

# PUTTING THE PRECAUTIONARY PRINCIPLE IN ITS PLACE: PARAMETERS FOR THE PROPER APPLICATION OF A PRECAUTIONARY APPROACH AND THE IMPLICATIONS FOR DEVELOPING COUNTRIES IN LIGHT OF THE DOHA WTO MINISTERIAL

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## INTRODUCTION

An important question in the context of international trade liberalization, and specifically in the context of the World Trade Organization (“WTO”) Agreements and the new round of WTO negotiations launched by the Doha Ministerial, is the extent to which the existing international trade rules accommodate measures that government authorities adopt in order to protect health, safety, and/or the environment (“HSE”), but which otherwise violate one or more of a Member’s trade commitments. A key issue is the extent to which government authorities are justified in taking a precautionary approach when they adopt unilateral HSE protection measures.

Article XX of the General Agreement on Tariffs and Trade (“GATT”) 1994<sup>1</sup> recognizes that the protection of HSE may, under certain conditions, justify a measure that otherwise violates a Member’s obligations.<sup>2</sup> In addition, the WTO Agreement on Sanitary

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1. *See* General Agreement on Tariffs and Trade, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1144-54 (1994), Annex 1A, Art. XX [hereinafter GATT 1994] (enumerating the general exceptions to the Agreement, which allow contracting parties to adopt and enforce certain measures as they deem necessary). Note that Article XX was fully annexed under the GATT 1994.

2. *See id.* (noting that certain exceptions exist under which Members may

and Phytosanitary Measures (“SPS Agreement”)<sup>3</sup> sets out a series of requirements that must be satisfied in order for certain HSE measures to qualify as WTO-compatible. The underlying concern of these provisions is that such measures may constitute unjustified obstacles to trade. Recent WTO discussions about expanding recognition of a so-called “precautionary principle” reflect the same conflicting interests. On one hand, there is an interest in the international rules being deferential towards the approach a given Member takes to the management of HSE risks. On the other hand, there is also an interest in preventing new protectionist barriers from arising under the guise of precaution.

All WTO Members theoretically have an equal interest in both promoting deference to legitimate HSE measures and avoiding new protectionist barriers. Nevertheless, those countries that rely more heavily on exports of basic plant and animal products have a particularly strong practical interest in ensuring access abroad for their products. This is often the case for developing countries, which already have a difficult time matching the resources of more developed WTO Members in being able to defend their rights vigorously under the Dispute Settlement Understanding.<sup>4</sup>

In this context, this author believes that developing countries have reason to be satisfied with the contents of the Ministerial Decision of November 14, 2001, on Implementation-Related Issues and Concerns (“Doha Implementation Decision”)<sup>5</sup> and the Ministerial Declaration of November 20, 2001 (“Main Doha Declaration”).<sup>6</sup> This

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disregard a particular provision of the GATT 1994 if it is necessary to do so in order to protect certain interests relating to health, safety, and the environment).

3. Agreement on the Application of Sanitary and Phytosanitary Measures, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 6, 33 I.L.M. 1125, 1153 (1994), Annex 1A [hereinafter SPS Agreement].

4. Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 112 (1994), Annex 2 [hereinafter DSU].

5. WTO Ministerial Conference, Doha Implementation Decision – Related Issues and Concerns, WT/MIN(01)/17 (Nov. 14, 2001) [hereinafter Doha Implementation Decision].

6. WTO Ministerial Conference, Doha Ministerial Declaration,

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article explains the basis for this conclusion by first examining the manner in which the WTO Standing Appellate Body (“SAB”) has thus far interpreted and applied Article XX of the GATT 1994 and the SPS Agreement to various national measures ostensibly taken to protect health, safety, or the environment.<sup>7</sup> The focus of this analysis is on the deference shown to a Member’s precautionary approach. This article then looks at the decisions from the Doha WTO Ministerial against this background.

The conclusions of the present article are twofold. First, the WTO Agreements, as interpreted and applied by the SAB, take an appropriately deferential approach towards the legitimate public policy concerns of WTO Members, including developing countries. Any effort to push for a stronger role for a precautionary approach in the WTO Agreements would undermine the delicate balance already achieved to the particular detriment of developing countries’ exports. Second, the various implementation initiatives established in conjunction with the Doha Ministerial should help developing countries avoid becoming the victim of an arbitrarily precautionary approach adopted by developed countries.

### I. PRELIMINARY COMMENT REGARDING TERMINOLOGY: “PRECAUTIONARY PRINCIPLE” AND “PRECAUTIONARY APPROACH”

To define a “precautionary principle,” proponents of its existence often point to Principle 15 of the Rio Declaration on Environment and Development:<sup>8</sup> “In order to protect the environment, the precautionary approach shall be widely applied by States according

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WT/MIN(01)/DEC/1 (Nov. 20, 2001) [hereinafter Doha Declaration].

7. The present study looks in particular at Article XX of the GATT 1994 and the provisions of the SPS Agreement because these rules have now been invoked in a number of WTO disputes. Furthermore, this author believes that the pattern of interpretation emerging with regard to these provisions will apply as relevant to the parallel provisions of the Technical Barriers to Trade Agreement (“TBT”) and the General Agreement on Trade in Services (“GATS”).

8. United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, U.N. Doc. A/Conf.151/5/Rev.1 (June 13, 1992), *reprinted in* 31 I.L.M. 874, 879 [hereinafter Rio Declaration].

to their capability. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>9</sup>

The second sentence, which might be considered the essence of a “precautionary principle,” is striking for its use of a triple negative. A slight rephrasing makes this triple negative more obvious:

*Where there are threats of serious or irreversible damage, the fact that authorities do NOT have full scientific certainty shall NOT be used as a reason for NOT taking prompt cost-effective measures to prevent environmental degradation.*

By virtue of the second of the three negatives, this provision removes a possible justification for government inaction (i.e., the lack of full scientific certainty). This is important in a context where government officials are held accountable for their decisions to act or not to act, and could be liable for damages if they take action when there are insufficient grounds for imposing measures (e.g., because of insufficient scientific certainty). These considerations reflect two fundamental principles of sound administration: 1) that a government authority must give an adequately reasoned justification for its actions; and 2) that it must not take arbitrary action.

In addition, removing the justification for inaction could serve to justify action, and may even amount to a *requirement* of action if other conditions are met. Certain international declarations take this more active and normative approach to precautionary measures. For example, the Ministerial Declaration of the Second International Conference on the Protection of the North Sea<sup>10</sup> states that “in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence.”<sup>11</sup> The Ministers further agreed to “accept the principle of safeguarding the marine ecosystem of the North Sea by reducing

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9. *Id.* at Principle 15.

10. Second International Conference on the Protection of the North Sea, Nov. 24-25, 1987, 27 I.L.M. 835, 836 [hereinafter Second Conference].

11. *Id.* para. VII.

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polluting emissions of substances that are persistent, toxic and liable to bioaccumulate at source . . . even when there is no scientific evidence to prove a causal link between emissions and effects (“the principle of precautionary action”).”<sup>12</sup>

While this Ministerial Declaration spoke of “the principle of precautionary action,” the Ministerial Declaration of the Third International Conference on the Protection of the North Sea<sup>13</sup> used the term “the precautionary principle.” Thus, the Third Conference’s Declaration states that signatories “will continue to apply the precautionary principle, that is to take action to avoid potentially damaging impacts of substances that are persistent, toxic and liable to bioaccumulate even where there is no scientific evidence to prove a causal link between emissions and effects.”<sup>14</sup>

Regardless of the label used, the differences in the above formulations are significant and have important implications for evaluating a government’s responsibility in a given situation. Thus, stating that a lack of full scientific certainty cannot by itself justify inaction is very different from stating that action may be required even where no evidence of a causal link exists. The Rio Declaration, in effect, defines the limit at one end of the spectrum of scientific certainty by stating that government authorities may be required to act, even if there is not full scientific certainty. The Declarations from the Conferences on the Protection of the North Sea go much further in the opposite direction by stating that even in the absence of any evidence of a causal link to a particular risk, government authorities may be required to take precautionary measures.

In addition to observing that there are significant variations in the formulation of a “precautionary principle,” one might also ask whether it is necessary to refer to a “precautionary principle” as

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12. *See id.* para. XVI(1) (noting that the Members agree to utilize a precautionary approach when dealing with pollution inputs to the North Sea via rivers and estuaries of substances that are toxic and may accumulate).

13. Third International Conference on the Protection of the North Sea, Ministerial Declaration, Mar. 8, 1990, 1 Y.B. INT’L ENVTL. L. 658, 662-73 (1990) [hereinafter Third Conference], available at <http://www.odin.dep.no/md/html/conf/declaration/hague.html>.

14. Third Conference, *supra* note 13, at pmb1. (describing one of the premises upon which the participants will base their future work).

something distinct from a “precautionary approach,” which is an integral part of ordinary, everyday risk management. In this regard, while international instruments relate primarily to government action, or inaction, all societal actors, whether individuals, companies, or governments, continuously carry out risk analysis and management within their spheres of responsibilities as an integral part of daily activities and planning for the future.<sup>15</sup> Further, in the international instruments cited above, as well as others, the terms “precautionary principle” and “precautionary approach” seem interchangeable. Similarly, in the EC – Beef Hormones Appellate Body Report,<sup>16</sup> the SAB comments regarding the existence and implications of a precautionary principle also indicate that this principle is not distinct from the already used and recognized precautionary approach to risk management.<sup>17</sup>

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15. See Organization for Economic Cooperation and Development, *Report of the Working Group in Harmonization of Regulatory Oversight in Biotechnology*, C(2000)86/ADD2 (May 25, 2000), at 18-22 [hereinafter OECD Biotechnology Report] (describing current approaches and experiences in environmental risk and safety assessments); see also *infra* Annex A (setting forth the basic elements of risk analysis).

16. WTO Appellate Body Report, European Communities – Measure Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter EC – Beef Hormones Appellate Body Report] (resolving a complaint against the European Communities concerning the use of certain hormones in their meat products, which violates the SPS Agreement).

17. See *id.* paras. 123-25 (discussing the relevance of the precautionary principle to the dispute in this case and concluding that the precautionary principle does not override the provisions of the SPS Agreement). Within the EC legal order, the European Court of Justice appears to take the same stance:

[I]t must be found that express reference to [the precautionary] principle did not alter the account of the latest position as submitted to the [College of Commissioners]. The French Government had for several months been putting forward arguments regarding the obligation to protect public health, scientific uncertainty in the matter and problems connected with risk management. The addition of the label “precautionary principle” to those arguments added nothing to their content.

