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International Trade Law

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INTERNATIONAL TRADE LAW
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Jurisprudence

Report of the Appellate Body, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 7 April 2004

WORLD TRADE ORGANIZATION

WT/DS246/AB/R
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EUROPEAN COMMUNITIES – CONDITIONS FOR THE GRANTING OF TARIFF PREFERENCES TO DEVELOPING COUNTRIES

AB-2004-1

Report of the Appellate Body

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
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Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
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EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, circulated to Members 1 December 2003
EEC – Dessert Apples	GATT Panel Report, *European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile*, L/6491, adopted 22 June 1989, BISD 36S/93
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
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Japan – Agricultural Products I	GATT Panel Report, *Japan – Restrictions on Imports of Certain Agricultural Products*, L/6253, adopted 2 March 1988, BISD 35S/163
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002

Short Title	Full Case Title and Citation
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
US – Customs User Fee	GATT Panel Report, *United States – Customs User Fee*, L/6264, adopted 2 February 1988, BISD 35S/245
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations", Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29
US – Malt Beverages	GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted 19 June 1992, BISD 39S/206
US – MFN Footwear	GATT Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, DS18/R, adopted 19 June 1992, BISD 39S/128
US – Section 337	GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323
US – Wool Shirts and Blouses	Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997, as upheld by the Appellate Body Report, WT/DS33/AB/R, DSR 1997:I, 343

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1971 Waiver Decision	Waiver Decision on the Generalized System of Preferences, GATT Document L/3545, 25 June 1971, BISD 18S/24 (attached as Annex D-2 to the Panel Report)
1999 LDC Waiver	Waiver Decision on Preferential Tariff Treatment for Least-Developed Countries, WT/L/304, 15 June 1999
Agreed Conclusions	Agreed Conclusions of the UNCTAD Special Committee on Preferences (attached as Annex D-4 to the Panel Report)
Charter of Algiers	Charter of Algiers, TD/38, adopted at the Ministerial Meeting of the Group of 77 on 24 October 1967
Drug Arrangements	Special arrangements to combat drug production and trafficking, contained in the Regulation
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
Enabling Clause	Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, GATT Document L/4903, 28 November 1979, BISD 26S/203 (attached as Annex 2 to this Report)
GATT 1947	*General Agreement on Tariffs and Trade 1947*
GATT 1994	*General Agreement on Tariffs and Trade 1994*
General Arrangements	General arrangements described in Article 7 of the Regulation
General Principle Eight	General Principle Eight contained in the Final Act and Report adopted at the First Session of UNCTAD on 15 June 1964, at p. 20 (Exhibit EC-20 submitted by the European Communities to the Panel)
GSP	Generalized System of Preferences
MFN	Most-favoured-nation
OECD Special Report	Report of the Special Group of the Organization for Economic Co-operation and Development (OECD) on Trade with Developing Countries, TD/56, 29 January 1968
Regulation	Council Regulation (EC) No. 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004, *Official Journal of the European Communities*, L Series, No. 346 (31 December 2001), p. 1 (Exhibit India-6 submitted by India to the Panel)
Resolution 21(II)	Resolution 21(II) of the Second Session of UNCTAD, entitled "Expansion and Diversification of Exports of Manufactures and Semi-Manufactures of Developing Countries" (attached as Annex D-3 to the Panel Report)
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SPS Agreement	*Agreement on the Application of Sanitary and Phytosanitary Measures*
UNCTAD	United Nations Conference on Trade and Development
Vienna Convention	*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679
Working Procedures	*Working Procedures for Appellate Review,* WT/AB/WP/7, 1 May 2003
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries

European Communities, *Appellant*
India, *Appellee*

Bolivia, *Third Participant*
Brazil, *Third Participant*
Colombia, *Third Participant*
Costa Rica, *Third Participant*
Cuba, *Third Participant*
Ecuador, *Third Participant*
El Salvador, *Third Participant*
Guatemala, *Third Participant*
Honduras, *Third Participant*
Mauritius, *Third Participant*
Nicaragua, *Third Participant*
Pakistan, *Third Participant*
Panama, *Third Participant*
Paraguay, *Third Participant*
Peru, *Third Participant*
United States, *Third Participant*
Venezuela, *Third Participant*

AB-2004-1

Present:

Abi-Saab, Presiding Member
Baptista, Member
Sacerdoti, Member

I. Introduction

1. The European Communities appeals certain issues of law and legal interpretations developed in the Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (the "Panel Report").[1] The Panel was established to consider a complaint by India against the European Communities regarding the conditions under which the European Communities accords tariff preferences to developing countries pursuant to Council Regulation (EC) No. 2501/2001 of 10 December 2001 "applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004" (the "Regulation").[2]

2. The Regulation provides for five preferential tariff "arrangements" [3], namely:

[1]WT/DS246/R, 1 December 2003.

[2]*Official Journal of the European Communities*, L Series, No. 346 (31 December 2001), p. 1 (Exhibit India-6 submitted by India to the Panel).

[3]Regulation, Art. 1.2.

(a) general arrangements described in Article 7 of the Regulation (the "General Arrangements");

(b) special incentive arrangements for the protection of labour rights;

(c) special incentive arrangements for the protection of the environment;

(d) special arrangements for least-developed countries; and

(e) special arrangements to combat drug production and trafficking (the "Drug Arrangements").[4]

3. All the countries listed in Annex I to the Regulation are eligible to receive tariff preferences under the General Arrangements[5], which provide, broadly, for suspension of Common Customs Tariff duties on products listed as "non-sensitive" and for reduction of Common Customs Tariff *ad valorem* duties on products listed as "sensitive".[6] The General Arrangements are described in further detail in paragraphs 2.4 and 2.5 of the Panel Report. The four other arrangements in the Regulation provide tariff preferences *in addition* to those granted under the General Arrangements.[7] However, only some of the country beneficiaries of the General Arrangements are also beneficiaries of the other arrangements. Specifically, preferences under the special incentive arrangements for the protection of labour rights and the special incentive arrangements for the protection of the environment are restricted to those countries that "are determined by the European Communities to comply with certain labour [or] environmental policy standards"[8], respectively. Preferences under the special arrangements for least-developed countries are restricted to certain specified countries.[9] Finally, preferences under the Drug Arrangements are provided only to 12 predetermined countries, namely Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru, and Venezuela.[10]

4. India is a beneficiary of the General Arrangements but not of the Drug Arrangements, or of any of the other arrangements established by the Regulation. In its request for the establishment of a panel, India challenged the Drug Arrangements as well as the special incentive arrangements for the protection of labour rights and the environment.[11] However, in a subsequent meeting with the Director-General regarding the composition of the Panel—and later in writing to the European Communities—India indicated its decision to limit its complaint to the Drug Arrangements, while reserving its right to bring additional complaints regarding the two "special incentive arrangements".[12] Accordingly, this dispute concerns only the Drug Arrangements.

[4] *Ibid.*

[5] Panel Report, para. 2.4.

[6] Regulation, Arts. 7.1-7.2.

[7] *Ibid.*, Arts. 8-10. For example, these tariff preferences include further reductions in the duties imposed on certain "sensitive" products.

[8] Panel Report, para. 2.3. See Regulation, Arts. 14 and 21, and Annex I (Columns E and G).

[9] Regulation, Annex I (Column H).

[10] *Ibid.* (Column I); Panel Report, paras. 2.3 and 2.7.

[11] Request for the establishment of a panel by India, WT/DS246/4, 9 December 2002, p. 2.

[12] Panel Report, para. 1.5.

5. The Panel summarized the effect of the Drug Arrangements as follows:

> The result of the Regulation is that the tariff reductions accorded under the Drug Arrangements to the 12 beneficiary countries are greater than the tariff reductions granted under the General Arrangements to other developing countries. In respect of products that are included in the Drug Arrangements but not in the General Arrangements, the 12 beneficiary countries are granted *duty free* access to the European Communities' market, while all other developing countries must pay the *full duties applicable under the Common Customs Tariff*. In respect of products that are included in both the Drug Arrangements and the General Arrangements and that are deemed "sensitive" under column G of Annex IV to the Regulation with the exception for products of CN codes 0306 13, 1704 10 91 and 1704 10 99, the 12 beneficiary countries are granted *duty-free* access to the European Communities' market, while all other developing countries are entitled only to *reductions in the duties applicable under the Common Customs Tariff*. [13] (original italics)

6. India requested the Panel to find that "the Drug Arrangements set out in Article 10" [14] of the Regulation are inconsistent with Article I:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and are not justified by the Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries (the "Enabling Clause").[15] In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 1 December 2003, the Panel concluded that:

(a) India has the burden of demonstrating that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994;

(b) India has demonstrated that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994;

(c) the European Communities has the burden of demonstrating that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause; [and]

(d) the European Communities has failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause[.][16]

The Panel also concluded that the European Communities had "failed to demonstrate that the Drug Arrangements are justified under Article XX(b) of GATT 1994".[17] Finally, the Panel concluded, pursuant to Article 3.8 of the *Understanding on Rules and Procedures Governing the Settlement of*

[13] *Ibid.*, para. 2.8. See also, *ibid.*, para. 2.7.

[14] *Ibid.*, para. 3.1 (referring to India's first written submission to the Panel, para. 67).

[15] GATT Document L/4903, 28 November 1979, BISD 26S/203 (attached as Annex 2 to this Report).

[16] Panel Report, para. 8.1(a)-(d).

[17] *Ibid.*, para. 8.1(e).

Disputes (the "DSU"), that "because the Drug Arrangements are inconsistent with Article I:1 of GATT 1994 and not justified by Article 2(a) of the Enabling Clause or Article XX(b) of GATT 1994, the European Communities has nullified or impaired benefits accruing to India under GATT 1994."[18]

7. On 8 January 2004, the European Communities notified the Dispute Settlement Body of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal[19] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[20] On 19 January 2004, the European Communities filed its appellant's submission.[21] On 30 January 2004, Pakistan notified its intention to appear at the oral hearing as a third participant.[22] On 2 February 2004, India filed its appellee's submission.[23] On the same day, Costa Rica, Panama, Paraguay, and the United States each filed a third participant's submission, and Bolivia, Colombia, Ecuador, Peru, and Venezuela filed a joint third participant's submission as the Andean Community.[24] Also on 2 February 2004, Brazil notified its intention to make a statement at the oral hearing as a third participant, and Mauritius notified its intention to appear at the oral hearing as a third participant.[25] Finally, on 2 February 2004, El Salvador, Guatemala, Honduras, and Nicaragua jointly notified their intention to make a statement at the oral hearing as third participants.[26] On 4 February 2004, Cuba notified its intention to appear at the oral hearing as a third participant.[27] By letter dated 16 February 2004, Pakistan submitted a request to make a statement at the oral hearing.[28] No participant objected to Pakistan's request, which was authorized by the Division hearing the appeal on 18 February 2004.[29]

8. The oral hearing in this appeal was held on 19 February 2004. The participants and third participants presented oral arguments (with the exception of Cuba and Mauritius) and responded to questions posed by the Members of the Division hearing the appeal.

[18] *Ibid.*, para. 8.1(f).

[19] Notification of an appeal by the European Communities, WT/DS246/7, 8 January 2004 (attached as Annex 1 to this Report).

[20] WT/AB/WP/7, 1 May 2003.

[21] Pursuant to Rule 21 of the *Working Procedures*.

[22] Pursuant to Rule 24(2) of the *Working Procedures*.

[23] Pursuant to Rule 22 of the *Working Procedures*.

[24] Pursuant to Rule 24(1) of the *Working Procedures*.

[25] Pursuant to Rule 24(2) of the *Working Procedures*.

[26] *Ibid.*

[27] Pursuant to Rule 24(4) of the *Working Procedures*.

[28] *Ibid.*

[29] Pursuant to Rule 27(3)(c) of the *Working Procedures*. The Director of the Appellate Body Secretariat advised Pakistan and the other participants in the appeal of the Division's decision by letter dated 18 February 2004.

II. Arguments of the Participants and Third Participants

A. *Claims of Error by the European Communities – Appellant*

1. The Relationship Between Article I:1 of the GATT 1994 and the Enabling Clause

9. The European Communities argues that the Panel erred in finding that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994 and in assigning to the European Communities the burden of justifying the Drug Arrangements under the Enabling Clause. Furthermore, the European Communities submits, the Panel erred in finding that Article I:1 applies to measures covered by the Enabling Clause. The European Communities requests the Appellate Body to reverse the Panel's consequent finding that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 and, because India made no claim with respect to the Enabling Clause, to refrain from assessing the Drug Arrangements under the Enabling Clause.

10. According to the European Communities, the Panel's main reason for deciding that the Enabling Clause is an exception to Article I:1 was that the Enabling Clause does not provide "positive rules establishing obligations in themselves".[30] In the European Communities' view, however, the fact that developed countries are not legally obliged to implement schemes pursuant to the Generalized System of Preferences ("GSP") does not mean that the Enabling Clause does not impose positive obligations, or that it is an exception to Article I:1. The European Communities argues that the Panel's reasoning suggests that, if a WTO provision applies only when a WTO Member takes a particular step that it is not obliged to take, that provision cannot create a positive obligation and must be an exception. According to the European Communities, this test is not consistent with Appellate Body decisions and "would lead to manifestly absurd results".[31] For example, the European Communities contends, this test would mean that the following provisions do not impose positive rules establishing obligations in themselves, despite contrary reasoning in previous Appellate Body decisions: Article 27.4 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"); Article 3.3 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"); Article 2.4 of the *Agreement on Technical Barriers to Trade*; and Article 6 of the *Agreement on Textiles and Clothing*.[32] According to the European Communities, Articles VI and XIX of the GATT 1994 would also be rendered exceptions under the Panel's reasoning, contrary to well-established GATT and WTO panel practice.

11. The European Communities suggests that the Panel should have begun its analysis by examining the ordinary meaning of the word "notwithstanding" in the Enabling Clause. This ordinary meaning, in the view of the European Communities, does not compel the Panel's finding that the Enabling Clause is an "exception" to Article I:1. This is apparent from the dissenting opinion in the Panel Report and the Panel's own recognition that the definition of "notwithstanding" is not dispositive of this question. Therefore, the European Communities argues, in accordance with the basic rules of treaty interpretation in Article 31 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")[33], the Panel should have proceeded to examine the relevant "content"[34],

[30] European Communities' appellant's submission, para. 32 (quoting Panel Report, para. 7.35, itself quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, at 337).

[31] *Ibid.*, para. 34.

[32] *Ibid.*, para. 35 (referring to Appellate Body Report, *Brazil – Aircraft*, paras. 134-141; Appellate Body Report, *EC – Hormones*, paras. 97-104; Appellate Body Report, *EC – Sardines*, para. 275; and Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 12-17, DSR 1997:I, at 333-338).

[33] Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

context, and object and purpose of the Enabling Clause in order to identify the relationship between the Enabling Clause and Article I:1. Instead, the European Communities observes, the Panel simply "assumed"[35] that the Enabling Clause is an exception to Article I:1.

12. Turning to the content and context of the Enabling Clause, the European Communities submits that the Enabling Clause provides a comprehensive set of rules that positively regulate the substantive content of GSP schemes, to the exclusion of the rules in Article I:1 of the GATT 1994. Specifically, the European Communities emphasizes that the words "generalized, non-reciprocal and non discriminatory" in footnote 3 of the Enabling Clause are distinct from and are intended to replace the most-favoured-nation ("MFN") obligation in Article I:1. The European Communities also argues that, according to the Panel's own reasoning, footnote 3 should be interpreted in the context of the Agreed Conclusions of the Special Committee on Preferences of the United Nations Conference on Trade and Development (the "Agreed Conclusions")[36] and the submissions by developed countries to that committee. As such, the detailed obligations created by paragraph 2(a), footnote 3, and paragraph 3(c) of the Enabling Clause go far beyond "mere 'anti-abuse' safeguards".[37] The European Communities contends that the Enabling Clause is unlike the chapeau of Article XX of the GATT 1994, which neither regulates the substantive content of measures adopted by Members, nor replaces the substantive rules from which Article XX derogates.

13. The European Communities relies in support of its argument on the position of the Enabling Clause within the GATT 1994 and the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"). Thus, the European Communities contends that if paragraph 2(a) of the Enabling Clause were an exception to Article I:1, it would typically be found in Article I, or immediately after that Article. This is not the case, however. The Enabling Clause is a separate decision complementing Part IV of the GATT 1994, which is entitled "Trade and Development". In the view of the European Communities, Part IV of the GATT 1994 and the Enabling Clause cannot be "mere 'exception[s]'" to the GATT 1994.[38] Rather, the European Communities argues, they constitute a "special regime" for developing countries to address inequalities among the WTO Membership.[39]

14. The European Communities submits that its understanding of the relationship between Article I:1 and the Enabling Clause is supported by the object and purpose of the Enabling Clause, in accordance with the rules of treaty interpretation. The European Communities emphasizes that the Enabling Clause is "the most concrete, comprehensive and important application"[40] of the principle of special and differential treatment. In the view of the European Communities, special and differential treatment is "the most basic principle of the international law of development"[41], and it constitutes *lex specialis* that applies to the exclusion of more general WTO rules on the same subject matter. In concluding that the Enabling Clause is an "exception" to Article I:1, the Panel chose to "disregard"[42] this principle. Moreover, the European Communities argues, characterizing special and differential treatment as an "exception" suggests that this principle "is *discriminatory* against the developed

[34]European Communities' appellant's submission, paras. 18 and 39, and heading 2.5.1.

[35]European Communities' appellant's submission, para. 31.

[36]Attached as Annex D-4 to the Panel Report.

[37]European Communities' appellant's submission, para. 48.

[38]*Ibid.*, para. 51.

[39]*Ibid.*

[40]European Communities' appellant's submission, para. 20.

[41]*Ibid.*, para. 21.

[42]*Ibid.*, para. 23.

country Members".[43] In fact, special and differential treatment is designed to achieve effective equality among Members. Therefore, the European Communities contends that the Panel's reasoning undermines the principle of special and differential treatment and challenges its "legitimacy".[44] The European Communities also asserts that the Panel was "oblivious"[45] to certain elements of the drafting history of the Enabling Clause, which indicate that the Contracting Parties intended to strengthen the legal status of GSP schemes in the GATT by replacing the Waiver Decision on the Generalized System of Preferences (the "1971 Waiver Decision")[46] with the Enabling Clause.

15. The European Communities further contends that special and differential treatment is critical to achieving one of the fundamental objectives of the *WTO Agreement*, as identified in its Preamble: ensuring that developing countries "secure a share in the growth in international trade commensurate with the needs of their economic development".[47] Therefore, according to the European Communities, the object and purpose of the Enabling Clause clearly distinguish it from exceptions such as those found in Article XX(a) and (b) of the GATT 1994, which generally allow Members to adopt "legitimate policy objectives"[48] that are *separate and distinct* from the objectives of the *WTO Agreement*. In the European Communities' view, the Appellate Body decision in *Brazil – Aircraft* confirms that the fact that a provision confers special and differential treatment is highly relevant in determining whether that provision constitutes an exception.

16. The European Communities notes the Panel's suggestion that absurd results would flow from characterizing the Enabling Clause as excluding the application of Article I:1 because it "would mean that GSP imports from different developing countries could be subject to different taxation levels in the importing country's domestic market."[49] According to the European Communities, the Panel confuses *tariff measures* covered by paragraph 2(a) with the *imported products* to which such measures apply. Finding that the Enabling Clause excludes the application of Article I:1 would mean only that Article I:1 does not apply to a *tariff measure* falling within paragraph 2(a) of the Enabling Clause. It would not mean, as the Panel suggested, that Article I:1 does not apply with respect to *imported products* covered by such a *tariff measure*.

17. The European Communities submits that, as a result of the Panel's erroneous findings that the Enabling Clause is an "exception" to Article I:1 and that the Enabling Clause does not prevent the continued application of Article I:1, the Panel found that the European Communities bears the burden of justifying the Drug Arrangements under the Enabling Clause. According to the European Communities, the Enabling Clause imposes "positive obligations"[50] and is not an exception. As such, it is India that must, in the first instance, claim that the Drug Arrangements are inconsistent with the Enabling Clause and thereby bear the burden of demonstrating that inconsistency. According to the European Communities, India made no claim under the Enabling Clause. Consequently, the European Communities requests the Appellate Body to reverse the Panel's finding that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 and to refrain from examining the consistency of the Drug Arrangements with the Enabling Clause.

[43]*Ibid.*, para. 26. (original italics)

[44]*Ibid.*

[45]*Ibid.*, para. 25.

[46]GATT Document L/3545, 25 June 1971, BISD 18S/24 (attached as Annex D-2 to the Panel Report).

[47]European Communities' appellant's submission, para. 20 (quoting *WTO Agreement*, Preamble, second recital).

[48]*Ibid.*, para. 52.

[49]European Communities' appellant's submission, para. 56 (quoting Panel Report, para. 7.46).

[50]*Ibid.*, para. 39.

2. Whether the Drug Arrangements are Justified Under the Enabling Clause

18. The European Communities makes a "subsidiary" appeal, which would arise only if the Appellate Body were to find that the Enabling Clause is an exception to Article I:1 of the GATT 1994, or that India made a valid claim under the Enabling Clause. Specifically, the European Communities claims "subsidiarily"[51] that the Panel erred in finding that the Drug Arrangements are not "justified"[52] under paragraph 2(a) of the Enabling Clause and, therefore, requests the Appellate Body to reverse this finding.

19. According to the European Communities, this finding of the Panel was based on two erroneous legal interpretations. The first alleged error relates to the Panel's interpretation of the term "non-discriminatory" in footnote 3 of the Enabling Clause as requiring GSP schemes to provide "identical" preferences to "all" developing countries without differentiation, except with regard to *a priori* import limitations as permissible safeguard measures. The second error alleged by the European Communities concerns the Panel's interpretation of the term "developing countries" in paragraph 2(a) of the Enabling Clause as meaning *all* developing countries, except with regard to *a priori* limitations.

20. The European Communities asserts that the Panel's interpretation of the word "non-discriminatory" in footnote 3 of the Enabling Clause is erroneous because the phrase "generalized, non-reciprocal and non discriminatory" in footnote 3 merely refers to the description of the GSP in the 1971 Waiver Decision and, of itself, does not impose any legal obligation on preference-granting countries.[53] Even assuming such obligations existed, the European Communities maintains, the Panel failed to take into account the context of footnote 3 and the object and purpose of the Enabling Clause. Properly interpreted, the European Communities argues, the word "non-discriminatory" allows a preference-granting country to accord differential tariff treatment in its GSP scheme to developing countries that have different development needs according to "objective criteria", provided that tariff differentiation is an "adequate" response to these differences.[54]

21. The European Communities emphasizes that the immediate context for interpreting the term "non-discriminatory" in footnote 3 includes the terms "generalized" and "non-reciprocal" in that same footnote. These three terms express "distinct requirement[s]"[55], according to the European Communities, and they must be interpreted so that each is compatible with the other two, without being rendered redundant.

22. According to the European Communities, the ordinary meaning of the word "generalized" and the negotiating history indicate that GSP schemes are not required to cover *all* developing countries. The word "generalized" in footnote 3 was intended to distinguish these preferences from "special" preferences, which were granted to selected developing countries for political, historical, or geographical reasons. The European Communities maintains that consultations in the United Nations Conference on Trade and Development ("UNCTAD") led to a compromise in the Agreed Conclusions such that developed countries would, "in general"[56], recognize as beneficiaries those countries that

[51] *Ibid.*, para. 67.

[52] *Ibid.* (quoting Panel Report, para. 7.177).

[53] European Communities' response to questioning at the oral hearing.

[54] European Communities' appellant's submission, para. 4.

[55] *Ibid.*, para. 80.

[56] *Ibid.*, para. 87.

considered themselves as developing countries, although a developed country might decide to exclude a country *ab initio* on grounds it considered "compelling".[57]

23. In contrast to the term "generalized", the European Communities argues, the word "non-discriminatory" relates to whether developed countries may grant different preferences to individual developing countries that have already been recognized as beneficiaries of a GSP scheme. The European Communities submits that the Panel's interpretation of "non-discriminatory", as requiring that identical preferences be granted to *all* developing countries, would render redundant the term "generalized".

24. Referring to the term "non-reciprocal" in footnote 3, the European Communities argues that reciprocity, in connection with inter-state relations, generally refers to an exchange of identical or similar benefits. In contrast to the word "unconditionally" found in Article I:1 of the GATT 1994, the European Communities argues, the word "non-reciprocal" was not intended to prevent developed countries from attaching all types of conditions to preferences granted under GSP schemes. Rather, in the European Communities' view, the word "non-reciprocal" only prohibits developed countries from imposing conditions of *reciprocity*. The European Communities contends that the Panel's interpretation of "non-discriminatory" precludes the imposition of *any* conditions on the granting of preferences, thereby rendering redundant the word "non-reciprocal" in footnote 3. In addition, the European Communities claims, the Panel's interpretation equates *conditional* preferences with *discriminatory* preferences. In fact, according to the European Communities, a preference is not rendered discriminatory by virtue of a condition being attached to it if the condition applies equally to, and is capable of being fulfilled by, all GSP beneficiaries "that are in the same situation".[58]

25. The European Communities maintains that its interpretation of "non-discriminatory" in footnote 3 does not render redundant paragraph 2(d) of the Enabling Clause, as the Panel suggested. In the view of the European Communities, the scope of paragraph 2(a) differs from that of paragraph 2(d) in three respects. First, paragraph 2(a) applies to preferences granted by *developed* countries, whereas paragraph 2(d) includes preferences granted by *any* WTO Member. Secondly, paragraph 2(a) relates only to preferences under GSP schemes, whereas paragraph 2(d) relates to any measures imposed in favour of developing countries. Thirdly, paragraph 2(a) applies only to tariff measures, whereas paragraph 2(d) applies to any kind of "special treatment".[59] In addressing only the last of these differences, the European Communities argues, the Panel's reasoning was "manifestly flawed".[60]

26. The European Communities points out that the Panel found that paragraph 3(c) of the Enabling Clause allows developed countries to differentiate in their GSP schemes in only two ways, namely, in connection with least-developed countries and in the implementation of *a priori* limitations. According to the European Communities, the Panel arrived at this interpretation despite the absence of any such restriction in the text of paragraph 3(c) and despite the Panel's acceptance of the European Communities' argument that the "needs" described in paragraph 3(c) extend to individual or common needs of particular categories of developing countries. In fact, the European Communities argues, paragraph 3(c) lends contextual support to the European Communities' interpretation of the word "non-discriminatory" in footnote 3. The European Communities claims that the objective described in paragraph 3(c) is best achieved by allowing developed countries to design their GSP schemes so as to take into account the development needs of certain categories of developing countries.

[57] European Communities' appellant's submission, paras. 85 and 87.

[58] *Ibid.*, para. 120.

[59] *Ibid.*, para. 122 (quoting Enabling Clause, para. 2(d) (attached as Annex 2 to this Report)).

[60] European Communities' appellant's submission, para. 125.

27. The European Communities argues that the Panel's contrary interpretation of paragraph 3(c) stems from the Panel's concern that developed countries might abuse their discretion by distinguishing arbitrarily between developing countries. In the view of the European Communities, such policy concerns cannot replace the text of paragraph 3(c). Furthermore, the European Communities submits that this concern is unwarranted because the European Communities' interpretation of "non-discriminatory" would not allow a preference-granting country to distinguish between developing countries on the basis of political, historical, or geographical ties. Rather, a distinction would be allowed only if it: (i) pursued an "objective which is legitimate in the light of the objectives of the Enabling Clause" and the principle of special and differential treatment; and (ii) represented a "reasonable" and "proportionate" means of achieving that objective.[61] In order to assess whether these criteria are met, panels need to analyze the relevant facts.

28. The European Communities contends that, because of the Panel's erroneous legal interpretations, the Panel made insufficient factual findings in order for the Appellate Body to complete the legal analysis regarding the consistency of the Drug Arrangements with footnote 3. Nevertheless, should the Appellate Body decide to complete this analysis, the European Communities requests the Appellate Body to find that the Drug Arrangements are consistent with the term "non-discriminatory" in footnote 3 and, therefore, with paragraph 2(a) of the Enabling Clause.

29. The European Communities contends that, although tariff preferences may not be an "adequate" or "appropriate" response to other development problems, drug production and trafficking form major economic activities in the relevant countries, which activities cannot be eliminated without the provision of "alternative licit activities".[62] Therefore, the European Communities claims that tariff preferences are an appropriate response to the drug problem, as recognized by the Members of the WTO—through the Preamble to the *Agreement on Agriculture* and the waiver for the United States' Andean Trade Preference Act[63]—and the United Nations—through other instruments. Furthermore, the European Communities argues that the Drug Arrangements are non-discriminatory because the drug problem affects individual developing countries in different ways, and because beneficiaries under the Drug Arrangements are designated according to the impact of the drug problem in those countries.

30. The European Communities distinguishes the "object and purpose" of the Enabling Clause from that of Article I:1 of the GATT 1994. Article I:1 focuses on providing equal conditions of competition for imports of like products from WTO Members, whereas the Enabling Clause embodies special and differential treatment for developing countries and, therefore, aims to provide unequal competitive opportunities to respond to the needs of such countries. The European Communities claims that, in the light of the objectives associated with special and differential treatment, providing additional preferences to countries with particular development needs is not discriminatory in the context of the Enabling Clause. However, the Panel failed to take into account these objectives. The European Communities contends that the Panel should have interpreted the objectives described in the Preamble to the *WTO Agreement* in a harmonious manner, instead of assuming that the objective of eliminating discrimination prevails over the objective of ensuring that developing countries secure a share of international trade commensurate with their development needs.

31. The European Communities contends that the Panel relied selectively and incorrectly on certain UNCTAD texts to support its findings. According to the European Communities, some of these documents do not assist in interpreting footnote 3 of the Enabling Clause.[64] In several cases, this is because they relate not to the issue of non-discrimination, but to the exclusion of certain developing countries *ab initio* from GSP schemes.[65] The European Communities contends that several other documents that the Panel relied on contain merely "expectations"[66] or "aim[s]"[67] of particular parties, rather than agreed statements of "legally binding" obligations.[68] Finally, the European Communities argues, the Agreed Conclusions do not purport to be an exhaustive regulation of GSP schemes. Therefore, in the European Communities' view, the allowance under the Agreed Conclusions for differentiation in favour of least-developed countries does not mean that the Agreed Conclusions prohibit all other forms of differentiation between developing countries.

[61] *Ibid.*, para. 135.

[62] European Communities' appellant's submission, paras. 144-145.

[63] *Ibid.*, para. 148 (referring to Waiver Decision on the United States – Andean Trade Preference Act, GATT Document L/6991, 19 March 1992, BISD 39S/385; renewed 14 October 1996, WT/L/184).

32. The European Communities submits that the practice by developed countries of seeking waivers in order to provide more favourable treatment to a limited number of developing countries—as highlighted by the Panel—does not mean that such treatment may not otherwise be provided. According to the European Communities, the waivers mentioned by the Panel all relate to the restriction of preferences *ab initio* to particular countries in a particular region. The European Communities further points out that, in seeking these waivers, the preference-granting countries did not claim that the preferences were restricted to developing countries with development needs of a specific kind.

33. The European Communities contends that the Panel's interpretation of the term "developing countries" in paragraph 2(a) of the Enabling Clause is erroneous because it is entirely dependent on the Panel's erroneous interpretation of the word "non-discriminatory". In the European Communities' view, as the word "non-discriminatory" in footnote 3 of the Enabling Clause allows Members to differentiate between developing countries with different development needs, it follows for the same reasons that paragraph 2(a) does not require Members to grant the same preferences to *all* developing countries.

34. For these reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that the Drug Arrangements are inconsistent with paragraph 2(a) of the Enabling Clause and, in particular, with footnote 3 thereof.

[64] *Ibid.*, paras. 159-160 (referring to Resolution 21(II) of the Second Session of UNCTAD, entitled "Expansion and Diversification of Exports of Manufactures and Semi-Manufactures of Developing Countries" (attached as Annex D-3 to the Panel Report) ("Resolution 21(II)")) and paras. 182-183 (referring to the Recommendation contained in Annex A.II.1 to the Final Act and Report adopted at the First Session of UNCTAD on 15 June 1964, at p. 26).

[65] European Communities' appellant's submission, paras. 162-163 (referring to the Charter of Algiers, TD/38, adopted at the Ministerial Meeting of the Group of 77 on 24 October 1967 ("Charter of Algiers")) and paras. 179-181 (referring to General Principle Eight contained in the Final Act and Report adopted at the First Session of UNCTAD on 15 June 1964, at p. 20 (Exhibit EC-20 submitted by the European Communities to the Panel) ("General Principle Eight")).

[66] *Ibid.*, para. 162 (referring to Charter of Algiers).

[67] *Ibid.*, para. 165 (referring to the Report of the Special Group of the Organization for Economic Co-operation and Development (OECD) on Trade with Developing Countries, TD/56, 29 January 1968 ("OECD Special Report")).

[68] *Ibid.*, para. 180 (referring to General Principle Eight).

B. *Arguments of India – Appellee*

1. The Relationship Between Article I:1 of the GATT 1994 and the Enabling Clause

35. India argues that the Panel correctly found that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994 and requests the Appellate Body to uphold this finding. In addition, India submits that it made a claim against the Drug Arrangements under the Enabling Clause and that, therefore, the Appellate Body should examine the consistency of the Drug Arrangements under the Enabling Clause, even if it finds that the Enabling Clause is not an exception to Article I:1.

36. India contends that the Panel's test as to what is an "exception" is consistent with previous Appellate Body decisions. According to India, the Appellate Body drew an important distinction in *US – Wool Shirts and Blouses* between "positive rules establishing obligations in themselves" and "exceptions" to those obligations.[69] India states that an exception is an "affirmative defence"[70] and, accordingly, panels examine the consistency of a challenged measure with an exception only if the Member complained against invokes the exception to justify its measure. This leaves the Member with the choice of which exceptions to invoke and prevents exceptions being turned into rules. In other words, in India's view, a Member needs to comply with a provision that is an exception only when the Member invokes that exception to justify an inconsistency with another provision.

37. Applying this reasoning to the present dispute, India characterizes paragraph 2(a) of the Enabling Clause as an "exception" to Article I:1, because it grants developed-country Members a "conditional right"[71] to provide tariff preferences to developing-country Members under the conditions contained in paragraphs 2(a) and 3 of the Enabling Clause. India submits that these paragraphs impose conditions only on Members who invoke the Enabling Clause as a defence, whereas Article I:1 imposes obligations regardless of the defence invoked.

38. India argues, with reference to the *Vienna Convention*, that "subsequent practice"[72] supports its interpretation. First, India maintains that all waivers for preferential tariff treatment for products from developing countries have permitted derogations from Article I without mentioning the Enabling Clause. Indeed, according to India, the fact that the European Communities requested a waiver[73] from its obligations *under Article I:1* in respect of the Drug Arrangements cannot be reconciled with the European Communities' position that the Enabling Clause excludes the application of Article I:1. Secondly, India refers to two GATT panels that examined, first, the consistency of a challenged measure under Article I:1, before proceeding to consider whether the measure was authorized under the Enabling Clause. India regards this as evidence of the "common understanding" of the

[69]India's appellee's submission, para. 36 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, at 337).

[70]*Ibid.*, para. 36.

[71]*Ibid.*, para. 39.

[72]*Ibid.*, para. 42 (referring to *Vienna Convention*, Art. 31.3(b)).

[73]Council for Trade in Goods, Request for a WTO Waiver, "New EC Special Tariff Arrangements to Combat Drug Production and Trafficking", G/C/W/328, 24 October 2001 (Exhibit India-2(b) submitted by India to the Panel).

Contracting Parties to the *General Agreement on Tariffs and Trade 1947* (the "GATT 1947") regarding the relationship between Article I:1 and the Enabling Clause.[74]

39. India disputes the European Communities' contention that the Enabling Clause is not an exception to Article I:1 because the Enabling Clause constitutes *lex specialis*. India argues, with reference to a study by the International Law Commission and certain Appellate Body decisions[75], that the "maxim *lex specialis derogat legi generali*"[76] means not that a special rule necessarily excludes the application of a related general rule, but that the two rules apply cumulatively, and the special rule prevails over the general rule only to the extent of any conflict between the two rules. Thus, India maintains, developing-country Members have not waived their rights under Article I:1, which applies "cumulatively" with the Enabling Clause, except to the extent that these provisions are in conflict with each other.[77]

40. India also contests the European Communities' reliance on the Appellate Body decisions in *Brazil – Aircraft* and *EC – Hormones*. India states that these appeals related to Article 27.2(a) of the *SCM Agreement* and Article 3.1 of the *SPS Agreement*, both of which provisions explicitly exclude other provisions. India argues that, in contrast, the Enabling Clause does not clearly exclude the application of Article I:1 of the GATT 1994. In India's view, this supports India's contention that Article I:1 and the Enabling Clause apply "concurrently".[78]

41. India claims that, even if the Appellate Body were to find that the Enabling Clause is not an exception to Article I:1, the Appellate Body should assess the consistency of the Drug Arrangements with the Enabling Clause because India did make a claim under the Enabling Clause. The European Communities' argument to the contrary, according to India, is "factually baseless".[79] India highlights that it originally requested the establishment of a panel "to examine whether [the Drug Arrangements] are consistent with Article I:1 … *and ... the Enabling Clause*".[80] In addition, India maintains that, in its first and second written submissions to the Panel, it requested the Panel to find that the Drug Arrangements "*are not justified [by] the Enabling Clause*".[81] Moreover, India states that the European Communities acknowledged in its first written submission to the Panel that the Enabling Clause forms part of India's claim[82], and that the Panel confirmed India's inclusion of this claim in paragraph 7.61 of the Panel Report.

42. India submits that it does not follow from India's characterization of the Enabling Clause as an "exception"—which was a "procedural argument" regarding the allocation of the burden of

[74]India's appellee's submission, para. 43 (referring to GATT Panel Report, *US – Customs User Fee*, 1988, BISD 35S/245, at 289-290; and GATT Panel Report, *US – MFN Footwear*, 1992, BISD 39S/128, at 153).

[75]*Ibid.*, paras. 76-80 (referring to International Law Commission, *Study Group on Fragmentation: Koskenniemi*, p. 5, <http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf>; Appellate Body Report, *Argentina – Footwear (EC)*, para. 89; and Appellate Body Report, *Guatemala – Cement I*, para. 65).

[76]*Ibid.*, para. 76.

[77]*Ibid.*, heading II.C.1.

[78]*Ibid.*, para. 51.

[79]India's appellee's submission, para. 52.

[80]*Ibid.*, para. 54 (quoting request for the establishment of a panel by India, WT/DS246/4, 9 December 2002, p. 2). (italics added by India in its appellee's submission)

[81]*Ibid.*, para. 56 (quoting India's first written submission to the Panel, para. 67; and India's second written submission to the Panel, para. 164). (italics added by India in its appellee's submission)

[82]*Ibid.*, para. 58 (referring to European Communities' first written submission to the Panel, paras. 57, 141, and 206).

proof—that India made no "substantive" claims under the Enabling Clause.[83] India maintains that, in response to questioning by the Panel, it "merely stated that the Enabling Clause is not a *material element* of India's *claim under Article I:1 of the GATT*."[84] Furthermore, India reiterated its request for the Panel to examine the consistency of the Drug Arrangements with the Enabling Clause at the second substantive meeting of the Panel and at the interim review stage. In addition, India maintains that the Panel would have had "competence"[85] to assess the Drug Arrangements under the Enabling Clause even if the Panel had found that the Enabling Clause is not an exception to Article I:1.[86] In India's view, requiring India to resubmit its claims under the Enabling Clause to a new panel would be contrary to the "fundamental principle of good faith"[87] and the objectives of the dispute settlement system.[88] India asserts that the question of which party bears the burden of proof "does not affect the outcome of this dispute".[89]

43. Finally, India emphasizes that the European Communities has not yet obtained a waiver from its obligations under Article I:1 with respect to the Drug Arrangements and that only the WTO Members can provide such a waiver.

44. For these reasons, India requests the Appellate Body to uphold the Panel's finding that the Enabling Clause is an exception to Article I:1 of the GATT 1994.

2. Whether the Drug Arrangements are Justified Under the Enabling Clause

45. India requests the Appellate Body to uphold the Panel's finding that the Drug Arrangements are not justified under the Enabling Clause. In particular, India maintains that paragraph 2(a) of the Enabling Clause does not authorize the European Communities to differentiate between developing-country Members that are beneficiaries under the European Communities' GSP scheme.

46. At the outset, India submits that the present dispute focuses not on the European Communities' initial selection of particular developing countries as beneficiaries under its GSP scheme, but on the European Communities' treatment of developing countries already identified as beneficiaries under that scheme. Therefore, according to India, the Appellate Body is not required to examine legal issues arising from the initial selection of beneficiaries under the Enabling Clause. Rather, India urges the Appellate Body to find that the term "developing countries" in footnote 3 of the Enabling Clause includes at least those countries that are beneficiaries under a given GSP scheme, and that the words "products originating in developing countries" in paragraph 2(a) refer to products originating in any of those beneficiary countries.

47. India argues that its interpretation is reinforced by the nature of the MFN principle embodied in Article I:1 as "a fundamental norm of the rules-based multilateral trading system of the WTO".[90] India points to Appellate Body decisions as support for its view that "derogations" from Article I:1

[83] *Ibid.*, para. 70.

[84] *Ibid.*, para. 64. (original italics)

[85] *Ibid.*, heading II.B.3.

[86] *Ibid.*, paras. 70-71 (referring to Panel Report, *US – Wool Shirts and Blouses*; Appellate Body Report, *EC – Hormones*, footnote 71 to para. 109 and footnote 180 to para. 197; and DSU, Arts. 7.2 and 11).

[87] *Ibid.*, para. 72 (referring to Appellate Body Report, *US – FSC*, para. 166).

[88] India's appellee's submission, para. 74 (referring to DSU, Arts. 3.3-3.4 and 3.7).

[89] *Ibid.*, para. 73.

[90] *Ibid.*, para. 1.

exist only where provided for explicitly.[91] India emphasizes that paragraph 2(a) of the Enabling Clause does *not* specifically state that developing countries waive their rights to MFN treatment. Moreover, the object and purpose of the Enabling Clause, as well as its drafting history, indicate that the developing countries did not agree to relinquish their MFN rights as between themselves in agreeing to paragraph 2(a) of the Enabling Clause.

48. India contends that the Drug Arrangements are not "non discriminatory preferences beneficial to the developing countries" within the meaning of footnote 3 of the Enabling Clause. First, India relies on dictionary definitions to ascertain that the ordinary meaning of "non-discriminatory preferences" in footnote 3 is "preferential tariff treatment that is applied equally".[92] Secondly, India finds "contextual guidance"[93] on the meaning of "non-discriminatory" in Articles I, XIII, and XVII of the GATT 1994. According to India, these provisions confirm that "non-discrimination" refers to the provision of "equal competitive opportunities" in relation to non-tariff measures and of "formally equal[] treatment" in relation to tariff measures.[94] In addition, in India's submission, the inclusion of the word "unjustifiable" before the word "discrimination" in the chapeau of Article XX of the GATT 1994 demonstrates that a Member's reasons for distinguishing between products of different origin are not relevant to whether such distinction constitutes discrimination.

49. Turning to the words "generalized" and "non-reciprocal" in footnote 3, India argues that the word "generalized" refers to the countries that should be included *ab initio* as beneficiaries under a GSP scheme, whereas the word "non-discriminatory" refers to the treatment of products originating in beneficiary countries. Even if "generalized" meant that all developing countries must be included *ab initio* as beneficiaries, in India's view, the "additional requirement"[95] imposed by the word "non-discriminatory" would still be relevant in addressing the separate question of how products from beneficiary countries should be treated. India contests the European Communities' argument that the Panel's interpretation of "non-discriminatory" renders redundant the word "non-reciprocal" in footnote 3. India suggests that reciprocity is a "principle of trade negotiations"[96], whereas "non-discriminatory" addresses the implementation of the results of such negotiations. India argues that Part IV of the GATT 1994 (entitled "Trade and Development") was added to the original GATT provisions because it is possible to comply with the principle of non-discrimination while insisting on non-reciprocity in negotiations.

50. India contends that paragraph 2(a) of the Enabling Clause and Article I:1 of the GATT 1994 must be interpreted in a harmonious manner so as to give effect to both provisions.[97] With this in mind, India submits that the Enabling Clause should be interpreted to authorize only those deviations from the MFN principle that are necessary in order for GSP schemes to operate. Thus, the Enabling Clause authorizes developed-country Members to exclude other developed countries from their GSP schemes, because Members could not grant any tariff preferences under these schemes if such exclusion was not authorized. However, in India's view, the Enabling Clause does not authorize tariff

[91] *Ibid.*, paras. 93-94 (referring to Appellate Body Report, *Canada – Autos*, para. 84; and Appellate Body Report, *EC – Bananas III*, paras. 190-191).

[92] India's appellee's submission, para. 106.

[93] *Ibid.*, para. 115.

[94] *Ibid.*, paras. 118 and 120 (referring to Appellate Body Report, *EC – Bananas III*, paras. 190-191). (See also, *ibid.*, paras. 170 and 180)

[95] *Ibid.*, para. 148.

[96] *Ibid.*, para. 153.

[97] India's appellee's submission, para. 83 (referring to Appellate Body Report, *Korea – Dairy*, para. 81; Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; and International Court of Justice, Preliminary Objections, *Right of Passage over Indian Territory (Portugal v. India)*, 1957, ICJ Reports, p. 142).

preferences that differentiate between developing countries, as tariff preferences under GSP schemes can be and are granted to developing countries without differentiation of this kind. According to India, a contrary interpretation would be inconsistent with the need to interpret paragraph 2(a) and Article I:1 so as to avoid conflict between the two provisions.

51. India derives support for its interpretation from several provisions of the Enabling Clause. In particular, India reads paragraphs 2(a) and 2(d) together as identifying three categories of countries: the developed countries, the developing countries, and the least-developed countries. In India's view, under the Enabling Clause, the developed countries "relinquished" their MFN rights in respect of preferential tariff treatment in favour of developing and least-developed countries, whereas the developing countries "relinquished" their MFN rights only in respect of preferential treatment in favour of least-developed countries.[98] However, India sees nothing in the text of the Enabling Clause to indicate that developing countries have similarly relinquished their MFN rights in relation to preferential treatment accorded by developed countries to other developing countries. India suggests that the European Communities itself recognized this fact prior to this dispute.[99] India maintains that paragraph 2(d) was specifically inserted to allow differentiation of a kind that was not previously allowed under the 1971 Waiver Decision. India argues that the European Communities' current interpretation of "non-discriminatory" in footnote 3 would render paragraph 2(d) redundant, contrary to the "principle of effectiveness in treaty interpretation".[100]

52. The opening words of paragraph 3(c) demonstrate, according to India, that paragraph 3(c) of the Enabling Clause does not provide for derogations from obligations imposed under paragraph 2(a), (b), or (d). Further, unlike paragraphs 5 and 6, paragraph 3(c) does not refer to "individual" or "particular" needs of developing countries. India argues that this shows that the "needs" intended by the drafters under paragraph 3(c) are the needs of "developing countries as a whole".[101]

53. India draws support for its reading of paragraph 2(a) from the object and purpose of the Enabling Clause. According to India, the purpose includes: facilitating "mutually acceptable arrangements"[102] that were "unanimous[ly] agree[d]"[103] in UNCTAD; replacing "special preferences"[104] granted only to some developing countries with generalized preferences that do not differentiate between developing countries; and, promoting the trade of developing countries without raising barriers to or creating undue difficulties for the trade of other Members, as confirmed in paragraph 3(a). India points to several UNCTAD texts to confirm these purposes[105], arguing that the European Communities offers no such support for its contrary views. India regards differentiation between developing countries under a GSP scheme as inconsistent with paragraph 3(a) because it creates difficulties for the trade of other developing countries by "divert[ing] competitive

[98] *Ibid.*, paras. 3 and 5.

[99] *Ibid.*, para. 6 (referring to "User's Guide to the European Union's Scheme of Generalised Tariff Preferences" (February 2003) (Exhibit India-1 submitted by India to the Panel)).

[100] *Ibid.*, para. 132 (referring to Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, at 21).

[101] India's appellee's submission, para. 124.

[102] *Ibid.*, paras. 95 and 190.

[103] *Ibid.*, para. 165.

[104] *Ibid.*, paras. 147 and 190.

[105] *Ibid.*, paras. 158-184 (referring to Agreed Conclusions; Resolution 21(II); Resolution 24(II) of the Second Session of UNCTAD; Charter of Algiers, paras. (a) and (d); and OECD Special Report, part II).

opportunities"[106] from one country to another. In addition, India contends that linking GSP benefits to "the situation or policies"[107] of beneficiaries reduces the certainty and value of such benefits.

54. India contends that the European Communities' interpretation of paragraph 3(c) would mean that developed countries "would have *the obligation*"[108] to differentiate between developing countries according to their individual needs. This would have the "absurd consequence"[109] that a measure eliminating tariffs on products from *all* least-developed countries, without differentiating between those countries would be open to challenge under paragraph 3(c). Moreover, India argues that it would result not only in the European Communities' scheme, but in all GSP schemes being inconsistent with the Enabling Clause because they do not differentiate between developing countries based on their *individual* development needs. India also maintains that the European Communities' suggestion that its interpretation would best fulfil the objectives of paragraph 3(c) is inconsistent with the rule that treaty interpretation should be based on the text and not on policy considerations that are not reflected in the text.

55. For these reasons, India requests the Appellate Body to uphold the Panel's finding that the Drug Arrangements are not justified under the Enabling Clause.

C. *Arguments of the Third Participants*

1. Andean Community

56. The governments of Bolivia, Colombia, Ecuador, Peru, and Venezuela (jointly, the "Andean Community") submit that the Panel erred in finding that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994 and in finding that Article I:1 applies concurrently with the Enabling Clause. The Andean Community also contends that, contrary to the Panel's finding, the Drug Arrangements are consistent with the Enabling Clause. Accordingly, the Andean Community supports the European Communities' contention that the Drug Arrangements are "fully WTO-compatible".[110]

57. The Andean Community argues that the Enabling Clause establishes "a self-standing regime"[111], meaning that Article I:1 of the GATT 1994 does not apply to GSP schemes.[112] According to the Andean Community, the ordinary meaning of the word "notwithstanding" in paragraph 1 of the Enabling Clause confirms this interpretation, as do the context, and object and purpose of the Enabling Clause. In addition, the "history, ... practice and ... current role"[113] of the Enabling Clause indicate that GSP schemes provide the "most concrete and relevant form"[114] of special and differential treatment. This supports the concept of the Enabling Clause as a self-standing regime. According to the Andean Community, because measures falling within the Enabling Clause are to be judged solely

[106] *Ibid.*, para. 192.

[107] *Ibid.*, para. 21.

[108] *Ibid.*, para. 14. (original italics)

[109] *Ibid.*, para. 15.

[110] Andean Community's third participant's submission, para. 97.

[111] See, for example, *ibid.*, paras. 8, 12, and 27.

[112] *Ibid.*, para. 9 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 139).

[113] *Ibid.*, para. 13.

[114] *Ibid.*, para. 21.

under the Enabling Clause, India was required to make a claim under the Enabling Clause. As India did not do so, the Andean Community maintains, India's claim should be dismissed.

58. The Andean Community submits further that, even if the Enabling Clause is an exception to Article I:1, this characterization is not determinative of which party bears the burden of proof. The Andean Community asserts that the Panel erred in assigning the burden. According to the Andean Community, under the Panel's allocation of the burden of proof, every GSP scheme would be open to challenge, with the burden falling on each preference-granting country to establish the consistency of its GSP scheme with the Enabling Clause. The Andean Community claims that the assigning of the burden of proof is "a fundamental initial decision upon which every further consideration is based", such that the Appellate Body "should reverse on this element alone".[115]

59. Regarding the consistency of the Drug Arrangements with the Enabling Clause, the Andean Community submits, first, that the Panel did not properly interpret the historical texts serving as context and preparatory work for the Enabling Clause. The Andean Community emphasizes the "aspirational tone"[116] of these texts and argues that the Panel "mischaracterize[d]"[117] certain texts as binding or reflecting "unanimous agreement".[118] Secondly, turning to the interpretation of the term "non-discriminatory" in the Enabling Clause, the Andean Community contends that the Panel wrongly equated this concept with MFN treatment. The Andean Community further alleges that the Panel's allowance for *a priori* limitations under the Enabling Clause is contrary to the Panel's own interpretation of "non-discriminatory".

60. In the view of the Andean Community, "a prohibition of discrimination is a command not to treat equal situations differently, or different situations equally"[119] and, accordingly, the word "non-discriminatory" in the Enabling Clause does not require that identical treatment be granted to all developing countries. The Andean Community suggests that differentiating between developing countries—taking into account their objectively different situations—does not constitute discrimination. The Andean Community argues that the "production and trafficking of illicit drugs have far-reaching, unparalleled and unquantifiable implications for the economic and social development"[120] of affected developing countries. By providing preferential access for "alternative products"[121] and, thereby, seeking to reduce the importance of drugs as an economic activity, the European Communities responds to these countries' specific needs. The Andean Community asserts that this response is consistent with the requirements of the Enabling Clause.

2. Costa Rica

61. Costa Rica submits that the Panel erred in finding that the Drug Arrangements are not justified under the Enabling Clause. Costa Rica asserts that the Panel based this finding on erroneous interpretations of the terms "non-discriminatory" and "developing countries" contained in footnote 3 and paragraph 2(a), respectively, of the Enabling Clause. Accordingly, Costa Rica supports the European Communities' request that the Appellate Body reverse this finding.

[115]Andean Community's third participant's submission, para. 41.

[116]*Ibid.*, para. 50.

[117]*Ibid.*, para. 56. (original underlining)

[118]*Ibid.*, para. 55.

[119]*Ibid.*, para. 64.

[120]*Ibid.*, para. 78.

[121]*Ibid.*, para. 87.

62. Costa Rica contends that, instead of relying on the ordinary meaning of these terms of the Enabling Clause in context, the Panel relied on other instruments that "cannot be properly considered context for the interpretation of the Enabling Clause".[122] Costa Rica maintains that this led to the Panel's incorrect finding that "non-discriminatory" treatment under footnote 3 of the Enabling Clause is synonymous with identical or unconditional treatment. Costa Rica asserts that had the Panel interpreted the Enabling Clause in accordance with Article 31 of the *Vienna Convention*—in the light of the object and purpose of the Enabling Clause and the 1971 Waiver Decision—it would have found that "the 'non-discriminatory' standard prohibits developed countries from according tariff preferences that make an unjust or prejudicial distinction between different categories of developing countries."[123]

63. In addition, according to Costa Rica, the Panel erred in concluding that the term "developing countries" in paragraph 2(a) of the Enabling Class means *all* developing countries. In Costa Rica's view, in interpreting this term, the Panel relied on its incorrect interpretation of the term "non-discriminatory" and failed to examine paragraph 1 of the Enabling Clause as relevant context. Moreover, Costa Rica is of the opinion that it is not appropriate to consider the *travaux préparatoires* as a supplementary means of interpretation under Article 32 of the *Vienna Convention* in interpreting paragraph 2(a). However, even if this were appropriate, the drafting history of the 1971 Waiver Decision confirms that the term "developing countries" means less than all developing countries.

3. Panama

64. Panama submits that the Panel erred in finding that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994. Panama maintains that the Enabling Clause is "*per se* an autonomous rule"[124] that permits the granting of more favourable treatment to developing countries. Panama also contests the Panel's finding that the Drug Arrangements are incompatible with the Enabling Clause. In particular, Panama argues that the Panel erred in interpreting the term "non-discriminatory" in footnote 3 of the Enabling Clause as requiring preference-granting countries to accord identical treatment to all developing countries. Panama therefore states that it is "completely in agreement with the arguments by the European Communities".[125]

65. Panama is of the view that, if the Enabling Clause were an exception to Article I of the GATT 1994, it would be included as a waiver decision in the GATT 1994.[126] Because the Enabling Clause is not so included, Panama contends, it is an "independent" and "special" rule governing the differential and more favourable treatment accorded to developing countries under the schemes set out in paragraph 2 of the Enabling Clause.[127] Panama submits that "the Enabling Clause creates a standalone mechanism that is linked to the general principle contained in GATT Article I:1"[128] and, as such, constitutes an "autonomous right"[129] of WTO Members.

[122]Costa Rica's third participant's submission, para. 6.

[123]*Ibid.*, para. 15.

[124]Panama's third participant's submission, para. 4.

[125]Panama's third participant's submission, para. 1.

[126]Paragraph 1(b)(iii) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.

[127]Panama's third participant's submission, paras. 5-6.

[128]*Ibid.*, para. 10.

[129]*Ibid.*, para. 8.

66. Panama argues that the Enabling Clause is not an affirmative defence but, rather, "excludes the application of ... Article I:1".[130] As such, Panama claims, it was up to India to claim that the Drug Arrangements do not fall within the scope of paragraph 2(a) of the Enabling Clause and are inconsistent with paragraph 3(c) thereof. Because India did not do so, Panama argues, the Appellate Body should refrain from assessing the consistency of the Drug Arrangements with the Enabling Clause.

67. According to Panama, "non-discrimination" does not mean equal treatment. Panama submits that the fact that the Drug Arrangements are not extended to all developing countries does not mean that they discriminate between developing countries. In addition, Panama maintains that the obligation imposed in paragraph 3(c) of the Enabling Clause must be interpreted in order to allow some flexibility for preference-granting countries to provide preferential treatment that "effectively help[s] 'generalized' needs".[131] In this respect, Panama claims, the Drug Arrangements satisfy the "requirement" in paragraph 3(c) because they respond to "specific growth needs".[132]

4. Paraguay

68. Paraguay contends that the Panel was correct in finding that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994. In addition, Paraguay agrees with the Panel's interpretation of paragraph 2(a) of the Enabling Clause and the Panel's consequent finding that the Drug Arrangements are not justified by the Enabling Clause. Accordingly, Paraguay supports India's request that the Appellate Body uphold these findings.

69. According to Paraguay, where a Member's measure differentiates between other Members in a manner inconsistent with Article I:1 and does not fall within any specific exceptions such as the Enabling Clause or Article XX of the GATT 1994, the only way for that Member to impose its measure in accordance with its WTO obligations is to seek a waiver under Article IX of the *WTO Agreement*. Paraguay maintains that the Drug Arrangements are inconsistent with Article I:1 and that the European Communities has received no such waiver in respect of them.

70. Paraguay contests the European Communities' characterization of the Enabling Clause as a "different, parallel legal regime".[133] Paraguay maintains that Article I:1 forms the "primary basis" for WTO trade and that exceptions to Article I:1 must be founded on "properly established legal rules".[134] In Paraguay's view, the Enabling Clause is an exception to Article I:1 and is a part of the GATT 1994, and the GSP recognized in the Enabling Clause is "a permanent mechanism of the rules-based multilateral trading system".[135]

71. Paraguay emphasizes that developing countries did not renounce their right to MFN treatment under Article I:1 of the GATT 1994 in agreeing to the Enabling Clause. According to Paraguay, the Enabling Clause was adopted to replace the "special preferences"[136] provided by developed countries to certain developing countries, with a generalized system under which all developing countries would benefit. Paraguay argues that the only distinction that the WTO draws within the category of developing countries is in recognizing the category of least-developed countries, as explicitly stated in

[130] *Ibid.*, para. 17.

[131] *Ibid.*, para. 23.

[132] *Ibid.*, para. 13.

[133] Paraguay's third participant's submission, para. 13.

[134] *Ibid.*, para. 12.

[135] *Ibid.*, para. 11.

[136] *Ibid.*, para. 14.

paragraph 2(d) of the Enabling Clause. As such, in Paraguay's view, the "condition"[137] of non-discrimination in footnote 3 means that benefits granted to some developing countries must be granted to all such countries. Therefore, Paraguay submits that tariff preferences pursuant to the Enabling Clause must apply to all developing countries.

5. United States

72. The United States contends that the Panel misconceived the relationship between the Enabling Clause and Article I:1 of the GATT 1994. The United States also submits that the Panel erred in concluding that the term "non-discriminatory" in footnote 3 of the Enabling Clause requires preference-granting countries to accord "identical" treatment to all beneficiaries and that, consequently, paragraph 2(a) covers only identical preferences extended to *all* developing countries. Accordingly, the United States supports the European Communities' request that the Appellate Body reverse the Panel's legal interpretation of the terms "non-discriminatory" in footnote 3 and "developing countries" in paragraph 2(a) and, consequently, reverse the Panel's finding that the Enabling Clause is an "exception" to Article I:1.

73. Beginning with the relationship between Article I:1 and the Enabling Clause, the United States claims that the Panel failed to consider the entire text of the Enabling Clause and the context and object and purpose of the Enabling Clause and of the GATT 1994. The United States argues that the Panel "misconstru[ed]" the statement of the Appellate Body in *US – Wool Shirts and Blouses* and applied this statement "as a mechanical 'test'" without due regard to the term "notwithstanding" in the Enabling Clause.[138] The United States observes that the Panel examined the ordinary meaning of "notwithstanding" in paragraph 1 of the Enabling Clause only after the Panel had concluded that the Enabling Clause is an "exception". In addition, in the view of the United States, the reasoning underlying the Panel's conclusion that the Enabling Clause is an exception "would result in ... inconsistencies and absurd results"[139] because several WTO obligations apply only if a Member chooses to take the action addressed in the relevant provision.

74. The United States submits that the Enabling Clause is part of the overall balance of rights and obligations in the covered agreements and, as such, is a "separate provision authorizing the types of treatment provided therein", "in spite of" the MFN obligation in Article I:1.[140] In other words, the United States maintains that, contrary to the finding of the Panel, the Enabling Clause *is* a "positive rule establishing obligations in itself".[141] The United States emphasizes that several aspects of the Enabling Clause are unrelated to Article I:1 and that the Enabling Clause is incorporated into the GATT 1994. The United States also argues that, unlike Article XX of the GATT 1994, the Enabling Clause "*encourages*"[142] developed-country Members to grant preferences to developing-country Members. In the view of the United States, "[p]lacing the burden on developed countries to defend actions they take to benefit developing countries ... would create a *disincentive* for developed countries" to take such action.[143]

[137] *Ibid.*, para. 27.

[138] United States' third participant's submission, paras. 2-3.

[139] *Ibid.*, para. 5.

[140] *Ibid.*, paras. 3 and 10.

[141] *Ibid.*, para. 4.

[142] United States' third participant's submission, para. 8. (original italics)

[143] *Ibid.*, para. 9. (original italics)

75. Turning to footnote 3 of the Enabling Clause, the United States contests the Panel's "assum[ption]"[144] that the term "non-discriminatory" in footnote 3 imposes obligations on preference-granting countries. In the view of the United States, "[t]his footnote is simply a cross-reference to where the Generalized System of Preferences is described."[145] Because the Panel began its analysis "from a false premise", the United States suggests that the Panel's finding as to footnote 3 "should be rejected on that basis alone".[146] In any case, the United States contends, the Panel erroneously arrived at a "one size fits all"[147] obligation to grant "identical" tariff preferences to "all" developing countries. Furthermore, according to the United States, the fact that the Panel understood the Enabling Clause to allow *a priori* limitations demonstrates that the term "non-discriminatory" does not preclude *all* conditions. The United States asserts that the Panel focused not on the text, but on a policy concern—the prevention of "abuse"[148] by preference-granting countries. In the United States' view, the Panel's focus on this policy concern is inconsistent with Article 3.2 of the DSU and led to an incorrect interpretation of "non-discriminatory".

76. With respect to paragraph 3(c) of the Enabling Clause, the United States argues that the Panel wrongly interpreted this provision as imposing an obligation not to provide differentiated GSP benefits. In doing so, the United States submits, the Panel failed to recognize that the term "generalized" in footnote 3 ensures that the responses of preference-granting countries to the needs of developing countries do not result in tariff advantages accorded primarily to select countries.

77. Finally, the United States contends that the Panel's interpretation of "developing countries" in paragraph 2(a) as referring to *all* developing countries is "completely dependent"[149] on its erroneous interpretation of "non-discriminatory". Moreover, the United States argues, the Enabling Clause refers only to "developing countries" or "the developing countries", and not to "*all* developing countries".[150]

III. Issues Raised in This Appeal

78. The following issues are raised in this appeal:

(a) Whether the Panel erred in concluding that the "special arrangements to combat drug production and trafficking" (the "Drug Arrangements"), which are part of Council Regulation (EC) No. 2501/2001 (the "Regulation")[151], are inconsistent with Article I:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994")[152], based on the Panel's findings that:

(i) the Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries (the "Enabling Clause")[153] is an "exception"[154] to Article I:1 of the GATT 1994;

(ii) the Enabling Clause "does not exclude the applicability"[155] of Article I:1 of the GATT 1994; and

(iii) the European Communities bears the burden of invoking the Enabling Clause and proving that the Drug Arrangements are consistent with that Clause[156]; and

(b) Whether the Panel erred in concluding that the European Communities failed to prove that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause[157], based on the Panel's findings that:

(i) the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause requires that, pursuant to schemes under the Generalized System of Preferences ("GSP"), "identical tariff preferences"[158] be provided to all developing countries without differentiation, except as regards the implementation of *a priori* limitations; and

(ii) the term "developing countries" in paragraph 2(a) of the Enabling Clause means "all"[159] developing countries, except as regards the implementation of *a priori* limitations.

