Provisional measures under Article 5.7 of the WTO's Agreement on Sanitary and Phytosanitary Measures: Some Criticisms of the Jurisprudence so far

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The purpose of this article is to identify two potential difficulties in the application of Article 5.7 which appear to follow from certain statements made by Panels and the Appellate Body in the jurisprudence under that Article so far. The first relates to the situation in which a WTO Member legitimately takes provisional measures under Article 5.7, but refuses to conduct further research as required by that Article. In such circumstances, it is argued, the

however, been among the most closely watched and carefully critiqued of all WTO jurisprudence so far, and have given rise to important debates about the interpretation and application of many disciplines contained in the SPS Agreement. This brief article singles out two very specific issues which in my view have received insufficient attention in this literature. Both relate to interpretation of Article 5.7 of the SPS Agreement, and in both cases, my concern is that certain implications of the present jurisprudence may, if uncorrected, lead to difficulties in the future for governments wishing to design effective, WTO-compliant food safety regimes. First, where provisional measures are adopted under Article 5.7, there is the question of the consequences of a failure to comply with the additional obligations contained in the paragraph to 'obtain … additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time'. Although the situation is not entirely clear, the present jurisprudence suggests that such a failure renders the protective measures themselves WTO non-compliant, a result which in my view is both wrong in principle and contrary to the clear wording of the text. This argument is elaborated in Part 1. Second, there is the question whether Article 5.7 as currently interpreted adequately addresses the problems posed by the evolution of scientific knowledge. I suggest that, while Article 5.7 is in principle able to cope well with evolving science, there are some specific issues in the current jurisprudence that need clarification. This issue is covered in Part 2.

Article 2.2 of the SPS Agreement sets out an obligation to ensure that sanitary and phytosanitary measures are, amongst other things, 'based on scientific principles and … not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.' This general principle finds specific application in Articles 5.1 and 5.2[2], which require WTO Members to ensure that SPS measures 'are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plan life or health'[3], and in such an assessment, to 'take into account available scientific evidence'.[4] Perhaps the most important exemption[5] to these obligations is contained in paragraph 7 of Article 5, which reads as follows:

('Hormones Suspension'), WT/DS321/R with US – Continued Suspension of Obligations in the EC – Hormones Dispute, WT/DS320/R. (I have counted the final two as one, given the substantial similarity of the reports.

[2] EC – Measures Concerning Meat and Meat Products, Appellate Body Report, WT/DS26/AB/R, paragraph 180.

[3] Agreement on Sanitary and Phytosanitary Measures, Article 5.1.

[4] Agreement on Sanitary and Phytosanitary Measures, Article 5.2.

[5] By referring to the provision here as an 'exemption', I am following the careful wording of the Appellate Body in Japan – Measures Affecting Agricultural Products, Appellate Body Report,


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obligations of the second sentence. In the opinion of the Panel, it had not done so:

> we thus find that even if the varietal testing requirement were considered as a provisional measure adopted in accordance with the first sentence of Article 5.7, Japan has not fulfilled the requirements contained in the second sentence of Article 5.7.[12] [footnote omitted.]

The Panel did not consider in any detail what the consequences ought to be of a failure to comply with the second sentence of Article 5.7. It seemed to assume that failure to comply with any of the four requirements contained in Article 5.7 would be sufficient to disapply that provision. It noted simply that Article 2.2 imposed certain obligations to be complied with 'except as provided for in paragraph 7 of Article 5' , that Japan's measures were not in 'as provided for' in Article 5.7, and that therefore Japan was in breach of its obligations under Article 2.2.[13]

Both parties challenged a number of aspects of this decision on appeal. Most relevantly in the present context, Japan argued that the safe harbour of Article 5.7 is available to Members provided only that the conditions of its first sentence are met:

> the phrase "except as provided for in paragraph 7 of Article 5 in Article 2.2", should be interpreted to refer to the first sentence of

Thus, the Panel states, 'Article 2.2 would be applicable in a situation where a measure meets some, but not all, of the requirements of Article 5.7'.[22]