Case C-1/00, *Commission v. Fr.*, 2001 E.C.R. 000, 2002 O.J. (C 44) 2, para. 83 (holding that France failed to fulfill its obligations under the EC Treaty by maintaining its ban on British beef).

Also regarding the EC, see European Environment Agency, *Late Lessons From Early Warnings: The Precautionary Principle 1896-2000*, 22 ENVTL. ISSUE REP.

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Regardless of whether there is a definable and distinct “precautionary principle,” such a principle, if it exists, clearly involves a precautionary approach to risk management in situations characterized by a lack of full scientific certainty as to the magnitude of identified risks related to a given product. For this reason, the present article speaks more generally of the application of a precautionary approach for the adoption of governmental health, safety, and environmental measures within the general international legal framework of the WTO Agreements.

## II. DEFERENCE TO A PRECAUTIONARY APPROACH UNDER ARTICLE XX OF THE GATT 1994 AND THE SPS AGREEMENT

### A. GENERAL

Because Article XX of the GATT 1994 has been in effect longer than the SPS Agreement, and both contain provisions covering HSE measures, the exact relationship between the two sets of provisions is not immediately obvious. In this regard, Article XX appears generally to cover HSE measures that a Member might adopt, whereas the SPS Agreement relates only to specific types of measures (i.e. sanitary and phytosanitary). There is potential overlap between the subject matter of these provisions because, as noted in the SPS preamble, that Agreement sets out rules for the application of the provisions of GATT 1994 related to the use of SPS measures, in particular Article XX(b), in conjunction with the Chapeau of Article XX.<sup>18</sup> This is reflected in the presumption expressed in Article 2 of the SPS Agreement, that measures that conform with the SPS Agreement also conform with obligations under the provisions of GATT 1994.<sup>19</sup>

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(2001). This report, which purports to be a chronicle of various examples of the application of a precautionary principle, or lack thereof, essentially chronicles the application of a more or less precautionary approach.

18. See SPS Agreement, *supra* note 3, at pmb1. (describing the basic rights and obligations under the SPS Agreement).

19. See *id.* Art. 2 (stating that sanitary or phytosanitary measures conforming to the SPS Agreement likewise comply with provisions of GATT 1994, particularly Article XX(b)).

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In addition, before needing to examine whether a measure is justified under Article XX, there must be a finding that a violation of one or more general GATT obligations has occurred. On the other hand, a violation of an obligation under the SPS Agreement can arise in the absence of a prior finding of a violation of a general GATT obligation.<sup>20</sup> Once there is a finding of a violation of the SPS Agreement, a Member may not argue to excuse the violation by virtue of an exception under Article XX. This conclusion is based on the preamble of the SPS Agreement and the General Interpretative Note to Annex 1A, the latter giving explicit precedence to the SPS Agreement in case of a conflict with the provisions of the GATT 1994.<sup>21</sup>

## B. ARTICLE XX OF THE GATT 1994

### 1. General

Article XX of the GATT 1994 sets forth a series of general exceptions to Members' WTO obligations. The Article establishes various unilateral measures that a Member may adopt without breaching its obligations under the WTO Agreements.<sup>22</sup> Some of the types of measures which Members may adopt are those:

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20. See WTO Panel Report, European Communities – Measures Concerning Meat and Meat Products (Hormones) Complaint by the United States, WT/DS26/R/USA, paras. 8.31-8.42 (Aug. 18, 1997) [hereinafter EC – Beef Hormones Panel Report] (discussing the relationship between the SPS Agreement and the GATT 1994). The European Community did not appeal this point and it does not appear to be controversial.

21. See GATT 1994, *supra* note 1, at Annex 1A, Art. XX (“[I]n the event of any conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization . . . the provision of the other agreement shall prevail to the extent of the conflict.”). The same general observations apply to the relationship between the TBT Agreement and the GATS. To remove potential overlap between the SPS and TBT Agreements, the TBT Agreement expressly does not apply to measures that the SPS Agreement covers. See Agreement on Technical Barriers to Trade, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 6, 33 I.L.M. 1125, 1153 (1994), Annex 1A, art. 1.5 [hereinafter TBT Agreement].

22. See GATT 1994, *supra* note 1, Art. XX (enumerating the measures allowed).



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- (b) necessary to protect human, animal or plant life or health;...
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement;... [and]
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

A WTO Member only needs to invoke one of the exceptions of Article XX if the measure at issue violates one of the general GATT obligations. In this regard, Members seeking to challenge a decision to implement HSE risk reduction measures will most likely focus on the Most Favored Nation (“MFN”) and non-discrimination rules.<sup>23</sup> When a defending Member invokes an exception under Article XX, it must show a *prima facie* case that the measure in question falls under that exception, and that it meets the requirements of the Chapeau of Article XX.<sup>24</sup>

### *2. Requirements of the Exception in Question*

To show that a measure falls under a given exception, the Member must demonstrate a relationship between the measure and the objective set out for that exception. Paragraphs (b) and (d) of Article XX require that the measure in question be “necessary” to achieve the policy objective, while item (g) only requires that the measure “relate” to the conservation of exhaustible natural resources.

Qualification of a measure under the Article XX (b) “necessary to protect human life or health” standard requires that the WTO Panel appraise the scientific evidence used as the basis for the measure at issue.<sup>25</sup> In other words, a Member needs to show that its measure

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23. See GATT 1994, *supra* note 1, Arts. I, III (stating the most-favored nation and non-discrimination obligations placed on WTO Members).

24. See WTO Panel Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, WT/DS58/RW, para. 5.138 (Oct. 22, 2001) [hereinafter U.S. – Shrimp Panel Report: Article 21.5] (describing the way in which a Member can effectively use the General Exceptions under Article XX).

25. See *id.*, Art. XX (b); WTO Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, para. 115 (Mar. 12, 2001) [hereinafter EC – Asbestos Appellate

addresses a risk to human life or health as indicated by relevant scientific evidence.<sup>26</sup> As under the provisions of the SPS Agreement, the risk may be evaluated in either quantitative or qualitative terms.<sup>27</sup>

A dispute settlement panel, as the trier of fact, evaluates the sufficiency of the scientific assessment. The SAB will only interfere with the panel's appraisal if it is "satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence."<sup>28</sup> A panel need not reach a decision under Article XX(b) on the basis of the preponderant weight of the scientific evidence because of the recognition that a Member may rely in good faith "on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion."<sup>29</sup> In

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Body Report] (confirming that Article XX (b) of the GATT 1994 allows a Member to adopt a measure necessary to protect human life or health, even if this would undermine another provision of the GATT 1994). In this Report, the SAB disagreed with the Panel that considering evidence relating to health risks associated with a product, as Article III:4 of the GATT 1994 requires, undermines Article XX (b), because Article III:4 does not deprive Article XX (b) of its effectiveness. *See id.*

26. *See* EC – Asbestos Appellate Body Report, *supra* note 25, para. 115 (commenting that scientific evidence can allow a Member, under Article XX (b) of the GATT 1994, to adopt or enforce a measure that is inconsistent with a WTO rule if the measure is necessary to protect human health).

27. *See id.* para. 167 (recognizing that under Article XX (b) of the GATT 1994, risks to human life or health can be evaluated in either quantitative or qualitative terms); *see also* discussion, *infra* Part II.C.2.c. (discussing risk assessment of SPS measures under the SPS Agreement).

28. WTO Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, para. 151 (Dec. 22, 2000) [hereinafter U.S. – Wheat Gluten Appellate Body Report] (acknowledging that an appellate body cannot find an inconsistency with the Panel as a trier of fact simply because the appellate body may have reached a different factual finding). The Appellate Body concluded in this Report that it could not "interfere lightly" with the Panel's exercise of discretion unless the Panel exceeded the bounds of its discretion. *See id.*; *see also* EC – Asbestos Appellate Body Report, *supra* note 25, para. 162 (noting that the SAB may only challenge the Panel's decision upon a finding of abuse of discretion, and nothing here suggested that the Panel exceeded the bounds of its lawful discretion).

29. EC – Beef Hormones Appellate Body Report, *supra* note 16, para. 194 (relating the Appellate Body's belief that a risk assessment can include, and be based upon, mainstream scientific opinion, as well as other divergent scientific views).

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other words, “a Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion.”<sup>30</sup>

Further, the SAB interprets the “necessity” requirement of items (b) and (d) as involving a showing that no reasonably available alternative exists that would achieve the same policy objective and would be less restrictive of trade.<sup>31</sup> The determination of whether a suggested alternative measure is “reasonably available”<sup>32</sup> requires consideration of several factors, including:

- 1) the difficulty of implementation of the alternative measure;
- 2) the accompanying impact of the alternative measure on imports and exports;
- 3) the extent to which the alternative measure contributes to the realization of the end pursued; and,
- 4) the extent to which the common interests or values pursued are vital or important.<sup>33</sup>

In *U.S. – Shrimp*, the SAB held that Article XX (g) requires an examination of the relationship between the general structure and design of the measure at stake and the policy goal it purports to

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30. EC – Asbestos Appellate Body Report, *supra* note 25, para. 178.

31. *See id.* paras. 170-72 (describing the other cases in which the Appellate Body defined the term “necessary” in reference to Article XX(b) and (d) of the GATT 1994); WTO Appellate Body Report, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, paras. 157-80 (Dec. 11, 2000) [hereinafter Korea – Beef Appellate Body Report] (examining in detail the word “necessary” in the context of Article XX, and enumerating possible factors to consider when determining whether a measure is “necessary”).

32. *See* EC – Asbestos Appellate Body Report, *supra* note 25, paras. 170-72 (discussing the factors that other Appellate Body reports considered when defining the term “necessary”); *see* Korea – Beef Appellate Body Report, *supra* note 31, paras. 157-80 (stating the factors to consider in reference to Article XX, subsections (b) and (d), both of which use the word “necessary”).

