ECOLOMIC POLICY AND LAW

Journal of Trade & Environment Studies

©

Volume 3 (6)
October 2006

Published by EcoLomics International
16, bd des Philosophes, 6th floor
1205 Geneva, Switzerland
http://www.EcoLomics-International.org/
trade.env@EcoLomics-International.org

All rights reserved. This publication may be reproduced in whole or in part in any form for educational or nonprofit uses, without special permission, provided acknowledgement of the source is made.

PRECAUTION AS AN AUTONOMOUS RIGHT IN THE SPS AGREEMENT: IMPLICATIONS OF THE *EC-BIOTECH* FINDINGS REGARDING THE NATURE OF ARTICLE 5.7

María Julia Oliva •

• María Julia Oliva is a researcher and PhD candidate at the Faculty of Law, University of Geneva. Ms. Oliva also works as a legal and policy advisor for the UNCTAD BioTrade Facilitation Programme. She can be reached at mjuliaoliva@gmail.com.

Table of Contents

Abstract

Although the concept of precaution has been dealt with by WTO cases, it was only in the *EC-Biotech* Panel Report that the nature of Article 5.7 of the SPS Agreement, one of the main provisions contemplating precautionary measures, was specifically addressed. The Panel found that Article 5.7 should be characterized as an autonomous right – not an exception to the general obligation for WTO Members to base their sanitary and phytosanitary measures on scientific principles and, specifically, on a risk assessment. The clarification of the relationship between Article 5.7 and other SPS Agreement provisions has a potentially significant impact on the interface of WTO rules and sustainable development. Initial considerations of the *EC-Biotech* Panel Report noted that, by characterizing Article 5.7 as an autonomous right, this decision may facilitate the successful vindication of precautionary decision-making in the WTO. The present article examines the possible theoretical and practical consequences of the *EC-Biotech* analysis and findings on the nature of Article 5.7, including the exclusion of other provisions from applicability to precautionary measures, the placing of the burden of proof on the complaining parties, and the broader interpretation of its terms. It concludes that, while the Panel in the *EC-Biotech* case recognized and supported the critical role of precaution in the SPS Agreement, its characterization of Article 5.7 as an autonomous right is unlikely to revolutionize the consideration of precaution in the WTO.

1. Introduction

Precaution is not an exception but an integral part of science-based decision-making. It is well recognized that scientific and policy judgments should and do interact in the analysis of risks leading to regulatory decisions.[1] In addition, even as debate continues over the nature, terminology, and scope of precaution, its application is now generally considered a legitimate and distinctive approach in the face of scientific uncertainty and risks to health or the environment.[2]

The boundaries of precaution in the context of sanitary and phytosanitary measures have been addressed by a number of World Trade Organization (WTO) cases. Article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), as one of the main provisions contemplating precautionary measures, has been at the core of a number of disputes.[3] Various Panels and the Appellate Body have thus considered, for example, the characteristics of the four requirements that must be met in order for WTO Members to adopt and maintain measures under Article 5.7.[4] The Appellate Body also looked at Article 5.7 as part of the context of Article 2.2, which refers to it explicitly, noting 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."[5]

It was only in the *EC-Biotech* case, however, that a WTO Panel specifically addressed the nature of Article 5.7 within the SPS Agreement.[6] In particular, the Panel found that Article 5.7 should be characterized as an autonomous right – not an exception to the general obligation for WTO Members to base their sanitary and phytosanitary measures on scientific principles and, specifically, on a risk assessment.[7] Indeed, the relationship between Article 5.7 and other SPS Agreement provisions is one of several issues considered by the *EC-Biotech* Panel Report with a

[1] There is some distinction in regulatory approaches, however, as to the moment in which policy considerations enter the analysis of risks. The traditional approach considers risk assessments, for example, as objective and value-free, public values and concerns are only deemed relevant in the phase of risk management. Increasingly, however, it is acknowledged that even risk assessments are necessarily impacted by political and cultural factors. For an in depth analysis of the very dynamic and complex relationship between the assessment and the management of risk see: Christine Noiville and Nicolas de Sadeleer. 2001. La gestion des risques écologiques et sanitaires à l'épreuve des chiffres - le droit entre enjeux scientifiques et politiques. *Revue du Droit de l'Union Européen* 2: 389-450.

[2] In 2002, for example, Dr. John D. Graham, of the Executive Office of the President of the United States, speaking on the American view on the role of precaution in risk assessment and management, noted that the US government supports precautionary approaches to risk management, while not recognizing a precautionary principle.

[3] The Appellate Body in *EC-Hormones* found that "the precautionary principle indeed finds reflection in Article 5.7 of the SPS Agreement." Report of the Appellate Body, European Communities – Measures Concerning Meat and Meat Products (EC-Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted on 13 February 1998, paragraph 124.

