1 ARTICLE 2

1.1 Text of Article 2

Article 2

Basic Rights and Obligations

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

2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

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).

1.2 Scope of Article 2 obligations

1. According to the Panel in *US – Poultry (China)*, the "overarching and encompassing" title of Article 2 being "Basic Rights and Obligations", leads to the conclusion that the obligations in Article 2 inform all of the SPS Agreement.[1]

1.3 Article 2.1

2. In *India – Agricultural Products*, the Appellate Body dealt with the question of whether more specific provisions of the SPS Agreement could limit the scope of application of more general provisions. In that context, the Appellate Body held that "[a]s a general matter … Article 2.1 of the

[1] Panel Report, *US – Poultry (China)*, para. 7.142.

SPS Agreement … makes explicit the principle that Member must ensure that their SPS measures comply with all of the obligations set out in all such provisions."[2] At the same, the Appellate Body admitted that "some provisions of the SPS Agreement themselves identify circumstances in which the obligations that they prescribe do not apply."[3]

3. The Panel in *Costa Rica – Avocados (Mexico)* made consequential findings of violation of Article 2.1, based on its findings of violation of the obligations set forth in Articles 2.2, 5.1, 5.2, 5.3, and 5.5 of the SPS Agreement.[4]

1.4 Article 2.2

1.4.1 The elements of Article 2.2

4. In *EC – Approval and Marketing of Biotech Products*, the Panel listed the requirements within Article 2.2 of the SPS Agreement:

> "It is apparent from the text of Article 2.2 that this provision contains three separate requirements: (i) the requirement that SPS measures be applied only to the extent necessary to protect human, animal or plant life or health; (ii) the requirement that SPS measures be based on scientific principles; and (iii) the requirement that SPS measures not be maintained without sufficient scientific evidence."[5]

1.4.2 The requirement that SPS measures not be maintained without sufficient scientific evidence

1.4.2.1 General

5. The Panel in *US – Poultry (China)* was of the view that to maintain a measure with sufficient scientific evidence, the scientific evidence must bear a rational relationship to the measure, be sufficient to demonstrate the extent of the risk which the measure is supposed to address, and be of the kind necessary for a risk assessment.[6]

6. In *EC – Hormones*, as part of its determination of the link between the precautionary principle and the SPS Agreement, the Appellate Body noted that Member's precautionary approach is one element that a panel should bear in mind when appraising the scientific basis underlying their SPS measures:

> "[A] Panel charged with determining, for instance, whether 'sufficient scientific evidence' exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and 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."[7]

1.4.2.2 Rationale for the requirement of sufficient evidence

7. In *EC – Hormones*, the Appellate Body considered the purpose of the requirement of "sufficient scientific evidence", which with other provisions of the SPS Agreement enables the balance between promotion of international trade and protection of human life and health within the Agreement:

> "The requirements of a risk assessment under Article 5.1, as well as of 'sufficient scientific evidence' under Article 2.2, are essential for the maintenance of the delicate and carefully negotiated balance in the *SPS Agreement* between the shared, but

[2] Appellate Body Report, *India – Agricultural Products*, para. 5.21.
[3] Appellate Body Report, *India – Agricultural Products*, para. 5.21.
[4] Panel Report, *Costa Rica – Avocados (Mexico)*, para. 7.2304. See also Panel Report, *Panama – Import Measures (Costa Rica)*, paras. 7.431, 7.871, 7.1177, and 7.1378.
[5] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1424.
[6] Panel Report, *US – Poultry (China)*, para. 7.200.
[7] Appellate Body Report, *EC – Hormones*, para. 124.

> sometimes competing, interests of promoting international trade and of protecting the life and health of human beings."[8]

1.4.2.3 "Sufficient"

1.4.2.3.1 Meaning

8. In *Japan – Agricultural Products II*, with respect to the term "sufficient" in Article 2.2, the Appellate Body required an adequate relationship between the SPS measure and the scientific evidence:

> "The ordinary meaning of 'sufficient' is 'of a quantity, extent, or scope adequate to a certain purpose or object'. From this, we can conclude that 'sufficiency' is a relational concept. 'Sufficiency' requires the existence of a sufficient or adequate relationship between two elements, *in casu,* between the SPS measure and the scientific evidence."[9]

9. In *Japan – Apples (Article 21.5 – US)*, the Panel found that for scientific evidence to support a measure sufficiently, it must also demonstrate the existence of the risk which the measure is supposed to address:

> "[I]n order for scientific evidence to support a measure sufficiently, it seems logical to us that such scientific evidence must also be sufficient to demonstrate the existence of the risk which the measure is supposed to address. As a result, it seems reasonable to consider the extent of the relationship between the scientific evidence and the risk which this evidence is claimed to establish."[10]

1.4.2.3.2 Context

10. The Appellate Body in *Japan – Agricultural Products II* stated that "[t]he context of the word 'sufficient' or, more generally, the phrase 'maintained without sufficient scientific evidence' in Article 2.2, includes Article 5.1 as well as Articles 3.3 and 5.7 of the SPS Agreement".[11]

1.4.2.3.3 Insufficiency threshold

11. After an examination of the context of the term "sufficient", the Appellate Body in *Japan – Agricultural Products II* disagreed with Japan on the notion of a standard of "patent insufficiency":

> "We do not agree with Japan's proposition that direct application of Article 2.2 of the *SPS Agreement* should be limited to situations in which the scientific evidence is 'patently' insufficient, and that the issue raised in this dispute should have been dealt with under Article 5.1 of the *SPS Agreement*. There is nothing in the text of either Articles 2.2 or 5.1, or any other provision of the *SPS Agreement*, that requires or sanctions such limitation of the scope of Article 2.2."[12]

1.4.2.4 "scientific evidence"

12. The Panel in *Japan – Apples* looked into the meaning of "scientific evidence" and discussed the significance of the nature of the evidence that ought to be considered when a Member is making a determination of what measure to put in place:

> "We consider that … we must give full meaning to the term 'scientific' and conclude that, in the context of Article 2.2, the evidence to be considered should be evidence gathered through scientific methods, excluding by the same token information not acquired through a scientific method. We further note that scientific evidence may

[8] Appellate Body Report, *EC – Hormones*, para. 177.
[9] Appellate Body Report, *Japan – Agricultural Products II*, para. 73.
[10] Panel Report, *Japan – Apples (Article 21.5 – US)*, para. 8.45.
[11] Appellate Body Report, *Japan – Agricultural Products II*, para. 74.
[12] Appellate Body Report, *Japan – Agricultural Products II*, para. 82.

> include evidence that a particular risk may occur … as well as evidence that a particular requirement may reduce or eliminate that risk[.]
>
> Likewise, the use of the term 'evidence' must also be given full significance. Negotiators could have used the term 'information', as in Article 5.7, if they considered that any material could be used. By using the term 'scientific evidence', Article 2.2 excludes in essence not only insufficiently substantiated information, but also such things as a non-demonstrated hypothesis.
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> …
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> [R]equiring 'scientific evidence' does not limit the field of scientific evidence available to Members to support their measures. 'Direct' or 'indirect' evidence may be equally considered. The only difference is not one of scientific quality, but one of probative value within the legal meaning of the term, since it is obvious that evidence which does not directly prove a fact might not have as much weight as evidence directly proving it, if it is available."[13]

1.4.2.5 A rational and objective relationship between the SPS measure and the scientific evidence

13. The Appellate Body in *Japan – Agricultural Products II* established that Article 2.2 requires a rational or objective relationship between the SPS measure and the scientific evidence, a relationship that is to be determined in a case-by-case basis:

> "[W]e agree with the Panel that the obligation in Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence requires that there be a rational or objective relationship between the SPS measure and the scientific evidence. Whether there is a rational relationship between an SPS measure and the scientific evidence is to be determined on a case-by-case basis and will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence."[14]

14. In a finding upheld by the Appellate Body, the Panel, in *Japan – Apples*, considered that all the individual requirements contained in the measure should be treated cumulatively as the phytosanitary measure at issue in the case. On this basis, the Panel held that a measure as a whole should be considered to be maintained 'without sufficient scientific evidence' if one or more of its elements are not justified by the relevant scientific evidence addressing the risk at issue.[15]

15. The Appellate Body held in *India – Agricultural Products* that assessing whether a rational and objective relationship exists between the SPS measure and the scientific evidence involves "an inquiry into evidence adduced by the parties regarding the particular risks that such measure is said to protect against, and to whom the risk is posed (e.g. humans, animals, plants and/or the environment."[16]

16. The Appellate Body further relied on the reference in Article 2.2 to Article 5.7 and the term "a more objective assessment of risk" contained therein in emphasizing the need to analyse the relevant risks addressed by the measure in assessing its consistency with Article 2.2.[17]

1.4.3 Burden of proof on sufficiency of the evidence

1.4.3.1 General rule on allocation of burden of proof

17. In *Japan – Agricultural Products II*, the Appellate Body emphasized that in proceedings under the SPS Agreement, the general rules on burden of proof which were outlined in *EC – Hormones* need to be followed:

[13] Panel Report, *Japan – Apples*, paras. 8.92-8.93, and 8.98.
[14] Appellate Body Report, *Japan – Agricultural Products II*, para. 84.
[15] Panel Report, *Japan – Apples*, paras. 8.179, 8.180, 8.182, and 8.198.
[16] Appellate Body Report, *India – Agricultural Products*, para. 5.27.
[17] Appellate Body Report, *India – Agricultural Products*, para. 5.27.

