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1 ARTICLE 2

1.1 Text of Article 2

Article 2

Basic Rights and Obligations

1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.

2. 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

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"With regard to the rules on burden of proof in proceedings under the SPS Agreement ,
we noted in our Report in European Communities – Hormones

impossible burden. The United States could have requested Japan, pursuant to Article 5.8 of the SPS Agreement, to provide 'an explanation of the reasons' for its varietal testing requirement, in particular, as it applies to apricots, pears, plums and quince. Japan would, in that case, be obliged to provide such explanation. The failure of Japan to bring forward scientific studies or reports in support of its varietal testing requirement as it applies to apricots, pears, plums and quince, would have been a strong indication that there are no such studies or reports. The United States could also have asked the Panel's experts specific questions as to the existence of relevant scientific studies or reports or it could have submitted to the Panel the opinion of experts consulted by it on this issue. The United States, however, did not submit any evidence relating to apricots, pears, plums and quince."²¹

1.4.3.3 Burden of proof determined by the scope of a claim

20. Regarding the concept of prima facie case, the Appellate Body in Japan – Apples agreed with the Panel that the complainant could establish a prima facie case of inconsistency with Article 2.2 of the SPS Agreement even though it had confined its arguments to the perceived risks underlying the measures within the scope of its claim²²:

"Japan ... submits that, 'in order to establish a prima facie case of insufficient scientific evidence (i t s 0 s) 7 e
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presumed, more generally, not to be based on scientific principles or not to be maintained without sufficient scientific evidence within the meaning of Article 2.2. On that basis, the Appellate Body concluded that a violation of Article 5.1 also implied an inconsistency with Article 2.2.³⁶

32. In EC – Approval and Marketing of Biotech Products, the Panel discussed the relationship between Article 2.2 and Article 5.1 of the SPS Agreement, noting that the complainants' claim under Article 2.2 in that case was in the nature of consequential claim:

"The Panel notes that the Complaining Parties' claim under Article 2.2 is in the nature of a consequential claim. The Complaining Parties submit that an inconsistency with Article 2.2 follows by application from a demonstrated inconsistency with Article 5.1. With Article 5.1, the Appellate Body has found that a violation of Article 5.1 implies an inconsistency with Article 2.2." (WT/DS291/AB/R, para. 767)

importing Member, could constitute a violation of the necessity requirement of Article 2.2."⁴⁶

43. The Panel in *Japan – Apples*, on the other hand, emphasized that the requirement not to maintain a measure without sufficient scientific evidence under Article 2.2 should not be confused with the requirement of Article 5.6:

"[W]e should also be careful not to confuse the requirement that a measure is not maintained without sufficient scientific evidence with the requirement of Article 5.6 of the SPS Agreement that the measure is 'not more trade-restrictive than required to achieve [Japan's] appropriate level of ... phytosanitary protection'. In other words, while we might find that some specific requirements of the measure at issue are not supported by sufficient scientific evidence, our findings should be limited to Article 2.2."⁴⁷

44. In *Australia – Apples*, the Appellate Body further explained that the kind of relationship that exists between Article 2.2 and Article 5.1 also exists between Article 2.2 and Article 5.2 and between Article 2.2 and Article 5.6. With regard to the latter two provisions, the Appellate Body pointed to "the similarities between the requirement in Article 2.2 that Members apply their SPS measures 'only to the extent necessary to protect', and the requirement in Article 5.6 that SPS measures be 'no more trade-restrictive than required to achieve' the relevant objectives."⁴⁸

45. The Panel in *India – Agricultural Products* understood this Appellate Body statement to mean that:

"Articles 2.2 and 5.6 should constantly be read together, and that the basic concept in Article 2.2 imparts meaning to Article 5.6. Moreover, a finding that a Member has enacted a measure that reflects a higher level of protection than that Member's ALOP may imply a violation of Article 2.2."⁴⁹

