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1 ARTICLE 3

1.1 Text of article 3

Article 3

Harmonization

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, and 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 5.² 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 original)*² For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

4. Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.

5. The Committee on Sanitary and Phytosanitary Measures provided for in paragraphs 1 and 4 of Article 12 (referred to in this Agreement as the "Committee") shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.

1.2 Object and purpose

1. In *EC – Hormones*, the Appellate Body held that the object and purpose of Article 3 was to promote the harmonization of national SPS measures:

"In generalized terms, the object and purpose of Article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people. The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both

'necessary to protect' human life or health and 'based on scientific principles', and without requiring them to change their appropriate level of protection."¹

2. In *US/Canada – Continued Suspension*, the Appellate Body first recalled the harmonization objective of the SPS Agreement, outlined in the preamble and further described in Article 3 of the Agreement. Subsequently, the Appellate Body went on to consider the purpose of the latter provision, ruling that it stresses the relevance of international standardization bodies and Members' right to choose their appropriate level of protection:

"As the preamble of the *SPS Agreement* recognizes, one of the primary objectives of the *SPS Agreement* is 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'. This objective finds reflection in Article 3 of the *SPS Agreement*, which encourages the harmonization of SPS measures on the basis of international standards, while at the same time recognizing the WTO Members' right to determine their appropriate level of protection. Article 3.1 of the *SPS Agreement* establishes that Members shall 'base their [SPS] measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided in this Agreement, and in particular in paragraph 3.2."²

3. The Appellate Body in *India – Agricultural Products* further elaborated on the nature of obligations contained in Article 3 and the Panel's role in assessing the consistency of measures with that provision:

"The provisions of Article 3 establish a Member's obligations concerning harmonization with relevant international standards. In determining whether a particular SPS measure is based on, conforms to, or results in a higher level of protection than a relevant international standard, a panel must engage in a comparative assessment between the challenged measure and that international standard. In this respect, because the international standard serves as the benchmark against which a Member's compliance under Article 3 is to be assessed, it is incumbent on a panel to discern the meaning of that standard. In conducting such an assessment, panels have various means available to them. A panel may be guided by any relevant interpretative principles, including relevant customary rules of interpretation of public international law. In addition, a panel may find additional sources to be useful in discerning the meaning of the international standard. For example, panels may wish to have recourse to the views of the relevant standard-setting body, as referred to in Annex A(3) to the SPS Agreement, through evidence on the panel record or through direct consultation with that body, or with other experts in the relevant fields, pursuant to Article 11.2 of the SPS Agreement and Article 13 of the DSU."³

1.3 Article 3.1

1.3.1 General

4. In *US/Canada – Continued Suspension*, the Appellate Body specified the "international standards, guidelines and recommendations" considered in Article 3.1 and 3.2 of the SPS Agreement, emphasizing the Codex Alimentarius as the relevant standardization body in matters of food safety:

"The relevant 'international standards, guidelines or recommendations' that are referred to in Articles 3.1 and 3.2 are those set by the international organizations listed in Annex A, paragraph 3 of the *SPS Agreement*, which includes Codex as the relevant standard-setting organization for matters of food safety."⁴

¹ Appellate Body Report, *EC – Hormones*, para. 177.

² Appellate Body Reports, *US/Canada – Continued Suspension*, para. 690.

³ Appellate Body Report, *India – Agricultural Products*, para. 5.79.

⁴ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 693.

5. In *US – Animals*, the Panel noted that 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)."⁵

6. The Panel in *Russia – Pigs (EU)* observed that:

"[S]tandards calling for interactive processes, where certain steps may be contingent upon the satisfaction of other steps, may require a panel to examine the actions of both the importing and exporting Members. The extent to which an importing country's obligation to adhere to the international standard, guideline, or recommendation is excused or limited by the exporting country's actions or inactions must be determined on a case-by-case basis."⁶

1.3.2 "base[d] ... on"

7. The Appellate Body in *EC – Hormones*, considered that "based on" is a looser standard than "conform to". In the Appellate Body's view, the Panel's interpretation of the term "based on", as requiring Members to harmonize their SPS measures by conforming them with international standards⁷, was not in accordance with the object and purpose of Article 3, which, the Appellate Body interpreted to be the harmonization of SPS measures, in the future:

"[T]he object and purpose of Article 3 run counter to the Panel's interpretation. That purpose, Article 3.1 states, is '[t]o harmonize [SPS] measures on as wide a basis as possible ... It is clear to us 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*. To read Article 3.1 as requiring Members to harmonize their SPS measures *by conforming those measures with international standards, guidelines and recommendations, in the here and now*, is, in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex *recommendatory* in form and nature) with *obligatory* force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the *SPS Agreement* itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the *SPS Agreement* would be necessary."⁸

8. On the Appellate Body's distinction between the terms "based on" and "conform to" and the requirements for a measure to "conform to" an international standard, refer to the below reproduced findings in *EC – Hormones*, in paragraph 27 below.