IV. The Relationship Between Article I:1 of the GATT 1994 and the Enabling Clause

79. We begin our analysis of the European Communities' appeal by examining its claim that the Panel improperly characterized the relationship between Article I:1 of the GATT 1994 and the Enabling Clause, and thus improperly allocated the burden of proof in this dispute.

A. *The Panel's Analysis and the Arguments on Appeal*

80. The Panel observed that the participants disagree on whether the Enabling Clause constitutes a "positive rule setting out obligations", or an "exception" authorizing derogation from one or more such positive rules.[160] Based on its understanding of the Appellate Body's decision in *US – Wool Shirts and Blouses*, the Panel determined that the Enabling Clause, in and of itself, does not establish legal obligations but, instead, contains requirements that are "only subsidiary obligations, dependent on the decision of the Member to take [particular] measures".[161] The Panel further concluded that the legal function of the Enabling Clause is to permit Members to derogate from Article I:1 "so as to

[144] *Ibid.*, para. 11.

[145] *Ibid.*

[146] *Ibid.*

[147] *Ibid.*, para. 22.

[148] *Ibid.*, para. 20 (quoting Panel Report, para. 7.158).

[149] *Ibid.*, para. 23.

[150] United States' third participant's submission, para. 24. (original italics)

[151] Council Regulation (EC) No. 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004, *Official Journal of the European Communities*, L Series, No. 346 (31 December 2001), p. 1 (Exhibit India-6 submitted by India to the Panel).

[152] Panel Report, paras. 7.60 and 8.1(b).

[153] GATT Document L/4903, 28 November 1979, BISD 26S/203 (attached as Annex 2 to this Report).

[154] Panel Report, para. 7.53.

[155] *Ibid.*

[156] *Ibid.*

[157] *Ibid.*, para. 8.1(d).

[158] Panel Report, para. 7.161.

[159] *Ibid.*, para. 7.176.

[160] *Ibid.*, para. 7.32.

[161] *Ibid.*, para. 7.37.

enable developed countries, *inter alia*, to provide GSP to developing countries".[162] As a result, the Panel found that the Enabling Clause is "in the nature of an exception" to Article I:1.[163]

81. The Panel noted that the GATT 1994 includes several provisions in the nature of exceptions that serve to justify a measure's inconsistency with Article I:1, including Articles XX, XXI, and XXIV, and the Enabling Clause. According to the Panel, these exceptions reflect "legitimate objectives" that may be pursued by Members.[164] The Panel reasoned that, because a complaining party may not be able to discern the objectives of a given measure, particularly as they may not be apparent from the text of the measure itself, it is "sufficient" for a complaining party to demonstrate an inconsistency with Article I:1, without also establishing "violations" of any of the possible exception provisions.[165]

82. With respect to the present dispute, the Panel found that India could make its case against the European Communities solely by establishing the inconsistency of the Drug Arrangements with Article I:1.[166] Having done so, according to the Panel, it would then be incumbent upon the European Communities to invoke the Enabling Clause as a defence and to demonstrate the consistency of the Drug Arrangements with the requirements contained in that Clause.[167]

83. The Panel also examined whether Article I:1 applies to a measure covered by the Enabling Clause. It looked first to the ordinary meaning of the term "notwithstanding", as used in paragraph 1 of the Enabling Clause, and concluded on that basis that the Enabling Clause takes precedence over Article I "to the extent of conflict between the two provisions".[168] Nevertheless, the Panel declined to assume the exclusion of the applicability of a "basic GATT obligation" such as Article I:1 in the absence of a textual indication of Members' intent to that effect.[169] Thus, it also referred to World Trade Organization ("WTO") jurisprudence relating to other exception provisions, and concluded that the relationship between these exceptions and the obligations from which derogation is permitted is "one where both categories of provisions apply concurrently to the same measure, but where, in the case of conflict between these two categories of provisions, [the exception] prevails".[170] Accordingly, the Panel concluded, on the basis of both the ordinary meaning of the text of the provision and WTO case law, that Article I:1 applies to measures covered by the Enabling Clause and that the Enabling Clause prevails over Article I:1 "to the extent of the conflict between [them]".[171]

84. Finally, the Panel referred to the European Communities' reliance on the Appellate Body's decisions in *Brazil – Aircraft* and *EC – Hormones* and distinguished those cases from the present dispute. The Panel stated that the relationship between the provisions at issue in those cases was

[162] *Ibid.*, para. 7.38.

[163] *Ibid.*, para. 7.39.

[164] Panel Report, para. 7.40.

[165] *Ibid.*

[166] *Ibid.*

[167] *Ibid.*, para. 7.42.

[168] *Ibid.*, para. 7.44. Paragraph 1 of the Enabling Clause provides:

> Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties. (footnote omitted)

[169] Panel Report, para. 7.44.

[170] *Ibid.*, para. 7.45.

[171] *Ibid.*

"different" from the relationship it had found between Article I:1 and the Enabling Clause.[172] In particular, the Panel determined that, in the two earlier disputes, one provision "clearly exclude[d]" the application of the other.[173] In contrast, the Panel had already found that the Enabling Clause does not exclude the applicability of Article I:1. In these circumstances, the Panel suggested that the Enabling Clause constitutes an "affirmative defence", in relation to which the responding party bears the burden of proof if that party invokes the Enabling Clause to justify its challenged measure.[174]

85. On appeal, the European Communities challenges the Panel's finding that the Enabling Clause is an "exception"[175] to Article I:1 of the GATT 1994 and that, therefore, the European Communities must invoke the Enabling Clause as an "affirmative defence"[176] to India's claim that the Drug Arrangements are inconsistent with Article I:1. The European Communities submits that the Enabling Clause is part of a "special regime for developing countries"[177], which "encourages"[178], *inter alia*, the granting of tariff preferences by developed-country Members to developing countries. As a result, the Enabling Clause exists "side-by-side and on an equal level" with Article I:1, and applies to the *exclusion* thereof, rather than as an exception thereto.[179] The European Communities argues, therefore, that India is required to bring a claim under the Enabling Clause if it considers that the European Communities' GSP scheme has nullified or impaired India's rights.[180] The European Communities requests us to refrain from examining the consistency of the Drug Arrangements with the requirements of the Enabling Clause because, according to the European Communities and as allegedly acknowledged by India before the Panel, India did not bring a claim under the Enabling Clause.[181]

86. India, by contrast, supports the Panel's understanding of the relationship between Article I:1 and the Enabling Clause. India argues that paragraph 2(a) of the Enabling Clause qualifies as an "exception" because the conditions therein must be complied with only by Members adopting a measure pursuant to the authorization granted by that provision. This differs from the most-favoured nation ("MFN") obligation in Article I:1.[182] Moreover, according to India, we are not precluded from addressing the consistency of the Drug Arrangements with the Enabling Clause because, contrary to the assertion of the European Communities, India did make a claim under that Clause before the Panel.[183] India submits that denying the Panel the "competence"[184] to evaluate this claim, even if the Enabling Clause is not regarded as an exception, would be inconsistent with the objectives of WTO dispute settlement, "namely to secure a 'prompt' and 'positive solution to a dispute', and 'achieve a

[172] Panel Report, paras. 7.48-7.50.

[173] *Ibid.*, para. 7.48. (See also, *ibid.*, paras. 7.47-7.50) The Panel was referring to Articles 3.1(a) and 27.2(b) of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), as interpreted in Appellate Body Report, *Brazil – Aircraft*, and Articles 3.1 and 3.3 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), as interpreted in Appellate Body Report, *EC – Hormones*.

[174] Panel Report, para. 7.49.

[175] *Ibid.*, para. 7.39.

[176] *Ibid.*, para. 7.42.

[177] European Communities' appellant's submission, para. 51.

[178] *Ibid.*, para. 53.

[179] *Ibid.*, para. 22.

[180] *Ibid.*, para. 15(2).

[181] European Communities' appellant's submission, paras. 3, 13(2), and 66.

[182] India's appellee's submission, paras. 36 and 39.

[183] *Ibid.*, paras. 54-57.

[184] *Ibid.*, para. 71 and heading II.B.3.

satisfactory settlement of the matter' in accordance with rights and obligations under the covered agreements."[185] According to India, this is particularly so because the European Communities had been on notice throughout the Panel proceedings of India's position that the Drug Arrangements are not justified by the Enabling Clause.[186]

B. *Relevance of the Relationship Between Article I:1 of the GATT 1994 and the Enabling Clause for the Allocation of the Burden of Proof*

87. We begin our analysis of the relationship between Article I:1 of the GATT 1994 and the Enabling Clause, and the attendant implications for the allocation of the burden of proof in this dispute, by recalling the observation of the Appellate Body in *US – Wool Shirts and Blouses*:

> [I]t is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[187]

It is thus for the *complaining* party to raise a claim with respect to a particular obligation and to *prove* that the responding party is acting inconsistently with that obligation. It is for the *responding* party, if it so chooses, to raise a defence in response to an allegation of inconsistency and to *prove* that its challenged measure satisfies the conditions of that defence. Therefore, the question before us is whether India must raise a "claim" and prove that the Drug Arrangements are inconsistent with the Enabling Clause, or whether the European Communities must raise and prove, in "defence", that the Drug Arrangements are consistent with the Enabling Clause, in order to justify the alleged inconsistency of the Drug Arrangements with Article I:1.[188]

88. We recall that the Appellate Body has addressed the allocation of the burden of proof in similar situations. 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 Appellate Body has found that 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.[189] Otherwise, the permissive provision has been characterized as an exception, or defence, and the onus of invoking it and proving the consistency of the measure with its requirements has been placed on the responding party.[190] However, this distinction may not always be evident or readily applicable.

[185] *Ibid.*, para. 74 (quoting DSU, Arts. 3.3, 3.4, and 3.7). (footnotes omitted)

[186] *Ibid.*, para. 73.

[187] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, at 335.

[188] We are not concerned here with the situation where a complaining party brings a challenge solely under the provisions of the Enabling Clause, that is, without also claiming an inconsistency with Article I of the GATT 1994.

[189] See Appellate Body Report, *EC – Hormones*, para. 104; Appellate Body Report, *Brazil – Aircraft*, paras. 139-141; and Appellate Body Report, *EC – Sardines*, para. 275.

[190] See Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 131-133; and Appellate Body Report, *US – Wool Shirts and Blouses*, p.16, DSR 1997:I, at 337.

C. *Characterization of the Enabling Clause*

1. Text of Article I:1 and the Enabling Clause

89. In considering whether the Enabling Clause is an exception to Article I:1 of the GATT 1994, we look, first, to the text of the provisions at issue. Article I:1, which embodies the MFN principle, provides:

> *Article I*
>
> *General Most-Favoured-Nation Treatment*
>
> 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article I:1 plainly imposes upon WTO Members the obligation to treat "like products ... equally, irrespective of their origin".[191]

90. We turn now to the Enabling Clause, which has become an integral part of the GATT 1994.[192] Paragraph 1 of the Enabling Clause, which applies to all measures authorized by that Clause, provides:

> Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties. (footnote omitted)

[191] Appellate Body Report, *EC – Bananas III*, para. 190.

[192] In response to questioning at the oral hearing, the participants and third participants agreed that the Enabling Clause is one of the "other decisions of the CONTRACTING PARTIES" within the meaning of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*. That provision stipulates that:

> 1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of:
>
> ...
>
> (b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:
>
> ...
>
> (iv) other decisions of the CONTRACTING PARTIES to GATT 1947[.]

The ordinary meaning of the term "notwithstanding" is, as the Panel noted[193], "[i]n spite of, without regard to or prevention by".[194] By using the word "notwithstanding", paragraph 1 of the Enabling Clause permits Members to provide "differential and more favourable treatment" to developing countries "in spite of" the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO "immediately and unconditionally".[195] Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an "exception" to Article I:1.

2. Object and Purpose of the *WTO Agreement* and the Enabling Clause

91. The European Communities' contention that the Enabling Clause is *not* in the nature of an exception appears to be founded on the European Communities' understanding of the object and purpose of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") and the Enabling Clause. We, too, look to the object and purpose of the *WTO Agreement* and the Enabling Clause to clarify whether the Enabling Clause was intended to operate as an exception to Article I:1.

92. The Preamble to the *WTO Agreement* provides that Members recognize:

> ... that there is need for *positive efforts* designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development[.][196] (emphasis added)

The Waiver Decision on the Generalized System of Preferences (the "1971 Waiver Decision")[197], which provided the initial authorization under the GATT for developed countries' GSP schemes and is explicitly referred to in footnote 3 of the Enabling Clause[198], offers relevant guidance in discerning the object and purpose of the Enabling Clause. In the Preamble to the 1971 Waiver Decision, the Contracting Parties recognized:

> ... that a principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development;

[193]See Panel Report, para. 7.44.

[194]*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 1948.

[195]GATT 1994, Art. I:1.

[196]Second recital. We note that Article XXXVI:3 of the GATT 1994 similarly provides:

> There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.

[197]GATT Document L/3545, 25 June 1971, BISD 18S/24 (attached as Annex D-2 to the Panel Report).

[198]Footnote 3 of the Enabling Clause states:

> As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

> [and recognized] further that individual and joint action is essential to further the development of the economies of developing countries[.][199]

We understand, therefore, that the Enabling Clause is among the "positive efforts" called for in the Preamble to the *WTO Agreement* to be taken by developed-country Members to enhance the "economic development" of developing-country Members.[200]

93. According to the European Communities, the Enabling Clause, as the "most concrete, comprehensive and important application of the principle of Special and Differential Treatment", serves "to achieve one of the fundamental objectives of the WTO Agreement".[201] In the view of the European Communities, provisions that are exceptions permit Members to adopt measures to pursue objectives that are "not ... among the WTO Agreement's own objectives"[202]; the Enabling Clause thus does not fall under the category of exceptions. Pointing to this alleged difference between the role of measures falling under the Enabling Clause and that of measures falling under exception provisions such as Article XX, the European Communities contends that the *WTO Agreement* does not "merely tolerate" measures under the Enabling Clause, but rather "encourages" developed-country Members to adopt such measures.[203] According to the European Communities, to require preference-granting countries to invoke the Enabling Clause in order to justify or defend their GSP schemes cannot be reconciled with the intention of WTO Members to encourage these schemes.

94. We note, however, as did the Panel[204], that WTO objectives may well be pursued through measures taken under provisions characterized as exceptions. The Preamble to the *WTO Agreement* identifies certain objectives that may be pursued by Members through measures that would have to be justified under the "General Exceptions" of Article XX. For instance, one such objective is reflected in the recognition by Members that the expansion of trade must be accompanied by:

> ... the optimal use of the world's resources in accordance with the objective of sustainable development, [with Members] seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development[.][205]

95. As the Appellate Body observed in *US – Shrimp*, WTO Members retained Article XX(g) from the *General Agreement on Tariffs and Trade 1947* (the "GATT 1947") without alteration after the conclusion of the Uruguay Round, being "fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy".[206] Article XX(g) of the

[199]First and second recitals. Similarly, Article XXXVI:1(d) of the GATT 1994 provides:

> [I]ndividual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries[.]

[200]We discuss further the role of the Enabling Clause in the context of the covered agreements, *infra*, paras. 106-109.

[201]European Communities' appellant's submission, para. 20.

[202]*Ibid.*, para. 52.

[203]*Ibid.*, para. 53.

[204]See Panel Report, para. 7.52.

[205]*WTO Agreement*, Preamble, first recital.

[206]Appellate Body Report, *US – Shrimp*, para. 129.

GATT 1994 permits Members, subject to certain conditions, to take measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". It is well-established that Article XX(g) is an *exception* in relation to which the responding party bears the burden of proof.[207] Thus, by authorizing in Article XX(g) measures for environmental conservation, an important objective referred to in the Preamble to the *WTO Agreement*, Members implicitly recognized that the implementation of such measures would not be discouraged simply because Article XX(g) constitutes a defence to otherwise WTO-inconsistent measures. Likewise, characterizing the Enabling Clause as an exception, in our view, does not undermine the importance of the Enabling Clause within the overall framework of the covered agreements and as a "positive effort" to enhance economic development of developing-country Members. Nor does it "discourag[e]"[208] developed countries from adopting measures in favour of developing countries under the Enabling Clause.

96. The European Communities acknowledges that requiring Members to pursue environmental measures through Article XX(g), an exception provision, may be logical because "the WTO Agreement is not an environmental agreement and ... it contains no positive regulation of environmental matters."[209] Because the *WTO Agreement* "regulate[s] positively the use of trade measures"[210], however, and the Enabling Clause "promotes" the use of trade measures to further the development of developing countries, the European Communities argues that Members should not be required to prove the consistency of their measures with the Enabling Clause.

97. We do not consider it relevant, for the purposes of determining whether a provision is or is not in the nature of an exception, that the provision governs "trade measures" rather than measures of a primarily "non-trade" nature. Indeed, in a previous appeal, the Appellate Body found that the proviso to Article XVIII:11 of the GATT 1994—a provision authorizing quantitative restrictions when taken in response to balance-of-payments difficulties—is a defence to be invoked by the responding party.[211] The fact that a provision regulates the use of "trade measures", therefore, does not compel a finding that it is for the complaining party to establish inconsistency with that provision, rather than for the defending party to rely on it as a defence.

98. In sum, in our view, the characterization of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive "differential and more favourable treatment". 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 defence to be established by the responding party. Whatever its characterization, a provision of the covered agreements must be interpreted in accordance with the "customary rules of interpretation of public international law", as required by Article 3.2 of the

[207] *Ibid.*, para. 157; Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 15-16, DSR 1997:I, at 337 (referring to GATT Panel Report, *Canada – FIRA*, para. 5.20; GATT Panel Report, *US – Section 337*, para. 5.27; GATT Panel Report, *US – Malt Beverages*, paras. 5.43 and 5.52; and Panel Report, *US – Gasoline*, para. 6.20).

[208] United States' third participant's submission, para. 9.

[209] European Communities' appellant's submission, para. 54.

[210] European Communities' appellant's submission, para. 54.

[211] Appellate Body Report, *India – Quantitative Restrictions*, paras. 134-136. We also note that GATT panels determined Article XI:2(c) of the GATT 1947 to constitute an "exception", even though that provision addresses "trade measures", namely quantitative restrictions. (See GATT Panel Report, *Japan – Agricultural Products I*, para. 5.1.3.7; GATT Panel Report, *EEC – Dessert Apples*, para. 12.3; and GATT Panel Report, *Canada – Ice Cream and Yoghurt*, para. 59)

Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU").[212] Members' rights under the Enabling Clause are not curtailed by requiring preference-granting countries to establish in dispute settlement the consistency of their preferential measures with the conditions of the Enabling Clause. Nor does characterizing the Enabling Clause as an exception detract from its critical role in encouraging the granting of special and differential treatment to developing-country Members of the WTO.

99. In the light of the above, we *uphold* the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994.

100. We examine now the European Communities' appeal regarding the Panel's finding that the Enabling Clause "does not exclude the applicability" of Article I:1 of the GATT 1994.[213] The European Communities argues that the Enabling Clause exists "side-by-side and on an equal level" with Article I:1, and thus applies to the exclusion of that provision.[214] In our view, the European Communities misconstrues the relationship between the two provisions.

101. It is well settled that the MFN principle embodied in Article I:1 is a "cornerstone of the GATT" and "one of the pillars of the WTO trading system"[215], which has consistently served as a key basis and impetus for concessions in trade negotiations. However, we recognize that Members are entitled to adopt measures providing "differential and more favourable treatment" under the Enabling Clause. Therefore, challenges to such measures, brought under Article I:1, cannot succeed where such measures are in accordance with the terms of the Enabling Clause. In our view, this is so because the text of paragraph 1 of the Enabling Clause ensures that, to the extent that there is a conflict between measures under the Enabling Clause and the MFN obligation in Article I:1, the Enabling Clause, as the more specific rule, prevails over Article I:1. In order to determine whether such a conflict exists, however, a dispute settlement panel should, as a first step, examine the consistency of a challenged measure with Article I:1, as the general rule. If the measure is considered at this stage to be inconsistent with Article I:1, the panel should then examine, as a second step, whether the measure is nevertheless justified by the Enabling Clause. It is only at this latter stage that a final determination of consistency with the Enabling Clause or inconsistency with Article I:1 can be made.

[212] In this regard, we recall the Appellate Body's statement in *EC – Hormones* 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.

(Appellate Body Report, para. 104)

[213] Panel Report, para. 7.53.

[214] European Communities' appellant's submission, para. 22.

[215] Appellate Body Report, *Canada – Autos*, para. 69. See also, Appellate Body Report, *US – Section 211 Appropriations Act*, para. 297, which reads:

> Like the national treatment obligation, the obligation to provide most-favoured-nation treatment has long been one of the cornerstones of the world trading system. For more than fifty years, the obligation to provide most-favoured-nation treatment in Article I of the GATT 1994 has been both central and essential to assuring the success of a global rules-based system for trade in goods.

102. In other words, the Enabling Clause "does not exclude the applicability"[216] of Article I:1 in the sense that, as a matter of procedure (or "order of examination", as the Panel stated[217]), the challenged measure is submitted successively to the test of compatibility with the two provisions. But, as a matter of final determination—or *application* rather than *applicability*—it is clear that only one provision applies at a time. This is what the Panel itself found when, after stating that "as an exception provision, the Enabling Clause applies concurrently with Article I:1", it added "and *takes precedence* to the extent of the conflict between the two provisions."[218]

103. It is with this understanding, therefore, that we *uphold* the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause "does not exclude the applicability" of Article I:1 of the GATT 1994.

D. *Burden of Proof*

104. We now examine the implications of the relationship between Article I:1 of the GATT 1994 and the Enabling Clause for the allocation of the burden of proof in this dispute. As a general rule, the burden of proof for an "exception" falls on the respondent, that is, as the Appellate Body stated in *US – Wool Shirts and Blouses*, on the party "assert[ing] the affirmative of a particular ... defence".[219] From this allocation of the burden of proof, it is normally for the respondent, first, to *raise* the defence and, second, to *prove* that the challenged measure meets the requirements of the defence provision.

105. We are therefore of the view that the European Communities must *prove* that the Drug Arrangements satisfy the conditions set out in the Enabling Clause. Consistent with the principle of *jura novit curia*[220], it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause[221]; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause.

1. Responsibility for Raising the Enabling Clause

106. With respect to the legal responsibility for *raising* a defence as an issue in a dispute settlement proceeding, however, we regard the particular circumstances of this case as dictating a special approach, given the fundamental role of the Enabling Clause in the WTO system as well as its contents. The Enabling Clause authorizes developed-country Members to grant enhanced market access to products from developing countries beyond that granted to products from developed countries. Enhanced market access is intended to provide developing countries with increasing returns from their growing exports, which returns are critical for those countries' economic development. The Enabling Clause thus plays a vital role in promoting trade as a means of stimulating economic growth and development. In this respect, the Enabling Clause is not a typical "exception", or "defence", in the style of Article XX of the GATT 1994, or of other exception provisions identified by the Appellate Body in previous cases.

107. A brief review of the history of the Enabling Clause confirms its special status in the covered agreements. When the GATT 1947 entered into force, the Contracting Parties stated that one of its objectives was to "rais[e] standards of living".[222] However, this objective was to be achieved in countries at all stages of economic development through the *universally-applied* commitments embodied in the GATT provisions. In 1965, the Contracting Parties added Articles XXXVI, XXXVII, and XXXVIII to form Part IV of the GATT 1947, entitled "Trade and Development".[223] Article XXXVI expressly recognized the "need for positive efforts" and "individual and joint action" so that developing countries would be able to share in the growth in international trade and further their economic development.[224] Some of these "positive efforts" resulted in the Agreed Conclusions of the United Nations Conference on Trade and Development ("UNCTAD") Special Committee on Preferences (the "Agreed Conclusions")[225], which recognized that preferential tariff treatment accorded under a generalized scheme of preferences was key for developing countries "*(a)* to increase their export earnings; *(b)* to promote their industrialization; and *(c)* to accelerate their rates of economic growth."[226] The Agreed Conclusions also made clear that the achievement of these objectives through the adoption of preferences by developed countries required a GATT waiver, in particular, with respect to the MFN obligation in Article I:1.[227] Accordingly, the Contracting Parties adopted the 1971 Waiver Decision in order to waive the obligations of Article I of the GATT 1947 and thereby authorize the granting of tariff preferences to developing countries for a period of ten years.[228]

108. In 1979, the Enabling Clause expanded the authorization provided by the 1971 Waiver Decision to cover additional preferential measures and made the authorization a permanent feature of the GATT. In his report at the conclusion of the Tokyo Round of negotiations, the then-Director General observed:

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[216]Panel Report, para. 7.53.

[217]*Ibid.*, para. 7.45.

[218]*Ibid.* (emphasis added)

[219]Appellate Body Report, p. 14, DSR 1997:I, at 335. (See also, Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 133; and Appellate Body Report, *India – Quantitative Restrictions*, para. 136)

[220]The principle of *jura novit curia* has been articulated by the International Court of Justice as follows:

> It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.

(International Court of Justice, Merits, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 ICJ Reports, p. 14, para. 29 (quoting International Court of Justice, Merits, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, 1974 ICJ Reports, p. 9, para. 17))

[221]Compare Appellate Body Report, *EC – Hormones*, para. 156, which states:

> [N]othing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties -- or to develop its own legal reasoning -- to support its own findings and conclusions on the matter under its consideration. A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute.

[222]GATT 1947, Preamble, first recital.

[223]*Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development*, BISD 13S/2 (1965).

[224]GATT 1947, Arts. XXXVI:3 and XXXVI:1(d).

[225]Attached as Annex D-4 to the Panel Report.

[226]Agreed Conclusions, para. I.2 (Panel Report, p. D-8).

[227]*Ibid.*, paras. IX.1 and IX.2(*c*) (Panel Report, pp. D-13–D-14).

[228]1971 Waiver Decision, para. (*a*) (Panel Report, p. D-4).

> The Enabling Clause meets a fundamental concern of developing countries by introducing differential and more favourable treatment as an integral part of the GATT system, no longer requiring waivers from the GATT. It also provides the perspective against which the participation of developing countries in the trading system may be seen.[229]

Members reaffirmed the significance of the Enabling Clause in 1994 with the incorporation of the Enabling Clause into the GATT 1994.[230] The relationship between trade and development, and in particular the role of the Enabling Clause, remain prominent on the agenda of the WTO, as recognized by the Doha Ministerial Conference in 2001.[231]

109. We thus understand that, between the entry into force of the GATT and the adoption of the Enabling Clause, the Contracting Parties determined that the MFN obligation failed to secure adequate market access for developing countries so as to stimulate their economic development. Overcoming this required recognition by the multilateral trading system that certain obligations, applied to all Contracting Parties, could impede rather than facilitate the objective of ensuring that developing countries secure a share in the growth of world trade. This recognition came through an authorization for GSP schemes in the 1971 Waiver Decision and then in the broader authorization for preferential treatment for developing countries in the Enabling Clause.[232]

110. In our view, the special status of the Enabling Clause in the WTO system has particular implications for WTO dispute settlement. As we have explained, paragraph 1 of the Enabling Clause enhances market access for developing countries as a means of improving their economic development by authorizing preferential treatment for those countries, "notwithstanding" the obligations of Article I. It is evident that a Member cannot implement a measure authorized by the Enabling Clause without according an "advantage" to a developing country's products over those of a developed country. It follows, therefore, that every measure undertaken pursuant to the Enabling Clause would necessarily be inconsistent with Article I, if assessed on that basis alone, but it would be exempted from compliance with Article I because it meets the requirements of the Enabling Clause. Under these circumstances, we are of the view that a complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994, for to do only that would not convey the "legal basis of the complaint sufficient to present the problem clearly".[233] In other words, it is insufficient in WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant seeks also to argue that the measure is not justified under the Enabling Clause. This is especially so if the

[229]European Communities' appellant's submission, para. 25 (quoting Report by the Director-General of GATT, in GATT, *The Tokyo Round of Multilateral Trade Negotiations* (1979), Vol. I, p. 99).

[230]Para. 1(b)(iv) of the language of Annex 1A to the *WTO Agreement* incorporating the GATT 1994 into the *WTO Agreement*.

[231]Ministerial Decision of 14 November 2001, *Implementation-related Issues and Concerns*, WT/MIN(01)/17, paras. 12.1-12.2.

[232]We recognize that an exemption for developing countries from certain GATT obligations also resulted from the 1954-1955 Review Session, where the Contracting Parties amended the GATT by adding Article XVIII for the benefit of developing countries facing balance-of-payments difficulties or seeking to nurture an infant industry. (See Reports Relating to the Review of the Agreement: Quantitative Restrictions, GATT Document L/332/Rev.1 and Addenda, adopted 2, 4 and 5 March 1955, BISD, 3S/170, paras. 3, 35-36, 44, and 52)

[233]DSU, Art. 6.2. See also, Appellate Body Report, *Korea – Dairy*, paras. 120, 124, and 127.

challenged measure, like that at issue here, is plainly taken pursuant to the Enabling Clause, as we discuss *infra*.[234]

111. Furthermore, the history and objective of the Enabling Clause lead us to agree with the European Communities[235] that Members are *encouraged* to deviate from Article I in the pursuit of "differential and more favourable treatment" for developing countries. This deviation, however, is encouraged only to the extent that it complies with the series of requirements set out in the Enabling Clause, requirements that we find to be more extensive than more typical defences such as those found in Article XX.

112. Paragraph 2 of the Enabling Clause identifies the four types of measures to which the authorization of paragraph 1 applies:

> (*a*) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,[3]
>
> (*b*) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
>
> (*c*) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another
>
> (*d*) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.
>
> [3] As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

Measures that a Member claims are exempt from a finding of inconsistency with Article I by virtue of the Enabling Clause must fit within these sub-paragraphs, of which the most relevant for this case is paragraph 2(a), which provides for GSP schemes. As we discuss in greater detail *infra*[236], this provision requires the preferential treatment to be "in accordance with" the GSP and further defines this obligation through each of the terms "generalized, non-reciprocal and non discriminatory". Paragraphs 2(b)-(d) impose different obligations to be satisfied by a Member taking a measure pursuant to those provisions. Paragraph 3 identifies three conditions that must also be satisfied by *any* measure under the Enabling Clause. Paragraph 4 sets forth procedural conditions for the introduction, modification, or withdrawal of a preferential measure for developing countries.

[234]*Infra*, paras. 116-117.

[235]European Communities' appellant's submission, para. 53.

[236]*Infra*, paras. 142-174.

Paragraphs 5 through 9 include obligations that are not necessarily related to measures providing "differential and more favourable treatment".[237]

113. In the light of the extensive requirements set forth in the Enabling Clause, we are of the view that, when a complaining party considers that a preference scheme of another Member does not meet one or more of those requirements, the specific provisions of the Enabling Clause with which the scheme allegedly falls afoul, form critical components of the "legal basis of the complaint"[238] and, therefore, of the "matter" in dispute.[239] Accordingly, a complaining party cannot, in good faith, ignore those provisions and must, in its request for the establishment of a panel, identify them and thereby "notif[y] the parties and third parties of the nature of [its] case".[240] For the failure of such a complaining party to raise the relevant provisions of the Enabling Clause would place an unwarranted burden on the responding party. This due process consideration applies equally to the elaboration of a complaining party's case in its written submissions, which must "explicitly" articulate a claim so that the panel and all parties to a dispute "understand that a specific claim has been made, [are] aware of its dimensions, and have an adequate opportunity to address and respond to it".[241]

114. Exposing preference schemes to open-ended challenges would be inconsistent, in our view, with the intention of Members, as reflected in the Enabling Clause, to "encourage"[242] the adoption of preferential treatment for developing countries and to provide a practical means of doing so within the legal framework of the covered agreements. Accordingly, although a responding party must defend the consistency of its preference scheme with the conditions of the Enabling Clause and must prove such consistency, a *complaining* party has to define the parameters within which the *responding* party must make that defence.

115. The responsibility of the complaining party in such an instance, however, should not be overstated. It is merely to *identify* those provisions of the Enabling Clause with which the scheme is allegedly inconsistent, without bearing the burden of *establishing* the facts necessary to support such inconsistency. That burden, as we concluded above[243], remains on the responding party invoking the Enabling Clause as a defence.

116. We observe, moreover, that the measure challenged in this dispute is unmistakably a preferential tariff scheme, granted by a developed-country Member in favour of developing countries, and proclaiming to be in accordance with the GSP. The Drug Arrangements are found in Council Regulation (EC) No. 2501/2001, the title of which indicates the Regulation to be "applying a scheme

[237]See Enabling Clause (attached as Annex 2 to this Report).

[238]DSU, Art. 6.2, which provides:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

[239]Appellate Body Report, *US – Carbon Steel*, para. 125 (referring to Appellate Body Report, *Guatemala – Cement I*, paras. 69-76).

[240]*Ibid.*, para. 126 (referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, at 186; and Appellate Body Report, *EC – Bananas III*, para. 142).

[241]Appellate Body Report, *Chile – Price Band System*, para. 164.

[242]European Communities' appellant's submission, para. 53.

[243]*Supra*, para. 105.

of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004". The first recital in the Preamble to the Regulation provides:

> Since 1971, the Community has granted trade preferences to developing countries, in the framework of its scheme of generalised tariff preferences.

In its original proposal for the Regulation, the European Commission explained:

> In 1994, the Commission adopted some guidelines on the *role of the GSP* for the ten-year period 1995 to 2004. A new regulation is required in order to implement *those guidelines* for the remainder of the period, i.e. the years 2002 to 2004. This memorandum is meant to explain the proposal for that new regulation.[244] (footnote omitted; emphasis added)

In its amended proposal, adding Pakistan to the list of beneficiaries under the Drug Arrangements, the European Commission further stated:

> Since the *GSP drug regime* was extended to the countries of the Andean Community and to those of the Central American Common Market, it provided an important incentive to allow for the substitution of illicit crops, enhance exports in order to create jobs not linked to drug production and trafficking and foster diversification.
>
> The problems which Pakistan is facing today, are similar. The *GSP drug regime* is therefore likely to stabilise its economic and social structures and thus consolidate the institutions that uphold the rule of law.[245] (emphasis added)

117. It is therefore clear, on the face of the Regulation and from official, publicly-available explanatory documentation, that the Drug Arrangements challenged by India in this dispute are part of a preferential tariff scheme implemented by the European Communities pursuant to the authorization in paragraph 2(a) of the Enabling Clause. As such, India would have been well aware that the Drug Arrangements must comply with the requirements of the Enabling Clause, and that the European Communities was likely to invoke the Enabling Clause in response to a challenge of inconsistency with Article I:1. Indeed, India admitted as much before the Panel.[246] India also must have believed that at least certain of those requirements were not being met and that, as a consequence, the inconsistency of the Drug Arrangements with Article I could not be justified. Accordingly, India, as

[244]Explanatory Memorandum to the Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, para. 1 (attached to Amended Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, 2001/0131 (ACC), at p. 3) (Exhibit India-7 submitted by India to the Panel).

[245]Explanatory Memorandum to the Amended Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, 2001/0131 (ACC), p. 2, fourth and fifth recitals (Exhibit India-7 submitted by India to the Panel).

[246]See, for example, India's first written submission to the Panel, para. 44, which states: "[S]ince the Drug Arrangements are part of the EC's GSP scheme, it may reasonably be assumed that the EC will invoke the Enabling Clause as a defence."

the complaining party, should reasonably have articulated its claims of inconsistency with specific provisions of the Enabling Clause at the outset of this dispute as part of its responsibility to "engage in [dispute settlement] procedures in good faith in an effort to resolve the dispute".[247]

118. In sum, although the burden of *justifying* the Drug Arrangements under the Enabling Clause falls on the European Communities, India was required to do more than simply allege inconsistency with Article I. India's claim of inconsistency with Article I with respect to the measure challenged here is inextricably linked with its argument that the Drug Arrangements do not satisfy the conditions in the Enabling Clause and that, therefore, they cannot be justified as a derogation from Article I. In the light of the above considerations, we are of the view that India was required to (i) identify, in its request for the establishment of a panel, which obligations in the Enabling Clause the Drug Arrangements are alleged to have contravened, and (ii) make written submissions in support of this allegation. The requirement to make such an argument, however, does not mean that India must prove inconsistency with a provision of the Enabling Clause, because the ultimate burden of establishing the consistency of the Drug Arrangements with the Enabling Clause lies with the European Communities.[248]

2. Whether India Raised the Enabling Clause Before the Panel

119. We turn now to examine whether, in fact, India fulfilled these requirements and thereby sufficiently identified the scope of its claim before the Panel. In its request for consultations, India claimed that the Drug Arrangements and the special incentive arrangements for the protection of labour rights and the environment "nullify or impair the benefits accruing to India under the most-favoured-nation provisions of Article I:1 of the GATT 1994 and paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause."[249] In its request for the establishment of a panel, India asked that a panel examine whether the aforementioned arrangements of the European Communities' GSP scheme "are consistent with Article I:1 of the GATT 1994 and the requirements set out in paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause".[250] The Panel's terms of reference, therefore, included India's allegations that certain aspects of the European Communities' GSP scheme were not "consistent" with, or did not "meet the requirements set out in", paragraphs 2(a), 3(a), and 3(c) of the Enabling Clause.[251]

120. In its written submissions before the Panel, India clearly invoked paragraph 2(a) of the Enabling Clause as the basis for its allegation that the Drug Arrangements are not "justified" by the Enabling Clause.[252] For example, in its first written submission before the Panel, India stated:

> The tariff preferences under the Drug Arrangements are beneficial to some developing countries and detrimental to others and consequently do not comply with paragraph 2(a) of the Enabling Clause.[253]

121. India's second written submission before the Panel included a sub-heading entitled, "The EC has failed to demonstrate that under the Drug Arrangements it accords tariff treatment that is 'non-discriminatory' within the meaning of paragraph 2(a) of the Enabling Clause".[254] Under this sub-heading, India argued:

> [P]aragraph 2(a) of the Enabling Clause was meant to ensure that benefits under the GSP are extended to *all* developing countries, as opposed to some developing countries. Paragraph 2(a) of the Enabling Clause does not envisage selectivity. Instead, it requires that preferential tariff treatment is accorded to all developing countries.[255] (original italics)

India further argued that, even if the European Communities' interpretation of paragraph 2(a) were correct, the Drug Arrangements would not be "non-discriminatory", as required by footnote 3 to paragraph 2(a).[256]

[247]DSU, Art. 3.10. See also, Appellate Body Report, *US – FSC*, para. 166, which reads:

> Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. (footnote omitted)

[248]Compare Appellate Body Report, *US – Certain EC Products*, para. 114, which states:

> On the basis of our review of the European Communities' submissions and statements to the Panel, we conclude that the European Communities *did not specifically claim* before the Panel that, by adopting the 3 March Measure, the United States acted inconsistently with Article 23.2(a) of the DSU. As the European Communities did not make a specific claim of inconsistency with Article 23.2(a), it *did not adduce any evidence or arguments* to demonstrate that the United States made a "determination as to the effect that a violation has occurred" in breach of Article 23.2(a) of the DSU. And, as the European Communities did not adduce any evidence or arguments in support of a claim of violation of Article 23.2(a) of the DSU, the European Communities could not have established, and *did not establish, a prima facie case* of violation of Article 23.2(a) of the DSU. (footnotes omitted; emphasis added)

[249]Request for consultations by India, WT/DS246/1, 12 March 2002, p. 1.

[250]Request for the establishment of a panel by India, WT/DS246/4, 9 December 2002, p. 2. In addition to the Drug Arrangements and the special incentives for the protection of labour rights and the environment, India also challenged the WTO-consistency of "any implementing rules and regulations, ... any amendments to any of the foregoing, and ... their application". (*Ibid.*)

[251]Request for the establishment of a panel by India, WT/DS246/4, 9 December 2002, pp. 1-2. The Panel's terms of reference incorporated these allegations by reference to document WT/DS246/4. (Constitution of the panel established at the request of India, WT/DS246/5, 6 March 2003, para. 2)

[252]India's first written submission to the Panel, heading IV.C. and para. 67; India's second written submission to the Panel, heading III.B. and para. 164. By the time of its first written submission to the Panel, India had indicated to the European Communities and to the Panel that this dispute was limited to the WTO-consistency of the Drug Arrangements, but that India reserved its right to challenge the special incentives for the protection of labour rights and the environment in a future dispute settlement proceeding. (See *supra*, para. 4; and Panel Report, para. 1.5) Both participants confirmed, in response to questioning at the oral hearing, that the measure at issue in this dispute was limited to the Drug Arrangements.

[253]India's first written submission to the Panel, para. 62.

[254]India's second written submission to the Panel, heading III.B.3.

[255]*Ibid.*, para. 95.

[256]*Ibid.*, paras. 119-128.

122. We find that India acted in good faith, in its written submissions before the Panel, explaining why, in its view, the Drug Arrangements fail to meet certain requirements of the Enabling Clause, namely, those present in paragraph 2(a). Such an explanation, in our view, was sufficient to place the European Communities on notice as to the reasons underlying India's allegation that the Drug Arrangements are not justified by the relevant provision of the Enabling Clause. With such notice, the European Communities could be expected to defend its challenged measure under the Enabling Clause, in relation to which the European Communities ultimately bears the burden of justification.

123. In allocating the burden of proof, therefore, we conclude that India was required to raise the Enabling Clause in making its claim of inconsistency with Article I:1. Once India had identified, in its panel request and through argumentation in its written submissions, the relevant obligations of the Enabling Clause that it claims were not satisfied by the Drug Arrangements, the European Communities was then required to prove that the Drug Arrangements met those obligations, having chosen to rely on the Enabling Clause as a defence.

124. Finally, we observe that the European Communities' appeal of the Panel's conclusion that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 is "based on" the European Communities' claim that the Panel erroneously found that (i) the Enabling Clause is an "exception" to Article I:1; (ii) the Enabling Clause "does not exclude the applicability" of Article I:1; and (iii) the European Communities had the burden of proving the consistency of the Drug Arrangements with that Clause.[257] As we have not reversed any of these findings of the Panel[258], we do not need to review further and we *do not rule* on the Panel's conclusion that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994.[259]

[257]In its Notice of Appeal, the European Communities' reference to Article I:1 was limited to its decision to:

> ... seek[] review of the Panel's legal conclusion that [the Drug Arrangements] are inconsistent with Article I:1 ... This conclusion is based on the following erroneous legal findings:
>
> - that the Enabling Clause is an "exception" to Article I:1 of the GATT;
> - that the Enabling Clause does not exclude the applicability of Article I:1 of the GATT;
> - that the EC had the burden of proving that the Drug Arrangements were consistent with the Enabling Clause.

(Notification of an appeal by the European Communities, WT/DS246/7, 8 January 2004, p.1 (attached as Annex 1 to this Report))

[258]*Supra*, paras. 99, 103, and 123.

[259]Panel Report, paras. 7.60 and 8.1(b). The European Communities confirmed, in response to questioning at the oral hearing, that it is not appealing the Panel's conclusion, in paragraph 7.60 of the Panel Report, that the tariff advantages under the Drug Arrangements are inconsistent with Article I:1 because they are not accorded "unconditionally" to the like products originating in all other WTO Members.

125. For these reasons, we *modify* the Panel's finding, in paragraph 7.53 of the Panel Report, that "the European Communities bears the burden of invoking the Enabling Clause and justifying its Drug Arrangements under that provision." We *find* that it was incumbent upon India to *raise* the Enabling Clause in making its claim of inconsistency with Article I:1 of the GATT 1994, but that the European Communities bore the burden of *proving* that the Drug Arrangements satisfy the conditions of the Enabling Clause, in order to justify those Arrangements under that Clause. We *find*, further, that India sufficiently raised paragraph 2(a) of the Enabling Clause in making its claim of inconsistency with Article I:1 before the Panel. We turn now to examine whether the European Communities met its burden of justifying the Drug Arrangements under that provision.

V. Whether the Drug Arrangements are Justified Under the Enabling Clause

126. The European Communities "appeals subsidiarily" the Panel's finding that the Drug Arrangements are not justified under paragraph 2(a), should we "conclude that the Enabling Clause is an exception to GATT Article I:1, or that India made a valid claim under the Enabling Clause".[260] Having found that the Enabling Clause is in the nature of an exception to Article I:1 of the GATT 1994, we proceed to examine the European Communities' appeal as it relates to paragraph 2(a) of the Enabling Clause.

127. The European Communities challenges three of the Panel's findings, namely that:

(a) "the term 'non-discriminatory' in footnote 3 [to paragraph 2(a) of the Enabling Clause] requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations"[261];

(b) "the term 'developing countries' in paragraph 2(a) [of the Enabling Clause] should be interpreted to mean *all* developing countries, with the exception that where developed countries are implementing a priori limitations, 'developing countries' may mean *less than all* developing countries"[262]; and, ultimately, that

(c) the European Communities failed "to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause".[263]

128. Before addressing these specific issues, we will identify the precise scope of the appeal before us. In doing so, we note that both the European Communities and India agree that, in addressing paragraph 2(a) of the Enabling Clause, the Panel implicitly made findings on issues that were not before it. Thus, India submits that "[t]he issue before the Panel was not whether the EC could exclude from its GSP scheme countries claiming developing country status."[264] In India's view, that issue did not arise "because India and all the countries enjoying tariff preferences under the Drug Arrangements are beneficiaries under the EC's GSP scheme."[265] Also not before the Panel, according to India, was "whether the EC's mechanisms for the graduation of developing countries meet the requirements of

[260]European Communities' appellant's submission, para. 67.

[261]Panel Report, paras. 7.161 and 7.176.

[262]*Ibid.*, para. 7.174. (original italics; footnote omitted)

[263]*Ibid.*, para. 8.1(d).

[264]India's appellee's submission, para. 101.

[265]*Ibid.*

the Enabling Clause."[266] India emphasizes that it "did not submit any claims on these issues to the Panel because they are not relevant to the resolution of this dispute."[267] In other words, according to India, the legal issues raised in this dispute "relate exclusively"[268] to the treatment of those countries that a preference-granting country has included in its GSP scheme as beneficiaries. The European Communities echoes India's concern that the Panel read obligations into the Enabling Clause "in respect of issues which had not been raised by any of the parties and which [the Panel] did not have to address in order to resolve the dispute".[269]

129. Against this background, we understand India's claim before the Panel to have been limited to the consistency of the Drug Arrangements with the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause.[270] In particular, India's challenge to the Drug Arrangements is based on its submission that the term "non-discriminatory" prevents preference-granting countries from according preferential tariff treatment to any beneficiary of their GSP schemes without granting identical preferential tariff treatment to all other beneficiaries. Therefore, in this Report, we do not rule on whether the Enabling Clause permits *ab initio* exclusions from GSP schemes of countries claiming developing country status, or the partial or total withdrawal of GSP benefits from certain developing countries under certain conditions.

130. We note, moreover, that the European Communities has *not* appealed the Panel's interpretation of paragraph 3(c) of the Enabling Clause.[271] Instead, the European Communities has invoked that provision solely as "contextual support" for its interpretation of "non-discriminatory" in footnote 3.[272] We also note that the Panel made no findings in this case as to whether the Drug Arrangements are inconsistent with paragraph 3(a) or 3(c) of the Enabling Clause. Our mandate, pursuant to Article 17.6 of the DSU, is limited to "issues of law covered in the panel report and legal interpretations developed by the panel". Therefore, in this appeal, we are not required to, and we shall not address, the issue of whether the Drug Arrangements are consistent with paragraphs 3(a) and 3(c) of the Enabling Clause. This does not prevent us, of course, from examining those paragraphs as context for our interpretation of "non-discriminatory" in footnote 3.

131. With these considerations in mind, we turn to address the meaning of the term "non-discriminatory" in footnote 3. In doing so, we consider it useful to begin our analysis by setting out briefly the relevant findings of the Panel.

[266]India's opening statement at the oral hearing. By "graduation", we understand India to refer to the withdrawal of preferential tariff treatment with respect to specific products or designated developing countries on grounds of the degree of their development.

[267]India's opening statement at the oral hearing.

[268]India's appellee's submission, para. 103.

[269]European Communities' appellant's submission, para. 7.

[270]See *supra*, paras. 120-122.

[271]The European Communities refers to the Panel's finding, in paragraph 7.99 of the Panel Report, that paragraph 3(c) requires preference-granting countries to "provide product coverage and tariff cuts at levels in general no less than those offered and accepted in the Agreed Conclusions." The European Communities explains that "[s]ince this issue was not raised by India and is not directly relevant to the issues in dispute, ... the EC has not deemed [it necessary] to appeal it." (European Communities' appellant's submission, footnote 40 to para. 47)

[272]European Communities' appellant's submission, para. 126.

A. *Panel Findings*

132. The Panel stated at the outset that "[t]he main issue disputed by the parties is whether the Drug Arrangements are consistent with paragraph 2(a) of the Enabling Clause, particularly the requirement of 'non-discriminatory' in footnote 3 to this subparagraph."[273] Paragraph 2(a) reads:

> 2. The provisions of paragraph 1 apply to the following:
>
> (*a*) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,[3]
>
> [3] As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24). (footnote 2 omitted)

133. The Panel went on to examine, not the language of those provisions, but the meaning of paragraph 3(c) of the Enabling Clause, which reads:

> 3. Any differential and more favourable treatment provided under this clause:
>
> ...
>
> (*c*) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

The Panel explained that "[i]t is only possible to give a full meaning to paragraph 2(a) and footnote 3 after determining whether paragraph 3(c) allows differentiation among developing countries in 'respond[ing] positively to the development, financial and trade needs of developing countries'."[274]

134. Having found that the text of paragraph 3(c) "does not reveal whether the 'needs of developing countries' refers to the needs of *all* developing countries or to the needs of *individual* developing countries"[275], the Panel proceeded to examine "the drafting history in UNCTAD ... to identify the intention of the drafters on issues relating to the GSP arrangements."[276] The Panel concluded that paragraph 3(c) allows for differentiation among beneficiaries for the purposes of granting preferential treatment to least-developed countries and setting *a priori* import limitations for

[273]Panel Report, para. 7.65.

[274]Panel Report, para. 7.65 (quoting Enabling Clause, para. 3(c) (attached as Annex 2 to this Report)). In a footnote, the Panel explained further that "[t]he European Communities argue[d] that 'if the term "non-discriminatory" was interpreted as prohibiting any difference in treatment between developing countries, developed countries would be effectively precluded from responding positively to those needs, thus rendering [to] a nullity the requirement set forth in paragraph 3(c)'." (*Ibid.*, footnote 291 to para. 7.65 (quoting European Communities' first written submission to the Panel, para. 71))

[275]*Ibid.*, para. 7.78. (original italics)

[276]*Ibid.*, para. 7.80.

products originating in particularly competitive developing countries. The Panel asserted that "[n]o other differentiation among developing countries is permitted by paragraph 3(c)."[277]

135. Having made these findings based on its review of what it considered the "context" and "preparatory work"[278] of paragraph 3(c) of the Enabling Clause, the Panel turned to examine paragraph 2(a) and footnote 3 thereto. The Panel observed that the word "discriminate ... can have either a *neutral* meaning of making a distinction or a *negative* meaning carrying the connotation of a distinction that is unjust or prejudicial."[279] In order to determine the appropriate meaning of the term "non-discriminatory" as used in footnote 3, the Panel turned to the context of that term. According to the Panel, this context includes paragraphs 2(a), 2(d), and 3(c) of the Enabling Clause, with the "most relevant elements of context" being Resolution 21(II) of the Second Session of UNCTAD ("Resolution 21(II)")[280] and the Agreed Conclusions.[281] Based on its review of these documents, the Panel found that:

> … the clear intention of the negotiators was to provide GSP equally to all developing countries and to eliminate all differentiation in preferential treatment to developing countries, with the exception of the implementation of a priori limitations in GSP schemes.[282]

136. The Panel concluded:

> … that the requirement of non-discrimination, as a general principle formally set out in Resolution 21(II) and later carried over into the 1971 Waiver Decision and then into the Enabling Clause, obliges preference-giving countries to provide the GSP benefits to *all* developing countries without differentiation, except for the implementation of a priori limitations in GSP schemes.[283] (original italics)

137. The Panel found further support for its conclusion in its previous analysis of paragraph 3(c)[284] and in paragraph 2(d) of the Enabling Clause, which provides:

> 2. The provisions of paragraph 1 apply to the following:
>
> ...
>
> (*d*) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries. (footnote omitted)

[277] *Ibid.*, para. 7.116.

[278] *Ibid.*, para. 7.88.

[279] *Ibid.*, para. 7.126. (original italics)

[280] Resolution 21(II) of the Second Session of UNCTAD, entitled "Expansion and Diversification of Exports of Manufactures and Semi-Manufactures of Developing Countries" (attached as Annex D-3 to the Panel Report).

[281] Panel Report, para. 7.128.

[282] *Ibid.*, para. 7.144.

[283] *Ibid.*

[284] *Ibid.*, paras. 7.148-7.149.

The Panel stated that the term "non-discriminatory" cannot be interpreted "to permit preferential treatment to less than all developing countries without an explicit authorization".[285] According to the Panel, "[s]uch explicit authorization is only provided for the benefit of the least-developed countries in paragraph 2(d) of the Enabling Clause and for the implementation of a priori limitations, as set out in the Agreed Conclusions."[286]

138. Turning to the "object and purpose" of the Enabling Clause, the Panel considered that "the objective of promoting the trade of developing countries and that of promoting trade liberalization generally"[287] are relevant for the interpretation of the term "non-discriminatory". The Panel determined, however, that the latter "contributes more to guiding the interpretation of 'non-discriminatory', given its function of preventing abuse in providing GSP."[288]

139. The Panel found further support for its interpretation in an examination of the "overall practice" of preference-granting countries[289], which, according to the Panel, "suggests that there was a common understanding of 'equal' treatment to all developing countries except for a priori measures, and that it was on this basis that the 1971 Waiver Decision was adopted."[290]

140. Based on its analysis described above, the Panel found that:

> ... the term "non-discriminatory" in footnote 3 requires that *identical* tariff preferences under GSP schemes be provided to *all* developing countries without differentiation, except for the implementation of a priori limitations.[291] (emphasis added)

141. Regarding the measure at issue in this dispute, the Panel found that:

> ... the European Communities' Drug Arrangements, as a GSP scheme, do not provide identical tariff preferences to *all* developing countries and that the differentiation is neither for the purpose of special treatment to the least-developed countries, nor in the context of the implementation of a priori measures. Such differentiation is inconsistent with paragraph 2(a), particularly the term "non-discriminatory" in footnote 3[.][292] (original italics)

Consequently, the Panel also found that "the European Communities has failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause".[293]

[285] *Ibid.*, para. 7.151.

[286] Panel Report, para. 7.151.

[287] *Ibid.*, para. 7.158.

[288] *Ibid.*

[289] *Ibid.*, para. 7.159.

[290] *Ibid.*

[291] *Ibid.*, para. 7.161.

[292] *Ibid.*, para. 7.177.

[293] *Ibid.*, para. 8.1(d).

B. *Interpretation of the Term "Non-Discriminatory" in Footnote 3 to Paragraph 2(a) of the Enabling Clause*

142. We proceed to interpret the term "non-discriminatory" as it appears in footnote 3 to paragraph 2(a) of the Enabling Clause.

143. We recall first that the Enabling Clause has become a part of the GATT 1994.[294] Paragraph 1 of the Enabling Clause authorizes WTO Members to provide "differential and more favourable treatment to developing countries, without according such treatment to other WTO Members". As explained above, such differential treatment is permitted "notwithstanding" the provisions of Article I of the GATT 1994. Paragraph 2(a) and footnote 3 thereto clarify that paragraph 1 applies to "[p]referential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences"[295], "[a]s described in the [1971 Waiver Decision], relating to the establishment of 'generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries'".[296]

144. The Preamble to the 1971 Waiver Decision in turn refers to "preferential tariff treatment" in the following terms:

> *Recalling* that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries;
>
> *Considering* that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries[.][297] (original italics; underlining added)

145. Paragraph 2(a) of the Enabling Clause provides, therefore, that, to be justified under that provision, preferential tariff treatment must be "in accordance" with the GSP "as described" in the *Preamble* to the 1971 Waiver Decision. "Accordance" being defined in the dictionary as "conformity"[298], only preferential tariff treatment that is in conformity with the description "generalized, non-reciprocal and non-discriminatory" treatment can be justified under paragraph 2(a).

146. In the light of the above, we do not agree with European Communities' assertion[299] that the Panel's interpretation of the word "non-discriminatory" in footnote 3 of the Enabling Clause is erroneous because the phrase "generalized, non-reciprocal and non discriminatory" in footnote 3 merely refers to the description of the GSP in the 1971 Waiver Decision and, of itself, does not

[294] See *supra*, footnote 192.

[295] Enabling Clause, para. 2(a) (attached as Annex 2 to this Report).

[296] *Ibid.*, footnote 3 to para. 2(a).

[297] 1971 Waiver Decision, third and fourth recitals.

[298] *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 15.

[299] European Communities' response to questioning at the oral hearing.

impose any legal obligation on preference-granting countries. Nor do we agree with the United States that the Panel erred in "assum[ing]" that the term "non-discriminatory" in footnote 3 imposes obligations on preference-granting countries, and that, instead, footnote 3 "is simply a cross-reference to where the Generalized System of Preferences is described."[300]

147. We find support for our interpretation in the French version of paragraph 2(a) of the Enabling Clause, requiring that the tariff preferences be accorded "*conformément au Système généralisé de préférences*". The term "in accordance" is thus "*conformément*" in the French version. In addition, the phrase "[a]s described in [the 1971 Waiver Decision]" in footnote 3 is stated as "*[t]el qu'il est défini dans la décision des PARTIES CONTRACTANTES en date du 25 juin 1971*". Similarly, the Spanish version uses the terms "*conformidad*" and "*[t]al como lo define la Decisión de las PARTES CONTRATANTES de 25 de junio de 1971*". In our view, the stronger, more obligatory language in both the French and Spanish texts—that is, using "as defined in" rather than "as described in"—lends support to our view that only preferential tariff treatment that is "generalized, non-reciprocal and non-discriminatory" is covered under paragraph 2(a) of the Enabling Clause.[301]

148. Having found that the qualification of the GSP as "generalized, non-reciprocal and non discriminatory" imposes obligations that must be fulfilled for preferential tariff treatment to be justified under paragraph 2(a), we turn to address the Panel's finding that:

> ... the term "non-discriminatory" in footnote 3 requires that *identical* tariff preferences under GSP schemes be provided to *all* developing countries without differentiation, except for the implementation of a priori limitations.[302] (emphasis added)

149. The European Communities maintains that "'non-discrimination' is not synonymous with formally equal treatment"[303] and that "[t]reating differently situations which are objectively different is not discriminatory."[304] The European Communities asserts that "[t]he objective of the Enabling Clause is different from that of Article I:1 of the GATT."[305] In its view, the latter is concerned with "providing equal conditions of competition for imports of like products originating in all Members", whereas "the Enabling Clause is a form of Special and Differential Treatment for developing countries, which seeks the opposite result: to create unequal competitive opportunities in order to respond to the special needs of developing countries."[306] The European Communities derives contextual support from paragraph 3(c), which states that the treatment provided under the Enabling

[300] United States' third participant's submission, para. 11.

[301] We further note the existence of a 1999 WTO waiver allowing *developing* countries to grant special preferences to *least-developed* countries. (Waiver Decision on Preferential Tariff Treatment for Least-Developed Countries, WT/L/304, 15 June 1999 (the "1999 LDC Waiver")) That waiver applies only to "preferential tariff treatment ... provided on a generalized, non-reciprocal and non-discriminatory basis". (*Ibid.*, para. 2) As such, for tariff preferences to be justified thereunder, there is a *requirement* that the treatment be accorded on a "generalized, non-reciprocal and non-discriminatory *basis*." (emphasis added) We see no reason why *developed* countries would be permitted to provide preferential tariff treatment to developing countries under the Enabling Clause other than on a "non-discriminatory basis", when there is clearly a requirement for *developing* countries to provide such treatment to least-developed countries on a "non-discriminatory basis" under the 1999 LDC Waiver.

[302] Panel Report, para. 7.161.

[303] European Communities' appellant's submission, para. 71.

[304] *Ibid.*

[305] *Ibid.*, para. 152.

[306] *Ibid.*

Clause "shall ... be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries." The European Communities concludes that the term "non-discriminatory" in footnote 3 "does not prevent the preference-giving countries from differentiating between developing countries which have different development needs, where tariff differentiation constitutes an adequate response to such differences."[307]

150. India, in contrast, asserts that "non-discrimination in respect of tariff measures refers to formally equal[] treatment"[308] and that paragraph 2(a) of the Enabling Clause requires that "preferential tariff treatment [be] applied equally" among developing countries.[309] In support of its argument, India submits that an interpretation of paragraph 2(a) of the Enabling Clause that authorizes developed countries to provide "discriminatory tariff treatment *in favour of the developing countries* but not *between the developing countries* gives full effect to both Article I of the GATT and paragraph 2(a) of the Enabling Clause and minimises the conflict between them."[310] India emphasizes that, by consenting to the adoption of the Enabling Clause, developing countries did not "relinquish[] their MFN rights [under Article I of the GATT 1994] as between themselves, thus permitting developed countries to discriminate between them."[311]

151. We examine now the ordinary meaning of the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause. As we observed, footnote 3 requires that GSP schemes under the Enabling Clause be "generalized, non-reciprocal and non discriminatory". Before the Panel, the participants offered competing definitions of the word "discriminate". India suggested that this word means "'to make or constitute a difference in or between; distinguish' and 'to make a distinction in the treatment of different categories of peoples or things'."[312] The European Communities, however, understood this word to mean "'to make a distinction in the treatment of different categories of people or things, esp. *unjustly* or *prejudicially* against people on grounds of race, colour, sex, social status, age, etc.'"[313]

152. Both definitions can be considered as reflecting ordinary meanings of the term "discriminate"[314] and essentially exhaust the relevant ordinary meanings. The principal distinction between these definitions, as the Panel noted, is that India's conveys a "*neutral* meaning of making a distinction", whereas the European Communities' conveys a "*negative* meaning carrying the connotation of a distinction that is unjust or prejudicial."[315] Accordingly, the ordinary meanings of "discriminate" point in conflicting directions with respect to the propriety of according differential treatment. Under India's reading, any differential treatment of GSP beneficiaries would be prohibited, because such treatment necessarily makes a distinction between beneficiaries. In contrast, under the European Communities' reading, differential treatment of GSP beneficiaries would not be prohibited *per se*. Rather, distinctions would be impermissible only where the basis for such distinctions was improper. Given these divergent meanings, we do not regard the term "non-discriminatory", on its own, as determinative of the permissibility of a preference-granting country according different tariff preferences to different beneficiaries of its GSP scheme.

[307] *Ibid.*, para. 188.

[308] India's appellee's submission, para. 120.

[309] *Ibid.*, para. 106.

[310] *Ibid.*, para. 92. (original italics)

[311] India's appellee's submission, para. 104.

[312] Panel Report, para. 7.126 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 689).

[313] *Ibid.* (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 689). (italics added by the Panel)

[314] See *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 697.

[315] Panel Report, para. 7.126. (original italics)

153. Nevertheless, at this stage of our analysis, we are able to discern some of the content of the "non-discrimination" obligation based on the ordinary meanings of that term. Whether the drawing of distinctions is *per se* discriminatory, or whether it is discriminatory only if done on an improper basis, the ordinary meanings of "discriminate" converge in one important respect: they both suggest that distinguishing among similarly-situated beneficiaries is discriminatory. For example, India suggests that all beneficiaries of a particular Member's GSP scheme are similarly-situated, implicitly arguing that any differential treatment of such beneficiaries constitutes discrimination. The European Communities, however, appears to regard GSP beneficiaries as similarly-situated when they have "similar development needs".[316] Although the European Communities acknowledges that differentiating between similarly-situated GSP beneficiaries would be inconsistent with footnote 3 of the Enabling Clause, it submits that there is no inconsistency in differentiating between GSP beneficiaries with "different development needs".[317] Thus, based on the ordinary meanings of "discriminate", India and the European Communities effectively appear to agree that, pursuant to the term "non-discriminatory" in footnote 3, similarly-situated GSP beneficiaries should not be treated differently.[318] The participants disagree only as to the basis for determining whether beneficiaries are similarly-situated.

154. Paragraph 2(a), on its face, does not explicitly authorize or prohibit the granting of different tariff preferences to different GSP beneficiaries. It is clear from the ordinary meanings of "non-discriminatory", however, that preference-granting countries must make available identical tariff preferences to all similarly-situated beneficiaries.

