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1 ARTICLE 1

1.1 Text of Article 1

Article 1

General Provisions

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.
3. The annexes are an integral part of this Agreement.
4. Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement.

1.2 Article 1.1

1.2.1 Scope of the SPS Agreement

1.2.1.1 Application *ratione materiae* of the SPS Agreement

1. The Panel in *EC – Hormones* identified two requirements that must be met for a measure to fall within the realm of the SPS Agreement:

"According to Article 1.1 of the *SPS Agreement*, two requirements need to be fulfilled for the *SPS Agreement* to apply: (i) the measure in dispute is a sanitary or phytosanitary measure; and (ii) the measure in dispute may, directly or indirectly, affect international trade."¹

1.2.1.1.1 Sanitary or phytosanitary measures

2. For a discussion of the definition of SPS measures see the Section on Annex A to the SPS Agreement.

¹ Panel Reports, *EC – Hormones (Canada)*, para. 8.39; and *EC – Hormones (US)*, para. 8.36. See also Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.2554; *US – Poultry (China)*, para. 7.82; and *Costa Rica – Avocados (Mexico)*, paras. 7.69-7.72.

1.2.1.1.2 Measures which may directly or indirectly affect international trade

3. In *EC – Hormones (Canada)*, the Panel agreed with the parties' argument that the measures at issue could be considered as SPS measures if they satisfy the other requirement of Article 1.1 namely if they directly or indirectly impact international trade:

"Both parties ... agree that, according to Article 1.1 of the SPS Agreement, the SPS Agreement is applicable to this dispute. Article 1.1 provides that the SPS Agreement

'applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade'.

We agree with the parties that the EC measures 'may, directly or indirectly, affect international trade'. It cannot be contested that an import ban affects international trade."²

4. In *EC – Approval and Marketing of Biotech Products*, the Panel noted that this second requirement under Article 1 could be lessened given the wording used in the Article:

"Article 1.1 of the *SPS Agreement* provides, *inter alia*, that the *SPS Agreement* 'applies to all [SPS] measures which may, directly or indirectly, affect international trade'. Thus, for an SPS measure to be subject to the disciplines of the *SPS Agreement*, it must be capable of affecting international trade. ...

In our view, it is not necessary to demonstrate that an SPS measure has an actual effect on trade. Article 1.1 merely requires that an SPS measure 'may, directly or indirectly, affect international trade'"³

5. In a similar vein, the Panel in *Australia – Apples* accepted that a measure can have "an actual or potential trade effect" for it to directly or indirectly affect international trade within the meaning of Article 1.1.⁴ The Panel in *Russia – Pigs (EU)* agreed "that it is not necessary to demonstrate that an SPS measure has an actual effect on trade."⁵

6. The Panel in *US – Poultry (China)* however emphasized the importance of this second requirement, noting that: "Even if a measure falls within the definition of an SPS measure in Annex A(1) of the SPS Agreement, further to Article 1.1 of the *SPS Agreement*, such measure still needs to be a measure that directly or indirectly affect[s] international trade to be covered by the disciplines of the *SPS Agreement*."⁶

7. A number of panels considered measures that prohibit importation of goods or prevent placing them on the market to directly or indirectly affect international trade.⁷ The Panel in *India – Agricultural Products* noted that "an import ban is, by its very nature, intended to affect international trade."⁸

8. The Panel in *Costa Rica – Avocados (Mexico)* also found that the reports that contained the risk assessment underlying the challenged measure did not affect international trade within the meaning of Article 1.1:

"The Panel considers that the impact on international trade that Mexico has referred to during the proceedings stems from the imposition of the phytosanitary requirements through the resolutions, and not from the completion or issuance of the reports with

² Panel Report, *EC – Hormones (Canada)* para. 8.26.

³ Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.434 and 7.435.

⁴ Panel Report, *Australia – Apples*, para. 7.172.

⁵ Panel Report, *Russia – Pigs (EU)*, para. 7.233.

⁶ Panel Report, *US – Poultry (China)*, para. 7.87. See also Panel Report, *Costa Rica – Avocados (Mexico)*, para. 7.95.

⁷ Panel Reports, *EC – Hormones (Canada)* para. 8.26; *EC – Marketing and Approval of Biotech Products*, paras. 7.2561-7.2922; *India – Agricultural Products*, para. 7.157; *US – Animals*, para. 7.46; *Russia – Pigs (EU)*, paras. 7.235-7.236.