> "With regard to the rules on burden of proof in proceedings under the *SPS Agreement*, we noted in our Report in *European Communities – Hormones*, that the Panel in that case appropriately described the issue of the burden of proof as one of particular importance, in view of the multiple and complex issues of fact which may arise in disputes under that Agreement. Furthermore, as we noted in *European Communities – Hormones*, the rules on burden of proof are rules 'applicable in any adversarial proceedings'. We, therefore, agreed with the Panel in that case that in proceedings under the *SPS Agreement*:
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> > The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency."[18]

18. On the allocation of burden of proof, the Appellate Body in *Japan – Apples* said that although the complaining party bears the burden of proving its case, the responding party is responsible for proving the case it seeks to make in response:

> "In this case, the United States seeks a finding that Japan's measure is inconsistent with Article 2.2 of the *SPS Agreement*. Therefore, the initial burden lies with the United States to establish a *prima facie* case that the measure is inconsistent with Article 2.2. … Following the Appellate Body's ruling in *EC – Hormones*, if this *prima facie* case is made, it would be for Japan to counter or refute the claim that the measure is 'maintained without sufficient scientific evidence'.
>
> That said, the Appellate Body's statement in *EC – Hormones* does not imply that the complaining party is responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent with a given provision of a covered agreement. In other words, although the complaining party bears the burden of proving its case, the responding party must prove the case it seeks to make in response. In *US – Wool Shirts and Blouses*, the Appellate Body stated:
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> > *'… the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof.*"[19]

1.4.3.2 Presumption of "no relevant studies or report"

19. The Panel in *Japan – Agricultural Products II* had limited its finding of violation of Article 2.2 to only four of the eight products at issue on the grounds that, in respect of the other four products, the United States had not adduced sufficient evidence to raise a prima facie case.[20] The Appellate Body agreed with the Panel and found that it would be sufficient for the complainant to raise a presumption that no relevant scientific studies or reports exist:

> "[W]e disagree with the United States that the Panel imposed on the United States an impossible and, therefore, erroneous burden of proof by requiring it to prove a negative, namely, that there are no relevant studies and reports which support Japan's varietal testing requirement. In our view, it would have been sufficient for the United States to raise a presumption that there are no relevant studies or reports. Raising a presumption that there are no relevant studies or reports is not an impossible burden. The United States could have requested Japan, pursuant to Article 5.8 of the *SPS Agreement*, to provide 'an explanation of the reasons' for its varietal testing requirement, in particular, as it applies to apricots, pears, plums and quince. Japan would, in that case, be obliged to provide such explanation. The failure of Japan to bring forward scientific studies or reports in support of its varietal testing requirement as it applies to apricots, pears, plums and quince, would have been a

[18] Appellate Body Report, *Japan – Agricultural Products II*, para. 122.
[19] Appellate Body Report, *Japan – Apples*, para. 153.
[20] See Panel Report, *Japan – Agricultural Products II*, para. 8.6.

> strong indication that there are no such studies or reports. The United States could also have asked the Panel's experts specific questions as to the existence of relevant scientific studies or reports or it could have submitted to the Panel the opinion of experts consulted by it on this issue. The United States, however, did not submit any evidence relating to apricots, pears, plums and quince."[21]

1.4.3.3 Burden of proof determined by the scope of a claim

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

> "Japan … submits that, 'in order to establish a *prima facie* case of insufficient scientific evidence under Article 2.2 of the *SPS Agreement*, the complaining party must establish that there is not sufficient evidence for *any* of the perceived risks underlying the measure.' … We find no basis for the approach advocated by Japan. … In the present case, the Panel appears to have concluded that in order to demonstrate a *prima facie* case that Japan's measure is maintained without sufficient scientific evidence, it sufficed for the United States to address only the question of whether mature, symptomless apples could serve as a pathway for fire blight.
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> The Panel's conclusion seems appropriate to us for the following reasons. First, the claim pursued by the United States was that Japan's measure is maintained without sufficient scientific evidence to the extent that it applies to mature, symptomless apples exported from the United States to Japan. What is required to demonstrate a *prima facie* case is necessarily influenced by the nature and the scope of the claim pursued by the complainant. A complainant should not be required to prove a claim it does not seek to make. Secondly, the Panel found that mature, symptomless apple fruit is the commodity 'normally exported' by the United States to Japan. The Panel indicated that the risk that apples fruit other than mature, symptomless apples may actually be imported into Japan would seem to arise primarily as a result of human or technical error, or illegal actions, and noted that the experts characterized errors of handling and illegal actions as 'small' or 'debatable' risks. Given the characterization of these risks, in our opinion it was legitimate for the Panel to consider that the United States could demonstrate a *prima facie* case of inconsistency with Article 2.2 of the *SPS Agreement* through argument based solely on mature, symptomless apples. Thirdly, the record contains no evidence to suggest that apples other than mature, symptomless ones have ever been exported to Japan from the United States as a result of errors of handling or illegal actions."[22]

1.4.3.4 Burden of proof for both Articles 2.2 and 5.7

21. In *EC – Approval and Marketing of Biotech Products*, the Panel made it clear that the burden of proof under Article 2.2 needs to be allocated in consideration of provisions under Article 5.7 of the SPS Agreement, given that Article 5.7 is a qualified right and not an exception to Article 2.2:

> "According to the Appellate Body's statement in *EC – Tariff Preferences*, in cases where the permissive provision constitutes a right rather than an exception, 'the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour'. And in *EC – Sardines*, the Appellate Body observed that '[i]n *EC – Hormones*, we found that a 'general rule-exception' relationship between Articles 3.1 and 3.3 of the *SPS Agreement* does not exist, with the consequence that the complainant had to establish a case of inconsistency with *both* Articles 3.1 and 3.3'. We deduce from these two statements that in cases where a complaining party alleges that an SPS measure is inconsistent with the obligation in Article 2.2 not to maintain SPS measures without sufficient scientific evidence, it is incumbent on the complaining party, and not the responding party, to demonstrate that the challenged SPS measure is inconsistent with at least

[21] Appellate Body Report, *Japan – Agricultural Products II*, para. 137.
[22] Appellate Body Report, *Japan – Apples*, paras. 159-160.

> one of the four requirements set forth in Article 5.7. If such non-compliance is demonstrated, then, and only then, does the relevant obligation in Article 2.2 apply to the challenged SPS measure.
>
> Our view of the nature of the relationship between Article 2.2 and Article 5.7 and of the proper allocation of the burden of proof under these provisions is consistent with that of the Panel in *Japan – Agricultural Products II*. In that case, the United States as the complaining party claimed that the challenged measure was inconsistent, *inter alia*, with the obligation in Article 2.2 not to maintain SPS measures without sufficient scientific evidence. After reaching the provisional conclusion that the challenged measure was inconsistent with Article 2.2, the Panel noted that Japan, the responding party, was invoking Article 5.7 in support of its measure. Recalling the text of Article 2.2, and notably the clause 'except as provided for in paragraph 7 of Article 5', the Panel then stated that in view of Japan's invocation of Article 5.7 it needed to examine whether the challenged measure was a measure meeting the requirements in Article 5.7. The Panel noted that '[i]f the [challenged measure] meets these requirements, we cannot find that it violates Article 2.2'. The Panel then went on to analyse the measure in the light of the requirements of Article 5.7, finding that 'the United States [as the complaining party] has established a presumption that Japan did not comply with the requirements in the second sentence of Article 5.7. We also consider that Japan has not been able to rebut this presumption'. In the light of this finding, the Panel then reached the overall and final conclusion that the challenged measure was inconsistent with Article 2.2."[23]

1.4.4 Standard of review of a panel with respect to sufficiency of scientific evidence

22. With regard to a panel's review of sufficiency of evidence, the Appellate Body referred in *India – Agricultural Products* to its prior findings made under Article 5.1, and opined that:

> "[I]n scrutinizing the underlying scientific basis … the evidence presented must 'have the necessary scientific and methodological rigour to be considered reputable science.' Thus, 'while the correctness of the views need not have been accepted by the broader scientific community, the views must be considered to be legitimate science according to the standards of the relevant scientific community.'"[24]

23. In *India – Agricultural Products*, the Appellate Body criticised the Panel for not engaging with arguments and evidence provided by the respondent and failing to consider whether the respondent rebutted the presumption of inconsistency of measures with Article 2.2, following the finding of their inconsistency with Articles 5.1 and 5.2.[25]

1.4.4.1 Panel to take into account the prudence commonly exercised by governments

24. In *EC – Hormones*, the Appellate Body, while addressing the relationship between the precautionary principle and the SPS Agreement in the context of its analysis of whether a measure was maintained without sufficient scientific evidence, noted that a panel should take into account in its examination the prudence commonly exercised by governments in the event of irreversible risks:

> "[A] panel charged with determining, for instance, whether 'sufficient scientific evidence' exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and 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."[26]

[23] Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.2976-7.2977.
[24] Appellate Body Report, *India – Agricultural Products*, paras. 5.28.
[25] Appellate Body Report, *India – Agricultural Products*, paras. 5.36-5.40.
[26] Appellate Body Report, *EC – Hormones*, para. 124.