⁵ Panel Report, *US – Animals*, para. 7.222.

⁶ Panel Report, *Russia – Pigs (EU)*, para. 7.865.

⁷ In *EC – Hormones*, the Panel stated:

"We find ... that for a sanitary measure to be *based on* an international standard in accordance with Article 3.1, that *measure* needs to reflect the same level of sanitary protection as the *standard*. In this dispute a comparison thus needs to be made between the level of protection reflected in the EC measures in dispute and that reflected in the Codex standards for each of the five hormones at issue." Panel Reports, *EC – Hormones (Canada)*, para. 8.72; and *EC – Hormones (US)*, para. 8.69.

⁸ Appellate Body Report, *EC – Hormones*, para. 165.

9. When interpreting the term "based on" in Article 3.1, the Panel in *India – Agricultural Products* found helpful the Appellate Body's interpretation of the term "as a basis for", used in Article 2.4 of the TBT Agreement.⁹ The Panel then referred to the Appellate Body's findings in *EC – Sardines*, made in the context of the latter provision, to conclude that a measure cannot be considered to be based on an international standard if the measure and the standard contradict each other.¹⁰ The Panel thus found India's measures to constitute a "fundamental departure" from the relevant international standard and concluded on that basis that the measures were not based on that standard.¹¹

10. In *US – Animals*, the Panel further clarified that a panel's task under Article 3.1 is to "determine whether the challenged measures are 'founded' or 'built' upon or 'supported by' the relevant standards, guidelines or recommendations ... such that they serve as a principal constituent or fundamental principle of the ... measures."¹² According to the Panel, the term "based on" "does not require the wholesale adoption of the international standard, guideline or recommendation into the measure of the importing Member" as "this would wipe out any distinction between the scope of coverage of Articles 3.1 and 3.2."¹³

11. In *Russia – Pigs (EU)*, the Panel cautioned, however, that departure or deviation of one element of a measure from a certain aspect of an international standard does not necessarily constitute an outright contradiction of that aspect of the standard.¹⁴ The Panel added that:

"[E]ven if the deviation amounts to a contradiction, this may not necessarily lead to the conclusion that other elements of the measure cannot possibly be 'based on' other aspects of that standard. For example, in cases where a standard applies for a particular set or subset of products, part of a measure pertaining to one product may be based on the international standard while another part of the measure pertaining to a different product, may not be based on the international standard. Furthermore, distinctions may exist between standards. There may be standards that are conditional on the exporting Member undertaking particular actions, whether on a one-off basis or as part of an ongoing, continuous and dynamic SPS situation that may introduce temporal considerations or may require additional action."¹⁵

12. The Panel concluded on these grounds that "a challenged measure may be 'based on' the international standard with respect to one element, but not with respect to another element."¹⁶

13. The Panel further acknowledged existence of certain more flexible standards, which:

"[R]ecognize the inherent discretion of Members to exercise judgment in a particular set of circumstances, and a panel's review must take into account the particular nature of the provision of the relevant international standard at issue, in light of the specific facts and circumstances of the dispute. Moreover, standards calling for interactive processes, where certain steps may be contingent upon the satisfaction of other steps, may require a Panel to examine the actions of both the importing and exporting Members."¹⁷

1.3.3 "international standards, guidelines or recommendations where they exist"

1.3.3.1 Panel's mandate

14. With respect to the phrase "international standards ... where they exist", the Panel in *EC – Hormones* noted that it only needed to determine whether such standards exist rather than considering the level of the standards, the consensus behind them or their adoption process:

⁹ Panel Report, *India – Agricultural Products*, para. 7.266.

¹⁰ Panel Report, *India – Agricultural Products*, para. 7.269.

¹¹ Panel Report, *India – Agricultural Products*, para. 7.271.

¹² Panel Report, *US – Animals*, para. 7.233.

¹³ Panel Report, *US – Animals*, para. 7.239.

¹⁴ Panel Report, *Russia – Pigs (EU)*, para. 7.256.