⁸ Panel Report, *India – Agricultural Products*, para. 7.157.

the recommendations made by the risk analyst. Even if the recommendations presented in the reports were taken into account when determining the requirements to be imposed, these reports, by themselves or individually, did not have any effect on international trade. Without any other action being taken, i.e. the imposition of the phytosanitary requirements at issue in this dispute through the resolutions, there would be no effect, direct or indirect, on international trade, even with the existence of the reports."⁹

1.2.1.2 Temporal scope of the SPS Agreement

9. In *EC – Hormones*, in discussing the applicability of the SPS Agreement to a measure which was enacted before the entry into force of the Agreement, the Appellate Body held that the SPS Agreement would apply to situations or measures that had not ceased to exist, unless the SPS Agreement revealed a contrary intention. Furthermore, the Appellate Body noted that certain measures of the SPS Agreement "expressly contemplate applicability to SPS measures that already existed on 1 January 1995":

"We addressed the issue of temporal application in our Report in *Brazil – Measures Affecting Desiccated Coconut* and concluded on the basis of Article 28 of the *Vienna Convention* that:

Absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force.

We agree with the Panel that the *SPS Agreement* would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the *SPS Agreement* reveals a contrary intention. We also agree with the Panel that the *SPS Agreement* does not reveal such an intention. The *SPS Agreement* does not contain any provision limiting the temporal application of the *SPS Agreement*, or of any provision thereof, to SPS measures adopted after 1 January 1995. In the absence of such a provision, it cannot be assumed that central provisions of the *SPS Agreement*, such as Articles 5.1 and 5.5, do not apply to measures which were enacted before 1995 but which continue to be in force thereafter. If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly. Articles 5.1 and 5.5 do not distinguish between SPS measures adopted before 1 January 1995 and measures adopted since; the relevant implication is that they are intended to be applicable to both. Furthermore, other provisions of the *SPS Agreement*, such as Articles 2.2, 2.3, 3.3 and 5.6, expressly contemplate applicability to SPS measures that already existed on 1 January 1995."¹⁰

1.2.1.3 "shall be developed and applied in accordance with the provisions of this Agreement": relevance of the purpose of the measure at issue

10. The Panel in *EC – Approval and Marketing of Biotech Products* stressed the relevance of the purpose of the measure at issue in the establishment of its consistency with the SPS Agreement:

"Having determined that the purpose of Directives 90/220 and 2001/18 is to protect human health and the environment from adverse effects on human health and the environment which might result from the deliberate release of GMOs into the environment, we now proceed to examine whether that purpose is covered by the various sub-paragraphs of Annex A(1) to the *SPS Agreement*.

...

⁹ Panel Report, *Costa Rica – Avocados (Mexico)*, para. 7.192. See also *ibid.* para. 7.195. The Panel also found that a manual providing guidance on pest risk analyses did not affect international trade. *Ibid.*, paras. 7.230-7.232.

¹⁰ Appellate Body Report, *EC – Hormones*, para. 128.

We note that in accordance with Annex A(1)(a) and (b) of the *SPS Agreement*, the *SPS Agreement* covers measures applied to protect animal and plant life or health from certain risks. Thus, to the extent Directives 90/220 and 2001/18 are applied to protect animals and plants as part of their purpose of protecting the environment, they are not *a priori* excluded from the scope of application of the *SPS Agreement*.

...

It is clear from the definition contained in Annex A(1) that one of the elements which determines whether a particular measure is an SPS measure is the purpose of the measure. A measure is an SPS measure if it is applied 'to protect' life or health from certain enumerated risks, or if it is applied 'to prevent or limit' certain other damage."¹¹

1.2.1.4 Consequential violation of Article 1.1

11. In *US – Animals*, the Panel was confronted with a claim of consequential violation of Article 1.1, based on findings of inconsistency with other provisions of the SPS Agreement. The Panel drew a parallel between the language of Article 1.1 and similarly-worded provisions of the Anti-Dumping Agreement and the SCM Agreement. Noting that other panels regularly make findings of consequential violation of these provisions, when complainants include them in their claims, the Panel found it appropriate to consider such a claim under Article 1.1 of the SPS Agreement.¹²

12. The Panel in *Costa Rica – Avocados (Mexico)* made consequential findings of violation of Article 1.1, based on its findings of violation of the obligations set forth in Articles 2.2, 5.1, 5.2, 5.3 and 5.5 of the SPS Agreement.¹³

1.2.2 Article 1.2

13. As regards the interpretation of Annex A, see the Section on Annex A to the SPS Agreement.

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¹¹ Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.196, 7.207 and 7.2555.

¹² Panel Report, *US – Animals*, paras. 7.718-7.719.

¹³ Panel Report, *Costa Rica – Avocados (Mexico)*, para. 7.2304.