested that product being accorded a more favourable treatment could present a *higher* level of risk than the product being treated less favourably. See ibid.
[1553] See para. 7.580 above.
[1554] See para. 7.584 above.
[1555] See para. 7.586 above.

7.591. The first reason adduced by the United States to justify the difference in treatment between imports from Northern Argentina and Uruguay is that, at the time of the establishment of the Panel, APHIS had completed a risk analysis for the latter region and concluded that imports therefrom under the protocols in 9 CFR 94.22 would achieve the United States' ALOP.[1556] Conversely, the United States contends, at that time APHIS was still conducting a risk analysis with respect to Northern Argentina, therefore its conclusions as to the appropriateness of the application of the same mitigating protocols on imports therefrom were still pending.[1557]

7.592. We are not convinced by the United States' argument. In section 7.3.3.5.3 above, we found that APHIS' review of the FMD situation in Northern Argentina incurred an undue delay and that, at the time of the Panel's establishment, APHIS has all the necessary information to complete its evaluation with respect to Northern Argentina. In our view, a Member's failure to conduct a risk assessment and reach a final conclusion within a reasonable period of time cannot constitute an excuse for not complying with the non-discrimination obligation contained in Article 2.3 of the SPS Agreement.

7.593. Next, the United States submits that Argentina failed to show that Northern Argentina and Uruguay are in identical or similar conditions with respect to FMD.[1558] In its view, the fact that the two countries or regions share the same OIE FMD-status does not mean that imports of fresh (chilled or frozen) beef therefrom present the same level of risk of FMD-introduction into the United States.[1559] Rather, according to the United States, the differences between two regions in terms of surface area, cattle population in relation to the number of veterinarians, borders with regions of higher FMD risk, and the credibility of sanitary authorities distinguish the FMD situations in the two regions.[1560]

7.594. We agree with the United States that the mere fact that two countries or regions share the same OIE disease status is not, in and of itself, dispositive of the level of risk posed by imports therefrom. Indeed, the OIE confirmed at the meeting with the Panel that, in recognizing a region as FMD-free where vaccination is practised, it does not conduct a comparative analysis between that region and other regions that share the same FMD-status.[1561] We recall, however, that our assessment of the FMD conditions prevailing in Northern Argentina was not solely based on its OIE FMD-status, but rather on the scientific information on the record, in accordance with the Appellate Body' guidance in *Australia – Apples*.[1562] Moreover, our assessment took into account all the 11 factors considered by APHIS when reviewing the FMD situation in an applicant country or region under 9 CFR 92.2, as well as the risk assessment techniques developed by the OIE.[1563] In our assessment, we found that factors such as the surface area of Northern Argentina, its cattle population in relation to the number of veterinarians, its borders with regions of higher FMD risk, and the credibility of its sanitary authorities did not undermine the ability of imports from that region to meet the United States' ALOP if the protocols in 9 CFR 94.22 were applied.[1564] Therefore, we consider that the alleged differences between Northern Argentina and Uruguay pointed to by the United States are not sufficient to show that the two regions do not share similar conditions with respect to FMD.

7.595. In light of the above, we consider that the differential treatment between imports of fresh (chilled or frozen) beef from Northern Argentina and Uruguay is not rationally connected to the objective of APHIS' regulatory scheme for FMD, namely the need to ensure that imports of

[1556] United States' response to Panel question No. 42 following the first substantive meeting.
[1557] United States' response to Panel question No. 46 following the first substantive meeting.
[1558] See e.g. United States' second written submission, para. 117; United States' opening statement at the first meeting of the Panel, para. 70; United States' response to Panel question No. 44 following the first substantive meeting; United States' second written submission, para. 123; United States' opening statement at the second meeting of the Panel, para. 72.
[1559] See e.g. United States' second written submission, paras. 119-123.
[1560] United States' first written submission, para. 297 (referring to Ibid. paras. 308-310).
[1561] Transcript of the meeting, para. 1.123. The OIE stated, that "[i]f the OIE grants a status to a country or a zone, that is an evaluation of the probability of the virus being present. Having granted that status the appropriate measures to be applied are those in the Code and, after that, we encourage the countries to use those measures because they are safe." See Transcript of the meeting, para. 1.129.
[1562] See paras. 7.440-7.449 above.
[1563] See paras. 7.450-7.452 above.
[1564] See section 7.6.7.4.1 above.

FMD-susceptible animals and animal products into the United States are allowed only if the level of risk posed by such imports, possibly after the application of certain "scientifically justified" mitigating protocols, achieves the United States' ALOP for FMD.

7.596. Based on all the foregoing, we conclude that, by importing fresh (chilled or frozen) beef from Uruguay under the protocols in 9 CFR 94.22 and prohibiting imports of the same product from Northern Argentina, the United States' measures arbitrarily or unjustifiably discriminate between Members where the same conditions prevail, inconsistently with the first requirement of Article 2.3 of the SPS Agreement.

7.597. Having made such a determination, we find that addressing Argentina's claim that, by conducting a risk analysis and issuing a positive determination for Uruguay within a reasonable period of time, while maintaining its prohibition on imports from Northern Argentina without a risk assessment since 2001, the United States further discriminates between the two regions in terms of access to APHIS' regulatory process would not aid in securing a positive resolution to this dispute. Therefore, we exercise judicial economy on Argentina's claim.

7.598. As discussed in paragraph 7.575 above, we consider that a finding that a measure results in arbitrary or unjustifiable discrimination necessarily entails a finding that it constitutes a disguised restriction on international trade. Therefore, we find that the United States' measures at issue are applied in a manner that constitutes a disguised restriction on international trade, inconsistently with the second requirement of Article 2.3 of the SPS Agreement.

7.7.4.2 Discrimination between Patagonia, Santa Catarina, and Chile

7.599. We now turn to Argentina's claim that, by recognizing Santa Catarina and Chile as FMD-free within the meaning of 9 CFR 94.1(a) and applying the protocols under 9 CFR 94.11 to imports of FMD-susceptible animal products therefrom, while excluding from its market the same products from Patagonia, the United States arbitrarily or unjustifiably discriminates between the two regions. As stated in paragraph 7.578 above, our assessment will proceed in three steps: (i) Do similar or identical conditions prevail in Patagonia, Santa Catarina, and Chile?; (ii) If so, do the United States' measures discriminate between those regions?; and (iii) If so, is the discrimination arbitrary or unjustifiable?

7.7.4.2.1 Do similar or identical conditions prevail in Patagonia, Santa Catarina, and Chile?

7.600. Beginning with the first question, we recall that, as discussed in paragraphs 7.579-7.580 above, the relevant condition that must be identical or similar in two regions in light of the objective, design, architecture, and revealing structure of the United States' measures is the level of risk of FMD-introduction posed by imports of the relevant products from the two regions, as well as their ability to meet the United States' ALOP with or without the application of certain mitigating protocols. We find it appropriate to use the same standard here.

7.601. We are mindful that, in comparing the levels of FMD-risk posed by imports of FMD-susceptible animals and animal products from Patagonia, Santa Catarina and Chile, we are not simply required to assess whether FMD is present in the territory of each region or to take note of the OIE FMD-status assigned to such regions. Indeed, as the United States correctly observes, the level of risk posed by imports from the two regions is not only a function of their disease-prevalence in a given point in time, but also, and most importantly, of the credibility of the sanitary measures in place in such regions to prevent and control FMD.[1565] Thus, our assessment must include a comparison of the effectiveness and credibility of the sanitary measures in place in the above-mentioned regions to prevent and control FMD, as well as the ability of imports from the two regions to meet the United States' ALOP – with or without the application of certain mitigating protocols.

7.602. In section 7.6.7.4.2 above, we found that Patagonia has the necessary veterinary capacity and infrastructure to prevent and control FMD in its territory and to ensure that the region remains

[1565] United States' first written submission, para. 296.

free from the disease, as it has been since 1994. We also found that, if Patagonia were added to the list of FMD-free regions in 9 CFR 94.1(a) and its imports of the relevant products were subject to the protocols set forth in 9 CFR 94.11, the United States' ALOP for FMD would be achieved.

7.603. We note that, in 2010, APHIS completed a favourable risk analysis for Santa Catarina.[1566] Such an evaluation used a qualitative methodology and was based on the 11 factors set out in the pre-2012 version of 9 CFR 92.2, thus similar in method and scope to our assessment of Patagonia in paragraphs 7.512-7.539 above. Based on its analysis of the 11 factors, APHIS concluded that "Santa Catarina possesses the detection capabilities, reporting systems, and emergency response systems necessary to combat FMD".[1567] As a result, APHIS added the region to the list in 9 CFR 94.1(a) and allowed imports of FMD-susceptible animal products therefrom subject to the protocols in 9 CFR 94.11.[1568] Similarly, APHIS has long recognized Chile as FMD-free within the meaning of 9 CFR 94.1(a) and allows imports of the relevant products therefrom under 9 CFR 94.11.[1569]

7.604. Taken together, the findings above indicate that Patagonia, Santa Catarina, and Chile all possess the necessary veterinary capacity and infrastructure to prevent and control FMD. In their responses to Panel questions, the experts took the view that, based on the evidence on the record, several aspects of the sanitary measures in place in Patagonia and Santa Catarina to prevent and control FMD are comparable in terms of efficacy.[1570] Moreover, imports of FMD-susceptible animals and animal products from all three regions present a level of risk that, if mitigated by the protocols in 9 CFR 94.11, would achieve the United States' ALOP for FMD. Based on the foregoing, we take the view that the relevant conditions in Patagonia, Santa Catarina and Chile do have "a resemblance or likeness" and are "of the same nature or kind"[1571], and are therefore similar within the meaning of Article 2.3.

7.7.4.2.2 Do the United States' measures discriminate between Patagonia, Santa Catarina, and Chile?

7.605. Turning to the second prong of the test, we recall that, as discussed in paragraph 7.585 above, "discrimination" may arise when Members in which the same conditions prevail are treated differently.[1572] Further, according to the Appellate Body, a warning signal of discrimination is the substantial difference in treatment between an import prohibition on products originating in the territory of one Member and the permission of imports of products presenting an equivalent level of risk originating in the territory of another Member.[1573] Indeed, the Appellate Body took the view that "even … the most stringent" import conditions "would still be significantly less restrictive to trade than an outright prohibition".[1574]

7.606. The parties acknowledge, and we agree, that imports of FMD-susceptible animals and animal products from Santa Catarina and Chile are treated differently from imports of the same products from Patagonia. Indeed, the former are allowed into the United States under the mitigating protocols in 9 CFR 94.11, whereas the latter are prohibited. We consider that this difference in treatment is substantial, and therefore find that it amounts to discrimination between, on the one hand, Patagonia and, on the other hand, Santa Catarina and Chile.

[1566] 2010 Risk Evaluation for Santa Catarina, (Exhibit ARG-7).
[1567] 2010 Risk Evaluation for Santa Catarina, (Exhibit ARG-7), p. 63.
[1568] *Changes in the Disease Status of the Brazilian State of Santa Catarina with Regard to Certain Ruminant and Swine Diseases*, 75 Fed. Reg. 69851 (USDA/APHIS November 16, 2010) (Final Rule), (Exhibit ARG-21).
[1569] See APHIS website, *Foot-And-Mouth and Rinderpest*, available at http://www.aphis.usda.gov/import_export/animals/animal_disease_status.shtml (last accessed 23 January 2015), incorporated in 9 CFR 94.1(a), (Exhibit ARG-64).
[1570] See e.g. Dr Cupit's responses to Panel questions Nos. 38, 39, and 40; Dr Batho's responses to Panel questions Nos. 38, 39, and 40; Dr Bonbon's responses to Panel questions Nos. 38, 39, and 40.
[1571] *Shorter Oxford English Dictionary on Historical Principles*, 6th ed. (Oxford University Press, 2007), Vol. 2, p. 2838.
[1572] Appellate Body Report, *US – Shrimp*, para. 165.
[1573] Appellate Body Report, *Australia – Salmon*, para. 163. See also Panel Report, *US – Poultry (China)*, para. 7.285.
[1574] Panel Report, *Australia – Salmon*, para. 8.182.

7.7.4.2.3 Is the discrimination arbitrary or unjustifiable?

7.607. Finally, we must assess whether the discrimination entailed by the United States' measures is arbitrary or unjustifiable. As explained in paragraphs 7.587-7.589 above, we consider that, in assessing whether the United States' discrimination between imports of FMD-susceptible animals and animal products from Patagonia, Santa Catarina and Chile is "arbitrary or unjustifiable", we must determine whether the regulatory distinction between the two sets of imports bears a rational connection to the stated objective of the measures. To recall[1575], the objective of the measures at issue is to ensure that imports of FMD-susceptible animals and animal products into the United States are allowed only if the level of risk posed by such imports, possibly after the application of certain "scientifically justified" mitigating protocols, achieves the United States' ALOP for FMD. We already found that imports of FMD-susceptible animals from Patagonia have a similar ability to achieve the United States' ALOP as those from Santa Catarina and Chile, subject to the application of the protocols set forth in 9 CFR 94.11.[1576] We also found that, whereas imports from Santa Catarina and Chile are permitted under the protocols in question, imports from Patagonia are prohibited.

7.608. Taken together, these findings constitute strong indicators, or warning signals, that the United States' measures "arbitrarily or unjustifiably discriminate" between the above-mentioned regions. However, before reaching our conclusions, we find it appropriate to consider the United States' explanations as to the rationale underlying the regulatory distinction between, on the one hand, Patagonia and, on the other hand, Santa Catarina and Chile.

7.609. In the United States' view, the "key differentiation"[1577] between Patagonia and Santa Catarina, justifying the difference in treatment between imports from the two regions, is the fact that, at the time of the establishment of the Panel, APHIS had drawn "a conclusion as to the appropriateness of the import authorization terms" applied to imports from Santa Catarina.[1578] Conversely, it contends, at that time APHIS was still conducting a risk analysis with respect to Patagonia, and this delay was justified by the fact that, in 2008, SENASA extended its original request for the recognition of Patagonia South to include Patagonia North B and introduced "changes to the sanitary boundaries" between the two areas.[1579]

7.610. We are not convinced by the United States' argument. In section 7.3.3.5.4 above, we found that APHIS' review of the FMD situation in Patagonia incurred an undue delay and that, at the time of the Panel's establishment, APHIS had all the necessary information to complete its evaluation with respect to that region. In particular, while we agreed with the United States that Argentina's extension of its original request to include Patagonia North B and the changes in SENASA's regulatory framework for the Patagonia region justified APHIS' delay between December 2008 and February 2009[1580], we found that such occurrences could not justify APHIS' further delay between February 2009 and the date of the establishment of the Panel.[1581] In our view, a Member's failure to conduct a risk assessment and reach a final conclusion within a reasonable period of time cannot constitute an excuse for not complying with the non-discrimination obligation contained in Article 2.3 of the SPS Agreement. Moreover, we found that the enactment of SENASA Resolutions 148/2008 and 1282/2008 did not create uncertainty as to SENASA's ability to control the ingress of FMD-susceptible animals and animal products from Northern Argentina into Patagonia, but rather reinforced traceability and animal movement controls within the Patagonia region.[1582]

7.611. As for the discrimination between Patagonia and Chile, we note that the United States did not put forward any arguments as to differences that would warrant a regulatory distinction between such regions. Indeed, the only argument presented by the United States is that the fact that Patagonia and Chile share the same OIE FMD-status recognition is not, in and of itself,

[1575] See para. 7.580 above.
[1576] See para. 7.604 above.
[1577] United States' first written submission, para. 318.
[1578] United States' first written submission, para. 298.
[1579] United States' first written submission, para. 318. See also Ibid. para. 298.
[1580] See paras. 7.167-7.168 above.
[1581] See paras. 7.169-7.170 above.
[1582] See para. 7.528 above.

dispositive of whether imports from the two regions should be treated similarly.[1583] As noted in paragraph 7.601 above, we agree with the United States that sharing the same OIE FMD-status recognitions does not, in and of itself, constitute conclusive evidence of identity or similarity between two or more regions. However, since we found that imports from both Patagonia and Chile are able to meet the United States' ALOP if subjected to the protocols under 9 CFR 94.11. Moreover, we take the view that it was incumbent on the United States to provide a justification for its discriminatory treatment of such imports, but we find no such justification on the record.

7.612. In light of the above, we disagree that the elements referred to by the United States justify a regulatory distinction between, Patagonia – from which imports are prohibited – on the one hand, and Santa Catarina and Chile – from which imports are permitted subject to the protocols in 9 CFR 94.11, on the other hand. Thus, we consider that the differential treatment between the above-mentioned regions is not rationally connected to the objective of APHIS' regulatory scheme for FMD, namely the need to ensure that imports of FMD-susceptible animals and animal products into the United States are allowed only if the level of risk posed by such imports, possibly after the application of certain "scientifically justified" mitigating protocols, achieves the United States' ALOP for FMD.

7.613. Based on all the foregoing, we conclude that, by recognizing Santa Catarina and Chile as FMD-free within the meaning of 9 CFR 94.1(a) and applying the protocols in 9 CFR 94.11 to the relevant imports therefrom, while prohibiting imports from Patagonia, the United States' measures arbitrarily or unjustifiably discriminate between Members where the same conditions prevail, inconsistently with Article 2.3 of the SPS Agreement.

7.614. Having reached such a conclusion, we are of the view that a finding on Argentina's claim that, by conducting a risk analysis and issuing a positive determination for Santa Catarina within a reasonable period of time, while maintaining its prohibition on imports from Patagonia without a risk assessment since 2001, the United States further discriminates between the two regions in terms of access to APHIS' regulatory process would not aid in securing a positive resolution to this dispute. Therefore, we exercise judicial economy on this claim.

7.615. As discussed in paragraph 7.575 above, we consider that a finding that a measure results in arbitrary or unjustifiable discrimination necessarily entails a finding that it constitutes a disguised restriction on international trade. Therefore, we find that the United States' measures at issue are applied in a manner that constitutes a disguised restriction on international trade, inconsistently with the second requirement of Article 2.3 of the SPS Agreement.

7.7.4.3 Discrimination between Northern Argentina, Patagonia, Japan, and the United Kingdom

7.616. Finally, we turn to Argentina's claims that the United States arbitrarily or unjustifiably discriminated between, on the one hand, Northern Argentina and Patagonia and, on the other hand, Japan and the United Kingdom. APHIS completed its risk analyses and issued favourable determinations *vis-à-vis* imports of FMD-susceptible animals and animal products from Japan and the United Kingdom within approximately two to three years of the filing of the respective applications under 9 CFR 92.2.[1584] Conversely, as discussed in more detail in section 7.3.3 above, the United States has maintained its prohibitions on imports of fresh (chilled or frozen) beef from Northern Argentina and of FMD-susceptible animals and animal products from Patagonia since 2001. In Argentina's view, by doing so, APHIS granted "much greater and swifter access to its regulatory systems and processes" to Japan and the United Kingdom than to Argentina.[1585] The United States submits that Argentina's claim must fail because Argentina failed to show that similar or identical conditions with respect to FMD prevail in the regions to be compared.[1586]

7.617. Mindful of the test set forth by the panel in *Australia – Salmon (Article 21.5 – Canada)*, we must answer the following questions in order to determine whether Argentina has established its claim: (i) Do similar or identical conditions prevail in Northern Argentina, Patagonia, Japan and the

[1583] United States' response to Panel question No. 39 following the first substantive meeting.
[1584] See United States' response to Panel question No. 36 following the second substantive meeting.
[1585] Argentina's second written submission, para. 229.
[1586] See e.g. United States' second written submission, para. 122.