1.4.4.2 Panel not to conduct own risk assessment

25. The Panel in *Japan – Agricultural Products II* emphasized that in reviewing whether the measure at issue was being maintained without sufficient scientific evidence, it would not conduct its own risk assessment:

> "To determine whether or not the varietal testing requirement is maintained without sufficient scientific evidence … we need to refer to the opinions we received from the experts advising the Panel. We recall that these expert opinions are opinions on the evidence submitted by the parties. We are not empowered, nor are the experts advising the Panel, to conduct our own risk assessment."[27]

1.4.4.3 Panel to assess relevant allegations of fact

26. The Appellate Body in *Japan – Apples* found that the Panel acted within the limits of its investigative authority when the Panel assessed relevant allegations of fact asserted by Japan as the respondent:

> "Japan also contends that the Panel did not have the authority to make certain findings of fact and, in support of this contention, refers to the Appellate Body's statement in *Japan – Agricultural Products II*:
>
> > 'Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that Panels have a significant investigative authority. However, this authority cannot be used by a Panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it.'
>
> We disagree with Japan. We note first that we are not persuaded that the findings of the Panel, identified by Japan in relation to this argument, relate specifically to, or address apples other than mature, symptomless apples, as Japan seems to assume. Also, the Appellate Body's finding in *Japan – Agricultural Products II* does not support Japan's argument that the Panel was barred from making findings of fact in connection with apples other than mature, symptomless apples. Those findings were relevant to the claim pursued by the United States under Article 2.2 of the *SPS Agreement*, and were responsive to relevant allegations of fact advanced by Japan in the context of its rebuttal of the United States' claim. The Panel acted within the limits of its investigative authority because it did nothing more than assess relevant allegations of fact asserted by Japan, in the light of the evidence submitted by the parties and the opinions of the experts."[28]

1.4.4.4 Panel to take into account views of experts while evaluating scientific evidence

27. The Appellate Body in *Japan – Apples* held that the Panel was entitled to take into account the views of the experts in assessing whether the United States had established a *prima facie* case, recalling the similar approaches taken in other cases involving the evaluation of scientific evidence:

> "In order to assess whether the United States had established a *prima facie* case, the Panel was entitled to take into account the view of the experts. Indeed, in *India – Quantitative Restrictions,* the Appellate Body indicated that it may be useful for a Panel to consider the views of the experts it consults in order to determine whether a *prima facie* case has been made. Moreover, on several occasions, including disputes involving the evaluation of scientific evidence, the Appellate Body has stated that Panels enjoy discretion as the trier of facts; they enjoy 'a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence.' Requiring Panels, in their assessment of the evidence before them, to give precedence

[27] Panel Report, *Japan – Agricultural Products II*, para. 8.32. See also the Section on Article 5 of the SPS Agreement.
[28] Appellate Body Report, *Japan – Apples*, para. 158.

> to the importing Member's evaluation of scientific evidence and risk is not compatible with this well-established principle."[29]

1.4.4.5 Panel not obliged to give precedence to importing Member's approach to scientific evidence and risk

28. The Appellate Body in *Japan – Apples* held that a panel is not obliged to give precedence to the *importing* Member's approach to scientific evidence and risk over the views of the experts when analysing and assessing scientific evidence to determine whether a complainant established a prima facie case under Article 2.2. The panel's obligation is to carry out an objective assessment of facts.[30]

1.4.5 Relationship with other provisions of the SPS Agreement

1.4.5.1 Article 4

29. The Panel in *Japan – Apples* rejected Japan's argument that the Panel should consider Article 4 of the SPS Agreement in its assessment of Article 2.2:

> "[W]e agree that other provisions of the *SPS Agreement* are part of the context of Article 2.2, as recalled by the Appellate Body in *Japan – Agricultural Products II.* Article 4 deals with the specific question of the recognition of equivalence of measures. Unlike Article 3.3, 5.1 and 5.7, the purpose of Article 4 is clearly different from that of Article 2.2. We also note that the United States did not raise any claim under Article 4 and that this Article is not a defence against violations of other provisions of the *SPS Agreement*. As a result, we see no other reason to consider Japan's arguments regarding Article 4 in our assessment of Article 2.2, other than to the extent that Article 4 might form part of the relevant context in the interpretation of Article 2.2."[31]

1.4.5.2 Article 5

1.4.5.2.1 Article 5.1

30. In *EC – Hormones*, the Appellate Body stated that Articles 2.2 and 5.1 should "constantly be read together":

> "[T]he Panel considered that Article 5.1 may be viewed as a specific application of the basic obligations contained in Article 2.2 of the *SPS Agreement*[.]
>
> We agree with this general consideration and would also stress that Articles 2.2 and 5.1 should constantly be read together. Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1."[32]

31. In *Australia – Salmon*, the Appellate Body agreed with the Panel[33] that in the event an SPS measure is not based on a risk assessment, as required in Article 5.1, this measure can be presumed, more generally, not to be based on scientific principles or not to be maintained without

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[29] Appellate Body Report, *Japan – Apples*, para. 166.
[30] Appellate Body Report, *Japan – Apples*, paras. 165 and 167.
[31] Panel Report, *Japan – Apples*, para. 8.107.
[32] Appellate Body Report, *EC – Hormones*, para. 180.
[33] In *Australia – Salmon*, the Panel reiterated the statement made by the Appellate Body in *EC – Hormones* as regards the relationship between Articles 2.3 and 5.5, stating:
"[A]rticles 5.1 and 5.2 ... 'may be seen to be marking out and elaborating a particular route leading to the same destination set out in' Article 2.2. Indeed, in the event a sanitary measure is not based on a risk assessment as required in Articles 5.1 and 5.2, this measure can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence. We conclude, therefore, that if we find a violation of the more specific Article 5.1 or 5.2 such finding can be presumed to imply a violation of the more general provisions of Article 2.2. We do recognize, at the same time, that given the more general character of Article 2.2 not all violations of Article 2.2 are covered by Articles 5.1 and 5.2."
Panel Report, *Australia – Salmon*, para. 8.52.

sufficient scientific evidence within the meaning of Article 2.2. On that basis, the Appellate Body concluded that a violation of Article 5.1 also implied an inconsistency with Article 2.2.[34]

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

> "The Panel notes that the Complaining Parties' claim under Article 2.2 is in the nature of a consequential claim. The Complaining Parties submit that an inconsistency with Article 2.2 follows by implication from a demonstrated inconsistency with Article 5.1. However, we have determined above that Article 5.1 is not applicable to the product-specific measures as defined by the Complaining Parties and that, consequently, the European Communities has not acted inconsistently with its obligations under Article 5.1 in respect of the relevant product-specific measures. Since the European Communities has not acted inconsistently with Article 5.1, and since the Complaining Parties' claim under Article 2.2 is premised on the existence of a breach of Article 5.1 by the European Communities, the Complaining Parties' claim under Article 2.2 in our view cannot succeed."[35]

33. For the order of analysis, see the Section on Article 5 of the SPS Agreement.

1.4.5.2.2 Articles 5.1 and 5.2

34. In *Australia – Apples*, the Panel recognized that in past disputes, Panels and the Appellate Body have emphasized the relationship between Articles 2.2, 5.1 and 5.2. However, the Panel pointed out that the close link between the three provisions does not mean that they are identical provisions, as this would render at least one of the provisions redundant:

> "The close link between Articles 2.2, 5.1 and 5.2 of the SPS Agreement does not mean that these are identical provisions. Otherwise at least one of the provisions would be redundant. The Panel is aware in this respect that, as noted by the Appellate Body in *US – Gasoline*, under the general rule of interpretation contained in the Vienna Convention on the Law of Treaties, 'interpretation must give meaning and effect to all the terms of a treaty' and '[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.' With respect to the specific obligation that SPS measures are based on scientific principles, Article 2.2 directly focuses on the necessary link that must exist between the SPS measure and the scientific principles and evidence. Under Articles 5.1 and 5.2 of the SPS Agreement, such link is still necessary, but it is indirect as it rests on the requirement for a risk assessment. Any SPS measure must be based on a risk assessment, which, in turn, must be based on scientific evidence."[36]

35. The Panel in *US – Poultry (China)* agreed with the Panel's statements in *Australia – Apples* and clarified that "where an SPS measure is not based on a risk assessment as required in Articles 5.1 and 5.2 of the *SPS Agreement*, this measure is presumed not to be based on scientific principles and to be maintained without sufficient scientific evidence".[37]

36. In *India – Agricultural Products*, the Appellate Body confirmed the difference in the scope of application of Article 2.2 on the one hand and Articles 5.1 and 5.2 on the other hand. The Appellate Body found that:

> "[T]he terms used in Article 2.2 and Articles 5.1 and 5.2 are not identical, and that, therefore, their respective scopes may not be entirely coextensive. This in turn suggests that, although it may give rise to a *presumption of inconsistency* with

[34] Appellate Body Report, *Australia – Salmon*, para. 138. See also Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3396.
[35] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1757
[36] Panel Report, *Australia – Apples*, para. 7.214.
[37] Panel Report, *US – Poultry (China)*, para. 7.201. See also Panel Report, *Panama – Import Measures (Costa Rica)*, paras. 7.321, 7.404, 7.858.