33. Korea – Beef Appellate Body Report, *supra* note 31, paras. 163-66.

serve.<sup>34</sup> The essential test is whether the means are reasonably related to the ends in a “close and real” manner.<sup>35</sup> While the SAB in *U.S. – Shrimp* did not examine the availability of alternative and less trade-restrictive measures to determine whether Article XX (g) covered the measure, the SAB did discuss the availability of other courses of action to achieve the same policy goal within the context of the requirements of the Chapeau.<sup>36</sup>

### 3. Requirements of the Chapeau

#### a. General Requirement of Good Faith in the Exercise of the Basic Right to Determine the Level of Protection

In addition to the requirements of the individual exceptions, the measures listed in Article XX must meet certain general criteria in order to benefit from treatment as an exception. The Article XX Chapeau provides that measures falling under one of the listed exceptions must not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>37</sup> As a general matter, the SAB interprets the Chapeau as projecting both substantive and procedural

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34. See WTO Appellate Body Report, United States Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *U.S. – Shrimp Appellate Body Report*], paras. 136-37 (describing the proper relationship as one of a “genuine relationship of ends and means”).

35. See *id.* para. 141 (explaining that the relationship between the legislative measure taken by the United States and the legitimate policy of conserving an exhaustible and endangered species is close and real); see also WTO Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (April 29, 1996) [hereinafter *U.S. – Gasoline Appellate Body Report*] (illustrating the substantial relationship between the Environmental Protection Agency’s baseline establishment rules and the conservation of clean air in the United States).

36. See *U.S. – Shrimp Appellate Body Report*, *supra* note 34, paras. 146-60 (examining the manner in which a measure is applied under the Chapeau of Article XX); see also discussion *infra* Part II.B.3.b. (discussing unjustifiable discrimination and explaining that it is unacceptable for one Member country to require others to adopt a measure to further a policy goal that does not take into account specific conditions existing in various Member countries).

37. GATT 1994, *supra* note 1, Art. XX.

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requirements in that “the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner.”<sup>38</sup>

In addition, the SAB considers that the Chapeau of Article XX embodies the general treaty rule of application in good faith.<sup>39</sup> One application of this general principle “prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right ‘impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably’.”<sup>40</sup> In the words of the Appellate Body,

[The Chapeau] embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions to Article XX,

specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand.<sup>41</sup>

Further,

The task of interpreting and applying the Chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions . . . of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the Chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the

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38. U.S. – Shrimp Appellate Body Report, *supra* note 34, para. 160.

39. *See id.* para 158 (arguing that Article XX should be read as embodying the general principles of international law).

40. *Id.* (quoting BIN. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 125 (1953)).

41. *Id.* para. 156.

measures at stake vary and as the facts making up specific cases differ.<sup>42</sup>

With regard to health and safety measures, the SAB recognizes that Article XX endorses the fundamental right of each Member to set the level of protection that it deems appropriate for its population.<sup>43</sup> At the same time, the chosen level of protection has implications for the manner in which the Member selects a measure to attain that protection, and for application of that measure in practice.

b. No Arbitrary or Unjustifiable Discrimination

Under the Article XX Chapeau, a given measure may not have an “arbitrary or unjustifiable” discriminatory effect. The Appellate Body discussed this requirement most thoroughly in the *U.S. – Shrimp* case.<sup>44</sup> In that case, the SAB held that the “single, rigid and unbending requirement” that other countries adopt the program of the importing country that has imposed a measure, “without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries,” constitutes arbitrary discrimination.<sup>45</sup> Arbitrary discrimination also results from the denial of basic fairness and due process rights, such as transparency, the right to be heard, the right to notice of denial, and the right of appeal therefrom.<sup>46</sup>

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42. *Id.* para. 159; *see also id.* para. 120 (“The standards established in the Chapeau are necessarily broad in scope and reach . . . . When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies.”).

43. *See* EC – Asbestos Appellate Body Report, *supra* note 25, para. 168 (“[I]t is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.”).

44. *See generally*, U.S. – Shrimp Appellate Body Report, *supra* note 34, paras. 161-86 (articulating the meaning of arbitrary or unjustifiable discrimination). A showing of such discrimination requires that the application of the measure in question in fact results in discrimination, and that the discrimination occurs between countries where the same conditions prevail. *See id.*

45. *Id.* para. 177.

46. *See id.* para. 183 (acknowledging unjustifiable or arbitrary discrimination results when certain minimum standards for procedural fairness, established in Article X:3 of the GATT 1994, are not met).

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In *U.S. – Shrimp*, the SAB found unjustifiable discrimination based on the intended and actual coercive effect of the measure at issue on the specific policy decisions made by other WTO Members.<sup>47</sup> The effect of that measure’s application was “to establish a rigid and unbending standard” that ignored other specific policies and measures that an exporting country had adopted to accomplish the same policy objective.<sup>48</sup> The SAB held that it was unacceptable “for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members.”<sup>49</sup>

Another unjustifiable aspect of the regulatory program at issue in *U.S. – Shrimp* was the failure of the United States to engage certain exporting Members “in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements. . . before enforcing the import prohibition.”<sup>50</sup> In this regard, the SAB held that the Inter-American Convention on Sea Turtles<sup>51</sup> provided “convincing demonstration that an alternative course of action was reasonably open . . . for securing the legitimate policy goal of [the] measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition.”<sup>52</sup>

The SAB in *U.S. – Shrimp* also cited other kinds of differential

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47. *See id.* para. 161 (indicating that the most conspicuous flaw in application of the U.S. measure relates to its “intended and actual coercive effect on the specific policy decisions” that WTO Members made).

48. *See id.* para. 163 (stating that the actual application of the U.S. measure required other WTO Members to adopt a regulatory program that was essentially the same as that applied to U.S. shrimp vessels).

49. *Id.* para. 164 (emphasis added).

50. *U.S. – Shrimp* Appellate Body Report, *supra* note 34, para. 166.

51. Inter-American Convention on Sea Turtles, Dec. 1, 1996, S. TREATY DOC. NO. 105-48 (1998). This Convention involved the United States and other WTO Members from the Caribbean/Western Atlantic region.

52. *Id.* para. 171; *see, e.g., id.* para. 170 (explaining that the parties to the Inter-American Convention on Sea Turtles demonstrated the conviction of the Convention’s signatories that “consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles”).

treatment of various exporting countries. While the United States accorded some countries a three-year phase-in period to comply with the measure in question, others had only four months.<sup>53</sup> While the differing phase-in periods resulted from U.S. court decisions, that fact did not relieve the United States of responsibility, since all WTO Members assume responsibility for acts of all their departments, including the judiciary.<sup>54</sup> In addition, the United States made varying efforts vis-à-vis third countries to transfer the technology necessary to comply with the measure at issue.<sup>55</sup>

c. No Disguised Restriction of Trade

As the WTO Panel observed in *EC – Asbestos*,<sup>56</sup> “the actual scope of the words ‘disguised restriction on international trade’ has not been clearly defined.”<sup>57</sup> Nonetheless, the Panel did cite the SAB ruling in the *U.S. – Gasoline*<sup>58</sup> case, which clarifies this phrase

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53. *See id.* para. 172 (noting that the fourteen countries in the wider Caribbean/Western Atlantic region had a “phase-in” period of three years to adjust to the requirement regarding the use of the Turtle Excluder Devices (“TEDs”), while India, Malaysia, Pakistan, and Thailand (the appellees) had only four months to implement the use of TEDs). The length of the “phase-in” period is important for exporting countries that desire certification; that period relates directly to how onerous the burdens of complying with the requisites of certification are, as well as the practical feasibility of locating and developing alternative export markets for shrimp. *See id.* para. 174. The shorter the period, the heavier the burdens of compliance and the greater the difficulties of re-orientating the shrimp exports, particularly where a large number of vessels are involved. *See id.*

54. *See U.S. – Shrimp Appellate Body Report, supra* note 34, para. 173 (acknowledging that the United States Court of International Trade directed the implementation of greatly differing “phase-in” periods).

55. *See id.* para. 175 (identifying that the United States made far greater effort to transfer TED technology successfully to the fourteen countries than to the appellees’ home countries). In effect, “[b]ecause compliance with the requirements of certification realistically assumes successful TED technology transfer, low or merely nominal efforts at achieving that transfer will, in all probability, result in fewer countries being able to satisfy the certification requirements . . . within the very limited ‘phase-in’ periods . . .” *Id.*

56. WTO Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (Sept. 18, 2000) [hereinafter *EC – Asbestos Panel Report*].

57. *Id.* para. 8.233.

58. *U.S. – Gasoline Appellate Body Report, supra* note 35.



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somewhat:

“[D]isguised 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. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to “arbitrary or unjustifiable discrimination”, may also be taken into account in determining the presence of a “disguised restriction” on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.<sup>59</sup>

Emphasizing the disguised nature of the restriction that the Article XX Chapeau targets, the Panel in *EC-Asbestos* opined that an abuse would be present if compliance with the requirements of one of the exceptions listed in Article XX was “only a disguise to conceal the pursuit of trade-restrictive objectives.”<sup>60</sup> The Panel then applied the approach that the SAB uses in relation to Article III:2 of the GATT 1994,<sup>61</sup> where the question of whether a measure has been applied for protective purposes may also arise, and examined the design, architecture, and revealing structure of the measure at issue.<sup>62</sup>

Ultimately, the Panel in *EC – Asbestos* found no disguised pursuit of trade-restrictive objectives on the grounds that:

- 1) the measure was a response of the government to health scares and “panicked public opinion,” which did not constitute a premeditated intention to protect industry of an EC Member State, and

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59. EC – Asbestos Panel Report, *supra* note 56, para. 8.235 (drawing support from the US – Gasoline Appellate Body Report); *see generally* U.S. – Gasoline Appellate Body Report, *supra* note 35, para. 25.

60. EC – Asbestos Panel Report, *supra* note 56, para. 8.236.

61. *See generally* WTO Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8; DS10; DS11/AB/R (Oct. 4, 1996) [hereinafter Japan – Alcoholic Beverages Appellate Body Report] (employing a variety of factors to the analysis of whether taxing two similar products differently violated Article III:2 of the GATT 1994).

62. *See* EC – Asbestos Panel Report, *supra* note 56, para. 8.236 (explaining that although a measure’s true objective is not easily ascertainable, the design, architecture, and structure of a measure can indicate whether the measure is a disguised trade restriction).