United Kingdom? (ii) If so, do the United States' measures discriminate between those regions? and (iii) If so, is the discrimination arbitrary or unjustifiable?

7.618. Beginning with the first prong of the test, in paragraphs 7.579-7.580 above we found that the relevant condition that must be "identical or similar" in two or more regions in light of the objective, design, architecture, and revealing structure of the United States' measures is the level of risk of FMD-introduction posed by imports of the relevant products from the two regions, as well as their ability to meet the United States' ALOP with or without the application of certain mitigating protocols.

7.619. Argentina has presented no evidence that such a condition in Northern Argentina and Patagonia is identical or similar to the condition in Japan or the United Kingdom. Indeed, Argentina concedes that the substantive FMD situations of Northern Argentina and Patagonia, on the one hand, and the United Kingdom and Japan, on the other, are not necessarily identical.[1587] However, in its view, the condition that is relevant to our assessment here is that all the above-mentioned regions "had FMD outbreaks" and have an interest in having "their export rights provided by the [United States] through full access to the United States' regulatory system".[1588] In other words, Argentina contends that the condition relevant to our assessment is the common desire of the regions at hand to have their market access requests under 9 CFR 92.2 reviewed by APHIS within a reasonable period of time.

7.620. We note that, according to the panel in *US – Poultry (China)*, discrimination may stem not only from "'substantive' SPS measures", but also from "procedural and information requirements".[1589] In that dispute, under the measure at issue, China was *de jure* excluded from accessing the regulatory system of the United States, whereas other Members could access the system by submitting requests for imports of the relevant products.[1590] In light of the specific facts of that case, that panel found that the relevant condition for the purpose of a comparison of "identical or similar conditions" was the desire to access the regulatory process of the importing Member for the purpose of gaining market access.[1591] In this respect, the panel's reasoning is similar to that of the Appellate Body in *US – Shrimp*, where it stated that discrimination between two exporting countries stemmed from the fact that the measure at issue "[did] not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries".[1592]

7.621. In our view, APHIS' regulatory framework for FMD differs from the measures at issue in *US – Poultry (China)* and *US – Shrimp*. Under 9 CFR 92.2, any exporting Member may submit a request for recognition of a region as FMD-free within the meaning of 9 CFR 94.1(a). In other words, the only condition required to *activate* APHIS' regulatory process is the interest to export FMD-susceptible animals or animal products into the United States, expressed by submitting a request. However, we consider that the conditions required for APHIS' review being *completed* and a final determination being issued require something more than such an interest. Indeed, the timing and outcome of APHIS' review of a specific request do not depend simply on the desire of the applicant Member to access the United States' market, but rather on the level of risk of FMD-introduction posed by imports of the relevant products from that Member. In other words, as we found above, the approval procedures set forth in 9 CFR 92.2 are part of the process to determine whether the relevant products from a specific country or region pose a particular risk of introduction or dissemination of FMD into the United States.[1593] As we see it, the design, architecture, and revealing structure of the United States' measure at issue indicate that the length of time APHIS' review of a request may vary considerably based on the complexity of the factual situation in the region being reviewed.

[1587] Argentina's second written submission, para. 230.
[1588] Argentina's second written submission, para. 231. See also Argentina's response to Panel question No. 35 following the second substantive meeting.
[1589] Panel Report, *US – Poultry (China)*, para. 7.147. In the context of the chapeau of Article XX of the GATT 1994, see Appellate Body Reports, *US – Shrimp*, para. 160; *EC – Seal Products*, para. 5.302.
[1590] See Panel Report, *US – Poultry (China)*, para. 7.233.
[1591] Panel Report, *US – Poultry (China)*, paras. 7.233-7.237.
[1592] Appellate Body Report, *US – Shrimp*, para. 165.
[1593] See paras. 7.37-7.41, 7.74 above.

7.622. Argentina has not presented any evidence that the specific factual circumstances in Northern Argentina and Patagonia are identical or similar to those in Japan and the United Kingdom in terms of the information presented to APHIS in support of the applications or the complexity of APHIS' evaluation in light of the specific sanitary conditions present in each region. Conversely, the United States pointed to a number of variables that, in its view, justified APHIS' swifter evaluation of the requests of Japan and the United Kingdom vis-à-vis Argentina's requests. Such variables include the fact that both Japan and the United Kingdom are island countries which do not share land borders with regions of higher FMD-risk.[1594] Argentina has not addressed these relevant factual differences between the situations in Northern Argentina and Patagonia and those in Japan and the United Kingdom. Therefore, we are not convinced that Argentina has made its case that the relevant conditions in the above-mentioned regions are identical or similar within the meaning of Article 2.3.

7.623. In light of the above, we find that Argentina failed to demonstrate that the United States' measures arbitrarily or unjustifiably discriminate between, on the one hand, Northern Argentina and Patagonia and, on the other hand, Japan and the United Kingdom.

7.8 Adaptation to regional conditions

7.8.1 Relevant legal provisions

7.624. The text of Article 6 of the SPS Agreement, entitled "Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence", reads as follows:

> 1. Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area – whether all of a country, part of a country, or all or parts of several countries – from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.
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> 2. Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.
>
> 3. Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

7.625. Annex A(6) and A(7) set forth the definitions of "pest- or disease-free areas" and "areas of low pest or disease prevalence", respectively, as:

> 6. *Pest- or disease-free area* – An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur.
>
> NOTE: A pest- or disease-free area may surround, be surrounded by, or be adjacent to an area – whether within part of a country or in a geographic region which includes parts of or all of several countries – in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment

[1594] United States' first written submission, paras. 313 and 315.

of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.

7. *Area of low pest or disease prevalence* – An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which is subject to effective surveillance, control or eradication measures.

7.8.2 Main arguments of the parties

7.8.2.1 Argentina

7.626. Argentina claims that the United States' prohibition on imports of FMD-susceptible animals and animal products from Patagonia has been maintained inconsistently with Articles 6.1 and 6.2 of the SPS Agreement. Argentina argues that Articles 6.1 and 6.2 impose "complementary" obligations[1595], contending that Article 6.2 "particularize[s] and supplement[s]" the broader obligations contained in Article 6.1.[1596] Thus, according to Argentina, a measure inconsistent with Article 6.1 is, by implication, inconsistent with Article 6.2.[1597] Further, Argentina considers that the factors listed in Articles 6.1 and 6.2 must be considered by the authorities of a Member when evaluating the sanitary status of a region in the context of a risk assessment conducted under Articles 5.1 and 5.2 of the SPS Agreement.[1598] Therefore, in its view, a breach of Articles 6.1 or 6.2 would necessarily lead to a violation of Articles 5.1 and 5.2.[1599]

7.627. Beginning with Article 6.1, Argentina submits that the provision in question requires an importing Member to adapt its measure(s) to the SPS characteristics of a region, taking into account the factors listed in the second sentence, including the "appropriate criteria or guidelines" developed by the relevant international organizations.[1600] In Argentina's view, the OIE's region-specific disease status determinations are such criteria or guidelines.[1601] Argentina claims that, in adopting and maintaining its measure, the United States failed to take into account: the "level of prevalence of specific diseases or pests" in Patagonia South, which has been free from FMD since 1976, and in Patagonia North B, which has been free from FMD since 1994[1602]; the "exemplary eradication and control program" SENASA put in place, whose adequacy has been acknowledged by APHIS on several occasions[1603]; and the "appropriate criteria or guidelines" developed by the OIE, which has recognized the FMD-free where vaccination is not practised status of Patagonia South in 2002 and of Patagonia North B in 2007.[1604]

7.628. As for Article 6.2, Argentina does not express views as to whether APHIS' regulatory scheme set forth in 9 CFR 92.2 and 9 CFR 94, "as such", recognizes the concepts of disease-free areas and areas of low disease prevalence.[1605] However, Argentina claims that, as applied to the relevant products originating in Patagonia[1606], the maintenance of the United States' measure is "not based on the factors listed in Article 6.2".[1607] Specifically, according to Argentina, the United States disregarded: the "geography" of Patagonia, in particular its isolation from Northern Argentina and its distance from the 2006 FMD outbreak in the province of Corrientes[1608]; the

[1595] Argentina's second written submission, para. 238; Argentina's response to Panel question No. 45 following the second substantive meeting.
[1596] Argentina's first written submission, para. 548.
[1597] Argentina's first written submission, para. 548.
[1598] Argentina's response to Panel question No. 49 following the first substantive meeting.
[1599] Argentina's response to Panel question No. 49 following the first substantive meeting.
[1600] Argentina's response to Panel question No. 53 following the first substantive meeting.
[1601] Argentina's response to Panel question No. 53 following the first substantive meeting.
[1602] Argentina's first written submission, para. 535.
[1603] Argentina's first written submission, paras. 539-541.
[1604] Argentina's first written submission, para. 542.
[1605] Argentina's response to Panel question No. 43 following the second substantive meeting.
[1606] Argentina's first written submission, para. 543; Argentina's opening statement at the first meeting of the Panel, para. 77.
[1607] Argentina's first written submission, para. 551.
[1608] Argentina's first written submission, para. 554.

ecosystem of Patagonia, which is "naturally FMD-free"[1609]; and the FMD surveillance and control programs put in place by SENASA, whose adequacy was recognized by APHIS.[1610]

7.629. With respect to its own obligations under Article 6.3, Argentina acknowledges that, in principle, non-compliance with those obligations "stands as a potential affirmative defence by a respondent to claims under Articles 6.1 and 6.2".[1611] It maintains, however, that the United States has "failed to substantiate its assertions"[1612] that Argentina did not comply with its obligations to "objectively demonstrate" the disease-free status of Patagonia within the meaning of Article 6.3. Argentina submits that, in 2009, APHIS stated in a letter that it had "all the information" required to "proceed favourably".[1613] According to Argentina, this fact, coupled with the United States' representative's statements before the SPS Committee in 2010 and 2011, demonstrates that "Argentina had fulfilled its obligations under Article 6.3".[1614]

7.8.2.2 United States

7.630. The United States disagrees with Argentina that the prohibition on imports of FMD-susceptible animals and animal products from Patagonia is inconsistent with Articles 6.1 and 6.2.

7.631. The United States argues that the three paragraphs of Article 6 of the SPS Agreement "should be read together", as they provide "context for each other".[1615] In its responses to Panel questions, the United States asserts that the recognition of the "concepts of pest- or disease-free areas and areas of low pest or disease prevalence" under Article 6.2 is a "particular step" towards a Member's fulfilment of its obligation to ensure that SPS measures are adapted to the characteristics of an area under Article 6.1.[1616]

7.632. With respect to Argentina's claim under Article 6.1, the United States argues that the requirement for the importing Member to "adapt" an SPS measure to the sanitary characteristics of an area should be read in light of the requirement in Article 6.3 that the exporting Member "bring forth the necessary evidence to show that it is and is 'likely to remain' free of disease".[1617] The United States argues that Article 6.3 recognizes that, when confronted with an assertion that an exporting Member is free of a disease, the importing Member will not have sufficient relevant scientific evidence to evaluate that assertion.[1618] The United States argues that Article 6 contemplates "a dynamic process" whereby "information is brought to the attention of an importing Member" and the importing Member "engages in a process by which it evaluates the information and amends its measures" in light of the characteristics of that area.[1619] For the United States, such a claim of disease freedom and the concomitant need to evaluate new information results in any existing measure becoming a provisional measure that falls within the scope of Article 5.7, which requires that an importing Member review its measure, including any adaptation to the sanitary characteristics of the exporting region, within a reasonable period of time.[1620]

[1609] Argentina's first written submission, para. 557. However, we note that Argentina has not provided evidence to substantiate this statement.

[1610] Argentina's first written submission, paras. 558-565.

[1611] Argentina's response to Panel question No. 49 following the first substantive meeting. See also Argentina's second written submission, para. 242.

[1612] Argentina's response to Panel question No. 48 following the first substantive meeting.

[1613] Argentina's response to Panel question No. 48 following the first substantive meeting.

[1614] Argentina's response to Panel question No. 48 following the first substantive meeting. See also Argentina's opening statement at the second meeting of the Panel, para. 61.

[1615] United States' response to Panel question No. 49 following the first substantive meeting.

[1616] United States' response to Panel question No. 46 following the second substantive meeting.

[1617] United States' response to Panel question No. 22 following the first substantive meeting. See also United States' response to Panel question No. 49 following the first substantive meeting.

[1618] United States' response to Panel question No. 22 following the first substantive meeting.

[1619] United States' response to Panel question No. 54 following the first substantive meeting. See also United States' opening statement at the first meeting of the Panel, para. 56.

[1620] United States' response to Panel question No. 29 following the first substantive meeting. See also United States' response to Panel question No. 51 following the first substantive meeting.

7.633. The United States notes that "a process of information exchange" began when APHIS sought information from Argentina in response to Argentina's request.[1621] It argues that because of the concerns raised by subsequent FMD outbreaks in Northern Argentina in 2003 and 2006 and Argentina's "shifting [of] sanitary conditions between Patagonia South and Patagonia North B", and the expansion of Argentina's request for recognition to include Patagonia North B, APHIS extended the time taken to conclude its review.[1622] The United States thus asserts that the fact that, at the time of the establishment of the Panel, APHIS was still in the process of "adapting" its measure to the SPS characteristics of Patagonia is not due to any inconsistency on its part with Article 6.1, but rather to APHIS' justified uncertainty as to whether Argentina objectively demonstrated that Patagonia was, and was likely to remain, FMD-free.[1623]

7.634. Further, the United States asserts that, as OIE FMD-status determinations for specific countries or regions do not constitute "international standards, guidelines or recommendations for the purposes of Article 3, they also do not fall within the scope of "criteria or guidelines" under Article 6.1.[1624] In the United States' opinion, both the terms "criterion" and "guideline" refer to directing or standardizing principles, whereas the OIE's disease status designations constitute "conclusion[s]" or "outcome[s]" of the application of such principles to a specific situation.[1625]

7.635. As to Argentina's claim under Article 6.2, the United States argues that the measure at issue is consistent with the requirement to "recognize" or "acknowledge[e] the existence of the *idea* or *notion* of pest- or disease-free areas".[1626] Indeed, the United States observes, APHIS' regulatory framework set forth in 9 CFR 92.2 and 9 CFR 94 does, as such, "recognize the concepts" of FMD-free areas and areas of low FMD prevalence.[1627]

7.8.3 Main arguments of the third parties

7.8.3.1 Brazil

7.636. Brazil submits that Article 6.1 of the SPS Agreement sets forth a general obligation for Members to adapt their measures to the actual SPS characteristics of the "area" from which the product originated and to which the product is destined.[1628] In turn, according to Brazil, Article 6.2 details the obligations under Article 6.1 by requiring that Members recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, where the exporting Member provides evidence for this claim.[1629] Finally, for Brazil Article 6.3 requires the exporting Member to provide the necessary evidence in order to objectively demonstrate to the importing Member that certain areas of its territory are pest- or disease-free.[1630]

7.637. Brazil also observes that Article 6 should be read in the context of Articles 2.2 and 5.1. Accordingly, when considering the area of an exporting Member that is considered a "disease-free area" in light of the evidence provided by that Member under Article 6.3, the importing Member may refuse to recognize a pest- or disease-free area only on the basis of Article 5, especially Article 5.2, which establishes that "in the assessment of risks, Members shall take into account … existence of pest- or disease-free areas".[1631]

[1621] United States' opening statement at the first meeting of the Panel, para. 57. See also SENASA's letter of 30 December 2002, (Exhibit USA-79).
[1622] United States' opening statement at the first meeting of the Panel, para. 57.
[1623] United States' first written submission, para. 342. See also United States' opening statement at the first meeting of the Panel, paras. 56-57; United States' response to Panel question No. 22 following the first substantive meeting; United States' response to Panel question No. 49 following the first substantive meeting.
[1624] United States' response to Panel question No. 53 following the first substantive meeting, para. 219; United States' response to Panel question No. 49 following the second substantive meeting.
[1625] United States' response to Panel question No. 53 following the first substantive meeting.
[1626] United States' response to Panel question No. 54 following the first substantive meeting.
[1627] United States' response to Panel question No. 54 following the first substantive meeting. See also United States' opening statement at the first meeting of the Panel, para. 61.
[1628] Brazil's response to Panel question No. 16.
[1629] Brazil's response to Panel question No. 16.
[1630] Brazil's response to Panel question No. 16.
[1631] See also Brazil's responses to Panel questions Nos. 16 and 17.

7.8.3.2 European Union

7.638. The European Union takes the view that the three paragraphs of Article 6 of the SPS Agreement, read together, "create a balance of rights and obligations between exporting and importing Members". In particular, according to the European Union, the disciplines of Article 6.1 and Article 6.2 apply to both importing and exporting Members, as evidenced by the fact that Article 6.1 refers to both the area from which a product "originated" and the area to which the product "is destined".[1632]

7.639. According to the European Union, Article 6.3 requires exporting Members wishing to show that certain parts of their territory "should not be subject to SPS measures" of importing Members to provide the authorities of the importing Members with evidence necessary to "objectively demonstrate" that certain areas are, and are likely to remain, free of the disease in the future.[1633] Thus, for the European Union, the obligation of an importing Member to adapt its measure to the SPS characteristics of a particular area of the exporting Member is conditional upon the exporting Member's ability to objectively demonstrate that the specific area possesses those SPS characteristics and is likely to continue possessing them.[1634]

7.8.4 Analysis by the Panel

7.640. We are faced with the need to resolve several issues in connection with the interpretation of Article 6 before we can apply such a provision to Argentina's claims and the United States' defences. In particular, we shall elucidate the meaning of the obligations contained in Articles 6.1, 6.2, and 6.3, after which we will turn to an assessment of the interactions between the three paragraphs.