¹⁵ Panel Report, *Russia – Pigs (EU)*, para. 7.256.

¹⁶ Panel Report, *Russia – Pigs (EU)*, para. 7.259.

¹⁷ Panel Report, *Russia – Pigs (EU)*, para. 7.260.

"Article 3.1 unambiguously prescribes that '... Members shall base their sanitary ... measures on international standards ... *where they exist* ...' (emphasis added). Paragraph 3 of Annex A of the *SPS Agreement* states equally clearly that the international standards mentioned in Article 3:1 are 'for food safety, the standards ... *established by the Codex Alimentarius Commission* relating to ... *veterinary drug ... residues* ...' (emphasis added). No other conditions are imposed in the *SPS Agreement* on the relevance of international standards for the purposes of Article 3. Therefore, as a Panel making a finding on whether or not a Member has an obligation to base its sanitary measure on international standards in accordance with Article 3.1, we only need to determine whether such international standards exist. For these purposes, we need not consider (i) whether the standards reflect *levels* of protection or sanitary *measures* or the *type* of sanitary measure they recommend, or (ii) whether these standards have been adopted by consensus or by a wide or narrow majority, or (iii) whether the period during which they have been discussed or the date of their adoption was before or after the entry into force of the *SPS Agreement*."¹⁸

15. The Panel in *Russia – Pigs (EU)* found, however, that identification of the relevant standard is "intrinsicly interlinked with the meaning" of that standard and went on to discern that meaning.¹⁹ In doing that, the Panel noted that with regard to an international standard, as opposed to a treaty, "the rules of interpretation in the Vienna Convention would not be directly applicable", but "they may serve as useful guidance in [the Panel's] examination of the provisions of the [international standard at issue]."²⁰

1.3.3.2 Relevance of international standards for individual diseases

16. In *Australia – Salmon*, in the context of animal health, the Panel held that even if no international standards existed for the entire range of fish diseases at issue, this fact did not signify that an international standard applying to only one of the diseases at issue could not be relevant in the case before it:

"Paragraph 3(b) of Annex A to the *SPS Agreement* indicates that the international standards, guidelines or recommendations referred to in Article 3 *for animal health* (the concern at issue in this dispute) are those developed under the auspices of the International Office of Epizootics ('OIE'). Both parties agree that the International Aquatic Animal Health Code adopted by the OIE in 1995 ('OIE Code') provides international guidelines on a disease-by-disease basis. However, they also agree that as of today no relevant OIE guideline exists which deals with salmon on a product specific basis. Moreover, both parties also agree that OIE guidelines do not exist for all of the 24 diseases of concern to Australia. Therefore, even if we were to examine first, if and how many relevant international guidelines exist and second address the question of whether Australia deviates from these guidelines, we would thereafter still need to examine either (1) in the event Australia does deviate from any such guidelines contrary to Article 3, whether the measure in dispute could not be based on Australia's concern for any of the other diseases for which no international guideline exists (*in casu*, under Articles 2 and 5); or (2) in the event Australia's measure is based on and/or conforms to any such guidelines, whether that part of the measure for which no guidelines exist, is consistent with the provisions of the *SPS Agreement* other than Article 3 (*in casu*, Articles 2 and 5). In this respect, we are of the view, however, that the fact that in this case no international guidelines exist for *all* 24 diseases of concern does not mean that an international guideline which applies to only *one* of these diseases cannot be relevant (or, according to the language of Article 3.1, does not 'exist') for the measure at issue."²¹

¹⁸ Panel Reports, *EC – Hormones (Canada)*, para. 8.72; and *EC – Hormones (US)*, para. 8.69.

¹⁹ Panel Report, *Russia – Pigs (EU)*, para. 7.273.

²⁰ Panel Report, *Russia – Pigs (EU)*, para. 7.278.

²¹ Panel Report, *Australia – Salmon*, para. 8.46.