2) the information made available to the Panel did not suggest that the measure benefited the domestic substitute product manufacturers, “to the detriment of third country producers, to such an extent as to lead to the conclusion that [the measure] has been so applied as to constitute a disguised restriction on international trade.”<sup>63</sup>

In *U.S. – Shrimp*, both the original Panel and the Panel examining the claim under Article 21.5 of the GATT 1994 followed the same line of reasoning as the Panel in *EC – Asbestos*.<sup>64</sup> Each panel found that the measure at issue was not applied so as to constitute a disguised restriction on trade.<sup>65</sup> The panels based their findings on the following elements:

- 1) environmental groups initiated the proceedings that resulted in the U.S. court judgment which extended the scope of application of the measure at issue to the appellant Member;
- 2) U.S. producers were subject to comparable constraints; and,
- 3) U.S. producers were likely to obtain little commercial gain from the measure at issue given the flexibility of the measure and the acceptance of comparable programs for compliance purposes.<sup>66</sup>

Although various aspects of the panels’ reasoning in these cases are debatable, there was no appeal of the findings in either case, and thus the SAB did not address the analysis. What appears clear, however, is that to the extent a “disguised restriction on international trade” includes something more than “arbitrary or unjustifiable discrimination,” a determination of its existence requires an

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63. *Id.* paras. 8.238-39. The Panel also noted that the effect of favoring the domestic substitute product manufacturers “is a natural consequence of prohibiting a given product and in itself cannot justify the conclusion that the measure has a protectionist aim, as long as it remains within certain limits.” *Id.* While one could question whether the prohibition of a given product would naturally favor domestic substitute product manufacturers in particular, it is not at all clear what the “certain limits” are to which the Panel is referring. *See id.*

64. *See* US – Shrimp Panel Report: Article 21.5, *supra* note 24, paras. 5.143-44 (noting that in the absence of a premeditated intention to protect the domestic industry, mere showing of a protective measure would not prove the existence of “disguised restriction on international trade”).

65. *See id.* para. 5.144 (concluding that requiring other Member countries to adopt TED technology did not constitute a “disguised restriction” on international trade).

66. *Id.* para. 5.143.

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examination of all the circumstances surrounding the adoption of the measure at issue. In this regard, the various factors that the SAB has cited in relation to Article 5.5 of the SPS Agreement would all appear to be relevant: the extent of the discrepancy in levels of protection; the absence of risk assessment on which to base a protective measure; various proposals relating to adoption of a measure; and the absence of strict internal control over the product at issue.<sup>67</sup>

Given the uncertain contours of the term “disguised restriction on international trade,” and the fact that the term stands on its own in the Chapeau to Article XX, the question arises as to its objective limits. Unlike Article 5.5 of the SPS Agreement, the Chapeau of Article XX does not first require a finding of arbitrary or unjustifiable discrimination before determining whether there is a disguised restriction on international trade. In the absence of some kind of discrimination in favor of domestic producers of the same product or a close substitute, it would appear that damage would in practice be minimal. For this reason, the use of the analysis developed under Article III:2 of the GATT 1994 is particularly apt.<sup>68</sup>

### 4. Deference to a Precautionary Approach

In an evaluation of the extent to which Article XX of the GATT 1994 defers to a WTO Member’s precautionary approach to HSE risks, several pronouncements of the SAB stand out. First, and most fundamentally, there is no dispute that WTO Members are free to choose their own appropriate level of protection with regard to risks to health and safety.<sup>69</sup> This implies that there is no obstacle in principle to the choice of a zero risk level of protection with regard to a given risk.

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67. See *infra* Part II.C.2.f. (discussing factors that must be present to show arbitrary or unjustifiable distinctions in levels of protection that a Member considers appropriate in certain situations).

68. See *supra* notes 61-62 and accompanying text (examining the design, architecture, and structure of a measure to determine whether a measure is a disguised restriction on trade).

69. See EC – Asbestos Appellate Body Report, *supra* note 25, para. 168 (emphasizing the right of each Member to establish a level of protection that is appropriate for its own population).

Second, in order for a measure to meet the requirements of Article XX, a basic relationship must exist between the measure and the policy objective recognized under that Article.<sup>70</sup> While health and safety measures must be necessary to obtain their objective, which implies that some scientific evidence supports the determination that they are necessary, the SAB also recognizes that 1) the relevant risk may be evaluated in qualitative, rather than quantitative terms,<sup>71</sup> and 2) a Member is not obliged, in setting health policy, to automatically follow what, at a given time, may constitute a majority scientific opinion.<sup>72</sup>

Neither Article XX itself nor SAB interpretations of that provision mention any possibility of the imposition of (provisional) measures in the absence of sufficient scientific evidence. However, the fact that compliance with the SPS Agreement creates a presumption of compliance with other GATT provisions means that the imposition and maintenance of provisional measures in accordance with Article 5.7 of the SPS Agreement would be deemed, at least *prima facie*, to meet the requirements of Article XX of the GATT 1994.<sup>73</sup> This presumption in turn incorporates the deference shown to a precautionary approach with regard to the obligations imposed by Article 5.7 of the SPS Agreement.<sup>74</sup>

Finally, although the SAB has not yet reviewed their analysis, the panels in *EC – Asbestos* and *U.S. – Shrimp* arguably afforded

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70. See discussion *supra* Part II.B.2. (examining the relationship between a measure and the policy objective it purports to fulfill).

71. See *EC – Asbestos* Appellate Body Report, *supra* note 25, para.167 (stating that risk may be evaluated either in quantitative or qualitative terms).

72. See *id.* para. 178 (recognizing that a Member may rely in good faith on scientific sources which represent “a divergent, but qualified and respected, opinion”).

73. See SPS Agreement, *supra* note 3, Art. 2.4 (“Sanitary or phytosanitary measures which conform to the relevant provisions of this agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).”); see also *id.*, Art. 5.7 (stating that in cases where scientific evidence is insufficient, a Member may adopt provisional measures based on existing relevant information).

74. See *infra* Part II.C.2.d. (discussing Article 5.7 of the SPS Agreement, which creates an exemption from the obligation under Article 2.2 to adopt a provisional measure based on scientific evidence).

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deference to a precautionary approach in determining whether the measure at issue was a “disguised restriction on trade.”<sup>75</sup> In particular, the *EC – Asbestos* panel highlighted the role of concurrent health scares and “panicked public opinion,” which together would lead government authorities to act more quickly with less evidence—i.e., with more precaution—than under other circumstances.<sup>76</sup> In *U.S. – Shrimp*, the Panel observed that the U.S. court judgment, which extended the scope of application of the measure at issue to cover the appellant Member, resulted from a procedure that environmental groups initiated.<sup>77</sup> The Panel appeared to believe that such groups were not motivated by trade considerations. In any event, those groups would presumably favor a more, rather than a less, precautionary approach.

### C. SPS AGREEMENT

#### 1. *Measures in Conformity with International Standards*

Under Article 3.2 of the SPS Agreement, SPS measures are deemed necessary to protect life or health, and presumed to be consistent with the relevant provisions of the SPS Agreement and of GATT 1994, if they conform with international standards, guidelines, or recommendations.<sup>78</sup> As the SAB noted in *EC – Hormones*, this reflects an underlying objective of the SPS Agreement: to consider international standards as a basis for future harmonization.<sup>79</sup> While international standards may in effect be

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75. See *supra* notes 64-66 and accompanying text (explaining that the panels allowed for a precautionary approach in determining the existence of a disguised restriction on trade).

76. See *supra* note 63 and accompanying text (implying that when a government responded to health scares and panicked public opinion, the Panel was not likely to find a “disguised restriction on the international trade” in the absence of a premeditated intention to protect the domestic industry).

77. See WTO Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, para. 3.107 (May 15, 1998) [hereinafter *U.S. – Shrimp Panel Report*].

78. See SPS Agreement, *supra* note 3, Art 3.2.

79. See *EC – Beef Hormones Appellate Body Report*, *supra* note 16, para. 172 (stating that the SPS Agreement desires to promote the use of harmonized SPS measures between Members on the basis of international standards, although

protectionist (e.g., to the extent that their strictness precludes certain countries from meeting the standards), their multilateral nature at least precludes unilateral protectionism in their design.

*2. Measures Necessary to Achieve a Higher Level of Protection*

a. Unilateral Choice of the Level of Protection

Article 3.3 of the SPS Agreement allows a Member to introduce unilateral measures resulting in a higher level of protection than would otherwise be achieved by measures based on relevant international standards. This is true, however, only if those measures are necessary to achieve the level of protection that the Member deems appropriate, and not inconsistent with any other provision of the SPS Agreement.<sup>80</sup>

Through Article 3.3, the SPS Agreement clearly recognizes the prerogative of the Member adopting the measure to determine its appropriate level of protection.<sup>81</sup> While Article 5.4 of the SPS Agreement requires a Member to “take into account the objective of minimizing negative trade effects” when determining the appropriate level of sanitary or phytosanitary protection,<sup>82</sup> there is, in principle, no obstacle to the choice of zero risk as the appropriate level of protection.<sup>83</sup>

While the determination of the appropriate level of protection is a prerogative of the importing Member, the SAB also considers it an implied obligation under the SPS Agreement.<sup>84</sup> This position justifies

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Member countries are free to adopt their own level of protection).

80. SPS Agreement, *supra* note 3, Art. 3.3

81. *See, e.g.*, WTO Appellate Body Report, Australia – Measures Affecting Importation of Salmon, WT/DS18/AB/R, paras. 192 (Oct. 20, 1998) [hereinafter Australia – Salmon Appellate Body Report] (stating that neither the Panel nor the Appellate Body can substitute its reasoning regarding the appropriate protection level for that consistently expressed by Australia).

82. SPS Agreement, *supra* note 3, Art. 5.4.

83. *See* Australia – Salmon Appellate Body Report, *supra* note 81, para. 122 (distinguishing between the evaluation of risk in a risk assessment and the determination of the appropriate protection level).