7.8.4.1 The obligations under Article 6.1

7.641. The first sentence of Article 6.1 requires all Members to "ensure" that their SPS measures are "adapted" to the SPS characteristics of the area "from which the product originated and to which the product is destined". The term "area" is defined in the text of the provision as "all of a country, part of a country, or all or parts of several countries". We note that this definition closely mirrors the definition of "area" contained in Annex A(6) and A(7) of the SPS Agreement. The panel in *India – Agricultural Products,* which was the first panel to examine Article 6, found that the dictionary definition of the word "ensure" is "[to] make certain the occurrence of [something]"[1635], whereas the word "adapt" means "[t]o make … suitable or fit for a purpose, or conformable to specified conditions, standards, or requirements; … to make suitable for a new purpose or to a different context or environment".[1636]

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

[1632] European Union's third-party statement, para. 24.
[1633] European Union's third-party statement, para. 25.
[1634] European Union's third-party statement, paras. 26-28.
[1635] Panel Report, *India – Agricultural Products*, para. 7.668 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. I, p. 840).
[1636] Panel Report, *India – Agricultural Products*, para. 7.668 (quoting The Oxford English Dictionary, OED Online, Oxford University Press, accessed 23 April 2014, <http://www.oed.com/view/Entry/2110?rskey=4XPehN&result=2&isAdvanced=false#eid>).

has the same level of prevalence of a given disease), that Member may be required to tailor its measure by relaxing the restrictions on imports into that area.

7.643. We agree with the panel in *India – Agricultural Products* that the second sentence of Article 6.1 "presupposes that Members undertake an assessment of the SPS characteristics of a region" and contains "a list of factors that shall be taken into account by Members in undertaking such assessment".[1637] The use of the words "*inter alia*" indicates that this is a non-exhaustive list.[1638] The three factors listed in the provisions are: (i) the level of prevalence of specific diseases or pests; (ii) the existence of eradication or control programmes; and (iii) appropriate criteria or guidelines developed by the relevant international organizations.

7.644. We recall our finding from paragraph 7.408 above, that the requirement to "take into account" a particular factor requires consideration of the factor and does not mandate a particular result or determination. We note that the obligation to "take into account" the factors enumerated in the second sentence is intrinsically connected to the obligations relating to the assessment of risks under Article 5 of the SPS Agreement. In particular, Article 5.2 requires Members conducting a risk assessment to "take into account", *inter alia*, the "prevalence of specific diseases or pests" and the "existence of pest- or disease-free areas" when assessing the risks as required by Article 5.1. Therefore, it is reasonable to conclude that the assessment of the SPS characteristics of an area, taking into account the factors listed in the second sentence of Article 6.1 could be conducted as part of a Member's risk assessment.[1639] Therefore, we find some merit in Argentina's argument that, if a Member did not comply with the second sentence of Article 6.1, this would be relevant for a determination of whether the Member complied with Article 5.1 and had taken into account the factors in Article 5.2 as required.[1640]

7.645. As to the meaning of the term "region" in the second sentence of Article 6.1, the parties agree that, for the purposes of this dispute, the term can be used interchangeably with the term "area" in the first sentence.[1641] Moreover, the OIE uses the terms "region", "zone" and "area" as referring to the same concept.[1642] Accordingly, we do not consider it necessary to attribute different meanings to the words "area" and "region" for the purposes of this dispute.

7.646. Based on the foregoing, we consider that the two sentences of Article 6.1 set forth a logical progression that those Members adopting and applying SPS measures are required to follow. According to the second sentence, a Member must "assess" the SPS characteristics of a given area, taking into account, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines developed by the relevant international organizations. Once the SPS characteristics of the area have been assessed, the Member is required to "adapt" it's SPS measure to such characteristics.

7.8.4.2 The obligations under Article 6.2

7.647. The first sentence of Article 6.2 requires that Members "recognize" the "concepts" of two specific types of areas: (i) "pest- or disease-free areas"; and (ii) "areas of low pest or disease prevalence".[1643] The panel in *India – Agricultural Products* concluded that the ordinary meaning of the word "recognize" is "[a]cknowledge the existence, legality, or validity of, [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration".[1644] In turn, it found that the term "concept" means "an abstract idea" or "an idea of a class of objects; a general

[1637] Panel Report, *India – Agricultural Products*, para. 7.657.
[1638] Panel Report, *India – Agricultural Products*, para. 7.657.
[1639] Our statement should not be read to preclude the possibility of other situations where Article 6.1 could be applied in the absence of a risk assessment.
[1640] This understanding does not preclude the possibility that an importing Member could adapt its SPS measures to regional conditions even in the absence of a risk assessment, such as in a situation where a measure falls within the scope of Article 5.7 or the Member is basing the measures on the Terrestrial Code.
[1641] See e.g. United States' response to Panel question No. 52 following the first substantive meeting; Argentina's response to Panel question No. 52 following the first substantive meeting.
[1642] See OIE's response to Panel question No. 21.
[1643] Panel Report, *India – Agricultural Products*, para. 7.659.
[1644] Panel Report, *India – Agricultural Products*, para. 7.668 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 361).

notion or idea".[1645] Read together, those terms indicate that Members are required to accept the authority and validity of the general notions of "pest- or disease-free areas and areas of low pest or disease prevalence" and to treat them as worthy of consideration in the adoption and application of their SPS measures. The panel in *India – Agricultural Products* found that because the first sentence of Article 6.2 simply requires Members to acknowledge particular *abstract ideas*, it sets forth "a less exigent obligation" than that of "ensuring" that a measure is "adapted" to the SPS characteristics of an area under Article 6.1.[1646]

7.648. In turn, the second sentence of Article 6.2 provides that the "determination" of pest- or disease-free areas and areas of low pest or disease prevalence "shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls". The list of factors that such a determination must be based on is non-exhaustive, as indicated by the words "such as".[1647] We note that we have explained the meaning of the words "based on" in the context of Article 3.1 in paragraphs 7.218-7.220 above. We see no reason not to apply the same meaning to the terms "based on" in the second sentence of Article 6.2. Therefore, we conclude that an analysis of the factors listed therein must sufficiently warrant or reasonably support the determination of pest- or disease-free areas or areas of low pest or disease prevalence.

7.8.4.3 The obligations under Article 6.3

7.649. We now turn to examining the content of Article 6.3. As observed by the panel in *India – Agricultural Products*, Article 6.3 sets forth a number of obligations which, unlike those in Articles 6.1 and 6.2, are not addressed to WTO Members generally, but rather to *exporting* Members that claim to have areas within their territory that are pest- or disease-free areas or areas of low pest or disease prevalence.[1648] In particular, an exporting Member making such a claim must provide evidence to the importing Member to objectively demonstrate that its areas are, and are likely to remain, pest- or disease-free or areas of low pest or disease prevalence. The Member shall also provide reasonable access to the importing Member for inspection, testing and other relevant procedures. As the plain language of Article 6.3 indicates, the exporting Member is not only required to objectively demonstrate that areas within its territory are pest- or disease-free or of low pest or disease prevalence at a given point in time, but also that such areas are "likely to remain" in the same pest- or disease-condition.

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

7.651. The implication of the United States' argument is that, so long as a measure falls within the scope of Article 5.7, they would not be inconsistent with Article 6.1 and 6.2. In our view, an exporting Member's claim under Article 6.3 may, in certain circumstances, give rise to a situation whereby the importing Member does not have enough information to conduct a risk assessment taking into account whether the area subject to the claim is pest- or disease-free or of low pest or disease prevalence.[1649] This might be the case, for example, where the exporting Member does not provide the scientific information necessary to substantiate its assertion. In such instances, if the other three requirements of Article 5.7 are also satisfied, then the measure governing the imports

[1645] Panel Report, *India – Agricultural Products*, para. 7.670 (quoting *The Oxford Dictionaries Online*, accessed 10 April 2014, <http://www.oxforddictionaries.com/definition/english/concept?q=concept> and *The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 10 April 2014, <http://www.oed.com/view/Entry/38130?rskey=vaS8sT&result=1#eid>).

[1646] Panel Report, *India – Agricultural Products*, para. 7.670.

[1647] Panel Report, *India – Agricultural Products*, para. 7.663.

[1648] Panel Report, *India – Agricultural Products*, para. 7.674.

[1649] We note that Article 5.2 requires Members to take into account "…prevalence of specific diseases or pests; existence of pest- or disease-free areas…". Therefore, the disciplines of Article 6.3 may be seen as informing the obligations of Members to maintain their measures with sufficient scientific evidence under Articles 2.2, 5.1 and 5.2, and thus in some circumstances, under Article 5.7.

subject to the claim under Article 6.3 would fall within the scope of Article 5.7.[1650] In that situation, a panel may have to determine whether the qualified exemption in Article 5.7 extends to the obligations in Articles 6.1 and 6.2. However, as noted in section 7.5.2.4 above, we have found that the United States' measures do not fall within the scope of Article 5.7 and do not benefit from the qualified exemption therein. Therefore, we do not need to address the United States' arguments with respect to the relationship between Articles 6.3 and 5.7.[1651]

7.8.4.4 The relationship between the obligations contained in the three paragraphs of Article 6

7.652. The parties have offered claims, defences and arguments touching on the relationship between the obligations contained in Articles 6.1, 6.2, and 6.3. To recall, Argentina considers that Articles 6.1 and 6.2 establish "complementary obligations" with respect to the United States' measure at issue[1652], whereas Article 6.3 stands as a potential "affirmative defence" vis-à-vis claims put forward under Articles 6.1 and/or 6.2.[1653] The United States, for its part, invokes Article 6.3 only in connection with Argentina's claim under Article 6.1[1654], stating that such provisions entail "a dynamic process" between the exporting and the importing Member aimed at determining the disease status of the area concerned.[1655] The United States further contends that the claim under Article 6.2 must fail because the measure at issue does, "as such", recognize the concepts of disease-free areas and areas of low disease prevalence.[1656]

7.653. Article 6 does not provide an explicit indication of the manner in which its three paragraphs interact with one another.[1657] In our view, such interactions must be discerned by means of an assessment of Article 6 as a whole.

7.654. As discussed in paragraph 7.641 above, Article 6.1 sets forth a general obligation for all Members to adapt their measures to the SPS characteristics of a given area[1658], including but not limited to the prevalence of specific diseases or pests. Meanwhile, Articles 6.2 and 6.3 both focus explicitly on "pest- or disease-free areas" and "areas of low pest or disease prevalence". Accordingly, we consider that, by its own terms, Article 6.1 has a broader scope of application than Articles 6.2 and 6.3, in that it covers not only pest- or disease-free areas or areas of low pest or disease prevalence, but indeed *all* potential SPS characteristics of areas that may warrant the "adaptation" of an SPS measure.[1659] The reasoning of the panel in *India – Agricultural Products* supports our view that the scope of SPS characteristics covered by Articles 6.2 and 6.3 is more limited than that of Article 6.1. Indeed, that panel found that the words "in particular" at the beginning of Article 6.2 indicate that pest- or disease-free areas and areas of low pest or disease prevalence constitute a subset of all types of sanitary characteristics that are covered by Article 6.[1660]

7.655. Articles 6.2 and 6.3 set out in more detail the disciplines that must be followed in order to enable a Member to comply with the obligation to "adapt" its measure to such SPS characteristics as pest or disease freedom or low pest or disease prevalence. We note that the disciplines in

[1650] It may also be the case that an exporting Member's claim under Article 6.3 would not implicate Article 5.7 in any way.

[1651] For instance, Article 5.2 requires that the importing Member take into account the existence of pest- or disease-free areas in assessing the risks under Article 5.1. Therefore, if an exporting Member claims disease-freedom for a portion of its territory under Article 6.3 and provides all relevant information such that there is no insufficiency of the scientific evidence, Article 5.7 would not be applicable. Rather, the importing Member would simply review and update its risk assessment pursuant to Article 5.1.

[1652] Argentina's second written submission, para. 238; Argentina's response to Panel question No. 45 following the second substantive meeting.

[1653] Argentina's response to Panel question No. 49 following the first substantive meeting. See also Argentina's second written submission, para. 242.

[1654] See United States' first written submission, paras. 342-353.

[1655] United States' response to Panel question No. 54 following the first substantive meeting. See also United States' opening statement at the first meeting of the Panel, para. 56.

[1656] See United States' first written submission, paras. 354-358.

[1657] Panel Report, *India – Agricultural Products*, para. 7.665.

[1658] Furthermore, we note that Article 6.1 does not only address the sanitary status of the area from which a product originates, but also that of the area to which a product is destined.

[1659] See para. 7.642 above.

[1660] Panel Report, *India – Agricultural Products*, para. 7.671.

question contain obligations on both the importing and the exporting Members. This indicates that Article 6 contemplates an interaction in good faith between the two Members, ultimately aimed at the "adaptation" of a measure under Article 6.1.

7.656. Specifically, the first sentence of Article 6.2 requires, first, that the importing Member "recognize" the concepts of "pest- or disease-free areas" and "areas of low pest or disease prevalence". This means that the Member must provide for the possibility that certain areas be determined to be pest- or disease- free areas or areas of low pest or disease prevalence, as well as specify the requirements that an area has to meet in order to fall within one of those categories.[1661] This interpretation is confirmed by the *Guidelines to Further the Practical Implementation of Article 6* (Article 6 Guidelines)[1662] adopted by the SPS Committee in 2008, which, at paragraph 4, recommend that Members:

> [P]ublish the basis for recognition of pest- or disease-free areas and areas of low pest or disease prevalence and a description of the general process used, including the information generally required to evaluate such requests and a contact point responsible for requests for recognition of pest-or disease-free areas or areas of low pest or disease prevalence.

7.657. As we see it, the above requirement constitutes a logical prerequisite to the "adaptation" of a measure under Article 6.1. Indeed, where the general regulatory framework of the Member concerned does not permit the recognition of the general concepts of pest- or disease-free areas and areas of low pest or disease prevalence, the possibility to "adapt" its measures to the pest- or disease-freedom or low pest or disease prevalence of a specific area may be precluded from the outset.[1663] In support of this interpretation, we observe that the panel in *India – Agricultural Products* found that India's failure to set up a regulatory framework recognizing such concepts was inconsistent with Article 6.2 and, "consequentially", Article 6.1.[1664] We note that Argentina is not arguing that the United States does not have an appropriate regulatory framework in place that "as such" does recognizes the concept of pest or disease free areas. Rather Argentina is making an "as applied" claim with respect to the recognition of Patagonia as a disease free area.[1665]

7.658. We recall the United States' argument that APHIS' general regulatory framework for FMD set forth in 9 CFR 92.2 and 9 CFR 94, as such, recognizes the concepts of FMD-free areas and areas of low FMD-prevalence.[1666] We agree. Indeed, 9 CFR 94.1(a) expressly refers to regions that APHIS has declared to be free of FMD, and which are therefore allowed to import ruminants, swine and fresh (chilled or frozen) meat thereof into the United States.[1667] In turn, 9 CFR 94.0 defines "region" as "[a]ny defined geographic land area identifiable by geological, political, or surveyed boundaries", this comprising "[a] national entity (country); [p]art of a national entity (zone, county, department, municipality, parish, Province, State, etc.)[; p]arts of several national entities combined into an area; or [a] group of national entities (countries) combined into a single area".[1668] As this language indicates, APHIS' regulatory framework allows for the consideration of the specific FMD situations of regions within or across the territories of WTO Members and for the adaptation of the import conditions to such characteristics.

7.659. Where the importing Member, such as the United States, has an appropriate regulatory framework in place, the exporting Member may submit a claim that *specific* areas within its territory are pest- or disease-free or of low pest or disease prevalence.[1669] When an exporting

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[1661] See Panel Report, *India – Agricultural Products*, para. 7.698.

[1662] *Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application Of Sanitary and Phytosanitary Measures* adopted by the SPS Committee at its meeting of 2-3 April 2008, G/SPS/48 (16 May 2008).

[1663] See Panel Report, *India – Agricultural Products*, para. 7.680.

[1664] See Panel Report, *India – Agricultural Products*, para. 7.709.

[1665] Argentina's first written submission, para. 543; Argentina's opening statement at the first meeting of the Panel, para. 77.

[1666] United States' response to Panel question No. 54 following the first substantive meeting. See also United States' opening statement at the first meeting of the Panel, para. 61.

[1667] 9 CFR 94.0, (Exhibit ARG-64).

[1668] 9 CFR 94.0, (Exhibit ARG-64).

[1669] In this regard, the panel in *India – Agricultural Products* stated that, logically, "the importing Member must have already recognized in its SPS measures the concepts of pest- or disease-free areas or areas

Member does so, it is required, under Article 6.3 to "provide the necessary evidence" to the importing Member to "objectively demonstrate" its claim[1670] and to give the authorities of the importing Member reasonable access for inspection, testing and other relevant procedures upon request. In other words, Article 6.3 contemplates an exchange of information between the exporting and the importing Members, whereby the former provides evidence concerning the pest- or disease status of areas located within its territory, and the latter evaluates such information with a view to adapting its measure to the SPS characteristics of the areas concerned.

7.660. Article 6.3 does not specify what constitutes the "necessary evidence" the exporting Member has to provide. However, as noted above[1671], the second sentence of Article 6.2 provides a non-exhaustive list of factors "such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls" that the importing Member shall consider in reaching a determination concerning the area that is claimed to be pest- or disease-free or of low pest or disease prevalence. Thus, if an exporting Member wishes to "objectively demonstrate" the disease free status of an area the information submitted should address the factors listed in Article 6.2 in addition to any other information that would assist the importing Member in making its determination. The Article 6 Guidelines are also informative regarding the evidence that should be provided by the exporting Member, as well as the factors that should normally be considered by the importing Member in such a situation.[1672]

7.661. If, as a result of the interactive process outlined above, the importing Member determines that the area subject to the exporting Member's claim is, indeed, pest- or disease-free or of low pest or disease prevalence, it is required to "adapt" its measure to the pest- or disease status of that area, for instance by imposing less stringent conditions on imports of products therefrom. In adapting its measure, the importing Member shall take into account, besides pest- or disease-prevalence, the other factors listed in the second sentence of Article 6.1, namely the existence of eradication or control programmes and appropriate criteria or guidelines developed by the relevant international organizations, as well as other relevant factors not specifically listed.

7.662. Article 6.3 does not expressly establish the consequences of the exporting Member's failure to "objectively demonstrate" its claim of pest- or disease-freedom or low pest or disease prevalence with respect to a given area. The panel in *India – Agricultural Products* rejected the idea that such a failure may entail a bar of an exporting Member's claims before a panel under Articles 6.1 and/or 6.2. Indeed, the panel stated that Article 6.3 "is not directly linked to the first two paragraphs of Article 6, or to what Members must do generally with respect to adapting measures to SPS characteristics of certain areas, or in recognizing specific area concepts".[1673] It further observed that "[t]here is no conditional language" linking the obligations under Articles 6.1 and 6.2 "to Article 6.3, to an extraneous event such as the request of an exporting Member to recognize an area, or to any other event or situation".[1674] Thus, the panel concluded that Articles 6.1 and 6.2 "create free-standing obligations rather than obligations contingent upon a request from a Member claiming that areas within its territory are pest- or disease-free, pursuant to Article 6.3".[1675]

7.663. We agree that the obligations in 6.1 and 6.2 are not necessarily contingent on the actions of the exporting Member under Article 6.3. In particular, we note that Article 6.1 refers to adapting measures not only to the SPS characteristics of the area from which the product originates, but also the area to which the product is destined. In looking at the SPS characteristics of the area to which the product is destined, there is no need for a claim from the exporting Member or information from that Member. Similarly, if the Member can adapt the measure without a specific claim because it is applying the disease status designations of an international organization such as the OIE, then there would be no need for a claim under Article 6.3.