46. In that case, the Panel considered the extent to which the notion of "necessity" in Article 2.2 may be unders

"[B]efore we can find... whether or not Article 2.2 is violated in this dispute – we recall that Article 2.2 provides that 'Members shall ensure that any ... phytosanitary measure ... is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5' (emphasis added). We note that Japan invokes Article 5.7 in support of its varietal testing requirement. We therefore need to examine next whether the varietal testing requirement is a measure meeting the requirements in Article 5.7. If the varietal testing requirement meets these requirements, we cannot find that it violates Article 2.2."⁵²

49. In *Japan – Agricultural Products II*, the Appellate Body addressed the relationship between the requirement of sufficient scientific evidence under Article 2.2 and Article 5.7 and considered that Article 5.7 operates as a qualified exemption from the obligation under Article 2.2:

"[I]t is clear that Article 5.7 of the SPS Agreement, to which Article 2.2 explicitly refers, is part of the context of the latter provision and should be considered in the interpretation of the obligation not to maintain an SPS measure without sufficient scientific evidence. Article 5.7 allows Members to adopt provisional SPS measures '[i]n cases where relevant scientific evidence is insufficient' and certain other requirements are fulfilled. Article 5.7 operates as a qualified exemption from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence. An overly broad and flexible interpretation of that obligation would render Article 5.7 meaningless."⁵³

50. The Panel in *EC – Approval and Marketing of Biotech Products*, however, disagreed with the Appellate Body's characterization of Article 5.7 as a qualified exemption from Article 2.2. Instead, the Panel applied the Appellate Body's logic in *EC – Tariff Preferences* and *EC – Hormones* (where the Appellate Body considered the relationship between Articles 3.1 and 3.3 of the SPS Agreement) and found that Article 5.7 establishes an autonomous right of the importing Member:

"Evaluating the relationship between Article 2.2 and Article 5.7 in the light of the latter's (n)-deTJE

obligation under Article 2.2. In other words, we consider that in the same way that 'Article 3.1 of the SPS Agreement ... excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement', Article 2.2 excludes from its scope of application the kinds of situations covered by Article 5.7."⁵⁴

51. The Panel in *EC – Approval and Marketing of Biotech Products* also found that, if a challenged SPS measure was adopted and maintained consistently with Article 5.7, then the obligation in Article 2.2 not to maintain SPS measures without sufficient scientific evidence is not applicable:

"In concrete terms, characterizing Article 5.7 as a qualified right rather than an exception means that if a challenged SPS measure was adopted and is maintained consistently with the four cumulative requirements of Article 5.7, the situation is 'as provided for in paragraph 7 of Article 5' (Article 5.7.9.4)."

means that where the relevant scientific evidence is sufficient to perform a risk assessment, as defined in Annex A of the SPS Agreement , a WTO Member may take an SPS measure only if it is 'based on' a risk assessment in accordance with Article 5.1 and that SPS measure is also subject to the obligations in Article 2.2. If the relevant scientific evidence is insufficient to perform a risk assessment, a WTO Member may take a provisional SPS measure on the basis provided in Article 5.7, but

connection' between the reasons given for the discriminatory treatment and the objective of th

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the credibility of the sanitary measures in place in such regions to prevent and control FMD. 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."⁸¹

72. In *Russia – Pigs (EU)*, the Panel distinguished the facts before it from those underlying the findings of the Panel in *US – Animals* on the grounds that the relevant risk was already present in

restriction on international trade. In the context of Article XX, the Appellate Body noted that 'arbitrary discrimination', 'unjustifiable discrimination', and 'disguised restriction on international trade' impart meaning to one another. The Appellate Body has said that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX'. Consistently with our observations ... regarding the similarities be

1.5.4.2 Article 5.5

78. In EC – Hormones , the Appellate Body noted the close relationship between Articles 2.3 and 5.5:

"Article 5.5 must be read in context. An important part of that context is Article 2.3 of the SPS Agreement , ... When read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination the 8 Td[(t)2T3[(oc3 0 Td[

82. Explaining the context of the above findings of the Ap