[4] See, e.g., Report of the Appellate Body, Japan – Measures Affecting Agricultural Products (Japan-Varietals), WT/DS76/AB/R, adopted on 19 March 1999, paragraphs 86-94, and Report of the Appellate Body, Japan – Measures Affecting the Importation of Apples (Japan-Apples), WT/DS245/AB/R26, adopted on 10 December 2003, paragraphs 169-188.

[5] Japan-Apples, supra note 4, paragraph 80.

[6] Panel Report, European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC-Biotech), WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006.

[7] Id., paragraph 7.2997.

potentially significant impact on the interface of WTO rules and sustainable development.[8] The Panel's analysis of the right-exception distinction, though, has been described as "tangled," and the implications of depicting Article 5.7 as an autonomous right remains uncertain.[9]

The present article aims to provide a brief overview of the *EC-Biotech* analysis and conclusions in regard to the nature of Article 5.7, and some initial thoughts on the implications of these findings for the future consideration of precautionary measures in the SPS Agreement. After this Introduction, Section II will examine the relevant fragments of the *EC-Biotech* Panel Report. Section III will then turn to the legal repercussions of the Panel's findings for the applicability, the burden of proof, and the interpretation of Article 5.7. Finally, Section IV will provide some closing remarks on the impact of *EC-Biotech* for precautionary measures in the context of the SPS Agreement.

2. *EC-Biotech* Arguments, Analysis, and Findings on the Nature of Article 5.7

The nature of Article 5.7 of the SPS Agreement arose in *EC-Biotech* as an issue of applicable law. Having found that the SPS Agreement was indeed applicable to the various national measures challenged in the *EC-Biotech* case (herewith referred to as "safeguard measures"), the Panel had to determine the specific provisions under which to consider these measures.[10] Complaining parties claimed the safeguard measures fell under, and were inconsistent with, Article 5.1 of the SPS Agreement, which requires that SPS measures be based on a risk assessment. The European Communities (EC), on the other hand, argued that the safeguard measures – as provisional measures – fell to be assessed under Article 5.7 of the SPS Agreement. Moreover, the EC submitted that, since the relationship between Article 5.1 and Article 5.7 is one of exclusion, even if there was an inconsistency with Article 5.7, Article 5.1 would not become the relevant applicable provision.[11]

Although it found that the provisional character of the safeguard measures did not in itself determine the applicability of Article 5.7, as argued by the EC, the Panel still considered the relationship between Articles 5.1 and 5.7 as a threshold question in establishing the applicable provisions of the SPS Agreement.[12] In addressing this question, the Panel focused on the distinction between rights and exceptions in the SPS Agreement, following the EC argument that, if Article 5.7 is a right and not an exception, it would become the applicable rule to the exclusion of all others. It should be noted, however, that in WTO jurisprudence, the distinction between right and exception has been primarily considered as relevant for the purpose of the allocation

[8] Other aspects of the EC-Biotech case are analyzed, for example, in María Julia Oliva and Simonetta Zarrilli, "WTO Panel Report on the 'EC-Biotech' case: Considerations for Trade and Development," UNCTAD Trade and Development Board, TD/B/COM.1/CPR.4, 26 February 2007.

[9] Tomer Broude, "Genetically Modified Rules: The Awkard Rule-Exception-Right Distinction in *EC-Biotech*," International Law Forum of the Hebrew University of Jerusalem Law Faculty, Research Paper No. 14-06, December 2006.

[10] See EC-Biotech, supra note 6, paragraph 7.2923.

[11] The European Communities, nevertheless, noted that none of the Complaining Parties has presented a claim of violation under Article 5.7. As a result, it considered consistency with Article 5.7 to be irrelevant in the case because the complaining parties had invoked the wrong provision.

[12] See EC-Biotech, supra note 6, paragraph 7.2947-48.

of the burden of proof.[13] As a result, much of the Panel's analysis, as well as the parties' arguments, referred to claims and previous cases relating to the issue of burden of proof, and thus combined both procedural and substantive legal considerations.

The EC put forth two points to support its argument that Articles 5.1 and 5.7 presented a relationship of exclusion, thus making Article 5.7 an autonomous right and the only relevant provision for the safeguard measures. First, it made reference to textual similarities with other provisions that prior WTO cases had found to provide exclusions to rights and obligations in the SPS Agreement. It noted that Article 2.2, which must be constantly read with Article 5.1, contains wording "substantially identical" to that of Article 3.1. In *EC-Hormones,* the Appellate Body had looked at Article 3.1 in regard to Article 3.3, and found to manifest a relationship of exclusion, making Article 3.3 an autonomous right in the SPS Agreement.[14] This similarity, argued the EC, suggested that the relationship between Articles 2.2 and 5.1 and Article 5.7 is also one of exclusion. Secondly, the EC noted that the text of Article 5.7 is incorporated by reference into the text of Article 2.2.[15] Article 5.7 would therefore form part of Article 2 and thus set out basic rights and obligations of equal status to the others in that article.

