

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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

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.

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<sup>1</sup> See WT/DS447/1 and WT/DS447/1/Corr.1.  
<sup>2</sup> WT/DS447/2.  
<sup>3</sup> See WT/DSB/M/328.  
<sup>4</sup> WT/DS447/3.

### 1.3 *Panel Proceedings*

#### 1.3.1 General

1.7 After consultation with the parties, the Panel adopted its Working Procedures<sup>5</sup> 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.

1.10 In these panel proceedings, certain filings were not made in accordance with the Working Procedures and revised timetable adopted by the Panel.<sup>6</sup> 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

<sup>5</sup> See the Panel's Working Procedures in Annex A-1.

<sup>6</sup> 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.

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incorporating changes to the requirements regarding simultaneous filing of submissions.<sup>7</sup>

### 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.<sup>8</sup> 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.<sup>9</sup> Argentina indicated that it would not object to the Panel seeking advice from the OIE concerning its processes and decisions.<sup>10</sup> 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 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.<sup>11</sup> The Panel adopted the Working Procedures for the

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<sup>7</sup> 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.

<sup>8</sup> Panel question No. 76 following the first substantive meeting.

<sup>9</sup> United States' response to Panel question No. 76 following the first substantive meeting.

<sup>10</sup> Argentina's response to Panel question No. 76 following the first substantive meeting.

<sup>11</sup> See Letter from the Panel to the parties (4 March 2014).

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".<sup>12</sup>

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.

<sup>12</sup> Letter from the United States regarding proposed experts (15 April 2014).

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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.<sup>13</sup> Of the experts selected, Dr Cupit was proposed by the United States and 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.<sup>14</sup> 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'

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<sup>13</sup> 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, 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 Brasília, 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.

<sup>14</sup> 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.

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".<sup>15</sup> 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."<sup>16</sup> 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 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

<sup>15</sup> Letter from the United States to the Panel (11 August 2014).

<sup>16</sup> Letter from the Director-General of the OIE (19 August 2014).

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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.<sup>17</sup>

## 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.<sup>18</sup>

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

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<sup>17</sup> Communication from the United States to the Panel (1 September 2014).

<sup>18</sup> 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](http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/Q_A-FMD-EN.pdf) (last accessed 21 February 2014).



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) hooved animals).<sup>19</sup>

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 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.<sup>20</sup>

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.

<sup>19</sup> 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](http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/Q_A-FMD-EN.pdf) (last accessed 21 February 2014).

<sup>20</sup> 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](http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/Q_A-FMD-EN.pdf) (last accessed 21 February 2014).



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- 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)<sup>21</sup>, which, in its application, effectively prohibits the importation of fresh (chilled or frozen) beef from Northern Argentina and animals, meat and other animal products<sup>22</sup> 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](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

<sup>21</sup> *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).

<sup>22</sup> 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.

APHIS receives of outbreaks of the disease from veterinary officials of the exporting country, from the World Organization for Animal Health (OIE), or from other sources the Administrator determines to be reliable.<sup>23</sup>

- (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,

<sup>23</sup> 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).