155. We continue our interpretive analysis by turning to the immediate context of the term "non-discriminatory". We note first that footnote 3 to paragraph 2(a) stipulates that, in addition to being "non-discriminatory", tariff preferences provided under GSP schemes must be "generalized". According to the ordinary meaning of that term, tariff preferences provided under GSP schemes must be "generalized" in the sense that they "apply more generally; [or] become extended in application".[319] However, this ordinary meaning alone may not reflect the entire significance of the word

[316] European Communities' appellant's submission, para. 175. (See also, *ibid.*, para. 186)

[317] *Ibid.*, para. 188.

[318] We note that the contrasting definitions proffered by the participants, as well as the convergence of those definitions on the fact that similarly-situated entities should not be treated differently, find reflection in the use of the term "discrimination" in general international law. In this respect, we note, as an example, the definitions of "discrimination" provided by the European Communities, in footnotes 56 and 57 of its appellant's submission:

> [56] ... Mere differences of treatment do not necessarily constitute discrimination … discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way.

(quoting R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (Longman, 1992), Vol. I, p. 378)

> [57] ... Discrimination occurs when in a legal system an inequality is introduced in the enjoyment of a certain right, or in a duty, while there is no sufficient connection between the inequality upon which the legal inequality is based, and the right or the duty in which this inequality is made.

(quoting E.W. Vierdag, *The Concept of Discrimination in International Law*, (Martinus Nijhoff, 1973), p. 61)

[319] *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1082.

"generalized" in the context of footnote 3 of the Enabling Clause, particularly because that word resulted from lengthy negotiations leading to the GSP. In this regard, we note the Panel's finding that, by requiring tariff preferences under the GSP to be "generalized", developed and developing countries together sought to eliminate existing "special" preferences that were granted only to certain designated developing countries.[320] Similarly, in response to our questioning at the oral hearing, the participants agreed that one of the objectives of the 1971 Waiver Decision and the Enabling Clause was to eliminate the fragmented system of special preferences[321] that were, in general, based on historical and political ties between developed countries and their former colonies.

156. It does not necessarily follow, however, that "non-discriminatory" should be interpreted to require that preference-granting countries provide "identical" tariff preferences under GSP schemes to "all" developing countries. In concluding otherwise, the Panel assumed that allowing tariff preferences such as the Drug Arrangements would necessarily "result [in] the collapse of the whole GSP system and a return back to special preferences favouring selected developing countries".[322] To us, this conclusion is unwarranted. We observe that the term "generalized" requires that the GSP schemes of preference-granting countries remain generally applicable.[323] Moreover, unlike the Panel, we believe that the Enabling Clause sets out sufficient conditions on the granting of preferences to protect against such an outcome. As we discuss below[324], provisions such as paragraphs 3(a) and 3(c) of the Enabling Clause impose specific conditions on the granting of different tariff preferences among GSP beneficiaries.

157. As further context for the term "non-discriminatory" in footnote 3, we turn next to paragraph 3(c) of the Enabling Clause, which specifies that "differential and more favourable treatment" provided under the Enabling Clause:

> ... shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

158. At the outset, we note that the use of the word "shall" in paragraph 3(c) suggests that paragraph 3(c) sets out an obligation for developed-country Members in providing preferential

[320]Panel Report, paras. 7.135-7.137. The Panel also observed that statements by developed and developing countries indicated the aim of providing GSP schemes with a broad scope, encompassing the granting of preferences by *all* developed countries to *all* developing countries. (*Ibid.*, paras. 7.131-7.132)

[321]See also European Communities' appellant's submission, para. 175.

[322]Panel Report, para. 7.102.

[323]The European Communities argues in this respect that the GATT Contracting Parties and the WTO Members have granted a number of waivers, as mentioned in the Panel Report, for tariff preferences that are "confined *ab initio* and permanently to a limited number of developing countries located in a certain geographical region". (European Communities' appellant's submission, paras. 184-185 (referring to Panel Report, para. 7.160)) See also, Panel Report, footnote 31 to para. 4.32 (referring to Waiver Decision on the Caribbean Basin Economic Recovery Act, GATT Document L/5779, 15 February 1985, BISD 31S/20, renewed 15 November 1995, WT/L/104; Waiver Decision on CARIBCAN, GATT Document L/6102, 28 November 1986, BISD 33S/97, renewed 14 October 1996, WT/L/185; Waiver Decision on the United States – Andean Trade Preference Act, GATT Document L/6991, 19 March 1992, BISD 39S/385, renewed 14 October 1996, WT/L/184; Waiver Decision on The Fourth ACP-EEC Convention of Lomé, GATT Document L/7604, 9 December 1994, BISD 41S/26, renewed 14 October 1996, WT/L/186; and Waiver Decision on European Communities – The ACP-EC Partnership Agreement, WT/MIN (01)/15), 14 November 2001.

[324]*Infra*, paras. 157-168.

treatment under a GSP scheme to "respond positively" to the "needs of developing countries".[325] Having said this, we turn to consider whether the "development, financial and trade needs of developing countries" to which preference-granting countries are required to respond when granting preferences must be understood to cover the "needs" of developing countries *collectively*.

159. The Panel found that "the only appropriate way [under paragraph 3(c) of the Enabling Clause] of responding to the differing development needs of developing countries is for preference-giving countries to ensure that their [GSP] schemes have sufficient breadth of product coverage and depth of tariff cuts to respond positively to those differing needs."[326] In reaching this conclusion, the Panel appears to have placed a great deal of significance on the fact that paragraph 3(c) does not refer to needs of "*individual*" developing countries.[327] The Panel thus understood that paragraph 3(c) does not permit the granting of preferential tariff treatment exclusively to a sub-category of developing countries on the basis of needs that are common to or shared by only those developing countries. We see no basis for such a conclusion in the text of paragraph 3(c). Paragraph 3(c) refers generally to "the development, financial and trade needs of developing countries". The absence of an explicit requirement in the text of paragraph 3(c)[328] to respond to the needs of "all" developing countries, or to the needs of "each and every"[329] developing country, suggests to us that, in fact, that provision imposes no such obligation.[330]

160. Furthermore, as we understand it, the participants in this case agree that developing countries may have "development, financial and trade needs" that are subject to change and that certain development needs may be common to only a certain number of developing countries.[331] We see no reason to disagree. Indeed, paragraph 3(c) contemplates that "differential and more favourable treatment"[332] accorded by developed to developing countries may need to be "modified" in order to "respond positively" to the needs of developing countries. Paragraph 7 of the Enabling Clause supports this view by recording the expectation of "less-developed contracting parties" that their capacity to make contributions or concessions under the GATT will "improve with the progressive development of their economies and improvement in their trade situation". Moreover, the very purpose of the special and differential treatment permitted under the Enabling Clause is to foster

[325]We note that the European Communities agreed before the Panel that paragraph 3(c) of the Enabling Clause sets forth a "requirement". (European Communities' first written submission to the Panel, paras. 71 and 149)

[326]Panel Report, para. 7.149. (See also, *ibid.*, paras. 7.95-7.97 and 7.105)

[327]*Ibid.*, para. 7.78.

[328]The United States refers to Article 3.2 of the DSU to support its argument that "panels are barred from reading legal obligations into the Enabling Clause that are not found in the text." (United States' third participant's submission, para. 13)

[329]Panel Report, para. 7.105. (italics omitted)

[330]In this respect, we agree with the European Communities that paragraph 3(c) should "be interpreted in a manner which, while preserving its relevance, is both workable for developed countries and consistent with the requirements that the preferences be *non-discriminatory*." (European Communities' appellant's submission, para. 138 (original italics))

[331]The European Communities emphasized before the Panel that the "development, financial and trade needs of developing countries" referred to in paragraph 3(c) of the Enabling Clause "[o]bviously ... may vary between different categories of developing countries, as well as over time." (European Communities' first written submission to the Panel, para. 71) That "needs of developing countries" may change over time was also acknowledged by India in response to our questioning at the oral hearing. In addition, we understand India not to disagree that developing countries may have different individual needs, given that it argues that paragraph 3(c) should be interpreted as requiring "GSP schemes [to] respond to the needs of developing countries as a whole and not their individual needs." (India's appellee's submission, para. 124)

[332]Enabling Clause, para. 1 (attached as Annex 2 to this Report).

economic development of developing countries. It is simply unrealistic to assume that such development will be in lockstep for all developing countries at once, now and for the future.

161. In addition, the Preamble to the *WTO Agreement*, which informs all the covered agreements including the GATT 1994 (and, hence, the Enabling Clause), explicitly recognizes the "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".[333] The word "commensurate" in this phrase appears to leave open the possibility that developing countries may have different needs according to their levels of development and particular circumstances. The Preamble to the *WTO Agreement* further recognizes that Members' "respective needs and concerns at different levels of economic development"[334] may vary according to the different stages of development of different Members.

162. In sum, we read paragraph 3(c) as authorizing preference-granting countries to "respond positively" to "needs" that are *not* necessarily common or shared by all developing countries. Responding to the "needs of developing countries" may thus entail treating different developing-country beneficiaries differently.

163. However, paragraph 3(c) does not authorize *any* kind of response to *any* claimed need of developing countries. First, we observe that the types of needs to which a response is envisaged are limited to "development, financial and trade needs". In our view, a "need" cannot be characterized as one of the specified "needs of developing countries" in the sense of paragraph 3(c) based merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country. Rather, when a claim of inconsistency with paragraph 3(c) is made, the existence of a "development, financial [or] trade need" must be assessed according to an *objective* standard. Broad-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve as such a standard.[335]

164. Secondly, paragraph 3(c) mandates that the response provided to the needs of developing countries be "positive". "Positive" is defined as "consisting in or characterized by constructive action or attitudes".[336] This suggests that the response of a preference-granting country must be taken with a view to *improving* the development, financial or trade situation of a beneficiary country, based on the particular need at issue. As such, in our view, the expectation that developed countries will "respond positively" to the "needs of developing countries" suggests that a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant "development, financial [or] trade need". In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences. Therefore, only if a preference-granting country acts in the "positive" manner suggested, in "respon[se]" to a widely-recognized "development, financial [or] trade need", can such action satisfy the requirements of paragraph 3(c).

[333] *WTO Agreement*, Preamble, second recital.

[334] *WTO Agreement*, Preamble, first recital.

[335] The European Communities argues that tariff preferences are an appropriate response to the drug problem. In support of its argument, the European Communities refers to the Preamble to the *Agreement on Agriculture* and the waiver for the United States' Andean Trade Preference Act. In addition, the European Communities finds support in several international conventions and resolutions that have recognized drug production and drug trafficking as entailing particular problems for developing countries. (See Panel Report, paras. 4.71-4.74; and European Communities' appellant's submission, paras. 144-149)

[336] *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2293.

165. Accordingly, we are of the view that, by requiring developed countries to "respond positively" to the "needs of developing countries", which are varied and not homogeneous, paragraph 3(c) indicates that a GSP scheme may be "non-discriminatory" even if "identical" tariff treatment is not accorded to "all" GSP beneficiaries. Moreover, paragraph 3(c) suggests that tariff preferences under GSP schemes may be "non-discriminatory" when the relevant tariff preferences are addressed to a particular "development, financial [or] trade need" and are made available to all beneficiaries that share that need.

166. India submits that developing countries should not be presumed to have waived their MFN rights under Article I:1 of the GATT 1994 *vis-à-vis* other developing countries[337], and we make no such presumption. In fact, we note that the Enabling Clause *specifically* allows developed countries to provide differential and more favourable treatment to developing countries "notwithstanding" the provisions of Article I.[338] With this in mind, and given that paragraph 3(c) of the Enabling Clause contemplates, in certain circumstances, differentiation among GSP beneficiaries, we cannot agree with India that the right to MFN treatment can be invoked by a GSP beneficiary *vis-à-vis* other GSP beneficiaries in the context of GSP schemes that meet the conditions set out in the Enabling Clause.

167. Finally, we note that, pursuant to paragraph 3(a) of the Enabling Clause, any "differential and more favourable treatment ... shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties." This requirement applies, *a fortiori*, to any preferential treatment granted to one GSP beneficiary that is not granted to another.[339] Thus, although paragraph 2(a) does not prohibit *per se* the granting of different tariff preferences to different GSP beneficiaries[340], and paragraph 3(c) even contemplates such differentiation under certain circumstances[341], paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members.

168. Having examined the context of paragraph 2(a), we turn next to examine the object and purpose of the *WTO Agreement*. We note first that paragraph 7 of the Enabling Clause provides that "[t]he concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the [GATT 1994] should promote the basic objectives of the [GATT 1994], including those embodied in the Preamble". As we have observed, the Preamble to the *WTO Agreement* provides that there is "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".[342] Similarly, the Preamble to the 1971 Waiver Decision provides that "a principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development".[343] These objectives are also reflected in paragraph 3(c) of the Enabling Clause, which states that the treatment provided under the Enabling Clause "shall ... be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries".

[337] India's appellee's submission, para. 94.

[338] Compare para. 1 of the Enabling Clause ("Notwithstanding the provisions of Article I") with para. (a) of the 1971 Waiver Decision ("the provisions of Article I shall be waived ... to the extent necessary").

[339] We note in this respect that the language contained in paragraph 3(a) of the Enabling Clause is reflected in waivers referred to in *supra*, footnote 323.

[340] *Supra*, paras. 153-154.

[341] *Supra*, paras. 162-165.

[342] *WTO Agreement*, Preamble, second recital.

[343] 1971 Waiver Decision, Preamble, first recital.

169. Although enhanced market access will contribute to responding to the needs of developing countries *collectively*, we have also recognized that the needs of developing countries may vary over time. We are of the view that the objective of improving developing countries' "share in the growth in international trade", and their "trade and export earnings", can be fulfilled by promoting preferential policies aimed at those interests that developing countries have in common, *as well as* at those interests shared by sub-categories of developing countries based on their particular needs. An interpretation of "non-discriminatory" that does not require the granting of "identical tariff preferences"[344] allows not only for GSP schemes providing preferential market access to all beneficiaries, but also the possibility of additional preferences for developing countries with particular needs, provided that such additional preferences are not inconsistent with other provisions of the Enabling Clause, including the requirements that such preferences be "generalized" and "non-reciprocal". We therefore consider such an interpretation to be consistent with the object and purpose of the *WTO Agreement* and the Enabling Clause.

170. The Panel took the view, however, that the objective of "elimination of discriminatory treatment in international commerce"[345], found in the Preamble to the GATT 1994, "contributes more to guiding the interpretation of 'non-discriminatory'"[346] than does the objective of ensuring that developing countries "secure ... a share in the growth in international trade commensurate with their development needs."[347] We fail to see on what basis the Panel drew this conclusion.

171. We next examine the relevance of paragraph 2(d) of the Enabling Clause[348] for the interpretation of "non-discriminatory" in footnote 3. The Panel characterized paragraph 2(d) as an "exception" to paragraph 2(a)[349] and relied on paragraph 2(d) to support its view that paragraph 2(a) requires "formally identical treatment".[350] In the Panel's view, if developed-country Members were entitled under paragraph 2(a) to differentiate between developing-country Members, then they would have been entitled under that paragraph alone to differentiate between developing and least-developed countries. Accordingly, "there would have been no need to include paragraph 2(d) in the Enabling Clause."[351]

172. We do not agree with the Panel that paragraph 2(d) is an "exception" to paragraph 2(a), or that it is rendered redundant if paragraph 2(a) is interpreted as allowing developed countries to differentiate in their GSP schemes between developing countries. To begin with, we note that the terms of paragraph 2 do not expressly indicate that each of the four sub-paragraphs thereunder is mutually exclusive, or that any one is an exception to any other. Moreover, in our view, it is clear from several provisions of the Enabling Clause that the drafters wished to emphasize that least-developed countries form an identifiable sub-category of developing countries with "special economic difficulties and ... particular development, financial and trade needs".[352] When a developed-country Member grants tariff preferences in favour of developing countries under paragraph 2(a), as we have

[344]Panel Report, para. 7.161.

[345]*Ibid.*, para. 7.157 (quoting GATT 1994, Preamble, second recital).

[346]Panel Report, paras. 7.157-7.158.

[347]*Ibid.*, para. 7.155 (referring to *WTO Agreement*, Preamble, second recital).

[348]Paragraph 2(d) deals with special treatment of least-developed countries "in the context of any general or specific measures in favour of developing countries".

[349]Panel Report, para. 7.147.

[350]*Ibid.*, para. 7.145.

[351]*Ibid.*, para. 7.145.

[352]Enabling Clause, para. 6 (attached as Annex 2 to this Report). Similarly, paragraph 8 of the Enabling Clause refers to the "special economic situation and [the] development, financial and trade needs" of least-developed countries.

already found[353], footnote 3 imposes a requirement that such preferences be "non-discriminatory". In the absence of paragraph 2(d), a Member granting preferential tariff treatment only to least-developed countries would therefore need to establish, under paragraph 2(a), that this preferential treatment did not "discriminate" against other developing countries contrary to footnote 3. The inclusion of paragraph 2(d), however, makes clear that developed countries may accord preferential treatment to least-developed countries distinct from the preferences granted to other developing countries under paragraph 2(a). Thus, pursuant to paragraph 2(d), preference-granting countries need not establish that differentiating between developing and least-developed countries is "non-discriminatory". This demonstrates that paragraph 2(d) does have an effect that is different and independent from that of paragraph 2(a), even if the term "non-discriminatory" does not require the granting of "identical tariff preferences"[354] to all GSP beneficiaries.

173. Having examined the text and context of footnote 3 to paragraph 2(a) of the Enabling Clause, and the object and purpose of the *WTO Agreement* and the Enabling Clause, we conclude that the term "non-discriminatory" in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term "non-discriminatory", to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond.

174. For all of these reasons, we *reverse* the Panel's finding, in paragraphs 7.161 and 7.176 of the Panel Report, that "the term 'non-discriminatory' in footnote 3 [to paragraph 2(a) of the Enabling Clause] requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations."[355]

C. *The Words "Developing Countries" in Paragraph 2(a) of the Enabling Clause*

175. In addition to the Panel's interpretation of the term "non-discriminatory" in footnote 3 of the Enabling Clause, the European Communities appeals the Panel's finding that "the term 'developing countries' in paragraph 2(a) should be interpreted to mean *all* developing countries, [except as regards] *a priori* limitations".[356] The Panel's interpretation of paragraph 2(a) is premised on its findings that (i) footnote 3 permits the granting of different tariff preferences to different GSP beneficiaries *only* for the purpose of *a priori* limitations[357], and (ii) paragraph 3(c) permits the granting of different tariff preferences to different GSP beneficiaries *only* for the purposes of *a priori* limitations and preferential treatment in favour of least-developed countries.[358] We have concluded, contrary to the Panel, that footnote 3 and paragraph 3(c) do *not* preclude the granting of differential tariffs to different sub-categories of GSP beneficiaries, subject to compliance with the remaining conditions of the Enabling Clause. We find, therefore, that the term "developing countries" in paragraph 2(a) should not be read to mean "all" developing countries and, accordingly, that

[353]*Supra*, paras. 145-148.

[354]Panel Report, para. 7.161.

[355]Given our interpretation, which permits differentiation among GSP beneficiaries, it is not necessary for us to rule on whether *a priori* limitations are permitted under the Enabling Clause. (See also, *supra*, paras. 128-129)

[356]Panel Report, para. 7.174. (original italics) See also, European Communities' appellant's submission, para. 67.

[357]Panel Report, para. 7.170.

[358]Panel Report, para. 7.171.

paragraph 2(a) does not prohibit preference-granting countries from according different tariff preferences to different sub-categories of GSP beneficiaries.

176. Accordingly, we also *reverse* the Panel's finding, in paragraph 7.174 of the Panel Report, that "the term 'developing countries' in paragraph 2(a) [of the Enabling Clause] should be interpreted to mean *all* developing countries, with the exception that where developed countries are implementing a priori limitations, 'developing countries' may mean *less than all* developing countries."

D. *Consistency of the Drug Arrangements with the Enabling Clause*

177. We turn next to examine the consistency of the Drug Arrangements with the Enabling Clause.

178. We recall that, with respect to the Enabling Clause, the only challenge by India before the Panel related to paragraph 2(a) and, in particular, footnote 3 thereto.[359] In response, the European Communities argued that it found contextual support for its interpretation of paragraph 2(a) in the requirement, contained in paragraph 3(c), to respond positively to the needs of developing countries.[360] In rejecting the European Communities' interpretation of paragraph 2(a), the Panel did not determine whether the Drug Arrangements satisfy the conditions set out in paragraph 3(c), but, rather, limited its discussion of paragraph 3(c) to the relevance of that provision as context for its interpretation of paragraph 2(a). Thus, the Panel made a finding of inconsistency only with respect to paragraph 2(a) of the Enabling Clause.[361] The European Communities appeals this finding of inconsistency with paragraph 2(a).

179. Although paragraph 3(c) informs the interpretation of the term "non-discriminatory" in footnote 3 to paragraph 2(a), as detailed above[362], paragraph 3(c) imposes requirements that are separate and distinct from those of paragraph 2(a). We have already concluded that, where a developed-country Member provides additional tariff preferences under its GSP scheme to respond positively to widely-recognized "development, financial and trade needs" of developing countries within the meaning of paragraph 3(c) of the Enabling Clause, this "positive response" would not, as such, fail to comply with the "non-discriminatory" requirement in footnote 3 of the Enabling Clause[363], even if such needs were not common or shared by all developing countries. We have also observed that paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members.[364] With these considerations in mind, and recalling that the Panel made no finding in this case as to whether the Drug Arrangements are inconsistent with paragraphs 3(a) and 3(c) of the Enabling Clause[365], we limit our analysis here to paragraph 2(a) and do not examine *per se* whether the Drug Arrangements are consistent with the obligation contained in paragraph 3(c) to "respond positively to the development, financial and trade needs of developing countries" or with the obligation contained in paragraph 3(a) not to "raise barriers" or "create undue difficulties" for the trade of other Members.

[359] *Supra*, paras. 120-122.

[360] See Panel Report, para. 7.123; European Communities' first written submission to the Panel, paras. 70-71 and 149; and European Communities' second written submission to the Panel, paras. 48-52.

[361] Panel Report, para. 8.1(d).

[362] *Supra*, paras. 157-162.

[363] *Supra*, para. 165.

[364] *Supra*, para. 167.

[365] See *supra*, para. 134.

180. We found above that the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause does not prohibit the granting of different tariffs to products originating in different sub-categories of GSP beneficiaries, but that identical tariff treatment must be available to all GSP beneficiaries with the "development, financial [or] trade need" to which the differential treatment is intended to respond.[366] The need alleged to be addressed by the European Communities' differential tariff treatment is the problem of illicit drug production and trafficking in certain GSP beneficiaries. In the context of this case, therefore, the Drug Arrangements may be found consistent with the "non-discriminatory" requirement in footnote 3 only if the European Communities proves, at a minimum, that the preferences granted under the Drug Arrangements are available to all GSP beneficiaries that are similarly affected by the drug problem.[367] We do not believe this to be the case.

181. By their very terms, the Drug Arrangements are limited to the 12 developing countries designated as beneficiaries in Annex I to the Regulation.[368] Specifically, Article 10.1 of the Regulation states:

> Common Customs Tariff *ad valorem* duties on [covered products] which originate in a country that according to Column I of Annex I benefits from [the Drug Arrangements] shall be entirely suspended.

182. Articles 10 and 25 of the Regulation, which relate specifically to the Drug Arrangements, provide no mechanism under which additional beneficiaries may be added to the list of beneficiaries under the Drug Arrangements as designated in Annex I. Nor does any of the other Articles of the Regulation point to the existence of such a mechanism with respect to the Drug Arrangements. Moreover, the European Communities acknowledged the absence of such a mechanism in response to our questioning at the oral hearing. This contrasts with the position under the "special incentive arrangements for the protection of labour rights" and the "special incentive arrangements for the protection of the environment", which are described in Article 8 of the Regulation. The Regulation includes detailed provisions setting out the procedure and substantive criteria that apply to a request by a beneficiary under the general arrangements described in Article 7 of the Regulation (the "General Arrangements") to become a beneficiary under either of those special incentive arrangements.[369]

183. What is more, the Drug Arrangements themselves do *not* set out any clear prerequisites—or "objective criteria"[370]—that, if met, would allow for other developing countries "that are similarly affected by the drug problem"[371] to be *included* as beneficiaries under the Drug Arrangements.[372]

[366] *Supra*, para. 165.

[367] According to the European Communities, "the Drug Arrangements are *non-discriminatory* because the designation of the beneficiary countries is based only and exclusively on their development needs. All the developing countries that are similarly affected by the drug problem have been included in the Drug Arrangements". (European Communities' appellant's submission, para. 186 (original italics))

[368] The 12 designated beneficiary countries are: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru, and Venezuela. (Regulation, Annex I (Column I))

[369] Regulation, Title III.

[370] European Communities' appellant's submission, paras. 4 and 139.

[371] *Ibid.*, para. 186.

[372] In response to Question 4 posed by India at the First Panel Meeting, the European Communities confirmed that the Regulation does not set out objective criteria for designating beneficiary countries under the Drug Arrangements. The European Communities stated:

> The criteria are not set out in the GSP Regulation. They are not contained in a public document.

(Panel Report, p. B-69, para. 5)

Indeed, the European Commission's own Explanatory Memorandum notes that "the benefits of the drug regime ... are given without *any* prerequisite."[373] Similarly, the Regulation offers no criteria according to which a beneficiary could be *removed* specifically from the Drug Arrangements on the basis that it is no longer "similarly affected by the drug problem". Indeed, Article 25.3 expressly states that the evaluation of the effects of the Drug Arrangements described in Articles 25.1(b) and 25.2 "will be without prejudice to the continuation of the [Drug Arrangements] until 2004, and their possible extension thereafter." This implies that, even if the European Commission found that the Drug Arrangements were having no effect whatsoever on a beneficiary's "efforts in combating drug production and trafficking"[374], or that a beneficiary was no longer suffering from the drug problem, beneficiary status would continue.[375] Therefore, even if the Regulation allowed for the list of beneficiaries under the Drug Arrangements to be modified, the Regulation itself gives no indication as to how the beneficiaries under the Drug Arrangements were chosen or what kind of considerations would or could be used to determine the effect of the "drug problem" on a particular country. In addition, we note that the Regulation does not, for instance, provide any indication as to how the European Communities would assess whether the Drug Arrangements provide an "adequate and proportionate response"[376] to the needs of developing countries suffering from the drug problem.

184. It is true that a country may be removed as a beneficiary under Annex I, either altogether or in respect of certain product sectors, for reasons that are not specific to the Drug Arrangements. Thus, Article 3 of the Regulation provides for the removal of a country from Annex I (and hence, from the General Arrangements and any other arrangements under which it is a beneficiary) if particular circumstances are met indicating that the country has reached a certain level of development. Article 12 provides for the removal of a country as a beneficiary under the General Arrangements and the Drug Arrangements with respect to a product sector where the country's level of development and competition has reached a certain threshold with respect to that sector. Neither Article 3 nor Article 12 appears to relate in any way to the degree to which the country is suffering from the "drug problem". Finally, Title V to the Regulation contains certain "Temporary Withdrawal and Safeguard Provisions" that are common to all the preferential arrangements under the Regulation. Although one reason for which the arrangements may be temporarily withdrawn is "shortcomings in customs controls on export or transit of drugs (illicit substances or precursors), or failure to comply with international conventions on money laundering"[377], this reason applies equally to the General Arrangements, the Drug Arrangements, and the other special incentive arrangements. Moreover, as the Panel appeared to recognize, this condition is not connected to the question of whether the beneficiary is a "seriously drug-affected country".[378]

[373]Explanatory Memorandum to the Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, para. 35 (emphasis added) (attached to Amended Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, 2001/0131 (ACC), at p. 3) (Exhibit India-7 submitted by India to the Panel).

[374]Regulation, Art. 25.1(b).

[375]In response to questioning at the oral hearing, the European Communities confirmed that, although the sixth recital to the Preamble of the Regulation provides that the Drug Arrangements "should be closely monitored", the list of beneficiaries will be unaffected by the monitoring described in Articles 25.1 and 25.2 of the Regulation.

[376]European Communities' appellant's submission, para. 133.

[377]Regulation, Art. 26.1(d).

[378]Panel Report, para. 7.216.

185. We note, moreover, that the Drug Arrangements will be in effect until 31 December 2004.[379] Until that time, other developing countries that are "similarly affected by the drug problem" can be included as beneficiaries under the Drug Arrangements only through an amendment to the Regulation. The European Communities confirmed this understanding in response to questioning at the oral hearing.

186. Against this background, we fail to see how the Drug Arrangements can be distinguished from other schemes that the European Communities describes as "confined *ab initio* and permanently to a limited number of developing countries".[380] As we understand it, the European Communities' position is that such schemes would be discriminatory, whereas the Drug Arrangements are not because "all developing countries are potentially beneficiaries" thereof.[381] In seeking a waiver from its obligations under Article I:1 of the GATT 1994 to implement the Drug Arrangements, the European Communities explicitly acknowledged, however, that "[b]ecause the special arrangements *are only available* to imports originating in [the 12 beneficiaries of the Drug Arrangements], a waiver ... appears necessary".[382] This statement appears to undermine the European Communities' argument that "all developing countries are potentially beneficiaries of the Drug Arrangements" and, therefore, that the Drug Arrangements are "non-discriminatory".[383]

187. We recall our conclusion that the term "non-discriminatory" in footnote 3 of the Enabling Clause requires that identical tariff treatment be available to all similarly-situated GSP beneficiaries. We find that the measure at issue fails to meet this requirement for the following reasons. First, as the European Communities itself acknowledges, according benefits under the Drug Arrangements to countries other than the 12 identified beneficiaries would require an amendment to the Regulation. Such a "closed list" of beneficiaries cannot ensure that the preferences under the Drug Arrangements are available to all GSP beneficiaries suffering from illicit drug production and trafficking.

188. Secondly, the Regulation contains no criteria or standards to provide a basis for distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries. Nor did the European Communities point to any such criteria or standards anywhere else, despite the Panel's request to do so.[384] As such, the European Communities cannot justify the Regulation under paragraph 2(a), because it does not provide a basis for establishing whether or not a developing country qualifies for preferences under the Drug Arrangements. Thus, although the European Communities claims that the Drug Arrangements are available to all developing countries that are "similarly affected by the drug problem"[385], because the Regulation does not define the criteria or standards that a developing country must meet to qualify for preferences under the Drug Arrangements, there is no basis to determine whether those criteria or standards are discriminatory or not.

[379]Regulation, Arts. 1.1 and 41.2. We understand that the Regulation has been extended to 31 December 2005. (Council Regulation (EC) No. 2211/2003 of 15 December 2003 amending Regulation (EC) No. 2501/2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 and extending it to 31 December 2005, *Official Journal of the European Union*, L Series, No. 332 (19 December 2003), p. 1)

[380]European Communities' appellant's submission, para. 185.

[381]*Ibid.*, para. 186.

[382]Council for Trade in Goods, Request for a WTO Waiver, *New EC Special Tariff Arrangements to Combat Drug Production and Trafficking*, G/C/W/328, 24 October 2001, p. 2. (emphasis added)

[383]European Communities' appellant's submission, para. 186.

[384]See *supra*, footnote 372.

[385]European Communities' appellant's submission, para. 186.

189. For all these reasons, we find that the European Communities has failed to prove that the Drug Arrangements meet the requirement in footnote 3 that they be "non-discriminatory". Accordingly, we *uphold*, for different reasons, the Panel's conclusion, in paragraph 8.1(d) of the Panel Report, that the European Communities "failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause".

VI. Findings and Conclusions

190. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994;

(b) upholds the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause "does not exclude the applicability" of Article I:1 of the GATT 1994;

(c) modifies the Panel's finding, in paragraph 7.53 of the Panel Report, that the European Communities "bears the burden of invoking the Enabling Clause and justifying its Drug Arrangements" under that Clause, by finding that it was incumbent upon India to *raise* the Enabling Clause in making its claim of inconsistency with Article I:1 of the GATT 1994, but that the European Communities bore the burden of *proving* that the Drug Arrangements satisfy the conditions of the Enabling Clause, in order to justify those Arrangements under that Clause; and finds, further, that India sufficiently raised paragraph 2(a) of the Enabling Clause in making its claim of inconsistency with Article I:1 before the Panel;

(d) need not rule on the Panel's conclusion, in paragraphs 7.60 and 8.1(b) of the Panel Report, that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994;

(e) reverses the Panel's finding, in paragraphs 7.161 and 7.176 of the Panel Report, that "the term 'non-discriminatory' in footnote 3 [to paragraph 2(a) of the Enabling Clause] requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations";

(f) reverses the Panel's finding, in paragraph 7.174 of the Panel Report, that "the term 'developing countries' in paragraph 2(a) [of the Enabling Clause] should be interpreted to mean *all* developing countries, with the exception that where developed countries are implementing a priori limitations, 'developing countries' may mean *less than all* developing countries"; and

(g) upholds, for different reasons, the Panel's conclusion, in paragraph 8.1(d) of the Panel Report, that the European Communities "failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause".

191. The Appellate Body therefore recommends that the Dispute Settlement Body request the European Communities to bring Council Regulation (EC) No. 2501/2001, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with Article I:1 of the GATT 1994 and not justified under paragraph 2(a) of the Enabling Clause, into conformity with its obligations under the GATT 1994.

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS246/7
8 January 2004
(04-0070)

Original: English

EUROPEAN COMMUNITIES – CONDITIONS FOR THE GRANTING OF TARIFF PREFERENCES TO DEVELOPING COUNTRIES

Notification of an Appeal by the European Communities
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes ("DSU")

The following notification, dated 8 January 2004, from the Permanent Delegation of the European Commission, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the European Communities hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the panel established in response to the request from India in the dispute *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (WT/DS246R).

The European Communities seeks review of the Panel's legal conclusion that the Special Arrangements to Combat Drug Production and Trafficking provided in Council Regulation (EC) No. 2501/2001 (the "Drug Arrangements") are inconsistent with Article I:1 of the *General Agreement on Tariff and Trade 1994* (the "GATT"). This conclusion is based on the following erroneous legal findings:

- that the Enabling Clause is an "exception" to Article I:1 of the GATT;
- that the Enabling Clause does not exclude the applicability of Article I:1 of the GATT;
- that the EC had the burden of proving that the Drug Arrangements were consistent with the Enabling Clause.

The above legal conclusion, and the related legal findings and interpretations are set out in paragraphs 7.31 to 7.60 and 8.1 (b) and (c) of the Panel report.

India did not make any claims under the Enabling Clause and, therefore, the Appellate Body should refrain from examining the consistency of the Drug Arrangements with the Enabling Clause. However, if the Appellate Body were to uphold the Panel's conclusion that the Drug Arrangements are inconsistent with Article I:1 of the GATT, or if the Appellate Body were to decide that India made a valid claim under the Enabling Clause, the European Communities appeals subsidiarily the Panel's legal conclusion that the European Communities "failed to demonstrate that the Drug Arrangements

are justified under paragraph 2(a) of the Enabling Clause". That conclusion is based on the following erroneous legal findings:

- that "the term "non-discriminatory" in footnote 3 to Paragraph 2(a) requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations"; and

- that the term "developing countries" in Paragraph 2(a) means all developing countries.

This legal conclusion and the related legal findings and interpretations are set out in paragraphs 7.61-7.177 and 8.1(d) of the Panel report.

Finally the EC seeks review of the Panel's legal conclusion that the European Communities has nullified or impaired benefits accrued to India under GATT 1994, which is set out in paragraph 8.1(f) of the Panel report

ANNEX 2

DIFFERENTIAL AND MORE FAVOURABLE TREATMENT
RECIPROCITY AND FULLER PARTICIPATION
OF DEVELOPING COUNTRIES

Decision of 28 November 1979
(L/4903)

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries[1], without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following:[2]

(*a*) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,[3]

(*b*) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

(*c*) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another

(*d*) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

3. Any differential and more favourable treatment provided under this clause:

(*a*) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

(*b*) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

[1] The words "developing countries" as used in this text are to be understood to refer also to developing territories.

[2] It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

[3] As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

(*c*) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:[4]

(*a*) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(*b*) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latters' development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

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[4] Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

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Report of the Appellate Body,
Japan – Taxes on Alcoholic Beverages,
WT/DS8/AB/R, adopted 4 October 1996

WORLD TRADE ORGANIZATION

WT/DS8/AB/R
WT/DS10/AB/R
WT/DS11/AB/R
4 October 1996

(96-3951)

Appellate Body

Japan - Taxes on Alcoholic Beverages

AB-1996-2

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Japan - Taxes on Alcoholic Beverages	AB-1996-2
Japan, Appellant/Appellee United States, Appellant/Appellee	Present:
Canada, Appellee European Communities, Appellee	Lacarte-Murˊ, Presiding Member Bacchus, Member El-Naggar, Member

A. Introduction

Japan and the United States appeal from certain issues of law and legal interpretations in the Panel Report, *Japan - Taxes on Alcoholic Beverages*[1] (the "Panel Report"). That Panel (the "Panel") was established to consider complaints by the European Communities, Canada and the United States against Japan relating to the Japanese Liquor Tax Law (Shuzeiho), Law No. 6 of 1953 as amended (the "Liquor Tax Law").[2]

The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 11 July 1996. It contains the following conclusions:

> (i)Shochu and vodka are like products and Japan, by taxing the latter in excess of the former, is in violation of its obligation under Article III:2, first sentence, of the General Agreement on Tariffs and Trade 1994.
>
> (ii) Shochu, whisky, brandy, rum, gin, genever, and liqueurs are "directly competitive or substitutable products" and Japan, by not taxing them similarly, is in violation of its obligation under Article III:2, second sentence, of the General Agreement on Tariffs and Trade 1994.[3]

The Panel made the following recommendations:

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[1] WT/DS8/R, WT/DS10/R, WT/DS11/R.

[2] Norway originally reserved its right as a third party to the dispute but subsequently informed the Panel that it was withdrawing its request to participate as a third party.

[3] Panel Report, para. 7.1.

7.2 The Panel recommends that the Dispute Settlement Body request Japan to bring the Liquor Tax Law into conformity with its obligations under the General Agreement on Tariffs and Trade 1994.[4]

On 8 August 1996, Japan notified the Dispute Settlement Body[5] of the WTO of its decision to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*") and filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[6] On 19 August 1996, Japan filed an appellant's submission.[7] On 23 August 1996, the United States filed an appellant's submission pursuant to Rule 23(1) of the *Working Procedures*. The European Communities, Canada and the United States submitted appellees' submissions pursuant to Rule 22 of the *Working Procedures*, on 2 September 1996. That same day, Japan submitted an appellee's submission pursuant to Rule 23(3) of the *Working Procedures*.

The oral hearing contemplated by Rule 27 of the *Working Procedures* was held on 9 September 1996. The participants presented their arguments and answered questions from the Division of the Appellate Body hearing the appeal (the "Division"). The participants answered most of these questions orally at the hearing. They answered some in writing.[8] The Division gave each participant an opportunity to respond to the written post-hearing memoranda of the other participants.[9]

B. Arguments of Participants

1. Japan

Japan appeals from the Panel's findings and conclusions, as well as from certain of the legal interpretations developed by the Panel. Japan argues that the Panel erred in its interpretation of Article III:2, first and second sentences of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), which is an integral part of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*").[10] According to Japan, with respect to both the first and second sentences of Article III:2, the Panel erred in: (1) disregarding the need to determine whether the Liquor Tax Law has the aim of affording protection to domestic production; (2) ignoring whether there is "linkage" between the origin of products and the tax treatment they incur and, in this respect, not comparing the tax treatment of domestic products as a whole and foreign products as a whole; and (3) not giving proper weight to the tax/price ratio as a yardstick to compare the tax burdens.

With respect to the first sentence of Article III:2, Japan argues that the Panel erred by virtually ignoring Article III:1, particularly the phrase "so as to afford protection to domestic production", as part of the context of Article III:2. Japan maintains also that the title of Article III forms part of the context of Article III:2, and that the object and purpose of the GATT 1994 and the *WTO Agreement* as a whole

[4]Panel Report, para. 7.2.

[5]WT/DS8/9, WT/DS10/9, WT/DS11/6.

[6]WT/AB/WP/1.

[7]Pursuant to Rule 21(1) of the *Working Procedures*.

[8]Pursuant to Rule 28(1) of the *Working Procedures*.

[9]Pursuant to Rule 28(2) of the *Working Procedures*.

[10]Done at Marrakesh, Morocco, 15 April 1994 and entered into effect on 1 January 1995.

must also be taken into account in interpreting Article III:2. Japan argues that the interpretation of Article III:2, first sentence, in the light of these considerations, requires an examination of both the aim and the effect of the measure in question. Japan also alleges that the Panel erred in placing excessive emphasis on tariff classification in finding that shochu and vodka are "like products" within the meaning of Article III:2, first sentence, arguing that the relevant tariff bindings indicate that these products are not "like".

With respect to the second sentence of Article III:2, Japan asserts that the Panel erred by failing to interpret correctly the principle of Article III:1, in particular, the language "so as to afford protection to domestic production", erroneously placing excessive emphasis on the phrase "not similarly taxed" in the Interpretative Note *Ad* Article III:2. Japan claims further that the Panel erred by failing to examine the issue of *de minimis* differences in the light of the principle of "so as to afford protection to domestic production"; the Panel examined the issue of *de minimis* differences only by comparing taxes in terms of taxation per kilolitre of product and taxation per degree of alcohol.

With respect to the points of appeal raised by the United States in its appellant's submission, Japan responds that the arguments advanced by the United States are not based on a correct understanding of the Japanese liquor tax system. Japan argues that the Liquor Tax Law has the legitimate policy purpose of ensuring neutrality and equity, particularly horizontal equity, and that it has neither the aim nor the effect of protecting domestic production. Japan asserts that it is not correct to conclude that all distilled liquors are "like products" under Article III:2, first sentence, or to conclude that the Liquor Tax Law is inconsistent with Article III:2 because it imposes a tax on imported distilled liquors in excess of the tax on like domestic products.

2. United States

The United States supports the Panel's overall conclusions, but appeals nonetheless. The United States alleges several errors in the findings of the Panel and the legal interpretations developed by the Panel in reaching its conclusions in the Panel Report. The United States maintains that the Panel erred in its interpretation of Article III:2, first and second sentences, principally as a result of an erroneous understanding of the relationship between Article III:2 and Article III:1. The United States contends that the Panel disregarded Article III:1, which the United States sees as an integral part of the context that must be considered in interpreting Article III:2, and Article III generally. The United States asserts that Article III:1 sets out the object and purpose of Article III and must therefore be considered in any interpretation of the text of Article III:2. The United States argues that the Panel did not look beyond the text of Article III:2 in interpreting Article III:2 and thereby fell into error.

More specifically, with respect to the first sentence of Article III:2, the United States submits that the Panel erred in finding that "likeness" can be determined purely on the basis of physical characteristics, consumer uses and tariff classification without considering also the context and purpose of Article III, as set out in Article III:1, and without considering, in particular, whether regulatory distinctions are made, in the language of Article III:1, "so as to afford protection to domestic production". The United States concludes that the Panel erred in its interpretation of Article III:2, first sentence in: failing to interpret Article III:2, first sentence, in the light of Article III:1, consistently with the analysis in *United States - Measures Affecting Alcoholic and Malt Beverages* ("*Malt Beverages*");[11] not finding that all distilled spirits constitute "like products" under Article III:2, first sentence; and drawing a connection between national treatment obligations and tariff bindings.

[11]Panel Report adopted on 19 June 1992, BISD 39S/206.

With respect to the second sentence of Article III:2 and the *Ad* Article thereto, the United States argues that the Panel erred with respect to the *Ad* Article to the second sentence in its interpretation of the term "directly competitive or substitutable products" by not considering whether a tax distinction is applied "in a manner contrary to the principles set forth in paragraph 1 of [Article III]", that is, "so as to afford protection to domestic production". The United States also claims that the Panel erred by using cross-price elasticity as the "decisive criterion" for whether products are "directly competitive or substitutable".

The United States contends as well that the Panel erred in not addressing the full scope of the products subject to the dispute and that there is inconsistency between the Panel's conclusions in paragraph 7.1(ii) of the Panel Report and in paragraphs 6.32-6.33 of the Panel Report. The United States further submits that the Panel erred in incorrectly assessing the relationship between Article III:2 and Article III:4 by stating that the product coverage of the two provisions is not identical.

Finally, the United States claims that the Panel erred in incorrectly characterizing adopted panel reports as "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").[12] According to the United States, adopted panel reports serve only to clarify, for the purposes of the particular dispute, the application of the rights and obligations of the parties to that dispute to the precise set of circumstances at that time. The *decision* to adopt a panel report constitutes a "decision" within the meaning of paragraph 1(b)(iv) of the language incorporating the GATT 1994 into the *WTO Agreement*, however, the adopted panel report as such does not constitute a "decision" in this sense.

With respect to the claims of error raised in Japan's appellant's submission, the United States responds that: the national treatment provisions in Article III of GATT 1994 can apply to origin-neutral measures; Japan's taxation under the Liquor Tax Law does have the aim and effect of affording protection to domestic production; and the tax/price ratios cited by Japan are not the appropriate basis for evaluating the consistency of taxation under the Liquor Tax Law with Article III:2.

3. European Communities

The European Communities support the Panel's conclusions, and largely agree with the legal interpretations of Article III:2, first and second sentences, employed by the Panel. With respect to Article III:2, first sentence, the European Communities submit that the Panel's reasons for adopting the interpretation in the Panel Report, and thus for rejecting a specific test of "aims and effects", are sound and "in accordance with customary rules of interpretation of public international law", as contemplated by Article 3.2 of the *DSU*.[13] The European Communities contend that the Panel made it clear that the essential criterion for a "like product" determination is similarity of physical characteristics and that tariff nomenclatures may be relevant for a determination of "likeness" because they constitute an objective classification of products according to their physical characteristics. The European Communities maintain that the Panel's decision to identify only vodka and shochu as "like products" for purposes of Article III:2 cannot be regarded as arbitrary or insufficiently motivated. Although not entirely satisfied with the Panel's conclusions on the range of products found to be "like" under Article III:2, first sentence, the European Communities claim that those conclusions primarily involve the assessment of facts and, therefore, are not

[12] 23 May 1969, 1155 *U.N.T.S.* 331; 8 *International Legal Materials* 679.

[13] Article 3.2 of the *DSU* states in pertinent part:

> ...The Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

reviewable by the Appellate Body, which is limited to the consideration of issues of law under Article 17.6 of the *DSU*.[14]

With respect to Article III:2, second sentence, the European Communities argue that the Panel did not rule that cross-price elasticity is the decisive criterion for a determination that two products are directly competitive or substitutable, but rather ruled that such elasticity is only one of the criteria to be considered. The European Communities view the Panel's findings on the issue of the tax/price ratios as factual; however, if the Appellate Body nevertheless considers it necessary to rule on this issue, the European Communities argue that tax/price ratios are not the most appropriate yardstick for comparing tax burdens imposed by a system of specific taxes. The European Communities submit further that the Panel was correct in ignoring the linkage between differences in taxation and the origin of products. The European Communities assert that Japan's argument that the Liquor Tax Law is not applied "so as to afford protection to domestic production" of shochu because shochu is also produced in other countries and, therefore, is not an "inherently domestic product" rests on two wrong propositions: first, that "domestic production" of shochu is not "protected" if the same tax treatment is accorded to foreign shochu; and, second, that the mere fact that shochu is produced in third countries is sufficient to conclude that foreign shochu may benefit from the lower tax as much as domestic shochu and, consequently, that protection is not afforded only to domestic production. The European Communities further contend that the United States is incorrect to attribute to the Panel the statement that the product coverage of Article III:2 and Article III:4 is not equivalent.

With respect to the status of adopted panel reports, the European Communities conclude that the Panel's characterization of them as "subsequent practice in a specific case" is intrinsically contradictory, since the essence of subsequent practice is that it consists of a large number of legally relevant events and pronouncements. The European Communities' view is that one adopted panel report "would merely constitute part of a wall of the house that constitutes subsequent practice". The European Communities, therefore, ask the Appellate Body to modify the Panel's legal terminology on this issue. The European Communities further consider that the *decision* to adopt a panel report constitutes a "decision" within the meaning of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*, however an adopted panel report is not itself a "decision" in this sense.

[14] Article 17.6 of the *DSU* states:

> An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

4. Canada

Canada confined its submissions and arguments on appeal to Article III:2, second sentence. Canada supports the Panel's legal interpretations of Article III:2, second sentence, as well as the conclusion of the Panel that the Liquor Tax Law is inconsistent with Article III:2, second sentence. Canada claims that the Panel properly found that the phrase "so as to afford protection" in Article III:1 does not require a consideration of both the aim and effect of a measure to determine whether that measure affords protection to domestic production. Canada argues further that: first, the Panel Report did not create a *per se* test in Article III:2, second sentence, and did not equate the reference to "so as to afford protection to domestic production" with a determination that directly competitive or substitutable products are "not similarly taxed"; second, the Panel had sufficient evidence before it to conclude that differential tax treatment under the Liquor Tax Law favours domestic shochu production; third, the Panel Report considered in detail the issue of the tax/price ratios and assigned them their proper weight in assessing the tax burden on the products in dispute; and, finally, the Panel interpreted the phrase "directly competitive or substitutable" properly and did not identify "cross-price elasticity" as *the* decisive criterion for assessment of whether products are directly competitive or substitutable.

With regard to the status of adopted panel reports, Canada argues that decisions to adopt panel reports under GATT 1947 constitute "decisions" under Article 1(b)(iv) of the GATT 1994.

C. Issues Raised in the Appeal

The appellants, Japan and the United States, have raised the following issues in this appeal:

1. Japan

(a) whether the Panel erred in failing to interpret Article III:2, first and second sentences, in the light of Article III:1;

(b) whether the Panel erred in rejecting an "aim-and-effect" test in establishing whether the Liquor Tax Law is applied "so as to afford protection to domestic production";

(c) whether the Panel erred in failing to examine the effect of affording protection to domestic production from the perspective of the linkage between the origin of products and their treatment under the Liquor Tax Law;

(d) whether the Panel failed to give proper weight to tax/price ratios as a yardstick for comparing tax burdens under Article III:2, first and second sentences;

(e) whether the Panel erred in interpreting and applying Article III:2, second sentence, by equating the language "not similarly taxed" in *Ad* Article III:2, second sentence, with "so as to afford protection" in Article III:1; and

(f) whether the Panel erred in placing excessive emphasis on tariff classification as a criterion for determining "like products".

2. United States

(a) whether the Panel erred in failing to interpret Article III:2, first and second sentences, in the light of Article III:1;

(b) whether the Panel erred in failing to find that all distilled spirits are "like products";

(c) whether the Panel erred in drawing a connection between national treatment obligations and tariff bindings;

(d) whether the Panel erred in interpreting and applying Article III:2, second sentence, by equating the language "not similarly taxed" in *Ad* Article III:2, second sentence, with "so as to afford protection" in Article III:1;

(e) whether the Panel erred in its conclusions on "directly competitive or substitutable products" by examining cross-price elasticity as "the decisive criterion";

(f) whether the Panel erred in failing to maintain consistency between the conclusions in paragraph 7.1(ii) of the Panel Report on "directly competitive or substitutable products" and the conclusions in paragraphs 6.32-6.33 of the Panel Report, and whether the Panel erred in failing to address the full scope of products subject of this dispute;

(g) whether the Panel erred in finding that the coverage of Article III:2 and Article III:4 are not equivalent; and

(h) whether the Panel erred in its characterization of panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body as "subsequent practice in a specific case by virtue of the decision to adopt them".

D. Treaty Interpretation

Article 3.2 of the *DSU* directs the Appellate Body to clarify the provisions of GATT 1994 and the other "covered agreements" of the *WTO Agreement* "in accordance with customary rules of interpretation of public international law". Following this mandate, in *United States - Standards for Reformulated and Conventional Gasoline*,[15] we stressed the need to achieve such clarification by reference to the fundamental rule of treaty interpretation set out in Article 31(1) of the *Vienna Convention*. We stressed there that this general rule of interpretation "has attained the status of a rule of customary or general international law".[16] There can be no doubt that Article 32 of the *Vienna Convention*, dealing with the role of supplementary means of interpretation, has also attained the same status.[17]

Article 31, as a whole, and Article 32 are each highly pertinent to the present appeal. They provide as follows:

ARTICLE 31
General rule of interpretation

[15] Adopted 20 May 1996, WT/DS2/9.

[16] *Ibid.*, at p. 17.

[17] See *e.g.*: Jiménez de Aréchaga, "International Law in the Past Third of a Century" (1978-I) 159 Recueil des Cours p.1 at 42; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment*, (1994), I.C.J. Reports, p. 6 at 20; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment*, (1995), I.C.J.Reports, p. 6 at 18; *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night* (1932), P.C.I.J., Series A/B, No. 50, p. 365 at 380; cf. the *Serbian and Brazilian Loans Cases* (1929), P.C.I.J., Series A, Nos. 20-21, p. 5 at 30; *Constitution of the Maritime Safety Committee of the IMCO* (1960), I.C.J. Reports, p. 150 at 161; *Air Transport Services Agreement Arbitration* (*United States of America v. France*) (1963), International Law Reports, 38, p. 182 at 235-43.

> 1.A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2.The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a)any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b)any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3.There shall be taken into account together with the context:
>
> (a)any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b)any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c)any relevant rules of international law applicable in the relations between the parties.
>
> 4.A special meaning shall be given to a term if it is established that the parties so intended.
>
> ARTICLE 32
> *Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a)leaves the meaning ambiguous or obscure; or
> (b)leads to a result which is manifestly absurd or unreasonable.

Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretive process: "interpretation must be based above all upon the text of the treaty".[18] The provisions of the treaty are to be given their ordinary meaning in their context.[19] The object and purpose of

[18]*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, (1994) I.C.J. Reports, p. 6 at 20; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, *Judgment*, (1995) I.C.J.Reports, p. 6 at 18.

[19]See, *e.g., Competence of the General Assembly for the Admission of a State to the United Nations* (*Second Admissions Case*) (1950), I.C.J. Reports, p. 4 at 8, in which the International Court of Justice stated: "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning and in the context in which they occur".

the treaty are also to be taken into account in determining the meaning of its provisions.[20] A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (*ut res magis valeat quam pereat*).[21] In *United States - Standards for Reformulated and Conventional Gasoline*, we noted that "[o]ne of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[22]

E. Status of Adopted Panel Reports

In this case, the Panel concluded that,

> ...panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them. Article 1(b)(iv) of GATT 1994 provides institutional recognition that adopted panel reports constitute subsequent practice. Such reports are an integral part of GATT 1994, since they constitute "other decisions of the CONTRACTING PARTIES to GATT 1947".[23]

Article 31(3)(b) of the *Vienna Convention* states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" is to be "taken into account together with the context" in interpreting the terms of the treaty. Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.[24] An isolated act is generally not sufficient to establish subsequent practice;[25] it is a sequence of acts establishing the agreement of the parties that is relevant.[26]

[20]That is, the treaty's "object and purpose" is to be referred to in determining the meaning of the "terms of the treaty" and not as an independent basis for interpretation: Harris, Cases and Materials on International Law (4th ed., 1991) p. 770; Jiménez de Aréchaga, "International Law in the Past Third of a Century" (1978-I) 159 Recueil des Cours p. 1 at 44; Sinclair, *The Vienna Convention and the Law of Treaties* (2nd ed, 1984), p. 130. See *e.g.* Oppenheims' International Law (9th ed., Jennings and Watts, eds., 1992) Vol. I, p.1273; *Competence of the ILO to Regulate the Personal Work of the Employer* (1926), P.C.I.J., Series B, No. 13, p. 6 at 18; *International Status of South West Africa* (1962), I.C.J. Reports, p. 128 at 336; *Re Competence of Conciliation Commission* (1955), 22 International Law Reports, p. 867 at 871.

[21]See also (1966) Yearbook of the International Law Commission, Vol. II, p. 219: "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."

[22]*United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, adopted 20 May 1996, p. 23.

[23]Panel Report, para. 6.10.

[24]Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., 1984), p. 137; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités" (1976-III) 151 Recueil des Cours p. 1 at 48.

[25]Sinclair, *supra.*, footnote 24, p. 137.

[26](1966) Yearbook of the International Law Commission, Vol. II, p. 222; Sinclair, *supra.*, footnote 24, p. 138.

Although GATT 1947[27] panel reports were adopted by decisions of the CONTRACTING PARTIES[28], a decision to adopt a panel report did not under GATT 1947 constitute agreement by the CONTRACTING PARTIES on the legal reasoning in that panel report. The generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report.[29]

We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the *WTO Agreement*. Article IX:2 of the *WTO Agreement* provides: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". Article IX:2 provides further that such decisions "shall be taken by a three-fourths majority of the Members". The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.

Historically, the decisions to adopt panel reports under Article XXIII of the GATT 1947 were different from joint action by the CONTRACTING PARTIES under Article XXV of the GATT 1947. Today, their nature continues to differ from interpretations of the GATT 1994 and the other Multilateral Trade Agreements under the *WTO Agreement* by the WTO Ministerial Conference or the General Council. This is clear from a reading of Article 3.9 of the *DSU*, which states:

> The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 -- and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[30] In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*.

[27]By GATT 1947, we refer throughout to the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified.

[28]By CONTRACTING PARTIES, we refer throughout to the CONTRACTING PARTIES of GATT 1947.

[29]*European Economic Community - Restrictions on Imports of Dessert Apples*, BISD 36S/93, para. 12.1.

[30]It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.

For these reasons, we do not agree with the Panel's conclusion in paragraph 6.10 of the Panel Report that "panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case" as the phrase "subsequent practice" is used in Article 31 of the *Vienna Convention*. Further, we do not agree with the Panel's conclusion in the same paragraph of the Panel Report that adopted panel reports in themselves constitute "other decisions of the CONTRACTING PARTIES to GATT 1947" for the purposes of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.

However, we agree with the Panel's conclusion in that same paragraph of the Panel Report that *unadopted* panel reports "have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members".[31] Likewise, we agree that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant".[32]

F. Interpretation of Article III

The *WTO Agreement* is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.

One of those commitments is Article III of the GATT 1994, which is entitled "National Treatment on Internal Taxation and Regulation". For the purpose of this appeal, the relevant parts of Article III read as follows:

Article III

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

[31]Panel Report, para. 6.10.

[32]*Ibid.*

Ad Article III

Paragraph 2

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'".[33] Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.[34] "[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given".[35] Moreover, it is irrelevant that "the trade effects" of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.[36] Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the *WTO Agreement*.

The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the *WTO Agreement*. Although the protection of negotiated tariff concessions is certainly one purpose of Article III,[37] the statement in Paragraph 6.13 of the Panel Report that "one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II" should not be overemphasized. The sheltering scope of Article III is not limited to products that are the subject of tariff concessions under Article II. The Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation clearly extends also to products not bound under Article II.[38] This is confirmed by the negotiating history of Article III.[39]

[33] *United States - Section 337 of the Tariff Act of 1930,* BISD 36S/345, para. 5.10.

[34] *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.5(b).

[35] *Italian Discrimination Against Imported Agricultural Machinery*, BISD 7S/60, para. 11.

[36] *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9.

[37] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.5(b); *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, BISD 39S/27, para. 5.30.

[38] *Brazilian Internal Taxes*, BISD II/181, para. 4; *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9; *EEC - Regulation on Imports of Parts and Components*, BISD 37S/132, para. 5.4.

[39] At the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, held in 1947, delegates in the Tariff Agreement Committee addressed the issue of whether to include the national treatment clause from the draft Charter for an International Trade Organization ("ITO Charter") in the GATT 1947. One delegate noted:

G. Article III:1

The terms of Article III must be given their ordinary meaning -- in their context and in the light of the overall object and purpose of the *WTO Agreement*. Thus, the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms. The proper interpretation of the Article is, first of all, a textual interpretation. Consequently, the Panel is correct in seeing a distinction between Article III:1, which "contains general principles", and Article III:2, which "provides for specific obligations regarding internal taxes and internal charges".[40] Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation. Consistent with this principle of effectiveness, and with the textual differences in the two sentences, we believe that Article III:1 informs the first sentence and the second sentence of Article III:2 in different ways.

H. Article III:2

1. First Sentence

This Article in the Charter had two purposes, as I understand it. The first purpose was to protect the items in the Schedule or any other Schedule concluded as a result of any subsequent negotiations and agreements - that is, to ensure that a country offering a tariff concession could not nullify that tariff concession by imposing an internal tax on the commodity, which had an equivalent effect. If that were the sole purpose and content of this Article, there could really be no objection to its inclusion in the General Agreement. But the Article in the Charter had an additional purpose. That purpose was to prevent the use of internal taxes as a system of protection. It was part of a series of Articles designed to concentrate national protective measures into the forms permitted under the Charter, i.e. subsidies and tariffs, and since we have taken over this Article from the Charter, we are, by including the Article, doing two things: so far as the countries become parties to the Agreement, we are, first of all, ensuring that the tariff concessions they grant one another cannot be nullified by the imposition of corresponding internal taxes; but we are also ensuring that those countries which become parties to the Agreement undertake not to use internal taxes as a system of protection.

This view is reinforced by the following statement of another delegate:

... [Article III] is necessary to protect not only scheduled items in the Agreement, but, indeed, all items for all our exports and the exports of any country. If that is not done, then every item which does not appear in the Schedule would have to be reconsidered and possibly tariff negotiations re-opened if Article III were changed to permit any action on these non-scheduled items.

See EPCT/TAC/PV.10, pp. 3 and 33.

[40] Panel Report, para. 6.12.

Article III:1 informs Article III:2, first sentence, by establishing that if imported products are taxed in excess of like domestic products, then that tax measure is inconsistent with Article III. Article III:2, first sentence does not refer specifically to Article III:1. There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures "so as to afford protection". This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence. However, this does not mean that the general principle of Article III:1 does not apply to this sentence. To the contrary, we believe the first sentence of Article III:2 is, in effect, an application of this general principle. The ordinary meaning of the words of Article III:2, first sentence leads inevitably to this conclusion. Read in their context and in the light of the overall object and purpose of the *WTO Agreement*, the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are "like" and, second, whether the taxes applied to the imported products are "in excess of" those applied to the like domestic products. If the imported and domestic products are "like products", and if the taxes applied to the imported products are "in excess of" those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence.[41]

[41]In accordance with Article 3.8 of the *DSU*, such a violation is *prima facie* presumed to nullify or impair benefits under Article XXIII of the GATT 1994. Article 3.8 reads as follows:

> In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

This approach to an examination of Article III:2, first sentence, is consistent with past practice under the GATT 1947.[42] Moreover, it is consistent with the object and purpose of Article III:2, which the panel in the predecessor to this case dealing with an earlier version of the Liquor Tax Law, *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* ("*1987 Japan - Alcohol*"), rightly stated as "promoting non-discriminatory competition among imported and like domestic products [which] could not be achieved if Article III:2 were construed in a manner allowing discriminatory and protective internal taxation of imported products in excess of like domestic products".[43]

(a) *"Like Products"*

Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not "like products" as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of "like products" in Article III:2, first sentence, should be construed narrowly.[44]

[42]See *Brazilian Internal Taxes*, BISD II/181, para. 14; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.5(d); *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.1; *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*, DS44/R, adopted on 4 October 1994.

[43]*Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para 5.5(c).

[44]We note the argument on appeal that the Panel suggested in paragraph 6.20 of the Panel Report that the product coverage of Article III:2 is not identical to the coverage of Article III:4. That is not what the Panel said. The Panel said the following:

> *If* the coverage of Article III:2 is identical to that of Article III:4, a different interpretation of the term "like product" would be called for in the two paragraphs. Otherwise, if the term "like product" were to be interpreted in an identical way in both instances, the scope of the two paragraphs would be different. (emphasis added)

This was merely a hypothetical statement.

How narrowly is a matter that should be determined separately for each tax measure in each case. We agree with the practice under the GATT 1947 of determining whether imported and domestic products are "like" on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments*, adopted by the CONTRACTING PARTIES in 1970, set out the basic approach for interpreting "like or similar products" generally in the various provisions of the GATT 1947:

> ... the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.[45]

This approach was followed in almost all adopted panel reports after *Border Tax Adjustments*.[46] This approach should be helpful in identifying on a case-by-case basis the range of "like products" that fall within the narrow limits of Article III:2, first sentence in the GATT 1994. Yet this approach will be most helpful if decision makers keep ever in mind how narrow the range of "like products" in Article III:2, first sentence is meant to be as opposed to the range of "like" products contemplated in some other provisions of the GATT 1994 and other Multilateral Trade Agreements of the *WTO Agreement*. In applying the criteria cited in *Border Tax Adjustments* to the facts of any particular case, and in considering other criteria that may also be relevant in certain cases, panels can only apply their best judgement in determining whether in fact products are "like". This will always involve an unavoidable element of individual, discretionary judgement. We do not agree with the Panel's observation in paragraph 6.22 of the Panel Report that distinguishing between "like products" and "directly competitive or substitutable products" under Article III:2 is "an arbitrary decision". Rather, we think it is a discretionary decision that must be made in considering the various characteristics of products in individual cases.