84. *See id.* paras. 198-199 (finding the obligation implicit in paragraph three of Annex B, as well as Article 4.1161, Article 5.4, and Article 5.6 of the SPS

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using the level of protection that results from the SPS measure as the one deemed to be appropriate in cases where the importing Member has not clearly articulated that level of protection.<sup>85</sup>

b. Necessary to Achieve the Chosen Level of Protection

Article 3.3 of the SPS Agreement allows a Member to adopt a unilateral measure that is necessary to achieve the level of protection the Member deems appropriate.<sup>86</sup> While no panel or Appellate Body report has thus far had occasion to interpret the concept of “necessity” contained in this provision, the wording of Article 3.3 is nearly identical to that of Article XX(b), which deals with measures that are “necessary” to protect public health.<sup>87</sup> In *EC – Asbestos*, the SAB affirmed that the concept of “necessity” under Article XX(b) involves a determination of whether an alternative measure exists

that is reasonably available to achieve the targeted level of protection and that is less inconsistent with WTO rules.<sup>88</sup>

Because Article 5.6 of the SPS Agreement obligates a Member, when establishing or maintaining an SPS measure, to ensure that the measure is not more trade-restrictive than necessary to achieve the chosen appropriate level of protection,<sup>89</sup> an apparent overlap exists between Articles 3.3 and 5.6. The footnote to Article 5.6 alludes to

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Agreement).

85. *See id.* para. 200 (indicating that a Member’s failure to determine the appropriate level of protection would otherwise allow it to escape its obligations under the SPS Agreement—specifically those articulated in Articles 5.5 and 5.6).

86. *See* SPS Agreement, *supra* note 3, Art. 3.3.

87. *Compare* SPS Agreement, *supra* note 3, Art. 3.3, with GATT 1994, *supra* note 1, Art. XX (b) (discussing the concept of “necessity” in each agreement).

88. *See* EC – Asbestos Appellate Body Report, *supra* note 25, paras. 170-75; *see also infra* Part II.B.2. (listing factors to consider when determining whether an alternative measure is reasonably available). The Appellate Body has also affirmed the use of this standard in addressing the issue of “necessity” under Article XX(d). *See* Korea – Beef Appellate Body Report, *supra* note 31, paras. 165-66 (employing a “weighing and balancing process” to determine whether an alternative measure exists).

89. *See* SPS Agreement, *supra* note 3, Art. 5.6 (specifying that the restriction must consider technical and economic feasibility); *see also infra* notes 111-113 and accompanying text (discussing the scope of Article 5.6).

this overlap by indicating that a measure is more trade-restrictive than required if another SPS measure is both reasonably available to achieve the Member's appropriate level of protection and significantly less restrictive to trade than the SPS measure in question.<sup>90</sup>

c. Generally Based on Sufficient Scientific Evidence

Article 5.1 of the SPS Agreement requires that Members adopt SPS measures on the basis of a risk assessment.<sup>91</sup> As interpreted by the Appellate Body in *EC – Hormones*, this provision, when read in the light of Article 2.2 of the SPS Agreement, “requires that the results of the risk assessment must sufficiently warrant—that is to say, reasonably support—the SPS measure at stake.”<sup>92</sup> This is consistent with 1) Article 2.2 of the SPS Agreement, which stipulates that Members “shall ensure that any SPS measure . . . is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5,”<sup>93</sup> and 2) Article 3.3 of the SPS Agreement, which allows Members to adopt a unilateral SPS measure “if there is a scientific justification” and the measure is not inconsistent with any other provision of the SPS Agreement.<sup>94</sup>

The “scientific justification” requirement in Article 3.3 is met “if there is a rational relationship between the SPS measure at issue and the available scientific information.”<sup>95</sup> Similarly, the obligation in Article 2.2 “requires that there be a rational or objective relationship between the SPS measure and the scientific evidence.”<sup>96</sup> Whether such a relationship exists is “determined on a case-by-case basis and will depend upon the particular circumstances of the case, including

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90. See SPS Agreement, *supra* note 3, Art. 5.6, n.3.

91. See *id.* Art. 5.1.

92. EC – Beef Hormones Appellate Body Report, *supra* note 16, para. 193.

93. SPS Agreement, *supra* note 3, Art. 2.2.

94. *Id.* Art. 3.3.

95. WTO Appellate Body Report, Japan – Measures Affecting Agricultural Products, WT/DS76/AB/R, para. 79 (Feb. 22, 1999) [hereinafter Japan – Agricultural Products Appellate Body Report].

96. *Id.* para. 76; see also SPS Agreement, *supra* note 3, Art. 2.2 (requiring Members to ensure that their measures do not discriminate, are based on scientific principles, and are supported by scientific evidence).



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the characteristics of the measure at issue and the quality and quantity of the scientific evidence.”<sup>97</sup>

The Article 5.1 requirement of a risk assessment is “a specific application of the *basic* obligations contained in Article 2.2.”<sup>98</sup> For a risk assessment to be valid,<sup>99</sup> the “risk” evaluated must be an ascertainable risk.<sup>100</sup> There is, however, no requirement for a risk assessment to establish a certain magnitude or threshold level of degree of risk.<sup>101</sup> Furthermore, it is not necessary that the risk assessment “embody only the view of a majority of the relevant scientific community . . . [R]esponsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources.”<sup>102</sup> Additionally, the SPS measure at issue “may be objectively justified in a risk assessment carried out by another Member or an international organization.”<sup>103</sup>

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97. Japan – Agricultural Products Appellate Body Report, *supra* note 95, para. 84.

98. *Id.* para. 82.

99. These comments regarding risk assessments apply to both types of risk assessment described in paragraph four of Annex A to the SPS Agreement: an evaluation of the likelihood of entry or spread of a disease within an importing Member country and associated biological or economic consequences; and an evaluation of potential adverse health effects arising from additives or toxins contained in food, beverages, and feedstuffs. *See* SPS Agreement, *supra* note 3, Annex A. While Australia – Salmon involved the first type of risk assessment, EC – Beef Hormones involved a situation requiring a risk assessment of the second type. *See generally* Australia – Salmon Appellate Body Report, *supra* note 81; EC – Beef Hormones Appellate Body Report, *supra* note 16. The primary difference between the two types of risk assessments is that the first “demands an evaluation of the likelihood of entry, establishment or spread of a disease, and of the associated potential biological and economic consequences,” while the second “requires only the evaluation of the potential for adverse effects on human or animal health.” Australia – Salmon Appellate Body Report, *supra* note 81, para. 123 n.69.

100. EC - Beef Hormones Appellate Body Report, *supra* note 16, para. 186; Australia – Salmon Appellate Body Report, *supra* note 81, para. 122.

101. EC - Beef Hormones Appellate Body Report, *supra* note 16, para. 186; Australia – Salmon Appellate Body Report, *supra* note 81, para. 121.

102. EC – Beef Hormones Appellate Body Report, *supra* note 16, para. 194; *see also* Japan – Agricultural Products Appellate Body Report, *supra* note 95, para. 77 (citing the EC – Beef Hormones Appellate Body Report).

103. EC – Beef Hormones Appellate Body Report, *supra* note 16, para. 190.

The fact that Article 5.1 is a specific application of the Article 2.2 obligation implies that if an SPS measure is not based on the risk assessment required by Article 5.1, the measure “can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence.”<sup>104</sup>

d. Exceptionally Based Only on Available Information

Article 5.7 of the SPS Agreement allows Members to adopt a provisional SPS measure on the basis of “available pertinent information” when “relevant scientific evidence is insufficient.”<sup>105</sup> In such a circumstance, Article 5.7 requires the Member in question to “seek to obtain the additional information necessary for a more objective assessment of risk and review the SPS measure accordingly within a reasonable period of time.”<sup>106</sup>

As stated by the SAB, “Article 5.7 operates as a *qualified* exemption from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence.”<sup>107</sup> In other words, a Member may adopt a measure without sufficient scientific evidence, but the measure must be adopted on the basis of “available pertinent information,” the measure must be “provisional” (limited in time), the Member must seek “to obtain the additional information necessary for a more objective assessment of risk,” and the Member must review the measure “within a reasonable period of time.”<sup>108</sup>

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104. Australia – Salmon Appellate Body Report, *supra* note 81, paras. 134-135 (holding that Australia violated Article 2.2 of the SPS Agreement because its import prohibition was not based on a risk assessment as required by Article 5.1).

105. SPS Agreement, *supra* note 3, Art. 5.7.

106. *Id.*

107. Japan – Agricultural Products Appellate Body Report, *supra* note 95, para. 80.

108. In Japan – Agricultural Products Appellate Body Report, *supra* note 95, para. 89, the SAB also set out four cumulative requirements under Article 5.7, but not the same four as those cited here. In particular, the SAB did not highlight the fact that the measure in question must be provisional. On the one hand, the requirement that a Member review a measure within a reasonable period of time could be said to imply that the measure must be provisional. On the other hand, nothing prevents a definitive measure from including a review mechanism. In this author’s opinion, it is therefore useful to highlight separately the Article 5.7

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The obligation to seek to obtain additional information does not require specific results. It merely requires that the Member in question seek to obtain information that is “germane” to a proper risk assessment.<sup>109</sup>

With regard to the review requirement, “what constitutes a ‘reasonable period of time’ has to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review *and* the characteristics of the provisional SPS measure.”<sup>110</sup>

### e. Not More Trade-Restrictive Than Necessary

Article 5.6 of the SPS Agreement requires that the SPS measure at issue not be more restrictive of international trade than necessary.<sup>111</sup> To this effect, the footnote to Article 5.6 enumerates three elements that, taken together,<sup>112</sup> indicate that a measure is more trade-

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requirement that the measure be provisional.

The SAB brought out an additional requirement under Article 5.7, that a measure must be “imposed in respect of a situation where ‘relevant scientific information is insufficient.’” Such a requirement would be superfluous unless it meant that a Member could only adopt a provisional measure under Article 5.7 if the available information did not permit a scientific conclusion one way or the other. This follows from the fact that if the scientific evidence gave sufficient support to the measure, the measure would be justified under Article 3.3 of the SPS Agreement and there would be no need for a member to invoke Article 5.7. In other words, the measure in question would not be justified under Article 5.7 if relevant scientific information showed to a sufficient degree either that the measure in question was necessary (in which case it would be justified under Article 3.3) or that it was unnecessary. Because of the deferential manner in which the evaluation of the risk assessment is to be conducted, however, it would appear that scientific information that purported to show conclusively that the measure in question was not necessary would receive a correspondingly low degree of deference (i.e., a high degree of scrutiny). *See supra* Part II.C.2. In other words, it is most unlikely that this additional requirement of scientific uncertainty would impose any real practical burden.

