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1 PREAMBLE

1.1 Text of the Preamble

Members,

Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;

Desiring to improve the human health, animal health and phytosanitary situation in all Members;

Noting that sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols;

Desiring the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade;

Recognizing the important contribution that international standards, guidelines and recommendations can make in this regard;

Desiring to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health;

Recognizing that developing country Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;

Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)¹;

*(footnote original)*¹ In this Agreement, reference to Article XX(b) includes also the chapeau of that Article.

Hereby agree as follows:

1.2 First recital: consistency of Members' SPS measures with obligations within the SPS Agreement

1. In *US/Canada – Continued Suspension*, the Appellate Body referring to the first recital of the preamble of the SPS Agreement, recalled the right of WTO Members to take measures to protect human, animal or plant life or health provided that the measures exercised are consistent with the series of obligations that are set forth in the Agreement, "which seek to ensure that the measures are properly justified"^{1,2}

1.3 Fifth and sixth recitals: "international standards, guidelines and recommendations"

1.3.1 Relevance of international standards in the SPS Agreement

2. In *US/Canada – Continued Suspension*, the Appellate Body took note of the SPS Agreement' preamble mentioning harmonization of international standards, as one purpose of the agreement. The Appellate Body stated that international standards are given a prominent role under the SPS Agreement particularly in furthering the objective of promoting the harmonization of sanitary and phytosanitary standards between WTO Members. This is to be achieved by encouraging WTO Members to base their SPS measures on international standards, guidelines or recommendations where they exist.³

3. The Appellate Body also recognized this role of the SPS Agreement in *EC – Hormones*.

"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'."⁴

1.4 The relationship between the SPS Agreement and Article XX(b) of GATT 1994

4. In *EC – Hormones (Canada)*, the Panel discussed the relationship between the SPS Agreement and Article XX (b) of the GATT 1994. The Panel acknowledged that some provisions of the SPS Agreement, such as the eighth recital of the preamble elaborate on provisions already contained in the SPS Agreement. However, the Panel noted that this was not conclusive evidence that the SPS Agreement only applies, as Article XX(b) of the GATT 1994 does, if a prior violation of a GATT provision has been established. The Panel found that many provisions of the SPS Agreement, such as those contained in the second and sixth recitals of the preamble, go beyond and are additional to the requirements for the invocation of Article XX(b). The Panel concluded that, while Article XX(b) provides for a general exception which can be invoked to justify a violation of another GATT provision, the SPS Agreement, in contrast, provides for specific obligations to be met for a Member to enact or maintain SPS measures:

"[W]e find the EC claim that the SPS Agreement does not impose 'substantive' obligations additional to those already contained in Article XX(b) of GATT not to be persuasive. It is clear that some provisions of the SPS Agreement elaborate on provisions already contained in GATT, in particular Article XX(b). The final preambular paragraph of the SPS Agreement provides, indeed, that the Members desired 'to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)'. Examples of such rules are, arguably, some of the obligations contained in

¹ (*footnote original*) See the first recital of the preamble of the SPS Agreement. Article 2.3 of the SPS Agreement also provides that "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members" and that SPS measures "shall not be applied in a manner which would constitute a disguised restriction on international trade.

² Appellate Body Reports, *US/Canada – Continued Suspension*, para. 522.

³ Appellate Body Reports, *US/Canada – Continued Suspension*, para. 532.

⁴ Appellate Body Report, *EC – Hormones*, para. 165.

Article 2 of the SPS Agreement. However, on this basis alone we cannot conclude that the SPS Agreement only applies, as Article XX(b) of GATT does, if, and only if, a prior violation of a GATT provision has been established. Many provisions of the SPS Agreement impose 'substantive' obligations which go significantly beyond and are additional to the requirements for invocation of Article XX(b).⁵ These obligations are, *inter alia*, imposed to 'further the use of harmonized sanitary and phytosanitary measures between Members'⁶ and to 'improve the human health, animal health and phytosanitary situation in all Members'.⁷ They are not imposed, as is the case of the obligations imposed by Article XX(b) of GATT, to justify a violation of another GATT obligation (such as a violation of the non-discrimination obligations of Articles I or III).

We note in this respect that the general approach adopted in Article XX(b) of GATT is fundamentally different from the approach adopted in the SPS Agreement. Article XX(b), which is not limited to sanitary or phytosanitary measures, provides for a general *exception* which can be invoked to justify any violation of another GATT provision. The SPS Agreement, on the other hand, provides for specific *obligations* to be met in order for a Member to enact or maintain specific types of measures, namely sanitary and phytosanitary measures."⁸

1.5 The precautionary principle

1.5.1 Status in international law

5. With respect to the "precautionary principle" invoked by the European Communities in support of its claim in *EC – Hormones* that it had complied with Article 5.1 of the SPS Agreement, the Appellate Body declined to take a position on the status of the precautionary principle in international law:

"The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation."⁹

6. The Panel in *EC – Approval and Marketing of Biotech Products* reviewed the jurisprudence and doctrine related to the precautionary principle, noting many uncertainties in the status of the principle. The Panel finally declined to uphold the European Communities' contention that the precautionary principle has "by now become a fully-fledged and general principle of international law", and opted to refrain from expressing any view on the issue.¹⁰

1.5.2 Relationship of the precautionary principle with the SPS Agreement

7. As regards the relationship of the "precautionary principle" with the SPS Agreement, the Appellate Body noted the following four elements, one of which concerning the Preamble to the SPS Agreement:

⁵ (*footnote original*) One example is the obligation contained in Article 3.1 of the SPS Agreement which provides that "[t]o harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations, where they exist ..."

⁶ (*footnote original*) Preambular para. 6 of the SPS Agreement.

⁷ (*footnote original*) Preambular para. 2 of the SPS Agreement.

⁸ Panel Report, *EC – Hormones (Canada)*, paras. 8.41-8.42.

⁹ Appellate Body Report, *EC – Hormones*, para. 123

¹⁰ Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.88 and 7.89.

"First, the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement ... It is reflected also in the sixth paragraph of the preamble ... These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations ... Lastly, however, the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a Panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the *SPS Agreement*."¹¹

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¹¹ Appellate Body Report, *EC – Hormones*, para. 124