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of low pest or disease prevalence, as required under Article 6.2, in order for it to receive and consider a request for recognition under Article 6.3." (Panel Report, *India – Agricultural Products*, para. 7.677)

[1670] Panel Report, *India – Agricultural Products*, para. 7.676.

[1671] See para. 7.648 above.

[1672] See Article 6 Guidelines, paras. 8-10.

[1673] Panel Report, *India – Agricultural Products*, para. 7.674.

[1674] Panel Report, *India – Agricultural Products*, para. 7.675.

[1675] Panel Report, *India – Agricultural Products*, para. 7.679. In that dispute, the panel rejected India's argument that the importing Member does not have to comply with Article 6.2 until it received a claim of pest- or disease-freedom or low pest or disease prevalence under Article 6.3. (Ibid. paras. 7.698-7.707)

7.664. However, we take the view that in some circumstances the ability of the importing Member to adapt a measure under Article 6.1 is dependent on the exporting Member's compliance with Article 6.3. Indeed, in our opinion, Article 6.3 recognizes that, in certain cases, exporting Members are well if not best placed to gather information about the SPS conditions of geographical areas located within their territories, and that, without their cooperation, the "objective demonstration" of the pest- or disease status of the areas concerned to the importing Member may prove impossible. Furthermore, it would not be logical to expect an importing Member to necessarily adapt its measures to the disease statuses of any and all areas, regions or parts of countries the world over absent solicitation or provision of relevant information on the part of exporting Members wishing to obtain market access.

7.665. The panel in *India – Agricultural* products acknowledged this eventuality where it stated that, "under certain circumstances, a link may be made" between the information required for the assessment of SPS characteristics of an area envisaged by Article 6.1 and the obligation of an exporting Member to provide "the necessary evidence" under Article 6.3 that an area within its territory is pest- or disease-free or is an area of low pest or disease prevalence.[1676] We note that, in this dispute, Argentina did file a request for the recognition of Patagonia as FMD-free within the meaning of 9 CFR 94.1(a).[1677] In other words, it claimed that an area within its territory is a disease-free area. In our view, this constitutes one of the "circumstances" linking the United States' obligations under Articles 6.1 and 6.2 and Argentina's obligations under Article 6.3. Therefore, we consider that Argentina's claim that the United States' prohibition on imports of FMD-susceptible animals, meat and animal products from Patagonia is inconsistent with Articles 6.1 and 6.2 is properly addressed in the light of our examination whether Argentina provided the necessary evidence to "objectively demonstrate" that Patagonia is, and is likely to remain, free of FMD pursuant to Article 6.3. Our analysis must also include an assessment of whether Argentina granted reasonable access, upon request, to APHIS for inspection, testing and other relevant procedures.

7.666. Given that Argentina did make the claim and its compliance with the obligation in Article 6.3 is linked to the United States' ability to adapt the measure pursuant to Article 6.1, we do not consider it necessary to settle the issue of whether the United States could have or should have invoked Article 6.3 as an affirmative defence against Argentina's claims under Articles 6.1 and 6.2.

7.667. In sum we are of the view that Article 6.1 sets forth the overarching obligation and the ability of a Member to implement that obligation may be dependent on its own compliance with Article 6.2 and the exporting Member's compliance with Article 6.3. Given the facts of the present dispute where the United States does have a regulatory system that recognizes the concept of disease free areas and Argentina has submitted a claim for disease freedom for Patagonia, the two relevant preconditions for the application of Article 6.1 exist and it is appropriate to begin our analysis with Argentina's claims under Article 6.1.

7.8.4.5 Whether the United States recognized the concept of FMD-free areas and adapted its measure to the SPS characteristics of Patagonia

7.668. We now turn to Argentina's claims that the United States acted inconsistently with Article 6.1 by failing to adapt its measure to the FMD-free SPS characteristics of the Patagonia region. In our assessment, we find it useful to refer to the steps of the interactive process described in paragraphs 7.654-7.665 above.

7.669. At the time of the establishment of the Panel, APHIS had not yet recognized Patagonia as separate from the rest of the Argentine territory. Indeed, the 2001 Regulations, adopted in the aftermath of the FMD outbreaks in Northern Argentina during the period July 2000-March 2001, prohibited imports of all FMD-susceptible animals, meat and animal products from the entire Argentine territory, comprising of both Northern Argentina and Patagonia.[1678] The United States

[1676] Panel Report, *India – Agricultural Products*, para. 7.676.

[1677] See Information provided by SENASA for the Recognition of Argentina's Patagonia as a Region Comprised in Article 92.2, Title 9, Code Of Federal Regulations in Regard to Foot and Mouth Disease – FMD (July 2003), (Exhibit ARG-50).

[1678] 2001 Interim Rule on Argentina, (Exhibit ARG-29); 2001 Final Rule on Argentina, (Exhibit ARG-30).

has maintained its prohibition for all the above-mentioned products, without distinguishing between products originating in Northern Argentina and products originating in Patagonia, from 2001 up to and including the date of establishment of the Panel.[1679]

7.670. In order to determine whether the United States' omission to recognize Patagonia as separate from the rest of the Argentina territory amounts to a violation of its obligations under Articles 6.1 to adapt its measures to the SPS characteristics of the region, we must assess whether such an omission was justified by Argentina's failure to objectively demonstrate that, at the time of the Panel's establishment, Patagonia was and was likely to remain FMD-free.

7.671. We note that the 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. However , in our analysis under Article 8 and Annex C(1)(a) above[1680], we found that, at the time of the establishment of the Panel, APHIS itself was satisfied that it had sufficient information concerning the FMD situation in Patagonia to proceed with the finalization of its review of Argentina's request and the issuance of a determination thereon. This was evidenced, *inter alia*, by the fact that, after the 2009 site visit, APHIS did not request any additional information from SENASA concerning the FMD situation in Patagonia; that on 27 April 2009 APHIS sent a letter to SENASA stating that no additional information was currently required to proceed with APHIS' rulemaking[1681]; and that in June and October 2011 the United States' representative to the SPS Committee stated that "in light of the information Argentina provided in 2009, which was used to update the 2005 risk analysis, [APHIS] was able to conclude that the import of ruminants and ruminant products from th[at] region presented a negligible risk of FMD".[1682] Moreover, in our analysis under Article 5.6 above, we concluded that, at the time of the establishment of the Panel, the information available to APHIS showed that Patagonia was free of FMD and that allowing imports of FMD-susceptible animals, meat and animal products from that region subject to the general protocols set forth in 9 CFR 94.11 would achieve the United States' ALOP.[1683] Therefore, in our view, Argentina satisfied its obligation to "objectively demonstrate" that Patagonia is and is likely to remain FMD-free.

7.672. As to the issue whether, during the period leading up to the Panel's establishment, Argentina granted reasonable access, upon request, to APHIS for inspection, testing and other relevant procedures, we have already noted that Argentina agreed to APHIS' site visits to Patagonia in December 2003 and February 2009.[1684] We also disagreed with the United States' argument that, until the November 2013 site visit, APHIS' review of Argentina's request for Patagonia was reasonably delayed because APHIS needed to ensure that the information in its possession as a result of the 2006 site visit to Northern Argentina and the 2009 site visit to Patagonia was "current".[1685]

7.673. In addition to our finding under Article 8 and Annex C(1)(a) that the United States had not undertaken and completed its review without undue delay, we also found that the United States had not reviewed the measure within a reasonable period of time within the meaning of Article 5.7. The Panel is of the view that, in light of our prior findings, the fact that the United States had not yet completed its review of Patagonia, cannot serve to excuse it from its obligations under Article 6.1. We also recall our finding under Article 5.6 that the United States' measures are more trade-restrictive than required to achieve its ALOP because Patagonia is a region that has been FMD-free since 1994 and has the necessary veterinary capacity and infrastructure to prevent and control FMD in its own territory and the capacity to prevent incursions of the disease from regions of higher FMD-risk.

[1679] In particular, the United States published the 2014 Notice of Determination on Patagonia, (Exhibit USA-167). The Notice indicated that the measure would take effect 60 days after publication. Therefore, as of 28 October 2014, imports of relevant products from Patagonia are authorized pursuant to the mitigating protocols in 9 CFR 94.11.

[1680] See paras. 7.169-7.170 above.

[1681] APHIS' letter of 27 April 2009, (Exhibit ARG-79).

[1682] G/SPS/R/63, (Exhibit ARG-22), paras. 17-18. See also G/SPS/R/64, (Exhibit ARG-48), paras. 96-97.

[1683] See section 7.6.7.4.2 above.

[1684] See paras. 7.150 and 7.155 above.

[1685] See para. 7.170 above.

7.674. Based on the foregoing, we consider that, at the time of the Panel's establishment, Argentina had met its burden of providing the evidence necessary to "objectively demonstrate" that Patagonia as a whole (comprising of both Patagonia South and Patagonia North B) was, and was likely to remain, FMD-free. 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.

7.675. We note that Argentina also makes an "as applied" claim under Article 6.2 because it argues the United States has not specifically applied its general regulatory framework for recognizing disease free areas, i.e. 9 CFR 92.2, to Patagonia. We recall our discussion in paragraph 7.658 above that APHIS' regulatory system generally recognizes the concept of disease free areas. In an "as applied" situation like that in the present dispute, it is the Panel's view that any measures the United States takes to bring its measures into conformity with Article 6.1 would have the additional result of remedying any potential inconsistency with Article 6.2 if one were to exist. We do not see that a finding on Argentina's "as applied" claim under Article 6.2 would aid in providing a positive resolution to this dispute. Therefore, we exercise judicial economy on this claim.

7.9 Special and differential treatment

7.9.1 Relevant legal provisions

7.676. Article 10.1 of the SPS Agreement sets forth that:

> In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.

7.9.2 Main arguments of the parties

7.9.2.1 Argentina

7.677. Argentina argues that the purpose of the obligation in Article 10.1 is to maintain trade flows from developing country Members to the maximum extent possible. Argentina looks to Article 10.2 as context for the obligation in Article 10.1. In particular, Argentina argues that Article 10.2[1686] lends support to the view that the broad and unqualified obligation in Article 10.1 to take account of the special needs of developing country Members should be with a view to maintaining trade flows from developing country Members.[1687] Argentina claims that the United States has taken every effort to stop the flow of trade from Argentina, not maintain it. Argentina contrasts what it calls the denial of access for Argentina to the relevant administrative process, with the high level of access and speed accorded to developed country Members such as the United Kingdom and Japan.[1688] According to Argentina, the United States acted with alacrity in re-opening access to the United States' market for beef from the United Kingdom and Japan following FMD outbreaks in these countries and that these, among other developed countries, have returned to the permanent list of countries which the United States considers FMD-free. According to Argentina, they were given prompt risk assessments and, shortly thereafter, final rulemakings which put them back on the permissive list referenced in 9 CFR 94.1(a)(1).[1689]

7.678. It is Argentina's view that developing country Members should be given priority and support for risk assessments and rulemakings, not pushed aside for years while developed country Members have their interests taken care of promptly. Consequently, Argentina argues that the

[1686] Article 10.2 of the SPS Agreement provides:
Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.
[1687] Argentina's first written submission, paras. 354, 355,567, and 568.
[1688] Argentina's first written submission, para. 357.
[1689] Argentina's first written submission, para. 356.

United States has failed to accord Argentina special and differential treatment in the preparation and application of its SPS measures as required by Article 10.1 of the SPS Agreement.[1690]

7.679. Furthermore, Argentina notes that the United States itself identified a "special need" – namely a lack of veterinary capacity in SENASA to control FMD. Argentina argues that, pursuant to Article 10.1, the United States was under an obligation to help remedy any deficiencies it found in Argentina's ability to satisfy United States' sanitary standards.[1691] Argentina also argues, in this respect, that there is no qualification of the obligation in Article 10.1 based on which party identifies the special needs.[1692]

7.9.2.2 United States

7.680. The United States responds that, to the extent possible, it takes into account developing country Members' needs in meeting its obligations under the SPS Agreement. The United States notes that many countries at or even below Argentina's income level have been designated as FMD-free by APHIS and obtained import authorization.[1693]

7.681. The United States recalls that "the obligation laid down in Article 10.1 is for the importing Member to 'take account' of developing country Members' needs. The dictionary defines the expression 'take account of' as 'consider along with other factors before reaching a decision'". Consistent with this, the United States argues that Article 10.1 does not prescribe a specific result to be achieved."[1694]

7.682. The United States also argues that Argentina has not adduced any arguments explaining the special needs related to its developing country status. In response to a question from the Panel, the United States clarifies that in its view:

> [T]he developing country Member claiming a breach of that obligation should show how it communicated its "special needs" to the other Member. Otherwise, the Member that is the subject of the claim would have no opportunity to "take account" of the developing country Member's "special need".[1695]

7.683. At the second hearing of the Panel with the parties, the United States disputed that Article 10.1 obliges the importing Member to provide technical assistance or remedy the deficiencies in the developing country's ability to satisfy sanitary standards, arguing that there was no support in the text for Argentina's position. In any event the United States submits that it has provided support to Argentina in combatting FMD through technical assistance and other aid programmes.[1696]

7.9.3 Main arguments of the third parties

7.9.3.1 China

7.684. According to China, the burden of proof placed on developing country Members in Article 10.1 claims should be treated with special care. China argues that it is difficult to prove that a developed country Member has simply ignored its obligation under Article 10.1. It submits that such requirement would amount to asking a developing country Member to prove something that

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[1690] Argentina's first written submission, para. 359.
[1691] Argentina's second written submission, para. 20.
[1692] Argentina's response to Panel question No. 52 after the second substantive meeting.
[1693] United States' first written submission, paras. 359, 361. The United States uses World Bank data to argue that based on GDP or GNI, the following countries that have the right to export to the United States are at or below Argentina's development level (i) Belize; (ii) Dominican Republic; (iii) El Salvador; (iv) Guatemala; (v) Haiti; (vi) Honduras; (vii) Jamaica; (viii) Namibia; and (ix) Nicaragua.
[1694] United States' first written submission, para. 360 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1620).
[1695] United States' response to Panel question No. 52 after the second substantive meeting.
[1696] United States' first written submission, para. 365. The United States refers to providing training to Argentinian veterinary services and economic assistance in building veterinary infrastructure. We note that some of this assistance took place in the 1960s.

does not exist and that requiring the developing country Members to make efforts to collect such non-existing evidence is logically unsustainable.[1697]

7.685. China submits that whenever an importing Member "takes account of" the special needs of a developing Member this should be reflected in relevant documentation.[1698] In this context China refers to the Appellate Body finding in *China – GOES*, that "[t]he notion of the word "consider", when cast as an obligation upon a decision maker, is to oblige it to take something into account in reaching its decision". Although acknowledging that the Appellate Body's finding was made in the context of Article 3.2 of the Anti-Dumping Agreement, China submits that it sheds light on the interpretation of take account of under Article 10.1 of the SPS Agreement. This is especially so since the term "take account of" has been equated with consider by the Appellate Body.[1699]

7.9.3.2 European Union

7.686. The European Union expresses doubt whether the "vague" and non-specific language of Article 10.1 can serve as the basis for a claim in dispute settlement as it does not spell out any specific obligation on Members.[1700]

7.687. The European Union argues that in any event Argentina's assertion that the United States failed to take account of the developing countries' special needs is contradicted by Argentina's own assertion that the United States' "application" of the SPS measure was more favourable to Uruguay and the Santa Catarina region of Brazil, which are both developing countries. According to the European Union, this shows that the United States does take account of the developing countries' special needs. Thus, there is "no breach of whatever obligation is embodied in Article 10.1 of the SPS Agreement."[1701]

7.9.4 Analysis by the Panel

7.688. The issue before the Panel is whether Argentina has demonstrated that the United States failed to take into account the special needs of Argentina as a developing country when preparing and applying its SPS measures as required by Article 10.1. To make such a determination, the Panel will need to first clarify the nature of the obligation in the provision and then apply that interpretation to the facts of the case. Before moving to the specific requirements in Article 10.1, we first address an important preliminary issue, namely whether Article 10.1 is a positive obligation that can be subject to dispute settlement. Second, we address the burden of proof when making an Article 10.1 claim.

7.9.4.1 Whether Article 10.1 is a positive obligation

7.689. The European Union argued in its third-party submission that Article 10.1 is too vague to be the subject of dispute settlement. Neither Argentina nor the United States indicated that they shared this view. That being said, the Panel is nonetheless under an independent obligation pursuant to Article 11 of the DSU to make an objective assessment of the matter, including whether the provision can serve as the basis for a claim of violation. We do not agree with the European Union that the allegedly general and vague language of the provision does not set forth a specific obligation for positive action, thus removing it from the ambit of WTO dispute settlement.

7.690. First, many other provisions of the SPS Agreement – including Articles 5.1, 5.2 and 6.1 which are also raised in this dispute – and of the other covered agreements contain requirements for Members to "take into account" certain techniques, factors, international standards, and so on, which have been interpreted by panels and the Appellate Body.[1702] Therefore, the use of the

[1697] China's third-party submission, para. 59.
[1698] China's third-party submission, para. 60.
[1699] China's third-party submission, para. 60.
[1700] European Union's third-party submission, para. 74.
[1701] European Union's third-party submission, para. 79.
[1702] See Panel Report, *Japan – Apples*, para. 8.230; Appellate Body Report, *Australia – Apples*, para. 207. See also Appellate Body Report, *China – GOES*, para. 130 and fn 216 thereto (equating the term "consider" in Article 3.2 of the Anti-Dumping Agreement to "take into account").

phrase "shall take account of" in a provision does not make it so vague that it cannot constitute a positive obligation.[1703] With respect to the term "special needs", the panel in *EC – Approval and Marketing of Biotech Products* stated that Article 10.1 was "equivalent" to Article 12.3 of the TBT Agreement.[1704] The panel in *US – Clove Cigarettes,* although noting the vagueness of the expression "special development, financial and trade needs", nevertheless examined the specific socio-economic context of Indonesia and made a finding under Article 12.3 of the TBT Agreement.[1705] We are aware that the panel in *Brazil – Aircraft,* in examining a claim under Article 27.4 of the SCM Agreement, which refers to a developing country Member's "development needs", found that an inquiry into what those needs are is "of a peculiarly economic and political nature, and notably ill-suited to review by a panel whose function is fundamentally legal."[1706] However, we concur with the reasoning of the panels in *EC – Approval and Marketing of Biotech Products* and *US – Clove Cigarettes* that, such provisions impose positive obligations and must be subject to dispute settlement.[1707] To do otherwise might render unenforceable many special and differential treatment provisions throughout the covered agreements and upset the balance of rights and obligations between developed and developing country Members.[1708]

7.691. Therefore, in our view Article 10.1 does impose a positive obligation that is subject to dispute settlement and we will turn to Argentina's claim that the United States did not act in conformity with that obligation.