109. *See* Japan – Agricultural Products Appellate Body Report, *supra* note 95, para. 92 (citing as an example of appropriate additional information an evaluation of the likelihood of entry).

110. *Id.* para. 93.

111. *See* SPS Agreement, *supra* note 3, Art. 5.6.

112. *See* Japan – Agricultural Products Appellate Body Report, *supra* note 95,

restrictive than required: 1) another SPS measure is reasonably available, taking into account technical and economic feasibility; 2) that other measure achieves the Member's appropriate level of protection; and, 3) that other measure is significantly less restrictive to trade than the SPS measure contested.<sup>113</sup>

f. Not a Disguised Restriction of Trade

Article 5.5 of the SPS Agreement prohibits "arbitrary or unjustifiable distinctions in the levels [of protection a Member] considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade."<sup>114</sup> A showing under this provision involves three cumulative elements: 1) the Member concerned has varied the levels of protection in different situations; 2) those distinctions are arbitrary or unjustifiable; and, 3) those distinctions result in discrimination or a disguised restriction on international trade.<sup>115</sup>

With regard to the first element, it is necessary that the situations being compared are in fact comparable, that "they present some common element or elements sufficient to render them comparable."<sup>116</sup> As observed by the Appellate Body in *Australia – Salmon*, it is not necessary that the two situations under comparison share all elements in common.<sup>117</sup> For example, situations can be compared under Article 5.5 if they involve either a risk of entry of the same or similar disease, or a risk of the same or similar associated potential biological and economic consequences.<sup>118</sup> Also, for situations to be comparable under Article 5.5, it is sufficient for them to have in common a risk of entry of one disease of concern. It is not necessary for them to have in common a risk of entry of all

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para. 95 (specifying that these elements are cumulative).

113. SPS Agreement, *supra* note 3, Art. 5.6 n.3.

114. *Id.* Art. 5.5.

115. EC – Beef Hormones Appellate Body Report, *supra* note 16, paras. 212-15.

116. *Id.* para. 217. Situations involving the same substance or the same adverse health effect are comparable. *See id.*

117. *See* Australia – Salmon Appellate Body Report, *supra* note 81, para. 146 (specifying that the disease, the biological consequences, and the economic consequences do not need to be the same or similar).

118. *See id.*

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diseases of concern.<sup>119</sup>

Regarding the second element, distinct levels of protection may be arbitrary or unjustifiable if, for example, the risks that the more lenient measures address are actually greater than those the challenged measure addresses.<sup>120</sup>

Finally, a finding that arbitrary or unjustifiable distinctions in levels of protection result in a disguised restriction on trade involves consideration of several factors, including the degree of difference, or the extent of the discrepancy, in the levels of protection;<sup>121</sup> the absence of a sufficient risk assessment that serves as the basis for the SPS measure that is challenged;<sup>122</sup> proposals made in the course of adopting the SPS measure in question;<sup>123</sup> and, the absence of similarly strict internal (domestic) controls regarding the product at issue.<sup>124</sup>

g. Not Arbitrary or Unjustifiable Discrimination

Article 2.3 of the SPS Agreement provides that a Member's SPS measures must not "arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members."<sup>125</sup> This condition includes, and goes beyond, the provisions of Article 5.5 of the SPS Agreement, which prohibits an arbitrary or unjustifiable

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119. *See id.* paras. 143 and 148.

120. *See id.* para. 149 (upholding the Panel's finding that a distinction between Pacific salmon and herring was arbitrary or unjustifiable).

121. *See EC – Beef Hormones Appellate Body Report, supra* note 16, para. 240 (stating that the difference in the levels of protection, when combined with other factors, can be sufficient to determine that those levels constitute a disguised restriction on trade).

122. *See Australia – Salmon Appellate Body Report, supra* note 81, para 159 (noting that absence of a risk assessment, or an insufficient risk assessment, is a strong indication that the measure in question is a disguised restriction on trade).

123. *See id.* para. 165 (agreeing with the Panel decision that draft proposals are appropriate criteria for determining whether a measure under consideration disguises a restriction on trade).

124. *See id.* para. 168 (using the difference between different SPS measures as an indicator of a disguised restriction on trade).

125. SPS Agreement, *supra* note 3, Art. 2.3.

distinction in levels of protection only if it results in a disguised restriction on trade.<sup>126</sup> In other words, a finding of a violation of Article 5.5 will necessarily imply a violation of Article 2.3. By contrast, a finding of arbitrary or unjustifiable discrimination under Article 2.3 is possible without an examination of Article 5.5.<sup>127</sup>

In addition, because the language of Article 2.3 of the SPS Agreement repeats part of the conditions of the Chapeau of Article XX, the interpretation of the same conditions in the Chapeau of Article XX should also apply to Article 2.3 of the SPS Agreement.<sup>128</sup>

### 3. Deference to a Member's Precautionary Approach

In *EC – Beef Hormones*, the SAB affirmed that “the precautionary 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.”<sup>129</sup> At the same time, from this discussion of the various provisions of the SPS Agreement, and the SAB's interpretation of those provisions, it is evident that the SPS Agreement affords deference to a precautionary approach taken by WTO Members in several essential respects.

First, as a fundamental principle, WTO Members are free to choose their own appropriate level of protection with regard to risks to health and safety.<sup>130</sup> Thus, nothing hinders the choice of a zero risk level of protection with regard to a given risk. In other words, in deciding the extent to which its population shall be exposed to a given risk, a Member may act with maximum precaution in setting

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126. *See id.* Art. 5.5.

127. *See* Australia – Salmon Appellate Body Report, *supra* note 81, para. 244 (stating that an Article 5.5 violation automatically implies an Article 2.3 violation, but an Article 2.3 violation does not necessarily constitute an Article 5.5 violation).

128. *See* discussion *supra* Part II.B.3.b (detailing the no “arbitrary or unjustifiable discrimination” requirement of the Chapeau of Article XX).

129. *EC – Beef Hormones Appellate Body Report, supra* note 16, para. 124.

130. *See* Australia – Salmon Appellate Body Report, *supra* note 81, para. 192. Regarding the EC, *see, e.g.,* European Commission, *Communication from the Commission on the Precautionary Principle*, COM(2000)1 final, at 10 [hereinafter *Precautionary Communication*] (indicating that each WTO Member may determine its own level of protection).

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the acceptable level of exposure.<sup>131</sup>

Second, a risk assessment, which is the basis for the Member's SPS measure, does not need to "embody only the view of a majority of the relevant scientific community" in order to meet the requirements of Article 5 of the SPS agreement.<sup>132</sup> This flexibility in the risk assessment standard supports a precautionary approach to the extent that it allows a WTO Member to follow a minority view concerning the existence and/or magnitude of a given risk. Specifically, the standard allows a Member to follow a scientific view that supports a more restrictive measure in a situation of legitimate uncertainty.

Third, when determining whether an SPS measure is sufficiently based on a risk assessment, a panel should bear in mind that "responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned."<sup>133</sup> Thus, when determining whether there is a rational or objective relationship between the SPS measure and the scientific evidence, a WTO panel must consider the fact that it is rational and predictable that a Member, faced with risks of serious and irreversible harm, would adopt a precautionary approach.

Finally, even in the absence of a sufficient risk assessment, a Member may, under Article 5.7 of the SPS Agreement, adopt a provisional SPS measure on the basis of relevant available information.<sup>134</sup> This provision recognizes that a WTO Member may at times feel constrained to adopt a measure for whatever reason—including a perceived need to apply a precautionary approach—without a sufficient, objective basis.<sup>135</sup> The fact, however, that Article

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131. See Australia – Salmon Appellate Body Report, *supra* note 81, para. 122. Regarding the EC, see, e.g., *Precautionary Communication* at 10 (asserting that a Member may apply measures associated with a higher level of protection than relevant international standards recommend).

132. See EC – Beef Hormones Appellate Body Report, *supra* note 16, para. 194.

133. See *id.*

134. See SPS Agreement, *supra* note 3, Art. 5.7 (stating that a Member may provisionally adopt an SPS measure in cases where there is insufficient relevant scientific evidence).

135. See *id.* (allowing a Member to adopt a provisional SPS measure without

5.7 requires the Member to seek to obtain the relevant evidence within a reasonable period of time appears to temper this deference to a precautionary approach.<sup>136</sup>

On the other hand, even the obligations set out in Article 5.7 with regard to such a provisional measure are interpreted in a manner that provides ample room for a precautionary approach. For example, the obligation to seek to obtain additional information does not require specific results. It merely requires that the Member in question seek to obtain information that is germane to the conduct of a proper risk assessment.<sup>137</sup> Additionally, there is an obligation to review the measure within a reasonable period, but what constitutes a “reasonable period of time” is established on a case-by-case basis.<sup>138</sup> This determination will depend on several factors, such as the difficulty of obtaining the additional information necessary for the review, and the characteristics of the provisional SPS measure.<sup>139</sup>

#### D. CONCLUSIONS REGARDING ARTICLE XX AND THE SPS AGREEMENT

Overall, both Article XX of the GATT 1994 and several provisions of the SPS Agreement show, in several important respects, deference to a precautionary approach taken by WTO Members in the adoption of HSE measures.<sup>140</sup> In particular, while scientific evidence must in principle support a given measure, each

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specifying the reason for the absence of relevant scientific evidence).

136. *See id.* (requiring a Member that has adopted a provisional measure to try to obtain the relevant evidence within a reasonable amount of time).

137. *See* Japan – Agricultural Products Appellate Body Report, *supra* note 107, para. 92 (indicating that a Member need only try to obtain information relevant to a more objective risk assessment).

138. *See id.*, para. 93, and, regarding the EC, *Precautionary Communication*, *supra* note 130, at 27 (declaring that the definition of a “reasonable period of time” is decided on a case-by-case basis).

139. *See* Japan – Agricultural Products Appellate Body Report, *supra* note 107, para. 93. *See also*, regarding the EC, *Precautionary Communication*, *supra* note 130, at 27 (discussing the reasonable period set forth in the SPS agreement and factors used to consider whether it has been satisfied).

140. *Compare* discussion *supra* Part II.B.4. (detailing the deference afforded a precautionary approach by Article XX of the GATT), *with* discussion *supra* Part II.C.3. (describing the SPS Agreement’s deference to the precautionary approach).