I say that 'by and large' the Panel in *EC – Biotech* followed the Appellate Body's approach in *Japan – Varietals* because it did make two additions or elaborations, which may ultimately have some significance. First of all, where the Appellate Body in *Japan – Varietals* dealt exclusively with the relationship between Articles 2.2 and 5.7, the *EC – Biotech* Panel applied precisely the same reasoning to the relationship between Articles 5.1 and 5.7:

> We have already stated the main implications … in our discussion of the relationship between Article 2.2 and Article 5.7. Nonetheless, for clarity, it is useful to do so again given that we are concerned here with the relationship between Article 5.1 and Article 5.7. Thus, in terms of applicability of Article 5.1 … if a challenged SPS measure was adopted and is maintained consistently with the four cumulative requirements of Article 5.7, the obligation in Article 5.1 to base SPS measures on a risk assessment 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 aforementioned obligation in Article 5.1 is applicable to that measure … [23]

Secondly, the Panel elaborated on the Appellate Body's earlier characterisation of Article 5.7 as a 'qualified exemption'.[24] It found that Article 5.7 is not an *exception* to other obligations contained in the SPS *Agreement*, but rather a free-standing *right* (to take provisional measures).[25] Thus, Article 5.7 is not a 'carve-out' of Article 2.2/5.1, but rather the two provisions have mutually exclusive domains of operation. I will return to this point below, but for now the significance is that, after *EC – Biotech*, it seems that the 'research and review' obligations are properly characterised as conditions which must be fulfilled for the right to take provisional measures to lawfully continue. If these conditions are not satisfied, Article 5.7 does not apply, and the measure falls to be examined under Article 5.1. Under the current approach, therefore, the necessary consequence of a Member's failure to comply with the research and review obligations contained in the second sentence seems to be that it has no right to maintain the provisional measure in question.

The alternative approach, which in my view is preferable, is easy to explain. On this view, the first sentence contains a right to 'provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information'. This right

[22] ibid, paragraph 7.2975.
[23] ibid, paragraph 7.2998.
[24] See n 5 above.
[25] See *EC – Measures Affecting the Approval and Marketing of Biotech Products* n 19 above, paragraphs 7.2962ff, especially paragraphs 7.2969 and 7.2997.

exists in all cases where relevant scientific evidenc

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the benefit of clarity on this point. Furthermore, there may conceivably be situations in which further research is prohibitively costly or technically unfeasible for some Members. And even where the only problem is the time that further research takes, there is the question of whether withdrawal of the measure is required in the interim period.[30]

Third, the alternative approach is preferable because it provides better quality guidance to WTO Members as to how to comply with their WTO commitments. In Australia – Measures Affecting Importation of Salmon ('Australia – Salmon'), the Appellate Body observed that Panels ought generally to make sufficient findings


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subsequently become insufficient'.[45] It also went to specify the following test: 'there must be a critical mass of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence …' [46] I have some specific concerns about the way in which this test was applied in that case, which I set out below. But as a general point, this test seems to establish a very high threshold: it will have to be a very significant piece of new evidence indeed to call into question 'the fundamental precepts' of previous knowledge. One can easily imagine the existence of new evidence which casts some doubt on the reliability of previous risk assessments but which does not call the fundamental precepts of prior knowledge into question. The implications of this are troubling. For example, what it means is that wherever an international standard exists – and indeed, wherever a risk assessment has been carried out – there is in effect a new and very significant obstacle to the application of

evidence is (and always was) 'insufficient' for the purposes of Article 5.7. This is different from – and additional to – the argument that new evidence has turned a body of evidence from sufficient to insufficient. Furthermore, a decision on the adequacy or not of a risk assessment must in principle always be taken in light of the needs and preferences of the regulating Member – a risk assessment is adequate, after all, only for particular purposes and in a particular content. Unfortunately, the Panel's continued rejection of the claim that the sufficiency of existing evidence ought to be considered in light of a Member's level of protection,[52] comes dangerously close to precluding this line of argumentation.