No one approach to exercising judgement will be appropriate for all cases. The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is "like". The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of "likeness" is meant to be narrowly squeezed.

The Panel determined in this case that shochu and vodka are "like products" for the purposes of Article III:2, first sentence. We note that the determination of whether vodka is a "like product" to shochu under Article III:2, first sentence, or a "directly competitive or substitutable product" to shochu under Article III:2, second sentence, does not materially affect the outcome of this case.

A uniform tariff classification of products can be relevant in determining what are "like products". If sufficiently detailed, tariff classification can be a helpful sign of product similarity. Tariff classification has

[45]Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, para. 18.

[46]*The Australian Subsidy on Ammonium Sulphate*, BISD II/188; *EEC - Measures on Animal Feed Proteins*, BISD 25S/49; *Spain - Tariff Treatment of Unroasted Coffee*, BISD 28S/102; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83; *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136. Also see *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, adopted on 20 May 1996.

been used as a criterion for determining "like products" in several previous adopted panel reports.[47] For example, in the *1987 Japan - Alcohol* Panel Report, the panel examined certain wines and alcoholic

[47]*EEC - Measures on Animal Feed Proteins*, BISD 25S/49; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83; *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, adopted on 20 May 1996.

beverages on a "product-by-product basis" by applying the criteria listed in the Working Party Report on *Border Tax Adjustments*,

> ... as well as others recognized in previous GATT practice (see BISD 25S/49, 63), such as the Customs Cooperation Council Nomenclature (CCCN) for the classification of goods in customs tariffs which has been accepted by Japan.[48]

Uniform classification in tariff nomenclatures based on the Harmonized System (the "HS") was recognized in GATT 1947 practice as providing a useful basis for confirming "likeness" in products. However, there is a major difference between tariff classification nomenclature and tariff bindings or concessions made by Members of the WTO under Article II of the GATT 1994. There are risks in using tariff bindings that are too broad as a measure of product "likeness". Many of the least-developed country Members of the WTO submitted schedules of concessions and commitments as annexes to the GATT 1994 for the first time as required by Article XI of the *WTO Agreement*. Many of these least-developed countries, as well as other developing countries, have bindings in their schedules which include broad ranges of products that cut across several different HS tariff headings. For example, many of these countries have very broad uniform bindings on non-agricultural products.[49] This does not necessarily indicate similarity of the products covered by a binding. Rather, it represents the results of trade concessions negotiated among Members of the WTO.

It is true that there are numerous tariff bindings which are in fact extremely precise with regard to product description and which, therefore, can provide significant guidance as to the identification of "like products". Clearly enough, these determinations need to be made on a case-by-case basis. However, tariff bindings that include a wide range of products are not a reliable criterion for determining or confirming product "likeness" under Article III:2.[50]

With these modifications to the legal reasoning in the Panel Report, we affirm the legal conclusions and the findings of the Panel with respect to "like products" in all other respects.

(b) *"In Excess Of"*

The only remaining issue under Article III:2, first sentence, is whether the taxes on imported products are "in excess of" those on like domestic products. If so, then the Member that has imposed the tax is not in compliance with Article III. Even the smallest amount of "excess" is too much. "The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard."[51] We agree with the Panel's legal reasoning and with its conclusions on this aspect of the interpretation and application of Article III:2, first sentence.

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[48] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.6.

[49] For example, Jamaica has bound tariffs on the majority of non-agricultural products at 50%. Trinidad and Tobago have bound tariffs on the majority of products falling within HS Chapters 25-97 at 50%. Peru has bound all non-agricultural products at 30%, and Costa Rica, El Salvador, Guatemala, Morocco, Paraguay, Uruguay and Venezuela have broad uniform bindings on non-agricultural products, with a few listed exceptions.

[50] We believe, therefore, that statements relating to any relationship between tariff bindings and "likeness" must be made cautiously. For example, the Panel stated in paragraph 6.21 of the Panel Report that "... with respect to two products subject to the same tariff binding and therefore to the same maximum border tax, there is no justification, outside of those mentioned in GATT rules, to tax them in a differentiated way through internal taxation". This is incorrect.

[51] *United States - Measures Affecting Alcoholic and Malt Beverages*, BISD 39S/206, para 5.6; see also *Brazilian Internal Taxes*, BISD II/181, para. 16; *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.8.

2. Second Sentence

Article III:1 informs Article III:2, second sentence, through specific reference. Article III:2, second sentence, contains a general prohibition against "internal taxes or other internal charges" applied to "imported or domestic products in a manner contrary to the principles set forth in paragraph 1". As mentioned before, Article III:1 states that internal taxes and other internal charges "should not be applied to imported or domestic products so as to afford protection to domestic production". Again, *Ad* Article III:2 states as follows:

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Article III:2, second sentence, and the accompanying *Ad* Article have equivalent legal status in that both are treaty language which was negotiated and agreed at the same time.[52] The *Ad* Article does not replace or modify the language contained in Article III:2, second sentence, but, in fact, clarifies its meaning. Accordingly, the language of the second sentence and the *Ad* Article must be read together in order to give them their proper meaning.

Unlike that of Article III:2, first sentence, the language of Article III:2, second sentence, specifically invokes Article III:1. The significance of this distinction lies in the fact that whereas Article III:1 acts implicitly in addressing the two issues that must be considered in applying the first sentence, it acts explicitly as an entirely separate issue that must be addressed along with two other issues that are raised in applying the second sentence. Giving full meaning to the text and to its context, three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These three issues are whether:

(1)the imported products and the domestic products *are "directly competitive or substitutable products" which are in competition with each other*;
(2)the directly competitive or substitutable imported and domestic products *are "not similarly taxed*"; and
(3)the dissimilar taxation of the directly competitive or substitutable imported domestic products *is "applied ... so as to afford protection to domestic production*".

Again, these are three separate issues. Each must be established separately by the complainant for a panel to find that a tax measure imposed by a Member of the WTO is inconsistent with Article III:2, second sentence.

(a) *"Directly Competitive or Substitutable Products"*

If imported and domestic products are not "like products" for the narrow purposes of Article III:2, first sentence, then they are not subject to the strictures of that sentence and there is no inconsistency with the requirements of that sentence. However, depending on their nature, and depending on the competitive conditions in the relevant market, those same products may well be among the broader category of "directly competitive or substitutable products" that fall within the domain of Article III:2, second sentence. How much broader that category of "directly competitive or substitutable products" may be in any given case is a matter for the panel to determine based on all the relevant facts in that case. As with "like products" under the first sentence, the determination of the appropriate range of "directly competitive or substitutable products" under the second sentence must be made on a case-by-case basis.

In this case, the Panel emphasized the need to look not only at such matters as physical characteristics, common end-uses, and tariff classifications, but also at the "market place".[53] This seems appropriate. The GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets. It does not seem inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as "directly competitive or substitutable".

[52]The negotiating history of Article III:2 confirms that the second sentence and the *Ad* Article were added during the Havana Conference, along with other provisions and interpretative notes concerning Article 18 of the draft ITO Charter. When introducing these amendments to delegates, the relevant Sub-Committee reported that: "The new form of the Article makes clearer than did the Geneva text the intention that internal taxes on goods should not be used as a means of protection. The details have been relegated to interpretative notes so that it would be easier for Members to ascertain the precise scope of their obligations under the Article." E/CONF.2/C.3/59, page 8. Article 18 of the draft ITO Charter subsequently became Article III of the GATT pursuant to the Protocol Modifying Part II and Article XXVI, which entered into force on 14 December 1948.

[53]Panel Report, para. 6.22.

Nor does it seem inappropriate to examine elasticity of substitution as one means of examining those relevant markets. The Panel did not say that cross-price elasticity of demand is "*the* decisive criterion"[54] for determining whether products are "directly competitive or substitutable". The Panel stated the following:

> In the Panel's view, the decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, *inter alia*, as shown by elasticity of substitution.[55]

We agree. And, we find the Panel's legal analysis of whether the products are "directly competitive or substitutable products" in paragraphs 6.28-6.32 of the Panel Report to be correct.

We note that the Panel's conclusions on "like products" and on "directly competitive or substitutable products" contained in paragraphs 7.1(i) and (ii), respectively, of the Panel Report fail to address the full range of alcoholic beverages included in the Panel's Terms of Reference.[56] More specifically, the Panel's conclusions in paragraph 7.1(ii) on "directly competitive or substitutable products" relate only to "shochu, whisky, brandy, rum, gin, genever, and liqueurs," which is narrower than the range of products referred to the Dispute Settlement Body by one of the complainants, the United States, which included in its request for the establishment of a panel "all other distilled spirits and liqueurs falling within HS heading 2208". We consider this failure to incorporate into its conclusions all the products referred to in the Terms of Reference, consistent with the matters referred to the DSB in WT/DS8/5, WT/DS10/5 and WT/DS11/2, to be an error of law by the Panel.

(b) *"Not Similarly Taxed"*

To give due meaning to the distinctions in the wording of Article III:2, first sentence, and Article III:2, second sentence, the phrase "not similarly taxed" in the *Ad* Article to the second sentence must not be construed so as to mean the same thing as the phrase "in excess of" in the first sentence. On its face, the phrase "in excess of" in the first sentence means *any* amount of tax on imported products "in excess of" the tax on domestic "like products". The phrase "not similarly taxed" in the *Ad* Article to the second sentence must therefore mean something else. It requires a different standard, just as "directly competitive or substitutable products" requires a different standard as compared to "like products" for these same interpretive purposes.

Reinforcing this conclusion is the need to give due meaning to the distinction between "like products" in the first sentence and "directly competitive or substitutable products" in the *Ad* Article to the second sentence. If "in excess of" in the first sentence and "not similarly taxed" in the *Ad* Article to the second sentence were construed to mean one and the same thing, then "like products" in the first sentence and "directly competitive or substitutable products" in the *Ad* Article to the second sentence would also

[54]United States Appellant's Submission, dated 23 August 1996, para. 98, p.63. (emphasis added)

[55]Panel Report, para 6.22.

[56]The Panel's Terms of Reference cite the matters referred to the Dispute Settlement Body by the European Communities, Canada and the United States in WT/DS8/5, WT/DS10/5 and WT/DS11/2, respectively. In WT/DS8/5, the European Communities referred the Dispute Settlement Body to Japan's taxation of shochu, "spirits", "whisky/brandy" and "liqueurs". In WT/DS10/5, Canada referred the Dispute Settlement Body to Japan's taxation of shochu and products falling "within HS 2208.30 (' whiskies'), HS 2208.40 (' rum and tafia'), HS 2208.90 (' other' including fruit brandies, vodka, ouzo, korn, cream liqueurs and ' classic' liqueurs.)" In WT/DS11/2, the United States referred the Dispute Settlement Body to Japan's taxation of shochu and "all other distilled spirits and liqueurs falling within HS heading 2208".

mean one and the same thing. This would eviscerate the distinctive meaning that must be respected in the words of the text.

To interpret "in excess of" and "not similarly taxed" identically would deny any distinction between the first and second sentences of Article III:2. Thus, in any given case, there may be some amount of taxation on imported products that may well be "in excess of" the tax on domestic "like products" but may not be so much as to compel a conclusion that "directly competitive or substitutable" imported and domestic products are "not similarly taxed" for the purposes of the *Ad* Article to Article III:2, second sentence. In other words, there may be an amount of excess taxation that may well be more of a burden on imported products than on domestic "directly competitive or substitutable products" but may nevertheless not be enough to justify a conclusion that such products are "not similarly taxed" for the purposes of Article III:2, second sentence. We agree with the Panel that this amount of differential taxation must be more than *de minimis* to be deemed "not similarly taxed" in any given case.[57] And, like the Panel, we believe that whether any particular differential amount of taxation is *de minimis* or is not *de minimis* must, here too, be determined on a case-by-case basis. Thus, to be "not similarly taxed", the tax burden on imported products must be heavier than on "directly competitive or substitutable" domestic products, and that burden must be more than *de minimis* in any given case.

In this case, the Panel applied the correct legal reasoning in determining whether "directly competitive or substitutable" imported and domestic products were "not similarly taxed". However, the Panel erred in blurring the distinction between that issue and the entirely separate issue of whether the tax measure in question was applied "so as to afford protection". Again, these are separate issues that must be addressed individually. If "directly competitive or substitutable products" are *not* "not similarly taxed", then there is neither need nor justification under Article III:2, second sentence, for inquiring further as to whether the tax has been applied "so as to afford protection". But if such products are "not similarly taxed", a further inquiry must necessarily be made.

(c) *"So As To Afford Protection"*

This third inquiry under Article III:2, second sentence, must determine whether "directly competitive or substitutable products" are "not similarly taxed" in a way that affords protection. This is not an issue of intent. It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, "*applied* to imported or domestic products so as to afford protection to domestic production".[58] This is an issue of how the measure in question is *applied*.

In the *1987 Japan- Alcohol* case, the panel subsumed its discussion of the issue of "not similarly taxed" within its examination of the separate issue of "so as to afford protection":

> ... whereas under the first sentence of Article III:2 the tax on the imported product and the tax on the like domestic product had to be equal in effect, Article III:1 and 2, second sentence, prohibited only the application of internal taxes to imported or domestic products in a manner "so as to afford protection to domestic production". The Panel was of the view that also small tax differences could influence the competitive relationship between directly competing distilled liquors, but the existence of protective taxation could be established only in the light of the particular circumstances of each case and there could be a *de minimis* level below which a tax difference ceased to have the protective effect prohibited by Article III:2, second sentence.[59]

[57]Panel Report, para. 6.33.

[58]Emphasis added.

To detect whether the taxation was protective, the panel in the 1987 case examined a number of factors that it concluded were "sufficient evidence of fiscal distortions of the competitive relationship between imported distilled liquors and domestic shochu affording protection to the domestic production of shochu". These factors included the considerably lower specific tax rates on shochu than on imported directly competitive or substitutable products; the imposition of high *ad valorem* taxes on imported alcoholic beverages and the absence of *ad valorem* taxes on shochu; the fact that shochu was almost exclusively produced in Japan and that the lower taxation of shochu did "afford protection to domestic production"; and the mutual substitutability of these distilled liquors.[60] The panel in the 1987 case concluded that "the application of considerably lower internal taxes by Japan on shochu than on other directly competitive or substitutable distilled liquors had trade-distorting effects affording protection to domestic production of shochu contrary to Article III:1 and 2, second sentence".[61]

As in that case, we believe that an examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. We believe it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.

Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. The very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application, as the Panel rightly concluded in this case. Most often, there will be other factors to be considered as well. In conducting this inquiry, panels should give full consideration to all the relevant facts and all the relevant circumstances in any given case.

In this respect, we note and agree with the panel's acknowledgment in the *1987 Japan - Alcohol* Report:

[59]*Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages,* BISD 34S/83, para. 5.11.

[60]*Ibid.*

[61]*Ibid.*

> ... that Article III:2 does not prescribe the use of any specific method or system of taxation. ... there could be objective reasons proper to the tax in question which could justify or necessitate differences in the system of taxation for imported and for domestic products. The Panel found that it could also be compatible with Article III:2 to allow two different methods of calculation of price for tax purposes. Since Article III:2 prohibited only discriminatory or protective tax burdens on imported products, what mattered was, in the view of the Panel, whether the application of the different taxation methods actually had a discriminatory or protective effect against imported products.[62]

We have reviewed the Panel's reasoning in this case as well as its conclusions on the issue of "so as to afford protection" in paragraphs 6.33 - 6.35 of the Panel Report. We find cause for thorough examination. The Panel began in paragraph 6.33 by describing its approach as follows:

> ... if directly competitive or substitutable products are not "similarly taxed", and if it were found that the tax favours domestic products, then protection would be afforded to such products, and Article III:2, second sentence, is violated.

This statement of the reasoning required under Article III:2, second sentence is correct.

However, the Panel went on to note:

[62] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages,* BISD 34S/83, para. 5.9(c).

> ... for it to conclude that dissimilar taxation afforded protection, it would be sufficient for it to find that the dissimilarity in taxation is not *de minimis*. ... the Panel took the view that "similarly taxed" is the appropriate benchmark in order to determine whether a violation of Article III:2, second sentence, has occurred as opposed to "in excess of" that constitutes the appropriate benchmark to determine whether a violation of Article III:2, first sentence, has occurred.[63]

In paragraph 6.34, the Panel added:

> (i) The benchmark in Article III:2, second sentence, is whether internal taxes operate "so as to afford protection to domestic production", a term which has been further interpreted in the Interpretative Note ad Article III:2, paragraph 2, to mean dissimilar taxation of domestic and foreign directly competitive or substitutable products.

And, furthermore, in its conclusions, in paragraph 7.1(ii), the Panel concluded that:

> (ii) Shochu, whisky, brandy, rum, gin, genever, and liqueurs are "directly competitive or substitutable products" and Japan, by not taxing them similarly, is in violation of its obligation under Article III:2, second sentence, of the General Agreement on Tariffs and Trade 1994.

Thus, having stated the correct legal approach to apply with respect to Article III:2, second sentence, the Panel then equated dissimilar taxation above a *de minimis* level with the separate and distinct requirement of demonstrating that the tax measure "affords protection to domestic production". As previously stated, a finding that "directly competitive or substitutable products" are "not similarly taxed" is necessary to find a violation of Article III:2, second sentence. Yet this is not enough. The dissimilar taxation must be more than *de minimis*. It may be so much more that it will be clear from that very differential that the dissimilar taxation was applied "so as to afford protection". In some cases, that may be enough to show a violation. In this case, the Panel concluded that it was enough. Yet in other cases, there may be other factors that will be just as relevant or more relevant to demonstrating that the dissimilar taxation at issue was applied "so as to afford protection". In any case, the three issues that must be addressed in determining whether there is such a violation must be addressed clearly and separately in each case and on a case-by-case basis. And, in every case, a careful, objective analysis, must be done of each and all relevant facts and all the relevant circumstances in order to determine "the existence of protective taxation".[64] Although the Panel blurred its legal reasoning in this respect, nevertheless we conclude that it reasoned correctly that in this case, the Liquor Tax Law is not in compliance with Article III:2. As the Panel did, we note that:

> ...the combination of customs duties and internal taxation in Japan has the following impact: on the one hand, it makes it difficult for foreign-produced shochu to penetrate the Japanese market and, on the other, it does not guarantee equality of competitive conditions between shochu and the rest of 'white' and 'brown' spirits. Thus, through a combination of high import duties and differentiated internal taxes, Japan manages to "isolate"

[63] Panel Report, para 6.33.

[64] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.11.

> domestically produced shochu from foreign competition, be it foreign produced shochu or any other of the mentioned white and brown spirits.[65]

Our interpretation of Article III is faithful to the "customary rules of interpretation of public international law".[66] WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the "security and predictability" sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.[67]

I. Conclusions and Recommendations

For the reasons set out in the preceding sections of this report, the Appellate Body has reached the following conclusions:

(a) the Panel erred in law in its conclusion that "panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them";

(b) the Panel erred in law in failing to take into account Article III:1 in interpreting Article III:2, first and second sentences;

(c) the Panel erred in law in limiting its conclusions in paragraph 7.1(ii) on "directly competitive or substitutable products" to "shochu, whisky, brandy, rum, gin, genever, and liqueurs", which is not consistent with the Panel's Terms of Reference; and

(d) the Panel erred in law in failing to examine "so as to afford protection" in Article III:1 as a separate inquiry from "not similarly taxed" in the *Ad* Article to Article III:2, second sentence.

With the modifications to the Panel's legal findings and conclusions set out in this report, the Appellate Body affirms the Panel's conclusions that shochu and vodka are like products and that Japan, by taxing imported products in excess of like domestic products, is in violation of its obligations under Article III:2, first sentence, of the General Agreement on Tariffs and Trade 1994. Moreover, the Appellate Body concludes that shochu and other distilled spirits and liqueurs listed in HS 2208, except for vodka, are "directly competitive or substitutable products", and that Japan, in the application of the Liquor Tax Law, does not similarly tax imported and directly competitive or substitutable domestic products and affords protection to domestic production in violation of Article III:2, second sentence, of the General Agreement on Tariffs and Trade 1994.

The Appellate Body *recommends* that the Dispute Settlement Body request Japan to bring the Liquor Tax Law into conformity with its obligations under the General Agreement on Tariffs and Trade 1994.

[65] Panel Report, para. 6.35.

[66] Article 3.2 of the *DSU*.

[67] *Ibid.*

Signed in the original at Geneva this 25th day of September 1996 by:

_____
Julio Lacarte-Muró
Presiding Member

_____ _____
James Bacchus Said El-Naggar
Member Member

Report of the Appellate Body,
European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,
WT/DS135/AB/R, adopted 12 March 2001

WORLD TRADE ORGANIZATION

WT/DS135/AB/R
12 March 2001

(01-1157)

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EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS

AB-2000-11

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products

Canada, *Appellant/Appellee*
European Communities, *Appellant/Appellee*

Brazil, *Third Participant*
United States, *Third Participant*

AB-2000-11

Present:

Feliciano, Presiding Member
Bacchus, Member
Ehlermann, Member

I. Introduction

1. Canada appeals certain issues of law and legal interpretations developed in the Panel Report in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (the "Panel Report").[1] The Panel was established to consider claims made by Canada regarding French Decree No. 96-1133 concerning asbestos and products containing asbestos (*décret no. 96-1133 relatif à l'interdiction de l'amiante, pris en application du code de travail et du code de la consommation*) ("the Decree"), which entered into force on 1 January 1997.[2]

2. Articles 1 and 2 of the Decree set forth prohibitions on asbestos and on products containing asbestos fibres, followed by certain limited and temporary exceptions from those prohibitions:

> **Article 1**
>
> I. For the purpose of protecting workers, and pursuant to Article L. 231-7 of the Labour Code, the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres shall be prohibited, regardless of whether these substances have been incorporated into materials, products or devices.
>
> II. For the purpose of protecting consumers, and pursuant to Article L. 221.3 of the Consumer Code, the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and transfer under any title whatsoever of all varieties of asbestos fibres or any product containing asbestos fibres shall be prohibited.
>
> III. The bans instituted under Articles I and II shall not prevent fulfilment of the obligations arising from legislation on the elimination of wastes.

[1] WT/DS135/R, 18 September 2000.

[2] *Journal officiel*, 26 December 1996.

Article 2

I. On an exceptional and temporary basis, the bans instituted under Article 1 shall not apply to certain existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available which:

- On the one hand, in the present state of scientific knowledge, poses a lesser occupational health risk than chrysotile fibre to workers handling those materials, products or devices;
- on the other, provides all technical guarantees of safety corresponding to the ultimate purpose of the use thereof.

II. The scope of application of paragraph I of this Article shall cover only the materials, products or devices falling within the categories shown in an exhaustive list decreed by the Ministers for Labour, Consumption, the Environment, Industry, Agriculture and Transport. To ascertain the justification for maintaining these exceptions, the list shall be re-examined on an annual basis, after which the Senior Council for the Prevention of Occupational Hazards and the National Commission for Occupational Health and Safety in Agriculture shall be consulted.

The remaining operative provisions of the Decree contain additional rules governing the grant of an exception (Articles 3 and 4), the imposition of penalties for violation of the prohibition in Article 1 (Article 5), and the temporary exclusion of certain "vehicles" and "agricultural and forestry machinery" from aspects of the prohibition (Article 7). Further factual aspects of this dispute are set forth in paragraphs 2.1 – 2.7 of the Panel Report, and the Decree is reproduced in its entirety as Annex I in the Addendum to the Panel Report.[3]

3. Canada claimed that the Decree is inconsistent with a number of obligations of the European Communities under Article 2 of the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*"), Articles III and XI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and that, under Article XXIII:1(b) of the GATT 1994, the Decree nullified or impaired advantages accruing to Canada directly or indirectly under the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), or impeded the attainment of an objective of that Agreement.[4]

4. In the Panel Report, circulated to WTO Members on 18 September 2000, the Panel concluded that:

(a) … the "prohibition" part of the Decree does not fall within the scope of the TBT Agreement. The part of the Decree relating to "exceptions" does fall within the scope of the TBT Agreement. However, as Canada has not made any claim concerning the compatibility with the TBT Agreement of the part of the Decree relating to exceptions, the Panel refrains from reaching any conclusion with regard to the latter.

(b) … chrysotile asbestos fibres as such and fibres that can be substituted for them as such are like products within the meaning of Article III:4 of the GATT 1994. Similarly, the Panel concludes that the asbestos-cement products and the fibro-cement products for which sufficient information has been submitted to the Panel are like products within the meaning of Article III:4 of the GATT 1994.

(c) With respect to the products found to be like, the Panel concludes that the Decree violates Article III:4 of the GATT 1994.

(d) However, … the Decree, insofar as it introduces a treatment of these products that is discriminatory under Article III:4, is justified as such and in its implementation by the provisions of paragraph (b) and the introductory clause of Article XX of the GATT 1994.

(e) Finally, … Canada has not established that it suffered non-violation nullification or impairment of a benefit within the meaning of Article XXIII:1(b) of the GATT 1994.[5]

5. Having found that the Decree is subject to, and inconsistent with, the obligations set forth in Article III:4 of the GATT 1994, the Panel did not deem it necessary to examine the claims of Canada under Article XI of the GATT 1994.[6]

6. On 23 October 2000, Canada notified the Dispute Settlement Body (the "DSB") of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[7] On 16 November 2000, Canada filed an appellant's submission.[8] On 21 November 2000, the European Communities filed an other appellant's submission.[9] On 1 December 2000, Canada and the European Communities each filed an appellee's submission.[10] On the same day, Brazil and the United States each filed a third participant's submission.[11]

7. On 21 November 2000, the Appellate Body received a letter from Zimbabwe indicating its interest in attending the oral hearing in this appeal. Zimbabwe participated in the proceedings before the Panel as a third party which had notified its interest to the DSB under Article 10.2 of the DSU, but

[3]WT/DS135/R/Add.1, pp. 3-6.

[4]Panel Report, paras. 1.1 and 1.2. In its request for the establishment of a panel (WT/DS/135/3, 9 October 1998), Canada also claimed that the Decree is inconsistent with the obligations of the European Communities under Articles 2 and 5 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"). However, Canada did not pursue this claim in its written or oral arguments before the Panel.

[5]Panel Report, para. 9.1.

[6]*Ibid.*, para. 8.159.

[7]WT/DS135/8, 23 October 2000.

[8]Pursuant to Rule 21(1) of the *Working Procedures*.

[9]Pursuant to Rule 23(1) of the *Working Procedures*.

[10]Pursuant to Rules 22 and 23(3) of the *Working Procedures*.

[11]Pursuant to Rule 24 of the *Working Procedures*.

it did not file a third participant's submission in the appeal. No participant or third participant objected to Zimbabwe's request. On 15 December 2000, the Members of the Division hearing this appeal informed Zimbabwe, the participants and third participants, that Zimbabwe would be allowed to attend the oral hearing as a passive observer.

8. On 20 December 2000, the Appellate Body informed the DSB that, due to the exceptional workload of the Appellate Body, and in light of the agreement of the participants, Canada and the European Communities, the Appellate Body Report in this appeal would be circulated to WTO Members no later than Monday, 12 March 2001.[12]

9. The oral hearing in the appeal was held on 17 and 18 January 2001.[13] The participants and the third participants presented oral arguments and responded to questions put to them by Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by Canada – Appellant*

1. *TBT Agreement*

10. Canada requests that the Appellate Body reverse the Panel's findings and conclusions on the definition of the term "technical regulation", hold that the Decree as a whole falls within the scope of the *TBT Agreement*, and find that the Decree is inconsistent with paragraphs 1, 2, 4 and 8 of Article 2 of the *TBT Agreement*.

11. Canada asserts that the Panel erred in law in failing to examine Canada's allegations under the *TBT Agreement*. The Panel wrongly split the Decree into two and considered the prohibitions and exceptions in the Decree to be separate measures for the purposes of determining whether the Decree is a technical regulation within the meaning of the *TBT Agreement*. Canada believes that the Panel's analysis is arbitrary, contrary to the internal coherence of the Decree, and allows the applicability of the *TBT Agreement* to be determined by the way in which a Member drafts its legislation.

12. Canada argues that the Panel also erred in its interpretation of the definition of "technical regulation" in Annex 1 to the *TBT Agreement*, in particular, in articulating two criteria that must be satisfied before a measure can be a "technical regulation": (i) the measure must concern identifiable products; and (ii) the measure must identify the technical characteristics that products must have to be marketed in the territory of the Member taking the measure. This interpretation adds requirements to the definition of "technical regulation" that have no basis in the text of the *TBT Agreement*, and are inconsistent with the object and purpose of that Agreement, namely to restrain non-tariff barriers to trade that may be disguised as technical regulations. In addition, with respect to the first criterion, requiring a measure to relate to identifiable products to constitute a technical regulation could lead to arbitrary results in practice. As for the second criterion, Canada alleges that it is too narrow and would exclude from characterization as "technical regulations", and thereby insulate from the disciplines of the *TBT Agreement*, measures regulating activities other than the marketing of products, such as measures relating to transportation of products, disposal of hazardous waste, and use of special equipment to repair certain products.

13. Canada challenges the Panel's conclusion that the *TBT Agreement* does not apply to a general prohibition like the one in the Decree. The Panel relied on a false distinction between general

[12]WT/DS135/10, 20 December 2000.

[13]Pursuant to Rule 27 of the *Working Procedures*.

prohibitions, which it considered fall exclusively under the GATT 1994, and technical regulations, which are subject to the disciplines of the *TBT Agreement*. In fact, a technical regulation can have the effect on trade of a general prohibition.

14. Canada maintains that, had the Panel viewed the Decree as a unified measure, and correctly interpreted the term "technical regulation", the Panel would have concluded that the Decree is a technical regulation within the meaning of the *TBT Agreement*. However, even if the general prohibition contained in the Decree were not characterized as a technical regulation, the Panel nevertheless erred in failing to examine Canada's claims under the *TBT Agreement*, given that the Panel also found that the *TBT Agreement* applies to the part of the Decree concerning exceptions, and that Canada's claims related to the Decree as a whole. Canada therefore requests the Appellate Body to reverse the Panel's conclusions on the applicability of the *TBT Agreement* to the Decree, and to assess the compatibility of the Decree with that Agreement. Canada argues that, as in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*"), "the facts on the record of the panel proceedings" allow the Appellate Body "to undertake the completion of the analysis required to resolve this dispute."[14]

15. Canada argues that the Decree is inconsistent with Article 2.1 of the *TBT Agreement*. Since the principle of national treatment in Article 2.1 is a specific, particular expression of Article III:4 of the GATT 1994, the interpretation of the words "like products" in Article 2.1 must be identical to the interpretation of the same words in Article III:4. The meaning of "like products" in Article III:4 is relevant context and, in the view of Canada, both Article III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement* have the same object and purpose, namely to avoid protectionism and to provide equality of competitive conditions for imported products in relation to domestic products. Thus, Canada maintains, the findings of "likeness", and of less favourable treatment, made by the Panel pursuant to Article III:4 of the GATT 1994 must be extended to Article 2.1 of the *TBT Agreement*.

16. In Canada's view, the Decree is inconsistent with Article 2.2 of the *TBT Agreement*. Canada insists, first, that there is no rational connection between the Decree and France's objective of protecting human health since: (i) it is friable materials containing amphiboles which pose a risk to human health; (ii) the manipulation of chrysotile-cement products and other high-density products containing chrysotile asbestos fibres does not pose a danger to human health; and (iii) the Decree exposes the French public to substitute fibres, the health risks of which are still poorly understood. Canada adds, second, that the Decree has effects that are more trade-restrictive than necessary to achieve its objective, in particular, because: (i) the manipulation of chrysotile-cement products and other high-density products containing chrysotile asbestos fibres does not create a risk to human health; and (ii) there is a less trade-restrictive alternative that protects human health, namely the "controlled use" of chrysotile-cement products and other high-density products containing chrysotile asbestos fibres. What must be demonstrated under Article 2.2 of the *TBT Agreement* is the same as what must be demonstrated under Article XX(b) of the GATT 1994. In this regard, according to Canada, the reports of the panel and the Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*") establish that a less trade-restrictive alternative can only be ruled out if it is shown to be impossible to implement.[15] However, France did not demonstrate, and the Panel did not find, that it is impossible to implement "controlled use". Furthermore, Canada contends, it would be less trade-restrictive to ban products containing chrysotile asbestos fibres on the basis of a product-by-product demonstration of the ineffectiveness and unfeasibility of "controlled use", rather than on the basis of the existence of substitute products.

17. Canada also argues that the Decree is inconsistent with Article 2.4 of the *TBT Agreement*, because there are relevant international standards on the "controlled use" of chrysotile, which

[14]Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, para. 124.

[15]Panel Report, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29.

constitute an effective and appropriate means to achieve France's objective of protecting human health. In any event, the French government acted inconsistently with Article 2.4 because it did not use international standards as a basis for the Decree. Lastly, Canada considers that the Decree is inconsistent with Article 2.8 of the *TBT Agreement* because it institutes a prohibition based on the descriptive characteristics of products, rather than on requirements in terms of performance.

2. Article XX(b) of the GATT 1994 and Article 11 of the DSU

18. Canada requests that the Appellate Body reverse the Panel's findings and conclusions under Article XX(b) of the GATT 1994 and find that the Decree is not justified under that provision. Canada also asks the Appellate Body to find that the Panel did not make an "objective assessment of the matter", as required under Article 11 of the DSU, because it failed to assess the scientific data in accordance with the principle of the balance of probabilities, and failed to assess the facts objectively.

19. Canada argues that the Panel erred in finding that there is a risk to human health associated with the manipulation of chrysotile-cement products. Canada identifies seven factors it claims the Panel mistakenly relied on in reaching this conclusion: (i) a statement by Dr. Henderson that "building workers now count among those most exposed to chrysotile fibres and hence to the risk of mesothelioma"[16]; (ii) an "anecdotal" statement by Dr. Henderson concerning "cases of mesothelioma in patients who had been only incidentally exposed, without any relation to their occupational activity"[17]; (iii) the opinion of experts that it has not been established that there is a threshold below which exposure does not constitute a risk for mesothelioma or lung cancer; (iv) the "Charleston study"[18]; (v) "statistical data" adduced by Dr. Henderson, which, according to the Panel, confirmed "the impact of chrysotile on mechanics exposed to that material in a car brake maintenance context" despite a contrary study on automobile brake maintenance relied on by Canada[19]; (vi) the use of the no-threshold linear relationship model as a basis for concluding that there is a "real risk" and "an undeniable public health risk" associated with exposure to chrysotile asbestos fibres at low or intermittent levels[20]; and (vii) data supplied by the European Communities concerning intermittent manipulation and a reference by Dr. Henderson to a Japanese study as a basis for concluding that the manipulation of chrysotile-cement using inappropriate tools could cause exposure levels above statutory limits.[21] Canada sets forth detailed explanations as to why none of these factors supports the Panel's conclusion.

20. Canada also contends that the Panel erred in its application of the test of "necessity" under Article XX(b) of the GATT 1994. Canada accepts the Panel's view that the extent of the risk to human health is relevant to the assessment of "necessity". However, Canada disputes that there is any risk involved in the manipulation of such products, highlights that the evidence relied on by the Panel certainly could not form the basis for a finding that the health risk was so high that it could justify strict measures, and argues that the Panel failed to comply with its obligation to quantify this type of risk. In Canada's view, these errors distorted the Panel's analysis of the test of necessity and led it to take a much too restrictive approach to its consideration of reasonably available alternatives to the Decree.

21. Canada asserts that, in its examination of whether less restrictive international trade alternatives can achieve the level of protection inherent in the Decree, the Panel erred in accepting that such level of protection is a halt to the spread of the risk associated with chrysotile asbestos fibres. This premise does not take account of the risk associated with the use of substitute fibres, of the absence in France of any regulatory framework for "controlled use" of such fibres, or of the false sense of security created among the French public due to the absence of such a framework. The Panel also erred in law in finding that there was no reasonably available alternative to the Decree that is consistent or less inconsistent with the GATT 1994. In this regard, Canada makes the same arguments that it made above with respect to Article 2.2 of the *TBT Agreement*, and emphasizes that the Panel was overly strict in its examination of the alternatives, considering that France could have adopted a measure establishing bans on specific products containing chrysotile asbestos fibres, based on demonstrations of the ineffectiveness and unfeasibility of the "controlled use" of each product.

[16]Panel Report, para. 8.191.

[17]*Ibid.*, para. 8.191 and footnote 147.

[18]Panel Report, paras. 8.192 and 8.193.

[19]*Ibid.*, para. 8.192 and footnote 154.

[20]*Ibid.*, paras. 8.202 and 8.203.

[21]*Ibid.*, para. 8.191.

22. Canada submits that the Panel failed to discharge its responsibility to make an objective assessment of the matter when it declined to take a position on the opinions expressed by the scientific community. For Canada, the principle of the balance of probabilities, or the preponderance of evidence, requires the trier of fact to take a position as to the respective weight of the evidence. Had the Panel properly applied this principle, it would not have been able to conclude that the Decree was justified under Article XX(b) of the GATT 1994, in view of the multiple studies submitted by Canada showing, for example, that there is no increased risk among garage and brake mechanics, or among construction workers, resulting from the manipulation of chrysotile asbestos. Canada adds that the Panel also failed to make an objective assessment of the matter before it because, in its determinations on the "controlled use" of chrysotile, it relied extensively on the opinions of the experts consulted, who in fact did not possess expertise in the area of "controlled use".

B. *Arguments of the European Communities – Appellee*

1. *TBT Agreement*

23. The European Communities urges the Appellate Body to reject Canada's appeal on the *TBT Agreement*. The Panel correctly concluded that the "prohibition part" of the Decree is not a technical regulation within the meaning of Annex 1.1 to the *TBT Agreement*. Canada's arguments with respect to the "exceptions part" of the Decree are legally irrelevant, since it would be impossible for the Appellate Body to complete the legal analysis due to the lack of sufficient and undisputed facts. The European Communities adds that the claims made by Canada under the *TBT Agreement* should, in any event, be denied.

24. The European Communities sees no error in the Panel's separation of the prohibitions part of the Decree from the exceptions part. The exceptions are ancillary to the prohibitions, and separating the two parts for the purpose of their legal characterization under the *TBT Agreement* in no way affects the internal coherence of the Decree. In this case, the issue before the Panel was whether the prohibitions laid down in the Decree constitute a technical regulation, *not* whether, in the abstract, a general ban may be a technical regulation. The European Communities also considers that the Panel correctly interpreted the term "technical regulation", and that the interpretation suggested by Canada would deprive other GATT 1994 provisions, such as Article XI, of effect.

25. The European Communities agrees with the Panel's treatment of the exceptions part of the Decree, and insists that, having made no specific violation claim regarding the narrowness of the exceptions throughout these proceedings, Canada cannot now argue that the exceptions violate the *TBT Agreement*. The European Communities argues that the Appellate Body is in any case prevented from addressing Canada's claims under the *TBT Agreement* because to do so would require the Appellate Body to make findings of a factual and technical nature which, in the absence of undisputed facts and findings in the record, it cannot do on appeal. The Appellate Body could not simply use the findings of the Panel under Articles III:4 and XX of the GATT 1994 as a basis for an analysis under the *TBT Agreement*. While the two sets of rules are related, they are not "part of a logical

continuum"[22], and are not sufficiently closely related as to allow the Appellate Body to extrapolate the findings of the Panel under Article III:4 and Article XX(b) of the GATT 1994 into the sphere of the *TBT Agreement*. Should the Appellate Body examine Canada's claims under the *TBT Agreement*, the European Communities argues that these claims should be dismissed and refers, in this regard, to its arguments with respect to Article XX(b) of the GATT 1994, and to the arguments it made before the Panel with regard to Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*.

2. Article XX(b) of the GATT 1994 and Article 11 of the DSU

26. The European Communities submits that the Panel's finding that the violation of Article III:4 is justified under Article XX(b) of the GATT 1994 is legally sound and correct. Canada's arguments on this issue amount to a request that the Appellate Body make new factual and scientific findings on appeal, contrary to the limits on the scope of appellate review set out in Article 17.6 of the DSU.

27. The European Communities believes that the Panel concluded that the ban on asbestos was "necessary" based on a series of objective and verifiable findings, made after a detailed and careful evaluation of the factual and scientific evidence presented. In assessing whether the ban was "necessary", the Panel was not obliged to undertake a "quantitative" assessment of the identified risk. Neither the ordinary meaning of the terms "necessary to protect" in Article XX(b) nor the concept of risk assessment mandate such an approach. An assessment of risk may be made either in quantitative or qualitative terms. The European Communities adds that the Panel correctly found that, after the European Communities had established a *prima facie* case for the existence of a health risk in connection with the use of chrysotile, Canada bore the burden of refuting that case by showing the absence of such a health risk.

28. On the issue of whether another measure was reasonably available, the European Communities submits that Canada cannot, on appeal, make arguments based on the health risks associated with the substitute products for asbestos, or on the safety of the "controlled use" of asbestos, as both arguments seek to have the Appellate Body revisit factual findings made by the Panel on the basis of the evidence submitted and the opinions advanced by the experts consulted.

29. With respect to the alleged inconsistency with Article 11 of the DSU, the European Communities considers that Canada's claim that the Panel committed a fundamental error in its appreciation of the facts seems to be based solely on the fact that the Panel based itself exclusively on the opinions of the experts consulted in this case. In this regard, the European Communities emphasizes that Canada did not object to the selection of the experts by the Panel, that Canada proposed one of those experts itself, and that the experts themselves answered a question on "controlled use" rather than professing a lack of expertise on the issue. As for Canada's argument that the Panel erred in law in failing to evaluate the scientific evidence in accordance with the principle of preponderance of the evidence, the Panel's approach does not seem inconsistent with such a principle and, in any case, the principle of preponderance of the evidence is inapposite in the context of risk assessment since such an approach would preclude Members from basing their regulatory decisions on diverging scientific opinions. The European Communities refuses to accept that the evidence relied on by the Panel – representing the unanimous views of the four experts consulted and of all international institutions that have evaluated asbestos – reflects, as Canada seems to suggest, a divergent, minority scientific point of view on asbestos.

[22]European Communities' appellee's submission, para. 43.

C. *Claims of Error by the European Communities – Appellant*

1. "Like Products" in Article III:4 of the GATT 1994

30. The European Communities requests the Appellate Body to reverse the Panel's findings that chrysotile asbestos fibres are "like" polyvinyl alcohol ("PVA"), cellulose and glass fibres, and that chrysotile-cement products are "like" fibro-cement products, as well as the Panel's consequent finding that, with respect to the products found to be "like", the Decree violates Article III:4 of the GATT 1994.

31. The Panel's interpretation of the term "like products" in Article III:4, is of serious concern to the European Communities; is contrary to the ordinary meaning of Article III:4, read in context and in light of its object and purpose; and is inconsistent with established case law. As the Appellate Body has previously found, the first paragraph of Article III defines the object and purpose of the whole of Article III, namely, to provide equality of competitive conditions for imported products in relation to domestic products. In the view of the European Communities, the Panel, however, erroneously analyzed the term "like products" in light of the objective of ensuring market access for products, and, in so doing, adopted an exclusively commercial approach to the comparison of "like" products and erroneously expanded the scope of application of Article III:4.

32. The European Communities submits that this erroneous focus on market access led the Panel to exclude from its "like" product analysis the very reason why the Decree singles out asbestos fibres, namely, the fact that asbestos fibres are carcinogenic. While Article III:4 protects expectations concerning the competitive relationship between imported and domestic products, the impact of a measure on such expectations is not relevant in determining "likeness", but only later in the Article III:4 analysis, for the purposes of establishing whether the measure discriminates between imported and domestic products. For the European Communities, the decisive criterion for determining the "likeness" of products must be whether the basis for the regulatory distinction between products denies to imported products the treatment accorded to domestic products that are the subject of the relevant measure.

33. The European Communities contends that, because the Panel ignored the basis for the regulatory treatment set forth in the Decree, it compared the wrong products in its analysis of "likeness". The Decree prohibits *all carcinogenic asbestos fibres*, and it denies competitive opportunities to all such fibres equally. Thus, the prohibited carcinogenic asbestos fibres are not "like" the three substitute fibres because the application of the French regulatory distinction between them does not alter or affect the competitive opportunities of those substitute fibres. The European Communities concludes that, instead of comparing the products claimed by Canada to be "like" products (PVA, cellulose and glass fibres) with the category of products prohibited by the French Decree at issue (all carcinogenic asbestos fibres), the Panel erroneously compared the allegedly "like" products with an arbitrary third category of products, namely "fibres with certain industrial applications".[23]

34. The European Communities challenges the Panel's conclusion that, in view of the relationship between Articles III and XX(b) of the GATT 1994, it is not appropriate to take the "risk" criterion into account either when examining the properties, nature and quality of the product, or when examining other criteria of "likeness".[24] The Panel found that the health, safety or other concerns that lead regulators to apply different treatment to products may *only* be taken into account in the analysis under Article XX, *not* in the analysis under Article III:4 of the GATT 1994. The Panel's approach misconstrues the relationship between Articles III:4 and XX of the GATT 1994, requires the

[23]European Communities' other appellant's submission, para. 29.

[24]Panel Report, para. 8.132.

"likeness" of two products to be determined solely on the basis of commercial factors and, in the view of the European Communities, entails a serious curtailment of national regulatory autonomy. If non-commercial considerations may only be considered at the Article XX stage of the analysis, then the list of policy purposes for which regulators may distinguish between products is unduly limited to the categories listed in Article XX. The application of a "risk" criterion in the analysis of "likeness" under Article III would not, as the Panel suggests, make the other criteria of "likeness" "totally redundant"[25], since all relevant criteria, including the "risk" criterion, must be considered in the assessment of "likeness".

35. The European Communities contends that the Panel committed a number of errors in its application of the four criteria used to assess "likeness", and placed excessive importance on the criterion of end-use. The Panel failed to follow the approach used in previous case law, and ignored the fact that Article III:4 of the GATT 1994, unlike Article III:2 and its accompanying Interpretive Note, does not contain the phrase "directly competitive or substitutable" products. The Panel's analysis of "end-use" is inadequately reasoned, in particular since the Panel failed to identify the small number of identical or similar end-uses for chrysotile asbestos, PVA, cellulose and glass fibres and ignored that, overall, the end-uses for asbestos and its substitutes are very different. The European Communities adds that the Panel relied on its conclusions on end-use in its analysis of the properties, nature and quality of the products, as well as their tariff classification, and, in effect disregarded these other criteria.

2. Article XXIII:1(b) of the GATT 1994

36. The European Communities appeals the Panel's findings on Article XXIII:1(b) of the GATT 1994 in paragraphs 8.262, 8.264, 8.273 and 8.274 of the Panel Report, but not the Panel's conclusion that Canada did not establish nullification or impairment of a benefit within the meaning of Article XXIII:1(b). The Panel's reasoning is inconsistent with the proper interpretation of the GATT 1994, past practice, and relevant case law. Historically, the non-violation remedy was conceived as a legal instrument designed to prevent the circumvention of tariff concessions. Only three non-violation complaints have succeeded. All previous non-violation complaints have related to measures imposed for commercial purposes, and all such complaints would today most likely be resolved as violation complaints under the expanded WTO competence, reflected in the covered agreements. The European Communities urges the Appellate Body to accept that the concept of non-violation nullification and impairment is an exceptional one, as WTO Members have recognized, and should be applied with utmost circumspection.

37. The European Communities challenges, in particular, the Panel's conclusion that "Article XXIII:1(b) applies to a measure whether it is consistent with the GATT because the GATT does not apply to it or is justified by Article XX."[26] In so finding, the Panel wrongly implied that Article XXIII:1(b) of the GATT 1994 protects the expectation that, once a tariff concession has been made for a product, the regulatory framework applicable to that product will not be adapted in response to new scientific knowledge concerning health risks. In the view of the European Communities, the Panel's interpretation wrongly expanded the coverage of Article XXIII:1(b) in a manner that has grave systemic implications.

38. The European Communities urges the Appellate Body to reject, as a matter of legal principle, the possibility of finding nullification or impairment under Article XXIII:1(b) with respect to health and safety regulations, or with respect to measures that fall under any of the other grounds listed in Article XX, or under provisions such as Articles XIX and XXI of the GATT 1994. Article XXIII:1(b) cannot apply in cases involving health measures, since the legitimacy of an exporting Member's expectation that the health measure will not be taken cannot be assessed without examining the health

[25]Panel Report, para. 8.131.

[26]*Ibid*., para. 8.264.

measure itself and the balance of interests underlying that law. The participants in the Uruguay Round knew that the value of the concessions negotiated in that Round could be adversely affected by measures taken to protect, *inter alia*, human, animal or plant life or health, or a national security interest. Therefore, the European Communities concludes, if a Member takes a measure that is consistent with the GATT 1994, it does not disturb the balance of rights and obligations under the GATT 1994, and no redress is available under Article XXIII:1(b).

D. *Arguments of Canada – Appellee*

1. "Like Products" in Article III:4 of the GATT 1994

39. Canada requests the Appellate Body to dismiss the European Communities' appeal relating to Article III:4 of the GATT 1994. Canada is of the view that the Panel correctly separated the analysis of "likeness" from the issue of whether the competitive opportunities afforded to imports on the domestic market have been upset. In its appeal, the European Communities confounds these two distinct questions and attaches undue significance to the Panel's statement regarding the importance of "market access" under Article III:4 of the GATT 1994.

40. Canada considers that the Panel properly applied the criteria set out in the case law for determining whether products are "like". The European Communities appears to confuse the concept of "likeness" under Article III:4 of the GATT 1994 with "likeness" under Article III:2. "Likeness", however, under Article III:4 is different from, and broader than, "likeness" under the first sentence of Article III:2, and the Panel's approach properly reflects this distinction. In assessing the "likeness" of the fibres, the Panel recognized that the criteria of "properties" and "end-use" are interdependent, and analyzed them accordingly. Canada does not accept that the Panel created a hierarchy among the traditional "likeness" criteria, but, even so, this would not be an error of law, since "likeness" must be approached on a case-by-case basis, and it is within a panel's discretion to establish a hierarchy among the criteria in any given case. Finally, Canada notes, the appeal of the European Communities focuses on the Panel's conclusion that chrysotile asbestos fibres are "like" PVA, cellulose and glass fibres, and the criticisms that the European Communities makes of this conclusion cannot be extended to the Panel's separate conclusion that chrysotile-cement products are "like" fibro-cement products.

41. Canada submits that the Panel correctly decided that the "dangerousness" of a product is not a factor to be considered in determining "likeness" and that to introduce a criterion of this nature into the analysis of "likeness" would nullify the effect of Article XX(b) of the GATT 1994. The object and purpose of Article III of the GATT 1994 is to provide equality of competitive conditions for imported and domestic products, and the four traditional criteria of "likeness" all relate to the state of *commercial* competition between such products. The "dangerousness" of products is unrelated to such commercial competition. Furthermore, to introduce such factors into the analysis of "likeness" under Article III:4 would lead to unpredictability as to the scope of that provision, and imply that determining the "likeness" of products requires complex scientific analysis for which panels have no special expertise. Canada adds that even if the "dangerousness" of a product were relevant to the determination of "likeness", it would not necessarily follow that chrysotile asbestos fibres are not "like" the substitute fibres. Since Article XX of the GATT 1994 was specially designed to balance the interest of promoting international trade with legitimate societal interests, it is a more appropriate framework than Article III for taking account of these types of considerations. Canada also stresses that, contrary to the argument of the European Communities, such an approach does not lead to a curtailment of national regulatory autonomy, because the list in Article XX covers a broad range of interests on the basis of which a Member may justify a measure.

42. Canada also submits that, in its appeal, the European Communities errs in asserting that the examination of "likeness" must be done on the basis of the regulatory distinction in question, and in claiming that the Panel should only have compared chrysotile asbestos fibres with carcinogenic fibres, rather than with other fibres that serve similar industrial uses. Such an approach is inconsistent with

the proper interpretation of Article III:4. In seeking to focus the analysis on the reason for any given regulatory distinction, the European Communities would allow national regulatory authorities to predetermine the scope of Article III:4 through the distinctions they choose to make. Such an approach is also inconsistent with the object and purpose of Article III:4, which aims to discipline measures that have trade-restrictive effects, even when those measures are not aimed at restricting trade. Finally, in Canada's view, the Panel correctly compared chrysotile asbestos fibres with the fibres with which they compete in certain industrial applications, since such a comparison is consistent with the aim of providing equality of competitive conditions, and since the Decree itself makes no reference to carcinogenic fibres.

2. Article XXIII:1(b) of the GATT 1994

43. Canada requests the Appellate Body to reject the European Communities' appeal with respect to Article XXIII:1(b) of the GATT 1994. Canada suggests, first, that the Appellate Body should apply the principle of judicial economy and refrain from ruling on these grounds of appeal. Canada argues that a ruling by the Appellate Body in respect of Article XXIII:1(b) of the GATT 1994 would not further the objective of dispute settlement, as set forth in Article 3.7 of the DSU, namely to secure a positive solution to a dispute. There is no dispute concerning Article XXIII:1(b) because neither party has appealed the Panel's conclusions on this issue. Canada also refers to Article 3.2 of the DSU and cautions the Appellate Body against "making law" by clarifying provisions of the *WTO Agreement* outside the context of resolving a particular dispute.[27]

44. Should the Appellate Body address the interpretation of Article XXIII:1(b) of the GATT 1994, Canada invites it to affirm the Panel's reasoning, in particular the Panel's recognition that there may be particularly exceptional cases in which a measure justified under Article XX(b) would nonetheless nullify or impair benefits within the meaning of Article XXIII:1(b). Article XX(b) and XXIII:1(b) may be applied simultaneously, since Article 26.1 of the DSU does not require the withdrawal of a measure that nullifies or impairs benefits within the meaning of Article XXIII:1(b). As regards the concept of legitimate expectations, Canada rejects as artificial, and without any textual basis, the distinction that the European Communities seeks to draw between pure trade measures and measures linked to the protection of health.

E. *Arguments of the Third Participants*

1. Brazil

(a) *TBT Agreement*

45. Brazil believes that the Panel erred in its findings regarding the scope of the *TBT Agreement*. Brazil argues that the Panel erred in dividing the Decree into two separate parts in determining whether the *TBT Agreement* applies to the Decree. This division was arbitrary and inconsistent with the logic and objectives of the Decree, which deals with the same products in both the prohibition and the exception parts. Furthermore, Brazil is particularly concerned by the findings of the Panel in paragraphs 8.38, 8.39, 8.43, 8.49, 8.57, 8.60, 8.61 and 8.71 of the Panel Report, and by the serious systemic implications of the finding that a general prohibition does not constitute a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*. Contrary to the Panel's interpretation, nothing in the *TBT Agreement* specifies that a product must be "identifiable", or that a measure must relate to one, or more than one product, in order to be a technical regulation. Such a narrow interpretation unduly excludes from the scope of the *TBT Agreement* a wide range of measures affecting products that could potentially represent barriers to trade. Brazil also contests the Panel's finding that a technical regulation must include specifications to be met in order for a product

[27]Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, 323, at 340.

to be authorized for *marketing*. Brazil adds that, in its view, both France and the European Communities conceded, when they notified the Decree under the *TBT Agreement*, that the measure is a technical regulation.

2. United States

(a) *TBT Agreement*

46. The United States argues that the Panel erred in its interpretation of the phrase "technical regulation" in Annex 1 to the *TBT Agreement*, and, in consequence, improperly excluded from the scope of the *TBT Agreement* technical regulations that apply generally to products. Specifically, the United States contends that the Panel erred in finding that the phrase "product characteristics" in the definition of "technical regulation" refers to characteristics of "one or more given products", rather than characteristics of products generally.

47. Should the Appellate Body find that the *TBT Agreement* applies to the Decree and decide to complete the analysis of Canada's claims under that Agreement, the United States submits that the Appellate Body should find that the Decree is consistent with the *TBT Agreement*. Asbestos and asbestos-containing products, on the one hand, and substitute fibres and asbestos-free products, on the other, are not "like products" within the meaning of Article 2.1 of the *TBT Agreement* for the same reasons that they are not "like products" for the purposes of Article III:4 of the GATT 1994. The test to be applied under Article 2.2 of the *TBT Agreement* is very similar to the test to be applied under Article XX(b) and the introductory clause to Article XX. However, unlike Article XX of the GATT 1994, where the burden was on the European Communities to present a *prima facie* case that the Decree was justified, under Article 2.2 of the *TBT Agreement*, it is for Canada to make a *prima facie* case that the Decree creates an unnecessary barrier to trade, and it has not done so. The Decree is also consistent with Article 2.4 of the *TBT Agreement*, since the international standards identified by Canada are neither relevant to, nor an effective or appropriate means of achieving, France's public health objective. Lastly, the United States argues that the Decree is consistent with Article 2.8 of the *TBT Agreement*, since it would be inappropriate to express the technical regulation in any way other than as a prohibition on the use of asbestos.

(b) "Like Products" in Article III:4 of the GATT 1994

48. The United States submits that the Panel erred in concluding that asbestos fibres and substitute fibres are "like products" under Article III:4 of the GATT 1994. The Panel erred in law in concluding that, in examining the properties, nature and quality of asbestos, it could not take into account the fact that asbestos differs from other fibres because it splits longitudinally into narrow, or thin, fibres, and has a high potential to release particles that possess certain characteristics, and in concluding that, in examining consumer tastes and habits, it could not take account of the proven carcinogenic nature of asbestos. In so proceeding, the Panel ignored the single most important distinguishing feature between asbestos and its substitutes. The Panel also wrongly inflated the significance of another factor – the end uses of products concerned. In the view of the United States, the application of a proper "like product" analysis should lead the Appellate Body to find that asbestos is not "like" its substitute fibres, and that asbestos-containing products are not "like" asbestos-free products and, therefore, conclude that the Decree does not violate Article III:4 of the GATT 1994.

(c) Article XX(b) of the GATT 1994 and Article 11 of the DSU

49. Should the Appellate Body resort to Article XX(b) of the GATT 1994, the United States urges the Appellate Body to find that the Decree is permissible under Article XX(b). Canada's appeal on this issue is based on criticism of the Panel's findings with respect to the scientific information before it, and that Canada erroneously asserts that Article 11 of the DSU requires the Panel to decide which scientific view is the correct one. However, the role of a panel, under Article 11 of the DSU, is

to make an objective assessment of the facts before it, and to evaluate whether there is a rational or objective relationship between the measure at issue and the scientific basis asserted for the measure. The United States argues that the Panel acted consistently with this mandate in finding that the Decree is necessary to protect human health, and the Appellate Body should not disturb this finding.

III. Preliminary Procedural Matter

50. On 27 October 2000, we wrote to the parties and the third parties indicating that we were mindful that, in the proceedings before the Panel in this case, the Panel received five written submissions from non-governmental organizations, two of which the Panel decided to take into account.[28] In our letter, we recognized the possibility that we might receive submissions in this appeal from persons other than the parties and the third parties to this dispute, and stated that we were of the view that the fair and orderly conduct of this appeal could be facilitated by the adoption of appropriate procedures, for the purposes of this appeal only, pursuant to Rule 16(1) of the *Working Procedures*, to deal with any possible submissions received from such persons. To this end, we invited the parties and the third parties in this appeal to submit their comments on a number of questions. These related to: whether we should adopt a "request for leave" procedure; what procedures would be needed to ensure that the parties and third parties would have a full and adequate opportunity to respond to submissions that might be received; and whether we should take any other points into consideration if we decided to adopt a "request for leave" procedure. On 3 November 2000, all of the parties and third parties responded in writing to our letter of 27 October. Canada, the European Communities and Brazil considered that issues pertaining to any such procedure should be dealt with by the WTO Members themselves. The United States welcomed adoption of a request for leave procedure, and Zimbabwe indicated that it had no specific reasons to oppose adoption of a request for leave procedure. Without prejudice to their positions, Canada, the European Communities and the United States each made a number of suggestions regarding any such procedure that might be adopted.

51. On 7 November 2000, and after consultations among all seven Members of the Appellate Body, we adopted, pursuant to Rule 16(1) of the *Working Procedures*, an additional procedure, *for the purposes of this appeal only*, to deal with written submissions received from persons other than the parties and third parties to this dispute (the "Additional Procedure"). The Additional Procedure was communicated to the parties and third parties in this appeal on 7 November 2000. On 8 November 2000, the Chairman of the Appellate Body informed the Chairman of the Dispute Settlement Body, in writing, of the Additional Procedure adopted, and this letter was circulated, for information, as a dispute settlement document to the Members of the WTO.[29] In that communication, the Chairman of the Appellate Body stated that:

> … This additional procedure has been adopted by the Division hearing this appeal for the purposes of this appeal only pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and is *not* a new working procedure drawn up by the Appellate Body pursuant to paragraph 9 of Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*. (original emphasis)

The Additional Procedure was posted on the WTO website on 8 November 2000.

52. The Additional Procedure provided:

[28]Panel Report, paras. 6.1-6.4 and 8.12-8.14.

[29]WT/DS135/9, 8 November 2000.

1. In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.

2. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body *by noon* on *Thursday, 16 November 2000.*

3. An application for leave to file such a written brief shall:

   (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;

   (b) be in no case longer than three typed pages;

   (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;

   (d) specify the nature of the interest the applicant has in this appeal;

   (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;

   (f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and

   (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.

4. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave.

5. The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.

6. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat *by noon* on *Monday, 27 November 2000*.

7. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:

(a) be dated and signed by the person filing the brief;

(b) be concise and in no case longer than 20 typed pages, including any appendices; and

(c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.

8. An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute *by noon* on *Monday, 27 November 2000*.

9. The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure. (original emphasis)

53. The Appellate Body received 13 written submissions from non-governmental organizations relating to this appeal that were not submitted in accordance with the Additional Procedure.[30] Several of these were received while we were considering the possible adoption of an additional procedure. After the adoption of the Additional Procedure, each of these 13 submissions was returned to its sender, along with a letter informing the sender of the procedure adopted by the Division hearing this appeal and a copy of the Additional Procedure. Only one of these associations, the Korea Asbestos Association, subsequently submitted a request for leave in accordance with the Additional Procedure.

54. By letter dated 15 November 2000, Canada and the European Communities jointly requested that they be provided with copies of all applications filed pursuant to the Additional Procedure, and of

[30]Such submissions were received from: Asbestos Information Association (United States); HVL Asbestos (Swaziland) Limited (Bulembu Mine); South African Asbestos Producers Advisory Committee (South Africa); J & S Bridle Associates (United Kingdom); Associação das Indústrias de Produtos de Amianio Crisótilo (Portugal); Asbestos Cement Industries Limited (Sri Lanka); The Federation of Thai Industries, Roofing and Accessories Club (Thailand); Korea Asbestos Association (Korea); Senac (Senegal); Syndicat des Métallos (Canada); Duralita de Centroamerica, S.A. de C.V. (El Salvador); Asociación Colombiana de Fibras (Colombia); and Japan Asbestos Association (Japan).

the decision taken by the Appellate Body in respect of each such application. All such documents were subsequently provided to the parties and third parties in this dispute.

55. Pursuant to the Additional Procedure, the Appellate Body received 17 applications requesting leave to file a written brief in this appeal. Six of these 17 applications were received after the deadline specified in paragraph 2 of the Additional Procedure and, for this reason, leave to file a written brief was denied to these six applicants.[31] Each such applicant was sent a copy of our decision denying its application for leave because the application was not filed in a timely manner.

56. The Appellate Body received 11 applications for leave to file a written brief in this appeal within the time limits specified in paragraph 2 of the Additional Procedure.[32] We carefully reviewed and considered each of these applications in accordance with the Additional Procedure and, in each case, decided to deny leave to file a written brief. Each applicant was sent a copy of our decision denying its application for leave for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure.

57. We received a written brief from the Foundation for International Environmental Law and Development, on its behalf and on behalf of Ban Asbestos (International and Virtual) Network, Greenpeace International, International Ban Asbestos Secretariat, and World Wide Fund for Nature, International, dated 6 February 2001. As we had already denied, in accordance with the Additional Procedure, an application from these organizations for leave to file a written brief in this appeal[33], we did not accept this brief.

IV. Issues Raised in this Appeal

58. This appeal raises the following issues:

(a) whether the Panel erred in its interpretation of the term "technical regulation" in Annex 1.1 of the *TBT Agreement* in finding, in paragraph 8.72(a) of the Panel Report, that "the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products" does not constitute a "technical regulation";

[31]Applications from the following persons were received by the Division after the deadline specified in the Additional Procedure for receipt of such applications: Association of Personal Injury Lawyers (United Kingdom); All India A.C. Pressure Pipe Manufacturer's Association (India); International Confederation of Free Trade Unions/European Trade Union Confederation (Belgium); Maharashtra Asbestos Cement Pipe Manufacturers' Association (India); Roofit Industries Ltd. (India); and Society for Occupational and Environmental Health (United States).