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Member has wide latitude to choose its own “appropriate” level of protection.<sup>141</sup> Furthermore, it is not necessary that the scientific support for the measure represents a majority position,<sup>142</sup> and an evaluation of the adequacy of the relationship between the scientific risk assessment and the measure at issue should take into account the fact that representative governments act in a precautionary manner.<sup>143</sup>

Together, these points make it likely that a Member’s measure would have an adequate basis if the Member has made any substantial effort to carry out a proper risk assessment.<sup>144</sup> In this regard, a developing country which lacks the resources needed to carry out a proper risk assessment may adopt a measure on the basis of a risk assessment carried out by another Member or by an international organization. Further, even in the absence of a proper risk assessment, a Member may adopt provisional measures.<sup>145</sup>

From a trade perspective, the strongest restraints on the use of HSE measures are that a given measure must be the least trade-restrictive among reasonably available measures that accomplish the same level of protection,<sup>146</sup> and that measure must not result in arbitrary or unjustifiable discrimination against another WTO Member.<sup>147</sup> This result is entirely appropriate because even a

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141. *See supra* notes 69 and 132-34 and accompanying text (stating the fundamental principle that each WTO Member is free to choose its level of protection).

142. *See supra* notes 72 and 132-33 and accompanying text (indicating that the scientific support for an HSE measure does not have to represent a majority position).

143. *See supra* notes 120-21 (discussing a representative government’s propensity to act in a prudent and precautionary manner).

144. *See supra* notes 140-143 and accompanying text (describing the features of Article XX of the GATT 1994 and the SPS Agreement, which demonstrate deference to the precautionary principle).

145. *See SPS Agreement, supra* note 3, Art. 5.7 (setting forth the standards for implementing a provisional SPS measure).

146. *See discussion supra* notes 31-33 and accompanying text (describing the SAB’s interpretation of the necessity requirement of Article XX of the GATT as including a no less restrictive measure requirement); SPS Agreement, *supra* note 3, Art. 5.6 (indicating that Members’ SPS measures shall not be more restrictive than necessary).

147. *See discussion supra* Part II.B.3.b. (detailing the prohibition on arbitrary or unjustifiable discrimination in Article XX of the GATT); *see also* discussion *supra*

perceived need for a precautionary approach should not lead a Member to choose disproportionately restrictive measures—more restrictive than other measures that would accomplish the same level of protection—or measures which discriminate in an arbitrary or unjustifiable manner. That said, the SAB has even afforded a large degree of deference to national HSE measures through its restrictive interpretation of when an alternative measure is “reasonably available” and would accomplish “the same level of protection,”<sup>148</sup> as well as its liberal construction of requirements regarding due process and efforts to negotiate international agreements.<sup>149</sup>

### III. RESULTS OF THE DOHA MINISTERIAL

#### A. INTRODUCTION

More than a year before the Doha Ministerial, negotiations began to address a series of concerns that developing countries raised concerning the implementation of agreements reached at the conclusion of the Uruguay Round.<sup>150</sup> Some of these concerns related to the implementation of the SPS Agreement and the manner in which developed countries took precautionary measures against imports from developing countries.<sup>151</sup> Meanwhile, developed countries were reluctant to recognize exporting countries' measures

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Part II.C.2.g. (describing the prohibition on arbitrary or unjustifiable discrimination in Article 2.3 of the SPS Agreement).

148. See, e.g., EC – Asbestos Appellate Body Report, *supra* note 25, paras. 169-75 (listing the factors to consider when determining whether a particular measure is necessary or reasonably available).

149. See, e.g., WTO Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, WT/DS58/AB/RW, [hereinafter U.S. – Shrimp Appellate Body Report: Article 21.5], paras. 122-34 (describing the good faith efforts required to avoid an arbitrary or unjustified discrimination determination).

150. See WTO Documents, *Briefing Note on WTO Agreements and Developing Countries – Problems With Implementation* [hereinafter *Problems with Implementation*] (discussing concerns developing countries raised about the implementation of the Uruguay Round agreements, especially the costs these countries incurred in attempting to implement the agreements).

151. See *id.* (noting criticism from developing countries that market access to their exports in agriculture and textiles is inadequate, and that these countries do not possess enough flexibility in terms of implementing SPS measures).

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to protect health and safety, resulting in unequal treatment of the developing countries' products.<sup>152</sup> This state of affairs magnified the extent to which the measures that importing countries took restricted trade.<sup>153</sup> These concerns were so important that addressing them was a precondition for developing countries to participate in a new round of substantive WTO negotiations.<sup>154</sup>

Concurrently, and even prior to the 1999 Seattle Ministerial, the European Community in particular had openly set out among its objectives for the new round of WTO negotiations, "[a] clarification of the relationship between multilateral trade rules and core environmental principles, notably the precautionary principle . . . Such clarification should seek to secure, within the relevant WTO rules, the importance of the precautionary principle, and to agree on multilateral criteria for the scope of action possible under that principle."<sup>155</sup> Additionally, the EC sought, "[t]o clarify and strengthen the existing WTO framework for the use of the precautionary principle in the area of food safety, in particular with a view to finding an agreed methodology for the scope of action under that principle."<sup>156</sup>

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152. See WTO Documents, *Briefing Note on Sanitary and Phytosanitary (SPS) Measures – Food Safety, etc.*, [hereinafter *Food Safety*] (detailing the concerns of developing countries over the manner in which the SPS agreement has been implemented), at [http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/about\\_e/08sps\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/08sps_e.htm) (last visited March, 22, 2002).

153. See *Problems with Implementation*, *supra* note 150 (claiming that developed countries have implemented the agreements in a way that fails to benefit the developing countries' trade).

154. See *id.* (explaining that many developing countries believe they deserve redress from the effects of the Uruguay Round agreements before new rounds can commence).

155. European Commission, *Communication from the Commission to the Council and the European Parliament on the EU Approach to the Millennium Round*, COM(99)331 final, at 15 [hereinafter *EU Approach*].

156. *Id.* at 18. In its Conclusions Regarding the Preparation of the Third WTO Ministerial Conference, however, the Council was more vague than the Commission when it stated: "[O]n the non-trade concerns [related to agriculture], the Union will take forward the multifunctional role of agriculture, food safety, including the precautionary principle, food quality, and animal welfare." European Commission, Council Conclusions on the Preparation of the Third WTO Ministerial Conference 4 (Oct. 25, 1999), at <http://europa.eu.int/comm/trade/pdf/agr15en.pdf>. In terms of trade and the

While a clarification of rules is usually not controversial, the idea of strengthening the framework for the use of “the precautionary principle” drew opposition among WTO Members.<sup>157</sup> Given the lack of consensus on the definition of a “precautionary principle,” and the deference of the existing WTO rules to the precautionary HSE measures that Members adopt, developing countries in particular had reason to fear that further promotion of a precautionary approach would translate into additional obstacles for exports to developed countries.<sup>158</sup>

### B. IMPLEMENTATION DECISION

The Doha Ministerial, in the Implementation Decision of November 14, 2001, endorsed a number of initiatives aimed at addressing deficiencies in the WTO framework for SPS measures that have had the effect of limiting the rights of developing countries.<sup>159</sup> These initiatives included financial and technical assistance to least-developed countries to help them implement the SPS Agreement, longer time-frames for developing countries to comply with other countries’ new SPS measures, a regular review of the operation of the SPS Agreement at least once every four years, and actions by the WTO Director-General to help developing countries participate more effectively in setting international SPS standards.<sup>160</sup>

Included, and perhaps most important, among these initiatives is

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environment, the Council stated that “a set of issues should be included in the negotiations aiming . . . at examining the role of core environmental principles, notably the precautionary principle in WTO rules.” *Id.* at 6.

157. *See Food Safety, supra* note 152 (discussing the debate surrounding the strengthening of the precautionary principle).

158. *See id.* (delineating many of the developing countries’ concerns over the SPS Agreement).

159. *See Doha Implementation Decision, supra* note 5, at 1 (stressing the Conference’s determination to address the concerns of the developing countries over the implementation of some of the WTO Agreements and Decisions).

160. *See id.* para. 3. (setting forth the new initiatives relative to the SPS Agreement).

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the decision regarding “equivalence” guidelines.<sup>161</sup> The basis for these guidelines is Article 4 of the SPS Agreement, which states that:

Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member’s appropriate level of sanitary or phytosanitary protection.<sup>162</sup>

While this provision sounds straightforward, many Members, developing countries in particular, experienced difficulties in persuading importing Members to recognize the equivalence of their sanitary or phytosanitary measures.<sup>163</sup> The practical consequence was

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161. *See id.* para. 3.3 (instructing the Committee on Sanitary and Phytosanitary Measures to develop a specific program to implement the equivalence guidelines).

162. SPS Agreement, *supra* note 3, Art. 4.

163. *See supra* notes 150-154 and accompanying text (discussing the difficulties developing countries experienced in the treatment of their exports).

that the exporting Members found obtaining market access in the importing countries to be problematic at times.<sup>164</sup>

On October 24, 2001, the Committee on SPS Measures agreed on an outline of steps designed to make it easier for all WTO Members to make use of the equivalence provision.<sup>165</sup> Essentially, that decision assigns a number of discrete tasks to importing and exporting Members.

First, at the request of the exporting Member, the importing Member should explain the objective and rationale of the SPS measure and clearly identify the risks that the measure is intended to address. The importing Member should also indicate the appropriate level of protection which its measure is designed to achieve. The explanation should be accompanied by a copy of the risk assessment on which the measure is based, or a technical justification based on a relevant international standard, guideline, or recommendation. The importing Member should also provide any additional information which may assist the exporting Member in demonstrating objectively the equivalence of its own measure.<sup>166</sup>

Second, the exporting Member shall provide appropriate science-based and technical information to support its objective demonstration that its measure achieves the appropriate level of protection identified by the importing Member. In addition, the exporting Member shall provide reasonable access, upon request, to the importing Member for inspection, testing and other relevant procedures for the recognition of equivalence.<sup>167</sup>

Third, "an importing Member shall respond in a timely manner to any request from an exporting Member for consideration of the equivalence of its measures, normally within a six-month period of time."<sup>168</sup> When considering the request, the importing Member

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164. See generally *Food Safety*, *supra* note 152 (describing the issues surrounding the equivalence standards).

165. See WTO SPS Committee, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, G/SPS/19 (Oct. 26, 2001) [hereinafter *Article 4 Decision*].