7.9.4.2 Shall take account of special needs of developing country Members

7.9.4.2.1 Special needs of developing country Members

7.692. With regard to the phrase "special needs of developing country Members", we find that the provision is written broadly so as to encompass both the needs of developing country Members generally, and the needs of a particular developing country Member. We find support for this interpretation in the context provided by Article 10.2, which links special and differential treatment to particular ALOPs and "products of interest". In light of the wide varieties of products that developing countries produce and the equally wide variety of ALOPs that could be applied to those products, a reading that limited the scope of Article 10.1 to some generic need experienced by all developing countries would deprive the provision of meaning. That being said, we note that the definition of an SPS measure is broad and also encompasses measures that are applicable to all products – such as sampling methods, testing, inspection, certification and approval procedures. Reading Article 10.1 as *only* applying to the needs of individual developing countries would remove the obligation for those SPS measures of general application and we see no basis for doing so.

7.693. The dictionary defines "special" as "distinguished from others of the kind by a particular quality or feature; distinctive in some way".[1709] The dictionary defines "need" as "a condition of lacking or requiring some special thing".[1710] We recall that the panel in *EC – Approval and*

[1703] We note that in our determination under Article 5.4 we found that a provision which stated that a Member "should" take account of the objective to minimize negative trade effects did not impose a positive obligation. That determination was made by evaluating all the phrases used in the provision as well as its overall context. Article 5.4 is distinguished from the Article 10.1 in that it says "should" rather than "shall" and is even more attenuated by requiring the taking into account of an "objective".

[1704] Panel Report, *EC – Approval and Marketing of Biotech Products*, fn 1330 to para. 7.1615.

[1705] Panel Report, *US – Clove Cigarettes*, para. 7.627.

[1706] Panel Report, *Brazil – Aircraft*, para. 7.89.

[1707] Additionally, we note that in the arbitration over the reasonable period of time in *Indonesia – Autos* the arbitrator considered whether Indonesia's status as a "developing country … in a dire economic and financial situation" justified the awarding of an extended period of time for compliance with the DSB's rulings and recommendations. The arbitrator observed that, under Article 21.2 of the DSU, "[p]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement", and considered it "appropriate to give full weight to matters affecting the interests of Indonesia", thereby extending the reasonable period of time by an extra six months. See Award of the Arbitrator, *Indonesia – Autos (Article 21.3(c))*, para. 24.

[1708] We are mindful of the requirement of Article 3.2 of the DSU that a panel should not add to nor detract from the obligations in the covered agreements.

[1709] Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1903).

[1710] Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2943).

Marketing of Biotech Products equated the term "special needs" in 10.1 with the term "special development, financial and trade needs of the developing country" in Article 12.3 of the TBT Agreement. [1711]

7.9.4.2.2 Shall take account of

7.694. With regard to the requirement to take account of special needs the use of the word shall indicates a mandatory obligation.[1712] The United States does not dispute the mandatory nature of the obligation. Furthermore, both parties agree that take account of requires the importing Member to consider the special needs of the developing country Member.[1713] Prior panels and the Appellate Body have interpreted the phrase "take into account"[1714] to mean "take into consideration, notice".[1715] More specifically, the panel in *US – COOL* also clarified that an obligation to take something into account does not require any particular result of that consideration.[1716] In the case of Article 10.1, it is the special needs of developing country Members, and in particular of the least developed country Members that must be taken into account or considered.

7.9.4.3 Burden of proof

7.695. In applying Article 10.1 to the facts of this case, it is necessary to first address the arguments of the Parties regarding burden of proof. The United States urges the Panel to adopt the approach taken by the panel in *EC – Approval and Marketing of Biotech Products*, which was made in the specific context of Article 10.1 of the SPS Agreement. That panel held that Article 10.1 does not specifically require the importing Member to document how it has complied with Article 10.1 and the absence of references in the challenged measures to how developing country Members' needs were taken into account is not sufficient for the purposes of establishing a claim under Article 10.1.[1717]

7.696. Argentina, for its part, argues that the Appellate Body's ruling in *China – GOES*, stands for the opposite principle to that set forth by the panel in *EC – Approval and Marketing of Biotech Products.* In particular, Argentina notes that the Appellate Body interpreted the term "consider" as being synonymous with "taking account of" and found that to comply with an obligation to consider a particular factor in an injury determination, the importing Member must document how it did so. Argentina asks the Panel to interpret the language in Article 10.1 in the same manner and also conclude that the absence of a risk assessment or a rulemaking notice from the United States means that it did not comply with the obligation in Article 10.1.[1718]

7.697. We note that the Appellate Body's interpretation of "consider" in *China – GOES,* was made in the context of a dispute under the Anti-Dumping and SCM Agreements. In particular, we note that the Anti-Dumping and SCM Agreements have very specific obligations with respect to publication and documentation of decisions. Although the SPS Agreement does have some provisions that encourage transparency and communication to the interested Members and exporters, they are not as detailed as those in the Anti-Dumping and SCM Agreements. Therefore, we do not find it appropriate to simply transplant wholesale the Appellate Body's interpretation in *China – GOES* concerning a provision about how to determine injury into an SPS provision

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[1711] Panel Report, *EC – Approval and Marketing of Biotech Products*, fn 1330 to para. 7.1615.

[1712] We note that a non-binding Secretariat document entitled "Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, Mandatory and Non-Mandatory Special and Differential Treatment Provisions" classifies Article 10.1 as a mandatory provision, WT/COMTD/W/77/Rev.1/Add.1/Corr.1. The Appellate Body has commented on the mandatory nature of obligations containing the word "shall". (See e.g. Appellate Body Reports, *EC – Fasteners (China)*, para. 366; and *EC – Tariff Preferences*, para. 246)

[1713] United States' first written submission, paras. 344 and 360; see also United States' response to Panel question No. 34 following the first substantive meeting; and Argentina's response to Panel question No. 34 following the first substantive meeting.

[1714] Or similar phrases such as "taking into account" and "taking account of".

[1715] Appellate Body Report, *Korea – Various Measures on Beef*, para. 111; see also Panel Report, *US – COOL*, para. 7.776.

[1716] Panel Report, *US – COOL*, para. 7.776.

[1717] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1623.

[1718] Argentina's response to Panel question No. 34 following the first substantive meeting.

concerning special and differential treatment that requires the importing Member "to take account of".

7.698. In the context of Article 10.1, we agree with the panel in *EC – Approval and Marketing of Biotech Products* and find that the absence of documentation in the form of a risk assessment or final measure is not sufficient in itself for Argentina to establish a *prima facie* case under Article 10.1. However, we are cognisant that in considering what is required to show an inconsistency with Article 10.1 we cannot create a potentially insurmountable burden on the complainant.[1719] This is all the more so in the context of the obligation in Article 10.1 which is aimed at protecting the interests of developing countries. Therefore, we want to clarify that we do not understand the panel's reasoning in *EC – Approval and Marketing of Biotech Products* to stand for the proposition that there is no way to satisfy the burden of proof under Article 10.1. While the absence of documentation *alone* will not suffice to establish a violation, the absence of such documentation is relevant evidence and will be particularly probative in a situation where a special need has been expressly identified and brought to the importing Member's attention.

7.699. In particular, it is our view that the burden of proof in Article 10.1 begins with a determination of whether a specific special need of a developing country Member has been identified.[1720] In that respect, we note that the United States is of the view that the exporting Member must identify its special needs and that Argentina did not do so. Argentina argues that there is no qualification of the obligation in Article 10.1 based on which party identifies the special needs.[1721] According to Argentina it depends on the facts of the specific measure and the specific case. We agree with Argentina. In the Panel's view there are multiple ways in which a special need could be brought to the attention of the importing Member. It could be that the developing country knows of a need that it needs to remedy and should make that known to the importing country, this would make sense from a practical viewpoint as the developing country Member would be identifying its own special needs.[1722] Conversely, the importing country could identify a special need, for example while conducting its risk assessment, and convey that to the developing country Member.[1723] The Panel underlines however, that while we consider that an importing country may identify a special need, we do not consider that the burden is on the importing Member to *necessarily* identify any such special need.

[1719] China's third-party submission, paras. 59-60.

[1720] We recall the reasoning of the panel in *EC – Approval and Marketing of Biotech Products* that a developing country does not have to specifically *ask* that its special needs be taken into account. The requirement to take into account the special needs of developing country Members is inherent in the obligation in Article 10.1 without any action required on the part of the developing country Member. However, as will be discussed further below, the importing Member does need to be aware that a special need exists. See Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1625.

[1721] Argentina's response to Panel question No. 52 after the second substantive meeting.

[1722] Such an understanding of the process would be consistent with "The Procedure to Enhance Transparency of Special and Differential Treatment in Favour of Developing Country Members" developed by the SPS Committee. That Procedure provides:

> Step 5: If an exporting Member identifies significant difficulties with the proposed measure, that Member may, in its comments, request an opportunity to discuss and resolve the potential difficulty with the notifying Member ….
>
> Step 6: If, following the entry into force of a new regulation (including an emergency measure), an exporting Member identifies significant difficulties which its exports face in complying with the new regulation, it may request an opportunity to discuss its difficulties with the importing Member to attempt to resolve the issue of concern, especially where no time, or an insufficient period of time, has been provided for comments. In the case of such a request from an exporting developing country Member, the importing Member would, in any discussions, examine whether and how the identified problem could best be addressed to take into account the special needs of the interested exporting developing country Member, so as to enable it to satisfy the requirements of the measure.

[1723] We note that with respect to all Members, Annex C(1)(b) provides that the importing Member: informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained.

7.700. If a developing country Member can demonstrate that its special needs were expressly identified to or by the importing Member *and* can show a lack of documentation of the consideration that is likely enough to shift the burden on to the importing Member to show how it took account of those special needs. Conversely, if the importing Member was not made aware of the special needs of the developing country Member, we consider that it will be more difficult for the developing country Member to make its case. This is consistent with the reasoning of the panel in *EC – Approval and Marketing of Biotech Products*, that the European Communities could not have known that the products being reviewed were those of a developing country, because the European Communities had not been made aware that any of the applicants seeking to place biotech products on the European market was an Argentine company or individual.[1724]

7.9.4.4 Whether the United States took account of Argentina's special needs

7.701. Turning to Argentina's claims in this case, Argentina has argued that the United States did not take account of two special needs: first, its special need is for it to have full and speedy or priority access to the approval process at a level above that given to developed countries; and second, the special need it argues the United States identified namely SENASA's alleged lack of sufficient veterinary capacity to control FMD. We will consider each in turn.

7.9.4.4.1 Priority access

7.702. Argentina submits that the special need it identified was to have full and speedy or priority access to the approval process at a level above that given to developed countries. We recognize that, in a particular case, it may be that a product is so central to the economy of a developing country that its special need could be precisely that the approval procedures need priority consideration. However, Argentina has expressed this concept of priority access in broad and general terms without making specific reference to products of particular interest to the developing country or other considerations.

7.703. The panel in *EC – Approval and Marketing of Biotech Products* found that "Article 10.1 does not provide that the importing Member must invariably accord special and differential treatment in a case where a measure has led, or may lead, to a decrease, or a slower increase, in developing country exports".[1725] Indeed, that panel went on to note that "[t]here is nothing in Article 10.1 to suggest that in weighing and balancing the various interests at stake, the [importing Member] must necessarily give priority to the needs of Argentina as a developing country."[1726]

7.704. We agree with this interpretation and believe it supports a conclusion that failure to give priority access as described by Argentina in this case does not constitute a violation of Article 10.1. We recall that the term "take account of" does not mandate any particular conclusion. Accepting Argentina's interpretation would mean that no weighing and balancing of various interests is involved and implies an automatic and mandatory response by the importing Member to put the developing country at the front of the line for risk assessments. We see nothing in the text of Article 10.1 that requires importing Members to always do risk assessments for products from developing countries first or faster.

7.705. Therefore, we find that with respect to the special need of priority access, Argentina has not established a violation of Article 10.1.

7.9.4.4.2 Sufficient veterinary capacity

7.706. We now turn to consider Argentina's claim that the United States should have taken into account SENASA's alleged "insufficient veterinary capacity". As an initial point, the Panel notes that an adequate and efficient veterinary service is undoubtedly vital in enabling any country to maintain effective surveillance in its territory both as regards vaccination, where applicable, and so as to enable the country to respond quickly to any foot-and-mouth outbreak. Thus, a lack of veterinary capacity in a developing country may very well need to be addressed before it can have market access for products that are important to its development needs. Therefore, consideration

[1724] Panel Report, *EC – Approval and Marketing of Biotech Products*, fn 1334.
[1725] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1620.
[1726] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1621.

of this lack of capacity can be a special need that a Member preparing or applying an SPS measure should take account of within the meaning of Article 10.1.[1727]

7.707. In light of the foregoing, we therefore conclude that, in principle, the lack of veterinary capacity could be a special need within the meaning of Article 10.1.

7.708. However, in the context of discussing the alleged special need of veterinary capacity, Argentina argues that pursuant to Article 10.1 if there was any deficiency in SENASA's capacity, then the United States had an "obligation to provide the necessary assistance to correct and overcome such failures of capacity".[1728] We see several problems with Argentina's position.

7.709. First and foremost, we believe Argentina misreads the obligation in Article 10.1 to take account of special needs and conflates it with an obligation to remedy any shortcomings of a developing country. We find no support for this conclusion in the text or context of Article 10.1. Indeed, any obligation to provide technical assistance of any kind is found in Article 9 entitled "Technical Assistance". The Panel specifically asked Argentina to provide a textual and interpretative basis for its reasoning. Argentina's response recognizes that Article 10.1 does not specify any particular form of assistance. However, Argentina argues that this is because Article 10.1 "focuses on measure-specific situations whereas Article 9 deals with technical assistance generally."[1729] We find this argument unpersuasive. Argentina cannot point to anything in the text of Article 10.1 to indicate that it applies to *specific* technical assistance while Article 9 applies to *general* technical assistance. In our view, Article 9.2 refers to the product involved indicating that Article 9 covers general and specific technical assistance and that Article 10 relates to other subject matter.

7.710. In addition to the fact that any obligations with respect to the provision of technical assistance are covered by Article 9, we recall that an obligation to "take account of" mandates no particular conclusion or action. Therefore, we cannot conclude that Article 10.1 includes an obligation for the importing Member to provide technical assistance to correct or overcome failures of capacity in the exporting developing country that might also be considered special needs within the meaning of Article 10.1. For these reasons, we find that Article 10.1 does not require the United States to remedy any alleged lack of veterinary capacity in SENASA.

7.711. Nevertheless, Article 10.1 does impose an obligation to take account of special needs, including, potentially, a lack of veterinary capacity. In considering this issue we are cognisant that Argentina did not actually identify veterinary capacity as a special need either during the period its application was being considered by the United States, or during these proceedings. Rather, Argentina maintains that it is the United States that identified this need and thus was required to take account of it in the preparation and application of its SPS measures. Argentina does not point to any APHIS documentation that states that APHIS views veterinary capacity to be lacking in Argentina. Rather, Argentina bases its argument that the United States identified lack of veterinary capacity as a special need on the United States' submissions to the Panel. In particular, in response to a question from the Panel, Argentina argues:

> [T]he United States points to technical assistance for training eight Argentine scientists in the decade from 1999-2009 and to financial assistance it provided Argentina in the *1960's*.[1730] The US' own reference to technical and financial assistance provided to Argentina in the past in connection to imports susceptible to FMD is an admission by the United States that they are relevant to Argentina's special needs as a developing country. The only deficiency that the US has identified is alleged problems with SENASA. If that was the United States' reason for its inaction, then it could have addressed this "special need" by supporting SENASA.[1731]

[1727] We discuss below in this section of our findings whether there is any obligation on the importing Member to offer assistance to remedy any deficiencies identified pursuant to Article 10.1.

[1728] Argentina's second written submission, para. 20.

[1729] Argentina's response to Panel question No. 51 following the second substantive meeting.

[1730] (footnote original) United States FWS at para. 113.

[1731] Argentina's response to Panel question No. 74 following the first substantive meeting.

7.712. Argentina further argues that the United States' defence of its failure to approve imports from Argentina is based on an attack on SENASA which "is inaccurate, unfair and indefensible."[1732] Nevertheless, Argentina contends that it is "important in the context of Article 10.1 to understand that, if the lack of capability of SENASA was, in fact, the reason for the US denial of Argentina's applications for the past 12 years, then the United States had an obligation under Article 10.1 to assist Argentina."[1733] Argentina does not provide specific citations or quotations from the United States' submissions that it believes support its contention that the United States has identified a lack of capacity at SENASA. As Argentina admits, the identification of this special need is a supposition deduced from the United States arguments made to this Panel in the context of WTO dispute settlement and not from any identification *by APHIS* of a lack of veterinary capacity at SENASA in any documentation or communications.[1734] Indeed, at least since 2005, APHIS documentation tends to support the opposite conclusion. Therefore, we find that veterinary capacity was not identified by either Argentina or the United States as a special need of Argentina. In these circumstances, we do not consider that Argentina has made a *prima facie* case that the United States has acted inconsistently with Article 10.1 by failing to take account of an alleged lack of veterinary capacity at SENASA.

7.9.4.5 Conclusion

7.713. For the reasons outlined above, we do not consider that Argentina has satisfied its burden of proof to establish that the United States did not take account of its special needs as required by Article 10.1.

7.10 Consequential violations

7.10.1 Argentina's claims under Article 1.1 of the SPS Agreement

7.10.1.1 Relevant legal provision

7.714. Article 1.1 of the SPS Agreement states:

> This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.

7.10.1.2 Main arguments of the parties

7.10.1.2.1 Argentina

7.715. Argentina notes that as 9 CFR 94.1(b) and the 2001 Regulations are SPS measures, they may only be applied to the extent that they are "in accordance with the provision of this [SPS] Agreement". Argentina submits that as the measures are inconsistent with the provisions of the SPS Agreement, as a consequence they are inconsistent with the requirements of Article 1.1.[1735]

7.10.1.2.2 United States

7.716. The United States presents no specific arguments with respect to this claim.

[1732] Argentina's second written submission, para. 279. Indeed, Part III of Argentina's second written submission is devoted to explaining the capabilities of SENASA.

[1733] Argentina's second written submission, para. 279.

[1734] Argentina's second written submission, paras. 20 and 279; Argentina's response to Panel question No. 51 following the second substantive meeting. Indeed, at the second substantive meeting with the parties, the United States stated that it had never said that SENASA did not meet the United States' standards but rather that they were evaluating them and that APHIS has now concluded that SENASA does meet the United States' standards.

[1735] Argentina's first written submission, paras. 181, 184, and 414.