[32]Applications from the following persons were received by the Division within the deadline specified in the Additional Procedure for receipt of such applications: Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Association (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment and American Chemistry Council (United States); European Chemical Industry Council (Belgium); Australian Centre for Environmental Law at the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint application from Foundation for Environmental Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban Asbestos International and Virtual Network (France), Greenpeace International (The Netherlands), World Wide Fund for Nature, International (Switzerland), and Lutheran World Federation (Switzerland).

[33]These organizations, together with the Center for International Environmental Law and the Lutheran World Federation, filed a joint application for leave to file a written brief. We decided to deny leave to these applicants to file a written brief. See *supra*, para. 56 and footnote 32.

(b) whether the Panel erred in its interpretation and application of the term "like products" in Article III:4 of the GATT 1994 in finding, in paragraph 8.144 of the Panel Report, that chrysotile asbestos fibres are "like" PVA, cellulose and glass fibres, and in finding, in paragraph 8.150 of the Panel Report, that cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing polyvinyl alcohol, cellulose and glass fibres;

(c) whether the Panel erred in finding that the measure at issue is "necessary to protect human … life or health" under Article XX(b) of the GATT 1994, and whether, in carrying out its examination under Article XX(b) of the GATT 1994, the Panel failed to make an objective assessment of the matter under Article 11 of the DSU; and

(d) whether the Panel erred in its interpretation of Article XXIII:1(b) of the GATT 1994 in finding that that provision applies to a measure which falls within the scope of application of other provisions of the GATT 1994, and in finding that Article XXIII:1(b) applies to measures which pursue health objectives.

V. *TBT Agreement*

59. Before the Panel, Canada claimed that the measure at issue is inconsistent with Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*. Each of these provisions applies solely to "technical regulations". Thus, a threshold issue in the examination of Canada's claims under the *TBT Agreement* is whether the measure at issue is a "technical regulation".

60. In addressing this threshold issue, the Panel examined the nature and structure of the measure to assess how the *TBT Agreement* might apply to it. For this examination, the Panel decided that it would be appropriate to examine the measure in two stages. First, the Panel examined "the part of the Decree prohibiting the marketing of asbestos and asbestos-containing products"; next, the Panel analyzed the "exceptions" in the Decree.[34] The Panel concluded that the part of the Decree containing the prohibitions is *not* a "technical regulation", and that, therefore, the *TBT Agreement* does not apply to this part of the Decree.[35] However, the Panel also concluded that the part of the Decree containing the exceptions does constitute a "technical regulation", and that, therefore, the *TBT Agreement* applies to that part of the Decree. On this basis, the Panel decided not to examine Canada's claims under the *TBT Agreement* because, it said, those claims relate solely to the part of the Decree containing the prohibitions, which, in the Panel's view, does not constitute a "technical regulation", and, therefore, the *TBT Agreement* does not apply.[36]

61. In concluding that the part of the Decree containing the prohibitions is not a "technical regulation", the Panel found that:

> a measure constitutes a "technical regulation" if:
>
> (a) the measure affects one or more given products;
>
> (b) the measure specifies the technical characteristics of the product(s) which allow them to be marketed in the Member that took the measure;
>
> (c) compliance is mandatory.[37]

[34]Panel Report, heading (a) on p. 404 and heading (b) on p. 411.

[35]*Ibid.*, para. 8.72(a).

[36]*Ibid.*, para. 8.72.

62. Canada appeals the Panel's finding that the *TBT Agreement* does not apply to the part of the Decree relating to the prohibitions on imports of asbestos and asbestos-containing products. According to Canada, the Panel erred in considering the part of the Decree relating to those prohibitions *separately* from the part of the Decree relating to the exceptions to those prohibitions, and, therefore, the Panel should have examined the Decree as a *single*, unified measure. Furthermore, Canada argues that the Panel erred in its interpretation of a "technical regulation", as defined in Annex 1.1 to the *TBT Agreement,* because, in Canada's view, a general prohibition can be a "technical regulation".

63. We start with the measure at issue. It is clear from Canada's request for the establishment of a panel that Canada's complaint concerns Decree 96-1133 as a whole.[38] The Decree, in essence, consists of prohibitions on asbestos fibres and on products containing asbestos fibres (Article 1), coupled with limited and temporary exceptions from the prohibitions for certain "existing materials, products or devices containing chrysotile fibre" (Article 2). The remaining operative provisions of the Decree contain additional rules governing the grant of an exception (Articles 3 and 4) and the imposition of penalties for violation of the prohibitions in Article 1 (Article 5). Furthermore, certain used "vehicles" and "agricultural and forestry machinery" are entirely excluded, until 31 December 2001, from certain aspects of the prohibitions in Article 1, namely, from the prohibitions on "possession for sale, offering for sale and transfer under any title" (Article 7).[39]

64. In our view, the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole. Article 1 of the Decree contains broad, general prohibitions on asbestos and products containing asbestos. However, the scope and generality of those prohibitions can only be understood in light of the exceptions to it which, albeit for a limited period, *permit*, *inter alia*, the use of certain products containing asbestos and, principally, products containing chrysotile asbestos fibres. The measure is, therefore, *not* a *total* prohibition on asbestos fibres, because it also includes provisions that *permit*, for a limited duration, the use of asbestos in certain situations. Thus, to characterize the measure simply as a general prohibition, and to examine it as such, overlooks the complexities of the measure, which include both prohibitive and permissive elements. In addition, we observe that the exceptions in the measure would have no autonomous legal significance in the absence of the prohibitions. We, therefore, conclude that the measure at issue is to be examined as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it.

65. Accordingly, we reverse the Panel's two-stage interpretive approach of examining, first, the application of the *TBT Agreement* to the prohibitions contained in the measure and, second and separately, its application to the exceptions contained in the measure.

[37]*Ibid.*, para. 8.57.

[38]WT/DS135/3. In its request for the establishment of a panel, Canada stated:

> … the Government of Canada requested consultations with the European Communities concerning certain measures taken by France prohibiting asbestos and products containing asbestos, and concerning the general asbestos regulations in force in France. *These measures and regulations include*, but are not limited to, *Decree No. 96-1133* … (emphasis added)

Canada requested that the Panel "find that *Decree No. 96-1133*" is inconsistent with the European Communities' WTO obligations. (emphasis added) See, further, Canada's request for consultations, WT/DS135/1, G/SPS/GEN/72, G/TBT/D/15, which also identifies the measure at issue as Decree No. 96-1133.

[39]The full text of the Decree is reproduced in Annex I in the Addendum to the Panel Report. Articles 1 and 2 of the Decree are reproduced in paragraph 2 of this Report.

66. We turn now to the term "technical regulation" and to the considerations that must go into interpreting the term. Article 1.2 of the *TBT Agreement* provides that, for the purposes of this Agreement, the meanings given in Annex 1 apply. Annex 1.1 of the *TBT Agreement* defines a "technical regulation" as a:

> Document which lays down *product characteristics* or their related processes and production methods, including the *applicable administrative provisions*, with which *compliance is mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (emphasis added)

67. The heart of the definition of a "technical regulation" is that a "document" must "lay down" – that is, set forth, stipulate or provide – "product *characteristics*". The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics". Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal *exclusively* with terminology, symbols, packaging, marking *or* labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics".

68. The definition of a "technical regulation" in Annex 1.1 of the *TBT Agreement* also states that "*compliance*" with the "product characteristics" laid down in the "document" must be "*mandatory*". A "technical regulation" must, in other words, regulate the "characteristics" of products in a binding or compulsory fashion. It follows that, with respect to products, a "technical regulation" has the effect of *prescribing* or *imposing* one or more "characteristics" – "features", "qualities", "attributes", or other "distinguishing mark".

69. "Product characteristics" may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products *must possess* certain "characteristics", or the document may require, negatively, that products *must not possess* certain "characteristics". In both cases, the legal result is the same: the document "lays down" certain binding "characteristics" for products, in one case affirmatively, and in the other by negative implication.

70. A "technical regulation" must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, "of the *products to be covered*" by a proposed "technical regulation". (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a "technical regulation" must apply to "*given*" products

which are actually *named*, *identified* or *specified* in the regulation.[40] (emphasis added) Although the *TBT Agreement* clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the "characteristic" that is the subject of regulation.

71. With these considerations in mind, we examine whether the measure at issue is a "technical regulation". Decree 96-1133 aims primarily at the regulation of a named product, asbestos. The first and second paragraphs of Article 1 of the Decree impose a prohibition on asbestos *fibres*, as such. This prohibition on these *fibres* does not, *in itself*, prescribe or impose any "characteristics" on asbestos fibres, but simply bans them in their natural state. Accordingly, if this measure consisted *only* of a prohibition on asbestos *fibres*, it might not constitute a "technical regulation".

72. There is, however, more to the measure than this prohibition on asbestos *fibres*. It is not contested that asbestos fibres have no known use in their raw mineral form.[41] Thus, the regulation of asbestos can *only* be achieved through the regulation of *products that contain asbestos fibres*. This, too, is addressed by the Decree before us. An integral and essential aspect of the measure is the regulation of "*products containing asbestos fibres*", which are also prohibited by Article 1, paragraphs I and II of the Decree. It is important to note here that, although formulated *negatively* – products containing asbestos are prohibited – the measure, in this respect, effectively prescribes or imposes certain objective features, qualities or "characteristics" on *all* products. That is, in effect, the measure provides that *all* products must *not* contain asbestos fibres. Although this prohibition against products containing asbestos applies to a large number of products, and although it is, indeed, true that the products to which this prohibition applies cannot be determined from the terms of the measure itself, it seems to us that the products covered by the measure are *identifiable*: all products must be asbestos free; any products containing asbestos are prohibited. We also observe that compliance with the prohibition against products containing asbestos is mandatory and is, indeed, enforceable through criminal sanctions.[42]

73. Articles 2, 3 and 4 of the Decree also contain certain exceptions to the prohibitions found in Article 1 of the Decree. As we have already noted, these exceptions would have no meaning in the absence of the rest of the measure because they define the scope of the prohibitions in the measure. The nature of these exceptions is to *permit* the use of certain products containing chrysotile asbestos fibres, subject to compliance with strict administrative requirements. The scope of the exceptions is determined by an "exhaustive list" of products that are permitted to contain chrysotile asbestos fibres, which is promulgated and reviewed annually by a government Minister.[43] The inclusion of a product in the list of exceptions depends on the absence of an acceptable alternative fibre for incorporation into a particular product, and the demonstrable provision of "all technical guarantees of safety".[44]

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[40]Panel Report, para. 8.57. We note that the Panel stated that a "technical regulation" must apply to "*identifiable*" products (Panel Report, para. 8.38; emphasis added). However, the Panel went on to state that a "technical regulation" must apply to "*given*" products (Panel Report, para. 8.57; emphasis added). The Panel also noted that the measure does not "identify *by name* nor even by function or category" the products covered by the measure (Panel Report, para. 8.40; emphasis added). Thus, in parts of the Panel Report, the Panel appears to require that a "technical regulation" apply to *given* products rather than *identifiable* products.

[41]Canada asserted that "chrysotile fibre has no use in its raw form; it serves as an input in the production of chrysotile materials" (Panel Report, paras. 3.418 and 3.439). This assertion is not contested by the European Communities.

[42]Article 5 of the Decree characterizes a contravention of any aspect of Articles 1.I or 1.II as a "5th class offence".

[43]Article 2.II of the Decree.

[44]Article 2.I of the Decree.

Any person seeking to avail himself of these limited exceptions must provide a detailed justification to the authorities, complete with necessary supporting documentation concerning "the state of scientific and technological progress".[45] Compliance with these administrative requirements is mandatory.[46]

74. Like the Panel, we consider that, through these exceptions, the measure sets out the "applicable administrative provisions, with which compliance is mandatory" for products with certain objective "characteristics".[47] The exceptions apply to a narrowly defined group of products with particular "characteristics". Although these products are not named, the measure provides criteria which permit their identification, both by reference to the qualities the excepted products must possess and by reference to the list promulgated by the Minister.

75. Viewing the measure as an integrated whole, we see that it lays down "characteristics" for all products that might contain asbestos, and we see also that it lays down the "applicable administrative provisions" for certain products containing chrysotile asbestos fibres which are excluded from the prohibitions in the measure. Accordingly, we find that the measure is a "document" which "lays down product characteristics … including the applicable administrative provisions, with which compliance is mandatory." For these reasons, we conclude that the measure constitutes a "technical regulation" under the *TBT Agreement*.

76. We, therefore, reverse the Panel's finding, in paragraph 8.72(a) of the Panel Report, that the *TBT Agreement* "does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a 'technical regulation' within the meaning of Annex 1.1 to the TBT Agreement."

77. We note, however – and we emphasize – that this does not mean that *all* internal measures covered by Article III:4 of the GATT 1994 "affecting" the "sale, offering for sale, purchase, transportation, distribution or use" of a product are, necessarily, "technical regulations" under the *TBT Agreement*. Rather, we rule only that this particular measure, the Decree at stake, falls within the definition of a "technical regulation" given in Annex 1.1 of that Agreement.

78. As we have reached a different conclusion from the Panel's regarding the applicability of the *TBT Agreement* to the measure, we now consider whether it is appropriate for us to rule on the claims made by Canada relating to the *TBT Agreement*. In previous appeals, we have, on occasion, completed the legal analysis with a view to facilitating the prompt settlement of the dispute, pursuant to Article 3.3 of the DSU.[48] However, we have insisted that we can do so only if the factual findings

[45]Article 3.I of the Decree.

[46]Article 3.II of the Decree limits the benefit of the exception to activities that have been the subject of the necessary formalities.

[47]Panel Report, para. 8.69.

[48]See, for instance, Appellate Body Report, *United States – Gasoline*, *supra*, footnote 15, at 18 ff; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* ("*Canada – Periodicals*"), WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, at 469 ff; Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 222 ff; Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, paras. 156 ff; Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, paras. 117 ff, 193 ff and 227 ff; Appellate Body Report, *United States – Shrimp*, *supra*, footnote 14, paras. 123 ff; Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, paras. 112 ff; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, paras. 133 ff; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, *Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, paras. 43 ff; and Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*United States – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001, paras. 80 ff and 127 ff.

In addition, after modifying the panel's reasoning, we have, on occasion, applied our interpretation of the legal provisions at issue to the facts of the case (see, for instance, Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, paras. 48 ff; Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 October 1999, paras. 138 ff; Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, paras. 109 ff).

of the panel and the undisputed facts in the panel record provide us with a sufficient basis for our own analysis. If that has not been the case, we have not completed the analysis.[49]

79. The need for sufficient facts is not the only limit on our ability to complete the legal analysis in any given case. In *Canada – Periodicals*, we reversed the panel's conclusion that the measure at issue was inconsistent with Article III:2, first sentence, of the GATT 1994, and we then proceeded to examine the United States' claims under Article III:2, second sentence, which the panel had not examined at all. However, in embarking there on an analysis of a provision that the panel had not considered, we emphasized that "the first and second sentences of Article III:2 are *closely related*" and that those two sentences are "part of a *logical continuum*."[50] (emphasis added)

80. In this appeal, Canada's outstanding claims were made under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*. We observe that, although the *TBT Agreement* is intended to "further the objectives of GATT 1994", it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the *TBT Agreement* imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994.

81. As the Panel decided not to examine Canada's four claims under the *TBT Agreement*, it made no findings, at all, regarding any of these claims. Moreover, the meaning of the different obligations in the *TBT Agreement* has not previously been the subject of any interpretation or application by either panels or the Appellate Body. Similarly, the provisions of the Tokyo Round *Agreement on Technical Barriers to Trade*, which preceded the *TBT Agreement* and which contained obligations similar to those in the *TBT Agreement*, were also never the subject of even a single ruling by a panel.

82. In light of their novel character, we consider that Canada's claims under the *TBT Agreement* have not been explored before us in depth. As the Panel did not address these claims, there are no "issues of law" or "legal interpretations" regarding them to be analyzed by the parties, and reviewed by us under Article 17.6 of the DSU. We also observe that the sufficiency of the facts on the record depends on the reach of the provisions of the *TBT Agreement* claimed to apply – a reach that has yet to be determined.

83. With this particular collection of circumstances in mind, we consider that we do not have an adequate basis properly to examine Canada's claims under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement* and, accordingly, we refrain from so doing.

[49]See Appellate Body Report, *Australia – Salmon*, *supra*, footnote 48, paras. 209 ff, 241 ff and 255; Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, paras. 91 ff and 102 ff; Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, paras. 133 ff and 144 ff; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("*Korea – Beef*"), WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paras. 128 ff.

[50]*Supra*, footnote 48, at 469.

VI. "Like Products" in Article III:4 of the GATT 1994

A. *Background*

84. In addressing Canada's claims under Article III:4 of the GATT 1994, the Panel examined whether two different sets of products are "like".[51] First, the Panel examined whether *chrysotile asbestos fibres* are "like" certain other fibres, namely *polyvinyl alcohol fibres ("PVA"), cellulose and glass fibres* (PVA, cellulose and glass fibres are all collectively referred to, in the remainder of this Report, as "PCG fibres"). The Panel concluded that chrysotile asbestos and PCG fibres are all "like products" under Article III:4.[52] The Panel next examined whether *cement-based products containing chrysotile asbestos fibres* are "like" *cement-based products containing one of the PCG fibres*. The Panel also concluded that all these cement-based products are "like".[53]

85. In examining the "likeness" of these two sets of products, the Panel adopted an approach based on the Report of the Working Party on *Border Tax Adjustments*.[54] Under that approach, the Panel employed four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits; and, (iv) the tariff classification of the products. The Panel declined to apply "a criterion on the risk of a product", "neither in the criterion relating to the properties, nature and quality of the product, nor in the other likeness criteria …".[55]

86. On appeal, the European Communities requests that we reverse the Panel's findings that the two sets of products examined by the Panel are "like products" under Article III:4 of the GATT 1994, and requests, in consequence, that we reverse the Panel's finding that the measure is inconsistent with Article III:4 of the GATT 1994. The European Communities contends that the Panel erred in its interpretation and application of the concept of "like products", in particular, in excluding from its analysis consideration of the health risks associated with chrysotile asbestos fibres. According to the European Communities, in this case, Article III:4 calls for an analysis of the health objective of the regulatory distinction made in the measure between asbestos fibres, and between products containing asbestos fibres, and all other products. The European Communities argues that, under Article III:4, products should not be regarded as "like" unless the regulatory distinction drawn between them "entails [a] shift in the competitive opportunities" in favour of domestic products.[56]

B. *Meaning of the Term "Like Products" in Article III:4 of the GATT 1994*

87. Article III:4 of the GATT 1994 reads, in relevant part:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to *like products* of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. … (emphasis added)

[51]The Panel's approach is set forth in para. 8.111 of the Panel Report.

[52]Panel Report, para. 8.144.

[53]*Ibid.*, para. 8.150.

[54]Working Party Report, *Border Tax Adjustments*, adopted 2 December 1970, BISD 18S/97.

[55]Panel Report, paras. 8.130 and 8.132.

[56]European Communities' other appellant's submission, para. 45.

88. The European Communities' appeal on this point turns on the interpretation of the word "like" in the term "like products" in Article III:4 of the GATT 1994. Thus, this appeal provides us with our first occasion to examine the meaning of the word "like" in *Article III:4* of the GATT 1994.[57] Yet, this appeal is, of course, not the first time that the term "like products" has been addressed in GATT or WTO dispute settlement proceedings.[58] Indeed, the term "like product" appears in many different provisions of the covered agreements, for example, in Articles I:1, II:2, III:2, III:4, VI:1, IX:1, XI:2(c), XIII:1, XVI:4 and XIX:1 of the GATT 1994.[59] The term is also a key concept in the *Agreement on Subsidies and Countervailing Measures*, the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"), the *Agreement on Safeguards* and other covered agreements. In some cases, such as in Article 2.6 of the *Anti-Dumping Agreement*, the term is given a specific meaning to be used "[t]hroughout [the]

[57]We have already had occasion to interpret other aspects of Article III:4 of the GATT 1994 in two other appeals, but in neither appeal were we asked to address the meaning of the term "like products" (see Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, and Appellate Body Report, *Korea – Beef*, *supra*, footnote 49).

[58]See, for instance, Working Party Report, *Brazilian Internal Taxes*, adopted 30 June 1949, BISD II/181, (Article III:2 of the GATT 1947); Working Party Report, *The Australian Subsidy on Ammonium Sulphate* ("*Australia – Ammonium Sulphate*"), adopted 3 April 1950, BISD II/188 (Articles I and III:4 of the GATT 1947); Panel Report, *Treatment by Germany of Imports of Sardines* ("*Germany – Sardines*"), adopted 31 October 1952, BISD 1S/53 (Articles I and XIII of the GATT 1947); Working Party Report, *Border Tax Adjustments*, *supra*, footnote 54 (Articles II, III and XVI of the GATT 1947); Panel Report, *EEC – Measures on Animal Feed Proteins* ("*EEC – Animal Feed*"), adopted 14 March 1978, BISD 25S/49 (Articles I, III:2 and III:4 of the GATT 1947); Panel Report, *Spain – Tariff Treatment of Unroasted Coffee*, adopted 11 June 1981, BISD 28S/102 (Article I:1 of the GATT 1947); Panel Report, *Spain – Measures Concerning Domestic Sale of Soyabean Oil* ("*Spain – Soyabean*"), L/5142, 17 June 1981, unadopted (Article III:4 of the GATT 1947); Panel Report, *Canada – Measures Affecting the Sale of Gold Coins*, L/5863, 17 September 1985, unadopted (Article III:2 of the GATT 1947); Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136 (Article III:2 of the GATT 1947); Panel Report, *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* ("*1987 Japan – Alcoholic Beverages*"), adopted 10 November 1987, BISD 34S/83 (Article III:2 of the GATT 1947); Panel Report, *Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, adopted 19 July 1989, BISD 36S/167 (Article I:1 of the GATT 1947); Panel Report, *United States – Definition of Industry Concerning Wine and Grape Products*, adopted 28 April 1992, BISD 39S/436 (Article VI of the GATT 1947); Panel Report, *United States – Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil*, adopted 19 June 1992, BISD 39S/128 (Article I:1 of the GATT 1947); Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206 (Article III:2 and III:4 of the GATT 1947); Panel Report, *United States – Taxes on Automobiles*, DS31/R, 11 October 1994, unadopted (Article III:2 and III:4 of the GATT 1947); Panel Report, *United States – Gasoline*, *supra*, footnote 15 (Article III:4 of the GATT 1994); Panel Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages*"), WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125 (Article III:2 of the GATT 1994); Appellate Body Report, *Japan – Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 (Article III:2 of the GATT 1994); Panel Report, *Canada – Periodicals*, WT/DS31/R, adopted 30 July 1997, as modified by the Appellate Body Report, WT/DS31/AB/R, DSR 1997:I, 481 (Articles III:2 and III:4 of the GATT 1994); Appellate Body Report, *Canada – Periodicals*; *supra*, footnote 48 (Article III:2 of the GATT 1994); Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry,* WT/DS54/R, WT/DS55/R, WT/DS59/R, WTDS64/R, adopted 23 July 1998 (Articles I:1 and III:2 of the GATT 1994); Panel Report, *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R (Article III:2 of the GATT 1994); Appellate Body Report, *Korea – Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999 (Article III:2 of the GATT 1994); Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R (Article III:2 of the GATT 1994).

[59]In addition, the term "like commodity" appears in Article VI:7 and the term "like merchandise" is used in Article VII:2 of the GATT 1994.

Agreement", while in others, it is not. In each of the provisions where the term "like products" is used, the term must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears. Accordingly, and as we observed in an earlier case concerning Article III:2 of the GATT 1994:

> … there can be *no one precise and absolute definition of what is "like"*. The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. *The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply*. …[60] (emphasis added)

89. It follows that, while the meaning attributed to the term "like products" in other provisions of the GATT 1994, or in other covered agreements, may be relevant context in interpreting Article III:4 of the GATT 1994, the interpretation of "like products" in Article III:4 need not be identical, in all respects, to those other meanings.

90. Bearing these considerations in mind, we turn now to the ordinary meaning of the word "like" in the term "like products" in Article III:4. According to one dictionary, "like" means:

> Having the same characteristics or qualities as some other … thing; of approximately identical shape, size, etc., with something else; similar.[61]

91. This meaning suggests that "like" products are products that share a number of identical or similar characteristics or qualities. The reference to "similar" as a synonym of "like" also echoes the language of the French version of Article III:4, "*produits similaires*", and the Spanish version, "*productos similares*", which, together with the English version, are equally authentic.[62]

92. However, as we have previously observed, "dictionary meanings leave many interpretive questions open."[63] In particular, this definition does not resolve three issues of interpretation. First, this dictionary definition of "like" does not indicate *which characteristics or qualities are important* in assessing the "likeness" of products under Article III:4. For instance, most products will have many qualities and characteristics, ranging from physical properties such as composition, size, shape, texture, and possibly taste and smell, to the end-uses and applications of the product. Second, this dictionary definition provides no guidance in determining the *degree or extent to which products must share qualities or characteristics* in order to be "like products" under Article III:4. Products may share only very few characteristics or qualities, or they may share many. Thus, in the abstract, the term "like" can encompass a spectrum of differing degrees of "likeness" or "similarity". Third,

[60]Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 114. We also cautioned against the automatic transposition of the interpretation of "likeness" under the first sentence of Article III:2 to other provisions where the phrase "like products" is used (p. 113).

[61]*The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 1588.

[62]*WTO Agreement*, final, authenticating clause. See, also, Article 33(1) of the *Vienna Convention of the Law of the Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[63]Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 153.

this dictionary definition of "like" does not indicate *from whose perspective* "likeness" should be judged. For instance, ultimate consumers may have a view about the "likeness" of two products that is very different from that of the inventors or producers of those products.

93. To begin to resolve these issues, we turn to the relevant context of Article III:4 of the GATT 1994. In that respect, we observe that Article III:2 of the GATT 1994, which deals with the internal tax treatment of imported and domestic products, prevents Members, through its first sentence, from imposing internal taxes on imported products "in excess of those applied … to *like* domestic products." (emphasis added) In previous Reports, we have held that the scope of "like" products in this sentence is to be construed "narrowly".[64] This reading of "like" in Article III:2 might be taken to suggest a similarly narrow reading of "like" in Article III:4, since both provisions form part of the same Article. However, both of these paragraphs of Article III constitute specific expressions of the overarching, "general principle", set forth in Article III:1 of the GATT 1994.[65] As we have previously said, the "general principle" set forth in Article III:1 "informs" the rest of Article III and acts "as a guide to understanding and interpreting the specific obligations contained" in the other paragraphs of Article III, including paragraph 4.[66] Thus, in our view, Article III:1 has particular contextual significance in interpreting Article III:4, as it sets forth the "general principle" pursued by that provision. Accordingly, in interpreting the term "like products" in Article III:4, we must turn, first, to the "general principle" in Article III:1, rather than to the term "like products" in Article III:2.

94. In addition, we observe that, although the obligations in Articles III:2 and III:4 both apply to "like products", the text of Article III:2 differs in one important respect from the text of Article III:4. Article III:2 contains *two separate* sentences, each imposing *distinct* obligations: the first lays down obligations in respect of "like products", while the second lays down obligations in respect of "directly competitive or substitutable" products.[67] By contrast, Article III:4 applies only to "like products" and does not include a provision equivalent to the second sentence of Article III:2. We note that, in this dispute, the Panel did not examine, at all, the significance of this textual difference between paragraphs 2 and 4 of Article III.

95. For us, this textual difference between paragraphs 2 and 4 of Article III has considerable implications for the meaning of the term "like products" in these two provisions. In *Japan – Alcoholic Beverages*, we concluded, in construing Article III:2, that the two separate obligations in the two sentences of Article III:2 must be interpreted in a harmonious manner that gives meaning to *both* sentences in that provision. We observed there that the interpretation of one of the sentences necessarily affects the interpretation of the other. Thus, the scope of the term "like products" in the first sentence of Article III:2 affects, and is affected by, the scope of the phrase "directly competitive or substitutable" products in the second sentence of that provision. We said in *Japan – Alcoholic Beverages*:

[64]Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 112 and 113. See, also, Appellate Body Report, *Canada – Periodicals*, *supra*, footnote 48, at 473.

[65]Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 111.

[66]*Ibid.*

[67]The meaning of the second sentence of Article III:2 is elaborated upon in the Interpretative Note to that provision. This note indicates that the second sentence of Article III:2 applies to "directly competitive or substitutable product[s]".

> Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not "like products" as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of "like products" in Article III:2, first sentence, should be construed narrowly.[68]

96. In construing Article III:4, the same interpretive considerations do not arise, because the "general principle" articulated in Article III:1 is expressed in Article III:4, not through two distinct obligations, as in the two sentences in Article III:2, but instead through a single obligation that applies solely to "like products". Therefore, the harmony that we have attributed to the two sentences of Article III:2 need not and, indeed, cannot be replicated in interpreting Article III:4. Thus, we conclude that, given the textual difference between Articles III:2 and III:4, the "accordion" of "likeness" stretches in a different way in Article III:4.

97. We have previously described the "general principle" articulated in Article III:1 as follows:

> The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported and domestic products so as to afford protection to domestic production'". Toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions for imported products in relation to domestic products*. … Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. …[69] (emphasis added)

98. As we have said, although this "general principle" is not explicitly invoked in Article III:4, nevertheless, it "informs" that provision.[70] Therefore, the term "like product" in Article III:4 must be interpreted to give proper scope and meaning to this principle. In short, there must be consonance between the objective pursued by Article III, as enunciated in the "general principle" articulated in Article III:1, and the interpretation of the specific expression of this principle in the text of Article III:4. This interpretation must, therefore, reflect that, in endeavouring to ensure "equality of competitive conditions", the "general principle" in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, "so as to afford protection to domestic production."

99. As products that are in a competitive relationship in the marketplace could be affected through treatment of *imports* "less favourable" than the treatment accorded to *domestic* products, it follows that the word "like" in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. In saying this, we are mindful that there is a spectrum of degrees of "competitiveness" or

[68] *Supra*, footnote 58, at 112 and 113.

[69] Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 109 and 110.

[70] *Ibid.*, at 111.

"substitutability" of products in the marketplace, and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word "like" in Article III:4 of the GATT 1994 falls. We are not saying that *all* products which are in *some* competitive relationship are "like products" under Article III:4. In ruling on the measure at issue, we also do not attempt to define the precise scope of the word "like" in Article III:4. Nor do we wish to decide if the scope of "like products" in Article III:4 is co-extensive with the combined scope of "like" and "directly competitive or substitutable" products in Article III:2. However, we recognize that the relationship between these two provisions is important, because there is no sharp distinction between fiscal regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4. Both forms of regulation can often be used to achieve the same ends. It would be incongruous if, due to a significant difference in the product scope of these two provisions, Members were prevented from using one form of regulation – for instance, fiscal – to protect domestic production of certain products, but were able to use another form of regulation – for instance, non-fiscal – to achieve those ends. This would frustrate a consistent application of the "general principle" in Article III:1. For these reasons, we conclude that the scope of "like" in Article III:4 is broader than the scope of "like" in Article III:2, first sentence. Nonetheless, we note, once more, that Article III:2 extends not only to "like products", but also to products which are "directly competitive or substitutable", and that Article III:4 extends only to "like products". In view of this different language, and although we need not rule, and do not rule, on the precise product scope of Article III:4, we do conclude that the product scope of Article III:4, although broader than the *first* sentence of Article III:2, is certainly *not* broader than the *combined* product scope of the *two* sentences of Article III:2 of the GATT 1994.

100. We recognize that, by interpreting the term "like products" in Article III:4 in this way, we give that provision a relatively broad product scope – although no broader than the product scope of Article III:2. In so doing, we observe that there is a second element that must be established before a measure can be held to be inconsistent with Article III:4. Thus, even if two products are "like", that does not mean that a measure is inconsistent with Article III:4. A complaining Member must still establish that the measure accords to the group of "like" *imported* products "less favourable treatment" than it accords to the group of "like" *domestic* products. The term "less favourable treatment" expresses the general principle, in Article III:1, that internal regulations "should not be applied … so as to afford protection to domestic production". If there is "less favourable treatment" of the group of "like" imported products, there is, conversely, "protection" of the group of "like" domestic products. However, a Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" *imported* products "less favourable treatment" than that accorded to the group of "like" *domestic* products. In this case, we do not examine further the interpretation of the term "treatment no less favourable" in Article III:4, as the Panel's findings on this issue have not been appealed or, indeed, argued before us.

C. *Examining the "Likeness" of Products under Article III:4 of the GATT 1994*

101. We turn to consideration of how a treaty interpreter should proceed in determining whether products are "like" under Article III:4. As in Article III:2, in this determination, "[n]o one approach … will be appropriate for all cases."[71] Rather, an assessment utilizing "an unavoidable element of individual, discretionary judgement"[72] has to be made on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments* outlined an approach for analyzing "likeness" that has been followed and developed since by several panels and the Appellate Body.[73] This approach has, in

[71] Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 114.

[72] Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 113.

[73] See, further, Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 58, at 113 and, in particular, footnote 46. See, also, Panel Report, *United States – Gasoline*, *supra*, footnote 15, para. 6.8, where the approach set forth in the *Border Tax Adjustment* case was adopted in a dispute concerning Article III:4 of the GATT 1994 by a panel. This point was not appealed in that case.

the main, consisted of employing four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products.[74] We note that these four criteria comprise four categories of "characteristics" that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.

102. These general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the "likeness" of particular products on a case-by-case basis. These criteria are, it is well to bear in mind, simply tools to assist in the task of sorting and examining the relevant evidence. They are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products. More important, the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence. In addition, although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interrelated. For instance, the physical properties of a product shape and limit the end-uses to which the products can be devoted. Consumer perceptions may similarly influence – modify or even render obsolete – traditional uses of the products. Tariff classification clearly reflects the physical properties of a product.

103. The kind of evidence to be examined in assessing the "likeness" of products will, necessarily, depend upon the particular products and the legal provision at issue. When all the relevant evidence has been examined, panels must determine whether that evidence, as a whole, indicates that the products in question are "like" in terms of the legal provision at issue. We have noted that, under Article III:4 of the GATT 1994, the term "like products" is concerned with competitive relationships between and among products. Accordingly, whether the *Border Tax Adjustments* framework is adopted or not, it is important under Article III:4 to take account of evidence which indicates whether, and to what extent, the products involved are – or could be – in a competitive relationship in the marketplace.

D. *The Panel's Findings and Conclusions on "Likeness" under Article III:4 of the GATT 1994*

1. Overview

104. In this case, the European Communities argues that the Panel erred in its consideration of "likeness", in particular, because it adopted an exclusively "commercial or market access approach" to the comparison of allegedly "like products"; placed excessive reliance on a single criterion, namely, end-use; and failed to include consideration of the health "risk" factors relating to asbestos.[75]

105. Before considering these arguments, we think it helpful to summarize the way in which the Panel assessed the "likeness" of *chrysotile asbestos fibres*, on the one hand, and the *PCG fibres* – PVA, cellulose and glass fibres – on the other. It will be recalled that the Panel adopted the approach in the *Border Tax Adjustments* report, using the four general criteria mentioned above.[76] After

[74]The fourth criterion, tariff classification, was not mentioned by the Working Party on *Border Tax Adjustments*, but was included by subsequent panels (see, for instance, *EEC – Animal Feed*, *supra*, footnote 58, para. 4.2, and *1987 Japan – Alcoholic Beverages*, *supra*, footnote 58, para. 5.6).

[75]European Communities' other appellant's submission, para. 33.

[76]Panel Report, paras. 8.114 and 8.115.

reviewing the *first* criterion, "properties, nature and quality of the products", the Panel "conclude[d] that … chrysotile fibres *are like* PVA, cellulose and glass fibres."[77] (emphasis added) In reaching this "conclusion", the Panel found that it was not decisive that the products "do not have the same structure or chemical composition", nor that asbestos is "unique". Instead, the Panel focused on "market access" and whether the products have the "same applications" and can "replace" each other for some industrial uses.[78] The Panel also declined to "[i]ntroduce a criterion on the risk of a product".[79]

106. Under the second criterion, "end-use", the Panel stated that it had already found, under the first criterion, that the products have "certain identical or at least similar end-uses" and that it did not, therefore, consider it necessary to elaborate further on this criterion.[80] The Panel declined to "take a position" on "consumers' tastes and habits", the third criterion, "[b]ecause this criterion would not provide clear results".[81] The Panel observed that consumers' tastes and habits are "very varied".[82] Finally, the Panel did not regard as "decisive" the different "tariff classification" of the fibres.[83]

107. Based on this reasoning, the Panel concluded that *chrysotile asbestos fibres* and *PCG fibres* are "like products" under Article III:4 of the GATT 1994.[84]

108. The Panel next examined whether *cement-based products containing chrysotile asbestos fibres* are "like" *cement-based products containing PCG fibres*.[85] Applying the reasoning from its findings on fibres, and noting that the individual cement-based products have the same tariff classification, irrespective of their fibre content, the Panel concluded that these cement-based products are also "like" under Article III:4.[86]

2. Chrysotile and PCG fibres

109. In our analysis of this issue on appeal, we begin with the Panel's findings on the "likeness" of *chrysotile asbestos and PCG fibres* and, in particular, with the Panel's overall approach to examining the "likeness" of these fibres. It is our view that, having adopted an approach based on the four criteria set forth in *Border Tax Adjustments*, the Panel should have examined the evidence relating to *each* of those four criteria and, then, weighed *all* of that evidence, along with any other relevant evidence, in making an *overall* determination of whether the products at issue could be characterized as "like". Yet, the Panel expressed a "conclusion" that the products were "like" after examining only the *first* of the four criteria. The Panel then repeated that conclusion under the second criterion – without further analysis – before dismissing altogether the relevance of the third criterion and also before rejecting the differing tariff classifications under the fourth criterion. In our view, it was inappropriate for the Panel to express a "conclusion" after examining only one of the four criteria.[87] By reaching a "conclusion" without examining all of the criteria it had decided to examine, the Panel,

[77]*Ibid.*, para. 8.126.

[78]*Ibid.*, paras. 8.123, 8.124 and 8.126.

[79]*Ibid.*, para. 8.130.

[80]*Ibid.*, para. 8.136.

[81]Panel Report, para. 8.139.

[82]*Ibid.*

[83]*Ibid.*, para. 8.143.

[84]*Ibid.*, para. 8.144.

[85]*Ibid.*

[86]*Ibid.*, para. 8.150. The Panel devoted six paragraphs to the "likeness" of the cement-based products, whereas it devoted 27 paragraphs to the "likeness" of chrysotile asbestos and PCG fibres.

[87]*Ibid.*, para. 8.126.

in reality, expressed a conclusion after examining only some of the evidence. Yet, a determination on the "likeness" of products cannot be made on the basis of a partial analysis of the evidence, after examination of just one of the criteria the Panel said it would examine. For this reason, we doubt whether the Panel's overall approach has allowed the Panel to make a proper characterization of the "likeness" of the fibres at issue.

110. We must next examine more closely the Panel's treatment of the four individual criteria. We see the first criterion, "properties, nature and quality", as intended to cover the physical qualities and characteristics of the products. In analyzing the "properties" of the products, the Panel said that, "because of its physical and chemical characteristics, *asbestos is a unique product*."[88] (emphasis added) The Panel expressly acknowledged that, based on physical properties alone, "[i]t could … be concluded that [the fibres] are *not* like products."[89] (emphasis added) However, to overcome that fact, the Panel adopted a "market access" approach to this first criterion.[90] Thus, in the course of its examination of "*properties*", the Panel went on to rely on "*end-uses*" – the second criterion – and on the fact that, in a "small number" of cases, the products have the "same applications" and can "replace" each other.[91] The Panel then stated:

> We therefore conclude that, taking into account the properties criterion, chrysotile fibres are like PVA, cellulose and glass fibres.[92]

111. We believe that physical properties deserve a separate examination that should not be confused with the examination of end-uses. Although not decisive, the extent to which products share common physical properties may be a useful indicator of "likeness". Furthermore, the physical properties of a product may also influence how the product can be used, consumer attitudes about the product, and tariff classification. It is, therefore, important for a panel to examine fully the physical character of a product. We are also concerned that it will be difficult for a panel to draw the appropriate conclusions from the evidence examined under each criterion if a panel's approach does not clearly address each criterion separately, but rather entwines different, and distinct, elements of the analysis along the way.

112. In addition, we do not share the Panel's conviction that when two products can be used for the same end-use, their "*properties* are then *equivalent*, if not identical."[93] (emphasis added) Products with quite different physical properties may, in some situations, be capable of performing similar or identical end-uses. Although the *end-uses* are then "*equivalent*", the physical properties of the products are not thereby altered; they remain different. Thus, the physical "uniqueness" of asbestos that the Panel noted does not change depending on the particular use that is made of asbestos.

113. The European Communities argues that the inquiry into the physical properties of products must include a consideration of the risks posed by the product to human health. In examining the physical properties of the product at issue in this dispute, the Panel found that "it was not appropriate to apply the 'risk' criterion proposed by the EC".[94] The Panel said that to do so "would largely nullify the effect of Article XX(b)" of the GATT 1994.[95] In reviewing this finding by the Panel, we note that neither the text of Article III:4 nor the practice of panels and the Appellate Body suggest that any

[88]Panel Report, para. 8.123.

[89]*Ibid.*, para. 8.121.

[90]*Ibid.*, paras. 8.122 and 8.124.

[91]*Ibid.*, paras. 8.123 and 8.125.

[92]*Ibid.*, para. 8.126.

[93]*Ibid.*, para. 8.125.

[94]Panel Report, para. 8.132.

[95]*Ibid.*, para. 8.130.

evidence should be excluded *a priori* from a panel's examination of "likeness". Moreover, as we have said, in examining the "likeness" of products, panels must evaluate *all* of the relevant evidence. We are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of "likeness" under Article III:4 of the GATT 1994. We do not, however, consider that the evidence relating to the health risks associated with chrysotile asbestos fibres need be examined under a *separate* criterion, because we believe that this evidence can be evaluated under the existing criteria of physical properties, and of consumers' tastes and habits, to which we will come below.

114. Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace. In the case of chrysotile asbestos fibres, their molecular structure, chemical composition, and fibrillation capacity are important because the microscopic particles and filaments of chrysotile asbestos fibres are carcinogenic in humans, following inhalation. In this respect, we observe that, at paragraph 8.188 of its Report, the Panel made the following statements regarding chrysotile asbestos fibres:

> … we note that the carcinogenicity of chrysotile fibres has been acknowledged for some time by international bodies.[135] This carcinogenicity was confirmed by the experts consulted by the Panel, with respect to both lung cancers and mesotheliomas, even though the experts appear to acknowledge that chrysotile is less likely to cause mesotheliomas than amphiboles. We also note that the experts confirmed that the types of cancer concerned had a mortality rate of close to 100 per cent. We therefore consider that we have sufficient evidence that there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres. Moreover, in the light of the comments made by one of the experts, the doubts expressed by Canada with respect to the direct effects of chrysotile on mesotheliomas and lung cancers are not sufficient to conclude that an official responsible for public health policy would find that there was not enough evidence of the existence of a public health risk.

[135]Since 1977 by the IARC (see *List of Agents Carcinogenic to Humans, Overall Evaluations of Carcinogenicity to Humans*, Monographs of the International Agency for Research on Cancer, Volumes 1-63), see also WHO, *IPCS Environmental Health Criteria (203) on Chrysotile*, Geneva (1998), cited in para. 5.584 above. On the development of knowledge of the risks associated with asbestos, see Dr. Henderson, para. 5.595.

This carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of chrysotile asbestos fibres. The evidence indicates that PCG fibres, in contrast, do not share these properties, at least to the same extent.[96] We do not see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of "likeness" under Article III:4 of the GATT 1994.

115. We do not agree with the Panel that considering evidence relating to the health risks associated with a product, under Article III:4, nullifies the effect of Article XX(b) of the GATT 1994. Article XX(b) allows a Member to "adopt and enforce" a measure, *inter alia*, necessary to protect human life or health, even though that measure is inconsistent with another provision of the GATT 1994. Article III:4 and Article XX(b) are distinct and independent provisions of the GATT 1994 each to be interpreted on its own. The scope and meaning of Article III:4 should not be

[96]Panel Report, para. 8.220.

broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*. Article XX(b) would only be deprived of *effet utile* if that provision could *not* serve to allow a Member to "adopt and enforce" measures "necessary to protect human … life or health". Evaluating evidence relating to the health risks arising from the physical properties of a product does not prevent a measure which is inconsistent with Article III:4 from being justified under Article XX(b). We note, in this regard, that, different inquiries occur under these two very different Articles. Under Article III:4, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly "like" products. The same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a *Member* has a sufficient basis for "adopting or enforcing" a WTO-inconsistent measure on the grounds of human health.

116. We, therefore, find that the Panel erred, in paragraph 8.132 of the Panel Report, in excluding the health risks associated with chrysotile asbestos fibres from its examination of the physical properties of that product.

117. Before examining the Panel's findings under the second and third criteria, we note that these two criteria involve certain of the key elements relating to the competitive relationship between products: first, the extent to which products are capable of performing the same, or similar, functions (end-uses), and, second, the extent to which consumers are willing to use the products to perform these functions (consumers' tastes and habits). Evidence of this type is of particular importance under Article III of the GATT 1994, precisely because that provision is concerned with competitive relationships in the marketplace. If there is – or could be – *no* competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production. Thus, evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses, is highly relevant evidence in assessing the "likeness" of those products under Article III:4 of the GATT 1994.

118. We consider this to be especially so in cases where the evidence relating to properties establishes that the products at issue are physically quite different. In such cases, in order to overcome this indication that products are *not* "like", a higher burden is placed on complaining Members to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that *all* of the evidence, taken together, demonstrates that the products are "like" under Article III:4 of the GATT 1994. In this case, where it is clear that the fibres have very different properties, in particular, because chrysotile is a known carcinogen, a very heavy burden is placed on Canada to show, under the second and third criteria, that the chrysotile asbestos and PCG fibres are in such a competitive relationship.

119. With this in mind, we turn to the Panel's evaluation of the second criterion, end-uses. The Panel's evaluation of this criterion is far from comprehensive. First, as we have said, the Panel entwined its analysis of "end-uses" with its analysis of "physical properties" and, in purporting to examine "end-uses" as a distinct criterion, essentially referred to its analysis of "properties".[97] This makes it difficult to assess precisely how the Panel evaluated the end-uses criterion. Second, the Panel's analysis of end-uses is based on a "small number of applications" for which the products are substitutable. Indeed, the Panel stated that "[i]t suffices that, for a *given utilization*, the properties are the same to the extent that one product can replace the other."[98] (emphasis added) Although we agree that it is certainly relevant that products have similar end-uses for a "small number of …

[97]Panel Report, para. 8.136.

[98]*Ibid*., para. 8.124.

applications", or even for a "given utilization", we think that a panel must also examine the other, *different* end-uses for products.[99] It is only by forming a complete picture of the various end-uses of a product that a panel can assess the significance of the fact that products share a limited number of end-uses. In this case, the Panel did not provide such a complete picture of the various end-uses of the different fibres. The Panel did not explain, or elaborate in any way on, the "small number of … applications" for which the various fibres have similar end-uses. Nor did the Panel examine the end-uses for these products which were not similar. In these circumstances, we believe that the Panel did not adequately examine the evidence relating to end-uses.

120. The Panel declined to examine or make any findings relating to the third criterion, consumers' tastes and habits, "[b]ecause this criterion would not provide clear results".[100] There will be few situations where the evidence on the "likeness" of products will lend itself to "clear results". In many cases, the evidence will give conflicting indications, possibly within each of the four criteria. For instance, there may be some evidence of similar physical properties and some evidence of differing physical properties. Or the physical properties may differ completely, yet there may be strong evidence of similar end-uses and a high degree of substitutability of the products from the perspective of the consumer. A panel cannot decline to inquire into relevant evidence simply because it suspects that evidence may not be "clear" or, for that matter, because the parties agree that certain evidence is not relevant.[101] In any event, we have difficulty seeing how the Panel could conclude that an examination of consumers' tastes and habits "would not provide clear results", given that the Panel did not examine *any* evidence relating to this criterion.

121. Furthermore, in a case such as this, where the fibres are physically very different, a panel *cannot* conclude that they are "like products" if it *does not examine* evidence relating to consumers' tastes and habits. In such a situation, if there is *no* inquiry into this aspect of the nature and extent of the competitive relationship between the products, there is no basis for overcoming the inference, drawn from the different physical properties of the products, that the products are not "like".

122. In this case especially, we are also persuaded that evidence relating to consumers' tastes and habits would establish that the health risks associated with chrysotile asbestos fibres influence consumers' behaviour with respect to the different fibres at issue.[102] We observe that, as regards *chrysotile asbestos and PCG fibres*, the consumer of the fibres is a *manufacturer* who incorporates the fibres into another product, such as cement-based products or brake linings. We do not wish to speculate on what the evidence regarding these consumers would have indicated; rather, we wish to highlight that consumers' tastes and habits regarding *fibres*, even in the case of commercial parties, such as manufacturers, are very likely to be shaped by the health risks associated with a product which is known to be highly carcinogenic.[103] A manufacturer cannot, for instance, ignore the preferences of the ultimate consumer of its products. If the risks posed by a particular product are sufficiently great, the ultimate consumer may simply cease to buy that product. This would, undoubtedly, affect a manufacturer's decisions in the marketplace. Moreover, in the case of products posing risks to human health, we think it likely that manufacturers' decisions will be influenced by other factors, such as the

[99]*Ibid*., paras. 8.124 and 8.125.

[100]*Ibid*., para. 8.139.

[101]In that respect, we note that, at the oral hearing before us, Canada stated that it believed that the parties were in agreement that consideration of consumers' tastes and habits "would add nothing" to the determination of "likeness".

[102]We have already noted the health risks associated with chrysotile asbestos fibres in our consideration of properties (*supra*, para. 114).

[103]We recognize that consumers' reactions to products posing a risk to human health vary considerably depending on the product, and on the consumer. Some dangerous products, such as tobacco, are widely used, despite the known health risks. The influence known dangers have on consumers' tastes and habits is, therefore, unlikely to be uniform or entirely predictable.

potential civil liability that might flow from marketing products posing a health risk to the ultimate consumer, or the additional costs associated with safety procedures required to use such products in the manufacturing process.

123. Finally, we note that, although we consider consumers' tastes and habits significant in determining "likeness" in this dispute, at the oral hearing, Canada indicated that it considers this criterion to be *irrelevant*, in this dispute, because the existence of the measure has disturbed normal conditions of competition between the products. In our Report in *Korea – Alcoholic Beverages*, we observed that, "[p]articularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand" for a product.[104] We noted that, in such situations, "it may be highly relevant to examine latent demand" that is suppressed by regulatory barriers.[105] In addition, we said that "evidence from other markets may be pertinent to the examination of the market at issue, particularly when demand on that market has been influenced by regulatory barriers to trade or to competition."[106] We, therefore, do not accept Canada's contention that, in markets where normal conditions of competition have been disturbed by regulatory or fiscal barriers, consumers' tastes and habits cease to be relevant. In such situations, a Member may submit evidence of latent, or suppressed, consumer demand in that market, or it may submit evidence of substitutability from some relevant third market. In making this point, we do not wish to be taken to suggest that there *is* latent demand for chrysotile asbestos fibres. Our point is simply that the existence of the measure does not render consumers' tastes and habits irrelevant, as Canada contends.

124. We observe also that the Panel did not regard as decisive the different tariff classifications of the chrysotile asbestos, PVA, cellulose and glass fibres, each of which is classified under a different tariff heading.[107] In the absence of a full analysis, by the Panel, of the other three criteria addressed, we cannot determine what importance should be attached to the different tariff classifications of the fibres.

125. In sum, in our view, the Panel reached the conclusion that *chrysotile asbestos and PCG fibres* are "like products" under Article III:4 of the GATT 1994 on the following basis: the Panel disregarded the quite different "properties, nature and quality" of chrysotile asbestos and PCG fibres, as well as the different tariff classification of these fibres; it considered no evidence on consumers' tastes and habits; and it found that, for a "small number" of the many applications of these fibres, they are substitutable, but it did not consider the many other end-uses for the fibres that are different. Thus, the only evidence supporting the Panel's finding of "likeness" is the "small number" of shared end-uses of the fibres.

126. For the reasons we have given, we find this insufficient to justify the conclusion that the chrysotile asbestos and PCG fibres are "like products" and we, therefore, reverse the Panel's conclusion, in paragraph 8.144 of the Panel Report, "that chrysotile fibres, on the one hand, and PVA, cellulose and glass fibres, on the other, are 'like products' within the meaning of Article III:4 of the GATT 1994."

3. Cement-based products containing chrysotile and PCG fibres

127. Having reversed the Panel's finding on the "likeness" of the *fibres*, we now examine the Panel's findings regarding the "likeness" of *cement-based products containing chrysotile asbestos fibres* and *cement-based products containing PCG fibres*. In examining the "likeness" of these

[104] *Supra*, footnote 58, para. 115.

[105] *Ibid.*, para. 120. We added that "studies of cross-price elasticity … involve an assessment of latent demand" (para. 121).

[106] *Supra*, footnote 58, para. 137.

[107] Panel Report, para. 8.143.

cement-based products, the Panel stated that, physically, the only difference between these products is the incorporation of a different fibre.[108] In this respect, the Panel indicated that "many of the arguments put forward in relation to chrysotile asbestos, PVA, cellulose and glass fibres are applicable *mutatis mutandis* to products containing those fibres."[109] The Panel noted that, for any given cement-based product, the tariff classification is the same, irrespective of the fibre incorporated into the product.[110] The Panel declined to examine the "risk" criterion advanced by the European Communities, and also considered it unnecessary to analyze consumers' tastes and habits.[111] On this basis, the Panel concluded that "chrysotile-fibre products and fibro-cement products are like products within the meaning of Article III:4 of the GATT 1994."[112]

128. As the Panel said, the primary physical difference between cement-based products containing chrysotile asbestos fibres and cement-based products containing PCG fibres lies in the particular fibre incorporated into the product. This difference is important because, as we have said in our examination of fibres, we believe that the health risks associated with a product may be relevant to the inquiry into the physical properties of a product when making a determination of "likeness" under Article III:4 of the GATT 1994.[113] This is also true for cement-based products containing the different fibres. In examining the *physical properties* of the two sets of cement-based products, it cannot be ignored that one set of products contains a fibre known to be highly carcinogenic, while the other does not.[114] In this respect, we recall that the Panel concluded that "there is an undeniable public health risk in relation to chrysotile contained in high-density chrysotile-cement products."[115] We, therefore, reverse the Panel's finding, in paragraph 8.149 of the Panel Report, that these health risks are not relevant in examining the "likeness" of the cement-based products.

129. Furthermore, the Panel did not indicate whether or to what extent the incorporation of one type of fibre, instead of another, affects other physical properties of a particular cement-based product and, consequently, affects the suitability of that product for a specific *end-use*. The Panel noted that the fibres give the products their specific function – "mechanical strength, resistance to heat, compression, etc." – but the Panel did not examine the extent to which the presence of a particular fibre affects the ability of a cement-based product to perform one or more of these functions efficiently.[116]

130. In addition, even if the cement-based products were functionally interchangeable, we consider it likely that the presence of a known carcinogen in one of the products would have an influence on *consumers' tastes and habits* regarding that product. We believe this to be true irrespective of whether the consumer of the *cement-based* products is a commercial party, such as a construction company, or is an individual, for instance, a do-it-yourself ("DIY") enthusiast or someone who owns or lives or works in a building. This influence may well vary, but the possibility of such an influence should not be overlooked by a panel when considering the "likeness" of products containing chrysotile asbestos. In the absence of an examination of consumers' tastes and habits, we do not see how the Panel could reach a conclusion on the "likeness" of the cement-based products at issue.[117]

[108] Panel Report, para. 8.145.

[109] *Ibid.*

[110] *Ibid.*, para. 8.148.

[111] *Ibid.*, para. 8.149.

[112] *Ibid.*, para. 8.150.

[113] *Supra*, para. 113.

[114] *Supra*, para. 114.

[115] Panel Report, para. 8.203.

[116] Panel Report, para. 8.145.

[117] See, further, *supra*, paras. 117 and 118. See, also, *supra*, paras. 121 and 122.

131. For all of these reasons, we reverse the Panel's conclusion, in paragraph 8.150 of the Panel Report, "that chrysotile-fibre products and fibro-cement products are like products within the meaning of Article III:4 of the GATT 1994."

132. As we have reversed the Panel's findings that chrysotile asbestos fibres and PCG fibres are "like products" under Article III:4 of the GATT 1994, and also the Panel's findings that cement-based products containing chrysotile asbestos fibres and cement-based products containing PCG fibres are "like products" under that provision, we also reverse, in consequence, the Panel's conclusion, in paragraph 8.158 of the Panel Report, that the measure is inconsistent with Article III:4 of the GATT 1994 as this finding rests, in part, on the Panel's findings that the two sets of products are "like".

E. *Completing the "Like Product" Analysis under Article III:4 of the GATT 1994*

133. As we have reversed both of the Panel's conclusions on "likeness" under Article III:4 of the GATT 1994, we think it appropriate to complete the analysis, on the basis of the factual findings of the Panel and of the undisputed facts in the Panel record. We have already examined the meaning of the term "like products", and we have also approved the approach for inquiring into "likeness" that is based on the Report of the Working Party in *Border Tax Adjustments* and that was also approved, though not entirely followed, by the Panel in this case. Under that approach, the evidence is to be examined under four criteria: physical properties; end-uses; consumers' tastes and habits; and tariff classification.

1. Chrysotile and PCG fibres

134. We address first the "likeness" of *chrysotile asbestos fibres* and *PCG fibres*. As regards the physical properties of these fibres, we recall that the Panel stated that:

> The Panel notes that no party contests that the structure of chrysotile fibres is unique by nature and in comparison with artificial fibres that can replace chrysotile asbestos. The parties agree that none of the substitute fibres mentioned by Canada in connection with Article III:4 has the same structure, either in terms of its form, its diameter, its length or its potential to release particles that possess certain characteristics. Moreover, they do not have the same chemical composition, which means that, in purely physical terms, none of them has the same nature or quality. …[118]

135. We also see it as important to take into account that, since 1977, chrysotile asbestos fibres have been recognized internationally as a known carcinogen because of the particular combination of their molecular structure, chemical composition, and fibrillation capacity.[119] In that respect, the Panel noted that:

[118]Panel Report, para. 8.121.

[119]*Supra*, para. 114.

> … the carcinogenicity of chrysotile fibres has been acknowledged for some time by international bodies. This carcinogenicity was confirmed by the experts consulted by the Panel, with respect to both lung cancers and mesotheliomas, even though the experts appear to acknowledge that chrysotile is less likely to cause mesotheliomas than amphiboles. We also note that the experts confirmed that the types of cancer concerned had a mortality rate of close to 100 per cent. We therefore consider that we have sufficient evidence that there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres. …[120]

In contrast, the Panel found that the PCG fibres "are not classified by the WHO at the same level of risk as chrysotile."[121] The experts also confirmed, as the Panel reported, that current scientific evidence indicates that PCG fibres do "not present the same risk to health as chrysotile" asbestos fibres.[122]

136. It follows that the evidence relating to properties indicates that, physically, chrysotile asbestos and PCG fibres are very different. As we said earlier, in such cases, in order to overcome this indication that products are *not* "like", a high burden is imposed on a complaining Member to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that, *all* of the evidence, taken together, demonstrates that the products are "like" under Article III:4 of the GATT 1994.

137. The Panel observed that the end-uses of chrysotile asbestos and PCG fibres are the same "for a small number" of applications.[123] The Panel simply adverted to these overlapping end-uses and offered no elaboration on their nature and character. We note that Canada argued before the Panel that there are some 3,000 commercial applications for asbestos fibres.[124] Canada and the European Communities indicated that the most important end-uses for asbestos fibres include, in no particular order, incorporation into: cement-based products; insulation; and various forms of friction lining.[125] Canada noted that 90 percent, by quantity, of French imports of chrysotile asbestos were used in the production of cement-based products.[126] This evidence suggests that chrysotile asbestos and PCG fibres share a small number of similar end-uses and, that, as Canada asserted, for chrysotile asbestos, these overlapping end-uses represent an important proportion of the end-uses made of chrysotile asbestos, measured in terms of quantity.

138. There is, however, no evidence on the record regarding the nature and extent of the many end-uses for chrysotile asbestos and PCG fibres which are *not* overlapping. Thus, we do not know what proportion of all end-uses for chrysotile asbestos and PCG fibres overlap. Where products have a wide range of end-uses, only some of which overlap, we do not believe that it is sufficient to rely solely on evidence regarding the overlapping end-uses, without also examining evidence of the nature and importance of these end-uses in relation to all of the other possible end-uses for the products. In the absence of such evidence, we cannot determine the significance of the fact that chrysotile asbestos and PCG fibres share a small number of similar end-uses.

[120]Panel Report, para. 8.188.

[121]*Ibid.*, para. 8.220.

[122]*Ibid.*

[123]Panel Report, para. 8.125.

[124]*Ibid.*, para. 3.21.

[125]*Ibid.*, paras. 3.21 (Canada) and 3.23 (European Communities). The lists of important uses given by the parties is not identical in all respects and we have distilled from each list the common elements.

[126]Panel Report, para. 3.21, footnote 7.

139. As we have already stated, Canada took the view, both before the Panel and before us, that consumers' tastes and habits have no relevance to the inquiry into the "likeness" of the fibres.[127] We have already addressed, and dismissed, the arguments advanced by Canada in support of this contention.[128] We have also stated that, in a case such as this one, where the physical properties of the fibres are very different, an examination of the evidence relating to consumers' tastes and habits is an indispensable – although not, on its own, sufficient – aspect of any determination that products are "like" under Article III:4 of the GATT 1994.[129] If there is no evidence on this aspect of the nature and extent of the competitive relationship between the fibres, there is no basis for overcoming the inference, drawn from the different physical properties, that the products are not "like". However, in keeping with its argument that this criterion is irrelevant, Canada presented *no* evidence on consumers' tastes and habits regarding chrysotile asbestos and PCG fibres.[130]

140. Finally, we note that chrysotile asbestos fibres and the various PCG fibres all have different tariff classifications. While this element is not, on its own, decisive, it does tend to indicate that chrysotile and PCG fibres are not "like products" under Article III:4 of the GATT 1994.

141. Taken together, in our view, all of this evidence is certainly far from sufficient to satisfy Canada's burden of proving that chrysotile asbestos fibres are "like" PCG fibres under Article III:4 of the GATT 1994. Indeed, this evidence rather tends to suggest that these products are not "like products" for the purposes of Article III:4 of the GATT 1994.

2. Cement-based products containing chrysotile and PCG fibres

142. We turn next to consider whether *cement-based products containing chrysotile asbestos fibres* are "like" *cement-based products containing PCG fibres* under Article III:4 of the GATT 1994. We begin, once again, with physical properties. In terms of composition, the physical properties of the different cement-based products appear to be relatively similar. Yet, there is one principal and significant difference between these products: one set of cement-based products contains a known carcinogenic fibre, while the other does not. The Panel concluded that the presence of chrysotile asbestos fibres in cement-based products poses "an undeniable public health risk".[131]

143. The Panel stated that the fibres give the cement-based products their specific function – "mechanical strength, resistance to heat, compression, etc."[132] These functions are clearly based on the physical properties of the products. There is no evidence of record to indicate whether the presence of chrysotile asbestos fibres, rather than PCG fibres, in a particular cement-based product, affects these particular physical properties of the products. For instance, a tile incorporating chrysotile asbestos fibres may be more heat resistant than a tile incorporating a PCG fibre.

144. In addition, there is no evidence to indicate to what extent the incorporation of one type of fibre, instead of another, affects the suitability of a particular cement-based product for a specific end-use.[133] Once again, it may be that tiles containing chrysotile asbestos fibres perform some end-uses, such as resistance to heat, more efficiently than tiles containing a PCG fibre. Thus, while we accept

[127] *Supra*, paras. 120 and 123.

[128] *Ibid.*

[129] Our reasons for reaching this conclusion are set forth, *supra*, in paras. 117, 118, 121 and 122.

[130] Canada did present evidence that the impact of the Decree was to reduce demand for chrysotile (Panel Report, paras. 3.20 and 3.422). However, as Canada recognized, this is a necessary consequence of the prohibition on chrysotile and is not evidence of consumers' attitudes and choices regarding the products at issue. As we have said, regulatory measures *may* suppress latent consumer demand for a product (*supra*, para. 123).

[131] Panel Report, para. 8.203.

[132] *Ibid.*, para. 8.145.

[133] *Supra*, para. 129.

that the two different types of cement-based products may perform largely similar end-uses, in the absence of evidence, we cannot determine whether each type of cement-based product can perform, with *equal* efficiency, *all* of the functions performed by the other type of cement-based product.