166. See *id.* para. 2.

167. See *id.* para. 4.

168. *Id.* para. 3.

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should analyze the information provided by the exporting Member with “a view to determining whether these measures achieve the level of protection provided” by its own relevant SPS measures.<sup>169</sup>

Fourth, “the importing Member should accelerate its procedure for determining equivalence in respect of those products which it has historically imported from the exporting Member.”<sup>170</sup>

Finally, “a Member shall give full consideration to requests by another Member, especially a developing country Member, for appropriate technical assistance to facilitate the implementation of Article 4 of the SPS Agreement.” This includes helping to “identify and implement measures which can be recognized as equivalent, or to otherwise enhance market access opportunities.”<sup>171</sup>

The Implementation Decision explicitly endorsed the decision of October 24, 2001, and instructed the Committee on SPS Measures “to develop expeditiously the specific programme to further the implementation of Article 4” of the SPS Agreement.<sup>172</sup> To the extent developing countries have felt that their measures were not sufficiently recognized as equivalent, the steps endorsed in the Implementation Decision give an important boost to the efforts of those countries to gain increased access to export markets. Specifically, with regard to the application by importing Members of a precautionary approach in adopting SPS measures, compliance with the steps endorsed in the Implementation Decision should make the precautionary element more transparent. This will come from the importing Member’s explanation of the scientific basis for its measure, and from identification of the level of protection it considers appropriate.

### C. GENERAL DOHA DECLARATION

The very first item of the Work Programme in the General Doha Declaration, reflecting the importance of the subject matter,

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169. *Id.* para. 7.

170. *Article 4 Decision, supra* note 165, para. 5.

171. *Id.* para. 8.

172. Doha Implementation Decision, *supra* note 5, para. 3.3.

addresses “implementation-related issues and concerns.”<sup>173</sup> Among other points, it specifically adopts the Implementation Decision and, thus, the decision of the Committee on SPS Measures related to the “equivalence” guidelines.<sup>174</sup>

In addition, new negotiations were launched under the heading of “Trade and Environment,” but the Programme did not specifically adopt anything concerning the strengthening or even the application of the precautionary principle.<sup>175</sup> The closest the Declaration comes is with a general instruction to the Committee on Trade and Environment, as part of its on-going work, to identify “any need to clarify relevant WTO rules.”<sup>176</sup> The work of the Committee on Trade and Environment will not, however, involve negotiations per se, since the Committee may only make recommendations about the desirability of negotiations on the points about which it received instructions.<sup>177</sup>

At the same time, the Ministers instructed the Committee on Trade and Environment “to give particular attention to . . . the effect of environmental measures on market access, especially in relation to developing countries.”<sup>178</sup> The underlying concern—the recognition that compliance with environmental requirements can be burdensome for an exporter—is particularly relevant in connection with measures adopted primarily on the basis of a precautionary approach. For such measures, the compliance requirements are clearly a burden, but by hypothesis it is not certain that a causal link exists to the alleged hazards used to justify the measures.

The Doha Declaration contains no statement concerning new negotiations about the rules relating to sanitary and phytosanitary

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173. Doha Declaration, *supra* note 6, para. 12.

174. *See id.* (discussing implementation-related issues and concerns in the Work Programme).

175. *See id.* paras. 31-33 (agreeing to the commencement of new negotiations on several matters, none of which specifically address the precautionary principle).

176. *Id.* para. 32.

177. *See id.* (detailing the specific tasks charged to the Committee, none of which include the actual negotiations).

178. *Id.*



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measures.<sup>179</sup> To the contrary, in the portion of the Work Programme related to “Trade and Environment,” the Declaration provides that the outcome of the work of the Committee on Trade and Environment, as well as the new negotiations regarding specific MEA trade obligations and procedures for regular information exchange, “shall not add to or diminish the rights and obligations of members under existing WTO agreements, in particular the Agreement on the Application of Sanitary or Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.”<sup>180</sup>

### D. CONCLUSIONS

Any reference to clarification or strengthening of the precautionary principle was conspicuously absent from the General Doha Declaration.<sup>181</sup> In addition, the fact that the Declaration specifically provides for the maintenance of existing rights and obligations under the SPS Agreement ensures that the new round of negotiations will not weaken a framework that is already highly deferential to a precautionary approach to HSE measures.<sup>182</sup> In light of the observations made above, this arrangement can be seen as a restraint on the “race to the top” with regard to food safety standards in developed countries—a race which effectively blocks exports from developing countries.<sup>183</sup>

The restraint in modifying the current rules, the decisions to increase the capacities of developing countries, and the various

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179. *See generally id.* (failing to address any new negotiations relating to SPS measures).

180. *Id.* para. 32.

181. *See supra* notes 175-80 and accompanying text (discussing the absence of consideration of the precautionary principle in the Doha Declaration).

182. *See* Doha Declaration, *supra* note 6, para. 32 (ensuring that existing rights under the SPS Agreement are not altered).

183. *Cf.* TSUNEHIRO OTSUKI, JOHN S. WILSON & MIRVAT SEWADEH, A RACE TO THE TOP? A CASE STUDY OF FOOD SAFETY STANDARDS AND AFRICAN EXPORTS (Development Research Group, World Bank, Working Paper No. 2563, 2000) (quantifying the impact of particular food safety standards on food exports from developing countries).

guidelines to facilitate the access of developing countries' exports to developed country markets are hopeful indications that developing countries' concerns are being taken seriously as the new round begins. Of course, much remains to be seen as to how the decisions made at the Doha Ministerial are implemented in practice and addressed in the remainder of the new round. At the same time, the results of this Ministerial show the extent to which the developed countries are unable simply to impose their will in the current environment. The growing effectiveness of developing countries arguably reflects, first, their recognition that they have much to gain from the WTO Agreements and their active participation in the system, and second, their increasing ability to find common ground amongst themselves on key issues.

## CONCLUSION

The European Community has been particularly active in pushing for a greater endorsement of the precautionary principle in the WTO Agreements.<sup>184</sup> At the same time, it has recognized the need to meet "developing country concerns over unilateralism and eco-protectionism . . . with a view to preventing potential abuses."<sup>185</sup> While together these orientations could support a circumscribed set of negotiations that might clarify the existing rules, the perspective of the Main Doha Declaration appears to be that, for the moment, the risks of upsetting the delicate balance already achieved outweigh any need for further clarification.

The above analysis, which demonstrates that the WTO acquis already affords ample deference to a precautionary approach, supports this perspective. Under the existing rules, as interpreted and applied by the SAB, WTO Members have wide discretion to adopt measures for the protection of health, safety, or the environment on the basis of precaution, despite a lack of full scientific certainty concerning the risks that the measures in question target. As part of

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184. See generally *Precautionary Communication*, *supra* note 130 (discussing the EU's approach to greater endorsement of the precautionary principle).

185. *EU Approach*, *supra* note 155, at 14.

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the WTO acquis, the Appellate Body rulings on this matter create legitimate expectations for all WTO Members.<sup>186</sup>

Entering into the new round of WTO negotiations, developing countries have benefited both from the decision not to strengthen the deference given to a precautionary approach under the WTO rules, and from the decisions to improve implementation of the existing rules concerning SPS measures. In particular, the equivalence guidelines should aid developing countries' efforts to improve access for exports to the markets of developed countries.

Overall, the decisions made at the start of the new round of WTO negotiations reflect a general interest in ensuring that 1) government measures to reduce societal risks with regard to health, safety, or the environment deviate as little as possible from WTO rules, and 2) when such measures are justified, the disruption of trade flows is minimal. This approach appears to reflect a conviction that freer trade flows promote innovation and the development of new technologies, which in turn provide new capacities for dealing with risks to health and the environment.<sup>187</sup> Given their current disadvantage in terms of capacities, developing countries in particular should benefit from these freer trade flows. Developing countries' support of the Main Doha Declaration appears to confirm that they share this belief .

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186. See U.S. – Shrimp Appellate Body Report, *supra* note 34, paras. 108-09 (stating that previously adopted Appellate Body reports , just as adopted panel reports, create legitimate expectations among WTO members).

187. An issue exists whether freer trade leads to the creation of more serious risks than are created by technologies that improve the capacity to deal with risks. One approach is to say that technologies are developing anyway and freer international trade is merely allowing broader access. While this ignores a geographical containment aspect of risk management—by narrowing access, risks may be easier to manage—containment can be achieved in various ways and, in particular, in ways that avoid unnecessary, arbitrary, or unjustifiable restrictions on trade.

ANNEX A

BASIC ELEMENTS OF RISK ANALYSIS

A structured approach to the analysis of risk can be said to comprise three elements: risk assessment, risk management, and risk communication.<sup>188</sup>

The risk assessment element involves an evaluation of an existing risk exposure. To be complete, a risk assessment should not only identify and assess a degree of risk, but it should also identify measures already in place or being taken to reduce that risk, and evaluate both the remaining degree of risk and the degree of risk that would remain in the event various additional measures were applied, whether alternatively or cumulatively.<sup>189</sup> Thus, the risk assessment should provide data concerning both the current and probable future level of risk, with and without the application of additional measures.<sup>190</sup>

In the risk management phase, a decision is made on the basis of the risk assessment as to whether further measures must be taken to reduce net exposure. This requires a political judgment as to whether the remaining (net) level of risk (prior to the application of additional measures) is acceptable in the context of overall societal priorities and available resources. If further measures are deemed necessary, there is then a further decision—to the extent there is a choice—about which additional measures to take.<sup>191</sup>

This process is normally reviewed and repeated because circumstances change: risks develop; existing measures become inadequate or excessive over time; additional risk reduction measures become technically feasible; and the actor's priorities, resources, and acceptance of risks evolve.<sup>192</sup>

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188. See, e.g., *Precautionary Communication*, *supra* note 130, at 2 (stating the elements of a structured risk analysis). See also OECD Biotechnology Report, *supra* note 15.

189. See generally, WTO Committee on Sanitary and Phytosanitary Measures, *Summary Report on the SPS Risk Analysis Workshop*, G/SPS/GEN/209, at 3-5 (Nov. 3, 2000) (discussing the fundamentals of risk analysis).

190. See *id.*

191. See *id.* at 4 (detailing the steps taken after the risk assessment phase).

192. See *id.* (indicating that the process is often repeated).