17. In *US – Animals*, the Panel found that the SPS Agreement does not require a fine distinction between each of the terms "standards", "guidelines" and "recommendations", used in Article 3.1.²²

1.3.3.3 Revision and adoption of international standards, guidelines and recommendations

18. The Panel in *Australia – Salmon* stated as follows, with respect to the standards developed by the OIE:

"[T]he *SPS Agreement* (paragraph 3(b) of Annex A) explicitly directs us to the OIE and the standards, guidelines and recommendations it develops ... The fact that the OIE Code is subject to revision or the way it has been adopted in our view does not change its validity for our purposes."²³

19. In *India – Agricultural Products*, the Panel addressed the question of which version of an international standard, which had been subject to amendments, was relevant to the assessment whether it served as basis for SPS measures. Referring to the Panel report in *Japan – Apples*, the Panel noted that it is appropriate for a panel to examine a claim under Article 3.1 of the SPS Agreement in the light of the standard, *in casu* the edition of the OIE Terrestrial Code, that reflects the latest science.²⁴ However, in a statement upheld by the Appellate Body, the Panel noted that:

"[A]ny changes to the 21st edition that were reflected in the 22nd edition were not known by the parties at the time of establishment of the Panel ... In our view, to determine that the prism through which the respondent's measure will be judged is, in effect, a moving target would offend the fundamental principle of due process as the complainant and the respondent have a right to know with some certainty the standard against which the measures will be assessed in this panel process. In other words, the scope of this dispute cannot expand or contract depending upon the science that informs the Terrestrial Code as the dispute moves through its various procedural steps. Under the circumstances, we believe that this Panel should determine which edition reflects the latest science at a point in time that would not only allow the complainant to make its case, but would also avail the respondent of the opportunity to defend itself."²⁵

20. In a similar vein, the Panel in *Russia – Pigs (EU)*, confirmed the importance of reviewing SPS measures in light of the latest available scientific evidence, but also emphasised that:

"[T]he most appropriate prism through which the defendant's measures should be assessed cannot possibly be a moving target. Rather, the dictates of due process demand certainty and predictability with regard to the standard against which the measures at issue will be assessed in this Panel proceeding."²⁶

1.3.4 Burden of proof

1.3.4.1 Establishing *prima facie* inconsistency on the complainant's side

21. In *EC – Hormones*, the Appellate Body disagreed with the Panel which had held that if a measure enacted by a Member does not conform to an international standard, the complaining Member is exempted from making a *prima facie* case of inconsistency of this measure with the SPS Agreement or with the GATT 1994²⁷:

"Under Article 3.1 of the *SPS Agreement*, a Member may choose to establish an SPS measure that is based on the existing *relevant* international standard, guideline or

²² Panel Report, *US – Animals*, para. 7.231.

²³ Panel Report, *Australia – Salmon*, para. 7.11.

²⁴ Panel Report, *India – Agricultural Products*, paras. 7.209-7.210.

²⁵ Panel Report, *India – Agricultural Products*, para. 7.211.

²⁶ Panel Report, *Russia – Pigs (EU)*, para. 7.265.

²⁷ Panel Reports, *EC – Hormones (United States)*, paras. 8.86-8.88; and *EC – Hormones (Canada)*, paras. 9.81-9.91.

recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2; but, as earlier observed, the Member is not penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant Article of the *SPS Agreement* or of the GATT 1994."²⁸

1.3.5 Relationship with other paragraphs of Article 3

1.3.5.1 Paragraphs 1, 2 and 3

22. The Panel in *EC – Hormones* identified a "general rule - exception" relationship between paragraphs 1, 2 and 3 of Article 3²⁹. The Appellate Body disagreed with this view:

"The Panel relies on two interpretative points in reaching its ... finding. First, the Panel posits the existence of a 'general rule – exception' relationship between Article 3.1 (the general obligation) and Article 3.3 (an exception) and applies to the *SPS Agreement* what it calls 'established practice under GATT 1947 and GATT 1994' to the effect that the burden of justifying a measure under Article XX of the GATT 1994 rests on the defending party. It appears to us that the Panel has misconceived the relationship between Articles 3.1, 3.2 and 3.3, a relationship discussed below, which is qualitatively different from the relationship between, for instance, Articles I or III and Article XX of the GATT 1994. Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement, that is, where a Member has projected for itself a higher level of sanitary protection than would be achieved by a measure based on an international standard. Article 3.3 recognizes the autonomous right of a Member to establish such higher level of protection, provided that that Member complies with certain requirements in promulgating SPS measures to achieve that level. ... merely characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation."³⁰

23. The Appellate Body in *EC – Hormones* made the following distinctions between Articles 3.1, 3.2 and 3.3:

Under Article 3.2 of the *SPS Agreement*, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the *SPS Agreement* and of the GATT 1994.

²⁸ Appellate Body Report, *EC – Hormones*, para. 171.