For the complaining parties, Article 5.7 could not be an autonomous right as "it does not provide basis for a claim of an alleged breach of a WTO obligation, but acts as a defence to shield measures that would otherwise violate Articles 2.2 and 5.1."[16] In addition, Canada argued that equating the relationship between Articles 2.2 and 5.1, and Article 5.7, with the relationship between Articles 3.1 and 3.3 was inappropriate because of the different purposes and characteristics of these articles.[17] Article 3.1 of the SPS Agreement contains an obligation for WTO Members to base their sanitary and phytosanitary measures on international standards. Article 3.3 gives WTO Members, in the view of Canada, a "separate but equal" right to adopt measures to achieve levels of protection higher than those provided by those standards.[18] Canada submitted that Article 5.7 does not exist as such an option that can be freely chosen by the Member concerned. Rather, it is a temporary solution that must eventually give way to the obligations in Articles 2.2 and 5.1, and an exception that is only required if a measure is found to be inconsistent with these articles.

In addressing these arguments, the Panel began by examining the relationship between Article 2.2 and Article 5.7. In order to do this, it resorted to what it considered the "general test" to determine the relationship between two provisions for the purpose of allocating burden of proof,[19] articulated by the Appellate Body in *EC-Tariff Preferences*[20] on the basis of previous cases, including *EC-Hormones*:

---

[13] The WTO jurisprudence on burden of proof as it relates to the EC-Biotech Panel Report is further analyzed in Section III of the present paper.
[14] See EC-Hormones, supra note 3, paragraph 104.
[15] See EC-Biotech, supra note 6, paragraph 7.2952.
[16] Id., paragraph 7.2955.
[17] Id., paragraph 7.2957.
[18] Id.
[19] Id., paragraph 7.2967.
[20] Appellate Body Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (EC-Tariff Preferences), WT/DS246/AB/R, adopted on 20 April 2004.

> …In cases where one provision permits, in certain circumstances, behaviour that would otherwise be inconsistent with an obligation in another provision, and one of the two provisions refers to the other provision … the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour *only* where one of the provisions suggests that the obligation is not applicable to the said measure.[21]

Evaluating the relationship between Article 2.2 and Article 5.7, the Panel in *EC-Biotech* came to the conclusion that Article 5.7 should be characterized as a right and not an exception from a general obligation under Article 2.2.:

> 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 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. As we will explain further below, characterizing Article 5.7 as a right rather than as an exception has implications for the allocation of the burden of proof. [22]

Using the *EC-Tariff Preferences* test, it considered that

> The relationship in question is one where 'one provision [namely, Article 5.7] permits, in certain circumstances, behavior [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.[23]

The Panel recognized the existence of substantive differences between articles with similar texts and relationships, including Articles 3.1 and 3.3, as noted by Canada, but did not consider that these differences supported characterizing Article 5.7 as an exception.[24] Moreover, it also found its view consistent, for example, with the characterization of Article 5.7 as a "qualified exemption" in *Japan-Agricultural Products II.*[25]

As to the implications of its finding, the Panel noted that they were twofold. First, in terms of applicable law, "characterizing Article 5.7 as a qualified right rather than an exception means that if a challenged SPS measure was adopted and is

[21] Id., paragraph 88 (footnotes omitted), cited in EC-Biotech, supra note 6, paragraph 7.2962.
[22] See EC-Biotech, supra note 6, paragraph 7.2969.
[23] Id., paragraph 7.2968.
[24] Id., paragraph 7.2979.
[25] Id., paragraph 7.2972. Appellate Body Report, Japan – Measures Affecting Agricultural Products (Japan-Agricultural Products II), WT/DS/76/AB/R, adopted 19 March 1999.

maintained consistently with the four cumulative requirements of Article 5.7 … 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 relevant obligation in Article 2.2 is applicable to the challenged measure…"[26] The Panel thus did not accept the EC's arguments regarding the complete exclusion of Article 5.1 if a challenged measure fell under Article 5.7. Second, in terms of burden of proof, characterizing Article 5.7 as an autonomous right entails 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 one of the four requirements set forth in Article 5.7."[27]