> Article 2.2, a finding of a violation of Articles 5.1 and 5.2 might not *invariably* lead to a finding of inconsistency with Article 2.2."[38]

37. The Appellate Body did not exclude that, in certain circumstances, an SPS measure violating Articles 5.1 and 5.2 will not be inconsistent with Article 2.2. The Appellate Body concluded on that basis that a presumption of violation of Article 2.2 arising from a finding of inconsistency with Articles 5.1 and 5.2 can be rebutted.[39]

38. In *Russia – Pigs (EU)*, the Panel noted the differences between Article 2.2 on the one hand and Articles 5.1 and 5.2 on the other hand:

> "In its relevant part, Article 2.2 refers to scientific principles and sufficient scientific evidence. With respect to the specific obligation that SPS measures be based on scientific principles and not maintained without sufficient scientific evidence, Article 2.2 directly focuses on the necessary link that must exist between the SPS measure and the scientific principles and evidence, while Articles 5.1 and 5.2 concern the assessment of risk. Under Articles 5.1 and 5.2, such link is still necessary, but it rests on the requirement for a risk assessment."[40]

39. The Panel found that Russia's measure was not based on pertinent available information under Article 5.7 and that the measure was based neither on scientific principles, nor maintained with sufficient scientific evidence. In the absence of any arguments raised by Russia to rebut the presumption of inconsistency, the Panel concluded that the measure was also inconsistent with Article 2.2.[41]

40. The Panel in *Costa Rica – Avocados (Mexico)*, having found violations of Article 5.2, also found a violation of the obligation in Article 2.2 "because of the flaws relating to the scientific basis and the risk analyst's reasoning, which mean it cannot be concluded that there is a rational or objective relationship between the SPS measure and the scientific evidence for the purposes of Article 2.2."[42]

1.4.5.2.3 Articles 5.4 and 5.6

41. On the relationship between Articles 5.4 to 5.6 and Article 2.2, the Panel in *EC – Hormones* noted:

> "Articles 5.4 to 5.6 may be viewed as specific applications of the basic obligations provided for in Article 2.2 which, *inter alia*, states that 'Members shall ensure that any sanitary or phytosanitary measure is *applied only to the extent necessary to protect* human, animal or plant life or health' (emphasis added) and Article 2.3 which provides that 'Members shall ensure that their sanitary and phytosanitary measures do *not arbitrarily or unjustifiably discriminate between Members* where identical or similar conditions prevail …' and that 'Sanitary and phytosanitary measures *shall not be applied in a manner which would constitute a disguised restriction* on international trade' (emphasis added)."[43]

42. While not making a finding in that regard, the Appellate Body did not exclude in *Australia – Salmon* that a violation of Article 5.6 could result in a violation of Article 2.2:

> "The establishment or maintenance of an SPS measure which implies or reflects a higher level of protection than the appropriate level of protection determined by an

[38] Appellate Body Report, *India – Agricultural Products*, para. 5.24.
[39] Appellate Body Report, *India – Agricultural Products*, para. 5.24. See also Panel Report, *Costa Rica – Avocados (Mexico)*, para. 7.368.
[40] Panel Report, *Russia – Pigs (EU)*, para. 7.624.
[41] Panel Report, *Russia – Pigs (EU)*, para. 7.718.
[42] Panel Report, *Costa Rica – Avocados (Mexico)*, para. 7.1734.
[43] Panel Reports, *EC – Hormones (Canada)*, para. 8.99 and *EC – Hormones (US)*, para. 8.96.

> importing Member, could constitute a violation of the necessity requirement of Article 2.2."[44]

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

> "[W]e should also be careful not to confuse the requirement that a measure is not maintained without sufficient scientific evidence with the requirement of Article 5.6 of the *SPS Agreement* that the measure is 'not more trade-restrictive than required to achieve [Japan's] appropriate level of … phytosanitary protection'. In other words, while we might find that some specific requirements of the measure at issue are not supported by sufficient scientific evidence, our findings should be limited to Article 2.2."[45]

44. In *Australia – Apples*, the Appellate Body further explained that the kind of relationship that exists between Article 2.2 and Article 5.1 also exists between Article 2.2 and Article 5.2 and between Article 2.2 and Article 5.6. With regard to the latter two provisions, the Appellate Body pointed to "the similarities between the requirement in Article 2.2 that Members apply their SPS measures 'only to the extent necessary to protect', and the requirement in Article 5.6 that SPS measures be 'no more trade-restrictive than required to achieve' the relevant objectives".[46]

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

> "Articles 2.2 and 5.6 should constantly be read together, and that the basic concept in Article 2.2 imparts meaning to Article 5.6. Moreover, a finding that a Member has enacted a measure that reflects a higher level of protection than that Member's ALOP may imply a violation of Article 2.2."[47]

46. In that case, the Panel considered the extent to which the notion of "necessity" in Article 2.2 may be understood in light of the content of the more specific obligation in Article 5.6. Having analysed the meaning of the term "necessity" as used in the provisions of various covered agreements, the Panel found that the fact that:

> "[T]he elements of Article 5.6 so closely resemble the elements of 'necessity' indicates to the Panel that the specific obligation in Article 5.6 elaborates on the notion of 'necessity' in the SPS Agreement and therefore on the more general obligation in Article 2.2 in the manner suggested by the Appellate Body in *Australia – Apples*."[48]

47. On that basis, and taking into account that Article 2.2 is made operative in the specific obligations in Article 5 and that Article 2.2 and Article 5.6 should be constantly read together, the Panel concluded that:

> "[A] finding that a measure is inconsistent with Article 5.6 may lead to a presumption that the same measure is inconsistent with the obligation in Article 2.2 to ensure that an SPS measure is applied only to the extent necessary to protect human, animal or plant life or health."[49]

1.4.5.2.4 Article 5.7

48. The Panel in *Japan – Agricultural Products II* stated that a measure consistent with Article 5.7 cannot be found inconsistent with Article 2.2:

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[44] Appellate Body Report, *Australia – Salmon*, fn 166.
[45] Panel Report, *Japan – Apples*, para. 8.78.
[46] Appellate Body Report, *Australia – Apples*, para. 339.
[47] Panel Report, *India – Agricultural Products*, para. 7.603.
[48] Panel Report, *India – Agricultural Products*, para. 7.613.
[49] Panel Report, *India – Agricultural Products*, para. 7.614. See also, Panel Reports, *Russia – Pigs (EU)*, paras. 7.841-7.842; *Panama – Import Measures (Costa Rica)*, paras. 7.403, 7.857, 7.1156, and 7.1357.