²⁹ The Panel stated:

"One purpose of the SPS Agreement, as explicitly recognized in the preamble, is to promote the use of international standards, guidelines and recommendations. To that end, Article 3.1 imposes an obligation on all Members to base their sanitary measures on international standards except as otherwise provided for in the SPS Agreement, and in particular in Article 3.3 thereof. In this sense, Article 3.3 provides an *exception* to the general obligation contained in Article 3.1. Article 3.2, in turn, specifies that the complaining party has the burden of overcoming a presumption of consistency with the SPS Agreement in the case of a measure based on international standards. It thereby suggests by implication that when a measure is not so based, the burden is on the respondent to show that the measure is justified under the exceptions provided for in Article 3.3.

We find, therefore, that once the complaining party provides a *prima facie* case (i) that there is an international standard with respect to the measure in dispute, and (ii) that the measure in dispute is *not* based on this standard, the burden of proof under Article 3.3 shifts to the defending party."

Panel Reports, *EC – Hormones (US)*, paras. 8.86 and 8.87; and *EC – Hormones (Canada)*, paras. 8.89 and 8.90.

³⁰ Appellate Body Report, *EC – Hormones*, para. 104.

Under Article 3.1 of the *SPS Agreement*, a Member may choose to establish an SPS measure that is based on the existing relevant international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2; but, as earlier observed, the Member is not penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant Article of the *SPS Agreement* or of the GATT 1994.

24. The Panel in *India – Agricultural Products* concluded from the above findings of the Appellate Body that:

"A measure that is 'based on' a standard may not necessarily 'conform to' that same standard, as some elements of the standard may not be present in the measure at issue. Indeed, while it may be sufficient to adopt only *some* of the elements of an international standard for the measure to be 'based on' such standard, Article 3.2 requires that an SPS measure embodies the standard completely to be said to 'conform to' it. Hence, the language in Article 3.1 whereby an SPS measure may be 'based on' an international standard establishes a less rigorous threshold than that contemplated in Article 3.2 ('conform to'). We understand this to mean that failure to meet the 'based on' threshold in Article 3.1 would also result in not meeting the more rigorous 'conform to' threshold in Article 3.2."³¹

25. Under Article 3.3 of the *SPS Agreement*, a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not 'based on' the international standard. The Member's appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right."³²

1.4 Article 3.2

1.4.1 General

26. In *US/Canada – Continued Suspension*, the Appellate Body discussed the presumption of consistency that applies to SPS measures under Article 3.2 of the SPS Agreement. The Appellate Body stated:

"Article 3.2 provides that SPS measures which conform to international standards shall be deemed necessary to protect human, animal or plant life or health, and shall be presumed to be consistent with the relevant provisions of the *SPS Agreement* and of the GATT 1994. This presumption, however, does not apply where a Member has not adopted a measure that conforms with an international standard. Article 3.2 is inapplicable where a Member chooses a level of protection that is higher than would be achieved by a measure based on an international standard. The presumption in Article 3.2 cannot be interpreted to imply that there is sufficient scientific evidence to perform a risk assessment where a Member chooses a higher level of protection."³³

1.4.2 "conform to"

27. In *EC – Hormones*, the Appellate Body reversed the Panel's finding that Article 3.2 "equates measures based on international standards with measures which conform to such standards".³⁴ The Appellate Body drew a distinction between the terms "based on" and "conform to" and noted certain requirements for a measure to "conform to" an international standard:

"In the first place, the ordinary meaning of 'based on' is quite different from the plain or natural import of 'conform to'. A thing is commonly said to be 'based on' another

³¹ Panel Report, *India – Agricultural Products*, para. 7.202.

³² Appellate Body Report, *EC – Hormones*, paras. 170-172.

³³ Appellate Body Report, *US/Canada – Continued Suspension*, paras. 694.

³⁴ Panel Reports, *EC – Hormones (Canada)*, para. 8.75; and *EC – Hormones (US)*, para. 8.72.

thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter. In contrast, much more is required before one thing may be regarded as 'conform[ing] to' another: the former must 'comply with', 'yield or show compliance' with the latter. The reference of 'conform to' is to 'correspondence in form or manner', to 'compliance with' or 'acquiescence', to 'follow[ing] in form or nature'. A measure that 'conforms to' and incorporates a Codex standard is, of course, 'based on' that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure."³⁵

28. The Appellate Body in *EC – Hormones*, after distinguishing between the ordinary meaning of "based on" and "conform to", noted that they were used in different provisions of the SPS Agreement and rejected the view that such different usage was "merely inadvertent":