The Panel then turned to examine the relationship between Article 5.1 and Article 5.7, also using the *EC-Tariff Preferences* test as a basis to determining whether Article 5.7 is a right in relation to Article 5.1. It thus considered three issues. First, the Panel looked at whether Article 5.7 permits, in certain circumstances, what would otherwise be inconsistent with Article 5.1. It found that under Article 5.7, SPS measures may be provisionally adopted and maintained even if they are not based on the type of risk assessment required by Article 5.1, so this is indeed the case.[28] Second, the Panel addressed whether either Article 5.1 or Article 5.7 refers to the other provision. In this regard, the Panel found a number of implicit references, including the expression "a more objective risk assessment" in Article 5.7, which it construed as an implicit reference to the type of risk assessment required in Article 5.1.[29] Lastly, the Panel examined whether there is any suggestion that the obligation in Article 5.1 is not applicable to measures falling within the scope of Article 5.7. It concluded that Article 5.1 is indeed not applicable to these measures, as suggested by the phrase "[i]n cases where relevant scientific evidence is insufficient" in Article 5.7, and by the clause "except as provided for in paragraph 7 of Article 5" in Article 2.2, which necessarily implies that Article 5.1 – a specific application of Article 2.2 – cannot be applicable in situations covered by Article 5.7.[30] As a result, the Panel found that Article 5.7 should be characterized as a right also in relation to Article 5.1.[31]

The implications, regarding both allocating the burden of proof and determining applicable of law, were considered to be similar to those deriving from the nature of Article 5.7 as a right vis-à-vis Article 2.2. In relation to burden of proof, it would be thus be up to the complaining parties to prove inconsistency with both Article 5.7 and Article 5.1.[32] In relation to applicable law, Article 5.1 would only be

[26] See EC-Biotech, supra note 6, paragraph 7.2973.
[27] Id., paragraph 7.2975.
[28] Id., paragraph 7.2992.
[29] Id., paragraph 7.2993.
[30] Id., paragraph 7.2994-5.
[31] Id., paragraph 7.2996.
[32] The Panel did recognize that previous panels have found inconsistencies with Article 5.1 without specifically examining whether the complaining party had adequately proved inconsistency with both Articles 5.1 and 5.7. However, in its view, this only reflects the fact that in those cases the responding party had not invoked the provisions of Article 5.7 in response to a claim of violation under Article 5.1.

applicable to a challenged measure if the measure was found to be inconsistent with at least one of the four requirements of Article 5.7.

In the specific *EC-Biotech* circumstances, however, the Panel chose to move away from the above-mentioned inferences. Even if, according these inferences, it should have begun its analysis with Article 5.7, which the EC had invoked as applicable, the Panel considered that the "critical legal issue" was whether the relevant safeguard measures met the requirements set out in the text of Article 5.1.[33] Therefore, it chose to follow the order of analysis established by previous WTO jurisprudence, and began its analysis of the consistency of the safeguard measures with the SPS Agreement by considering whether they met the Article 5.1 requirements:

> Under this approach, should we find that a relevant safeguard measure meets the requirements set out in the text of Article 5.1, there would be no need to examine the Complaining Parties' claims under Article 5.1 further... Should we find, however, that the safeguard measure does not meet the requirements set out in the text of Article 5.1, we would need to go on to examine whether this measure is consistent with the requirements of Article 5.7. If the safeguard measure were consistent with the requirements of Article 5.7, Article 5.1 would not be applicable and we would consequently need to conclude that the European Communities has not acted inconsistently with its obligations under Article 5.1. Conversely, if the safeguard measure were inconsistent with the requirements of Article 5.7, Article 5.1 would be applicable and, in view of the assumed fact that the safeguard measure does not meet the requirements set out in the text of Article 5.1, we would need to conclude that the European Communities has acted inconsistently with its obligations under Article 5.1.[34]

3. Implications of Characterizing Article 5.7 as an Autonomous Right in the SPS Agreement

Article 5.7 of the SPS Agreement has long been considered central to achieving the objective of sustainable development in the WTO. In reflecting the precautionary principle, Article 5.7 incorporates an essential basis for policy making in cases in which sanitary and phytosanitary action is needed to prevent and mitigate risks to human health and the environment before there is comprehensive and clear scientific evidence.[35] In addition, WTO Members have the right under the SPS Agreement to determine their appropriate level of protection, and it is Article 5.7 that ensures that insufficient scientific evidence does not impede them from taking measures to attain and maintain that level of protection. As a result, commentators have argued that Article 5.7 cannot be considered an exception within the SPS Agreement.[36] Rather, it has been maintained that Article 5.7 should be regarded as a central element in the science-based approach of the SPS Agreement, which aims to limit arbitrary or

[33] See EC-Biotech, supra note 6, paragraph 7.3005.
[34] Id., paragraph 7.3006.
[35] The precautionary principle has been incorporated, in various forms, in international environmental agreements and declarations, including the Rio Declaration. There is no single formulation of the precautionary principle, but a common element is the recognition that lack of certainty regarding the threat of environmental harm should not be used as an excuse for not taking action to avert that threat.
[36] See, e.g., Center for International Environmental Law et al, "Amicus Curiae Brief to the *EC-Biotech* Case," 1 June 2004.