145. As with the fibres, Canada contends that evidence on consumers' tastes and habits concerning cement-based products is irrelevant. Accordingly, Canada submitted no such evidence to the Panel. We have dismissed Canada's arguments in support of this contention.[134] We have also indicated that it is of particular importance, under Article III of the GATT 1994, to examine evidence relating to competitive relationships in the marketplace.[135] We consider it likely that the presence of a known carcinogen in one of the products will have an influence on consumers' tastes and habits regarding that product.[136] It may be, for instance, that, although cement-based products containing chrysotile asbestos fibres are capable of performing the same functions as other cement-based products, consumers are, to a greater or lesser extent, not willing to use products containing chrysotile asbestos fibres because of the health risks associated with them. Yet, this is only speculation; the point is, there is no evidence. We are of the view that a determination on the "likeness" of the cement-based products cannot be made, under Article III:4, in the absence of an examination of evidence on consumers' tastes and habits. And, in this case, no such evidence has been submitted.

146. As regards tariff classification, we observe that, for any given cement-based product, the tariff classification of the product is the same.[137] However, this indication of "likeness" cannot, on its own, be decisive.

147. Thus, we find that, in particular, in the absence of any evidence concerning consumers' tastes and habits, Canada has not satisfied its burden of proving that cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing PCG fibres, under Article III:4 of the GATT 1994.

148. As Canada has not demonstrated either that chrysotile asbestos fibres are "like" PCG fibres, or that cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing PCG fibres, we conclude that Canada has not succeeded in establishing that the measure at issue is inconsistent with Article III:4 of the GATT 1994.

149. One Member of the Division hearing this appeal wishes to make a concurring statement. At the outset, I would like to make it abundantly clear that I agree with the findings and conclusions reached, and the reasoning set out in support thereof, by the Division, in: Section V (*TBT Agreement*); Section VII (Article XX(b) of the GATT 1994 and Article 11 of the DSU); Section VIII (Article XXIII:1(b) of the GATT 1994); and Section IX (Findings and Conclusions) of the Report. This concurring statement, in other words, relates only to Section VI ("Like Products" in Article III:4 of the GATT 1994) of the Report.

150. More particularly, in respect of Section VI of the Report, I join in the findings and conclusions set out in: paragraphs 116, 126, 128, 131, 132, 141, 147 and 148. I am bound to say that, in truth, I agree with a great deal more than just the bare findings and conclusions contained in these eight paragraphs of the Report. It is, however, as a practical matter, not feasible to sort out and identify which part of which paragraph, of the sixty-odd paragraphs comprising Section VI of our Report in which I join. Nor is it feasible to offer a detailed statement with respect to the portions that would then remain. Accordingly, I set out only two related matters below.

[134] *Supra*, paras. 120 and 123.

[135] *Supra*, para. 117.

[136] *Supra*, para. 130.

[137] Panel Report, para. 8.148.

151. In paragraph 113 of the Report, we state that "[w]e are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of 'likeness' under Article III:4 of the GATT 1994." We also point out, in paragraph 114, that "[p]anels must examine fully the physical properties of products. In particular, … those physical properties of products that are likely to influence the competitive relationship between products in the market place. In the cases of chrysotile asbestos fibres, their molecular structure, chemical composition, and fibrillation capacity are important because the microscopic particles and filaments of chrysotile asbestos fibres are carcinogenic in humans, following inhalation." This carcinogenicity we describe as "a defining aspect of the physical properties of chrysotile asbestos fibres"[138], which property is not shared by the PCG fibres, "at least to the same extent."[139] We express our inability to "see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of 'likeness' under Article III:4 of the GATT 1994."[140] (emphasis in the original) We observe also that the Panel, after noting that the carcinogenicity of chrysotile asbestos fibres has been acknowledged by international bodies and confirmed by the experts the Panel consulted, ruled that it "[has] sufficient evidence that *there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres*."[141] (emphasis added) In fact, the scientific evidence of record for this finding of carcinogenicity of chrysotile asbestos fibres is so clear, voluminous, and is confirmed, a number of times, by a variety of international organizations, as to be practically overwhelming.

152. In the present appeal, considering the nature and quantum of the scientific evidence showing that the physical properties and qualities of chrysotile asbestos fibres include or result in carcinogenicity, my submission is that there is ample basis for a definitive characterization, on completion of the legal analysis, of such fibres as *not* "like" PCG fibres. PCG fibres, it may be recalled, have not been shown by Canada to have the same lethal properties as chrysotile asbestos fibres. That definitive characterization, it is further submitted, may and should be made even in the absence of evidence concerning the other two *Border Tax Adjustments* criteria (categories of "potentially shared characteristics") of end-uses and consumers' tastes and habits. It is difficult for me to imagine what evidence relating to economic competitive relationships as reflected in end-uses and consumers' tastes and habits could outweigh and set at naught the undisputed deadly nature of chrysotile asbestos fibres, compared with PCG fibres, when inhaled by humans, and thereby compel a characterization of "likeness" of chrysotile asbestos and PCG fibres.

153. The suggestion I make is not that *any* kind or degree of health risk, associated with a particular product, would *a priori* negate a finding of the "likeness" of that product with another product, under Article III:4 of the GATT 1994. The suggestion is a very narrow one, limited only to the circumstances of this case, and confined to chrysotile asbestos fibres as compared with PCG fibres. To hold that these fibres are not "like" one another in view of the undisputed carcinogenic nature of chrysotile asbestos fibres appears to me to be but a small and modest step forward from mere reversal of the Panel's ruling that chrysotile asbestos and PCG fibres are "like", especially since our holding in completing the analysis is that Canada failed to satisfy a complainant's burden of proving that PCG fibres are "like" chrysotile asbestos fibres under Article III:4. That small step, however, the other Members of the Division feel unable to take because of their conception of the "fundamental", perhaps decisive, role of economic competitive relationships in the determination of the "likeness" of products under Article III:4.

154. My second point is that the necessity or appropriateness of adopting a "fundamentally" economic interpretation of the "likeness" of products under Article III:4 of the GATT 1994 does not

[138] *Supra*, para. 114.

[139] *Ibid.*

[140] *Ibid.*

[141] Panel Report, para. 8.188. See, *supra*, para. 114.

appear to me to be free from substantial doubt. Moreover, in future concrete contexts, the line between a "fundamentally" and "exclusively" economic view of "like products" under Article III:4 may well prove very difficult, as a practical matter, to identify. It seems to me the better part of valour to reserve one's opinion on such an important, indeed, philosophical matter, which may have unforeseeable implications, and to leave that matter for another appeal and another day, or perhaps other appeals and other days. I so reserve my opinion on this matter.

VII. Article XX(b) of the GATT 1994 and Article 11 of the DSU

155. Under Article XX(b) of the GATT 1994, the Panel examined, first, whether the use of chrysotile-cement products poses a risk to human health and, second, whether the measure at issue is "necessary to protect human … life or health". Canada contends that the Panel erred in law in its findings on both these issues. We will examine these two issues in turn before addressing Canada's appeal that the Panel failed to make an "objective assessment", under Article 11 of the DSU, in reaching its conclusions under Article XX(b) of the GATT 1994.

156. We recall that Article XX(b) of the GATT 1994 reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of *measures*:
>
> …
>
> (*b*) *necessary to protect human*, animal or plant *life or health*; (emphasis added)
>
> …

A. *"To Protect Human Life or Health"*

157. On the issue of whether the use of chrysotile-cement products poses a risk to human health sufficient to enable the measure to fall within the scope of application of the phrase "to protect human … life or health" in Article XX(b), the Panel stated that it "considers that the evidence before it *tends to show* that handling chrysotile-cement products constitutes a risk to health rather than the opposite."[142] (emphasis added) On the basis of this assessment of the evidence, the Panel concluded that:

[142] Panel Report, para. 8.193.

> … the EC has made a prima facie case for the existence of a health risk in connection with the use of chrysotile, in particular as regards lung cancer and mesothelioma in the occupational sectors downstream of production and processing and for the public in general in relation to chrysotile-cement products. This prima facie case has not been rebutted by Canada. Moreover, the Panel considers that the comments by the experts confirm the health risk associated with exposure to chrysotile in its various uses. *The Panel therefore considers that the EC have shown that the policy of prohibiting chrysotile asbestos implemented by the Decree falls within the range of policies designed to protect human life or health.* … [143] (emphasis added)

Thus, the Panel found that the measure falls within the category of measures embraced by Article XX(b) of the GATT 1994.

158. According to Canada, the Panel deduced that there was a risk to human life or health associated with manipulation of chrysotile-cement products from seven factors.[144] These seven factors all relate to the scientific evidence which was before the Panel, including the opinion of the scientific experts. Canada argues that the Panel erred in law by deducing from these seven factors that chrysotile-cement products pose a risk to human life or health.[145]

159. Although Canada does not base its arguments about these seven factors on Article 11 of the DSU, we bear in mind the discretion that is enjoyed by panels as the trier of facts. In *United States – Wheat Gluten*, we said:

> … in view of the distinction between the respective roles of the Appellate Body and panels, we have taken care to emphasize that a panel's appreciation of the evidence falls, in principle, "within the *scope of the panel's discretion as the trier of facts*". (emphasis added) In assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. As is clear from previous appeals, we will not interfere lightly with the panel's exercise of its discretion.[146]

160. In *Korea – Alcoholic Beverages*, we were faced with arguments that sought to cast doubt on certain studies relied on by the panel in that case. We stated:

[143]Panel Report, para. 8.194.

[144]Canada's appellant's submission, para. 170. The seven factors Canada relies upon are identified in para. 19 of this Report.

[145]Canada's appellant's submission, para. 171.

[146]*Supra*, footnote 48, para. 151.

> The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. This is true, for instance, with respect to the Panel's treatment of the Dodwell Study, the Sofres Report and the Nielsen Study. *We cannot second-guess the Panel in appreciating either the evidentiary value of such studies or the consequences, if any, of alleged defects in those studies.* Similarly, it is not for us to review the relative weight ascribed to evidence on such matters as marketing studies … [147] (emphasis added)

161. The same holds true in this case. The Panel enjoyed a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence. The Panel was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements – that is the essence of the task of appreciating the evidence.

162. With this in mind, we have examined the seven factors on which Canada relies in asserting that the Panel erred in concluding that there exists a human health risk associated with the manipulation of chrysotile-cement products. We see Canada's appeal on this point as, in reality, a challenge to the Panel's assessment of the credibility and weight to be ascribed to the scientific evidence before it. Canada contests the conclusions that the Panel drew both from the evidence of the scientific experts and from scientific reports before it. As we have noted, we will interfere with the Panel's appreciation of the evidence only when we are "satisfied that the panel has *exceeded the bounds of its discretion*, as the trier of facts, in its appreciation of the evidence."[148] (emphasis added) In this case, nothing suggests that the Panel exceeded the bounds of its lawful discretion. To the contrary, all four of the scientific experts consulted by the Panel concurred that chrysotile asbestos fibres, and chrysotile-cement products, constitute a risk to human health, and the Panel's conclusions on this point are faithful to the views expressed by the four scientists. In addition, the Panel noted that the carcinogenic nature of chrysotile asbestos fibres has been acknowledged since 1977 by international bodies, such as the International Agency for Research on Cancer and the World Health Organization.[149] In these circumstances, we find that the Panel remained well within the bounds of its discretion in finding that chrysotile-cement products pose a risk to human life or health.

163. Accordingly, we uphold the Panel's finding, in paragraph 8.194 of the Panel Report, that the measure "protect[s] human … life or health", within the meaning of Article XX(b) of the GATT 1994.

B. *"Necessary"*

164. On the issue of whether the measure at issue is "necessary" to protect public health within the meaning of Article XX(b), the Panel stated:

[147]*Supra*, footnote 58, para. 161.

[148]Appellate Body Report, *United States – Wheat Gluten*, *supra*, footnote 48, para. 151.

[149]Panel Report, para. 8.188.

> In the light of France's public health objectives as presented by the European Communities, the Panel concludes that the EC has made a prima facie case for the non-existence of a reasonably available alternative to the banning of chrysotile and chrysotile-cement products and recourse to substitute products. Canada has not rebutted the presumption established by the EC. We also consider that the EC's position is confirmed by the comments of the experts consulted in the course of this proceeding.[150]

165. Canada argues that the Panel erred in applying the "necessity" test under Article XX(b) of the GATT 1994 "by stating that there is a high enough risk associated with the manipulation of chrysotile-cement products that it could in principle justify strict measures such as the Decree."[151] Canada advances four arguments in support of this part of its appeal. First, Canada argues that the Panel erred in finding, on the basis of the scientific evidence before it, that chrysotile-cement products pose a risk to human health.[152] Second, Canada contends that the Panel had an obligation to "quantify" itself the risk associated with chrysotile-cement products and that it could not simply "rely" on the "hypotheses" of the French authorities.[153] Third, Canada asserts that the Panel erred by postulating that the level of protection of health inherent in the Decree is a halt to the spread of asbestos-related health risks. According to Canada, this "premise is false because it does not take into account the risk associated with the use of substitute products without a framework for controlled use."[154] Fourth, and finally, Canada claims that the Panel erred in finding that "controlled use" is not a reasonably available alternative to the Decree.

166. With respect to Canada's first argument, we note simply that we have already dismissed Canada's contention that the evidence before the Panel did not support the Panel's findings.[155] We are satisfied that the Panel had a more than sufficient basis to conclude that chrysotile-cement products do pose a significant risk to human life or health.

167. As for Canada's second argument, relating to "quantification" of the risk, we consider that, as with the *SPS Agreement*, there is no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health.[156] A risk may be evaluated either in quantitative or qualitative terms. In this case, contrary to what is suggested by Canada, the Panel assessed the nature and the character of the risk posed by chrysotile-cement products. The Panel found, on the basis of the scientific evidence, that "no minimum threshold of level of exposure or duration of exposure has been identified with regard to the risk of pathologies associated with chrysotile, except for asbestosis."[157] The pathologies which the Panel identified as being associated with chrysotile are of a very serious nature, namely lung cancer and mesothelioma, which is also a form of cancer.[158] Therefore, we do not agree with Canada that the Panel merely relied on the French authorities' "hypotheses" of the risk.

[150]Panel Report, para. 8.222.

[151]Canada's appellant's submission, para. 187.

[152]*Ibid.*, paras. 188 and 189.

[153]*Ibid.*, para. 193.

[154]*Ibid.*, para. 195.

[155]*Supra*, paras. 159-163.

[156]Appellate Body Report, *European Communities – Hormones*, *supra*, footnote 48, para. 186.

[157]Panel Report, para. 8.202.

[158]*Ibid.*, para. 8.188. See Panel Report, para. 5.29, for a description of mesothelioma given by Dr. Henderson.

168. As to Canada's third argument, relating to the level of protection, we note that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted[159], that the chosen level of health protection by France is a "halt" to the spread of *asbestos*-related health risks. By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection. Our conclusion is not altered by the fact that PCG fibres might pose a risk to health. The scientific evidence before the Panel indicated that the risk posed by the PCG fibres is, in any case, *less* than the risk posed by chrysotile asbestos fibres[160], although that evidence did *not* indicate that the risk posed by PCG fibres is non-existent. Accordingly, it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place. In short, we do not agree with Canada's third argument.

169. In its fourth argument, Canada asserts that the Panel erred in finding that "controlled use" is not a reasonably available alternative to the Decree. This last argument is based on Canada's assertion that, in *United States – Gasoline*, both we and the panel held that an alternative measure "can only be ruled out if it is shown to be impossible to implement."[161] We understand Canada to mean by this that an alternative measure is only excluded as a "reasonably available" alternative if implementation of that measure is "impossible". We certainly agree with Canada that an alternative measure which is impossible to implement is not "reasonably available". But we do not agree with Canada's reading of either the panel report or our report in *United States – Gasoline*. In *United States – Gasoline*, the panel held, in essence, that an alternative measure did not *cease* to be "reasonably" available simply because the alternative measure involved *administrative difficulties* for a Member.[162] The panel's findings on this point were not appealed, and, thus, we did not address this issue in that case.

170. Looking at this issue now, we believe that, in determining whether a suggested alternative measure is "reasonably available", several factors must be taken into account, besides the difficulty of implementation. In *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, the panel made the following observations on the applicable standard for evaluating whether a measure is "necessary" under Article XX(b):

> The import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could *reasonably be expected to employ to achieve its health policy objectives*.[163] (emphasis added)

171. In our Report in *Korea –Beef*, we addressed the issue of "necessity" under Article XX(d) of the GATT 1994.[164] In that appeal, we found that the panel was correct in following the standard set forth by the panel in *United States – Section 337 of the Tariff Act of 1930*:

> It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with

[159]*Ibid.*, para. 8.204.

[160]*Ibid.*, para. 8.220.

[161]Canada's appellant's submission, para. 202, referring to, *inter alia*, para. 130 of that submission.

[162]See Panel Report, *United States – Gasoline*, *supra*, footnote 15, paras. 6.26 and 6.28.

[163]Adopted 20 February 1990, BISD 37S/200, para. 75.

[164]*Supra*, footnote 49, paras. 159 ff.

> other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[165]

172. We indicated in *Korea – Beef* that one aspect of the "weighing and balancing process … comprehended in the determination of whether a WTO-consistent alternative measure" is reasonably available is the extent to which the alternative measure "contributes to the realization of the end pursued".[166] In addition, we observed, in that case, that "[t]he more vital or important [the] common interests or values" pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends.[167] In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.

173. Canada asserts that "controlled use" represents a "reasonably available" measure that would serve the same end. The issue is, thus, whether France could reasonably be expected to employ "controlled use" practices to achieve its chosen level of health protection – a halt in the spread of asbestos-related health risks.

174. In our view, France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to "halt". Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of "controlled use" remains to be demonstrated.[168] Moreover, even in cases where "controlled use" practices are applied "with greater certainty", the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a "significant residual risk of developing asbestos-related diseases."[169] The Panel found too that the efficacy of "controlled use" is particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos.[170] Given these factual findings by the Panel, we believe that "controlled use" would not allow France to achieve its chosen level of health protection by halting the spread of asbestos-related health risks. "Controlled use" would, thus, not be an alternative measure that would achieve the end sought by France.

175. For these reasons, we uphold the Panel's finding, in paragraph 8.222 of the Panel Report, that the European Communities has demonstrated a *prima facie* case that there was no "reasonably available alternative" to the prohibition inherent in the Decree. As a result, we also uphold the Panel's conclusion, in paragraph 8.223 of the Panel Report, that the Decree is "necessary to protect human … life or health" within the meaning of Article XX(b) of the GATT 1994.

[165] Adopted 7 November 1989, BISD 36S/345, para. 5.26; we expressly affirmed this standard in our Report in *Korea – Beef*, *supra*, footnote 49, para. 166.

[166] Appellate Body Report, *Korea – Beef*, *supra*, footnote 49, paras. 166 and 163.

[167] *Ibid.*, para. 162.

[168] Panel Report, para. 8.209.

[169] *Ibid.*, paras. 8.209 and 8.211.

[170] *Ibid.*, paras. 8.213 and 8.214.

C. *Article 11 of the DSU*

176. As part of its argument that the Panel erred in finding that the measure is justified under Article XX(b) of the GATT 1994, Canada also asserts that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU. According to Canada, the requirement imposed on panels by Article 11 to make an objective assessment of the matter implies "that scientific data must be assessed in accordance with the principle of the balance of probabilities."[171] In particular, Canada asserts that, where the evidence is divergent or contradictory, the "principle of the preponderance of evidence" implies that a panel must take a position as to the respective weight of the evidence.[172] Canada also contends that the Panel failed to assess the facts objectively because the Panel accepted "the opinions of experts on the controlled use of chrysotile, when those experts had no controlled-use expertise."[173]

177. These arguments by Canada on the "balance of probabilities" and the "preponderance of evidence" concern the credibility and weight that the Panel ascribed to different elements of evidence.[174] In essence, Canada argues that the Panel has not taken sufficient account of certain evidence and that the Panel has placed too much weight on certain other evidence. Thus, Canada is challenging the Panel's exercise of discretion in assessing and weighing the evidence. As we have already noted, "[w]e cannot second-guess the Panel in appreciating either the evidentiary value of … studies or the consequences, if any, of alleged defects in [the evidence]".[175] And, as we have already said, in this case, the Panel's appreciation of the evidence remained well within the bounds of its discretion as the trier of facts.

178. In addition, in the context of the *SPS Agreement*, we have said previously, in *European Communities – Hormones*, that "responsible and representative governments may act in good faith on the basis of what, at a given time, may be a *divergent* opinion coming from qualified and respected sources."[176] (emphasis added) In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the "preponderant" weight of the evidence.

179. With regard to Canada's argument that certain of the experts lacked expertise in "controlled use", we note that, from the beginning of the process for the selection of experts, the Panel made clear that it wished to consult experts on the "effectiveness of the controlled use of chrysotile."[177] The selection of the experts was the subject of a rigorous procedure which involved the consultation of five institutions with experience in this field and also of the parties.[178] At no stage did Canada object to the selection of any of the experts, nor indicate that any of them was unqualified to deal with issues relating to "controlled use".[179] We also note that the experts were instructed by the Panel to answer

[171] Canada's appellant's submission, para. 204.

[172] *Ibid.*

[173] *Ibid.*, para. 209.

[174] *Ibid.*, para. 204.

[175] Appellate Body Report, *Korea – Alcoholic Beverages*, *supra*, footnote 58, para. 161. See, *supra*, para. 160.

[176] *Supra*, footnote 48, para. 194.

[177] Panel Report, para. 5.1.

[178] *Ibid.*, para. 5.20.

[179] *Ibid.*

only those questions that fell within their area of expertise.[180] As Canada indicates, several experts indicated that particular questions, or parts of questions, posed to them went beyond their area of expertise.[181]

180. In these circumstances, we have serious difficulty accepting that the Panel failed to make an objective assessment by relying on experts who had no expertise. The Panel was entitled to assume that the experts possessed the necessary expertise to answer the questions, or parts of questions, they chose to answer. In other words, it was not incumbent on the Panel expressly to confirm, with respect to every opinion expressed by each expert, that the expert possessed the necessary expertise to give that particular opinion. If Canada thought that one of the experts did not possess the expertise necessary to answer certain questions posed to him, Canada should have raised those concerns, either with the expert, at the meeting the Panel held with the parties and the experts on 17 January 2000, or with the Panel at some other time. We observe, finally, that, where an expert declined to answer a specific question, or part of a question, because of a professed lack of expertise, the Panel had no opinion from that expert on which to rely.

181. For these reasons, we decline Canada's appeal on Article 11 of the DSU.

VIII. Article XXIII:1(b) of the GATT 1994

182. Before the Panel, Canada claimed, under Article XXIII:1(b) of the GATT 1994, that the application of the measure at issue nullified or impaired benefits accruing to Canada. The European Communities raised preliminary objections, arguing on two grounds that the measure falls outside the scope of application of Article XXIII:1(b). First, the European Communities contended that Article XXIII:1(b) only applies to measures which *do not otherwise fall* under other provisions of the GATT 1994.[182] Second, the European Communities argued that, while it may be possible to have "legitimate expectations" in connection with a purely "commercial" measure, it is not possible to claim "legitimate expectations" with respect to a measure taken to protect human life or health, which can be justified under Article XX(b) of the GATT 1994. Such measures are, the European Communities asserted, excluded from the scope of Article XXIII:1(b).[183]

183. Before examining the substance of Canada's claim under Article XXIII:1(b) of the GATT 1994, the Panel first considered, and rejected, both of these preliminary objections raised by the European Communities, and found, as a consequence, that Canada could invoke Article XXIII:1(b) in respect of the measure.[184] The European Communities appeals the Panel's findings and conclusions relating to the two preliminary objections.

184. Before considering this aspect of the appeal, we note that the Panel went on to examine the substance of Canada's claim under Article XXIII:1(b) and concluded that Canada had not established "the existence of nullification or impairment of a benefit within the meaning of Article XXIII:1(b) of the GATT 1994 as a result of the application of the measure".[185] We note also that this ultimate conclusion by the Panel has not been appealed by either party. Accordingly, we address only the two

[180] *Ibid.*, para. 5.22.

[181] Canada's appellant's submission, para. 211, footnote 219, referring to Panel Report, paras. 5.335, 5.345, 5.346, 5.353, 5.363, 5.364, 5.370, 5.371, and 5.374, and to Annex VI of the Panel Report, para. 222.

[182] Panel Report, para. 8.255.

[183] *Ibid.*, para. 8.257.

[184] *Ibid.*, paras. 8.265 and 8.274.

[185] *Ibid.*, para. 8.304.

narrow issues that have been appealed by the European Communities, and we will not address any other aspects of the Panel's findings under Article XXIII:1(b) of the GATT 1994.

185. This appeal is our first occasion to examine Article XXIII:1(b) of the GATT 1994. For this reason, before turning to the appeal by the European Communities, it seems to us useful to make certain preliminary observations about the relationship between Articles XXIII:1(a) and XXIII:1(b) of the GATT 1994. Article XXIII:1(a) sets forth a cause of action for a claim that a Member has failed to carry out one or more of its obligations under the GATT 1994. A claim under Article XXIII:1(a), therefore, lies when a Member is alleged to have acted inconsistently with a provision of the GATT 1994. Article XXIII:1(b) sets forth a separate cause of action for a claim that, through the application of a measure, a Member has "nullified or impaired" "benefits" accruing to another Member, "whether or not that measure conflicts with the provisions" of the GATT 1994. Thus, it is not necessary, under Article XXIII:1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994. Cases under Article XXIII:1(b) are, for this reason, sometimes described as "non-violation" cases; we note, though, that the word "non-violation" does not appear in this provision. The purpose of this rather unusual remedy was described by the panel in *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* ("*EEC – Oilseeds*") in the following terms:

> The idea underlying [the provisions of Article XXIII:1(b)] is that *the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement*. In order *to encourage contracting parties to make tariff concessions* they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.[186] (emphasis added)

186. Like the panel in *Japan – Measures Affecting Consumer Photographic Film and Paper* ("*Japan – Film*"), we consider that the remedy in Article XXIII:1(b) "should be approached with caution and should remain an exceptional remedy".[187] That panel stated:

[186] Adopted 25 January 1990, BISD 37S/86, para. 144.

[187] Adopted 22 April 1998, WT/DS44/R, para. 10.37.

> Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been "on the books" for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims. This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC – Oilseeds* case, and the two parties in this case, have confirmed that *the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept.* The reason for this caution is straightforward. *Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.*[188] (emphasis added)

187. Against this background, we turn now to the European Communities' argument that Article XXIII:1(b) does not apply to measures that fall within the scope of application of other provisions of the GATT 1994. The text of Article XXIII:1(b) stipulates that a claim under that provision arises when a "benefit" is being "nullified or impaired" through the "application … of any measure, *whether or not it conflicts with the provisions of this Agreement*". (emphasis added) The wording of the provision, therefore, clearly states that a claim may succeed, under Article XXIII:1(b), *even if the measure "conflicts" with some substantive provisions of the GATT 1994*. It follows that a measure may, *at one and the same time*, be inconsistent with, or in breach of, a provision of the GATT 1994 *and*, nonetheless, give rise to a cause of action under Article XXIII:1(b). Of course, if a measure "conflicts" with a provision of the GATT 1994, that measure must actually fall within the scope of application of that provision of the GATT 1994. We agree with the Panel that this reading of Article XXIII:1(b) is consistent with the panel reports in *Japan – Film* and *EEC – Oilseeds*, which both support the view that Article XXIII:1(b) applies to measures which simultaneously fall within

[188]*Supra,* footnote 187, para. 10.36. Claims under Article XXIII:1(b) have been considered in the following reports: Working Party Report, *Australia – Ammonium Sulphate*, *supra*, footnote 58; Panel Report, *Germany – Sardines*, *supra*, footnote 58; Panel Report, *Uruguayan Recourse to Article XXIII*, adopted 16 November 1962, BISD 11S/95; Panel Report, *Spain – Soyabean*, *supra*, footnote 58; Panel Report, *European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* ("*EC – Citrus Products*"), L/5776, 7 February 1985, unadopted; Panel Report, *European Economic Community – Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes* ("*EEC – Canned Fruit*"), L/5778, 20 February 1985, unadopted; Panel Report, *Japan – Trade in Semi-Conductors*, adopted 4 May 1988, BISD 35S/116; Panel Report, *United States – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986, unadopted; Panel Report, *EEC – Oilseeds*, *supra*, footnote 186; Panel Report, *United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions*, adopted 7 November 1990, BISD 37S/228; Panel Report, *Japan – Film*, *supra*, footnote 187; Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000. We note that claims under Article XXIII:1(b) of the GATT 1947 were also examined in the Panel Report, *European Economic Community – Follow-up on the Panel Report, Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* ("*EEC – Oilseeds II*"), 31 March 1992, BISD 39S/91, unadopted.

Including *EEC – Oilseeds II*, and the present dispute, there have, therefore, been 14 cases in which a claim under Article XXIII:1(b) has been considered by working parties, panels, and, now, the Appellate Body. In six of these cases, the claim under Article XXIII:1(b) was successful and, on three of these occasions, the report was adopted. The successful claims were made in: *Australia – Ammonium Sulphate* (adopted 3 April 1950), *Germany – Sardines* (adopted 31 October 1952), *EC – Citrus Products* (unadopted), *EEC – Canned Fruit* (unadopted), *EEC – Oilseeds* (adopted 25 January 1990) and *EEC – Oilseeds II* (unadopted).

the scope of application of other provisions of the GATT 1994.[189] Accordingly, we decline the European Communities' first ground of appeal under Article XXIII:1(b) of the GATT 1994.

188. The European Communities also contends that the Panel erred in finding that Article XXIII:1(b) applies to measures which pursue health, rather than commercial, objectives and which can, therefore, be justified under Article XX(b) of the GATT 1994. Once again, we look to the text of Article XXIII:1(b), which provides that "the application by another Member of *any measure*" may give rise to a cause of action under that provision. The use of the word "any" suggests that measures of all types may give rise to such a cause of action. The text does not distinguish between, or exclude, certain types of measure. Clearly, therefore, the text of Article XXIII:1(b) contradicts the European Communities' argument that certain types of measure, namely, those with health objectives, are excluded from the scope of application of Article XXIII:1(b).

189. In any event, an attempt to draw the distinction suggested by the European Communities between so-called health and commercial measures would be very difficult in practice. By definition, measures which affect trade in goods, and which are subject to the disciplines of the GATT 1994, have a commercial impact. At the same time, the health objectives of many measures may be attainable only by means of commercial regulation. Thus, in practice, clear distinctions between health and commercial measures may be very difficult to establish. Nor do we see merit in the argument that, previously, only "commercial" measures have been the subject of Article XXIII:1(b) claims, as that does not establish that a claim *cannot* be made under Article XXIII:1(b) regarding a "non-commercial" measure.

190. An important aspect of the European Communities' argument is that a Member cannot have reasonable expectations of continued market access for products which are shown to pose a serious risk to human life or health. However, the paragraphs of the Panel Report appealed by the European Communities involve *exclusively* the Panel's findings on the threshold issues of the scope of application of Article XXIII:1(b). This particular argument of the European Communities, important as it is, simply does not relate to those threshold issues. Rather, the European Communities' argument relates to the substance of a claim that has been determined to fall within the scope of application of Article XXIII:1(b) and, in particular, concerns the issue whether a "benefit" has been "nullified or impaired" by a measure restricting market access for products posing a health risk. Here, we emphasize that the European Communities does *not* appeal the Panel's findings relating to the "nullification or impairment" of a "benefit" through the frustration of reasonable expectations by application of the measure at issue. We do not, therefore, find it necessary to examine the European Communities' argument relating to reasonable expectations.

191. For these reasons, we dismiss the European Communities' appeal under Article XXIII:1(b) of the GATT 1994 and uphold the Panel's finding that Article XXIII:1(b) applies to measures which fall within the scope of application of other provisions of the GATT 1994 and which pursue health objectives.

IX. Findings and Conclusions

192. For the reasons set out in this Report, the Appellate Body:

(a) reverses the Panel's finding, in paragraph 8.72(a) of the Panel Report, that the *TBT Agreement* "does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a 'technical regulation' within the meaning of Annex 1.1 to the

[189]See Panel Report, para. 8.263, which refers to the Panel Report in *Japan – Film*, *supra*, footnote 187, para. 10.50, and footnote 1214; and *EEC – Oilseeds*, *supra*, footnote 186, para. 144.

TBT Agreement", and finds that the measure, viewed as an integrated whole, does constitute a "technical regulation" under the *TBT Agreement*;

(b) reverses the Panel's findings, in paragraphs 8.132 and 8.149 of the Panel Report, that "it is not appropriate" to take into consideration the health risks associated with chrysotile asbestos fibres in examining the "likeness", under Article III:4 of the GATT 1994, of those fibres and PCG fibres, and, also, in examining the "likeness", under that provision, of cement-based products containing chrysotile asbestos fibres or PCG fibres;

(c) reverses the Panel's finding, in paragraph 8.144 of the Panel Report, that chrysotile asbestos fibres and PCG fibres are "like products" under Article III:4 of the GATT 1994; and finds that Canada has not satisfied its burden of proving that these fibres are "like products" under that provision;

(d) reverses the Panel's finding, in paragraph 8.150 of the Panel Report, that cement-based products containing chrysotile asbestos fibres and cement-based products containing PCG fibres are "like products" under Article III:4 of the GATT 1994; and finds that Canada has not satisfied its burden of proving that these cement-based products are "like products" under Article III:4 of the GATT 1994;

(e) reverses, in consequence, the Panel's finding, in paragraph 8.158 of the Panel Report, that the measure is inconsistent with Article III:4 of the GATT 1994;

(f) upholds the Panel's finding, in paragraphs 8.194, 8.222 and 8.223 of the Panel Report, that the measure at issue is "necessary to protect human … life or health", within the meaning of Article XX(b) of the GATT 1994; and, finds that the Panel acted consistently with Article 11 of the DSU in reaching this conclusion;

(g) upholds the Panel's finding, in paragraphs 8.265 and 8.274 of the Panel Report, that the measure may give rise to a cause of action under Article XXIII:1(b) of the GATT 1994.

193. It follows from our findings that Canada has not succeeded in establishing that the measure at issue is inconsistent with the obligations of the European Communities under the covered agreements and, accordingly, we do not make any recommendations to the DSB under Article 19.1 of the DSU.

Report of the Appellate Body, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, adopted 11 December 2000

WORLD TRADE ORGANIZATION

WT/DS161/AB/R
WT/DS169/AB/R
11 December 2000

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KOREA – MEASURES AFFECTING IMPORTS OF FRESH, CHILLED AND FROZEN BEEF

AB-2000-8

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef

Korea, *Appellant*
Australia, *Appellee*
United States, *Appellee*

Canada, *Third Participant*
New Zealand, *Third Participant*

AB-2000-8

Present:

Ehlermann, Presiding Member
Abi-Saab, Member
Feliciano, Member

I. Introduction

1. Korea appeals certain issues of law and legal interpretations in the Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (the "Panel Report").[1] The Panel was established to consider a complaint by Australia and the United States with respect to Korean measures that affect the importation of certain beef products. The aspects of these measures relevant for this appeal relate to, first, domestic support provided to the beef industry and to the Korean agriculture sector more generally, and, second, the separate retail distribution channels that exist for certain imported and domestic beef products (the so-called "dual retail system") and related measures. The dual retail system is given legal effect by the *Management Guideline for Imported Beef* (the "*Management Guideline*").[2] The factual aspects of this dispute are described in detail in paragraphs 8 through 29 of the Panel Report.

2. The Panel considered claims by Australia that the requirements imposed on the retail sale of imported beef are contrary to Articles III and XI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"); that the tendering process adopted by the Livestock Products Marketing Organization (the "LPMO") results in quantitative restrictions being applied to grass-fed beef, contrary to Articles II:1, III:4, XI:1 and XVII of the GATT 1994; that discharge procedures for LPMO beef are contrary to Articles III, XI and XVII of the GATT 1994 and Article 4.2 of the *Agreement on Agriculture*; that restrictions on sales of beef imported by the LPMO are contrary to Article III:4 of the GATT 1994; that Korea applies a mark-up on beef imported under the "Simultaneous Buy/Sell" ("SBS") system which is inconsistent with Korea's obligations under Articles II or III of the GATT 1994; that the SBS system applies limitations on the import and distribution of imported beef, and imposes labelling, reporting and record-keeping requirements, that

[1]WT/DS161/R, WT/DS169/R, 31 July 2000.

[2]The essential features of the Korean dual retail system for beef are found in the *Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores,* (61550-81) 29 January 1990, modified on 15 March 1994; and the *Regulations Concerning Sales of Imported Beef,* (51550-100), modified on 27 March 1993, 7 April 1994, and 29 June 1998. On 1 October 1999, these two instruments were replaced by the *Management Guideline for Imported Beef*, (Ministry of Agriculture Notice 1999-67), which maintained, however, the basic principles of the dual retail system. The *Management Guideline* is an elaboration of Article 25 of the *Livestock Act (Revised)*, as amended by Act No. 5720 on 29 January 1999.

are contrary to Articles III and XI of the GATT 1994; and that, in 1997, Korea provided domestic support to its beef industry which resulted in Korea's Current Total Aggregate Measurement of Support ("AMS") for 1997 being in excess of its reduction commitments for that year, contrary to Articles 3, 6 and 7 of the *Agreement on Agriculture*.[3]

3. The Panel also considered claims by the United States that Korea's requirement that imported beef be sold only in specialized imported beef stores, and its laws and regulations restricting the resale and distribution of imported beef by SBS super-groups, retailers, customers, and end-users are inconsistent with its obligations under Article III:4 of the GATT 1994; that Korea's discretionary import regime, as well as the LPMO's establishment of minimum import prices and delay of both invitations to tender as well as quota allocations, are inconsistent with its obligations under Article XI:1 of the GATT 1994, Article 4.2 of the *Agreement on Agriculture*, and Articles 1 and 3 of the *Agreement on Import Licensing Procedures*; that Korea's imposition of other duties or charges in the form of a mark-up not provided for in Korea's Schedule LX is inconsistent with its obligations under Article II:1 of the GATT 1994; and that Korea has failed to fulfill its reduction commitment for domestic support for 1997 and 1998, and has, thus, acted inconsistently with its obligations under Articles 3, 6, and 7 of the *Agreement on Agriculture*.[4]

4. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 31 July 2000.

5. The Panel concluded that certain of the measures at issue are included in "the remaining restrictions" within the meaning of Note 6(e) of Korea's Schedule and thus benefit from a transitional period until 1 January 2001, by which date they shall be eliminated or otherwise brought into conformity with the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"); that the dual retail system for beef (including the obligation for department stores and supermarkets authorized to sell imported beef to hold a separate display, and the obligation for foreign beef shops to bear a sign with the words "Specialized Imported Beef Store") is inconsistent with the provisions of Article III:4 of the GATT 1994 in that it treats imported beef less favourably than domestic beef, and cannot be justified pursuant to Article XX(d) of the GATT 1994; that the requirement that the supply of beef from the LPMO's wholesale market be limited to specialized imported beef stores is inconsistent with Article III:4 of the GATT 1994 and cannot be justified pursuant to Article XX(d) of the GATT 1994; that the imposition of more stringent record-keeping requirements on those who purchase foreign beef imported by the LPMO than on those who purchase domestic beef is inconsistent with Article III:4 of the GATT 1994; that the prohibition against cross-trading between end-users of the SBS system is inconsistent with Article III:4 of the GATT 1994; that any additional labelling requirements imposed on foreign beef imported through the SBS system that are not also imposed on domestic beef, such as the requirement that the end-consumer, the contract number and super-group importer be identified and indicated on the imported beef, are inconsistent with Article III:4 of the GATT 1994; that the LPMO's lack of, and delays in, calling for tenders, and its discharge practices between November 1997 and the end of May 1998, constitute import restrictions on foreign beef, inconsistent with Article XI of the GATT 1994, and the same practices are also inconsistent with Article 4.2 of the *Agreement on Agriculture* and its footnote; that even if the LPMO had not had monopoly rights over the import and distribution of its share of Korea's beef import, the LPMO's lack of, and delays in, calling for tenders during the same period constituted an import restriction inconsistent with Article XI of the GATT 1994 through the application of the Ad Note to Articles XI, XII, XIII, XIV and XVIII of the GATT 1994, and that the LPMO's discharge practices during the same period were inconsistent with Article XVII:1(a) of the GATT 1994; that the LPMO's calls for tenders that are made subject to grass-fed or grain-fed distinctions impose import

[3]Panel Report, para. 49.

[4]*Ibid.*, para. 51.

restrictions inconsistent with Article XI of the GATT 1994, and treat imports of grass-fed beef less favourably than is provided for in Korea's Schedule, contrary to Article II:1(a) of the GATT 1994; that Korea's domestic support for beef for 1997 and 1998 was not correctly calculated and exceeded the *de minimis* level, contrary to Article 6 of the *Agreement on Agriculture*, and was not included in Korea's Current Total AMS, contrary to Article 7.2(a) of the *Agreement on Agriculture*; that Korea's total domestic support (Current Total AMS) for 1997 and 1998 exceeded Korea's commitment levels, as specified in Part IV, Section I of its Schedule, contrary to Article 3.2 of the *Agreement on Agriculture*.[5]

6. The Panel recommended that the Dispute Settlement Body ("DSB") request Korea to bring its measures into conformity with its obligations under the *WTO Agreement*.[6]

7. On 11 September 2000, Korea notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 21 September 2000, Korea filed its appellant's submission.[7] On 6 October 2000, Australia and the United States[8] each filed an appellee's submission. On the same day, Canada and New Zealand each filed a third participant's submission.[9]

8. The oral hearing in the appeal was held on 23 and 24 October 2000. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. Korea – Appellant

1. Terms of Reference

9. Korea claims that the Panel erred by making two findings that were outside its terms of reference. First, the Panel erred by ruling on Part IV, Section I of Korea's Schedule LX, in particular by considering which set of numbers in Schedule LX constitutes Korea's commitment levels. Neither the United States nor Australia challenged Korea's Schedule LX in their requests for the establishment of a panel. As Schedule LX is not mentioned in these panel requests, the complaining parties have not met the "minimum prerequisite" established by the Appellate Body for panel requests under Article 6.2 of the DSU, that treaty provisions claimed to have been violated must be identified, and, therefore, Korea should be considered *per se* to have suffered prejudice.

10. Second, neither the United States nor Australia, in their panel requests, identified Annex 3 of the *Agreement on Agriculture* as a treaty provision claimed to have been violated in the context of Korea's calculation methodology for domestic support to the cattle industry. Consequently, the Panel acted outside its terms of reference when it ruled that Annex 3 provided the basis for calculating Korea's current domestic support for beef. Further, the complaining parties have not met the

[5]Panel Report, para. 845.

[6]Panel Report, para. 847.

[7]Pursuant to Rule 21(1) of the *Working Procedures*.

[8]Pursuant to Rule 22 of the *Working Procedures*.

[9]Pursuant to Rule 24 of the *Working Procedures*.

"minimum prerequisite" established by the Appellate Body for panel requests under Article 6.2 of the DSU.

2. Domestic Support Under the *Agreement on Agriculture*

11. Korea believes the Panel erred in finding that, by virtue of Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture*, Korea is bound by the provisions of Annex 3 of that Agreement in its calculation of Current AMS for beef, since it did not have any "constituent data and methodology" for beef in its Schedule. The Panel's interpretation of Articles 1(a)(ii) and 1(h)(ii) leads to an unfair outcome and ignores the object and purpose of the *Agreement on Agriculture*. WTO Members' Schedules on the reduction of subsidies for agricultural products can be understood as multi-year equations. One side of the equation includes the commitment level for a given year, while the other side of the equation includes the actual AMS provided for the same year. Thus, for the equation to be meaningful, both sides of the equation should be based on the same set of data and methodology. Using one methodology for commitment levels and another methodology for actual AMS undermines comparability between the two, and leads to unfair results. All the commitment levels set out in Korea's Schedule and all the actual AMS provided by Korea are calculated on the basis of a consistent methodology, which relies on the base years of 1989-1991 (with an exception for rice) and an "actual purchase" definition of eligible production. However, according to the Panel's ruling, Korea should calculate its Current AMS for beef according to different base years and a different definition of eligible production than was used for calculating commitment levels. Korea argues that this leads to unfair results.

12. Furthermore, Korea contends the Panel's interpretation would frustrate the object and purpose of the *Agreement on Agriculture*, which is, in part, to provide for substantial progressive reduction in agricultural support and protection over an agreed period of time. The Panel's interpretation would make it impossible correctly to determine whether a Member has abided by its reduction commitments or not.

13. Moreover, the Panel's interpretation of Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture* would render inutile important parts of these provisions. If the calculation methods of Annex 3 were mandatory, as the Panel suggests, the reference in Articles 1(a)(ii) and 1(h)(ii) to the constituent data and methodology in the tables of supporting material would be reduced to redundancy and inutility. The Panel found that support to Korea's cattle industry should be calculated solely on the basis of Annex 3, because support to the cattle industry was not included in Korea's Schedule. However, Articles 1(a)(ii) and 1(h)(ii) do not make a distinction between products which are already contained in the Schedule of a Member and those which are not.

14. In addition, in Korea's view, the Panel erred in finding that Korea's annual AMS commitment levels in its Schedule LX were not the figures in brackets, but rather the figures not in brackets. The Panel was fundamentally in error when it found that "Korea did not identify" which of the two sets of figures for annual commitment levels (figures in brackets or figures not in brackets) constitutes Korea's obligation. The Panel failed to apply the general rule of interpretation expressed in Article 31 of the *Vienna Convention on the Law of Treaties*[10] (the "*Vienna Convention*") by not taking into account the context of the terms of Korea's Schedule LX, in particular Note 1 to Korea's Schedule LX, which refers to Note 1 of Supporting Table 6. In addition, the Panel's finding on this point would reduce the figures in brackets, Note 1 to Schedule LX, and Note 1 in Supporting Table 6 to inutility, again contrary to the customary rules of treaty interpretation and previous Appellate Body rulings.

15. Korea also submits that Korea's commitment levels were "public knowledge". Korea's Schedule, including Part IV, Section I, was reviewed by all the negotiating parties during the Uruguay

[10]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

Round. Also, the amount of Korea's subsidy to agricultural products was notified to the Committee on Agriculture every year since 1996. In each notification, Korea used the figures within brackets as Korea's commitment level for the given year. Korea considers that its consistent and amply documented position on this issue has been a matter of public record since 1996 and the very first meeting of the Committee on Agriculture to review Members' notifications under the *Agreement on Agriculture*. Thus, the "subsequent practice" of the parties following the Uruguay Round sustains Korea's position on this point of interpretation. Korea also believes that its position is supported by the manner in which the United States and Australia treated this issue in their first submissions to the Panel.

3. Dual Retail System

(a) Article III:4 of the GATT 1994

16. To Korea, the Panel fundamentally misinterpreted and misapplied Article III:4 of the GATT 1994 when it concluded that the dual retail system maintained by Korea is inconsistent with that provision. Article III:4 requires that WTO Members provide equal conditions of competition to both domestic and foreign like products. Article III:4 is an "obligation of result": the result that must be achieved is "no less favourable treatment for foreign goods". The particular method of achieving this result is irrelevant. Article III:4 neither imposes nor prohibits any particular means that Members employ to provide equal conditions of competition. According to Korea, its dual retail system does provide "no less favourable treatment to foreign goods", and, therefore, achieves the result required by Article III:4. The Panel erroneously concluded that the dual retail system "constitutes in itself differential treatment."

17. Korea submits that a proper analysis of Korea's obligation under Article III:4 requires review of both *de jure* and *de facto* discrimination. The dual retail system does not amount to either *de jure* or *de facto* discrimination. With regard to *de jure* discrimination, Korea's dual retail system assures perfect regulatory symmetry between imports and domestic products. Imported beef is sold only in stores that choose to sell imported beef, and domestic beef is sold only in stores choosing to sell domestic beef. In addition, there is total freedom on the part of retailers to switch from one category of shops to the other. Thus, the Panel failed to demonstrate that there is any discrimination "demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument," the standard for a finding of *de jure* discrimination.

18. To demonstrate the presence or absence of *de facto* discrimination, the Panel should have undertaken an analysis of the market as part of an examination of the "total configuration of the facts". Instead, the Panel resorted to "speculation". An examination of the facts of the Korean beef market demonstrates that imported and domestic goods experience equal competitive conditions. The absence of such a factual analysis means that the Panel's finding on the dual retail system under Article III:4 is in error.

19. Korea also argues that the Panel erred in finding the display sign requirement to be inconsistent with Article III:4. The first ground offered by the Panel is that the display sign requirement would necessarily be inconsistent with Article III:4 since the dual retail system had already been found to be inconsistent. However, the Panel itself stated that the display sign requirement is a related measure "which the Panel addresses separately in Section 3 thereinafter." In other words, the Panel did not include the display sign requirement in its review of the dual retail system.

20. The second ground cited by the Panel is that the display sign requirement goes beyond the indication of origin of goods. Quoting from a 1956 Working Party Report, the Panel argues that such requirements are inconsistent with Article III:4 of the GATT. To Korea, the legal status of this report

is unclear. The language of the report suggests that it was not intended to be binding or to provide an authoritative interpretation of the GATT.

(b) Article XX(d) of the GATT 1994

21. Should the Appellate Body disagree with Korea's claim that the dual retail system is consistent with Article III:4, then Korea submits that the Panel erred in ruling that the dual retail system was not justified under Article XX(d) of the GATT 1994.

22. The Panel found that Korea did not apply a dual retail system for other products in respect of which fraudulent sales have occurred. According to the Panel, such failure was evidence that the dual retail system was not "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement" under Article XX(d). Korea submits that to decide whether a particular measure is necessary under Article XX(d), panels must simply examine whether another means exists which is less restrictive than the one used, and which can reach the objective sought. Consistency among regulations applicable to different products is irrelevant for establishing whether the means chosen by a WTO Member is necessary to achieve the objective of the regulation.

23. Furthermore, the Panel, in analyzing alternative, less restrictive means, did not take into account the level of enforcement sought. Korea's goal is not simply the "reduction or limitation" of deceptive practices, but their "elimination". The Panel considered four less trade-restrictive alternatives, which are investigations, fines, record-keeping and policing. In view of the fact that all four alternatives already comprise a package of policy tools used by Korea, along with the dual retail system, the Panel should have examined the facts to see whether, if the dual retail system were withdrawn, Korea's regulatory goal of the *elimination* of deceptive practices would be satisfied. Instead, the Panel narrowly focused its review on whether the less restrictive option is reasonably available. The Panel failed to link the means of implementation used to the objective sought.

24. Korea's dual retail system satisfies the requirements of the introductory clause of Article XX of the GATT 1994 as well. As the Appellate Body has held, the introductory clause of Article XX is concerned with the "even-handedness" underlying the application of national legislation. In other words, national legislation must be applied "even-handedly" between and among trading partners. Korea's dual retail system does not differentiate between Korea's trading partners. In fact, the dual retail system imposes, in practice, a much heavier burden on domestic beef producers.

25. Furthermore, in Korea's view, the display sign requirement is justified under Article XX(d) of the GATT 1994 as it is "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement". To require shop-owners to display a sign that their store engages in selling imported beef imposes a "proportional burden" in view of the objective sought. Korea considered an alternative measure, but it would not have achieved Korea's objective.

26. Finally, Korea argues that the Panel failed to examine whether the display sign requirement was justified under Article XX(d) of the GATT 1994. The Panel did not explain its failure to examine the display sign requirement under Article XX(d), despite the fact that Korea had made clear that its Article XX defense extended to the display sign requirement as well. Korea submits that, were the Appellate Body to complete the analysis left undone by the Panel, the Appellate Body will find that the display sign requirement is fully justified under Article XX.

B. *Australia – Appellee*

1. Terms of Reference

27. Australia considers that Korea's claim that the Panel ruled outside its terms of reference in making findings as to the commitment levels and the AMS calculation methodology used by Korea to calculate the Current AMS, is unfounded. In Australia's view, the Panel correctly ruled that Australia's panel request meets the requirements of Article 6.2 of the DSU because Australia identified the specific measures at issue and provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

28. In respect of the commitment levels, Australia argues that as Articles 3, 6 and 7 of the *Agreement on Agriculture* specifically refer to a Member's Schedule, consideration of Korea's commitment levels contained in Part IV, Section I of Korea's Schedule was within the Panel's terms of reference. A determination as to which of Korea's two sets of commitment levels constituted the figures against which its Current Total AMS should be compared was necessary to the Panel's legal examination of claims under Articles 3, 6 and 7 of the *Agreement on Agriculture*.

29. With regard to the AMS calculation methodology, Australia submits that the Panel took into account the linkages between the obligations contained in Articles 3, 6 and 7 of the *Agreement on Agriculture* and the relevant definitions contained in Article 1 of that Agreement, which include specific reference to methodologies contained in Annex 3. The Panel correctly concluded that it could not assess whether Korea had met its obligations under Articles 3, 6 and 7 without examining the calculation prescriptions for AMS contained in Annex 3.

30. Furthermore, Australia contends that Korea has failed to show any prejudice arising from a deficiency in Australia's request for a panel. Korea appears to have been informed sufficiently well of the claims being made to prepare a defence. Korea seems to have understood the nature of the legal claims sufficiently well for the purposes of its first submission, in which it argued at length that its calculation methodology was in fact consistent with the *Agreement on Agriculture*. It was not until the final meeting with the Panel that Korea claimed that its ability to defend itself had been prejudiced. Korea has also not shown that third parties were prejudiced.

2. Domestic Support Under the *Agreement on Agriculture*

31. Australia submits that Korea's argument, that the Panel's interpretation of Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture* is unfair, illogical and results in inappropriate comparisons between a WTO Member's reduction commitments and support provided, is without substance. Korea's arguments evidence a misunderstanding of the concepts of Current AMS, Current Total AMS and Annual and Final Bound Reduction Commitments, as defined in the *Agreement on Agriculture*. Australia states that the two figures involved in the comparison will not necessarily be based on the same product mix, as the categories of products that are subsidized may change from year to year.

32. Australia considers that Korea's interpretation that Current AMS should be calculated based on the constituent data and methodology in Korea's Schedule would render the reference to Annex 3 in Articles 1(a)(ii) and 1(h)(ii) inutile. The Panel correctly found that for products where no support was included in the base period, there is no relevant "constituent data or methodology" in the tables of supporting material. Calculations based on Annex 3 are, therefore, mandatory.

33. With regard to the two sets of commitment levels in Korea's Schedule, Australia argues that a treaty interpreter is not required to give effect to treaty terms which are invalid. The Panel noted that Korea is the only WTO Member whose Part IV domestic support Schedule contains two sets of

annual commitment levels, and that no provision of the *Agreement on Agriculture* authorizes such a departure from the norm or practice. For this reason, the Panel was under no obligation to give effect to the commitment level figures in brackets.

34. Australia also contends that the question of whether Korea's commitment levels were "public knowledge" is beyond the Appellate Body's mandate under Article 17.6 of the DSU to address "issues of law covered in the panel report and legal interpretations developed by the panel", as Korea did not present any such evidence to the Panel. In any case, public knowledge of a WTO-inconsistent Schedule commitment does not validate that commitment. Finally, Korea did not meet its burden of demonstrating that "subsequent practice" of WTO Members establishes the agreement of Members regarding the interpretation of Korea's Schedule.

3. Dual Retail System

(a) Article III:4 of the GATT 1994

35. In Australia's view, Korea's claim that proper analysis of its obligation under Article III:4 requires a two-step review of whether *de jure* or *de facto* discrimination is at issue is legally flawed and should be rejected. According to Australia, the legal standard imposed by the phrase "less favourable treatment" has long been settled: a panel must consider whether imported products are being accorded effective equality of competitive opportunities.

36. Australia contends that the Panel was correct when it found that the design and architecture of the dual retail system and related measures clearly provide less favourable treatment for imported beef. Australia states that stores selling imported beef face restrictions on volumes, price and types of beef available for sale, additional record-keeping, recording and signage requirements, and the commercial disadvantage of having to dismantle their current business in domestic beef if they wish to test the market for imported beef. Fundamentally, imported beef is prevented from being sold in the same stores, under the same conditions, as domestic beef. Thus, the claim by Korea that "regulatory symmetry" exists cannot be sustained.

37. In Australia's view, the Panel correctly concluded that the dual retail system constitutes, in and of itself, differential treatment. This differential treatment unavoidably results in imported beef being less favourably treated on the Korean market than like domestic products, and the segregation of imported beef provides the domestic product with a competitive advantage over the imported product.

(b) Article XX(d) of the GATT 1994

38. Australia claims the Panel was correct in finding that, even if the dual retail system had been instituted to prevent the fraudulent misrepresentation of imported beef as domestic beef, the measure was not "necessary" to accomplish that purpose, within the meaning of Article XX(d). The Panel explored the alternatives available to Korea, including alternatives currently applied to situations of alleged country of origin fraud involving other foodstuffs where price differentials prevail. This approach reflects the ordinary meaning of the term "necessary" that no reasonable alternative exists, as well as past GATT and WTO practice.

39. Australia submits that the burden is on Korea to demonstrate a *prima facie* case that the dual retail system falls within one of the exceptions of Article XX, and that it meets the requirements of the introductory clause. Korea has to demonstrate that there was no other alternative measure it could reasonably employ, which was WTO-consistent or less WTO-inconsistent, to secure compliance with the *Unfair Competition Act*. In the particular circumstances of the Korean market for imported beef, where it is otherwise impossible to distinguish between domestic and imported beef, where there is no

dual wholesale system and where no record-keeping by stores selling domestic beef is required, it is impossible to conclude that the dual retail system has any serious impact on the prevention or elimination of fraud.

40. Even if the Panel erred in law in finding that the dual retail system did not qualify for the exception provided by Article XX(d), the Appellate Body has sufficient facts and legal argument to complete the Panel's inquiry. In doing so, the Appellate Body should find that the dual retail system does not meet the requirements of the introductory clause of Article XX. Australia considers relevant the fact that Korea only applies the dual retail system to imported beef, despite the fact that the problem of fraud also exists in relation to different types of beef and to a range of other agricultural products where a price differential exists between imported and domestic products. Furthermore, the dual retail system is not an isolated measure in an otherwise non-discriminatory environment for imported beef. Rather, the dual retail system is part of the regulatory framework for imported beef under which the importation, distribution and sale of imported beef is tightly regulated and heavily restricted by the Korean government, and substantial subsidies are provided to domestic producers, consistent with the government's stabilisation policies for domestic beef. Consideration of the dual retail system in this context reveals its protective purpose.

41. According to Australia, Korea is incorrect when it asserts that the Panel did not consider the display sign requirement in its review of the dual retail system. The Panel agreed with Korea that the sign requirement was "essentially ancillary to the dual retail system", and considered the two requirements together under Article XX(d). Thus, the Panel subsumed its findings related to the display sign requirement within its findings related to the dual retail system as a whole.

C. *United States – Appellee*

1. Terms of Reference

42. According to the United States, its panel request clearly states its claim that Korea has increased the level of domestic support for its cattle industry to the point that the total domestic support provided by Korea exceeds its AMS commitment levels. Based on Articles 3, 6 and 7 of the *Agreement on Agriculture*, Korea's current total domestic support is greater than the AMS commitment levels set out in the *Agreement on Agriculture*. All of the pertinent provisions of the *Agreement on Agriculture*, including Annex 3, had to be examined. The determination of the level of Current Total AMS, requires the application of the provisions of Annex 3, as Annex 3 is "intrinsic" to the calculation of the Current Total AMS.

43. Similarly, the commitment levels in Korea's Schedule also had to be examined. As the Current Total AMS was to be compared to Korea's commitment levels, it was first necessary to determine which set of figures in Korea's Schedule constituted Korea's commitment levels.

44. The United States notes that the Appellate Body has previously stated that a panel is obliged to consider provisions that are "directly linked" to the provisions cited in the panel request. In this case, Annex 3 and the commitment levels in Korea's Schedule are "directly linked" to the claim set out in the panel request, and therefore must be considered.

45. Furthermore, Korea suffered no prejudice on this issue as a result of the complaining parties' panel requests. In fact, Korea, in its first submission, submitted detailed explanations on how it had calculated its AMS for beef. Thus, Korea clearly understood the matter at issue.

2. Domestic Support Under the *Agreement on Agriculture*

46. According to the United States, the Panel was correct in its finding that Korea's Current AMS for beef must be calculated in accordance with the requirements of Annex 3 of the *Agreement on Agriculture*. The specific language of Article 1(a)(ii) makes clear that the Current AMS calculation must be made in accordance with the provisions of Annex 3. While additional guidance is provided in this provision, to the effect that the "constituent data and methodology" in Korea's Schedule must be taken into account, this cannot be construed to nullify the express requirement that the Current AMS calculation be performed in accordance with Annex 3.

47. If Korea's Current AMS for beef is calculated correctly, it is more than *de minimis* under Article 6.4 of the *Agreement on Agriculture*, and must therefore be included in the calculations for Current Total AMS. When Current AMS for beef is included in Current Total AMS, Current Total AMS exceeds Korea's AMS commitment levels set out in its Schedule.

48. The United States contends that Korea, by including an alternative set of commitment levels in its Schedule, is trying to modify unilaterally the terms of the *Agreement on Agriculture* to substitute a domestic support commitment that is not in accordance with Annex 3. In effect, by claiming that the figures in brackets represent its commitment levels, Korea is attempting to inflate the amount of its annual AMS commitment level. The methodology used by Korea is not consistent with the obligations under the *Agreement on Agriculture*. The United States notes that a WTO Member may not, in its Schedule, act inconsistently with its WTO obligations. WTO Members may yield rights and grant benefits in their Schedules, but may not diminish their obligations.

49. Korea has argued that WTO Members knew of the contents of Korea's Schedule, and, therefore, they implicitly accepted the figures in the Schedule. The United States contends that this argument is untenable, for two reasons. First, in making this argument, Korea raises new factual allegations, which may not be addressed by the Appellate Body on appeal. Second, WTO Members did not waive their rights to dispute settlement with regard to other Members' Schedules as a result of the signing of the *WTO Agreement*.

3. Dual Retail System

(a) Article III:4 of the GATT 1994

50. According to the United States, the Panel correctly found that the dual retail system in itself constituted "less favourable treatment" inconsistent with Article III:4. Article III:4 is concerned with preserving the "effective equality of opportunities" for imported products. With regard to the dual retail system, the notion of effective equality of opportunities means that there must be a possibility for imported beef to be physically present with "like" domestic beef at the point of sale to the consumer. By excluding imported beef from the existing retail system for domestic beef, the dual retail system limits the potential market opportunities for imported beef. Since imported beef does not enjoy the same competitive opportunity to be sold in the same manner and in the same stores in which Korean beef is sold, it is treated less favourably than domestic beef.

51. The United States argues that Korea's defense of the dual retail system as providing "regulatory symmetry" between imported and domestic beef must fail. The Panel found that, in fact, the dual retail system, in conjunction with certain restrictions on imports, more onerous record-keeping requirements for imported beef sellers, and the display sign requirement imposed on imported beef sellers, resulted in less favourable treatment for imported beef.

52. Furthermore, the United States contends, the Panel's additional conclusion that the dual retail system involves *de facto* discrimination against imported beef was also correct. The Panel noted the

following factors as relevant: the separate store requirement limits the ability of consumers to make side-by-side comparisons of imported and domestic beef and to make purchasing decisions based on differences in quality, characteristics and prices of the respective products; imported beef is segregated due to the obstacles confronted by a store owner who wishes to sell imported beef; and there are fewer imported than domestic beef stores. The Panel found that the segregation of domestic and imported beef provides domestic beef with a competitive advantage over the imported product. In the view of the United States, this finding of the Panel should be upheld.

53. Article 9 of the *Management Guideline* requires that imported beef stores display a sign indicating that the beef sold in the store is imported. According to the United States, given the undisputed difference in treatment resulting from Article 9 of the Guidelines, Korea bears the burden of demonstrating that the dual retail system does not result in less favourable treatment, and Korea has failed to meet its burden. The Panel's finding that the display sign requirement was "ancillary" to the dual retail system was accurate. The 1956 Working Party Report was simply invoked to "reinforce" the Panel's view, not as a basis for its finding.

(b) Article XX(d) of the GATT 1994

54. The United States argues that the Panel correctly concluded that Korea failed to sustain its burden of justifying its dual retail system under Article XX(d) of the GATT 1994. The Panel determined that in order to benefit from the Article XX(d) exception, Korea had to demonstrate that its dual retail regime: (1) was in place in order to "secure compliance" with laws or regulations that are themselves not inconsistent with the GATT 1994; (2) was "necessary" to secure compliance with those laws or regulations; and (3) was applied in conformity with the requirements of the introductory clause of Article XX. The Panel found that the dual retail system was in place in order to "secure compliance" with laws or regulations that are themselves not inconsistent with the GATT 1994, in particular, the *Unfair Competition Act*. However, the Panel found that Korea did not demonstrate that the dual retail system is "necessary" to secure compliance with Korea's *Unfair Competition Act*.