> "[B]efore we can find… whether or not Article 2.2 is violated in this dispute – we recall that Article 2.2 provides that 'Members shall ensure that any … phytosanitary measure … is not maintained without sufficient scientific evidence, *except as provided for in paragraph 7 of Article 5*' (emphasis added). We note that Japan invokes Article 5.7 in support of its varietal testing requirement. We therefore need to examine next whether the varietal testing requirement is a measure meeting the requirements in Article 5.7. If the varietal testing requirement meets these requirements, we cannot find that it violates Article 2.2."[50]

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

> "[I]t is clear that Article 5.7 of the *SPS Agreement,* to which Article 2.2 explicitly refers, is part of the context of the latter provision and should be considered in the interpretation of the obligation not to maintain an SPS measure without sufficient scientific evidence. Article 5.7 allows Members to adopt provisional SPS measures '[i]n cases where relevant scientific evidence is insufficient' and certain other requirements are fulfilled. Article 5.7 operates as a *qualified* exemption from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence. An overly broad and flexible interpretation of that obligation would render Article 5.7 meaningless."[51]

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

> "Evaluating the relationship between Article 2.2 and Article 5.7 in the light of the general test provided by the Appellate Body in *EC – Tariff Preferences*, we consider that the relationship in question is one where 'one provision [Article 5.7] permits, in certain circumstances, behaviour [namely, the provisional adoption of SPS measures in cases where scientific evidence is insufficient on the basis of available pertinent information] that would otherwise be inconsistent with an obligation in another provision [namely, the obligation in Article 2.2 not to maintain SPS measure without sufficient scientific evidence], [where] one of the two provisions [namely, Article 2.2] refers to the other provision, [and] where one of the provisions [namely, Article 2.2, and in particular the clause 'except as provided for in paragraph 7 of Article 5'] suggests that the obligation [in Article 2.2 not to maintain SPS measure without sufficient scientific evidence] is not applicable to measures falling within the scope of Article 5.7.
>
> Thus, we find the general test provided by the Appellate Body in *EC – Tariff Preferences* to be applicable, and application of that test leads us to the conclusion that Article 5.7 should be characterized as a right and not an exception from a general

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[50] Panel Reports, *Japan – Agricultural Products II*, para. 8.48; and *Japan – Apples*, para. 8.200. The Panel in *Japan – Apples* also followed the approach set by the Panel on *Japan – Agricultural Products II* and refrained from making final findings with respect to the consistency of the measure at issue with Article 2.2 until the Panel had completed its analysis under Article 5.7. The Panel further stated that the only situation where it would not need to address Article 5.7 after the examination of the Article 2.2 claim would be if the measure was found to be "not maintained without sufficient scientific evidence" within the meaning of Article 2.2:

> [W]e believe it appropriate to follow, in this case too, the approach of the Panel in *Japan – Agricultural Products II*. There is only one situation where it may not be necessary to address Article 5.7. This is if we find that the measure or measures as a whole is/are 'not maintained without sufficient scientific evidence' within the meaning of Article 2.2. If we were to find, however, that part or all of the measure or measures at issue is/are maintained without sufficient scientific evidence, we would suspend our final conclusion on the consistency of the measure(s) at issue with that provision until we have completed our examination under Article 5.7 of the *SPS Agreement*.
>
> Panel Report, *Japan – Agricultural Products II*, para. 8.4.

[51] Appellate Body Report, *Japan – Agricultural Products II*, para. 80.

> obligation under Article 2.2. In other words, we consider that in the same way that 'Article 3.1 of the SPS Agreement … excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement', Article 2.2 excludes from its scope of application the kinds of situations covered by Article 5.7."[52]

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

> "In concrete terms, characterizing Article 5.7 as a qualified right rather than an exception means that if a challenged SPS measure was adopted and is maintained consistently with the four cumulative requirements of Article 5.7, the situation is 'as provided for in paragraph 7 of Article 5' (Article 2.2), and the obligation in Article 2.2 not to maintain SPS measures without sufficient scientific evidence is not applicable to the challenged measure. Conversely, if a challenged SPS measure is not consistent with one of the four requirements of Article 5.7, the situation is not 'as provided for in paragraph 7 of Article 5' (Article 2.2), and the relevant obligation in Article 2.2 is applicable to the challenged measure, provided there are no other elements which render Article 2.2 inapplicable."[53]

52. The Panel in *EC – Approval and Marketing of Biotech Products* rejected an argument put forth by the European Communities that, if a Panel found an SPS measure to be inconsistent with Article 5.7, it should find a violation of Article 5.7 alone and not find that the obligations of Article 2.2 are applicable to the measure:

> "To say, as the Appellate Body did, that a measure is 'inconsistent' with Article 5.7 when the relevant requirements are not satisfied is not tantamount to saying that Article 2.2 is inapplicable to that measure. Indeed, as we have pointed out, the Appellate Body in *Japan – Agricultural Products II* also stated that Article 5.7 operates as a qualified exemption from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence. Moreover, the ordinary meaning of the clause 'except as provided for in paragraph 7 of Article 5' in Article 2.2 indicates that Article 2.2 would be applicable in a situation where a measure meets some, but not all, of the requirements of Article 5.7."[54]

1.4.5.2.5 Articles 5.1 and 5.7

53. In *US/Canada – Continued Suspension*, the Appellate Body addressed the relationship between Articles 2.2, 5.1 and 5.7. The Appellate Body emphasized the requirement common to these articles, that the application of one or another provision depends on the availability of sufficient scientific evidence:

> "Under Article 2.2 of the *SPS Agreement*, WTO Members are required to 'ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.' This requirement is made operative in other provisions of the *SPS Agreement*, including Article 5.1, which requires SPS measures to be 'based on' a risk assessment. At the same time, Article 2.2 excludes from its scope of application situations in which the relevant scientific evidence is insufficient. In such situations, the applicable provision is Article 5.7 of the *SPS Agreement*. Thus, the applicability of Articles 2.2 and 5.1, on the one hand, and of Article 5.7, on the other hand, will depend on the sufficiency of the scientific evidence. The Appellate Body has explained that the relevant scientific evidence will be considered 'insufficient' for purposes of Article 5.7 'if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the *SPS Agreement*.' This

[52] Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.2968-7.2969.
[53] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.2974.
[54] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.2975.

> means that where the relevant scientific evidence is sufficient to perform a risk assessment, as defined in Annex A of the *SPS Agreement*, a WTO Member may take an SPS measure only if it is 'based on' a risk assessment in accordance with Article 5.1 and that SPS measure is also subject to the obligations in Article 2.2. If the relevant scientific evidence is insufficient to perform a risk assessment, a WTO Member may take a provisional SPS measure on the basis provided in Article 5.7, but that Member must meet the obligations set out in that provision."[55]

1.5 Article 2.3

1.5.1 General

54. In *India – Agricultural Products*, the Panel explained that Article 2.3 contains two primary obligations:

> "The first obligation is contained in the first sentence: 'Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members'. The second obligation is contained in the second sentence: 'Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade'."[56]

55. The Panel in *US – Poultry (China)* stated that Article 2.3 applies to both substantive and procedural aspects of SPS measures:

> "The text of Article 2.3 obliges Members to ensure non-discrimination in 'their SPS measures' without making any distinction between possible types of SPS measures. Given that it embodies a non-discrimination obligation, the Panel sees no reason to conclude that Article 2.3 of the *SPS Agreement* would be inapplicable to procedural requirements as the United States argues. Indeed, both 'substantive' SPS measures as well as procedural and information requirements can be applied in a manner which arbitrarily or unjustifiably discriminates between Members or constitutes a disguised restriction on international trade. We do not see why such arbitrary or unjustifiable discrimination or disguised restrictions on trade would be prohibited for one type of SPS measure and yet allowed for another. The broad wording of Article 2.3 of the *SPS Agreement* and the nature of the obligations it contains is bound to be applicable to all SPS measures. Because we have found that Section 727 is an SPS measure, regardless of whether it relates to equivalence, we conclude that the disciplines of Article 2.3 apply to Section 727 and China may pursue a claim on this basis."[57]

1.5.2 No arbitrary or unjustifiable discrimination

1.5.2.1 Elements of violation

56. The Panel in *Australia – Salmon (Article 21.5 – Canada)* identified three elements necessary to find a violation of the first sentence of Article 2.3:

> "[T]hree elements, cumulative in nature, are required for a violation of this provision:
>
> > (1) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member;
> >
> > (2) the discrimination is arbitrary or unjustifiable; and

[55] Appellate Body Reports, *US/Canada – Continued Suspension,* para. 674.
[56] Panel Report, *India – Agricultural Products*, para. 7.388.
[57] Panel Report, *US – Poultry (China)*, para. 7.147. See also Panel Report, *Panama – Import Measures (Costa Rica)*, para. 7.550.

> (3) identical or similar conditions prevail in the territory of the Members compared."[58]

57. The Appellate Body further noted in *India – Agricultural Products* that "the three elements identified in the first sentence of Article 2.3 inform each other, such that the analysis of each element cannot be undertaken in strict isolation from the analysis of the other two elements."[59] With respect to the order of analysis of the three elements of violation, the Appellate Body found that:

> "While a sequential analysis of distinct elements may provide a useful framework within which to scrutinize a particular measure's conformity with the first sentence of Article 2.3, the use of such a framework does not, in itself, alter the content of the examination required or affect the overall burden of proof that is borne by a complainant under that provision. Indeed, the analytical approach adopted by a panel may vary as a function of, *inter alia*, the measure at issue, the nature of the alleged discrimination, and the particular circumstances of a case. We observe, in this connection, that the text of Article 2.3, first sentence, does not appear to mandate the particular order of analysing the requirements thereunder that was followed by the Panel in this dispute. Indeed, it seems to us that, logically, identifying the relevant conditions, and assessing whether they are identical or similar, will often provide a good starting point for an analysis under Article 2.3, first sentence."[60]

1.5.2.2 Burden of proof

58. The Appellate Body in *India – Agricultural Products* found that the burden of demonstrating a *prima facie* case of inconsistency with Article 2.3, first sentence, rests on the complainant raising such a claim. In that regard, the Appellate Body distinguished between Article XX of the GATT 1994 and Article 2.3, first sentence, which "sets out an obligation and is not expressed in the form of an exception."[61]