unjustifiable trade restrictions while ensuring that no WTO Member is prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health.[37]

Article 5.7 was finally recognized as a right, not an exception, in the *EC-Biotech* Panel Report. Nevertheless, this determination was made by no means on the basis of the role or relevance of precautionary measures in the SPS Agreement. The Panel analyzed the nature of Article 5.7 from a strictly textual perspective, considering the language similarities with other provisions of the SPS Agreement. Moreover, although the issue had been raised as one of substantive law, the Panel examined the nature of Article 5.7 primarily for its procedural implications, linking it with the allocation of burden of proof. Commentators worry about this "hodgepodge of substantive and procedural arguments" and note that "at no point does the panel step back to try and form a coherent, holistic understanding and orientation of the Article 2.2-5.1/5.7 relationship."[38]

Such a holistic approach may not be appropriate in WTO jurisprudence. In *EC-Tariff Preferences*, the case that provided the "general test" used by the Panel to evaluate the nature of Article 5.7 in *EC-Biotech*, the Appellate Body did go further in its substantive consideration of the provisions at issue, looking not only at their text but also at their object and purpose. Nevertheless, in the end it did not consider these arguments as determining factors. Indeed, the Appellate Body noted that "the status and relative importance of a given provision does not depend on whether it is characterized, for the purpose of allocating the burden of proof, as a claim to be proven by the complaining party, or as a defense to be established by the responding party."[39]

If characterizing a provision as an autonomous right within a WTO agreement does not reflect or affect its status or relevance, then, what are the real consequences of the *EC-Biotech* findings regarding the nature of Article 5.7? The Panel discusses theoretical implications in two areas – applicability of law and allocation of burden of proof. As will be described below, however, there are a number of ambiguities and inaccuracies in the Panel's analysis and conclusions that may limit the actual impact of its findings. In addition, potential implications of EC-Biotech's recognition of Article 5.7 as a right beyond those identified by the Panel will also be considered.

3.1. APPLICABLE LAW

Although the determination of the applicable law was the context in which the nature of Article 5.7 was raised and decided, the contours of the *EC-Biotech* Panel Report in this area are far from clear. Such lack of clarity partly derives from the intermingling of substantive and procedural elements in the Panel's analysis. In particular, there is a blur between the concept of "applicability of the law," to which the EC seems to refer in its arguments, and the concept of "application of the law," on which the Panel focuses when determining the consequences of Article 5.7 as an autonomous right.

WTO Panels are charged with determining the applicable law in a dispute. That is, each Panel must ascertain the provisions that govern the factual situation at

[37] Id.
[38] Broude, supra note 10, page 6.
[39] EC-Tariff Preferences, supra note 20, paragraph 98.

issue. This is a substantive determination, based on the contemplation of the scope of the various WTO agreements and, within those agreements, specific provisions. The determination of the applicable law consists of several sub-functions, including, in cases where two legal rules overlap, establishing whether both were meant to apply or whether one takes precedence.[40]

After the determination of the applicable law, WTO Panels must then actually apply the law to the facts at issue. This is a procedural process through which the challenged measure is successively submitted to a test of compatibility with the applicable provisions. After that, a Panel makes a final determination in which the measure is found to be consistent or inconsistent with the provision that applies in the particular case.[41]

In the *EC-Biotech* case, the EC introduced the debate on the nature of Article 5.7 as a matter of applicable law. In its view, the nature of Article 5.7 as an autonomous right determined that, to the extent the safeguard measures fell within the scope of the SPS Agreement, they needed to be assessed under Article 5.7 and *only* Article 5.7. The EC based its argument on the two different categories developed by WTO jurisprudence for rules exempting Members from compliance with more general rules: provisions that establish an exception to other provisions, and provisions that exclude the application of other provisions.[42] The EC submitted that Article 5.7 was in the latter category and, as a result, any measure that fell in its scope should not be considered in relation to Article 5.1.

The Panel agreed with the EC in that Article 5.7 is a right, not an exception. However, it defined the consequences of such a nature in relation not to the applicability but to the application of the law. Contrary to the EC position, the Panel found that the applicability of Article 5.7 did *not* exclude that of Articles 2.2 and 5.1. The Panel stated that if a measure is adopted and maintained consistently with Article 5.7, then Articles 2.2 and 5.1 are not applicable. If, in contrast, a measure is found to be inconsistent with Article 5.7, the Panel considered that Articles 2.2 and 5.1 would then become applicable.