"In the second place, 'based on' and 'conform to' are used in different articles, as well as in differing paragraphs of the same article. Thus, Article 2.2 uses 'based on', while Article 2.4 employs 'conform to'. Article 3.1 requires the Members to 'base' their SPS measures on international standards; however, Article 3.2 speaks of measures which 'conform to' international standards. Article 3.3 once again refers to measures 'based on' international standards. The implication arises that the choice and use of different words in different places in the *SPS Agreement* are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement. Canada has suggested the use of different terms was 'accidental' in this case, but has offered no convincing argument to support its suggestion. We do not believe this suggestion has overturned the inference of deliberate choice."³⁶

29. In *India – Agricultural Products*, the Panel made a consequential finding that because the challenged measures were not based on the relevant international standard within the meaning of Article 3.1, they also did not conform to that standard and, as a result, could not benefit from the presumption of consistency with other provisions of the SPS Agreement under Article 3.2.³⁷

1.4.3 Burden of proof

1.4.3.1 Presumption of consistency

30. The Appellate Body in *EC – Hormones*, in the context of addressing the burden of proof under the SPS Agreement, stated that the presumption in Article 3.2 does not mean that Members who decide not to conform their measures with a given international standard may be subject to a special burden of proof as penalty:

"The presumption of consistency with relevant provisions of the *SPS Agreement* that arises under Article 3.2 in respect of measures that conform to international standards may well be an *incentive* for Members so to conform their SPS measures with such standards. It is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*."³⁸

31. The Appellate Body in *EC – Hormones* also noted that measures pursuant to Article 3.2 enjoy the benefit of a presumption, albeit a rebuttable one.³⁹ See also paragraph 23 above.

32. In *US/Canada – Continued Suspension*, the Appellate Body observed that:

³⁵ Appellate Body Report, *EC – Hormones*, para. 163.

³⁶ Appellate Body Report, *EC – Hormones*, para. 164.

³⁷ Panel Report, *India – Agricultural Products*, para. 7.275.

³⁸ Appellate Body Report, *EC – Hormones*, para. 102.

³⁹ Appellate Body Report, *EC – Hormones* para. 170.

"Article 3.2 provides that SPS measures which conform to international standards shall be deemed necessary to protect human, animal or plant life or health, and shall be presumed to be consistent with the relevant provisions of the *SPS Agreement* and of the GATT 1994. This presumption, however, does not apply where a Member has not adopted a measure that conforms with an international standard. Article 3.2 is inapplicable where a Member chooses a level of protection that is higher than would be achieved by a measure based on an international standard. The presumption in Article 3.2 cannot be interpreted to imply that there is sufficient scientific evidence to perform a risk assessment where a Member chooses a higher level of protection."⁴⁰

1.4.4 Relationship with other paragraphs of Article 3

33. The Appellate Body in *EC – Hormones* clarified the meaning of Article 3.2 while discussing the relationship between Article 3.1, 3.2 and 3.3. See paragraph 23 above.

1.4.5 Relationship with other provisions of the SPS Agreement

1.4.5.1 Article 5.1

34. In *US/Canada – Continued Suspension*, the Appellate Body reflected on the relevance of Article 3.2 presumption of consistency of the risk assessment under Article 5.1. See paragraph 32 above.

1.4.5.2 Article 5.6

35. The Panel in *Australia – Salmon* referred to Article 3 in the context of its analysis under Article 5.6:

"Given the repeated reference made in the *SPS Agreement* to the relevant international organizations, in this dispute the OIE [International Office of Epizootics], and the recommendations they produce (e.g., Articles 3.1 and 5.1), as well as to the more general objective of harmonization (e.g., Articles 3.4 and the sixth preamble), we consider that appropriate weight should be given to [the] opinion on Option 5 [i.e., evisceration of the fish, proposed by the OIE]."⁴¹

1.4.5.3 Article 5.7

36. The Appellate Body in *US/Canada – Continued Suspension* stated that Article 3.2 provides that SPS measures which conform to international standards shall be presumed to be consistent with the relevant provisions of the SPS Agreement and of the GATT 1994. This presumption however, does not apply where a Member has not adopted a measure that conforms with an international standard and can therefore not be interpreted to imply that there is sufficient scientific evidence to perform a risk assessment where a Member chooses a higher level of protection. The Appellate Body found that this situation is borne out by Article 5.7.⁴²

37. In *Russia – Pigs (EU)*, the Panel distinguished the situation before the Appellate Body in *US/Canada – Continued Suspension* on the grounds that in *Russia – Pigs (EU)* the responding Member claimed that challenged measures are based on an international standard "to the extent possible".⁴³ This, according to the Panel, implied the respondent's recognition "of the scientific basis of the international standard relevant for [that] dispute", which the Panel took into account in determining whether the relevant scientific evidence was insufficient within the meaning of Article 5.7.⁴⁴

⁴⁰ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 694.