1.5.2.3 Scope of discrimination

59. While the Panel found no violation of Article 2.3 in *Australia – Salmon (Article 21.5 – Canada)*[62], it also stated that Article 2.3 prohibits not only discrimination between similar products, but also between different products:

> [W]e are of the view that discrimination in the sense of Article 2.3, first sentence, may also include discrimination between *different* products, e.g. not only discrimination between Canadian salmon and New Zealand salmon, or Canadian salmon and Australian salmon; but also discrimination between Canadian salmon and Australian fish including non-salmonids.[63]

1.5.2.4 Article XX of the GATT 1994 as context

60. With regard to the formulation of the legal test in Article 2.3, the Appellate Body opined in *Australia – Salmon* that the provision "takes up obligations similar to those arising under Article I:1 and Article III:4 of the GATT 1994 and incorporates part of the 'chapeau' to Article XX of the GATT 1994. Its fundamental importance in the context of the SPS Agreement is reflected in the first paragraph of the preamble of the SPS Agreement."[64]

61. In a similar vein, the Panel in *US – Animals* considered that, in the light of the language of the last recital of the Preamble of the SPS Agreement, in particular the reference to Article XX(b)

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[58] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111. See also Panel Reports, *India – Agricultural Products*, para. 7.389; *US – Animals*, para. 7.571; and *Russia – Pigs (EU)*, para. 7.1297.
[59] Appellate Body Report, *India – Agricultural Products*, para. 5.261.
[60] Appellate Body Report, *India – Agricultural Products*, para. 5.261.
[61] Appellate Body Report, *India – Agricultural Products*, para. 5.260. See also Appellate Body Report, *Korea – Radionuclides*, para. 5.58.
[62] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.113-7.114.
[63] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.112.
[64] Appellate Body Report, *Australia – Salmon*, para. 251.

of the GATT 1994, the chapeau of Article XX provides useful context for the interpretation of the terms of Article 2.3.[65]

1.5.2.5 The measure discriminates

62. The Panel in *US – Poultry (China)* found that discrimination under Article 2.3 may stem from both substantive SPS measures and procedural or information requirements, because "[t]he text of Article 2.3 obliges Members to ensure non-discrimination in 'their SPS measures' without making any distinction between possible types of SPS measures."[66]

63. In *India – Agricultural Products*, the Panel considered the chapeau of Article XX of the GATT 1994 as relevant context for the interpretation of the non-discrimination requirement in Article 2.3 of the SPS Agreement:

> "We note that the language of Article 2.3 of the SPS Agreement is similar to that of the *chapeau* to Article XX.[67] Both provisions speak of 'arbitrary' and 'unjustifiable' discrimination, and a comparison between conditions prevailing in different 'countries' (in the context of Article XX) or 'Members' (in the context of Article 2.3). We also note that the last recital of the preamble to the SPS Agreement states that the SPS Agreement 'elaborate[s] rules for the application of the provisions of GATT 1994 which relate to the use of [SPS] measures, in particular the provisions of Article XX(b)', which includes the *chapeau*. Given the similarities between these provisions and the reference to Article XX of the GATT 1994 in the preamble of the SPS Agreement, we consider it appropriate to interpret 'discrimination' in Article 2.3 of the SPS Agreement in a manner similar to that which the Appellate Body adopted in the context of Article XX of the GATT 1994.[68] Hence, in the context of Article 2.3 of the SPS Agreement, we consider that discrimination may result not only (i) when Members in which the same conditions prevail (including between the territory of the Member imposing the measure, and that of other Members) are treated differently, but also (ii) where the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country."[69]

64. The Panel in *US – Animals* followed a similar approach:

> "Turning to the requirement that the measures discriminate between Members that are in identical or similar conditions, the Appellate Body consistently stated that different treatment does not necessarily amount to discrimination. The focus of a discrimination analysis is whether the measure at issue alters the conditions of competition to the detriment of products originating in the territories of Members other than the Member imposing the measure or between the territory of the Member imposing the measure and that of another Member. In *US – Shrimp*, the Appellate Body found that 'discrimination' in the context of the chapeau of Article XX may result not only when Members in which the same conditions prevail are treated differently, but also where the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country. Further, according to the Appellate Body, discrimination may

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[65] Panel Report, *US – Animals*, para. 7.570.
[66] Panel Report, *US – Poultry (China)*, para. 7.147.
[67] *(footnote original)* We observe, however, that Article XX of the GATT 1994 refers to the manner in which measures "are applied", whereas Article 2.3, first sentence, requires only that Members ensure that their SPS measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Our analysis under Article 2.3, first sentence, will therefore not focus on the manner in which the measures at issue are applied.
[68] *(footnote original)* The word "discrimination" has been given different meanings depending on the context in which that word appears. In light of these differences in context, the Panel considers these cases to be of limited assistance. For example, in the context of the TRIPs Agreement, Panel Report, *Canada – Pharmaceutical Patents*, para. 7.94. In the context of the Enabling Clause, Appellate Body Report, *EC – Tariff Preferences*, paras. 142-174.
[69] Panel Report, *India – Agricultural Products*, para. 7.400.

> arise not only from 'the detailed operating provisions' of a measure, but also from the application of a measure 'otherwise fair and just on its face'".[70]

1.5.2.6 Arbitrary or unjustifiable discrimination

65. Regarding the last element of violation of Article 2.3, first sentence, the Panel in *India – Agricultural Products* held that:

> "[T]he similarity of the language used in Article 2.3 of the SPS Agreement and Article XX of the GATT 1994 renders the interpretation of 'arbitrary or unjustifiably' in the latter context of some utility in understanding the meaning of those same words in the context of Article 2.3."[71]

66. The Panel then recalled the findings by the Appellate Body made in the context of Article XX of the GATT 1994, and concluded that:

> "[T]he meaning of 'arbitrary or unjustifiable discrimination' within the context of Article 2.3 of the SPS Agreement involves a consideration of the 'cause' or 'rationale' put forward to explain the discrimination in question, and whether there is a 'rational connection' between the reasons given for the discriminatory treatment and the objective of the measure."[72]

67. The Panel found that because India's measures did not account for differences that may exist between and among WTO Members, specifically with regard to circumstances in which imported products do not pose a risk, even though they originate in a country where a disease has been reported, India's SPS measures represented "a 'rigid and unbending' requirement and do not exhibit any flexibility with regard to such differences among exporting countries."[73] This, according to the Panel:

> "[D]oes not 'connect with' the rationale India has put forward to explain this form of discrimination (namely, that the risk associated with foreign outbreaks of NAI is always different from that associated with domestic outbreaks), because India's AI measures do not account for circumstances in which there is no risk associated with a foreign outbreak."[74]

68. Referring to the findings of prior Panels and the Appellate Body made in the context of Article XX of the GATT 1994, the Panel in *US – Animals* considered that determining whether a measure discriminates in an arbitrary or unjustifiable manner a panel has to examine "whether the regulatory distinction between the two sets of imports bears a rational connection to the stated objective of the measures."[75]

69. In *Russia – Pigs (EU)*, the Panel referred to the Appellate Body's endorsement of a finding under Article 5.5 "that the measure at issue was arbitrarily and unjustifiably discriminatory because it treated differently two products that presented the same level of risk" and used it as guidance for its assessment of whether the measure in question discriminated in an arbitrary or unjustifiable manner within the meaning of Article 2.3.[76]

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[70] Panel Report, *US – Animals*, para. 7.573. See also, Panel Report, *Russia – Pigs (EU)*, para. 7.1318.
[71] Panel Report, *India – Agricultural Products*, para. 7.427.
[72] Panel Report, *India – Agricultural Products*, paras. 7.428-7.429 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 226-227). See also Panel Report, *Russia – Pigs (EU)*, paras. 7.1320-7.1321.
[73] Panel Report, *India – Agricultural Products*, para. 7.435.
[74] Panel Report, *India – Agricultural Products*, para. 7.435.
[75] Panel Report, *US – Animals*, para. 7.589.
[76] Panel Report, *Russia – Pigs (EU)*, para. 7.1322 (citing Appellate Body Report, *Australia – Salmon*, para. 158).