As a result, this paper would argue that the implications of the *EC-Biotech* characterization of Article 5.7 as a right do not in fact refer to the applicability of law. The SPS provisions applicable to measures adopted in cases of insufficient scientific evidence have not effectively changed. Articles 2.2, 5.1, and 5.7 all remain applicable provisions. As the EC stated in one of its submissions, the applicability of a WTO agreement "does not and cannot depend on whether or not it is consistent with one or other substantive provisions of that Agreement."[43] The situation is no different as regards Article 5.7 of the SPS Agreement or other specific provisions.

Though both Article 5.1 and 5.7 remain applicable, as a matter of application, only one provision will apply in each particular case. It is solely in this application process that the Panel situates the consequences of the nature of Article 5.7. These consequences are, in this regard, limited to altering the order of examination of the different applicable provisions. In the case of an exception, a WTO Panel should, as a first step, examine the consistency of a challenged measure with the general rule. If the measure is considered at this stage to be inconsistent, the Panel should then examine, as a second step, whether the measure is nevertheless justified by the

[40] Joel P. Trachtman, "The Domain of WTO Dispute Resolution," 40 Harv. Int'l L.J. 333 (1999).
[41] EC-Tariff Preferences, supra note 20, paragraph 102.
[42] Michelle T. Grando, "Allocating the Burden of Proof in WTO Disputes: A Critical Analysis," Journal of International Economic Law Vol. 9 No. 33, Oxford University Press 2006.
[43] Second Written Submission of the European Communities, *EC-Biotech*, July 2004, paragraph 83.

exception. It is only at this latter stage that a final determination of consistency with the general rule can be made.[44] In the case of an autonomous right, as described by the Panel in *EC-Biotech*, it is with this provision that a Panel would need to begin its examination. Nevertheless, as was noted in Section II, the *EC-Biotech* Panel in fact rejected to follow through on these findings, choosing, in the end, to follow the same order of examination as if Article 5.7 had been an exception, commencing by considering Article 5.1 and only then moving on to Article 5.7.

3.2. BURDEN OF PROOF

Characterizing Article 5.7 as an autonomous right, the *EC-Biotech* Panel found, would also have implications for the allocation of burden of proof. Indeed, this is the area in which the theoretical consequences of the nature of Article 5.7 seem most clear. The practical effects for future cases involving Article 5.7, however, are not evident.

In the WTO, as in most civil and common law systems and international tribunals, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense."[45] The rule seems simple enough, but WTO jurisprudence has struggled with distinguishing the provisions that establish affirmative defenses and thus place the burden of proof on the defending party. Nevertheless, it is widely accepted that certain provisions, even while exempting WTO Members from compliance with more general rules, are not such defenses or exceptions but "positive rules that establish obligations in themselves" or "autonomous rights."[46] In such cases, the burden of proof does not fall on the defending party. Rather, it is the complaining party that has the burden of proving, in addition to the claimed inconsistency with regards to the general rule, that the defending party does not fall under or meet the requirements of these provisions. As a result, after the *EC-Biotech* finding that Article 5.7 establishes an autonomous right, in cases where a complaining party alleges that an SPS measure is inconsistent with Articles 2.2 and 5.1, it would be this complaining party that bears the burden, rather than the responding party, to demonstrate that the challenged measure is inconsistent with at least one of the four requirements set forth in Article 5.7.

The implications of this allocation of burden of proof for future cases involving Articles 5.1 and 5.7 are still uncertain. The burden of proof in international proceedings is "the obligation of each of the parties to a dispute… to prove its claims to the satisfaction of, and in accordance with the rules acceptable to, the tribunal."[47] Each tribunal, as a result, regulates the process of presenting or evaluating evidence

---

[44] EC-Tariff Preferences, supra note 20, paragraph 101.

[45] Appellate Body Report, United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India (US-Wool Shirts and Blouses), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, page 14.

[46] The US-Wool Shirts and Blouses spoke of Articles XX and XI:(2)(c)(i) of the GATT as exceptions as opposed to "positive rules," and the expression was taken up in several posterior cases looking at burden of proof issues. The "autonomous right" language was used in EC-Hormones.

[47] Mojtaba Kazazi, BURDEN OF PROOF AND RELATED ISSUES (A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS), The Hague, Kluwer Law, 1996, page 10. As such, it is comparable with the notion of burden of proof utilized in civil law, and to the meaning of burden of proof as "burden of persuasion" in common law systems.

necessary to decide whether or not the burden of proof has been discharged.[48] It is worth considering the rules established in WTO jurisprudence, which delineate the responsibilities that must now be taken on by a complaining party in relation to Article 5.7 of the SPS Agreement.

