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1 GENERAL

1.1 Relationship of the SPS Agreement with other WTO agreements

1.1.1 WTO Agreement

1. The Appellate Body in *EC – Hormones* referred to Article XVI:4 of the WTO Agreement:

"Finally, we observe, more generally, that Article XVI.4 of the WTO Agreement stipulates that:

Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

Unlike the GATT 1947, the *WTO Agreement* was accepted definitively by Members, and therefore, there are no longer 'existing legislation' exceptions (so-called 'grandfather rights')."¹

1.1.2 TBT Agreement

2. See the Section on Article 1.5 of the TBT Agreement.

1.1.3 GATT 1994

1.1.3.1 Order of analysis

3. The Panel in *EC – Hormones* decided that both the SPS Agreement and the GATT 1994 applied to the European Communities' measure at issue. The Panel then addressed the question of which of the two Agreements to examine first:

"The *SPS Agreement* specifically addresses the type of measure in dispute. If we were to examine GATT first, we would in any event need to revert to the *SPS Agreement*: if a violation of GATT were found, we would need to consider whether Article XX(b) could be invoked and would then necessarily need to examine the *SPS Agreement*; if, on the other hand, no GATT violation were found, we would still need to examine the consistency of the measure with the *SPS Agreement* since nowhere is consistency with GATT presumed to be consistency with the *SPS Agreement*. For these reasons, and in order to conduct our consideration of this dispute in the most efficient manner, we shall first examine the claims raised under the *SPS Agreement*."²

¹ Appellate Body Report, *EC – Hormones*, paras. 128-129.

² Panel Reports, *EC – Hormones (Canada)*, para. 8.45; *EC – Hormones (US)*, para. 8.42.

4. The Panel in *Australia – Salmon* also dealt with the question whether to first address the claims under the GATT 1994 or those under the SPS Agreement:

"Canada recognizes that the SPS Agreement provides for obligations additional to those contained in GATT 1994, but, nevertheless, first addresses its claim under Article XI of GATT 1994. Australia invokes Article 2.4 of the SPS Agreement, which presumes GATT consistency for measures found to be in conformity with the SPS Agreement, to first address the SPS Agreement. We note, moreover, that (1) the SPS Agreement specifically addresses the type of measure in dispute, and (2) we will in any case need to examine the SPS Agreement, whether or not we find a GATT violation (since GATT consistency is nowhere presumed to constitute consistency with the SPS Agreement). In order to conduct our consideration of this dispute in the most efficient manner, we shall, therefore, first address the claims made by Canada under the SPS Agreement before addressing those put forward under GATT 1994."³

1.1.3.2 Article III and Article XI

1.1.3.2.1 The Panel's exercise of judicial economy

5. In *EC – Hormones*, the Panel stated: "Since we have found that the EC measures in dispute are inconsistent with the requirements of the SPS Agreement, we see no need to further examine whether the EC measures in dispute are also inconsistent with Articles III or XI of GATT."⁴

6. In *Australia – Salmon*, the Panel stated: "Since we have found that the measure in dispute is inconsistent with the requirements of the SPS Agreement, we see no need to further examine whether it is also inconsistent with Article XI of GATT 1994."⁵

1.1.3.3 Article XX(b)

7. In *EC – Hormones*, the European Communities submitted that "the 'substantive' provisions of the SPS Agreement can only be addressed if recourse is made to GATT Article XX(b), i.e., if, and only if, a violation of another provision of GATT is first established". The Panel, rejected this argument, stating:

"According to Article 1.1 of the *SPS Agreement*, two requirements need to be fulfilled for the *SPS Agreement* to apply: (i) the measure in dispute is a sanitary or phytosanitary measure; and (ii) the measure in dispute may, directly or indirectly, affect international trade. There are no additional requirements. The *SPS Agreement* contains, in particular, no explicit requirement of a prior violation of a provision of GATT which would govern the applicability of the *SPS Agreement*, as asserted by the European Communities."⁶

8. With respect to the relationship between the SPS Agreement and Article XX(b) of the GATT 1994, the Panel in *EC – Hormones* took the view that "[m]any provisions of the SPS Agreement impose 'substantive' obligations which go significantly beyond and are additional to the requirements for invocation of Article XX(b)":

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

³ Panel Report, *Australia – Salmon*, para. 8.39.

⁴ Panel Report, *EC – Hormones (Canada)*, para. 8.275. The Panel in *EC – Hormones (US)* exercised judicial economy with respect to the US claim under Articles I and III. Panel Report, *EC – Hormones (US)*, para. 8.272.

⁵ Panel Report, *Australia – Salmon*, para. 8.185.

⁶ Panel Reports, *EC – Hormones (Canada)*, para. 8.39; *EC – Hormones (US)*, para. 8.36.

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

9. The Panel in *US – Poultry (China)* observed that the preamble of the SPS Agreement uses the word "elaborate" to qualify the relationship of the SPS Agreement with Article XX(b). The Panel noted:

"[T]he ordinary meaning of the word 'elaborate' is to 'explain something in detail'. Accordingly, when the preamble states that the *SPS Agreement* elaborates the rules for the application of Article XX(b), it is thus saying that the *SPS Agreement* 'explains in detail' how to apply Article XX(b). ...

This is further confirmed by the wording of a number of provisions throughout the *SPS Agreement* which either explicitly refer to Article XX(b) or mirror relevant language in that provision."⁸

10. The Panel reinforced its understanding of the relationship between the SPS Agreement and Article XX(b) by looking to the record of the negotiations leading to the SPS Agreement. The Panel stated:

"The negotiating history of the *SPS Agreement* also appears to confirm our interpretation. The Negotiating Group on Agriculture established by the Group of Negotiation on Goods, sought to strengthen the GATT rules and disciplines, in particular Article XX(b) recognizing the need to rely on scientific evidence for SPS measures. This strengthening of GATT rules and disciplines was to be done by developing a set of principles that would govern the use of SPS regulations and barriers. In this sense, one of the purposes of the *SPS Agreement* was to complement Article XX(b) by providing specific provisions that SPS measures must comply with in order to be consistent with Article XX(b).

We therefore conclude that the *SPS Agreement* elaborates and thus explains the provisions of Article XX(b) in further detail when dealing with SPS measures. In the Panel's view, this interpretation gives meaning to both Article XX(b) of the GATT 1994 and the *SPS Agreement* in a harmonious manner."⁹

11. The Panel in *US – Poultry (China)* concluded that an SPS measure which has been found inconsistent with Articles 2 and 5 of the SPS Agreement, cannot be justified under Article XX of the GATT 1994.¹⁰

1.1.3.4 Article XXII and XXIII

12. Pursuant to Article 11.1 of the SPS Agreement, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the DSU shall apply to consultations and the settlement of disputes under the SPS Agreement, except as otherwise specifically provided in the Agreement.

⁷ Panel Reports, *EC – Hormones (Canada)*, para. 8.41; and *EC – Hormones (US)*, para. 8.38. See also Panel Report, *US – Poultry (China)*, para. 7.473.

⁸ Panel Report, *US – Poultry (China)*, paras. 7.471-7.472.

⁹ Panel Report, *US – Poultry (China)*, paras. 7.478-7.479.

¹⁰ Panel Report, *US – Poultry (China)*, paras. 7.481-7.482.

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