1.5.2.7 Identical or similar conditions prevail in the territory of the Members compared

70. Addressing claims under Article 2.3, first sentence, the Panel in *India – Agricultural Products* noted that "the same facts that inform whether or not discrimination is arbitrary or unjustifiable may also inform whether or not identical or similar conditions prevail."[77]

71. In interpreting the term "identical or similar conditions", the Panel in *US – Animals* referred to the dictionary meaning of these words. The Panel then quoted findings by the Appellate Body in *EC – Seal Products* made in the context of chapeau of Article XX of the GATT 1994 that "only 'conditions' that are *relevant* for the purpose of establishing arbitrary or unjustifiable discrimination in the light of the specific character of the measure at issue and the circumstances of a particular case' should be considered."[78] Based on the Appellate Body's guidance, the Panel found that "the regulatory objective pursued by the measure at issue may also provide useful guidance on the question of which 'conditions' prevailing in different Members are 'relevant'."[79]

72. The Panel also noted that, in determining whether similar conditions prevail in the territory of Members compared, it was not simply required to assess whether the relevant risk was present in the territory of either region or to take note of the disease status assigned to such regions. The Panel found that:

> "[T]he level of risk posed by imports from the two regions is not only a function of their disease-prevalence in a given point in time, but also, and most importantly, of the credibility of the sanitary measures in place in such regions to prevent and control FMD. Thus, our assessment must include a comparison of the effectiveness and credibility of the sanitary measures in place in the two regions to prevent and control FMD, as well as the ability of imports from the two regions to meet the United States' ALOP – with or without the application of certain mitigating protocols."[80]

73. In *Russia – Pigs (EU)*, the Panel distinguished the facts before it from those underlying the findings of the Panel in *US – Animals* on the grounds that the relevant risk was already present in the territory of the Member adopting the measure. The Panel agreed with the Panel in *India – Agricultural Products* that "the relevant 'conditions' for the purposes of a given analysis in the first sentence of Article 2.3 may be the presence of a disease within a territory and the concomitant risk associated with that disease."[81]

74. The Appellate Body in *Korea – Radionuclides* agreed that the Panel correctly recognized that "the regulatory objective of a measure should inform the determination of the relevant conditions under Article 2.3". The Appellate Body disagreed, however, with the Panel's finding that Article 2.3 "permits consideration of the 'risk present in products in international trade as *the* relevant condition'". The Appellate Body found that this would not give due weight to all other relevant conditions under Article 2.3, as a proper interpretation of Article 2.3 "includes consideration of other relevant conditions, such as territorial conditions, to the extent they have the potential to affect the products at issue". The Appellate Body further emphasized that an analysis under Article 2.3 without "considering relevant territorial conditions that have the potential to affect products for the reason that they have not yet materialized" is not permitted, as an interpretative matter.[82]

75. The Panel in *Panama – Import Measures (Costa Rica)* noted that similar conditions prevailed between Costa Rica on the one hand and Peru and New Zealand on the other, and found the treatment accorded to Costa Rica in terms of the renewal of sanitary approvals to be discriminatory within the meaning of Article 2.3:

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[77] Panel Report, *India – Agricultural Products*, para. 7.460.
[78] Panel Report, *US – Animals*, para. 7.572 (quoting Appellate Body Report, *EC – Seal Products*, para. 5.299).
[79] Panel Report, *US – Animals*, para. 7.572 (quoting Appellate Body Report, *EC – Seal Products*, para. 5.300).
[80] Panel Report, *US – Animals*, para. 7.581.
[81] Panel Report, *Russia – Pigs (EU)*, para. 7.1311.
[82] Appellate Body Report, *Korea – Radionuclides*, paras. 5.62 – 5.64.

> "In the light of the foregoing, the Panel concludes that Costa Rica has demonstrated that the conditions in Costa Rica, on the one hand, and in Peru and New Zealand, on the other hand, are similar with respect to the steps taken to request the renewal of the sanitary approvals of their establishments.
>
> As a result of the foregoing, Panama permits the importation of products from the establishments in Peru and New Zealand, but not from those in Costa Rica. This difference in treatment constitutes discriminatory treatment for the purposes of Article 2.3 of the SPS Agreement, insofar as Panama permitted the importation of products from Peru and New Zealand, while it did not do the same for those from Costa Rica, by not extending the sanitary approvals of the 16 Costa Rican establishments. In this case, the distinction in treatment results from the manner in which Panama has handled the requests to extend those sanitary approvals."[83]

76. The Panel in *Panama – Import Measures (Costa Rica)* then examined the reasons put forward by Panama to explain the difference in treatment between Costa Rica and Peru/New Zealand, and found that none of them had a rational connection with the objective of the SPS measure at issue. On this basis, the Panel concluded that such treatment entailed an arbitrary or unjustifiable discrimination within the meaning of Article 2.3:

> "Given that the establishments in Costa Rica, Peru, and New Zealand were subject to the same comprehensive evaluation at approximately the same time, the Panel considers that Panama's argument would also not justify the difference in treatment to the detriment of the establishments in Costa Rica. In the Panel's view, this difference in treatment does not reflect a rational connection to the protection of human or animal life or health from risks associated with food safety and zoonosis.
>
> In the light of the foregoing, the Panel finds that Costa Rica has demonstrated that Measure 2 is inconsistent with the first sentence of Article 2.3 of the SPS Agreement, because it arbitrarily and unjustifiably discriminates against 16 establishments in Costa Rica compared to the establishments in Peru and New Zealand."[84]

77. The Panel in *Panama – Import Measures (Costa Rica)*, in assessing whether the contested measure entailed arbitrary or unjustifiable discrimination, disagreed with the view that the existence of different hosts of a pest justifies discriminatory treatment:

> "An additional issue raised by Costa Rica is whether the fact that they are different hosts justifies in any way the discriminatory treatment of pineapple from Costa Rica. In this respect, Costa Rica asserts that the fact that pineapple is not considered a main or primary host of the pest, unlike avocado, 'means that, technically, avocado has a higher risk of being associated with the pink mealybug'. As mentioned in the context of the claims under Article 5.7, both avocado and pineapple are considered hosts of the pink mealybug. Some sources classify avocado as a main or primary host of the pink mealybug. However, the scientific literature on the pest does not distinguish between hosts when addressing issues such as the detection and identification of the pest, spread pathways, and control methods. It can therefore be argued that, in relation to products from areas with the same phytosanitary status for the pest, avocado poses at least as high risk of being associated with the pest as pineapple does. Accordingly, the foregoing also does not justify a discriminatory treatment to the detriment of pineapple from Costa Rica.
>
> In the previous paragraphs, the Panel has determined that: (a) both avocados and pineapples are host fruits of the pest that come from Members where the pest is present, with limited distribution; and (b) their respective PIR have been drafted by AUPSA following the same procedure, which seeks to verify the pests of quarantine concern reported officially by the relevant NPPOs and to compare them with the list of pests of Panama's NPPO, and its ability to follow the pathway. Moreover, it should be recalled that the Panel found under Article 5.7 that Panama had sufficient information to conduct an assessment of the risk in question, accordingly Panama could have

[83] Panel Report, *Panama – Import Measures (Costa Rica)*, paras. 7.757 and 7.776.
[84] Panel Report, *Panama – Import Measures (Costa Rica)*, paras. 7.792 and 7.797.

> assessed whether the PIR for pineapple from Costa Rica still met its ALOP following incidents that, according to Panama, called into question its previous conclusions on the risks associated with the pink mealybug. Accordingly, the Panel finds nothing in the record that justifies Panama's discriminatory treatment of pineapple from Costa Rica compared to avocado from Colombia.
>
> In the light of the foregoing, the Panel concludes that the discriminatory treatment under Measure 3 of pineapple from Costa Rica compared to avocado from Colombia, whereby imports of the former are prohibited and imports of the latter are permitted, is arbitrary or unjustifiable given that it bears no rational connection to the stated objective of Measure 3 of protecting plant life and health in Panama's territory from risks arising from the entry, establishment or spread of the pink mealybug."[85]

1.5.3 Disguised restriction on international trade

78. In *India – Agricultural Products*, the Panel noted that the phrase "disguised restriction on international trade" had not been interpreted previously, but considered the Appellate Body's previous findings in the context of Article 5.5 to be relevant to its assessment under Article 2.3:

> "[T]he Appellate Body has made observations regarding what factors might indicate that a Member maintains a disguised restriction on international trade within the context of Article 5.5 of the SPS Agreement.[86] In *Australia – Salmon*, the Appellate Body was asked to review a series of factors taken into account by the panel in determining that distinctions in levels of protection amounted to a disguised restriction on international trade. The Appellate Body stated that a finding that an SPS measure is not based on risk assessment, including instances in which there was no risk assessment at all, is a strong indication that the measure 'is not really concerned with the protection of human, animal or plant life or health but is instead a trade restrictive measure taken in the guise of an SPS measure, i.e., a 'disguised restriction on international trade''. The Appellate Body also said that, where a panel has doubts regarding whether a responding Member applies similarly strict standards to the internal movement of products associated with a risk within its territory as it does to imports of those products, that may be considered a factor to be taken into account when determining whether distinctions in levels of protection amount to a disguised restriction on international trade (albeit such doubts would not be conclusive in this regard).
>
> We recall our discussion … regarding the similarity between Article 2.3 of the SPS Agreement and the *chapeau* to Article XX of the GATT 1994 and the utility in interpreting Article 2.3 of rulings interpreting Article XX. We observe that both provisions prohibit the application of measures that would constitute a disguised restriction on international trade. In the context of Article XX, the Appellate Body noted that 'arbitrary discrimination', 'unjustifiable discrimination', and 'disguised restriction on international trade' impart meaning to one another. The Appellate Body has said that ''disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX'. Consistently with our observations … regarding the similarities between Article XX of the GATT 1994 and Article 2.3 of the SPS Agreement, we consider that, in the context of the latter provision, 'disguised restriction on international trade' may similarly be read to encompass measures that constitute arbitrary or unjustifiable discrimination."[87]

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[85] Panel Report, *Panama – Import Measures (Costa Rica)*, paras. 7.1076 and 7.1078.