It should be noted, for example, that in WTO cases the duty to present evidence on a particular claim does not rest solely on the party bearing the burden of proof. The duty of parties to cooperate in the presentation of evidence at the international level derives from the idea of the peaceful settlement of disputes, and seeks to provide tribunals as much information on the case as possible.[49] In the WTO, the Dispute Settlement Understanding (DSU) provides that "the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute."[50] The principle of cooperation was confirmed in *Argentina-Textiles*, in which the Panel noted the requirement for collaboration of the parties in the presentation of the facts and evidence, and particularly the role of the respondent in providing the tribunal with relevant documents that are in its sole possession.[51]

As a result, not bearing the burden of proof does not absolve a WTO Member of all responsibilities in the course of a dispute. This is particularly true in light of the standard of proof used by Panels and the Appellate Body. With the standard of proof of a *prima facie* case, as will be described below, a party not bearing the burden of proof will nevertheless need to rebut the presumption created by the initial presentation of facts supporting a claim or defense.

The standard of proof is the level of evidence required in a particular legal action to discharge the burden of proof, i.e. to convince the court that a given proposition is true. Tribunals have the authority to determine the standard of proof that needs to be satisfied by a proponent of a claim or affirmative defense in order to discharge the burden of proof.[52] In municipal law, standards of proof vary, ranging, for example, from preponderance of evidence to beyond a reasonable doubt.

In the WTO, beginning with *US-Wool Shirts and Blouses*, the standard of proof required has been a *prima facie* case. Under this standard of proof, in order for the proponent of a claim or defense to establish its position – and thus discharge its burden of proof – it will be sufficient to submit evidence of a *prima facie* case.[53] In other words, it is not necessary to present conclusive evidence, but merely evidence that, unless rebutted, would be sufficient to prove the claim or defense. It is then be up to the opposing party to rebut that *prima facie* case. As stated by the Appellate Body in *US-Wool Shirts and Blouses*, if the party with the burden of proof "adduces

---

[48] Joost Pauwelyn, "Evidence, Proof, and Persuasion in WTO Dispute Settlement: Who Bears the Burden?" Journal of International Economic Law 1 (1998), page 233.

[49] Kazazi, supra note 47, page 375.

[50] WTO Dispute Settlement Understanding, Article 3.10.

[51] Panel Report, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items (Argentina-Textiles), WT/DS56/R, 1997, paragraph 6.40. The Panel noted, however, that this obligation does not arise until the claimant has done its best to secure evidence and has produced a *prima facie* case.

[52] Hendrik Lambert Botha, "Burden of Proof in WTO Law: A Study of the Manner in which the Concept of Burden of Proof has been Interpreted and Applied by the WTO Dispute Settlement Body," World Trade Institute, University of Berne, 2002.

[53] Pauwelyn, supra note 48, page 246.

evidence sufficient to raise a presumption that what is claimed is true" then it is up to the other party to adduce sufficient evidence to rebut the presumption.[54]

In this context, the allocation of burden of proof has minimal consequences for the outcome of cases. Moreover, it has been noted that, in light of Article 13 of the DSU, which gives Panels the right to seek information, opinions, and technical advice from any relevant source, WTO cases are decided on the basis of a "basket of evidence," consisting of the evidence and legal argument of both parties to the dispute as well as arguments and evidence submitted by independent experts.[55] Indeed, as Pauwelyn observes: "An explicit determination of who bears the burden of proof (and further evaluation of whether or not this burden has been discharged) should only be made in the event the trier of fact is in doubt because the evidence is incomplete or in equipoise. When, in the eyes of the adjudicator, the evidence is complete and clear (in one or the other way), the issue of burden of proof becomes of academic interest only."[56] Cases involving Article 5.7 are not likely to differ in this regard.

3.3. INTERPRETATION

In calls for Article 5.7 to be considered as an autonomous right in the SPS Agreement, commentators noted that the interpretation of the requirements of Article 5.7 directly affected the ability of countries to respond effectively to health and environmental needs.[57] Given the importance of an interpretation ample enough to allow WTO Members to take all necessary measures to address these needs, this line of argument seems to have aimed at avoiding the possible narrow interpretation of the requirements of Article 5.7 if this provision was considered an exception. Indeed, in municipal and international law, the principle of restrictive interpretation is often applied to exceptions, on the basis that such a narrow interpretation ensures the protection of the rights and obligations contained in the general rules of the laws or treaties.[58] Consequently, the characterization of Article 5.7 as an autonomous right could create potential implications in the interpretation of this provision.