⁴¹ Panel Report, *Australia – Salmon*, para. 8.180.

⁴² Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 694 and 695.

⁴³ Panel Report, *Russia – Pigs (EU)*, para. 7.668.

⁴⁴ Panel Report, *Russia – Pigs (EU)*, para. 7.668.

1.5 Article 3.3

1.5.1 General

38. In *EC – Hormones*, the Appellate Body held that the "right of a Member to establish its own level of sanitary protection under Article 3.3 of the SPS Agreement is an autonomous right and not an 'exception' from a 'general obligation' under Article 3.1".⁴⁵ In this respect, see also the excerpts from the Appellate Body report in paragraph 22 above.

39. The Appellate Body in *EC – Hormones* found that the right of a Member to define its appropriate level of protection is not an absolute or unqualified right:

"The right of a Member to define its appropriate level of protection is not, however, an absolute or unqualified right. Article 3.3 also makes this clear."⁴⁶

40. Regarding the relationship between Article 3.3 and the "precautionary principle", the Appellate Body in *EC – Hormones* also noted that the precautionary principle is reflected in Article 3.3.⁴⁷

1.5.2 "based on"

41. The Appellate Body in *EC – Hormones* disagreed with the Panel's finding that "for a sanitary measure to be based on an international standard ..., that measure needs to reflect the same level of sanitary protection as the standard".⁴⁸ According to the Appellate Body, the Panel read too much into the text of Article 3.3:

"It appears to us that the Panel reads much more into Article 3.3 than can be reasonably supported by the actual text of Article 3.3. Moreover, the Panel's entire analysis rests on its flawed premise that 'based on', as used in Articles 3.1 and 3.3, means the same thing as 'conform to' as used in Article 3.2. As already noted, we are compelled to reject this premise as an error in law."⁴⁹

42. For further interpretation of this term as it appears in Article 3.1, see paragraph 7 above.

1.5.3 "relevant international standards, guidelines or recommendations"

43. In *US/Canada – Continued Suspension*, the Appellate Body ruled on the relevance of international standards in the SPS Agreement while recognising the right of a WTO Member to introduce a measure that would result in a higher level of protection than that provided under an international standard:

"There is a rebuttable presumption that SPS measures that conform to international standards, guidelines or recommendations are 'necessary to protect human, animal or plant life or health, and ... [are] consistent with the relevant provisions of this Agreement and of GATT 1994. While use of international standards is encouraged, the *SPS Agreement* recognizes the right of WTO Members to introduce or maintain an SPS measure which results in a higher level of protection than would be achieved by measures based on such international standards. Where a Member exercises its right to adopt an SPS measure that results in a higher level of protection, that right is qualified in that the SPS measure must comply with the other requirements of the *SPS Agreement* including the right to perform a risk assessment. However, the Appellate Body has found that the adoption of an SPS measure that does not conform to an international standard and results in a higher level of protection does not give rise to a more exacting burden of proof under the *SPS Agreement*."⁵⁰

⁴⁵ Appellate Body Report, *EC – Hormones*, para. 172.

⁴⁶ Appellate Body Report, *EC – Hormones*, para. 173.

⁴⁷ Appellate Body Report, *EC – Hormones*, para. 124.

⁴⁸ Panel Reports, *EC – Hormones (Canada)*, para. 8.76; and *EC – Hormones (US)*, para. 8.73.

⁴⁹ Appellate Body Report, *EC – Hormones*, para. 168.

⁵⁰ Appellate Body Report, *US/Canada – Continued Suspension*, para. 532.

1.5.4 Compliance with risk assessment requirements

44. The Appellate Body in *EC – Hormones* found that footnote to Article 3.3, which defines scientific justification as an "examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement" obliges the party that has introduced a measure that results in a level of protection higher than that which would be achieved by measures based on the relevant international standards to comply with the requirements established under Article 5.1:

"Article 3.3 is evidently not a model of clarity in drafting and communication. The use of the disjunctive 'or' does indicate that two situations are intended to be covered. These are the introduction or maintenance of SPS measures which result in a higher level of protection:

- (a) 'if there is a scientific justification'; or
- (b) 'as a consequence of the level of ... protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5'.