55. In particular, Korea failed to demonstrate that the WTO-consistent alternatives shown by the complaining parties to be available were inadequate to secure compliance with the *Unfair Competition Act* with regard to imported beef. The Panel found that Korea employed traditional and WTO-consistent means, such as inspections, investigations and prosecutions, to enforce the *Unfair Competition Act* with respect to other imported food products. The Panel regarded this as evidence that Korea could eliminate any fraud involving beef with the same measures.

56. The United States contends that, contrary to Korea's claims, the Panel did not establish a "consistency" standard requiring that uniform measures be used to secure compliance. Rather, the Panel properly examined the enforcement practices used generally by Korea to obtain compliance with the *Unfair Competition Act* to determine whether means other than the dual retail system were reasonably available. Korea's practice with regard to other products was simply one factor to be taken into account as part of this analysis.

57. In addition, the United States argues that if the Appellate Body finds Korea's dual retail system to be "necessary" in terms of Article XX(d), Korea still cannot benefit from the Article XX exception, as Korea has failed to demonstrate that the dual retail system was designed to "secure compliance" with the *Unfair Competition Act*. The dual retail system does not prevent actions that would be illegal under the provisions of the *Unfair Competition Act* relating to fair trade practices. At most, the dual retail system serves the same objectives as the *Unfair Competition Act*.

58. The United States also submits that the dual retail system does not satisfy the requirements of the introductory clause of Article XX. For reasons of judicial economy, the Panel did not consider

this issue. However, if the Appellate Body were to reverse the Panel's finding regarding whether the dual retail system is "necessary" to secure compliance with the *Unfair Competition Act*, the Appellate Body should then complete the legal analysis and find that the dual retail system does not satisfy the requirements of the introductory clause, as that system constitutes "unjustifiable discrimination" within the meaning of the introductory clause.

59. Korea criticizes the Panel for not separately addressing Korea's assertion that the display sign requirement is entitled to an exception under Article XX(d). However, the Panel concluded that the display sign requirement is ancillary to the separate store requirement, and therefore is subject to the same analysis and legal conclusions. Thus, in the view of the United States, the Panel's examination of the dual retail system under Article XX(d) is pertinent to both the separate store requirement and to the display sign requirement.

60. Finally, the United States argues, it was for Korea to demonstrate that the display sign requirement was justified under Article XX(d). However, Korea offered no evidence or reasoning to support a finding that the display sign requirement is independently necessary to secure compliance with the *Unfair Competition Act*.

D. *Arguments of the Third Participants*

1. Canada

(a) Dual Retail System

(i) Article III:4 of the GATT 1994

61. Canada agrees with the Panel's finding that the dual retail system constitutes in itself differential treatment which leads to "less favourable treatment" for imported products under the terms of Article III:4 of the GATT 1994. The dual retail system reduces "direct competition" between imported and domestic beef. In effect, only domestic beef can compete directly against other domestic beef. In these circumstances, imported beef does not benefit from "equal conditions of competition" as compared to domestic beef.

62. Canada supports the Panel's finding that the display sign requirement is "ancillary" to the dual retail system, and thus is also inconsistent with Article III:4 of the GATT 1994. The measure would be inconsistent even if it existed independently of the dual retail system, as it treats imported beef differently than domestic beef, in contravention of Article III:4.

(ii) Article XX(d) of the GATT 1994

63. Canada also agrees with the Panel's finding with regard to Article XX(d).

2. New Zealand

(a) Terms of Reference

64. In New Zealand's view, it is within the Panel's terms of reference to examine the calculation methodology of AMS in order to determine whether Korea's Current Total AMS exceeds its commitment levels, in violation of Articles 3, 6 and 7 of the *Agreement on Agriculture*. Although Annex 3 of the *Agreement on Agriculture* is not specifically referred to in the complaining parties' panel requests in this dispute, Article 6 of the *Agreement on Agriculture*, which is referred to in the panel requests, defines AMS by reference to Article 1. Article 1, in turn, refers to the calculation of

AMS in terms of Annex 3. Thus, the provisions of Annex 3 are necessary to determine whether Korea has met its domestic support commitments under Articles 3, 6 and 7.

65. Furthermore, the complaining parties have not made a separate claim regarding Annex 3. Rather, the claim they have made is under Articles 3, 6 and 7 of the *Agreement on Agriculture*, and the references to Annex 3 are simply arguments in support of this claim. Since the claim under Articles 3, 6 and 7 of the *Agreement on Agriculture* is within the Panel's terms of reference, arguments in support of that claim are within the terms of reference as well.

66. New Zealand also argues that Korea has failed to demonstrate that it has been prejudiced by the omission of a reference to Annex 3 in the panel request. The calculation methods set out in Annex 3 are linked to Articles 3, 6 and 7 of the *Agreement on Agriculture*. New Zealand, as a third party to the dispute, was able to determine the measure and claims at issue and respond accordingly based on the reference in the panel request to "domestic support". Korea has not demonstrated that it could not do the same.

67. Finally, New Zealand contends that Korea failed to bring its procedural objections before the Panel in a timely manner.

(b) Domestic Support Under the *Agreement on Agriculture*

68. New Zealand notes that, according to Article 1(a)(ii) of the *Agreement on Agriculture*, the AMS is to be calculated "in accordance with" Annex 3, but "taking into account" the constituent data and methodology in the supporting tables in a Member's Schedule. Thus, a Member is to calculate the AMS according to Annex 3, but may also use the relevant and applicable constituent data and methodology set out in the supporting tables of its Schedule. However, resort to such data and methodology does not absolve a Member of the obligation of correctly calculating the AMS in a manner consistent with Annex 3.

69. New Zealand further submits that a Member can only take into account the constituent data and methodology where it exists. As there was no data or methodology for beef set out in the supporting tables of Part IV of Korea's Schedule, the Panel was correct to calculate AMS by relying on Annex 3 exclusively.

70. Finally, New Zealand argues that AMS calculations under Annex 3 are based on "eligible" production, as required by that provision. Thus, the argument of Korea that "actual" purchases are properly the basis of its AMS calculation should be rejected.

(c) Dual Retail system

(i) Article III:4 of the GATT 1994

71. New Zealand submits that the term "less favourable treatment" under Article III:4 requires that imported and domestic goods receive "effective equality of opportunities". New Zealand supports the Panel's finding that, in the circumstances of this case, Korea's dual retail system for beef results in competitive disadvantages for imported beef, as imported beef is denied the opportunity to compete in the framework of an integrated market. As the Panel concluded, the existence of a dual retail system, in circumstances where there is an extensive existing retail system, in itself constitutes a violation of Article III:4.

72. Furthermore, New Zealand agrees with the Panel's finding that the display sign requirement, being ancillary to the dual retail system, is also inconsistent with Article III:4. While the Panel chose

to consider this aspect of the dual retail system separately, it is nevertheless one of the components of the dual retail system.

(ii) Article XX(d) of the GATT 1994

73. New Zealand supports the Panel's finding that Korea failed to show that the dual retail system was "necessary" within the meaning of Article XX(d) to accomplish Korea's desired level of fraud prevention. As stated by the Panel, practices used in other sectors to address deceptive practices are relevant for a determination of whether certain practices are "necessary" in the beef sector.

74. New Zealand also contends that the dual retail system is not consistent with the requirements of the introductory clause of Article XX. The dual retail system enables the Korean Government to protect Korea's domestic beef producers from import competition by limiting the terms on which imported products may be sold in the market, and therefore constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, within the meaning of the introductory clause of Article XX.

III. Issues Raised in this Appeal

75. The issues raised in this appeal are the following:

(a) whether examination of Korea's Schedule LX and Annex 3 of the *Agreement on Agriculture* was within the Panel's terms of reference;

(b) whether the Panel erred in calculating Korea's Current AMS for beef based on Annex 3 of the *Agreement on Agriculture*, and whether the resulting Current Total AMS exceeded Korea's AMS commitment levels for 1997 and 1998;

(c) whether the "dual retail system", which requires the sale of imported beef in specialized stores, was inconsistent with Article III:4 of the GATT 1994; and

(d) whether the "dual retail system", if inconsistent with Article III:4 of the GATT 1994, can nevertheless be justified under Article XX(d).

IV. Terms of Reference

76. Before the Panel, Korea argued that its Schedule LX is not mentioned in the complaining parties' panel requests and, therefore, no violation can be claimed with regard to the Schedule.[11] Korea further contended that the panel requests were insufficiently detailed and specific to encompass the complaining parties' claims based on Annex 3 of the *Agreement on Agriculture*.[12]

77. The Panel held that, when examining claims regarding Articles 3, 6 and 7 of the *Agreement on Agriculture*, "its terms of reference require it to examine Korea's Schedule LX to assess whether its domestic support in 1997 and 1998 exceeded the reduction commitments contained in its Schedule"[13], and that "its assessment of the compatibility of Korea's domestic support with Articles 3, 6 and 7 requires that the Panel compares the effective support provided by Korea as determined using the

[11] Panel Report, para. 787.

[12] *Ibid.*

[13] *Ibid.*, para. 803.

calculation parameters of Annex 3."[14] Therefore, an examination of Korea's Schedule LX and Annex 3 of the *Agreement on Agriculture* for this purpose was not outside the Panel's terms of reference.

78. On appeal, Korea argues that the Panel erred by ruling on two claims that were outside of its terms of reference. In particular, Korea refers to the Panel's finding as to which set of numbers in its Schedule LX constitutes Korea's levels of commitment[15]; and to the Panel's finding that Korea's methodology for calculating Current Aggregate Measurement of Support ("AMS") for beef was not consistent with the methodology provided in Annex 3 of the *Agreement on Agriculture*.[16]

79. In this dispute, the Panel's terms of reference were defined as follows:

> To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS/161/5 and by Australia in document WT/DS/169/5, the matter referred to the DSB by the United States and Australia in those documents and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[17]

Thus, the Panel's terms of reference required it to examine the "matter" referred to the DSB by the complaining parties in the requests for the establishment of a panel by the United States and Australia, respectively.[18] The "matter" referred to the DSB is the set of claims made in these requests.[19]

80. In its panel request, Australia stated, in respect of Korea's agricultural domestic support, that:

> Korea has also increased the level of domestic support for its cattle industry in amounts which result in the total domestic support provided by Korea exceeding its Aggregate Measurement of Support (AMS) under the Agreement on Agriculture.

Australia went on to state that Korea was acting inconsistently with obligations under, *inter alia*, Articles 3, 6 and 7 of the *Agreement on Agriculture*.

81. The United States, in its panel request, stated, in very similar terms:

> At the same time, Korea has increased the level of domestic support for its cattle industry to the point that the total domestic support provided by Korea exceeds its Aggregate Measurement of Support (AMS) under the Agreement on Agriculture.

[14] *Ibid.*, para. 815.

[15] Korea's appellant's submission, paras. 15-25.

[16] *Ibid.*, paras. 65-70.

[17] WT/DS161/6, WT/DS169/6; see also Article 7.1 of the DSU.

[18] WT/DS161/5, WT/DS169/5.

[19] See Appellate Body Report, *Brazil – Measures Affecting Dessicated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, p. 22; Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, para. 72.

The United States also referred to Korea's measures as being inconsistent with, *inter alia*, Articles 3, 6, and 7 of the *Agreement on Agriculture*.

82. Thus, the claim made by both complaining parties was that Korea's domestic support for its cattle industry had increased to the point that Korea exceeded its AMS commitment levels for certain years, in contravention of Articles 3, 6 and 7 of the *Agreement on Agriculture*.

83. With respect to Korea's claim that the Panel acted outside its terms of reference in examining the "commitment levels" in Korea's Schedule, the following paragraphs of Articles 3 and 6 of the *Agreement on Agriculture* are of particular importance. Article 3.2 obligates Members not to exceed the support levels they had specified in their Schedules:

> Subject to the provisions of Article 6, a *Member shall not provide support* in favour of domestic producers in excess of the *commitment levels specified in Section I of Part IV of its Schedule*. (emphasis added)

Article 6.3 in turn states:

> A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which *its domestic support* in favour of agricultural producers expressed in terms of Current Total AMS *does not exceed* the corresponding *annual or final bound commitment level specified in Part IV of the Member's Schedule*. (emphasis added)

Articles 3.2 and 6.3 both refer explicitly to the "commitment level" specified in Part IV of a Member's Schedule. In order to make a finding on the complaining parties' claim, the Panel had no choice but to determine the appropriate "commitment levels" in Korea's Schedule.

84. With respect to Korea's claim[20] that the Panel acted outside its terms of reference in examining Annex 3 of the *Agreement on Agriculture*, we note that Article 6.4 provides:

> (a) A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:
>
> (i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year;
>
> …
>
> (b) For developing country Members, the *de minimis* percentage under this paragraph shall be 10 per cent.

Article 7.2(a) states:

[20] *Supra*, para. 78.

> Any domestic support measure in favour of agricultural producers, including any modification to such measure, and any measure that is subsequently introduced that cannot be shown to satisfy the criteria in Annex 2 to this Agreement or to be exempt from reduction by reason of any other provision of this Agreement shall be included in the Member's calculation of its Current Total AMS.

Both Articles 6 and 7, claimed by the complaining parties to have been violated by Korea, refer explicitly to Current AMS and/or Current Total AMS.

85. AMS and Total AMS are defined in Article 1 of the *Agreement on Agriculture*, entitled "Definition of Terms". According to Article 1(a)

> "*Aggregate Measurement of Support*" and "*AMS*" mean the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product … which is:
>
> …
>
> (ii) with respect to support provided during any year of the implementation period and thereafter, *calculated in accordance with the provisions of Annex 3 of this Agreement* and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule; (emphasis added)

According to Article 1(h)

> "*Total Aggregate Measurement of Support*" and "*Total AMS*" mean the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, … which is:
>
> …
>
> (ii) with respect to the level of support actually provided during any year of the implementation period and thereafter (i.e. the "Current Total AMS"), *calculated in accordance with the provisions of this Agreement*, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule; (emphasis added)

86. While Article 1(h)(ii) uses the terms "provisions of this Agreement", Article 1(a)(ii) is more specific and refers precisely to "*the provisions of Annex 3 of this Agreement*". Annex 3 is entitled "Domestic Support: Calculation of Aggregate Measurement of Support". Through the definitions set out in Article 1, Annex 3 thus becomes part of Articles 6 and 7. In examining the claims under Articles 3, 6 and 7, the Panel, therefore, had to examine the terms of Annex 3 as well. The Panel had to calculate Current AMS for beef "*in accordance with the provisions of Annex 3* … and taking into account the constituent data and methodology …" to determine whether Current AMS for beef was to

be included in Current Total AMS. Thus, in order to reach a finding on the complaining parties' claim, the Panel in this case had to ascertain the appropriate "commitment levels" in Korea's Schedule, and had to calculate Current AMS for beef "in accordance with the provisions of Annex 3 … " to determine whether Current AMS for beef was to be included in Current Total AMS.

87. It is true that, as Korea states, the panel requests in this dispute do not explicitly refer to the "commitment levels" in Korea's Schedule or to "Annex 3" of the *Agreement on Agriculture*. In *Argentina – Safeguard Measures on Imports of Footwear*, however, we held that the "terms of Article 4.2(c) of the *Agreement on Safeguards* expressly incorporate the provisions of Article 3" of that Agreement.[21] In that case, we stated that "we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the *Agreement on Safeguards*."[22] We believe the same approach appropriately applies here. Although the "commitment levels" in Korea's Schedule and "Annex 3" of the *Agreement on Agriculture* were *not explicitly* referred to in the panel requests in this dispute, it is clear that Articles 3 and 6 of the *Agreement on Agriculture*, which *were referred* to in the panel requests, incorporate those terms, either directly through Articles 3.2 and 6.3, in the case of the "commitment levels", or indirectly through Article 1(a)(ii), in the case of "Annex 3". In our view, the commitment levels in Korea's Schedule and the provisions of Annex 3 were in effect referred to in the complaining parties' panel requests, and were, therefore, within the Panel's terms of reference.

88. It is useful to add that, in deciding which set of figures in Korea's Schedule constituted the true and effective commitment levels of Korea and in determining how Current AMS should be calculated under Annex 3, the Panel did not rule on a separate "claim".[23] Rather, it examined specific arguments related to the claim that Korea's domestic support exceeded its AMS commitment levels. In this context, it seems useful to recall our statement in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* that:

> … there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[24]

The claim of the complaining parties was that Korea's domestic support for beef had increased to the point that this support exceeded Korea's commitment levels for certain specified years. This claim was made under Articles 3, 6 and 7 of the *Agreement on Agriculture*, as stated in both panel requests, and was clearly within the Panel's terms of reference. The Panel's examination of the commitment levels in Korea's Schedule and the calculation methodology in Annex 3 was carried out in the course of assessing arguments related to the complaining parties' claim.

[21] Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000, para. 74.

[22] *Ibid.*

[23] We note that in paragraph 800 of its Report, the Panel addressed the United States' "claim" that the Base Total AMS specified in Part IV, Section I of Korea's Schedule was initially miscalculated. The Panel considered that this "claim" was not properly before it. It concluded "that the only measure at issue is Korea's current domestic support for its beef industry in the context of Korea's scheduled commitment levels on domestic support under the *Agreement on Agriculture*". This conclusion of the Panel has not been appealed and is not before us.

[24] WT/DS27/AB/R, adopted 25 September 1997, para. 141.

89. For these reasons, we conclude that the Panel did not err in finding that the issue of which set of figures constituted Korea's commitment levels and the issue of whether Current AMS for beef must be calculated in accordance with Annex 3 were within its terms of reference.

V. Domestic Support under the *Agreement on Agriculture*

90. In the Panel proceedings, the complaining parties claimed that Korea provided domestic support to its beef industry, measured by Current AMS, in amounts which exceeded *de minimis* levels in 1997 and 1998 and which, therefore, were required to be included in Korea's calculation of Current Total AMS for those years. When domestic support for beef was included in Current Total AMS, they contended, Korea's Current Total AMS exceeded its commitment levels set out in Part IV of its Schedule for those years, contrary to Articles 3 and 6 of the *Agreement on Agriculture*.[25]

91. In addressing the above claim, the Panel ascertained both Korea's commitment levels for 1997 and 1998 and Korea's Current Total AMS for those years. With regard to Korea's commitment levels, the Panel noted that there were two sets of figures in Korea's Schedule in the column entitled "Annual and final bound commitments level 1995-2004", with one set in brackets and the other set not in brackets. The Panel concluded that the figures *not* in brackets constituted Korea's commitment levels.[26] With regard to Current Total AMS for 1997 and 1998, the Panel first examined whether Current AMS for beef exceeded the 10 per cent *de minimis* level set out in Article 6.4 of the *Agreement on Agriculture*. The Panel found that Current AMS for beef exceeded the *de minimis* level, and, therefore, was required to be included in Current Total AMS, and that Korea's failure to include Current AMS for beef in Current Total AMS was inconsistent with Article 7.2(a) of the *Agreement on Agriculture*.[27] The Panel then compared Current Total AMS for 1997 and 1998 with Korea's commitment levels for those years, and concluded that Current Total AMS exceeded the commitment levels, contrary to Article 3.2 of the *Agreement on Agriculture*.[28]

92. On appeal, Korea argues that the Panel's conclusion that Korea exceeded its commitment levels for 1997 and 1998 was in error, for two reasons. First, Korea's view is that the Panel's finding that Korea's commitment levels, as set out in its Schedule, comprise the figures not in brackets is wrong. According to Korea, the commitment levels are, in fact, embodied in the figures in brackets, as Note 1 of Supporting Table 6 of Korea's Schedule makes clear.[29] Second, Korea contends that the Panel's conclusion that Current AMS for beef must be included in Current Total AMS was also wrong. According to Korea, the Panel mistakenly looked to Annex 3 of the *Agreement on Agriculture* in order to calculate the Current AMS for beef, failing to rely instead on the "constituent data and methodology" provided in Korea's Schedule, as required by Articles 1(a)(ii) and 1(h)(ii). Korea claims that its Current AMS for beef was properly calculated, on the basis of "constituent data and methodology" in its Schedule, and is less than the *de minimis* level established in Article 6.4 of the *Agreement on Agriculture*. Therefore, Korea argues, Current AMS for beef need not be included in Current Total AMS.[30]

[25]See Panel Report, paras. 49, 51 and 818. Australia argued that Korea exceeded its commitment levels only for 1997, whereas the United States argued that Korea exceeded its commitment levels for both 1997 and 1998.

[26]Panel Report, para. 821.

[27]*Ibid.*, para. 841.

[28]*Ibid.*, para. 843.

[29]Korea's appellant's submission, paras. 26-54.

[30]*Ibid.*, paras. 79-90.

93. The issue before us on appeal has two parts: did the Panel err in finding, firstly, that Korea failed to include Current AMS for beef in Current Total AMS, contrary to Article 7.2(a) of the *Agreement on Agriculture*, and in finding, secondly, that, contrary to Article 3.2 of the *Agreement on Agriculture*, Korea's Current Total AMS exceeds the commitment levels in Part IV of its Schedule for 1997 and 1998? In examining the component parts of this issue, it is necessary for us to ascertain two sets of figures: the figures which constitute Korea's commitment levels for 1997 and 1998, and the figures for Korea's Current Total AMS for 1997 and 1998. We turn first to an examination of Korea's commitment levels for 1997 and 1998.

A. *Korea's Commitment Levels for 1997 and 1998*

94. In Korea's Schedule LX, Part IV, Section I, entitled "Domestic Support: Total AMS Commitments", Korea has provided annual bound commitment levels for domestic support for agriculture for the period 1995-2004. The Schedule contains three columns, as follows:

₩ = Korean Won

Base Total AMS	Annual and final bound commitments level 1995 - 2004			Relevant Supporting Tables and document reference
1	2			3
bil. ₩		bil. ₩		
1,718.6	1995:	1,695.74	(2,182.55) *Note 1	AGST/KOR (Supporting Table 4, 5, 6, 7, 8 and 10)
	1996:	1,672.90	(2,105.60)	
	1997:	1,650.03	(2,028.65)	
	1998:	1,627.17	(1,951.70)	
	1999:	1,604.32	(1,874.75)	
	2000:	1,581.46	(1,797.80)	
	2001:	1,558.60	(1,720.85)	
	2002:	1,535.74	(1,643.90)	
	2003:	1,512.89	(1,566.95)	
	2004:	1,490.00	(1,490.00)	

*Note 1 : Refer to Note 1 of Supporting Table 6 about the numbers in parentheses.

Korea's commitment levels are in Column 2, entitled "Annual and final bound commitments level 1995-2004". This column contains two sets of figures pertaining to the years 1995-2004: one set in brackets, and one set not in brackets.

95. In its findings, the Panel referred to part of Korea's Schedule. In particular, the Panel referred to the figures in Column 1 and Column 2. However, the Panel did not refer to "* Note 1" in Column 2, nor to the explanatory information set out in Note 1, and did not reprint Column 3.[31] The Panel concluded that the set of figures not in brackets constitutes Korea's commitment levels. In support of its conclusion, the Panel noted that "the unbracketed figures in Korea's Schedule are derived from, and directly linked to, the 'Base Total AMS'". By contrast, the figures in the column with brackets "bear no such relationship to the specified 'Base Total AMS' of 1,718.60 billion won."[32] Therefore, Korea's commitment level for 1997 is 1,650.03 billion won, while the commitment level

[31]Panel Report, para. 820.

[32]*Ibid.*, para. 822.

for 1998 is 1,627.17 billion won.[33] On appeal, Korea argues that the Panel's conclusion was in error.[34]

96. Examining this issue requires us to interpret Korea's Schedule. At the outset, we note, as we have previously stated in *European Communities – Customs Classification of Certain Computer Equipment*, that:

> A Schedule is … an integral part of the GATT 1994 … . Therefore, the concessions provided for in that schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention.*[35]

Thus, we now examine Korea's Schedule in light of the rules of treaty interpretation. We begin with the ordinary meaning of the terms of the Schedule, in their context and in the light of the object and purpose of the treaty, in accordance with Article 31(1) of the *Vienna Convention*.

97. The Panel examined the two sets of figures provided by Korea, as well as the figure for "Base Total AMS". However, as is clear from the table in Korea's Schedule LX, Part IV, Section I, which has been reprinted in paragraph 94 above, the two sets of figures do not exist in isolation. Rather, to the right of the two sets of figures is the notation "* Note 1". At the bottom of Korea's Schedule, there is "* Note 1" which states: "Refer to Note 1 of Supporting Table 6 about the numbers in parentheses." The Panel, in its reasoning, referred to the set of figures in Column 1 and Column 2, but did *not* refer to "* Note 1", nor did it consider the terms of "* Note 1".[36] An examination of the ordinary meaning of the terms of a treaty must take into account *all* of those terms, and, accordingly, we proceed with an examination of Korea's Schedule, including Note 1 of Supporting Table 6. In our view, the Panel's examination of the "ordinary meaning" of Korea's Schedule was not done in accordance with the rules of interpretation of general international law as codified in the *Vienna Convention*.

98. Supporting Table 6 is entitled "Aggregate Measurements of Support: Market Price Support". This table provides the supporting figures for the commitment levels set out in Part IV, Section I of Korea's Schedule LX, that is, the figures used to calculate the commitment levels. Supporting figures are provided for rice, barley, soybean, maize (corn) and rape seeds. In respect of each product, the AMS for each of the years 1989-1991 is provided, along with an average AMS level for the years 1989-1991. For rice, AMS figures for 1993 are given as well. The figures for each product were combined in order to obtain a Base Total AMS figure which could then be used to determine commitment levels for the years 1995-2004.

99. Note 1 of Supporting Table 6 reads as follows:

> The AMS for rice has been calculated based on 1993 market price support instead of 1989-1991 average. The Final Bound Commitment level in 2004, however, is the level reduced by 13.3% from the 1989-1991 average Base Total AMS.[37]

[33]See Panel Report, para. 843.

[34]Korea's appellant's submission, paras. 26-54.

[35]Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, para. 84.

[36]See Panel Report, paras. 820-823.

[37]G/AG/AGST/KOR, p. 8.

As the Panel did not consider Note 1 at the bottom of Korea's Schedule LX, Part IV, Section I, it did not consider Note 1 of Supporting Table 6 either.

100. In interpreting Note 1 of Supporting Table 6, we look again at its ordinary meaning. The first sentence of this Note indicates that the AMS calculations for *rice* are based on 1993 figures, whereas for products other than rice, the AMS figures are based on the 1989-1991 average amounts.

101. The second sentence of Note 1 of Supporting Table 6 makes clear that the final bound commitment level for 2004 has been determined by reducing the 1989-1991 average Base Total AMS by 13.3 per cent.

102. We note that the use of the term "however" ordinarily indicates a contrast between two things, and lends support to Korea's position. The contrast here is the following: whereas the starting AMS amount is calculated using the 1989-1991 figures for products other than rice and the 1993 figures for rice, the Final Bound Commitment level for 2004 is calculated based on the 1989-1991 average Base Total AMS, which relies on 1989-1991 figures for *all* products, including rice. It appears to us that what Korea stated in Note 1 of Supporting Table 6 was this: the starting AMS commitment level for 1995 is determined by using AMS calculations relying on base years of 1989-1991 for all products except rice, and 1993 for rice; "however", the final target commitment level for 2004 is based on the Base Total AMS figure which was derived by using the base years 1989-1991 for *all* products. The starting AMS commitment level figure for 1995 (2182.55 billion won) was reduced in equal annual amounts over the period from 1995 to 2004 in order to reach the final target commitment level for 2004 (1490.00 billion won). The reduced commitment levels for each year over the period 1995-2004, the calculation of which has been described by Korea in Note 1 of Supporting Table 6, are set out in the figures in brackets. It follows from the wording of Korea's Schedule LX, Part IV, Section I, read together with Note 1 of the Supporting Table 6, that Korea's AMS commitment levels for 1995-2004 are not represented, as the Panel concluded, by the figures not in brackets, but, rather, as Korea contends, by the figures in brackets.

103. The above view is reflected in Korea's subsequent statements before the Committee on Agriculture. At a November 1996 Committee on Agriculture meeting, New Zealand asked Korea this question: "Noted that Korea's Schedule contains two sets of figures regarding annual and final bound commitment levels. Which set is accurate?" Korea responded as follows:

> *The figures in brackets correspond to Korea's real annual commitment level, using the 1993 base period for rice and the 1989-1991 base period for other products*, as indicated in the footnote of Korea's Schedule LX. The said calculation and annual commitment level of AMS were already reviewed and agreed upon by Member countries in March 1994. *The other set of figures corresponds to the annual commitment using the base period of 1989-1991 for all the products.*[38] (emphasis added)

104. Furthermore, in its official annual Notifications to the Committee on Agriculture concerning domestic support commitments for 1995 to 1998, Korea made reference to its commitment level for the period in question. In each Notification, the figure Korea provided was the relevant commitment

[38]G/AG/R/9, 17 January 1997.

level from Korea's Schedule set out in the figures in brackets. Next to the AMS figure in each Notification is a note which says "See Note 1 of Supporting Table 6 in G/AG/AGST/KOR".[39]

105. For these reasons, we conclude that Korea's commitment levels in Part IV, Section I of its Schedule LX are denoted by the figures in the Column entitled "Annual and final bound commitments level 1995-2004" which are in brackets. Thus, Korea's commitment level is 2,028.65 billion won for the year 1997, and 1,951.70 billion won for the year 1998.

106. We turn next to an examination of Korea's Current Total AMS for 1997 and 1998, to determine whether Korea's Current Total AMS for these years exceeded its commitment levels for those same years.

B. *Korea's Current Total AMS for 1997 and 1998*

107. In its Notifications to the Committee on Agriculture for 1997 and 1998, Korea provided figures for the Current Total AMS for those years. Korea claimed that for 1997 it provided Current Total AMS of 1,936.95 billion won, and for 1998 it provided 1,562.77 billion won.[40] The complaining parties argue that Korea's Current Total AMS as provided in its Notifications was calculated improperly, as Korea did not include Current AMS for beef in its Current Total AMS. The United States contends that when Current AMS for beef is included in Current Total AMS, as required, Current Total AMS for both 1997 and 1998 exceeded Korea's commitment levels for 1997 and 1998, whereas Australia limits its contention to 1997.[41]

108. The Panel found that Korea's Current AMS for beef did exceed the *de minimis* level for 1997 and 1998, and, therefore, was required to be included in Current Total AMS, under Article 7.2(a) of the *Agreement on Agriculture*.[42] The Panel then compared Korea's Current Total AMS to Korea's commitment levels for 1997 and 1998, and concluded that Current Total AMS exceeded the commitment levels, contrary to Article 3.2 of the *Agreement on Agriculture*.[43]

109. On appeal, Korea contends that the Panel's conclusion that Current AMS for beef must be included in Current Total AMS is incorrect. According to Korea, the Panel mistakenly looked to Annex 3 of the *Agreement on Agriculture* in order to calculate the Current AMS for beef, while failing to take into account the "constituent data and methodology" provided in Korea's Schedule, as required by Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture*. Korea claims that its Current AMS for beef was properly calculated in its Notifications to the Committee on Agriculture, based on the "constituent data and methodology" in its Schedule, and that consequently this Current AMS fell below the *de minimis* level established in Article 6.4 of the *Agreement on Agriculture*. Therefore, Korea argues, the Current AMS for beef need not be included in the Current Total AMS, and Current Total AMS was properly calculated in its Notifications.[44]

110. In examining this issue, we need to determine first whether Current AMS for beef for 1997 and 1998 must be included in Korea's Current Total AMS for those years. We recall that Article 6.4 of the *Agreement on Agriculture* states that:

[39]See G/AG/N/KOR/24, 25 August 1999; G/AG/N/KOR/18, 16 September 1998; G/AG/N/KOR/14, 15 September 1997; G/AG/N/KOR/7, 18 November 1996.

[40]See G/AG/N/KOR/24, 25 August 1999; G/AG/N/KOR/18, 16 September 1998.

[41]See *supra*, footnote 25.

[42]Panel Report, para. 841.

[43]*Ibid.*, para. 843.

[44]Korea's appellant's submission, paras. 79-90.

> A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:
>
> (i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year;
>
> …

For developing country Members the *de minimis* percentage level under this paragraph is 10 per cent.[45] Thus, Korea's Current AMS for beef must be included in Current Total AMS only if the Current AMS for beef exceeds the 10 per cent *de minimis* requirement applicable in respect of developing country Members.

111. To determine whether Korea's Current AMS for beef exceeds 10 per cent of total value of beef production, we refer again to Article 1(a)(ii) of the *Agreement on Agriculture*, which defines Current AMS. Under this provision, Current AMS is to be

> calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule; … (emphasis added)

Article 1(a)(ii) contains two express requirements for calculating Current AMS. First, Current AMS is to be "calculated *in accordance with* the provisions of Annex 3 of this Agreement". The ordinary meaning of "accordance" is "agreement, conformity, harmony".[46] Thus, Current AMS must be calculated in "conformity" with the provisions of Annex 3. Second, Article 1(a)(ii) provides that the calculation of Current AMS is to be made while "taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule." "Take into account" is defined as "take into consideration, notice".[47] Thus, when Current AMS is calculated, the "constituent data and methodology" in a Member's Schedule must be "taken into account", that is, it must be "considered".[48]

112. Looking at the wording of Article 1(a)(ii) itself, it seems to us that this provision attributes higher priority to "the provisions of Annex 3" than to the "constituent data and methodology". From the viewpoint of ordinary meaning, the term "in accordance with" reflects a more rigorous standard than the term "taking into account".

[45]Article 6.4(b) of the *Agreement on Agriculture*.

[46]*The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 15.

[47]*Ibid.*

[48]We note that this difference is not reflected in the wording of the definition of Current Total AMS in Article 1(h). Article 1(h)(ii) provides that Current Total AMS is to be calculated "in accordance with the provisions of this Agreement, including Article 6, *and* with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". (emphasis added)

113. We note, however, that the Panel did not base its reasoning on this apparent hierarchy as between "the provisions of Annex 3" and the "constituent data and methodology".[49] Instead, the Panel considered that where no support was included in the base period calculation for a given product, there is no "constituent data or methodology" to refer to, so that the only means available for calculating domestic support is that provided in Annex 3.[50] As beef had not been included in Supporting Table 6 of Korea's Schedule LX, Part IV, Section I, the Panel concluded that Annex 3 alone is applicable for the purposes of calculating current non-exempt support in respect of Korean beef.[51]

114. In the circumstances of the present case, it is not necessary to decide how a conflict between "the provisions of Annex 3" and the "constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule" would have to be resolved in principle. As the Panel has found, in this case, there simply are no constituent data and methodology for beef.[52] Assuming *arguendo* that one would be justified – in spite of the wording of Article 1(a)(ii) – to give priority to constituent data and methodology used in the tables of supporting material over the guidance of Annex 3, for products entering into the calculation of the Base Total AMS, such a step would seem to us to be unwarranted in calculating Current AMS for a product which did *not* enter into the Base Total AMS calculation. We do not believe that the *Agreement on Agriculture* would sustain such an extrapolation. We, therefore, agree with the Panel that, in this case, Current AMS for beef has to be calculated in accordance with the provisions of Annex 3, and with these provisions alone.

115. Korea has argued that:

> National schedules on the reduction of subsidies in favour of agricultural products … can be understood as multi-year equations. One side of the equation includes the commitment level for a given year, while the other side of the equation includes the actual AMS for the same year. Thus, for the equation to be meaningful, both sides of the equation should be based on the same sets of data and methodology. … Using one methodology for commitment levels and another methodology for actual AMS undermines comparability between the two, and leads to unfair results.[53]

We believe that it is not necessary or appropriate to conceive of the pertinent provisions of the *Agreement on Agriculture* as establishing "multi-year equations". The treaty definitions of both AMS and Total AMS, set out in Articles 1(a) and 1(h) respectively, do provide a specific methodology for calculating Current AMS and Current Total AMS in respect of a particular year during the implementation period. However, with respect to the other side of a hypothetical equation, the relevant treaty provisions do *not* provide for any particular mode of calculation of the "Base Total AMS", from which figure the commitment levels for particular years of the implementation period are

[49]On the contrary, the Panel opines that the "constituent data and methodology" has an important role to play in ensuring that the calculation of support to any given product is calculated in subsequent years consistently with support calculated in the base period. Panel Report, para. 811.

[50]*Ibid.*

[51]*Ibid.*, para. 812.

[52]*Ibid.* In other words, there is no *data* (product) in respect of which the *methodology* of Schedule LX of Korea (that is, the use of figures for the years 1989-1991) could be applied, in so far as beef is concerned.

[53]Korea's appellant's submission, para. 63.

arithmetically derived. Article 1(a)(i) of the *Agreement on Agriculture* dealing with AMS states that "with respect to support provided during the base period", a treaty interpreter needs only to go to "the relevant tables of supporting material incorporated by reference *in Part IV of a Member's Schedule* … ". (emphasis added) Similarly, Article 1(h)(i) dealing with Total AMS, states that "with respect to support provided during the base period (i.e., the 'Base Total AMS') and the maximum support permitted to be provided during any year of the implementation period or thereafter (i.e., the 'Annual and Final Bound Commitment Levels')", a treaty interpreter needs only to go to what is "*specified in Part IV of a Member's Schedule* … ". (emphasis added) Thus, for purposes of determining whether a Member has exceeded its commitment levels, Base Total AMS, and the commitment levels resulting or derived therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned. As a result, Current Total AMS which is calculated according to Annex 3, is compared to the commitment level for a given year that is already specified as a given, absolute, figure in the Member's Schedule.

116. We examine next Annex 3, entitled: "Domestic Support: Calculation of Aggregate Measurement of Support". Paragraphs 8 and 9 of Annex 3 provide the following definition of "market price support", the particular form of domestic support at issue here:

> … *market price support* shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the *quantity of production eligible to receive* the applied administered price. Budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS.
>
> The *fixed external reference price shall be based on the years 1986 to 1988* and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed reference price may be adjusted for quality differences as necessary. (emphasis added)

Thus, under Annex 3, "market price support" is calculated by taking the difference between a fixed external reference price and the applied administered price, and multiplying that difference by "the quantity of *production eligible* to receive the applied administered price". (emphasis added) The fixed external reference price "shall be *based on the years 1986 to 1988*". (emphasis added)

117. The Panel found that in both 1997 and 1998 Korea miscalculated its fixed external reference price, contrary to Article 6 and paragraph 9 of Annex 3, by using a fixed external reference price based on data for 1989-1991.[54] Korea justifies this choice by invoking the "constituent data and methodology" used in its Supporting Table 6 for all products other than rice, i.e., for barley, soybean, maize (corn) and rape seeds. In Supporting Table 6, all these products use the period 1989-1991 for the fixed external reference price.[55]

118. We have already explained above that we share the Panel's view with respect to Korea's argument on "constituent data and methodology" used in the table of supporting material. We agree with the Panel that, in this case, Current AMS for beef has to be calculated in accordance with Annex 3. According to Annex 3, "[t]he fixed external reference price shall be based on the years 1986 to 1988". We, therefore, also agree with the Panel that in calculating the product specific AMS

[54]Panel Report, para. 830.

[55]Korea's appellant's submission, paras. 79-80.

for beef for the years 1997 and 1998, Korea should have used an external reference price based on data for 1986-1988, instead of data for 1989-1991.

119. The Panel found that, in calculating the Current AMS for beef for the years 1997 and 1998, Korea made a further mistake. In determining its market price support for beef, Korea used the quantity of Hanwoo cattle actually purchased. The Panel found that "[t]he actual quantity of purchases is not relevant in the calculation of market price support. Korea, by indicating its intent to purchase specified quantities, made them eligible to receive the applied administered price, and consequently affected and supported the price of all such products".[56]

120. We share the Panel's view that the words "production *eligible* to receive the applied administered price" in paragraph 8 of Annex 3 have a different meaning in ordinary usage from "production *actually purchased*". The ordinary meaning of "eligible" is "fit or *entitled* to be chosen".[57] Thus, "production eligible" refers to production that is "fit or entitled" to be purchased rather than production that was actually purchased. In establishing its program for future market price support, a government is able to define and to limit "eligible" production. Production actually purchased may often be less than eligible production.

121. In the present case, Korea, in effect, declared the quantity of "eligible production" when it announced in January, 1997, that it would purchase 500 head per day of Hanwoo cattle above 500 kg within the 27 January to 31 December 1997 period, which would be 170,000 head of cattle for the 1997 calendar year.[58] That figure, under paragraph 8 of Annex 3, accordingly constitutes the quantity of "eligible production". While there may be nothing under the *Agreement on Agriculture* to prevent Korea from changing the quantity of "eligible production", Korea did not do so, so far as the record of this case shows. Korea instead simply purchased a lesser number of cattle by ceasing its purchases.

122. Korea argues that it is entitled to calculate market price support in 1997 and 1998 by using actual purchases, because it used actual purchases in its calculations in the tables of supporting material in its Schedule. We recall that we share the Panel's view that for beef, "constituent data and methodology" do not exist in the Schedule, as beef did not enter into the calculation of Korea's initial Base Total AMS. We, therefore, agree with the Panel's finding that Korea erred in calculating market price support in 1997 and 1998 by using the amount of production actually purchased, instead of production declared eligible to receive the applied administered price, according to the provisions of paragraph 8 of Annex 3.

123. Having reached the conclusion that Korea had miscalculated its market price support in 1997 and 1998, the Panel attempted to evaluate correctly Korea's Current AMS for beef. In doing so, the Panel stated that "[f]or reasons of clarity and simplicity", it would rely on market price support calculations submitted by New Zealand for Korea's Current AMS for beef.[59] Based on these calculations, the Panel found that Korea's AMS for beef had exceeded the 10 per cent *de minimis* threshold referred to in Article 6.4(b) of the *Agreement on Agriculture* in 1997 and 1998.[60]

124. We note that in calculating Korea's Current AMS for beef, New Zealand uses – like Korea – a fixed external reference price based on 1989-1991 data. As we have found above, the use of such an

[56]Panel Report, para. 831.

[57]*The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 438.

[58]Panel Report, para. 834.

[59]Panel Report, para. 838.

[60]*Ibid.*, para. 840.

external reference price is incompatible with paragraph 9 of Annex 3, which requires an external reference price based on the years 1986-1988.

125. The Panel was aware of this incompatibility, but seemed to assume that New Zealand's reference to 1989-1991 data benefitted, rather than harmed, Korea.[61] This could be the case if the 1989-1991 data would result in a higher external reference price than the one prescribed by paragraph 9 of Annex 3, i.e., the external reference price based on the years 1986-1988. There is, however, no indication in the Panel Report of the level of the external reference price for the years 1986-1988. Furthermore, neither the Panel Report nor the Panel record contain any elements which might allow us to determine the level of such an external reference price.[62]

126. We, therefore, must reverse the Panel's finding that Korea exceeded the 10 per cent *de minimis* threshold of Current AMS for beef in 1997 and 1998, and the consequent finding that the failure to include Current AMS for beef in Current Total AMS in these years is inconsistent with Articles 6 and 7.2(a) of the *Agreement on Agriculture*.

127. As a consequence, we must also reverse the Panel's finding that, in 1997 and 1998, Korea's Current Total AMS exceeded Korea's commitment levels, as specified in Part IV, Section I of its Schedule, in violation of Article 3.2 of the *Agreement on Agriculture*.

128. We should, however, stress that, as there is insufficient information in the Panel record to allow determination of whether Current AMS for beef exceeded the *de minimis* threshold in 1997 and 1998, and, therefore, had to be included in Current Total AMS, we reach no conclusion as to whether or not Korea acted inconsistently with Articles 6 and 7.2(a) of the *Agreement on Agriculture*.

129. Furthermore, as a determination of Current Total AMS cannot be made without first ascertaining Current AMS for beef, no Current Total AMS can be calculated for 1997 and 1998. As a result, there is no basis on which we can reach a conclusion on the issue of whether or not Korea exceeded its commitment levels in Part IV of its Schedule for 1997 and 1998, contrary to Article 3.2 of the *Agreement on Agriculture*.

VI. Dual Retail System

A. *Article III:4 of the GATT 1994*

130. The Panel found that Korea's dual retail system for beef accords treatment less favourable to imported beef than to like Korean beef, and is, thus, inconsistent with Article III:4 of the GATT 1994. This finding was based on the Panel's view that any measure based exclusively on criteria relating to

[61]This seems to be the meaning of the words "inflating Korea's legitimate level of domestic support" in footnote 442 of the Panel Report which reads as follows:

> The Panel notes that for this recalculation of Korea's FERP, New Zealand even used 1989-1991 data (inflating Korea's legitimate level of domestic support), contrary to the Panel's conclusion that pursuant to Annex 3 a 1986-1988 FERP should have been employed.

[62]In *Australia – Measures Affecting the Importation of Salmon* we stated that where we have reversed a finding of a panel, we should attempt to complete a panel's legal analysis "to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record". Appellate Body Report, WT/DS18/AB/R, adopted 6 November 1998, para. 118. See also, Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 133.

the origin of a product is inconsistent with Article III:4.[63] The finding was also based on the Panel's assessment of how the dual retail system modifies the conditions of competition between imported and like domestic beef in the Korean market.[64]

131. Korea argues on appeal that the dual retail system does not accord treatment less favourable to imported beef than to like domestic beef. For Korea, the dual retail system does not *on its face* violate Article III:4, since there is "perfect regulatory symmetry" in the separation of imported and domestic beef at the retail level, and there is "no regulatory barrier" which prevents traders from converting from one type of retail store to another.[65] Nor, Korea argues, does the dual retail system violate Article III:4 *de facto*, and the Panel's conclusion to the contrary was not based on a proper empirical analysis of the Korean beef market.[66]

132. Article III:4 of the GATT 1994 reads in relevant part:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded *treatment no less favourable* than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. (emphasis added)

133. For a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are "like products"; that the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and that the imported products are accorded "less favourable" treatment than that accorded to like domestic products. Only the last element – "less favourable" treatment – is disputed by the parties and is at issue in this appeal.

134. The Panel began its analysis of the phrase "treatment no less favourable" by reviewing past GATT and WTO cases. It found that "treatment no less favourable" under Article III:4 requires that a Member accord to imported products "effective equality of opportunities" with like domestic products in respect of the application of laws, regulations and requirements.[67] The Panel concluded its review of the case law by stating:

[63]Panel Report, para. 627.

[64]*Ibid.*, paras. 631-637.

[65]Korea's appellant's submission, paras. 119-126.

[66]*Ibid.*, paras. 127-156.

[67]Panel Report, para. 624.

> Any regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III and this conclusion can be reached even in the absence of any imports (as hypothetical imports can be used to reach this conclusion) confirming that there is no need to demonstrate the actual and specific trade effects of a measure for it to be found in violation of Article III. The object of Article III:4 is, thus, to guarantee effective market access to imported products and to ensure that the latter are offered the same market opportunities as domestic products.[68]

135. The Panel stated that "any regulatory distinction that is based exclusively on criteria relating to the nationality or origin" of products is incompatible with Article III:4. We observe, however, that Article III:4 requires only that a measure accord treatment to imported products that is "no less favourable" than that accorded to like domestic products. A measure that provides treatment to imported products that is *different* from that accorded to like domestic products is not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is "no less favourable". According "treatment no less favourable" means, as we have previously said, according *conditions of competition* no less favourable to the imported product than to the like domestic product. In *Japan – Taxes on Alcoholic Beverages*, we described the legal standard in Article III as follows:

> The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'". Toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions* for imported products in relation to domestic products. "[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given".[69] (emphasis added)

136. This interpretation, which focuses on the *conditions of competition* between imported and domestic like products, implies that a measure according formally *different* treatment to imported products does not *per se*, that is, necessarily, violate Article III:4. In *United States – Section 337*, this point was persuasively made. In that case, the panel had to determine whether United States patent enforcement procedures, which were formally different for imported and for domestic products, violated Article III:4. That panel said:

[68]*Ibid.*, para. 627. (footnotes omitted)

[69]Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pp. 16-17. The original passage contains footnotes. The second sentence is footnoted to *United States - Section 337 of the Tariff Act of 1930* ("*United States – Section 337*"), BISD 36S/345, para. 5.10. The third sentence is footnoted to *United States – Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9; and *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.5(b). The fifth sentence is footnoted to *Italian Discrimination Against Imported Agricultural Machinery*, BISD 7S/60, para. 11.

> On the one hand, contracting parties may apply to imported products *different* formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognised that there may be cases where the application of formally *identical* legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable. For these reasons, the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4.[70] (emphasis added)

137. A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated "less favourably" than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.

138. We conclude that the Panel erred in its general interpretation that "[a]ny regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III."[71]

139. The Panel went on, however, to examine the conditions of competition between imported and like domestic beef in the Korean market. The Panel gave several reasons why it believed that the dual retail system alters the conditions of competition in the Korean market in favour of domestic beef. First, it found that the dual retail system would "limit the possibility for consumers to compare imported and domestic products", and thereby "reduce opportunities for imported products to compete directly with domestic products".[72] Second, the Panel found that, under the dual retail system, "the only way an imported product can get on the shelves is if the retailer agrees to substitute it, not only for one but for all existing like domestic products." This disadvantage would be more serious when the market share of imports (as is the case with imported beef) is small.[73] Third, the Panel found that the dual retail system, by excluding imported beef from "the vast majority of sales outlets", limits the potential market opportunities for imported beef. This would apply particularly to products "consumed on a daily basis", like beef, where consumers may not be willing to "shop around".[74] Fourth, the Panel found that the dual retail system imposes more costs on the imported product, since the domestic product will tend to continue to be sold from existing retail stores, whereas imported beef will require new stores to be established.[75] Fifth, the Panel found that the dual retail system "encourages the perception that imported and domestic beef are different, when they are in fact like products belonging to the same market", which gives a competitive advantage to domestic beef,

[70] *United States – Section 337*, *supra*, footnote 69, paragraph 5.11.

[71] Panel Report, para. 627.

[72] *Ibid.*, para. 631.

[73] *Ibid.*, para. 632.

[74] Panel Report, para. 633.

[75] *Ibid.*, para. 634.

"based on criteria not related to the products themselves".[76] Sixth, the Panel found that the dual retail system "facilitates the maintenance of a price differential" to the advantage of domestic beef.[77]

140. On appeal, Korea argues that the Panel's analysis of the conditions of competition in the Korean market is seriously flawed, relying largely on speculation rather than on factual analysis. Korea maintains that the dual retail system does not deny consumers the possibility to make comparisons, and the numbers of outlets selling imported beef, as compared with outlets selling domestic beef, does not support the Panel's findings. Korea argues, furthermore, that the dual retail system neither adds to the costs of, nor shelters high prices for, domestic beef.[78]

141. It will be seen below that we share the ultimate conclusion of the Panel in respect of the consistency of the dual retail system for beef with Article III:4 of the GATT 1994. Portions, however, of the Panel's analysis *en route* to that conclusion appear to us problematic. For instance, while limitation of the ability to compare visually two products, local and imported, at the point of sale may have resulted from the dual retail system, such limitation does not, in our view, necessarily reduce the opportunity for the imported product to compete "directly" or on "an equal footing" with the domestic product.[79] Again, even if we were to accept that the dual retail system "encourages" the perception of consumers that imported and domestic beef are "different", we do not think it has been demonstrated that such encouragement necessarily implies a competitive advantage for domestic beef.[80] Circumstances like limitation of "side-by-side" comparison and "encouragement" of consumer perceptions of "differences" may be simply incidental effects of the dual retail system without decisive implications for the issue of consistency with Article III:4.

142. We believe that a more direct, and perhaps simpler, approach to the dual retail system of Korea may be usefully followed in the present case. In the following paragraphs, we seek to focus on what appears to us to be the fundamental thrust and effect of the measure itself.

143. Korean law in effect requires the existence of two distinct retail distribution systems so far as beef is concerned: one system for the retail sale of domestic beef and another system for the retail sale of imported beef.[81] A small retailer (that is, a non-supermarket or non-department store) which is a "Specialized Imported Beef Store" may sell any meat *except domestic beef*; any other small retailer may sell any meat *except imported beef*.[82] A large retailer (that is, a supermarket or department store) may sell both imported and domestic beef, as long as the imported beef and domestic beef are

[76] *Ibid.*

[77] *Ibid.*

[78] Korea's appellant's submission, paras. 101, 127-156.

[79] See Panel Report, para. 633.

[80] *Ibid.*, para. 634.

[81] The essential features of the Korean dual retail system for beef are found in the *Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores,* (61550-81) 29 January 1990, modified on 15 March 1994; and the *Regulations Concerning Sales of Imported Beef,* (51550-100), modified on 27 March 1993, 7 April 1994, and 29 June 1998. On 1 October 1999, these two instruments were replaced by the *Management Guideline for Imported Beef*, (Ministry of Agriculture Notice 1999-67), which maintained, however, the basic principles of the dual retail system.

[82] *Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores* Art. 5(C); *Regulations Concerning Sales of Imported Beef,* Art. 14(5); *Management Guideline for Imported Beef*, Art. 15.

sold in separate sales areas.[83] A retailer selling imported beef is required to display a sign reading "Specialized Imported Beef Store".[84]

144. Thus, the Korean measure formally separates the selling of imported beef and domestic beef. However, that formal separation, *in and of itself*, does not necessarily compel the conclusion that the treatment thus accorded to imported beef is less favourable than the treatment accorded to domestic beef.[85] To determine whether the treatment given to imported beef is less favourable than that given to domestic beef, we must, as earlier indicated, inquire into whether or not the Korean dual retail system for beef modifies the *conditions of competition* in the Korean beef market to the disadvantage of the imported product.

145. When beef was first imported into Korea in 1988, the new product simply entered into the pre-existing distribution system that had been handling domestic beef. The beef retail system was a unitary one, and the conditions of competition affecting the sale of beef were the same for both the domestic and the imported product. In 1990, Korea promulgated its dual retail system for beef.[86] Accordingly, the existing small retailers had to choose between, on the one hand, continuing to sell domestic beef and renouncing the sale of imported beef or, on the other hand, ceasing to sell domestic beef in order to be allowed to sell the imported product. Apparently, the vast majority of the small meat retailers chose the first option.[87] The result was the virtual exclusion of imported beef from the retail distribution channels through which domestic beef (and until then, imported beef, too) was distributed to Korean households and other consumers throughout the country. Accordingly, a new and separate retail system had to be established and gradually built from the ground up for bringing the imported product to the same households and other consumers if the imported product was to compete at all with the domestic product. Put in slightly different terms, the putting into legal effect of the dual retail system for beef meant, in direct practical effect, so far as imported beef was concerned, the sudden cutting off of access to the normal, that is, the previously existing, distribution outlets through which the domestic product continued to flow to consumers in the urban centers and countryside that make up the Korean national territory. The central consequence of the dual retail system can only be reasonably construed, in our view, as the imposition of a drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same consumers served by the traditional retail channels for domestic beef. In 1998, when this case began, eight years after the dual retail system was first prescribed, the consequent reduction of commercial opportunity was reflected in the much smaller number of specialized imported beef shops (approximately 5,000 shops) as compared with the number of retailers (approximately 45,000 shops) selling domestic beef.[88]

146. We are aware that the dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. The legal necessity of making a choice was, however, imposed by the measure itself. The restricted nature of that choice should be noted. The choice given to the meat retailers was *not* an option between remaining with the pre-existing unified distribution set-up or

[83] *Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores,* Art. 3(A); *Management Guideline for Imported Beef*, Art. 9(5).

[84] *Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores,* Art. 5(A); *Regulations Concerning Sales of Imported Beef,* Art. 14(5); *Management Guideline for Imported Beef*, Art. 9(6).

[85] Apart from the display sign requirement, dealt with in para. 151.

[86] See Panel Report, para. 630.

[87] Panel Report, para. 633.

[88] The number of imported beef shops is noted by the Panel in footnote 347 of the Panel Report; the number of domestic beef shops has been provided by the United States in para. 175 of the Panel Report, and has not been contested by Korea.

going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only. Thus, the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure. In these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product.

147. We also note that the reduction of competitive opportunity through the restriction of access to consumers results from the imposition of the dual retail system for beef, notwithstanding the "perfect regulatory symmetry" of that system[89], and is not a function of the limited volume of foreign beef actually imported into Korea. The fact that the WTO-consistent quota for beef has, save for two years, been fully utilized does not detract from the lack of equality of competitive conditions entailed by the dual retail system.

148. We believe, and so hold, that the treatment accorded to imported beef, as a consequence of the dual retail system established for beef by Korean law and regulation, is less favourable than the treatment given to like domestic beef and is, accordingly, not consistent with the requirements of Article III:4 of the GATT 1994.

149. It may finally be useful to indicate, however broadly, what we are *not* saying in reaching our above conclusion. We are *not* holding that a dual or parallel distribution system that is *not* imposed directly or indirectly by law or governmental regulation, but is rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994. What is addressed by Article III:4 is merely the *governmental* intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory.

150. Finally, we note that Korea requires that imported beef be sold in a store displaying a sign declaring "Specialized Imported Beef Store". The Panel found that the sign requirement was "essentially ancillary to the dual retail system", and, since the dual retail system was inconsistent with Article III:4, the Panel found that the sign requirement was as well.[90] The Panel found also that, since the sign requirement went beyond an obligation to indicate origin, it was inconsistent with statements contained in a 1956 GATT Working Party Report.[91] On appeal, Korea claims that the Panel used "erroneous logic" in its conclusion based on the ancillary character of the sign requirement, and that the statement in the Working Party Report did not apply to the sign requirement.[92]

151. Without a system of specialized imported beef stores, the sign requirement would have no meaning and would not be required. When considered independently from a dual retail system, a sign requirement might or might not be characterized legally as consistent with Article III:4 of the GATT 1994. On the other hand, when considered simply as a detail of the dual retail system, the sign requirement partakes of the legal characterization given to that system itself. We believe it unnecessary to pass upon separately the consistency of the display sign requirement with Article III:4 of the GATT 1994.

[89] The notion of "perfect regulatory symmetry" is set out in Korea's appellant's submission, para. 95. See also *supra*, para. 17.

[90] Panel Report, para. 641.

[91] Working Party Report, *Certificates of Origin, Marks of Origin, Consular Formalities*, adopted 17 November 1956, BISD 5S/102, para. 13.

[92] Korea's appellant's submission, paras. 206-213.

B. *Article XX(d) of the GATT 1994*

152. The Panel went on to conclude that the dual retail system, which it found to be inconsistent with Article III:4, could *not* be justified pursuant to Article XX(d) of the GATT 1994. The Panel found that the dual retail system is a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices.[93]

153. The Panel began its examination of Korea's dual retail system under Article XX(d) by finding that the dual retail system was designed to "secure compliance" with the *Unfair Competition Act*, a law consistent on its face with WTO provisions.[94] The Panel then focused on whether the dual retail system is "necessary" to secure compliance with that law. It examined enforcement measures taken by Korea for related products where fraudulent misrepresentation or passing of one product for another has occurred, and found that in these areas a dual retail system was not used. Instead, in respect of such product areas, Korea uses traditional enforcement measures, consistent with WTO rules, which include record-keeping, investigations, policing and fines. The Panel next inquired into whether these alternative, WTO-consistent measures were "reasonably available" to Korea to meet Korea's desired level of enforcement of laws against fraudulent misrepresentation in the retail beef sector. The Panel concluded that these measures are "reasonably available" alternative measures, and that Korea therefore cannot justify the dual retail system as "necessary" under Article XX(d).[95]

154. Korea appeals the Panel's conclusion. Korea argues that the Panel incorrectly interpreted the term "necessary" in Article XX(d) as requiring *consistency* among enforcement measures taken in related product areas.[96] Further, according to Korea, the Panel neglected to take into account the *level of enforcement* that Korea sought with respect to preventing the fraudulent sale of imported beef.[97]

155. Article XX(d), together with the introductory clause of Article XX, reads as follows:

> *Article XX*
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> …

[93]Panel Report, para. 675.

[94]*Ibid.*, para. 658.

[95]*Ibid.*, paras. 660-674.

[96]Korea's appellant's submission, paras. 166-180.

[97]*Ibid.*, paras. 181-193.

> (*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

156. We note that in examining the Korean dual retail system under Article XX, the Panel followed the appropriate sequence of steps outlined in *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"). There we said:

> In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) -- listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. *The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.*[98] (emphasis added)

The Panel concentrated its analysis on paragraph (d), that is, the first-tier analysis. Having found that the dual retail system did not fulfill the requirements of paragraph (d), the Panel correctly considered that it did not need to proceed to the second-tier analysis, that is, to examine the application in this case of the requirements of the introductory clause of Article XX.

157. For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be "necessary" to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.[99]

158. The Panel examined these two aspects one after the other. The Panel found, "despite … troublesome aspects, … that the dual retail system was put in place, at least in part, in order to secure compliance with the Korean legislation against deceptive practices to the extent that it serves to prevent acts inconsistent with the *Unfair Competition Act*."[100] It recognized that the system was established at a time when acts of misrepresentation of origin were widespread in the beef sector. It also acknowledged that the dual retail system "does appear to reduce the opportunities and thus the temptations for butchers to misrepresent [less expensive] foreign beef for [more expensive] domestic beef".[101] The parties did not appeal these findings of the Panel.

[98]Appellate Body Report, WT/DS2/AB/R, adopted 20 May 1996, p. 22. See also, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*"), WT/DS58/AB/R, adopted 6 November 1998, paras. 119-121.

[99]Appellate Body Report, *United States – Gasoline*, *supra*, footnote 98, pp. 22-23; Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, pp. 14-16; Panel report, *United States – Section 337*, *supra*, footnote 69, para. 5.27.

[100]Panel Report, para. 658.

[101]*Ibid.*

159. We turn, therefore, to the question of whether the dual retail system is "necessary" to secure compliance with the *Unfair Competition Act*. Once again, we look first to the ordinary meaning of the word "necessary", in its context and in the light of the object and purpose of Article XX, in accordance with Article 31(1) of the *Vienna Convention*.

160. The word "necessary" normally denotes something "that cannot be dispensed with or done without, requisite, essential, needful".[102] We note, however, that a standard law dictionary cautions that:

> [t]his word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity".[103]

161. We believe that, as used in the context of Article XX(d), the reach of the word "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or "inevitable". Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".[104]

162. In appraising the "necessity" of a measure in these terms, it is useful to bear in mind the context in which "necessary" is found in Article XX(d). The measure at stake has to be "necessary to ensure compliance with laws and regulations … , *including* those relating to customs enforcement, the enforcement of [lawful] monopolies … , the protection of patents, trade marks and copyrights, and the prevention of deceptive practices". (emphasis added) Clearly, Article XX(d) is susceptible of application in respect of a wide variety of "laws and regulations" to be enforced. It seems to us that a treaty interpreter assessing a measure claimed to be necessary to secure compliance of a WTO-consistent law or regulation may, in appropriate cases, take into account the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect. The more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument.

163. There are other aspects of the enforcement measure to be considered in evaluating that measure as "necessary". One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the

[102] *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. II, p. 1895.

[103] *Black's Law Dictionary*, (West Publishing, 1995), p. 1029.

[104] We recall that we have twice interpreted Article XX(g), which requires a measure "*relating* to the conservation of exhaustible natural resources". (emphasis added). This requirement is more flexible textually than the "necessity" requirement found in Article XX(d). We note that, under the more flexible "*relating to*" standard of Article XX(g), we accepted in *United States – Gasoline* a measure because it presented a "*substantial* relationship", (emphasis added) i.e., *a close and genuine* relationship of ends and means, with the conservation of clean air. *Supra*, footnote 98, p.19. In *United States – Shrimp* we accepted a measure because it was "*reasonably related*" to the protection and conservation of sea turtles. *Supra*, footnote 98, at para. 141.

contribution, the more easily a measure might be considered to be "necessary". Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce[105], that is, in respect of a measure inconsistent with Article III:4, restrictive effects *on imported goods*. A measure with a relatively slight impact upon imported products might more easily be considered as "necessary" than a measure with intense or broader restrictive effects.

164. In sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.

165. The panel in *United States – Section 337* described the applicable standard for evaluating whether a measure is "necessary" under Article XX(d) in the following terms:

> It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.[106]

166. The standard described by the panel in *United States – Section 337* encapsulates the general considerations we have adverted to above. In our view, the weighing and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could "reasonably be expected to employ" is available, or whether a less WTO-inconsistent measure is "reasonably available".

167. The Panel followed the standard identified by the panel in *United States – Section 337*. It started scrutinizing whether the dual retail system is "necessary" under paragraph (d) of Article XX by stating:

> Korea has to convince the Panel that, contrary to what was alleged by Australia and the United States, no alternative measure consistent with the WTO Agreement is reasonably available at present in order to deal with misrepresentation in the retail market as to the origin of beef.[107]

168. The Panel first considered a range of possible alternative measures, by examining measures taken by Korea with respect to situations involving, or which could involve, deceptive practices

[105] We recall that the last paragraph of the Preamble of the GATT of 1994 reads as follows: "Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade *and to the elimination of discriminatory treatment in international commerce*". (emphasis added)

[106] Panel report, *United States – Section 337*, *supra*, footnote 69, para. 5.26.