In the WTO, the relevance of the right-exception distinction in interpretation seems to be less significant, however. Article 3.2 of the DSU establishes that the dispute settlement procedure serves to clarify the provisions of WTO agreements "in accordance with customary rules of interpretation of public international law." From

---

[54] US-Wool Shirts and Blouses, supra note 45, page 14. It should be noted that the Appellate Body in this and other cases, as well as numerous Panels, speak of the shift of the burden of proof once a *prima facie* case has been established. However, commentators agree that the prima facie case is a standard of proof, not burden of proof issue. Indeed, the burden of proof in international proceedings does not shift and remains with the party that bears it throughout these proceedings.

[55] Lambert Botha, supra note 52, page 32.

[56] Pauwelyn, supra note 48, page 258. The concept of burden of proof implies that, in the event in which the evidence is insufficient for a determination, or is considered to be in equipoise (equally balanced), the tribunal will find against the party that bears the burden of proof. See, e.g., Panel Report, United States – Section 301-310 of the Trade Act of 1974 (US-Trade Act), WT/DS152/R, 1999, paragraph 7.14, and Panel Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia (US-Shrimp),WT/DS58/RW, 2001, paragraph 5.19.

[57] See, e.g., CIEL et al, supra note 36.

[58] Myress McDougal et al, THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE, Yale University Press, 1994, page 183.

early on, the reference to customary rules was determined to allude to Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention).[59] Within the criteria announced in these provisions, the Appellate Body has attached the greatest weight to the need to consider "the ordinary meaning of the terms of the treaty,"[60] clearly preferring a method of literal interpretation. [61]

In WTO jurisprudence, therefore, although the principle of strict interpretation of exceptions has not been excluded, it does have a much smaller reach. In *EC-Hormones*, the Appellate Body said that "merely characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation."[62] There is an evident reference to Articles 31 and 32 of the Vienna Convention, which do not give grounds for preferring one portion of the text over another, construing the latter more narrowly than the former.[63] As a result, in spite of the principle of restrictive interpretation, in the WTO context it is not the nature of Article 5.7 but its wording that is likely to impact the breadth of its construction.

4. Conclusion

The defense of precautionary measures taken under the SPS Agreement has not proved straightforward. WTO jurisprudence has acknowledged the relevance of the precautionary principle in the SPS Agreement and provided an arguably low threshold for some of the requirements needed to act in cases of insufficient scientific evidence.[64] However, to date, no sanitary or phytosanitary measure assessed under Article 5.7 has ever been found consistent with WTO rules.

Initial considerations of the *EC-Biotech* Panel Report noted that, by characterizing Article 5.7 as an autonomous right, and thus allocating the burden of proof of inconsistency on the complaining parties, it may facilitate the successful vindication of precautionary decision-making in the WTO.[65] Indeed, theoretical implications of recognizing Article 5.7 as a right in the SPS Agreement involve excluding other provisions from applicability to precautionary measures, placing the burden of proof on the complaining parties, and allowing a broader interpretation of its terms.

A closer look, however, reveals that the *EC-Biotech* finding on the nature of Article 5.7 is unlikely to revolutionize the consideration of precaution in the WTO. First, the analysis on the relationship between rights and exceptions issue in the *EC-*

---

[59] See, e.g., Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline (US-Gasoline), WT/DS2/AB/R, adopted 20 May 1996.

[60] Vienna Convention on the Law of Treaties, Article 31.1.

[61] Claus-Dieter Ehlermann, « Six Years on the Bench of the 'World Trade Court' » in THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003, edited by Federico Ortino and Erns-Ulrich Petersmann, Kluwer Law International, 2004, page 509.

[62] EC-Hormones, supra note 3, paragraph 104.

[63] David Palmeter and Petros C. Mavroidis, DISPUTE SETTLEMENT IN THE WOLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE, Cambridge University Press, 2004, page 151.

[64] Review within a "reasonable period of time," for example.

[65] Heike Baumüller and María Julia Oliva, "EC-Biotech Report: Overview of Key Issues and Implications" Environmental Policy and Law, Volume 37, Number 1 / 2007.

Biotech Panel Report is regarded as tangled and unclear – it does not depart from past rulings, but does raise questions on the consistency and appropriateness of current WTO jurisprudence on the issue.[66] Second, certain implications are expressly negated by the Panel. For example, the Panel recognized Article 5.7 as an autonomous right, but considered that it did not completely exclude Articles 2.2 and 5.1 as applicable provisions. Finally, some of the potential impacts are limited due to the contours of WTO jurisprudence. Allocating the burden of proof on the complaining parties may be an important legal issue, but the practical consequences of such a burden may be minimal given the approach towards evaluating evidence in WTO disputes. Similarly, in light of the well-established practice on interpretation in the WTO dispute settlement system, it is doubtful that the status of Article 5.7 will modify the consideration of its terms.

++++ ++++

[66] See, e.g., Simon Lester in his review of the EC-Biotech case for the American Journal of International Law, Vol. 101 No. 2, April 2007.