7.10.1.3 Main arguments of the third parties

7.10.1.3.1 European Union

7.717. The European Union doubts whether Article 1.1 of the SPS Agreement, by itself, may serve as a legal basis for a claim in WTO dispute settlement proceedings, asserting that it serves merely to define the scope of the SPS Agreement. The European Union submits that Article 1.1 does not contain any specific obligation for WTO Members, and is independent from the obligations contained in the other provisions of the SPS Agreement. It states that "a Member's potential non-compliance with the general reference of Article 1.1 would always depend absolutely on non-compliance with some other provision of the SPS Agreement". As a consequence, no legal claim can be based solely on Article 1.1 of the SPS Agreement.[1736]

7.10.1.4 Analysis by the Panel

7.718. We note that there are provisions in other covered agreements that are not dissimilar from the language in Article 1.1 of the SPS Agreement. In particular, Article 1 of the Anti-Dumping Agreement[1737] and Article 10 of the SCM Agreement[1738] also call for all measures taken under each respective agreement to be consistent with the terms of that agreement. Panels regularly make findings of consequential violation of these provisions when complainants include them in their claims.[1739] The Appellate Body has explained that "to succeed in a claim under Article 1 of the Anti-Dumping Agreement or Article 10 of the SCM Agreement, a complaining Member need only establish that anti-dumping or countervailing duties were imposed and the imposing Member acted inconsistently with one of its obligations under the relevant Agreement."[1740]

7.719. Although no complainant has previously raised a claim of consequential violation of Article 1.1 of the SPS Agreement, we see no reason why we should not consider this claim by Argentina. We note that we have found that 9 CFR 94.1, as amended by the 2001 Regulations, is inconsistent with Articles 3.1, 3.3, 5.1, 2.2, 5.6, 2.3, and with respect to Patagonia Article 6.1 of the SPS Agreement. Therefore, we find that it is also inconsistent with Article 1.1 of the SPS Agreement.

7.10.2 Argentina's claims under Article 3.3 of the SPS Agreement

7.720. We recall that Article 3.3 codifies Members' autonomous right to establish their own ALOP and to adopt SPS measures that achieve a higher level of protection than would be achieved by a measure based on international standards, guidelines or recommendations.[1741] We also recall that the right under Article 3.3 is not absolute or unqualified[1742] and to be consistent with Article 3.3 the United States' measures must not be inconsistent with any other provision of the SPS Agreement.[1743]

[1736] European Union's third-party submission, paras. 22-25.

[1737] Article 1 of the Anti-Dumping Agreement provides: "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." (footnote omitted)

[1738] Article 10 of the SCM Agreement states: Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture. (footnotes omitted)

[1739] See e.g. Panel Report, *China – Broiler Products*, paras. 7.512-7.613; Panel Report, *China – GOES*, para. 7.681.

[1740] Appellate Body Reports, *US – Anti-dumping and Countervailing Duties (China)*, para. 358 and *US – Softwood Lumber IV*, para. 143.

[1741] Appellate Body Report, *EC – Hormones*, paras. 104 and 172.

[1742] Appellate Body Report, *EC – Hormones*, para. 173.

[1743] Appellate Body Report, *EC – Hormones*, paras. 175-177 (finding that the requirement to comply with all the other provisions of the SPS Agreement (including Article 5) applies both to measures adopted either (a) if there is a scientific justification, or (b) as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate). See also Appellate Body Report, *Canada/US – Continued Suspension*, para. 685.

7.721. We already found in paragraph 7.257 that the United States acted inconsistently with Article 3.3 because of its violation of Article 8 and Annex C(1)(a) and (b). We noted that we would return to Article 3.3 after we had completed our analysis of the rest of Argentina's claims. Having found that the United States measures are also inconsistent with Articles 5.1, 2.2, 5.6, 2.3, 6.1, and 1.1 of the SPS Agreement, we find that these are separate and additional bases for inconsistencies with Article 3.3.[1744]

7.11 Argentina's claims under the GATT 1994

7.722. Argentina also claims that the United States' measures are inconsistent with provisions of the GATT 1994, in particular Articles I:1 and XI:1.

7.11.1 Main arguments of the parties

7.11.1.1 Argentina

7.11.1.1.1 Article I:1 of the GATT 1994

7.723. Argentina submits that the application of the United States' measures against Argentine beef and ruminant and swine products from Patagonia is inconsistent with Article I:1 of the GATT 1994 because the United States grants advantages to other WTO Members in respect of like products that are not immediately and unconditionally accorded to Argentina. Argentina relies on WTO case law in stating that there are three steps in determining whether there is a violation of the Article I MFN obligation: is there (i) an "advantage" offered (ii) on a "like product" of another Member that (iii) has not been offered "immediately and unconditionally" to the complaining Member?[1745]

7.724. For the first step, Argentina argues that there are two "advantages" at issue. The first is the ability to export to the United States. Argentina states that this advantage was accorded to, for example, Uruguay, which is similarly situated to Argentina as an area that is FMD-free where vaccination is practised.[1746] With respect to Patagonia, Argentina argues that it is similarly situated to Santa Catarina, which is permitted to export to the United States.[1747] The second type of "advantage" Argentina refers to is access to and the completion of APHIS' regulatory process for conducting a risk assessment and concluding a final rulemaking to permit imports. Argentina compares its situation to that of Uruguay, which had the advantage of a risk assessment conducted in 2003, two years after an outbreak, and compares Patagonia to Santa Catarina. Noting that while APHIS has never published either the risk assessment it carried out for Patagonia in 2005 or a final rulemaking, Argentina alleges that Santa Catarina has had a risk assessment completed and that it gained import rights pursuant to the settlement of the *US – Upland Cotton* dispute.

7.725. As for the requirement that the products be "like", Argentina submits that products are fresh (chilled or frozen) beef from Argentina and other WTO Members, including Uruguay, and ruminants and swine from Patagonia and other WTO Members, including Brazil (Santa Catarina), Chile, Japan, or the United Kingdom. Argentina argues that the products are "like" according to the four criteria of "likeness" first set forth by the GATT panel in *Border Tax Adjustments.* According to Argentina, the products are named similarly, physically identical, marketed in a similar way, have the same end-uses, and are perceived similarly by consumers.[1748]

7.726. The third step requires the complainant to establish that the advantage on the like product has not been "immediately and unconditionally offered" to it. In this regard, Argentina asserts that it is unable to export the relevant products while other Members, like Uruguay and Brazil, can do

[1744] Argentina's first written submission, paras. 227 and 449.
[1745] Argentina's first written submission, para. 361.
[1746] Argentina's first written submission, para. 364.
[1747] Argentina's first written submission, para. 577.
[1748] Argentina's first written submission, paras. 369, 582-584.

so. Argentina also submits that it has not been immediately accorded access to the United States' regulatory system in particular when compared with other WTO Members.[1749]

7.11.1.1.2 Article XI:1 of the GATT 1994

7.727. Argentina asserts that the relevant measures result in a prohibition on importation of fresh (chilled or frozen beef) from Argentina and all ruminant and swine products from Patagonia. According to Argentina, this constitutes a zero quota and is thus clearly prohibited by Article XI:1 of the GATT 1994.[1750]

7.11.1.2 United States

7.11.1.2.1 Article I:1 of the GATT 1994

7.728. The United States does not answer specifically the arguments made by Argentina in relation to the GATT 1994 Article I:1 three-step test. It asserts that its application system is necessary to protect animal life or health, consistent with the SPS Agreement and Article XX(b). The United States notes that, pursuant to Article 2.4 of the SPS Agreement, if a measure complies with the SPS Agreement, then it is presumed to comply with Article XX(b). The United States concludes by stating that because it has satisfied its obligations under the SPS Agreement and Article XX(b), it has not breached Article I:1.[1751]

7.11.1.2.2 Article XI:1 of the GATT 1994

7.729. The United States does not answer specifically the arguments made by Argentina in relation to Article XI:1. Rather, it asserts that its application system is necessary to protect animal life or health, consistent with the SPS Agreement and Article XX(b) of the GATT 1994. The United States notes that pursuant to Article 2.4 of the SPS Agreement, if a measure complies with the SPS Agreement, then it is presumed to comply with Article XX(b). The United States concludes by stating that because it has satisfied its obligations under the SPS Agreement and Article XX(b), it has not breached Article XI:1.[1752]

7.11.2 Analysis by the Panel

7.730. We recall that a panel need only address those claims that must be addressed to resolve the matter at issue in the dispute. A finding of violation on the principal claim may make it unnecessary to continue and rule on alternative claims or on those made under other covered agreements.[1753] In particular, with respect to disputes where claims are raised under the GATT 1994 and the SPS Agreement, panels often decide that it is not necessary to make findings under the GATT 1994.[1754] Prior panels have recognized that the relationship between the two agreements could lead to circular reasoning that does not aid in providing a positive resolution to the dispute. The panel in *Australia – Salmon* reasoned that where any findings of inconsistency with GATT 1994 provisions would also require an examination of whether the measure was justified under Article XX(b) of the GATT 1994, the Panel would be led back to the SPS Agreement, with which the panel had already found inconsistencies.[1755] Such a conclusion is bolstered by Article 2.4 of the SPS Agreement, which states that:

[1749] Argentina's first written submission, paras. 371-374, 585-588.
[1750] Argentina's first written submission, paras. 379, 592.
[1751] United States' first written submission, para. 368.
[1752] United States' first written submission, para. 368.
[1753] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 17-20, DSR 1997:I, 323 at 339-340.
[1754] See e.g. Panel Reports, *EC – Hormones (US)*, para. 8.272; *EC – Hormones (Canada)*, para. 8.275; *Australia – Salmon*, para. 8.185; *Japan – Apples*, para. 8.328; *EC – Approval and Marketing of Biotech Products*, paras. 7.3422 and 7.3429; *India – Agricultural Products*, para. 7.803.
[1755] Panel Report, *Australia – Salmon*, para. 7.19. The panel in *US – Poultry (China)* reached a similar conclusion when it determined that for an SPS measure to be justified under Article XX(b) of the GATT 1994, it must be in conformity with the SPS Agreement and thus consideration of such a defence would lead the panel right back to its analysis of conformity with the SPS Agreement. See Panel Report, *US – Poultry (China)*, para. 7.481.

> [S]anitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of the GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular Article XX(b).

7.731. In light of the above, the Panel considers that when the United States brings its measures into conformity with the SPS Agreement, any inconsistency with the GATT 1994 will also be addressed. Under the circumstances, we see no reason to disagree with the consistent approach of prior panels.

7.732. We recall our findings above that the United States' measures are inconsistent with Articles 1.1, 2.2, 2.3, 3.1, 3.3, 5.1, 5.6, 6.1, 8 and Annex C(1)(a) and (b) of the SPS Agreement. Having made findings under the SPS claims, we conclude that it is not necessary to make findings under the GATT 1994 claims as they would not contribute to a positive resolution of the matter.[1756] Therefore, we consider it appropriate to exercise judicial economy over Argentina's claims under Articles I:1 and XI:1 of the GATT 1994 and the United States' defence under Article XX(b).

8 CONCLUSIONS AND RECOMMENDATION(S)

8.1. As described in greater detail above, the Panel finds in respect of Argentina's claims pursuant to the SPS Agreement that:

a. The United States' measures (9 CFR 94.1, as amended by the 2001 Regulations, the application of 9 CFR 92.2 to Argentina's applications for authorization to import for fresh (chilled or frozen) beef from Northern Argentina, and FMD-susceptible animals and animal products from Patagonia, and Section 737) are SPS measures subject to the disciplines of the SPS Agreement.

b. With respect to Article 8 and Annex C(1) the Panel finds that:

   i. The application of the disciplines of 9 CFR 92.2 to Argentina's requests for authorization to import fresh (chilled or frozen) beef from Northern Argentina and for recognition of Patagonia as FMD-free falls within the scope of Article 8 and Annex C(1) of the SPS Agreement.

   ii. That the United States has not undertaken and completed the procedure to review Argentina's request for imports of fresh (chilled or frozen) beef from Northern Argentina without undue delay and has therefore acted in a manner inconsistent with Article 8 and Annex C(1)(a) of the SPS Agreement.

   iii. That the United States has not undertaken and completed the review of Argentina's request for recognition of Patagonia as FMD-free without undue delay and it has thus acted inconsistently with Article 8 and Annex C(1)(a) of the SPS Agreement.

   iv. Argentina's claims under Article 8 and the first and third requirements of Annex C(1)(b) are outside the Panel's terms of reference.

   v. By failing to inform Argentina, upon request, of the stage of APHIS' review processes or to explain the delays incurred by such procedures, the United States acted inconsistently with Article 8 and the fifth requirement of Annex C(1)(b).

c. The Panel finds that 9 CFR 94.1, as amended by the 2001 Regulations, is not based on the relevant provisions of the Terrestrial Code and is thus inconsistent with Article 3.1 of the SPS Agreement.

[1756] See e.g. Panel Reports, *US/Canada – Continued Suspension*, para. 7.853; *Japan – Apples*, para. 8.328; *Japan – Apples (Article 21.5 – US)*, paras. 8.202-8.203; *EC–Hormones (US)*, para. 8.272; *Australia – Salmon*, para. 8.185; and *EC – Approval and Marketing of Biotech Products*, para. 7.3429.

d. The Panel finds the United States did not seek to obtain additional information nor did it review the measures within a reasonable period of time. Therefore, the Panel finds that the measures do not fall within the scope of Article 5.7 and the qualified exemption to the obligations in Articles 5.1, 5.2 and 2.2 is not available to the United States.

e. With respect to Articles 5.1, 5.2, and 2.2 the Panel finds that:

   i. The June 2001 Interim Rule is a risk assessment "appropriate to the circumstances" within the meaning of Article 5.1, 5.2, 5.3 and Annex A(4). The Panel also finds that at the time the measures were adopted in 2001 they were based on that risk assessment. Therefore, at the time the measures were adopted they were consistent with Articles 5.1 and 5.2.

   ii. The Panel also finds that the scientific evidence required a review or new risk assessment, which the United States had not completed as of the date of establishment of the Panel. Therefore, the Panel finds that the measures are not maintained based on a risk assessment as required by Article 5.1 of the SPS Agreement. Such failure cannot be justified by the fact that the risk assessment process was ongoing because the United States acted inconsistently with Article 8 and Annex C(1)(a) in the conduct of the risk assessment in that the process incurred undue delays. Therefore, the maintenance of the measures is inconsistent with Article 5.1. Having found that there was no risk assessment, the Panel finds no basis to move forward with an analysis under Article 5.2.

   iii. As a consequence of the violation of Article 5.1, the Panel finds that the United States' measures are also inconsistent with Article 2.2.

f. The Panel concludes that Article 5.4 does not impose a positive obligation on WTO Members. Even assuming, *arguendo*, that Argentina could raise a claim under Article 5.4, the Panel finds that it has not made a *prima facie* case of inconsistency.

g. With respect to Article 5.6 the Panel finds that:

   i. The United States' prohibitions on imports of fresh (chilled or frozen) beef from Northern Argentina are more trade-restrictive than required to achieve the United States' ALOP, and thus are inconsistent with Article 5.6.

   ii. The United States' prohibitions on imports of FMD-susceptible animals and animal products from Patagonia are more trade-restrictive than required to achieve the United States' ALOP, and thus are inconsistent with Article 5.6.

h. With respect to Article 2.3 the Panel finds that:

   i. By allowing imports of fresh (chilled or frozen) beef from Uruguay under the protocols set forth in 9 CFR 94.22, while prohibiting imports of the same product from Northern Argentina, the United States arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail, inconsistently with Article 2.3.

   ii. The Panel exercises judicial economy on Argentina's claim that, by conducting a risk analysis and issuing a positive determination for Uruguay within a reasonable period of time, while maintaining its prohibition on imports from Northern Argentina without a risk assessment since 2001, the United States discriminated between the two regions in terms of access to APHIS' regulatory process.

   iii. By recognizing Santa Catarina and Chile as FMD-free within the meaning of 9 CFR 94.1(a) and allowing imports of FMD-susceptible animals and animal products therefrom under the protocols in 9 CFR 94.11, while prohibiting imports of the same products from Patagonia, the United States arbitrarily or unjustifiably discriminates between Members where identical or similar conditions prevail, inconsistently with Article 2.3.

iv. The Panel exercises judicial economy on Argentina's claim that, by conducting a risk analysis and issuing a positive determination for Santa Catarina within a reasonable period of time, while maintaining its prohibition on imports from Patagonia without a risk assessment since 2001, the United States discriminated between the two regions in terms of access to APHIS' regulatory process.

v. Argentina failed to demonstrate that the United States' measures arbitrarily or unjustifiably discriminate between, on the one hand, Northern Argentina and Patagonia and, on the other hand, Japan and the United Kingdom.

i. With respect to Article 6 the Panel finds that:

i. By failing to adapt its measures to the sanitary characteristics of Patagonia, the United States acted inconsistently with Article 6.1.

ii. The Panel exercises judicial economy on Argentina's claim that, by failing to recognize the concepts of FMD-free areas or areas of low disease prevalence, the United States acted inconsistently with Article 6.2.

j. Argentina has not established that the United States acted inconsistently with its obligations under Article 10.1 by failing to take account of Argentina's special needs.

k. Having found that the United States acted inconsistently with Article 8 and Annex C(1)(a) and (b), and Articles 5.1, 2.2, 5.6, 2.3, 6.1, and 1.1 of the SPS Agreement, the Panel finds that the United States has also acted inconsistently with Article 3.3.

l. Having found that 9 CFR 94.1, as amended by the 2001 Regulations, is inconsistent with Articles 3.1, 3.3, 5.1, 2.2, 5.6, 2.3, and 6.1 of the SPS Agreement, we find that it is also inconsistent with Article 1.1 of the SPS Agreement.

8.2. In respect of the Argentina's claims under the GATT 1994, the Panel noted that it had already found that the United States' measures are inconsistent with Articles 1.1, 2.2, 2.3, 3.1, 3.3, 5.1, 5.6, 6.1, 8 and Annex C(1)(a) and (b) of the SPS Agreement. Therefore, the Panel exercised judicial economy over Argentina's claims under Articles I:1 and XI:1 of the GATT 1994 and the United States' defence under Article XX(b) of the GATT 1994.

8.3. Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the United States has acted inconsistently with the specified provisions of the SPS Agreement, it has nullified or impaired benefits accruing to Argentina under that agreement.

8.4. Pursuant to Article 19.1 of the DSU, having found that the United States acted inconsistently with its obligations under Articles 1.1, 2.2, 2.3 3.1, 3.3, 5.1, 5.6, 6.1, 8 and Annex C(1)(a) and (b) of the SPS Agreement, we recommend that the DSB request the United States to bring its measures into conformity with its obligations under the SPS Agreement.