It is true that situation (a) does not speak of Articles 5.1 through 5.8. Nevertheless, two points need to be noted. First, the last sentence of Article 3.3 requires that 'all measures which result in a [higher] level of ... protection', that is to say, measures falling within situation (a) as well as those falling within situation (b), be 'not inconsistent with any other provision of [the SPS] Agreement'. 'Any other provision of this Agreement' textually includes Article 5. Secondly, the footnote to Article 3.3, while attached to the end of the first sentence, defines 'scientific justification' as an 'examination and evaluation of available scientific information in conformity with relevant provisions of this Agreement ...'. This examination and evaluation would appear to partake of the nature of the risk assessment required in Article 5.1 and defined in paragraph 4 of Annex A of the *SPS Agreement*.

On balance, we agree with the Panel's finding that although the European Communities has established for itself a level of protection higher, or more exacting, than the level of protection implied in the relevant Codex standards, guidelines or recommendations, the European Communities was bound to comply with the requirements established in Article 5.1. We are not unaware that this finding tends to suggest that the distinction made in Article 3.3 between two situations may have very limited effects and may, to that extent, be more apparent than real. Its involved and layered language actually leaves us with no choice."⁵¹

1.5.5 "scientific justification"

1.5.5.1 Rational relationship

45. In *Japan – Agricultural Products II*, the Appellate Body recalled its findings in *EC –Hormones* with respect to the relationship between Articles 2.2 and 3.3. Based on these findings, the Appellate Body considered that there is scientific justification for an SPS measure, within the meaning of Article 3.3, if there is a rational relationship between the SPS measure and the available scientific information:

"[T]he context of the phrase 'not maintained without sufficient scientific evidence' in Article 2.2 also includes Article 3.3 of the *SPS Agreement*. Pursuant to Article 3.3, Members may introduce or maintain an SPS measure which results in a higher level of protection than would be achieved by a measure based on a relevant international standard, *inter alia*, 'if there is a scientific justification' and the measure is not inconsistent with any other provision of the *SPS Agreement*. In *European Communities – Hormones*, we stated:

⁵¹ Appellate Body Report, *EC – Hormones*, paras. 173, 175 and 176.

... the footnote to Article 3.3 ... defines 'scientific justification' as an 'examination and evaluation of available scientific information in conformity with relevant provisions of this Agreement ...'.⁵²

We also stated:

[t]his examination and evaluation would appear to partake of the nature of the risk assessment required in Article 5.1 and defined in paragraph 4 of Annex A of the *SPS Agreement*.

In our opinion, there is a 'scientific justification' for an SPS measure, within the meaning of Article 3.3, if there is a rational relationship between the SPS measure at issue and the available scientific information."⁵³

1.5.6 Relationship with other paragraphs of Article 3

46. In *EC – Hormones*, the Appellate Body reversed the Panel's finding that Article 3.3 would be an exception to Article 3.1. See 22 above.

47. As regards the relationship between Articles 3.1, 3.2 and 3.3, see paragraph 23 above.

1.5.7 Relationship with other provisions of the SPS Agreement

1.5.7.1 Article 5.1

48. Based on its analysis of Article 3.3 referenced in paragraph 44 above, the Appellate Body in *EC – Hormones* concluded that "the Panel's finding that the European Communities is required by Article 3.3 to comply with the requirements of Article 5.1 is correct".⁵⁴

49. The Panel in *US – Animals* found that the fact that the measures violated Article 5.1 constituted a separate and additional basis for their inconsistency with Article 3.3.⁵⁵

1.6 Article 3.5

50. With respect to the procedures to monitor the process of international harmonization, see the Section on Article 12.4.

1.6.1 Relationship with other provisions of the SPS Agreement

51. In *US – Animals*, the Panel found that violation of provisions of Article 8 and Annex C(1)(a) and (b), Articles 2.2, 2.3, 5.6 and 6.1 constituted separate bases for inconsistencies with Article 3.3.⁵⁶

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⁵² (footnote original) *European Communities – Hormones, supra*, footnote 12, para. 175.

⁵³ Appellate Body Report, *Japan – Agricultural Products II*, para. 79.

⁵⁴ Appellate Body Report, *EC – Hormones*, para. 177.

⁵⁵ Panel Report, *US – Animals*, para. 7.721.

⁵⁶ Panel Report, *US – Animals*, para. 7.721.