[86] *(footnote original)* Article 5.5 of the SPS Agreement requires (in relevant part) that "each Member shall avoid arbitrary or unjustifiable distinctions in the levels [of sanitary or phytosanitary protection] it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade". We also note that a finding of inconsistency with Article 5.5 can be presumed to imply a violation of the more general obligation in Article 2.3. Panel Report, *Australia – Salmon*, para. 8.109, and Appellate Body Report, *Australia – Salmon*, para. 178.

[87] Panel Report, *India – Agricultural Products*, paras. 7.475-7.476.

79. Moreover, in *Russia – Pigs (EU)*, the Panel referred to two factors, which the Appellate Body had found relevant to the assessment whether a measure constitutes a disguised restriction on international trade within the meaning of Article 5.5:

> "[I]n *Australia – Salmon*, the Appellate Body stated that a finding that an SPS measure is not based on a risk assessment is a strong indication that the measure 'is not really concerned with the protection of human, animal or plant life or health but is instead a trade restrictive measure taken in the guise of an SPS measure, i.e., a 'disguised restriction on international trade''. The Appellate Body also took into account the difference in treatment associated with a certain risk between the internal movement of products within the territory of a Member and the treatment accorded to the same imported products."[88]

1.5.4 Relationship with other provisions of the SPS Agreement

1.5.4.1 Articles 3 and 5

80. In *EC – Hormones*, with respect to the Panel's decision to examine a claim under Articles 3 and 5 before a claim under Article 2[89], the Appellate Body indicated a preference for beginning the analysis with Article 2:

> "We are, of course, surprised by the fact that the Panel did not begin its analysis of this whole case by focusing on Article 2 that is captioned 'Basic Rights and Obligations', an approach that appears logically attractive."[90]

81. In *Australia – Salmon*, where Articles 2, 3 and 5 were at issue, the Panel decided to commence its analysis with Article 5, because: (1) Canada, the complaining party, focused initially on this provision with respect to its claims and (2) the provisions under Article 5 "provide for more specific and detailed rights and obligations" than Article 2. The Appellate Body did not address this issue:

> "[E]ven if we were to start our examination of this dispute under Article 3, we would in any event be referred to and thus still need to address Articles 2 and 5. To conduct our examination of this case in the most efficient manner, we shall, therefore, first address Articles 2 and 5 … Since in this particular case, (1) Canada itself first presents its claims under Article 5, before addressing those under Article 2, and (2) the provisions invoked by Canada under Article 5 (i.e., Articles 5.1, 5.2, 5.5 and 5.6) all provide for more specific and detailed rights and obligations than the 'Basic Rights and Obligations' set out in rather broad wording in the provisions invoked by Canada under Article 2 (i.e., Articles 2.2 and 2.3), we consider it more appropriate in the circumstances of this dispute to first deal with Canada's claims under Article 5."[91]

1.5.4.2 Article 5.5

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

> "Article 5.5 must be read in context. An important part of that context is Article 2.3 of the *SPS Agreement*, … When read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3."[92]

83. In the context of examining the European Communities' measure at issue in the light of Article 5.5, the Appellate Body in *EC – Hormones* made the following statement with respect to Article 2.3:

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[88] Panel Report, *Russia – Pigs (EU)*, para. 7.1390.
[89] Panel Reports, *EC – Hormones (Canada)*, paras. 8.41-8.43, and 8.254; and *EC – Hormones (US)*, paras. 8.45-8.47, and 8.251.
[90] Appellate Body Report, *EC – Hormones*, para. 250.
[91] Panel Report, *Australia – Salmon*, paras. 8.47-8.48.
[92] Appellate Body Report, *EC – Hormones*, para. 212.

> "It is well to bear in mind that, after all, the difference in levels of protection that is characterizable as arbitrary or unjustifiable is only an element of (indirect) proof that a Member may actually be applying an SPS measure in a manner that discriminates between Members or constitutes a disguised restriction on international trade, prohibited by the basic obligations set out in Article 2.3 of the *SPS Agreement*."[93]

84. The Panel in *Australia – Salmon*, in a finding upheld by the Appellate Body[94], held that a violation of Article 5.5 implied a violation of Article 2.3:

> "Indeed, even though Article 5.5 deals with arbitrary or unjustifiable *distinctions in levels of protection* imposed by one WTO Member for different situations and Article 2.3 addresses, rather, sanitary measures which (1) arbitrary or unjustifiably *discriminate between* WTO Members or (2) are applied in a manner which would constitute a *disguised restriction* on trade; the third element under Article 5.5 also requires that the *measure* in dispute results in discrimination or a disguised restriction on trade. We conclude, therefore, that if we were to find that all three elements under Article 5.5 – including, in particular, the third element – are fulfilled and that, therefore, the more specific Article 5.5 is violated, such finding can be presumed to imply a violation of the more general Article 2.3. We do recognize, at the same time, that, given the more general character of Article 2.3, not all violations of Article 2.3 are covered by Article 5.5."[95]

85. In *Australia – Salmon*, the Appellate Body elaborated on the relationship between Articles 2.3 and 5.5 and considered that a finding of violation of Article 5.5 necessarily implies a violation of Article 2.3:

> "We recall that the third – and decisive – element of Article 5.5, discussed above, requires a finding that the SPS measure which embodies arbitrary or unjustifiable restrictions in levels of protection results in 'discrimination or a disguised restriction on international trade'. Therefore, a finding of violation of Article 5.5 will necessarily imply a violation of Article 2.3, first sentence, or Article 2.3, second sentence. Discrimination 'between Members, including their own territory and that of others Members' within the meaning of Article 2.3, first sentence, can be established by following the complex and indirect route worked out and elaborated by Article 5.5. However, it is clear that this route is not the only route leading to a finding that an SPS measure constitutes arbitrary or unjustifiable discrimination according to Article 2.3, first sentence. Arbitrary or unjustifiable discrimination in the sense of Article 2.3, first sentence, can be found to exist without any examination under Article 5.5."[96]

86. Explaining the context of the above findings of the Appellate Body, the Panel in *India – Agricultural Products* pointed to the "notable similarity in the language of the two provisions, with certain words or modified versions thereof appearing in both provisions, such as 'discriminate', 'arbitrary or unjustifiable', and 'disguised restriction on international trade'."[97] The Panel further found that "it is not necessary that a complaining Member pursue its claim via Article 5.5 and, subsequently, Article 2.3 of the SPS Agreement, in order to substantiate a claim of arbitrary or unjustifiable discrimination under the SPS Agreement."[98] The Panel noted in that regard that, if it were to commence its analysis with claims made under Article 5.5 and find the measures inconsistent with that provision and, as a consequence, also with Article 2.3, it would not assess the factual and legal arguments made with regard to Article 2.3, independently of any inconsistency with Article 5.5.[99]

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[93] Appellate Body Report, *EC – Hormones*, para. 240.
[94] Appellate Body Report, *Australia – Salmon*, para. 178.
[95] Panel Report, *Australia – Salmon*, para. 8.109.
[96] Appellate Body Report, *Australia – Salmon*, para. 252. See also Panel Report, *US – Poultry (China)*, para. 7.318.
[97] Panel Report, *India – Agricultural Products*, para. 7.339.
[98] Panel Report, *India – Agricultural Products*, para. 7.344.
[99] Panel Report, *India – Agricultural Products*, para. 7.346. See also Panel Report, *Russia – Pigs (EU)*, paras. 7.1262-7.1264.

87. In *Costa Rica – Avocados (Mexico)*, the Panel found that the challenged measure violated Article 2.3 for the same reasons that it violated Article 5.5.[100]

1.5.4.3 Article 5.6

88. In *Korea – Radionuclides*, the Panel found that the inconsistency of the measures with Article 5.6 was "a strong indication that any distinction in treatment is not rationally related to the stated regulatory objective, but rather a further warning signal that the discrimination resulting from [the measures] is arbitrary or unjustifiable."[101]

1.5.4.4 Articles 5, 6, 7 and 8

89. In *Japan – Agricultural Products II*, where claims were made under Articles 2, 5, 7, and 8, the Panel began its examination with Article 2. The Appellate Body did not address this issue.[102]

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[100] Panel Report, *Costa Rica – Avocados (Mexico)*, paras. 7.2174-7.2177.
[101] Panel Report, *Korea – Radionuclides*, para. 7.343.
[102] Panel Report, *Japan – Agricultural Products II*, para. 8.16.