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APPENDIX 1

CHRONOLOGY OF EVENTS RELATING TO THE UNITED STATES' EVALUATION OF THE FOOT-AND-MOUTH DISEASE SITUATION IN ARGENTINA

Type of Event	
Internal Argentine Event – including outbreaks and introduction of domestic regulations	**Bold**
OIE events	*Italics*
WTO notifications and current proceedings	Plain
US regulatory process – including communications with Argentina and site visits	Shading

Date	Event
1929	Last outbreak of FMD in the United States.[1]
1964-1987	Continued FMD outbreaks in Argentina.[2]
25 August 1997	The United States authorized the importation of fresh (chilled or frozen) beef from Argentina, following a risk assessment completed in June 1997.[3] The authorization included a set of mitigating protocols to bring the imports of Argentine beef into compliance with the United States' ALOP.
30 April 1999	**Anti-FMD vaccination was suspended in all Argentine regions.[4]**
22 May 2000	*OIE recognized Argentina as an FMD-free country where vaccination is not practised.[5]*
20 July 2000	**Type O Outbreak in Clorinda, Province of FORMOSA.[6]**
22 July 2000	**Cattle from a neighbouring country were illegally imported into Argentina.[7]**
27 July 2000	**Type O Outbreak in Concepcion del Uruguay department of the Province of ENTRE RIOS.[8]**
28 July 2000	**Type O Outbreak in Mercedes, Province of CORRIENTES.[9]**
2 August 2000	**Type O Outbreak reported in the Pilagàs Department of the Province of FORMOSA.[10]**
4 August 2000	**Type A Outbreak in Tercero Arriba, Province of CORDOBA.[11]**
9 August 2000	**Type A Outbreak in Gral. Villegas district, Province of BUENOS AIRES.[12]**
9 August 2000	**Out of concern for maintaining the international status of exports of FMD-susceptible products, SENASA decided to keep the FMD situation confidential until further data would permit a better evaluation of the situation.[13]**

[1] United States' first written submission, para. 106.
[2] Dr. Alberto E. Pecker, SENASA, Fiebre Aftosa: Su Paso Por La Argentina (October 2007), (Exhibit USA-149).
[3] *Importation of Beef from Argentina*, 62 Fed. Reg. 34385 (26 June 1997) (Final Rule), (Exhibit ARG-26).
[4] Argentina's first written submission, para. 103.
[5] Argentina's first written submission, para. 105. United States' first written submission, para. 71 (referring to Dr. Alberto E. Pecker, SENASA, Fiebre Aftosa: Su Paso Por La Argentina (October 2007), (Exhibit USA-25)).
[6] SENASA, *National FMD Eradication Plan April, 2001: Report of 2000-2001 FMD Outbreaks, Actions adopted and Contingency Program in Case of FMD Risks* (February 2002) (SENASA National FMD Eradication Plan 2001-2002), (Exhibit USA-33), p. 3.
[7] United States first written submission, para. 72 (referring to *Certification of Beef from Argentina*, 65 Fed. Reg. 82894 (29 December 2000) (Exhibit USA-30)).
[8] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33), p. 3.
[9] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33), p. 3.
[10] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33), p. 3.
[11] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33), p. 4.
[12] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33), p. 4.
[13] United States' first written submission, para. 84; General Auditing Office of Argentina, *SENASA Program for the Fight Against Foot and Mouth Disease* (22 August 2003), (Exhibit USA-42).

Date	Event
10 August 2000	**Argentina notified the OIE that it had detected FMD disease in animals that had illegally entered the North-eastern provinces of Argentina through the Northern border.[14]**
14 August 2000	**Type A Suspect case reported in Rio Segundo (centre-north of the Province of CORDOBA).[15] The district was located to the south of the Province of CORDOBA where the first outbreaks occurred. By mid - November, the epidemic had spread to the centre – west of the Province of CORDOBA and had entered San Luis. The first outbreaks in San Luis were reported in February 2001 and affected the districts of Dupuy and General Pedernera.[16]**
16 August 2000	Argentina confirmed to APHIS that one of the animals imported on 22 July 2000 was infected with FMD.[17]
21 August 2000	**Type O Outbreak reported in the Las Palmas District, Bermejo County in Province of CHACO.[18, 19]**
27 September- 6 October 2000	APHIS conducted a site visit to Argentina in conjunction with OIE staff, with a view to gathering information necessary to conduct a risk assessment for Argentina in connection with Argentina's report that FMD-infected bovines had been imported into Argentina illegally from Paraguay on 10 August 2000.[20]
2 October 2000	**Type O Outbreak reported in the Capital district of the Province of MISIONES.[21]**
Mid-November 2000	**SENASA stated that, by mid-November 2000, the type "A" FMD epidemic had spread to the centre west of the Province of CORDOBA and had entered SAN LUIS.[22]**
November 2000	**The president of SENASA resigned.[23]**
4 December 2000	APHIS publishes a favourable risk analysis on fresh or frozen beef from Argentina. The risk identified was associated to Argentina's report that 10 bovines, 4 of which were FMD-infected, had been imported into Argentina illegally from Paraguay.[24]
11 December 2000	**Type O Outbreak reported in the Vera district of the Province of SANTA FE.[25]**
18 December 2000	**Type O Outbreak reported in the San Christobal district of SANTA FE.[26]**
29 December 2000	APHIS published an interim rule allowing the importation of beef imports from Argentina to resume under 9 CFR 94.21 and amended that section to add additional conditions on the importation.
January 2001	**65 outbreaks of FMD reported in January 2001.[27]**
February 2001	**203 outbreaks of FMD reported in February 2001[28]**
February 2001	**The United States alleges that the FMD disease expanded into the Province of SAN LUIS during the month of February 2001, where a total of 12619 animals were affected by and 166278 were exposed to FMD.[29]**
March 2001	**247 outbreaks of FMD reported in March 2001[30]**

[14] Argentina's first written submission, para. 106.

[15] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33), p. 4. SENASA also mentions that seven outbreaks followed between 23 August 2000 and 25 September 2000**.** SENASA also mentioned that the period between 21 August 2000 to 15 September 2000 was the first in which there were 4 outbreaks in General Roca and in Rio Segundo at the same time.

[16] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33), p. 3.

[17] 2001 Interim Rule on Argentina, (Exhibit ARG-29).

[18] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33), p. 3.

[19] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33), p. 4.

[20] USDA/APHIS, *Risk Analysis: Evaluation of risk to the United States (US) of importing Foot and Mouth Disease (FMD) Virus in Fresh or Frozen Beef from Argentin*a (4 December 2000), (2000 Risk Analysis for Argentina), (Exhibit ARG-28).

[21] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33), p. 3.

[22] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33).

[23] United States' first written submission, para. 90.

[24] 2000 Risk Analysis for Argentina, (Exhibit ARG-28).

[25] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33), p. 4.

[26] SENASA National FMD Eradication Plan 2001-2002, (Exhibit USA-33), p. 4.

[27] Information Provided by SENASA (November 2002), (Exhibit USA-32), p. 16.

[28] Information Provided by SENASA (November 2002), (Exhibit USA-32), p. 16.

[29] United States' first written submission, para. 78 (referring to Information Provided by SENASA (November 2002), (Exhibit USA-32), p. 16).

Date	Event
March 2001	**SENASA introduced a new president, who resigned after 10 days, thus leading to the reappointment of a former president to head the agency.[31]**
12 March 2001	*Argentina reported to the OIE and the US that they had detected an FMD outbreak in the Province of BUENOS AIRES. A few days later Argentina informed the OIE and the US of outbreaks in four additional provinces.[32]*
12 March 2001	**Argentina suspended its exports of fresh (chilled or frozen) beef to the US.[33]**
April 2001	**359 outbreaks of FMD reported in April 2001[34]**
1 April 2001	**SENASA passed Decree 394/2001, through which it appointed a new president and vice-president of the agency and provided for the appointment of a new board of directors.[35]**
6 April 2001	**SENASA adopted Resolution 5/01, setting forth the National FMD Eradication Plan.[36]**
26 April 2001	**Pursuant to the National FMD Eradication Plan, SENASA adopted Resolution 25/2001, through which it established the regionalization of the Argentine territory, including controls on movement of FMD-susceptible animals between regions.[37] This supersedes Resolution 9/2001 adopted on 28 March 2001.**
24 May 2001	**SENASA implemented Resolution No 58/2001.[38]**
30 May 2001	*OIE removed Argentina from the list of countries free of FMD where vaccination is not practised.[39]*
May 2001	**605 outbreaks of FMD reported in May 2001[40, 41]**
4 June 2001	The United States published an interim rule on 4 June 2001, with retroactive effect as from February 19, 2001, which prohibited imports of fresh beef from Argentina, as an emergency measure following the outbreak.[42]
June 2001	**540 outbreaks of FMD reported in June 2001[43]**
July 2001	**324 outbreaks of FMD reported in July 2001[44]**
August 2001	**68 outbreaks of FMD reported in August 2001[45]**
September 2001	**17 outbreaks of FMD reported in September 2001[46]**
October 2001	**1 outbreaks of FMD reported in October 2001[47]**
November 2001	**7 outbreaks of FMD reported in November 2001[48]**
11 December 2001	The interim rule of 4 June 2001 prohibiting import of fresh beef from Argentina was imposed as a final rule. Upon its publication in the Federal Register, the final rule terminated the authorization at 9 CFR 94.21 which had allowed access of fresh meat from Argentina.[49]

[30] Information Provided by SENASA (November 2002), (Exhibit USA-32), p.16. See also United States' first written submission, paras. 78-81.
[31] "Cane Returns to Lead SENASA", La Nación (30 March 2001), (Exhibit USA-49).
[32] 2001 Interim Rule on Argentina, (Exhibit ARG-29), pp. 29897-29898.
[33] Argentina's first written submission, para. 107.
[34] Information Provided by SENASA (November 2002), (Exhibit USA-32), p.16. See also United States' first written submission, paras. 78-81.
[35] SENASA Decreto 394/2001, (Exhibit USA-50).
[36] Resolución SENASA 5/2001, (Exhibit ARG-4/USA-37).
[37] Resolución SENASA 25/2001, (Exhibit ARG-92).
[38] Resolución SENASA 58/2001, (Exhibit USA-59).
[39] OIE Resolution XVII of 2001, (Exhibit ARG-103).
[40] Information Provided by SENASA (November 2002), (Exhibit USA-32), p. 16.
[41] United States' first written submission, para. 78 (referring to Information Provided by SENASA (November 2002), (Exhibit USA-32)).
[42] 2001 Interim Rule on Argentina, (Exhibit ARG-29).
[43] Information Provided by SENASA (November 2002), (Exhibit USA-32), p. 16.
[44] Information Provided by SENASA (November 2002), (Exhibit USA-32), p. 16.
[45] Information Provided by SENASA (November 2002), (Exhibit USA-32), p. 16.
[46] Information Provided by SENASA (November 2002), (Exhibit USA-32), p. 16.
[47] Information Provided by SENASA (November 2002), (Exhibit USA-32), p. 16.
[48] Information Provided by SENASA (November 2002), (Exhibit USA-32), p. 16.
[49] 2001 Final Rule on Argentina, (Exhibit ARG-30).

Date	Event
December 2001	**2 outbreaks of FMD reported in December 2001[50]**
18 January 2002	**SENASA adopted Resolution 112/02, which prohibited the entry of FMD-vaccinated animals into Patagonia North B and Patagonia South.[51]**
23 January 2002	**Argentina reported an outbreak in the Province of CORDOBA.[52]**
May 2002	*The OIE recognized Patagonia South as an FMD-free zone where vaccination is not practised.[53]*
November 2002	SENASA submitted a request for authorization of imports of Argentine fresh (chilled or frozen) beef into the United States, pursuant to 9 CFR 92.[54]
6 November 2002	APHIS sent a fax to SENASA proposing to arrange a meeting between SENASA and APHIS' area director in Colombia.[55]
16 December 2002	Officials from the United States met with Argentina officials and requested technical documents to allow for the initiation of a risk analysis.[56]
30 December 2002	**SENASA passed Resolution 1051/2002, which repealed Resolution 112/2002 and modified the precautions for the preservation of the FMD-free status of Patagonia South and Patagonia North B.[57]**
23 April 2003	Officials from the United States and Argentina animal health officials met to discuss a range of issues.[58] During the meeting, the countries confirmed that a technical team would visit Argentina in September 2003 to discuss the status of FMD.[59]
18-23 May 2003	*The OIE confirmed its recognition of Patagonia South as FMD-free without vaccination.[60]*
July 2003	*The OIE recognized the Argentine territory located north of the 42nd parallel as an FMD-free zone where vaccination is practised.[61]*
28 August 2003	SENASA submitted a formal request to APHIS requesting the recognition of Patagonia as a region free of FMD.[62]
28 August 2003	*SENASA notified the OIE of the presence of animals with symptoms similar to FMD in the city of Tartagal, Department of San Martin, Province of Salta.[63]*
29 August 2003	**Suspicion of an FMD outbreak in the city of Tartagal, Department of San Martin, Province of Salta.[64] SENASA notified APHIS of the situation on the same day.[65]**
August 2003	*The OIE responded to the outbreak report in the Province of Salta by suspending Argentina's status as FMD-free with vaccination.[66]*
2 September 2003	**Outbreak of Type "O" confirmed in the city of Tartagal, Department of San Martin, Province of Salta. A SENASA epidemiological report performed on pigs**

[50] Information Provided by SENASA (November 2002), (Exhibit USA-32), p. 16. See also United States' first written submission, paras. 78-81.

[51] Resolución SENASA 112/2002, (Exhibit ARG-94).

[52] Information Provided by SENASA (November 2002), (Exhibit USA-32), p. 14.

[53] Argentina's first written submission, para. 133.

[54] Information Provided by SENASA (November 2002), (Exhibit USA-32).

[55] Facsimile from Donald Wimmer (United States Department of Agriculture, Animal and Plant Health Inspection Service (USDA, APHIS) Buenos Aires, Argentina Area Director) to Dr. Bernardo Cane (SENASA, President) (6 November 2002), (Exhibit USA-78).

[56] SENASA's letter of 30 December 2002, (Exhibit USA-79). In the communication, Argentina confirms that it submitted the technical documents the United States requested during the course of the 16 December meeting.

[57] Resolución SENASA 1051/2002, (Exhibit USA-60).

[58] APHIS' facsimile of 29 April 2003, (Exhibit USA-80).

[59] APHIS' facsimile of 29 April 2003, (Exhibit USA-80).

[60] OIE World Assembly, Resolution XX, *Recognition of the Foot and Mouth Disease Status of Member Countries*, 71st General Session (18-23 May 2003), (Exhibit ARG-100).

[61] Report of the Meeting of the OIE Foot and Mouth Disease and Other Epizootics Commission (Paris, 16, 17 and 22 May 2003), (Exhibit ARG-119).

[62] Information Provided by SENASA (July 2003), (Exhibit USA-98).

[63] Argentina's first written submission, para. 112.

[64] Report of the Meeting of the OIE Scientific Commission for Animal Diseases (December 2003), (Exhibit USA-81).

[65] SENASA's letter of 29 August 2003, (Exhibit USA-83).

[66] Report of the Meeting of the OIE Scientific Commission for Animal Diseases (December 2003), (Exhibit USA-81). The OIE Scientific Commission also noted that the status of Patagonia as FMD-free without vaccination remained unaffected.

Date	Event
	in the establishment concerned revealed that 16 pigs were infected, 2 of which died.[67] [68]
September 2003	APHIS arranged to perform a site visit in September 2003 to the Argentina region bordering Bolivia. However, the visit was cancelled by SENASA.[69]
3 October 2003	APHIS' requested additional information from SENASA with respect to the outbreak in Salta and notified SENASA of the model APHIS would use to assess the risk of FMD and the ensuing requests for additional information to develop input parameters.[70]
6 October 2003	An additional APHIS site visit was scheduled to occur on 6 October 2003, however, SENASA notified APHIS of the FMD outbreak.[71] APHIS cancelled the visit.[72]
14 October 2003	APHIS reiterated its desire to conduct the site review because the visit was important to further its evaluation of FMD in Argentina.[73]
30 October 2003	APHIS and SENASA arranged a bilateral meeting to convene in Buenos Aires.[74]
6 November 2003	APHIS contacted SENASA regarding a 1 December 2003 site visit to Patagonia.[75] APHIS also requested additional information from SENASA regarding the request for regional recognition of Patagonia as FMD-free.[76]
1-5 December 2003	APHIS, together with the Canadian Food Inspection Agency, conducted a site visit to Patagonia South and the Patagonia buffer zone consisting of Patagonia North A and B to continue its assessment of the status of FMD in the area.[77]
18 February 2004	SENASA responded to APHIS' request for a second bilateral meeting to reconvene in Buenos Aires on 8 March 2004.[78]
2 March 2004	In a follow-up letter sent to SENASA after the APHIS site visit between 1-5 December 2003 to Patagonia, APHIS informed SENASA that it would need to provide additional information to allow APHIS to proceed with the risk assessment.[79]
23-28 May 2004	*The OIE confirmed the recognition of Patagonia South as FMD-free without vaccination.*[80]
28 July 2004	SENASA and APHIS had an additional bilateral meeting in Buenos Aires, as agreed on 18 February 2004.[81]
October 2004	*The OIE Ad HOC Group evaluated SENASA's request to retain the status of FMD-free with vaccination for Argentina.*[82]
16 November 2004	SENASA responded to the 2 March 2004 letter, providing additional information concerning Patagonia in response to APHIS' request.[83]
November 2004	SENASA submitted its response to APHIS' October 2003 request for additional information in connection with Argentina's request for imports of fresh (chilled or frozen) beef.[84]

[67] Argentina's facsimile of 5 September 2003, (Exhibit USA-51).
[68] SENASA's letter of 29 August 2003, (Exhibit USA-83).
[69] APHIS' letter of 14 October 2003, (Exhibit USA-82).
[70] APHIS' letter of 3 October 2003, (Exhibit USA-84).
[71] SENASA's letter of 29 August 2003, (Exhibit USA-83).
[72] APHIS' letter of 3 October 2003, (Exhibit USA-84).
[73] APHIS' letter of 14 October 2003, (Exhibit USA-82).
[74] Facsimile from Thomas C. Schissel (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Assistant Area Director) to Jorge N. Amaya (SENASA, President) (23 October 2003), (Exhibit USA-85).
[75] APHIS' facsimile of 6 November 2003, (Exhibit USA-99).
[76] APHIS' letter of 6 November 2003, (Exhibit USA-100).
[77] APHIS' letter of 2 March 2004, (Exhibit USA-102).
[78] Facsimile from SENASA to Theresa Boyle (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Area Director) (18 February 2004), (Exhibit USA-86).
[79] APHIS' letter of 2 March 2004, (Exhibit USA-102).
[80] OIE World Assembly, Resolution XX, *Recognition of the Foot and Mouth Disease Status of Member Countries*, 72nd General Session (23-28 May 2004), (Exhibit ARG-101).
[81] Facsimile from SENASA to Theresa Boyle (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS, Area Director) (30 July 2004), (Exhibit USA-87).
[82] Report of the Meeting of the OIE Ad Hoc Group for Evaluation of Country Status for Foot and Mouth Disease (October 2004), (Exhibit USA-88).
[83] Information on Patagonia Provided by SENASA (November 2004), (Exhibit USA-103).
[84] Information on Northern Argentina provided by SENASA (November 2004), (Exhibit ARG-86).