Governments may also wish to take new provisional protective measures in response to new information disclosing a new kind of risk which has not previously been considered by earlier risk assessments. For example, new concerns might arise about the long-term implications of gene modification technology for biodiversity and ecosystem health, after a risk assessment has been carried out solely in respect of (say) the toxicity or allergenic effects of GMOs. Alternatively, information may come to light suggesting a new and previously unconsidered pathway for the potential gene transfer from modified crops to other species. Again, the government can of course perform a new risk assessment and impose new measures on ,01N==N*DM :,6R1808Mo:,01N38B*186RMs:,010N=*0D3Mp:,01N==N*DMe:,01N0D

The third case is the most difficult. Very often, our knowledge of the risks associated with particular products or organisms evolves in an incremental fashion, as risk assessments are subject to criticism, scrutiny and re-evaluation. Assessments may, for example, be criticised for their incomplete coverage, overly robust assumptions, methodological flaws, or (more radically) for inherent limitations in the techniques of risk assessment process themselves.[63] As a result of such criticisms, policy-makers may lose confidence in these assessments, and wish to take protective measures in light not of new evidence, or of newly-identified risks, but of new or increased awareness of the limitations and flaws of existing risk assessments. Assuming for present purposes that this is legitimate, to what extent are they able to do so under current WTO jurisprudence, before going through the entire process of another risk assessment?

In some cases, of course, a risk assessment will contain an explicit acknowledgement of its own limitations: it may set out both orthodox and minority scientific opinions, it may acknowledge alternative ways of reading relevant evidence, or it may explicitly identify remaining uncertainties and other factors which reduce the level of confidence of the assessment. In such cases, the Appellate Body has made it perfectly clear that a government may rely on these elements in a risk assessment to justify protective measures, and that such reliance will satisfy the requirements of Article 5.1.[64] But what of the case in which the risk assessment does not acknowledge remaining uncertainties or its own limitations, perhaps because those limitations only become apparent arise through careful scrutiny once the assessment has been carried out? What if the risk assessment comes to be seen as flawed, because it was carried out on the basis of unjustified assumptions, or because it came to its conclusions on the basis of what comes to be perceived as inadequate evidence? What of the situation in which a decision-maker wishes to take protective measures on the basis of that special irreducible kind of uncertainty that arises from the process of scientific risk assessment itself? The question is whether protective measures are permitted in such situations is a more difficult one.

It may be thought that Article 5.7 ought to provide a safe harbour in such cases. In other words, even where a risk assessment has been carried out, and the product has been found safe, Article 5.7 ought still to operate to justify protective measures which are based on remaining uncertainty, including irreducible uncertainty.[65] After all, Article 5.7 is designed to address the problem of the

insufficiency of available evidence – and the existing of flaws in, and limitations of, existing risk assessments is often evidence of 'insufficiency'.. But whatever the attractions of this approach, it seems to have been foreclosed by existing jurisprudence. For one thing, the EC – Biotech decision unequivocally rejects the

in relation to T25 maize on the basis that 'the product had not been examined under realistic conditions', and on the grounds that 'regional ecological aspects

The clear implication of this passage – particularly paragraphs (b) and (c) – is that if the member states had explained how and why they assessed the risks differently, if they had identified possible uncertainties and constraints in the risk assessments in question, and/or if they had explained why in view of such constraints and uncertainties their prohibitions were warranted, then the Panel's conclusion would have been different.[75] This is in many respects a clever and subtle compromise: on the one hand permitting countries to take into account the uncertainties and constraints of the risk assessment procedure, even where the uncertainties are not explicitly acknowledge in the risk assessment itself, and on the other hand requiring such countries to explain preci

procedures, and of the fundamental inability of scientific methods and tools to reliably predict all forms of risk? Of course the question whether or not governments ought to be able to rely on irreducible uncertainty of this kind is a heavily contested one, but even the more modest question of the legality of such measures is difficult. It has never been squarely addressed by WTO panels or the Appellate Body, but there are at least three comments from EC – Biotech which suggest a lack of sympathy to the problems posed by irreducible uncertainty. For one thing, in paragraph 7.3064, the Panel notes that governments may legitimately take into account 'factors which affect scientists' level of confidence' as well as

the Appellate Body, we will have a much clearer pict