Date	Event
January 2005	*The OIE Ad HOC Group which had evaluated SENASA's request to retain the status of FMD-free with vaccination for Argentina recommended that Argentina be recognized as FMD-free with vaccination.*[85]
17 March 2005	APHIS sent a letter to SENASA recalling that, in an earlier communication, APHIS had expressed its availability to conduct a visit to Argentina north of the 42nd parallel in June 2005. APHIS proposed to prepone the visit to 30 May 2005, and specified that the purpose of the visit was to gather information for the purposes of a quantitative risk assessment in order to determine whether Argentina may resume imports of fresh (chilled or frozen) beef.[86]
21 April 2005	Prior to the scheduled visit to Northern Argentina, APHIS requested additional information from SENASA to assist in compiling data to be used in the quantitative and qualitative risk analysis of the Argentine region north of the 42nd parallel.[87]
24 May 2005	*The OIE restored the FMD-free with vaccination status of Argentina's territory located north of the 42nd parallel.*[88] *By the same Resolution, the OIE confirmed the recognition of Patagonia South as FMD-free without vaccination.*[89]
30 May-3 June 2005	APHIS conducted the scheduled site visit to the Argentina's territory north of the 42nd parallel.[90]
June 2005	APHIS concluded and produced the risk analysis evaluating Patagonia South as a region free of FMD.[91]
7 July 2005	APHIS sent a follow-up letter to SENASA summarizing comments and observations made by its veterinary services during the visit to the Argentina region north of the 42nd parallel.[92]
4 August 2005	APHIS requested additional information from SENASA in light of a strike by SENASA personnel.[93]
15 November 2005	**SENASA introduced Resolution No 725. 94 The Resolution qualified the equivalence requirements between the regions, Patagonia North B and Patagonia South by imposing traceability requirements.[95] Resolution No. 725 maintained the general ban on transport to Patagonia South and Patagonia North B of animals susceptible to FMD; in addition, the resolution specified traceability requirements for animals traveling through the two zones.[96]**
30 November 2005	The Argentine Ambassador in a letter to the Secretary for Agriculture in the United States requested the USDA to expedite the administrative procedures to allow access of fresh beef from Argentina to the United States market.[97]
5 December 2005	**SENASA sent a letter to APHIS reporting about SENASA strikes, and stating that such strikes did not affect emergency services.[98]**
5 February 2006	**Two outbreaks of "type O" FMD occurred in San Luis del Palmar, Province of CORRIENTES.[99]**

[85] Report of the Meeting of the OIE Ad Hoc Group for Evaluation of Country Status for Foot and Mouth Disease (October 2004), (Exhibit USA-88).
[86] Letter from John R. Clifford (United States Department of Agriculture, Animal and Plant Health Inspection Service, USDA, APHIS) to Dr. Jose Molina (SENASA, Minister) (17 March 2005), (Exhibit USA-90).
[87] APHIS' letter of 21 April 2005, (Exhibit USA-91).
[88] OIE Resolution XX of 2005, (Exhibit ARG-95).
[89] OIE Resolution XX of 2005, (Exhibit ARG-95).
[90] APHIS' letter of 7 July 2005, (Exhibit USA-92).
[91] 2005 Risk Analysis for Patagonia South, (Exhibit ARG-9).
[92] APHIS' letter of 7 July 2005, (Exhibit USA-92).
[93] APHIS' letter of 4 August 2005, (Exhibit USA-93).
[94] Resolución SENASA 725/2005, (Exhibit USA-61).
[95] United States' first written submission, para. 101.
[96] United States' first written submission, para. 101.
[97] Letter from Hon. José O. Bordón, Ambassador of Argentina to Hon. Mike Johanns, US Secretary of Agriculture (30 November 2005), (Exhibit ARG-37).
[98] SENASA's letter of 5 December 2005, (Exhibit ARG-96).
[99] FMD Impact Worksheet, (Exhibit USA-54). See also OIE Disease Information, Vol. 19, No. 6, p. 96.

Date	Event
8 February 2006	**The president of SENASA notified the FMD outbreaks in San Luis del Palmar, Province of CORRIENTES to the OIE.[100]** **SENASA enacted Resolution 35/2006 establishing a sanitary alert which covered a zone comprising the affected department i.e. San Luis del Palmar, and the seven neighbouring departments i.e.: Capital; San Cosme; Itatí; Berón de Astrada; General Paz; Mburucuya; and Empedrado.[101]**
10 February 2006	APHIS requested information regarding the outbreak in the Province of CORRIENTES.[102]
May 2006	*The OIE removed the Argentina region north of the 42nd parallel from the list of FMD-free zones with vaccination.[103] The OIE, however, maintained the FMD-free without vaccination status of Patagonia South.[104]*
27 June 2006	APHIS contacted SENASA in connection with Argentina's request for authorization of imports of fresh (chilled or frozen) beef. APHIS informed SENASA that, in order to conclude its risk analysis, APHIS considered it necessary to arrange a visit to the Province of CORRIENTES to evaluate the area affected by the FMD outbreaks. APHIS proposed to conduct the visit in August.[105]
26 July 2006	In response to APHIS' request for information of 10 February 2006, SENASA submitted a report to APHIS detailing the actions taken by SENASA in response to the FMD outbreaks in the Province of CORRIENTES and to ensure the preservation of the FMD-free without vaccination status of Patagonia South.[106]
6-8 September 2006	APHIS visited the areas affected by the FMD outbreaks and performed an audit.[107]
5 January 2007	APHIS published a proposed rule in the Federal Register to change the disease status of Patagonia South to FMD-free.[108] During the ensuing 60-day period, APHIS received comments on the proposed rule from interested parties.
2007	**SENASA redefined its regional units by issuing Resolutions 225/2006, 335/2007, and 362/2007, and created a Regional Operative Unit (Unidad Regional Operative) (ROU) within the Central Unit (Vice-presidential Unit) to coordinate activities of the 14 Regional Operative Offices.[109]**
22 February 2007	*On 22 February 2007, after completing its evaluation, the OIE Ad Hoc Group submitted its recommendations to the Scientific Commission concerning the reinstatement of Argentina's disease-free with vaccination status and the enlargement of Argentina's FMD-free without vaccination area.[110]*
22 May 2007	*The OIE reinstated the FMD-free with vaccination status of Northern Argentina and extended the zone recognized as FMD-free without vaccination to include Patagonia North B.[111]*
22 January 2008	The United States Cattlemen's Association, the National Farmers Union, and American Agri-Women sent a letter to the House Committee on Agriculture with regard to the 2007 proposed rule for Patagonia South, in which they called for further discussion on the matter before APHIS finalize the process.[112]

[100] OIE, Final Report, 74th General Session (2006), (Exhibit USA-55), pp. 45, 144.
[101] Argentina's first written submission, para. 117; Resolución SENASA 35/2006, (Exhibit ARG-5).
[102] APHIS' letter of 10 February 2006, (Exhibit ARG-38).
[103] OIE, Final Report, 74th General Session (2006), (Exhibit USA-55), pp. 45, 144.
[104] OIE World Assembly, Resolution XXVI, *Recognition of the Foot and Mouth Disease Status of Member Countries*, 74th General Session (21-26 May 2006), (Exhibit ARG-102).
[105] APHIS' letter of 27 June 2006, (Exhibit USA-94).
[106] SENASA's letter of 26 July 2006, (Exhibit ARG-97).
[107] SENASA's letter of 19 July 2010, Note No. 150/2010, (Exhibit ARG-46).
[108] 2007 Proposed Rule on Patagonia South, (Exhibit ARG-56/USA-104).
[109] 2014 Risk Analysis for Patagonia, (Exhibit USA-133), p. 14.
[110] Report of the Meeting of the OIE Scientific Commission for Animal Diseases (February 2007), (Exhibit USA-57).
[111] OIE Resolution XXI of 2007, (Exhibit ARG-10); OIE World Assembly, 75th General Session, Final Report (20-25 May 2007), (USA-105).
[112] Letter dated 22 January 2008 from various legislators of the Agriculture Commission of the House of Representatives, requesting a hearing review into the proposed rule of the United States Department of Agriculture to recognize Patagonia as a region free of foot-and-mouth disease (22 January 2008), (Exhibit ARG-39).

Date	Event
7 March 2008	The Embassy of Argentina in Washington sent a letter to US Senator Jon Tester expressing the view that the Proposed Rule recognizing Patagonia South as FMD-free should be finalized so that commercial relations between the region of Argentina and the United States could be normalized.[113]
11 March 2008	**SENASA introduced Resolution 148/2008 to authorize transport of FMD-susceptible animals into Patagonia South from Patagonia North B under additional traceability requirements, in connection with EU regulations recognizing Patagonia South, but not yet Patagonia North B, as FMD-free without vaccination.[114]**
14 March 2008	Several US Senators urged the Administration not to adopt the final rule for the recognition of Patagonia South as FMD-free until the rule has been reviewed by the Office of Management and Budget.[115]
20 March 2008	The Embassy of Argentina in Washington sent letter to US Senator Max Baucus expressing the view that the Proposed Rule recognizing Patagonia South as FMD-free should be finalized so that the commercial relations between the region of Argentina and the United States could be normalized.[116]
21 July 2008	Argentina submitted communication G/SPS/GEN/868 to the SPS Committee concerning its FMD situation.[117]
15 October 2008	APHIS contacted SENASA with a view to fixing the agenda for a site visit by APHIS, aimed at updating the assessment of the risk for Patagonia South in order to respond to the comments received in connection with the 2007 Proposed Rule for Patagonia South.[118]
22 October 2008	SENASA sent a letter to APHIS expressing displeasure with the duration of FMD assessment process and noting that, because the situation in Patagonia South had not changed, SENASA did not consider that there were sufficient grounds to accept APHIS' proposed visit schedule for 15-18 December 2008.[119]
11 November 2008	SENASA sent a letter to APHIS reiterating its statements of 22 October 2008.[120]
16 December 2008	**SENASA introduced Resolution 1282/2008 as a consequence of the EU's recognition of Patagonia North B as FMD-free without vaccination. The resolution relaxed the movement of FMD-susceptible animals from Patagonia North B into Patagonia South for any purpose subject to strengthened measures on transport and traceability. The resolution did not modify the pre-existing requirements for entry of FMD-susceptible animals into the Patagonia region as a whole from FMD-free zones with vaccination.[121]**
17 December 2008	SENASA also granted approval for APHIS to visit Patagonia South in February 2009.[122] In granting the site visit request, SENASA also requested that APHIS extend the mission to cover Patagonia North B because the zone was recognized by the OIE as a region free of FMD where vaccination is not practiced.[123] For this purpose, SENASA updated the information concerning Patagonia with APHIS, including the data on Patagonia North B that had led to the international recognition of the zone as FMD-free without vaccination.[124]

[113] Letter from Minister José Pérez Gabilondo to Senator Tester in response to his concern over the access of beef from Argentina (7 March 2008), (Exhibit ARG-41).
[114] Resolución SENASA 148/2008, (Exhibit USA-62).
[115] Letter from Senator Baucus et al. to Edward Schafer, Secretary, US Department of Agriculture and Jim Nussle, Director, Office of Management and Budget regarding proposed USDA rule on Patagonia South (14 March 2008), (Exhibit ARG-40).
[116] Letter from Ambassador Héctor Timerman to Senator Baucus in response to his 14 March 2008 letter (20 March 2008), (Exhibit ARG-42).
[117] Communication by Argentina to the Committee on Sanitary and Phytosanitary Measures: *Foot And Mouth Disease Situation*, G/SPS/GEN/868 (21 July 2008), (Exhibit ARG-98).
[118] APHIS' letter of 15 October 2008, (Exhibit USA-106).
[119] SENASA's facsimile of 22 October 2008, (Exhibit USA-107).
[120] SENASA's facsimile of 11 November 2008, (Exhibit USA-108).
[121] Resolución SENASA 1282/2008, (Exhibit USA-109).
[122] SENASA's letter of 17 December 2008, (Exhibit ARG-59/USA-111).
[123] SENASA's letter of 17 December 2008, (Exhibit ARG-59/USA-111); SENASA's letter of 30 January 2009, (Exhibit ARG-60/USA-112).
[124] SENASA's letter of 17 December 2008, (Exhibit ARG-59/USA-111); SENASA's letter of 30 January 2009, (Exhibit ARG-60/USA-112).

Date	Event
23-26 February 2009	APHIS conducted a site visit to Patagonia, including Patagonia South and Patagonia North B.[125]
26 February 2009	The US Congress passed the *2009 Omnibus Appropriations Act*.[126]
27 April 2009	APHIS sent SENASA a letter stating that no additional information was currently required to proceed with APHIS' rulemaking.[127]
30 September 2009	The *2009 Omnibus Appropriations Act* expired.
19 July 2010	SENASA sent APHIS a letter detailing the information exchange with respect to Argentina's request for authorization to import fresh (chilled or frozen) beef, highlighting its concern at APHIS not being able to reopen access to beef from Argentine territory located North of río Negro, and asking that the outcome foreseen for Argentina's request be elucidated in a timely fashion.[128]
19 July 2010	SENASA sent APHIS a letter detailing the information exchange with regard to the recognition of Patagonia as FMD-free, highlighting its concerns over the fact that all the technical stages had been concluded on a scientific basis, and stating that only remained to be completed the administrative procedures to secure the recognition of Patagonia.[129]
13 September 2010	APHIS responded to SENASA's 19 July 2010 letter with respect to Argentina's application for the recognition of Patagonia as FMD-free, stating that APHIS "had made significant progress towards recognizing the FMD-free status of southern Patagonia". APHIS further noted that because it needs to be thorough and transparent in its deliberations, the rule-making process could take time.[130]
24 September 2010	APHIS responded to SENASA's letter of 19 July 2010 stating that APHIS was "currently drafting a proposed rule that would allow the importation of fresh, chilled, or frozen Argentine beef under certain conditions".[131]
30 June 2011	The United States stated before the SPS Committee that APHIS had "completed the risk analysis regarding the region north of the 42nd parallel and would subsequently draft a proposal to allow the importation of beef under certain conditions".[132]
19 October 2011	The United States reiterated before the SPS Committee that APHIS had "completed the assessment and was drafting a proposal to allow the importation of beef under certain conditions. When the assessment and rules were completed in the near future, the United States would be able to provide market access for Argentine beef".[133]
10 July 2012	Argentina raised the same STC at the 53rd Meeting of the SPS Committee.[134]
30 August 2012	Argentina requested consultations with the United States at the WTO.[135]
28 November 2012	The United States and Argentina met in Washington DC in the framework of the Consultations being held pursuant to Article 4 of the DSU.[136]
6 December 2012	Argentina requested the establishment of a panel.[137]
17 December 2012	The United States did not accept the request for establishment of a panel.[138]
28 January 2013	The DSB established the Panel with standard terms of reference.[139]

[125] SENASA's letter of 30 January 2009, (Exhibit USA-112).
[126] H.R. Res. 1226, 111th Cong. (2009); S. Res. 337, 111th Cong (2009), (Exhibit ARG-44).
[127] APHIS' letter of 27 April 2009, (Exhibit ARG-79).
[128] SENASA's letter of 19 July 2010, Note No. 150/2010, (Exhibit ARG-46).
[129] SENASA's letter of 19 July 2010, Note No. 149/2010, (Exhibit ARG-61/USA-56).
[130] APHIS' letter of 13 September 2010, (Exhibit ARG-62).
[131] APHIS' letter of 24 September 2010, (Exhibit ARG-47).
[132] G/SPS/R/63, (Exhibit ARG-22), paras. 17-18.
[133] G/SPS/R/64, (Exhibit ARG-48), paras. 96-97.
[134] Committee on Sanitary and Phytosanitary Measures, *Summary of the Meeting of 10-11 July 2012*, Note by the Secretariat, G/SPS/R/67 (11 September 2012), (Exhibit ARG-23), para. 43.
[135] Argentina's request for consultations, WT/DS447/1.
[136] APHIS' letter of 13 March 2013, (Exhibit USA-96).
[137] Argentina's request for the establishment of a panel, WT/DS447/2.
[138] Argentina's first written submission, para. 20.
[139] Argentina's first written submission, para. 21.

Date	Event
13 March 2013	APHIS wrote to SENASA summarizing the issues discussed in the Consultations on 28 November 2012 between Argentina and United States officials, including APHIS's desire to conduct a new site visit to Northern Argentina and Patagonia. APHIS formally requested permission from SENASA to conduct the site visit in order to progress with the review of Argentina's request.[140]
3 July 2013	SENASA agreed to the visit proposed by APHIS on 13 March 2013, but stated that the sanitary situation in Argentina had not changed.[141]
15 July 2013	APHIS replied to SENASA's 3 July 2013 letter stating that it was ready to schedule the agreed visit to Argentina as soon as possible. APHIS also stated its understanding that Argentina preferred that the site visit occur during the last week of October or the first week of November 2013.[142]
8 August 2013	The Panel was composed by the Director-General.
1st week of November 2013	APHIS visited Argentina to conduct the site review with regard to the approval of imports of Argentine fresh (chilled or frozen) beef under certain conditions.[143]
23 January 2014	APHIS published a Proposed Rule for recognition of the Patagonia region (comprising both Patagonia South and Patagonia North B) as FMD-free, pursuant to an updated risk assessment completed in January 2014.[144]
28-29 January 2014	The Panel held the first substantive meeting with the parties.
29 August 2014	APHIS published a risk assessment for Northern Argentina, dated April 2014, stating that the risk of introduction of FMD stemming from imports of fresh (chilled or frozen) beef from the region was "low",[145] as well as a Proposed Rule to allow imports of such product under the same protocols as those applied to fresh (chilled or frozen) beef from Uruguay. [146]
1st week of September 2014	The Panel held the meeting with the parties and the experts on 2 September 2014 and the second substantive meeting with the parties on 4-5 September 2014.
28 October 2014	APHIS' Final Rule recognizing Patagonia as FMD-free within the meaning of 9 CFR 94.1(a) entered into force.

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[140] APHIS' letter of 13 March 2013, (Exhibit USA-96).
[141] SENASA's letter of 13 July 2013, (Exhibit ARG-99).
[142] APHIS' letter of 15 July 2013, (Exhibit USA-97).
[143] United States' first written submission, para. 162.
[144] 2014 Notice of Availability of Risk Analysis for Patagonia, (Exhibit USA-132); 2014 Risk Analysis for Patagonia (Exhibit USA-133).
[145] 2014 Risk Analysis for Northern Argentina, (Exhibit USA-169).
[146] 2014 Proposed Rule on Northern Argentina, (Exhibit USA-168).