[107] Panel Report, para. 659.

similar to those which in 1989-1990 had affected the retail sale of foreign beef. The Panel found that Korea does not require a dual retail system in *related product areas*, but relies instead on traditional enforcement procedures. There is no requirement, for example, for a dual retail system separating domestic Hanwoo beef from domestic dairy cattle beef.[108] Nor is there a requirement for a dual retail system for any other meat or food product, such as pork or seafood.[109] Finally, there is no requirement for a system of separate restaurants, depending on whether they serve domestic or imported beef, even though approximately 45 per cent of the beef imported into Korea is sold in restaurants.[110] Yet, in all of these cases, the Panel found that there were numerous cases of fraudulent misrepresentation.[111] For the Panel, these examples indicated that misrepresentation of origin could, in principle, be dealt with "on the basis of basic methods … such as normal policing under the Korean *Unfair Competition Act*."[112]

169. Korea argues, on appeal, that the Panel, by drawing conclusions from the absence of any requirement for a dual retail system in related product areas, introduces an illegitimate "consistency test" into Article XX(d). For Korea, the proper test for "necessary" under Article XX(d):

> … is to see whether another means exists which is less restrictive than the one used and which can reach the objective sought. Whether such means will be applied *consistently* to other products or not is not a matter of concern for the necessity requirement under Article XX(d).[113]

170. Examining enforcement measures applicable to the same illegal behaviour relating to like, or at least similar, products does not necessarily imply the introduction of a "consistency" requirement into the "necessary" concept of Article XX(d). Examining such enforcement measures may provide useful input in the course of determining whether an alternative measure which could "reasonably be expected" to be utilized, is available or not.

171. The enforcement measures that the Panel examined were measures taken to enforce the same law, the *Unfair Competition Act*.[114] This law provides for penal and other sanctions[115] against any "unfair competitive act", which includes any:

[108]In 1998, domestic dairy cattle beef amounted to 12 percent of total beef consumption in Korea. Panel Report, para. 661.

[109]*Ibid.*, para. 662.

[110]*Ibid.*, para. 663.

[111]*Ibid.*, paras. 661-663, including footnote 366, in which the Panel noted "that the Livestock Times reported that the deceptive beef marketing practice was widespread in restaurants (where price differential was 58 per cent)".

[112]*Ibid.*, para. 664.

[113]Korea's appellant's submission, para. 167.

[114]In GATT case law, comparisons have been made between enforcement measures taken in different *jurisdictions*. In the *United States – Measures Affecting Alcoholic and Malt Beverages* case, the panel said that "[t]he fact that not all fifty states maintain discriminatory distribution systems indicates to the Panel that alternative measure for enforcement of state excise tax laws do indeed exist." Adopted 19 June 1992, BISD 39S/206, para. 5.43. In the *United States – Section 337* case, the panel "did not consider that a different scheme for imports alleged to infringe process patents is necessary, since many countries grant to their civil courts jurisdiction over imports of products manufactured abroad under processes protected by patents of the importing country". *Supra*, footnote 69, para. 5.28.

[115]*Unfair Competition Prevention and Business Secret Protection Act*, Article 2(1)(c), Article 8.

> *Act misleading the public to understand the place of origin of any goods* either by falsely marking that place on any commercial document or communication, in said goods or any advertisement thereof *or in any manner of misleading the general public*, or by selling, distributing, importing or exporting goods bearing such mark;[116] (emphasis added)

The language used in this law to define an "unfair competitive act" – "any manner of misleading the general public" – is broad. It applies to all the examples raised by the Panel – domestic dairy beef sold as Hanwoo beef, foreign pork or seafood sold as domestic product, as well as to imported beef served as domestic beef in restaurants.

172. The application by a Member of WTO-*compatible* enforcement measures to the same kind of illegal behaviour – the passing off of one product for another – for like or at least similar products, provides a suggestive indication that an alternative measure which could "reasonably be expected" to be employed may well be available. The application of such measures for the control of the same illegal behaviour for like, or at least similar, products raises doubts with respect to the objective *necessity* of a different, much stricter, and WTO-inconsistent enforcement measure. The Panel was, in our opinion, entitled to consider that the "examples taken from outside as well as within the beef sector indicate that misrepresentation of origin can indeed be dealt with on the basis of basic methods, consistent with the *WTO Agreement*, and thus less trade restrictive and less market intrusive, such as normal policing under the Korean *Unfair Competition Act*."[117]

173. Having found that possible alternative enforcement measures, consistent with the *WTO Agreement*, existed in other related product areas, the Panel went on to state that:

> … it is for Korea to demonstrate that such an alternative measure is not reasonably available or is unreasonably burdensome, financially or technically, taking into account a variety of factors including the domestic costs of such alternative measure, to ensure that consumers are not misled as to the origin of beef.[118]

174. The Panel proceeded to examine whether the alternative measures or "basic methods" – investigations, prosecutions, fines, and record-keeping – which were used in related product areas, were "reasonably available" to Korea to secure compliance with the *Unfair Competition Act.* The Panel concluded "that Korea has not demonstrated to the satisfaction of the Panel that alternative measures consistent with the WTO Agreement were not reasonably available".[119] Thus, as noted at the outset, the Panel found that the dual retail system was "a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices".[120] The dual retail system was, therefore, not justified under Article XX(d).[121]

[116]*Unfair Competition Prevention and Business Secret Protection Act*, Article 2(1)(c) (from translation provided by Korea as Exhibit 28 of its second submission to the Panel.

[117]Panel Report, para. 664.

[118]Panel Report, para. 665.

[119]*Ibid.*, para. 674.

[120]*Ibid.*, para 675.

[121]*Ibid.*

175. Korea also argues on appeal that the Panel erred in applying Article XX(d) because it did not "pay due attention to the level of enforcement sought."[122] For Korea, under Article XX(d), a panel must:

> … examine whether a means reasonably available to the WTO Member could have been used in order to reach the objective sought without putting into question the level of enforcement sought.[123]

For Korea, alternative measures must not only be reasonably available, but must also *guarantee* the level of enforcement sought which, in the case of the dual retail system, is the *elimination* of fraud in the beef retail market.[124] With respect to investigations, Korea argues that this tool can only reveal fraud *ex post*, whereas the dual retail system can combat fraudulent practices *ex ante*.[125] Korea contends that *ex post* investigations do not *guarantee* the level of enforcement that Korea has chosen, and therefore should not be considered. With respect to policing, Korea believes that this option is not "reasonably available", because Korea lacks the resources to police thousands of shops on a round-the-clock basis.

176. It is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations. We note that this has also been recognized by the panel in *United States – Section 337*, where it said: "The Panel wished to make it clear that this [the obligation to choose a reasonably available GATT-consistent or less inconsistent measure] does not mean that a contracting party could be asked to change its substantive patent law or its desired *level of enforcement* of that law …. ". (emphasis added) The panel added, however, the caveat that "provided that such law and such *level of enforcement* are the same for imported and domestically-produced products".[126]

177. We recognize that, in establishing the dual retail system, Korea could well have intended to secure a higher level of enforcement of the prohibition, provided by the *Unfair Competition Act*, of acts misleading the public *about the origin of beef* (domestic or imported) *sold by retailers*, than the level of enforcement of the same prohibition of the *Unfair Competition Act* with respect to *beef served in restaurants*, or the sale by *retailers* of *other meat or food products*, such as *pork or seafood*.

178. We think it unlikely that Korea intended to establish a level of protection that *totally eliminates* fraud with respect to the origin of beef (domestic or foreign) sold by retailers. The total elimination of fraud would probably require a total ban of imports. Consequently, we assume that in effect Korea intended to *reduce considerably* the number of cases of fraud occurring with respect to the origin of beef sold by retailers. The Panel did find that the dual retail system "does appear to reduce the opportunities and thus the temptations for butchers to misrepresent foreign beef for domestic beef".[127] And we accept Korea's argument that the dual retail system *facilitates* control and permits combatting fraudulent practices *ex ante*. Nevertheless, it must be noted that the dual retail system is only an *instrument* to achieve a significant reduction of violations of the *Unfair Competition Act*. Therefore, the question remains whether other, conventional and WTO-consistent instruments can not reasonably be expected to be employed to achieve the same result.

[122]Korea's appellant's submission, para. 182.

[123]*Ibid.*, para. 181.

[124]*Ibid.*, paras. 181, 185.

[125]*Ibid.*, para. 192.

[126]Panel report, *United States – Section 337*, *supra*, footnote 69, para. 5.26.

[127]Panel Report, para. 658.

179. Turning to investigations, the Panel found that Korea, in the past, had been able to distinguish imported beef from domestic beef, and had, in fact, published figures on the amount of imported beef fraudulently sold as domestic beef. This meant that Korea was able, in fact, to detect fraud.[128] On fines, the Panel found that these could be an effective deterrent, as long as they outweighed the potential profits from fraud.[129] On record-keeping, the Panel felt that if beef traders at all levels were required to keep records of their transactions, then effective investigations could be carried out.[130] Finally, on policing, the Panel noted that Korea had not demonstrated that the costs would be too high.[131] For all these reasons, the Panel considered "that Korea has not demonstrated to the satisfaction of the Panel that alternative measures consistent with the WTO Agreement were not reasonably available".[132] Thus, as already noted, the Panel found that the dual retail system was "a disproportionate measure not necessary to secure compliance with the Korean law against deceptive practices".[133]

180. We share the Panel's conclusion. We are not persuaded that Korea could not achieve its desired level of enforcement of the *Unfair Competition Act* with respect to the origin of beef sold by retailers by using conventional WTO-consistent enforcement measures, if Korea would devote more resources to its enforcement efforts on the beef sector. It might also be added that Korea's argument about the lack of resources to police thousands of shops on a round-the-clock basis is, in the end, not sufficiently persuasive. Violations of laws and regulations like the Korean *Unfair Competition Act* can be expected to be routinely investigated and detected through selective, but well-targeted, controls of potential wrongdoers. The control of records will assist in selecting the shops to which the police could pay particular attention.

181. There is still another aspect that should be noted relating to both the method actually chosen by Korea – its dual retail system for beef – and alternative traditional enforcement measures. Securing through conventional, WTO-consistent measures a higher level of enforcement of the *Unfair Competition Act* with respect to the retail sale of beef, could well entail higher enforcement costs for the national budget. It is pertinent to observe that, through its dual retail system, Korea has in effect shifted all, or the great bulk, of these potential costs of enforcement (translated into a drastic reduction of competitive access to consumers) to imported goods and retailers of imported goods, instead of evenly distributing such costs between the domestic and imported products. In contrast, the more conventional, WTO-consistent measures of enforcement do not involve such onerous shifting of enforcement costs which ordinarily are borne by the Member's public purse.

182. For these reasons, we uphold the conclusion of the Panel that Korea has not discharged its burden of demonstrating under Article XX(d) that alternative WTO-consistent measures were not "reasonably available" in order to detect and suppress deceptive practices in the beef retail sector[134], and that the dual retail system is therefore not justified by Article XX(d).[135]

183. Korea further argues, on appeal, that the Panel did not make a separate finding on whether the display sign requirement was justified by Article XX(d), and requests that, should the Appellate Body

[128]*Ibid.*, para. 668.

[129]Panel Report, para. 669

[130]*Ibid.*, para. 672.

[131]*Ibid.*, para. 673.

[132]*Ibid.*, para. 674.

[133]*Ibid.*, para. 675.

[134]Panel Report, para. 674.

[135]*Ibid.*, para. 675.

uphold the Panel's finding that the sign requirement was inconsistent with Article III:4, it should proceed to consider the issue of its justification under Article XX(d).[136]

184. We recall that Korean law requires an imported beef retailer to display a sign reading "Specialized Imported Beef Store".[137] Since the Panel correctly regarded the sign requirement as merely ancillary to the dual retail system, we consider that it is unnecessary to examine separately whether the display sign requirement can be justified under Article XX(d).

185. In sum, we uphold the Panel's conclusion that the dual retail system, which is inconsistent with Article III:4, is not justified under Article XX(d) of the GATT 1994.

VII. Findings and Conclusions

186. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's conclusion that, under the Panel's terms of reference, the Panel was required to examine, pursuant to the complaining parties' claims, the commitment levels in Korea's Schedule and Annex 3 of the *Agreement on Agriculture;*

(b) upholds the Panel's conclusion that Korea's domestic support for beef for 1997 and 1998 was not correctly calculated pursuant to Article 1(a)(ii) and Annex 3 of the *Agreement on Agriculture*;

(c) reverses the Panel's finding on recalculated amounts of Korea's domestic support for beef in 1997 and 1998, as the Panel used, for these recalculations, a methodology inconsistent with Article 1(a)(ii) and Annex 3 of the *Agreement on Agriculture*; and reverses, therefore, the Panel's following conclusions, based on these recalculated amounts: (i) that Korea's domestic support for beef in 1997 and 1998 exceeded the *de minimis* level contrary to Article 6 of the *Agreement on Agriculture*; (ii) that Korea's failure to include Current AMS for beef in Korea's Current Total AMS was contrary to Article 7.2(a) of that Agreement; and (iii) that Korea's total domestic support for 1997 and 1998 exceeded Korea's commitment levels contrary to Article 3.2 of the *Agreement on Agriculture*;

(d) is unable, in view of the insufficient factual findings made by the Panel, to complete the legal analysis of: (i) whether Korea's domestic support for beef exceeds the *de minimis* level contrary to Article 6 of the *Agreement on Agriculture*; (ii) whether the failure to include Current AMS for beef in Korea's Current Total AMS was contrary to Article 7.2(a) of that Agreement; and (iii) whether Korea's total domestic support for 1997 and 1998 exceeded Korea's commitment levels contrary to Article 3.2 of the *Agreement on Agriculture*;

(e) upholds the Panel's ultimate conclusion that Korea's dual retail system for beef is inconsistent with Article III:4 of the GATT 1994;

(f) upholds the Panel's conclusion that Korea's dual retail system for beef is not justified under Article XX(d) of the GATT 1994; and

[136]Korea's appellant's submission, paras. 217-223.

[137]Panel Report, paras. 642-643.

(g) finds it unnecessary to pass upon separately whether the ancillary sign requirement is consistent with Article III:4 or justified under Article XX(d) of the GATT 1994.

187. The Appellate Body recommends that the DSB request that Korea bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with Korea's obligations under the GATT 1994 and the *Agreement on Agriculture* into conformity with its obligations under those Agreements.

Report of the Appellate Body,
United States – Subsidies on Upland Cotton,
WT/DS267/AB/R, adopted 3 March 2005

WORLD TRADE ORGANIZATION

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Report of the Appellate Body

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EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EEC – Animal Feed Proteins	GATT Panel Report, *EEC – Measures on Animal Feed Proteins*, adopted 14 March 1978, BISD 25S/49
EEC – Apples I (Chile)	GATT Panel Report, *EEC Restrictions on Imports of Apples from Chile*, adopted 10 November 1980, BISD 27S/98
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3, and 4, adopted 23 July 1998, DSR 1998:VI, 2201
Italy – Agricultural Machinery	GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Japan – Apples	Appellate Body Report, *Japan - Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003
Korea – Alcoholic Beverages	Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
US – Canadian Tuna	GATT Panel Report, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted 22 February 1982, BISD 29S/91
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002

US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
US – Certain EC Products	Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R and Add.1, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS165/AB/R, DSR 2001:II, 413
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by the Appellate Body Report, WT/DS108/AB/RW, DSR 2002:I, 119
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248AB/R, WT/DS249AB/R, WT/DS251AB/R, WT/DS252AB/R, WT/DS253AB/R, WT/DS254AB/R, WT/DS258AB/R, WT/DS259AB/R, adopted 10 December 2003

US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323
US – Wool Shirts and Blouses	Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997, as upheld by the Appellate Body Report, WT/DS33/AB/R, DSR 1997:I, 343

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AMS	Aggregate Measurement of Support
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
CCC	Commodity Credit Corporation
CCP payments	counter-cyclical payments
DP payments	direct payments
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
ETI Act	FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Public Law 106-519
FAIR Act of 1996	Federal Agriculture Improvement and Reform Act of 1996, Public Law 104-127
FSRI Act of 2002	Farm Security and Rural Investment Act of 2002, Public Law 107-171
GATT 1994	*General Agreement on Tariffs and Trade 1994*
GSM 102	General Sales Manager 102
GSM 103	General Sales Manager 103
MLA payments	market loss assistance payments
peace clause	Article 13 of the *Agreement on Agriculture*
Panel Report	Panel Report, *United States – Subsidies on Upland Cotton* ("*US – Upland Cotton*"), WT/DS267/R, and Corr.1, 8 September 2004
PFC payments	production flexibility contract payments
price-contingent subsidies	Marketing loan program payments, Step 2 payments, market loss assistance payments, and counter-cyclical payments
SCGP	Supplier Credit Guarantee Program
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
Step 2 payments	User marketing (Step 2) payments
USDA	United States Department of Agriculture
Vienna Convention	*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679
Working Procedures	*Working Procedures for Appellate Review*
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Subsidies on Upland Cotton

AB-2004-5

United States, *Appellant/Appellee*
Brazil, *Appellant/Appellee*

Argentina, *Third Participant*
Australia, *Third Participant*
Benin, *Third Participant*
Canada, *Third Participant*
Chad, *Third Participant*
China, *Third Participant*
European Communities, *Third Participant*
India, *Third Participant*
New Zealand, *Third Participant*
Pakistan, *Third Participant*
Paraguay, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*
Venezuela, *Third Participant*

Present:

Janow, Presiding Member
Baptista, Member
Ganesan, Member

I. Introduction

1. The United States and Brazil each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Subsidies on Upland Cotton* (the "Panel Report").[1] The Panel was established on 18 March 2003 to consider claims by Brazil regarding various United States measures[2] that Brazil alleged constituted actionable subsidies within the meaning of Part III of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), prohibited subsidies within the meaning of Part II of the *SCM Agreement*, export subsidies within the scope of the *Agreement on Agriculture*, and/or subsidies actionable under Article XVI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). Brazil also alleged that certain of these measures were inconsistent with Article III:4 of the GATT 1994. The United States argued that some of the measures were domestic support measures that were exempt from certain actions by virtue of paragraphs (a) and (b) of Article 13 of the *Agreement on Agriculture*.

2. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 8 September 2004. In paragraph 7.194 of its Report, the Panel made the following findings with respect to whether certain measures fell within its terms of reference:

[1]WT/DS267/R, 8 September 2004.

[2]Brazil made claims in respect of marketing loan program payments, user marketing (Step 2) payments, production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, cottonseed payments, export credit guarantees and the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (Public Law 106-519) (the "ETI Act of 2000"). Brazil also made claims regarding legislation and regulations underlying certain of these programs. All of these measures are described more fully in paragraphs 7.200 to 7.250 of the Panel Report and are discussed further in the relevant sections of this Report.

The Panel rules that the following measures, as addressed in document WT/DS267/7, are within its terms of reference:

(i) export credit guarantees to facilitate the export of United States upland cotton, and other eligible agricultural commodities;

(ii) production flexibility contract payments and market loss assistance payments[.][3]

3. The Panel also ruled, in paragraph 7.196 of its Report, that:

> ... in its request for consultations in document WT/DS267/1, Brazil provided a statement of available evidence with respect to export credit guarantees under the GSM 102, GSM 103 and SCGP programmes relating to upland cotton and eligible agricultural commodities other than upland cotton, as required by Article 4.2 of the *SCM Agreement*.

4. With respect to the substantive issues raised by the parties, the Panel set out the following conclusions in paragraph 8.1 of its Report:

(a) Article 13 of the *Agreement on Agriculture* is not in the nature of an affirmative defence;

(b) PFC payments[4], DP payments[5], and the legislative and regulatory provisions which establish and maintain the DP programme, do not satisfy the condition in paragraph (a) of Article 13 of the *Agreement on Agriculture*;

[3]The Panel also ruled that production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments to upland cotton producers with respect to non-upland cotton base acres; cottonseed payments under both Public Law 106-224 and Public Law 107-25 (for the 2000 crop); storage payments and interest subsidies that implement the marketing loan program; and payments under programs and provisions within the Panel's terms of reference made after the date on which the Panel was established, were all within its terms of reference. (See Panel Report, para. 7.194(iii)-(vi)) The Panel also ruled that certain other measures fell outside of its terms of reference: see Panel Report, para. 7.195

[4]Production flexibility contract payments. Production flexibility contract payments are described by the Panel in paras. 7.212 ff of the Panel Report and are discussed further *infra*, para. 251.

[5]Direct payments. Direct payments are described by the Panel in paras. 7.218 ff of the Panel Report and are discussed further *infra*, para. 312.

(c) United States domestic support measures considered in Section VII:D of this report[6] grant support to a specific commodity in excess of that decided during the 1992 marketing year and, therefore, do not satisfy the conditions in paragraph (b) of Article 13 of the *Agreement on Agriculture* and, therefore, are not exempt from actions based on paragraph 1 of Article XVI of the *GATT 1994* or Articles 5 and 6 of the *SCM Agreement*;

(d) concerning United States export credit guarantees under the GSM 102[7], GSM 103[8] and SCGP[9] export credit guarantee programmes:

(i) in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice):

- United States export credit guarantees under the GSM 102, GSM 103 and SCGP export credit guarantee programmes are export subsidies applied in a manner which results in circumvention of United States' export subsidy commitments, within the meaning of Article 10.1 of the *Agreement on Agriculture* and they are therefore inconsistent with Article 8 of the *Agreement on Agriculture*;

- as they do not conform fully to the provisions of Part V of the Agreement on Agriculture, they do not satisfy the condition in paragraph (c) of Article 13 of the *Agreement on Agriculture* and, therefore, are not exempt from actions based on Article XVI of the *GATT 1994* or Articles 3, 5 and 6 of the *SCM Agreement*;

[6]In Section VII:D of the Panel Report, the Panel considered the following measures for purposes of calculating support during the implementation period in which Article 13 of the *Agreement on Agriculture* applies: marketing loan program payments, user marketing (Step 2) payments to domestic users (and not to exporters), production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, and cottonseed payments for the 1999, 2000, and 2002 crops of cottonseed. (Panel Report, para. 7.537 and footnote 695 thereto)

[7]General Sales Manager 102 ("GSM 102"). The United States' export credit guarantee programs, including the GSM 102 program, are described by the Panel in paras. 7.236 ff of the Panel Report and are discussed further *infra*, paras. 586-587.

[8]General Sales Manager 103 ("GSM 103"). The United States' export credit guarantee programs, including the GSM 103 program, are described by the Panel in paras. 7.236 ff of the Panel Report and are discussed further *infra*, paras. 586 and 588.

[9]Supplier Credit Guarantee Program ("SCGP"). The United States' export credit guarantee programs, including the SCGP program, are described by the Panel in paras. 7.236 ff of the Panel Report and are discussed further *infra*, paras. 586 and 589.

- United States export credit guarantees under the GSM 102, GSM 103 and SCGP export credit guarantee programmes are provided by the United States government at premium rates which are inadequate to cover long-term operating costs and losses of the programmes within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement*, and therefore constitute *per se* export subsidies prohibited by Articles 3.1(a) and 3.2 of the *SCM Agreement*.

(ii) however, in respect of exports of unscheduled agricultural products not supported under the programmes and other scheduled agricultural products:

- the United States has established that export credit guarantees under the GSM 102, GSM 103 and SCGP export credit guarantee programmes have not been applied in [a] manner which either results in, or which threatens to lead to, circumvention of United States export subsidy commitments within the meaning of Article 10.1 and that they therefore are not inconsistent with Article 8 of the *Agreement on Agriculture*;

- in these circumstances, and as Brazil has also not made a prima facie case before this Panel that the programmes do not conform fully to the provisions of Part V of the *Agreement on Agriculture*, this Panel must treat them as if they are exempt from actions based on Article XVI of the *GATT 1994* and Article 3 of the *SCM Agreement* in this dispute.

(e) concerning section 1207(a) of the FSRI Act of 2002[10] providing for user marketing (Step 2) payments to exporters of upland cotton:

(i) section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters of upland cotton is an export subsidy, listed in Article 9.1(a) of the *Agreement on Agriculture*, provided in respect of upland cotton, an unscheduled product. It is, therefore, inconsistent with the United States' obligations under Articles 3.3 and 8 of the *Agreement on Agriculture;*

[10]Farm Security and Rural Investment Act of 2002 (the "FSRI Act of 2002"); Public Law 107-171.

(ii) as it does not conform fully to the provisions of Part V of the *Agreement on Agriculture*, it does not satisfy the condition in paragraph (c) of Article 13 of the *Agreement on Agriculture* and, therefore, is not exempt from actions based on Article XVI of the *GATT 1994* or Articles 3, 5 and 6 of the *SCM Agreement;*

(iii) section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters of upland cotton is an export subsidy prohibited by Articles 3.1(a) and 3.2 of the *SCM Agreement*.

(f) concerning section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to domestic users of upland cotton: it is an import substitution subsidy prohibited by Articles 3.1(b) and 3.2 of the *SCM Agreement*;

(g) concerning serious prejudice to the interests of Brazil:

(i) the effect of the mandatory price-contingent United States subsidy measures – marketing loan programme payments, user marketing (Step 2) payments, MLA payments[11] and CCP payments[12] -- is significant price suppression in the same world market within the meaning of Article 6.3(c) of the *SCM Agreement* constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*;

(ii) however, Brazil has not established that:

- the effect of PFC payments, DP payments and crop insurance payments is significant price suppression in the same world market within the meaning of Article 6.3(c) of the *SCM Agreement* constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*; or

[11]Market loss assistance payments. Market loss assistance payments are described by the Panel in paras. 7.216 ff of the Panel Report and are discussed further *infra*, para. 251 and footnote 368.

[12]Counter-cyclical payments. Counter-cyclical payments are described by the Panel in paras. 7.223 ff of the Panel Report and are discussed further *infra*, footnote 370.

- the effect of the United States subsidy measures listed in paragraph 7.1107 of Section VII:G of this report[13] is an increase in the United States' world market share within the meaning of Article 6.3(d) of the *SCM Agreement* constituting serious prejudice within the meaning of Article 5(c) of the *SCM Agreement*.

(h) concerning the ETI Act of 2000:

(i) Brazil has not made a prima facie case before this Panel that the ETI Act of 2000 and alleged export subsidies provided thereunder are inconsistent with Articles 10.1 and 8 of the *Agreement on Agriculture* in respect of upland cotton;

(ii) with respect to the condition in Article 13(c)(ii) of the *Agreement on Agriculture*, as Brazil has also not made a prima facie case before this Panel that they do not conform fully to the provisions of Part V of the *Agreement on Agriculture* in respect of upland cotton, this Panel must treat them as if they are exempt from actions based on Article XVI of the *GATT 1994* and Article 3 of the *SCM Agreement* in this dispute. (footnotes omitted)

5. Based on these conclusions, the Panel recommended that the United States bring the measures listed in paragraphs 8.1(d)(i) and 8.1(e) of the Panel Report into conformity with the *Agreement on Agriculture*[14]; and withdraw the prohibited subsidies listed in paragraphs 8.1(d)(i), 8.1(e) and 8.1(f) of the Panel Report without delay and, at the latest, within six months of the date of adoption of the Panel Report by the Dispute Settlement Body (the "DSB") or 1 July 2005 (whichever is earlier).[15] With respect to the "mandatory price-contingent United States subsidy measures" addressed in paragraph 8.1(g)(i) of the Panel Report, the Panel noted that, pursuant to Article 7.8 of the *SCM Agreement*, "upon adoption of [the Panel Report] the United States is under an obligation to 'take appropriate steps to remove the adverse effects or ... withdraw the subsidy'."[16]

6. On 18 October 2004, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU), and filed a Notice of Appeal[17] pursuant to Rule 20 of the

[13]The Panel listed the following measures in paragraph 7.1107 of its Report: "(i) user marketing (Step 2) payments to domestic users and exporters; (ii) marketing loan programme payments; (iii) production flexibility contract payments; (iv) market loss assistance payments; (v) direct payments; (vi) counter-cyclical payments; (vii) crop insurance payments; (viii) cottonseed payments for the 2000 crop; and (ix) legislative and regulatory provisions currently providing for the payment of measures in (i), (ii), (v), (vi) and (vii) above".

[14]Panel Report, para. 8.3(a).

[15]*Ibid.*, paras. 8.3(b) and 8.3(c).

[16]*Ibid.*, para. 8.3(d).

[17]WT/DS267/17, 18 October 2004, attached as Annex 1 to this Report.

Working Procedures for Appellate Review (the "*Working Procedures*").[18] On 28 October 2004, the United States filed its appellant's submission.[19] On 2 November 2004, Brazil filed an other appellant's submission.[20] On 16 November 2004, Brazil and the United States each filed an appellee's submission.[21]

7. On 16 November 2004, Argentina, Australia, Canada, China, the European Communities, and New Zealand each filed a third participant's submission, and Benin and Chad filed a joint third participants' submission.[22] India, Pakistan, Paraguay, Venezuela, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu notified the Appellate Body of their intention to appear at the oral hearing.[23]

8. After consultation with the Appellate Body Secretariat, Brazil and the United States noted, in letters filed on 10 December 2004, that it would not be possible for the Appellate Body to circulate its Report in this appeal within the 90-day time limit referred to in Article 17.5 of the DSU. Brazil and the United States agreed that additional time was needed for several reasons: the issues arising in this appeal were particularly numerous and complex compared to prior appeals, which increased the burden on the Appellate Body and WTO translation services; WTO translation services were unavailable during the WTO holiday period; and the Appellate Body was likely to be considering two or three other appeals during the same period. Brazil and the United States accordingly confirmed that they would deem the Appellate Body Report in this proceeding, issued no later than 3 March 2005, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU.[24]

9. The oral hearing in this appeal was held on 13-15 December 2004. The participants and third participants presented oral arguments (with the exception of Pakistan, Paraguay, and Venezuela) and responded to questions posed by the Members of the Division hearing the appeal.

[18]WT/AB/WP/4, 1 May 2003. Revised *Working Procedures* were circulated by the Appellate Body during the course of these proceedings (WT/AB/WP/5, 4 January 2005). These revised *Working Procedures*, however, apply only to appeals initiated after 1 January 2005 and therefore did not apply to this appeal.

[19]Pursuant to Rule 21(1) of the *Working Procedures*. In a letter dated 1 November 2004, Brazil, without requesting action by the Appellate Body, drew attention to the failure by the United States to submit its appellant's submission in a timely fashion. Brazil observed that the United States' appellant's submission was submitted on 28 October 2004 after the deadline of 5:00 p.m. that had been established by the Division in the *Working Schedule* issued pursuant to Rule 26 of the *Working Procedures*.

[20]Pursuant to Rule 23(1) of the *Working Procedures*.

[21]Pursuant to Rules 22 and 23(3) of the *Working Procedures*, respectively.

[22]Pursuant to Rule 24(1) of the *Working Procedures*.

[23]Pursuant to Rule 24 of the *Working Procedures*. The notifications were received on the following dates: India, 16 November 2004; Pakistan, 17 November 2004; Paraguay, 17 November 2004; Venezuela, 17 November 2004; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, 18 November 2004.

[24]On 16 December 2004, the Appellate Body notified the Chair of the DSB that the expected date of circulation of its Report was 3 March 2005. (WT/DS267/18, 20 December 2004)

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the United States – Appellant*

1. Domestic Support

(a) Terms of Reference – Expired Measures

10. The United States contends that the Panel was wrong to reject its argument that payments under the expired production flexibility contract and market loss assistance programs were outside the Panel's terms of reference. The United States asks the Appellate Body to reverse the Panel's finding because these measures had expired before Brazil requested consultations.

11. Article 4.2 of the DSU provides that consultations are to cover "any representations made by another Member *concerning measures affecting the operation of any covered agreement* taken within the territory of the former".[25] The United States submits that measures that have expired before a request for consultations cannot be measures that are "affecting the operation of any covered agreement" at the time the request is made; consequently, they cannot be measures within the scope of the "dispute" referred to in Article 4.7, with respect to which a complaining Member can request the establishment of a panel. It was common ground that the legislation authorizing production flexibility contract payments and market loss assistance payments expired before Brazil's consultation and panel requests. They thus cannot have been within the scope of consultations under Article 4.2.

12. In response to the Panel's concern that the United States' position would mean that subsidy payments made in the past might never be the subject of challenge in WTO dispute settlement, the United States distinguishes between recurring and non-recurring subsidies. A non-recurring subsidy is a type of subsidy the benefits of which are allocated to future production. As such, a non-recurring subsidy can be regarded as continuing in existence beyond the period during which it is granted, and may continue to be actionable even after the authorizing program or legislation has expired. A recurring subsidy, by contrast, is typically provided year after year and is provided for current rather than future production. Once production has occurred and a measure has been replaced or superseded, there would no longer be any measure in existence to challenge. Market loss assistance and production flexibility contract payments were both subsidies paid for particular fiscal or crop years. As such, the benefit of these subsidies should have been attributed only to the particular year of payment and should not have been attributed to subsequent years. Thus, by the time of Brazil's consultation and panel requests[26], the only measure to consult upon and at issue under the DSU was the 2002 marketing year production flexibility contract payments; the other payments were all outside the Panel's terms of reference.

13. According to the United States, the Panel's conclusion is also inconsistent with Article 6.2 of the DSU, which requires that a panel request "identify the specific measures at issue". A measure that has expired cannot be a measure that is "at issue". This is confirmed by the context provided by Article 3.7 of the DSU, which contemplates the withdrawal of measures found to be inconsistent with the covered agreements, and Article 19.1 of the DSU, which contemplates a measure that "is inconsistent" with a covered agreement.

14. In addition to appealing the Panel's finding that payments under the expired production flexibility contract and market loss assistance programs were within its terms of reference, the United States lists this Panel finding as an example of the Panel's failure to meet the requirements of Article 12.7 of the DSU, which requires panels to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind its findings.

(b) Article 13(a) of the *Agreement on Agriculture* – Planting Flexibility Limitations

15. The United States appeals the Panel's finding that production flexibility contract payments, direct payments, and the legislative and regulatory provisions that establish and maintain the direct payment program[27] are not exempt from actions by virtue of paragraph (a) of Article 13 of the *Agreement on Agriculture* (the "peace clause"). The United States observes that the sole basis for this finding was the Panel's conclusion that these measures do not conform fully to paragraph 6(b) of Annex 2 of the *Agreement on Agriculture* (the "green box")[28], which conditions green box coverage and exemption under the peace clause upon the amount of payments not being related to the type or volume of production. The United States argues that, to make this finding, the Panel had to find that banning a recipient from producing a certain range of products was the same as conditioning the amount of payment on the type of production. The United States submits that paragraph 6(b) of Annex 2 permits such a partial ban.

16. The United States points out that, in order to receive production flexibility contract payments or direct payments, a producer is not required to produce a particular (or, indeed, any) crop. Instead, payments are based on a farm's historical acreage and yields during a base period. Farmers may plant any commodity or crop, subject to limitations concerning the planting of fruits and vegetables (and wild rice in the case of direct payments).[29] Where fruits, vegetables, or wild rice are produced, payments are eliminated or reduced, subject to certain exceptions.

17. Although the ordinary meaning of the term "related to" implies a relation or connection that could be positive or negative, the ordinary meaning does not identify which type of connection is meant under paragraph 6(b) of Annex 2. Turning to the context, the United States notes that this paragraph speaks of the "amount of such payments" not being related to or based on the type or volume of production. The United States argues that "[t]he Panel assumes that the 'amount of such payments' can be related to the current type of production (that is, of fruits or vegetables) because in some circumstances a recipient that produces fruits or vegetables receives less payment than that recipient otherwise would have been entitled to."[30] However, given that the payment relating to fruits, vegetables, or wild rice is zero, the "amount of such payments" is not related to fruit, vegetable, or wild rice production, because for the acres concerned, there is no payment at all. As regards the phrase "production ... undertaken by the producer" in paragraph 6(b), the United States notes that the term "undertaken" means, *inter alia*, to "attempt". In this case, the planting flexibility limitations ban a recipient from producing a certain range of products. This does not relate to the production "attempted"; rather, it relates to the type of production *not* attempted. Taken together, the ordinary meaning of the terms "amount of such payments" and "production ... undertaken" indicate that

[25]United States' appellant's submission, para. 501. (emphasis added by the United States)

[26]Request for Consultations by Brazil, WT/DS267/1, G/L/571, G/SCM/D49/1, G/AG/GEN/54, 3 October 2002; Request for the Establishment of a Panel by Brazil, WT/DS267/7, 7 February 2003.

[27]Panel Report, para. 7.388.

[28]Paragraph 6(b) of Annex 2 to the *Agreement on Agriculture* provides that:

> The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period.

[29]Panel Report, paras. 7.376-7.382.

[30]United States' appellant's submission, para. 26 (referring to Panel Report, para. 7.383).

payments are not "related to" current production within the meaning of paragraph 6(b) when a Member conditions payments on a recipient not producing certain products.

18. According to the United States, this interpretation is consistent with the "fundamental requirement" set out in paragraph 1 of Annex 2 of the *Agreement on Agriculture* that measures exempted from reduction commitments "have no, or at most minimal, trade-distorting effects or effects on production". The United States submits that "a condition that a recipient not produce certain products serves the fundamental requirement of Annex 2".[31] The United States further argues that the effect of the planting flexibility limitations at issue is minimal and does not result in increased production, pointing to evidence on the record showing that 47 per cent of farms receiving production flexibility contract payments or direct payments in the 2002 marketing year planted no upland cotton at all. Indeed, in finding that Brazil had not established that the effect of the United States' decoupled income support payments was significant price suppression, the Panel implicitly found that production flexibility contract payments and direct payments do not have more than minimal effects on production. For the United States, an explicit decision not to support a particular type of production does not relate the amount of payments to the type of production undertaken by the producer. Rather, such a decision serves the fundamental requirement that "green box" measures have no more than minimal trade-distorting effects, because a measure that conditions payment on not producing something does not create production inducements.

19. The United States also submits that the context provided by paragraph 6(e) confirms its reading of paragraph 6(b). Paragraph 6(e) provides: "[n]o production shall be required in order to receive such payments"; it does not preclude a Member from requiring non-production. A proper reading reveals that paragraphs 6(b) and 6(e) serve different purposes. As a Member may, under paragraph 6(e), require a recipient not to produce, it would not make sense to then prohibit a Member, under paragraph 6(b), from making the amount of payment contingent on fulfilling the requirement not to produce.

20. Furthermore, the United States argues that the Panel was incorrect to find contextual support for its interpretation of paragraph 6(b) in paragraphs 11(b) and 11(e) of Annex 2. Paragraphs 6(b) and 11(b) contain similar requirements about not relating payments to the type or volume of production, but paragraph 11(b) refers explicitly to paragraph 11(e), which permits requirements not to produce a particular product. The United States maintains that the context in which paragraphs 6(b) and 11(b) appear is very different. In the context of paragraph 6, an explicit authorization of requirements not to produce is not required as it is already implicit within the provisions. The United States notes that paragraph 11 pertains to payments "to assist the financial or physical restructuring of a producer's operations".[32] Although such aid is for restructuring of operations that will continue to produce, paragraph 11(e) imposes a constraint on the degree to which a government can interfere in the form that restructuring will take, by requiring that payments must not "mandate or in any way designate the agricultural products to be produced". A requirement not to produce certain products could be understood to fall within the prohibition in paragraph 11(e) against "in any way" designating the products to be produced. In order to allow such requirements, paragraph 11(e) clarifies that they are permitted. The United States submits that, in the light of the broad prohibition in paragraph 11(e), the requirement in paragraph 11(b) could be understood to *preclude* conditioning payment on *not* producing certain products, as this could be understood to be designating, in some way, the products to be produced. According to the United States, this would undermine the prohibition in paragraph 11(e). The cross-reference in paragraph 11(b) to the exception in paragraph 11(e) thus simply serves to make clear that conditioning payments on *not* producing does not conflict with the prohibition under paragraph 11(e) on designating in any way the products to be produced.

[31]United States' appellant's submission, para. 22.

[32]United States' appellant's submission, para. 45 (quoting paragraph 11(a) of Annex 2 to the *Agreement on Agriculture*).

21. In addition, the United States submits that the Panel's reading of paragraph 6(b) would require payments even if a recipient's production was illegal. Therefore, a Member would be prohibited from reducing or eliminating payments for prohibited types of production such as narcotic crops, unapproved biotech varieties, or environmentally damaging production.

(c) Article 13(b) of the *Agreement on Agriculture*

22. The United States appeals the Panel's finding that the United States' non-green box domestic support measures are not exempt from actions by virtue of paragraph (b) of Article 13 of the *Agreement on Agriculture*. The Panel found that those measures failed to satisfy, for each marketing year from 1999-2002, the proviso to Article 13(b)(ii), which reads "provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year".

(i) *Interpretation of "support to a specific commodity"*

23. The United States contends that the Panel erred in interpreting the phrase "support to a specific commodity" in Article 13(b)(ii). The ordinary meaning of this phrase encompasses "'assistance' or 'backing' 'specially ... pertaining to a particular' 'agricultural crop' or ... for a 'precise, exact, definite' 'agricultural crop'".[33] The ordinary meaning implies that support to a specific commodity excludes support that is not for a precise, exact, definite agricultural crop.

24. Context for interpreting the phrase "support to a specific commodity" may be found in other provisions of the *Agreement on Agriculture* that contain the terms "support", "specific" and "commodity". Annex 3 deals with "Calculation of the Aggregate Measurement of Support" ("AMS"). Paragraph 1 of that Annex clarifies that two types of support are to be calculated: first, support is calculated "on a product-specific basis", and, second, "[s]upport which is non-product specific shall be totalled into one non-product-specific AMS in total monetary terms". Article 1(a) of the *Agreement on Agriculture* contains this same distinction between "support ... provided for an agricultural product in favour of the producers of the basic agricultural product" and a residual category of "non-product-specific ... support". Article 1(h) also makes this distinction by dividing total support into "non-product-specific support" and "support for basic agricultural products". For the United States, the terms "support for basic agricultural products" in Article 1(h) and "support ... provided for an agricultural product in favour of the producers of the basic agricultural product" in Article 1(a) are virtually synonymous with the phrase "support for a specific commodity" in Article 13(b)(ii). The context of these provisions thus suggests that this phrase also means product-specific support.

25. The Panel relied on the different choice of specific words in Articles 1(a) and 13(b)(ii) in finding that the former was not pertinent to the interpretation of the latter. The United States argues, however, that the concept of product-specific support is expressed in different terms in different places in the *Agreement on Agriculture*. Indeed, nowhere in the Agreement is the precise phrase "product-specific support" used, although the Panel had no difficulty in finding that such a concept exists. Thus, the fact that the phrase "product-specific support" was not used in Article 13 does not prevent an interpretation that the concept nevertheless applies.

26. The United States disagrees with the Panel's reasoning that the categories of product-specific and non-product-specific support are not pertinent to the analysis under Article 13(b) because the

[33]United States' appellant's submission, para. 85 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, pp. 2972 and 3152).

proviso to Article 13(b)(ii) begins with the phrase "such measures", which refers to all the domestic support measures falling under Article 6 identified in the chapeau to Article 13(b), and not just to product-specific and non-product-specific support subject to reduction commitments. The United States notes that the Panel itself recognized that certain domestic support measures falling under Article 6 could be excluded from the comparison of support under Article 13(b)(ii): the Panel's approach "exclud[es] all other support, which either grants support to other specific commodities or does not grant support to any specific commodity".[34] The Panel also noted that "Brazil acknowledges this implicitly in that it does not challenge very widely available support, such as infrastructure or irrigation subsidies, some of which, presumably, deliver support to upland cotton either directly or indirectly".[35] Thus the mere fact that all domestic support measures falling under Article 6 are identified in the chapeau of Article 13(b) does not resolve the issue of whether a particular measure grants "support to a specific commodity".

27. The United States finds relevant context in Articles 3 and 6 of the *Agreement on Agriculture*. Under these provisions, a Member must comply with its domestic support reduction commitments. These commitments, however, are expressed on a total aggregate basis with no product-specific caps on support. Because there are no product-specific caps, a Member can comply with its overall reduction commitments while increasing support to a particular agricultural commodity. Article 13(b) provides shelter from actions for domestic support measures that conform to the reduction commitments. However, Members recognized that an increase in product-specific support, even within overall reduction commitment levels, could present an enhanced risk of production or trade effects. The proviso to Article 13(b)(ii) thus makes the exemption it provides conditional upon a Member not shifting support between commodities such that the level of product-specific support exceeds that decided for any one commodity in the 1992 marketing year.

28. Turning to the measures at issue, the United States observes that the Panel's reasoning means that payments to producers that do not produce cotton at all are deemed to be "support to upland cotton". The United States contends that the Panel erred in finding that payments based on past production during a base period currently grant support to production of that commodity. Production flexibility contract payments, market loss assistance, direct payments, and counter-cyclical payments do not specify upland cotton as a commodity to which they grant support, as the Panel implied. In fact, payments under these programs do not require any production at all. Indeed, uncontested facts show that 47 per cent of the farms receiving these payments did not plant a single acre of upland cotton. The United States asserts that payments cannot be deemed to grant support to a crop the recipient does not produce. Such payments do not grant support to a specific commodity. In the light of the context provided by Articles 1(a), 1(h), and 6.4 and Annex 3 of the *Agreement on Agriculture*, such payments are properly seen as non-product-specific support to agricultural producers in general.

29. The United States observes that the Panel correctly rejected all six of the methodologies proposed by Brazil for allocating decoupled payments as support to upland cotton. However, in the "Attachment to Section VII:D" the Panel included one allocation methodology that reduced payments on base acres to account only for the number of acres planted with upland cotton. The United States argues that, by including this methodology, the Panel endorsed it as an alternative to its own approach, in the event that the Panel's approach was found to be incorrect. The Panel labelled its finding in this regard as factual; however, the finding is patently legal, not sheltered from appellate review. The United States also contends that any methodology that allocates payments under the decoupled programs to upland cotton planted as a result of independent producer decisions beyond government control cannot reflect the support to a specific commodity that a Member has "decided", and thus is not appropriate for Article 13(b)(ii).

[34]United States' appellant's submission, para. 96 (quoting Panel Report, para. 7.502).

[35]*Ibid.*

(ii) *Calculation methodology for price-based measures*

30. The United States submits that the Panel did not compare properly the support current measures "grant" to that "decided" during the 1992 marketing year. The ordinary meaning of "grant" is to "bestow as a favour" or "[g]ive or confer (a possession, a right, etc.) formally".[36] The ordinary meaning of "decide" is to "[d]etermine on as a settlement, pronounce in judgement" and "[c]ome to a determination or resolution *that, to do, whether*".[37] Read in their context, as two halves of a comparison, these terms must allow the relevant "support" to be compared. The phrase "grant support", read in the light of the verb "decided", means the support that Members determine to "bestow" or "give or confer", and thus the focus of the peace clause comparison is on the support a Member decides. The United States submits that the Panel essentially agreed "that the Peace Clause proviso compares the support a Member determines through its measures, not 'support [that] was spent due to reasons beyond the control of the government'."[38]

31. Against this background, the United States contends that a proper application of Article 13(b)(ii) must reflect the way in which the United States "decided" support in the 1992 and 1999-2002 marketing years. In those years, the support "decided" by the United States was a rate of support.

32. The United States submits that it was possible for the Panel to have recourse to the rules for the calculation of the AMS set out in Annex 3 of the *Agreement on Agriculture*, so long as the appropriate calculation method was used. In the case of price-based measures (such as marketing loan program payments in the 1992 marketing year and the implementation period, and deficiency payments in the 1992 marketing year only), paragraph 10 of Annex 3 permits two different approaches: budgetary outlays or using "the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price" ("price gap" methodology). In the context of a comparison under the peace clause, only the price gap methodology reflects the support "decided" by the United States' price-based measures. By focusing on the gap between an external reference price (here, the actual price for determining rates for the years 1986-1988) and the applied administered price, the price gap methodology eliminates movements in market prices as a component of the measurement of support and focuses solely on those elements that a Member can control. By holding the reference price "fixed", support measured using a price gap calculation shows the effect of changes in the level of support decided by a Member, rather than changes in budgetary outlays that result from movements in market prices that Members do not control.

(iii) *Recalculation of the peace clause comparison*

33. On the basis of its arguments regarding calculation methodology and the interpretation of the phrase "support to a specific commodity", the United States recalculates the support to upland cotton in the 1992 marketing year and implementation period support between 1999-2002 using the price gap methodology for marketing loan program payments and deficiency payments, on the one hand, and excluding production flexibility contract payments, market loss assistance, direct payments, and counter-cyclical payments, on the other hand, because they are not "support to a specific commodity". The result is that the United States' support to upland cotton does not exceed that decided in the 1992 marketing year in any year of the implementation period. The United States accordingly requests the

[36]United States' appellant's submission, para. 65 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 1131).

[37]*Ibid.*, para. 65 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 607). (original emphasis)

[38]*Ibid.*, para. 66 (quoting Panel Report, para. 7.487).

Appellate Body to reverse the Panel's findings regarding Article 13(b) and to find that it is entitled to the protection of the peace clause.

2. Serious Prejudice

(a) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

34. The United States appeals the Panel's finding that the effect of the price-contingent subsidies[39] is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement* constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*. The United States asks the Appellate Body to reverse the Panel's finding that the effect of the price-contingent subsidies is significant price suppression. The United States also submits that the Panel failed to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind several aspects of this finding, as required by Article 12.7 of the DSU.

35. First, the United States submits that the Panel erred in interpreting the term "same market" in Article 6.3(c) of the *SCM Agreement* as including a "world market". Under Article 6.3(c), the price suppression must occur in a market that includes the subsidized product and the like product. Identifying the relevant market as a world market fails to give meaning to the word "same" in Article 6.3(c) because "there is no 'other' world market where the products can be found".[40] The United States relies on Article 6.6 and Annex V of the *SCM Agreement* on "Procedures for Developing Information Concerning Serious Prejudice" to substantiate this view. The United States also indicates that, although the subsidized product and the like product must be found in the same market, the Panel did not make a finding that United States and Brazilian upland cotton compete in the world market that it had identified for upland cotton. In addition, the United States contends that the Panel acknowledged that different conditions of competition would prevail in the markets of different Members and that, therefore, each market in which the two products are found would need to be examined separately.

36. The United States submits that the Panel's reading of "same market" in Article 6.3(c) contradicts its reasoning in relation to Article 6.3(d) of the *SCM Agreement*, which, according to the United States, demonstrates that no "world market" price prevails in any "world market" for upland cotton. Moreover, according to the United States, the Panel should have focused on the effect of the challenged subsidies on the *Brazilian* price of upland cotton, rather than their effect on any "world market" price, because only significant suppression of Brazilian prices could lead to serious prejudice to the interests of Brazil under Article 5(c) of the *SCM Agreement*.

37. Secondly, the United States argues that, in finding significant price suppression, the Panel "prejudged the result of its analysis of 'the effect of the subsidy'".[41] According to the United States, the Panel used circular logic: first, assuming causation in finding price suppression, and then, using its conclusion on price suppression to support its finding of causation. In addition, the Panel failed to take into account the effect of removing the price-contingent subsidies on all participants in the relevant market. Even if removing these subsidies would lead to lower United States production of cotton (which the United States contests), other producers could be expected to enter the market to

[39]The Panel characterized marketing loan program payments, user marketing (Step 2) payments, market loss assistance payments, and counter-cyclical payments as "price-contingent" subsidies. (Panel Report, para. 8.1(g)(i))

[40]United States' appellant's submission, para. 311.

[41]United States' appellant's submission, para. 158.

increase supply. These supply changes would need to be included in assessing the effect on prices of removing the price-contingent subsidies. The United States also claims that, in concluding that the price suppression it had found was "significant", the Panel should have identified the degree of price suppression it had found and should have explained why it regarded this degree as "significant". The United States argues that, in failing to do so, the Panel failed to comply with Article 12.7 of the DSU.

38. Thirdly, the United States contends that the Panel erred in finding that "the effect of" the price-contingent subsidies is significant price suppression under Article 6.3(c) of the *SCM Agreement*. The United States refers to the Panel's conclusion that the price-contingent subsidies are linked to world prices for upland cotton, "thereby numbing the response of United States producers to production adjustment decisions when prices are low".[42] However, according to the United States, the "relevant economic decision"[43] for a farmer is what to plant and, at the time of planting, the relevant price is what the farmer expects to receive when the crop is subsequently harvested, not the current price. Therefore, the Panel should have examined whether the price-contingent subsidies stimulate *planting* of upland cotton, rather than whether they stimulate *production* or harvesting. The United States submits that the Panel failed to set out the basic rationale for its analysis of the "effect of the subsidy" as required by Article 12.7.

39. The United States also suggests that the Panel failed to examine evidence showing that the price-contingent subsidies did not suppress upland cotton prices: United States planting of cotton acreage corresponded with expected market prices of cotton and competing crops; changes in United States cotton acreage corresponded with changes by cotton farmers throughout the world; and the United States' share of world cotton production was stable during the relevant period. In addition, the Panel's identification of the relative shares of world cotton exports cannot demonstrate the effect of the subsidy in the absence of an analysis of competition between United States cotton and cotton from other sources. Moreover, according to the United States, the Panel's finding of a "discernible temporal coincidence"[44] between suppressed market prices and the price-contingent subsidies is flawed and, in any case, could involve only correlation and not causation.

40. The United States further disputes, in relation to the Panel's reasoning in determining the "effect" of the subsidy, the Panel's conclusion that a comparison between the average total cost of production and market revenue in the United States demonstrates that the effect of the price-contingent subsidies is significant price suppression. As reflected in economics literature, farmers make planting decisions based on *variable* rather than *total* costs of production. The Appellate Body's decision in *Canada – Dairy (Article 21.5 – New Zealand and US)* is not relevant to this issue. Had the Panel examined variable costs, it would have seen that United States upland cotton producers more than covered their variable costs from 1997 to 2002, apart from in 2001. In addition, even if average total costs were not covered, the evidence before the Panel demonstrates that farmers had other sources of income to cover the shortfall.

41. Fourthly, the United States argues that the Panel erred in finding that Brazil need not demonstrate, and that the Panel need not find, the amount of the challenged subsidies that benefits upland cotton in establishing serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*. The United States contends that the Panel "misunderstood"[45] the United States' argument as requiring the transposition of methodologies from Part V to Part III of the *SCM Agreement*. Instead, it is the text of Articles 5(c) and 6.3(c) that requires a quantification of benefit. Articles 5(c) and 6.3(c) of the *SCM Agreement* both use the word "subsidy", which is defined in Article 1 as involving the conferral of a benefit, as confirmed by Article 14 of the *SCM Agreement*. Article 6.3(c) refers to a "subsidized

[42]*Ibid*., para. 162 (quoting Panel Report, para. 7.1308).

[43]*Ibid*., para. 161.

[44]United States' appellant's submission, para. 208 (referring to Panel Report, paras. 7.1351-7.1352).

[45]*Ibid*., para. 258.

product". Therefore, what is at issue is the amount of the subsidy that benefits a particular product. This reading is supported by Article 6.8 of the *SCM Agreement*, which provides for panels to determine serious prejudice on the basis of, *inter alia*, information submitted under Annex V of the *SCM Agreement*. According to the United States, this includes information necessary to establish the amount of subsidization (paragraph 2 of Annex V) and information concerning the amount of the subsidy (paragraph 5 of Annex V).

42. For Brazil's claims to succeed, therefore, the United States maintains that the challenged subsidies would have to subsidize upland cotton and confer a benefit on United States "producers, users, and/or exporters of upland cotton".[46] In addition, any benefit conferred by the challenged subsidies on products other than upland cotton cannot be included in determining the effect of the subsidies. However, the Panel attributed all counter-cyclical and market loss assistance payments to upland cotton. In fact, counter-cyclical and market loss assistance payments to recipients who did not produce upland cotton did not benefit upland cotton at all and therefore could not have caused serious prejudice and, in fact, fell outside the Panel's terms of reference altogether. As for counter-cyclical and market loss assistance payments to recipients who produced both upland cotton and other products, the Panel should have allocated the payments across the different products in assessing the effects of the payments in respect of upland cotton. Annex IV of the *SCM Agreement*[47] provides an "economically neutral" allocation methodology[48], and paragraphs 2 and 5 of Annex V of the *SCM Agreement* provide support for the argument that it may be necessary to allocate subsidies across the total value of the recipient's sales. As the Panel did not identify the amount of counter-cyclical and market loss assistance payments benefiting upland cotton, its serious prejudice finding regarding those payments is invalid. In addition, the United States submits that this amounted to a failure by the Panel to set out the basic rationale behind its findings and recommendations in accordance with Article 12.7 of the DSU.

43. Along similar lines, the United States contends that the Panel should have determined the extent to which subsidies provided with respect to *raw* cotton benefit *processed* cotton. Instead, the Panel "improperly assumed"[49] that subsidies provided to producers of raw cotton flowed to producers of processed cotton. The United States maintains that the Appellate Body's conclusion in *US – Softwood Lumber IV* that a subsidy bestowed on an input cannot be presumed to have passed through to the processed product is based on the definition of a subsidy, which applies to both Part III and Part V of the *SCM Agreement*.[50] Therefore, according to the United States, the Panel erred in finding that "pass-through" principles do not apply to Part III of the *SCM Agreement*.

44. Finally, the United States asserts that the Panel erred in making serious prejudice findings with respect to the price-contingent subsidies for marketing years 1999 to 2001. Even if the Panel was not required to determine the amount of the benefit flowing from the price-contingent subsidies to the subsidized product, the Panel had to determine whether the benefit from these subsidies continued when the Panel was established in 2002. This is because, under Article 11 of the DSU, the Panel could make findings only with respect to subsidies that could "form part of Brazil's claims"[51] and, under Article 19.1 of the DSU, the Panel could make recommendations only with respect to measures

[46]United States' appellant's submission, para. 245 (quoting Brazil's request for establishment of a panel, *supra*, footnote 26, p. 1).

[47]"Calculation of the Total Ad Valorem Subsidization (Paragraph 1(a) of Article 6)".

[48]United States' appellant's submission, para. 269.

[49]*Ibid.*, para. 303.

[50]*Ibid.*, paras. 304 and 305 (referring to Appellate Body Report, *US – Softwood Lumber IV*, paras. 140 and 142).

[51]United States' appellant's submission, para. 296.

that still exist. In addition, the United States maintains that the Panel "failed to adequately set out the legal basis for its examination of subsidies that no longer existed at the time of panel establishment" as required by Article 12.7 of the DSU.[52]

45. According to the United States, an annually recurring subsidy should be "allocated" or "expensed"[53] to the year to which it relates, whereas a non-recurring subsidy, such as an investment subsidy or equity infusion, should be allocated over time. In the United States' view, a payment no longer confers a benefit after the year to which it is allocated, and therefore it is no longer a "subsidy" under Article 1 of the *SCM Agreement*. Price-contingent subsidies for marketing years 1999 to 2001 were annually recurring subsidies that the Panel should have allocated to those years. The United States argues that the Panel did not find that these subsidies had "continuing effects" when the Panel was established and, therefore, that the Panel could not have found that these subsidies were "causing present serious prejudice".[54]

46. For these reasons, the United States requests the Appellate Body to reverse the Panel's finding that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement* constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*.

3. Import Substitution Subsidies and Export Subsidies

(a) Step 2 Payments

(i) *To domestic users*

47. The United States claims that the Panel erred in concluding that user marketing (Step 2) payments ("Step 2 payments") provided to domestic users of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, constitute import substitution subsidies that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*.

48. In the United States' view, the Panel's conclusion fails to give meaning to the introductory phrase "Except as provided in the Agreement on Agriculture" in Article 3 of the *SCM Agreement*. This phrase applies not only to export subsidies covered by Article 3.1(a) of the *SCM Agreement*, but also to import substitution subsidies covered by Article 3.1(b). The United States contends that giving proper meaning to the introductory phrase of Article 3 of the *SCM Agreement* requires treating Step 2 payments to domestic users as domestic support subject to reduction commitments under Article 6 of the *Agreement on Agriculture*.

49. The United States points out that paragraph 7 of Annex 3 of the *Agreement on Agriculture* requires that "[m]easures directed at agricultural processors shall be included [within a WTO Member's AMS] to the extent that such measures benefit the producers of the basic agricultural products". This is consistent with the objective of the *Agreement on Agriculture* of providing for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time. The United States submits that it has regularly reported Step 2 payments among the domestic support measures it provides to agricultural producers and includes them in the calculation of total AMS. Thus, the United States asserts, provided that they are within its domestic support reduction commitments, Step 2 payments to domestic users are not inconsistent with the United States' WTO obligations.

[52]*Ibid.*, para. 327.

[53]*Ibid.*, para. 283.

[54]*Ibid.*, para. 292.

50. The United States explains that the lack of any reference to domestic content subsidies in Article 13(b) of the *Agreement on Agriculture* does not support the Panel's interpretation. Article 13(b) does not refer to Article 3 of the *SCM Agreement* because the substantive obligation of Article 3.1(b) does not apply to domestic content subsidies in favour of agricultural producers.

51. Consequently, the United States requests that the Appellate Body reverse the Panel's finding that Step 2 payments to domestic users of United States upland cotton are import substitution subsidies that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*.

(ii) *To exporters*

52. The United States claims that the Panel erred in concluding that Step 2 payments provided to exporters of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are export subsidies covered by Article 9.1(a) of the *Agreement on Agriculture* and, therefore, inconsistent with Articles 3.3 and 8 of that Agreement. The United States also asserts that the Panel erroneously concluded that Step 2 payments to exporters are inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement*, because they are not exempted from action by Article 13(c) of the *Agreement on Agriculture*.

53. The United States argues that Step 2 payments are not contingent on export performance because upland cotton does not need to be exported to trigger eligibility; domestic users are also eligible. The program under which Step 2 payments are granted is indifferent as to whether the recipient of the payment is an exporter or a domestic user. Step 2 payments to exporters and domestic users are governed by a single legislative provision and a single set of regulations. The form and payment rate to domestic users and exporters are identical, and payments are made from a unified fund. Rather than being an export-contingent subsidy, the United States reports Step 2 payments as product-specific amber box domestic support for cotton within its AMS.

54. The United States submits that the facts in this case are similar to those before the panel in *Canada – Dairy*, where the panel found that payments contingent on use, without regard to the nature of the use, do not involve an export subsidy for purposes of Articles 9 and 10 of the *Agreement on Agriculture*.[55] The distinctions drawn by the Panel between the circumstances in this case and those in *Canada – Dairy* are based on a mischaracterization by the Panel of facts in the latter case.[56] Finally, the United States contends that the Panel's finding in respect of Step 2 payments to *exporters* seems to be based on the Panel's determination to find that Step 2 payments to *domestic users* are a prohibited import substitution subsidy.

55. The United States therefore requests that the Appellate Body reverse the Panel's finding that Step 2 payments to exporters are an export subsidy listed in Article 9.1(a) that is inconsistent with the United States' obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*. The United States also requests that the Appellate Body reverse the Panel's findings that Step 2 payments to exporters are not exempt from action under Article 13(c) of the *Agreement on Agriculture* and are inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement*.

(b) Export Credit Guarantees

(i) *Panel's terms of reference*

[55]United States' appellant's submission, paras. 444-445 (referring to Panel Report, *Canada – Dairy*, para. 7.41 and footnote 496 to para. 7.124).

[56]*Ibid.*, paras. 447-452 (referring to Panel Report, paras. 7.718 and 7.725).

56. The United States asserts that the Panel erred in concluding that export credit guarantees[57] to facilitate the export of United States agricultural commodities other than upland cotton were within its terms of reference. According to the United States, there is a clear progression between the measures included in the request for consultations under Article 4 of the DSU and the measures identified in the request for the establishment of a panel, which forms the basis for a panel's terms of reference.[58] The United States contends that a measure that is not included in the request for consultations may not form part of a panel's terms of reference.

57. In this case, the United States argues, the Panel erred in finding that Brazil's request for consultations identified export credit guarantees to agricultural commodities other than upland cotton as challenged measures. A plain reading of Brazil's request for consultations does not support the Panel's conclusion. The request identified the challenged measures as "subsidies provided to US producers, users and/or exporters of upland cotton".[59] Although footnote 1 to this sentence reads "Except with respect to export credit guarantee programs as explained below", none of the subsequent references to export credit guarantees in the request for consultations identified other United States agricultural commodities. Moreover, the statement of evidence attached to Brazil's request for consultations, pursuant to Article 4 of the *SCM Agreement*, did not mention commodities other than upland cotton, providing further proof that the request for consultations did not extend beyond export credit guarantees for upland cotton. That the request for consultations did not include export credit guarantees to other agricultural commodities is confirmed by the fact that Brazil included new language in its request for the establishment of a panel.

58. According to the United States, the Panel also erred in finding that "actual" consultations included export credit guarantees to agricultural commodities other than upland cotton. The fact that Brazil posed written questions to the United States about export credit guarantees for other commodities does not mean that Brazil and the United States held consultations about the topic. Were it otherwise, a complaining party could unilaterally alter the scope of consultations without regard to the requirements of Article 4.4 of the DSU, the time-frames, and the impact on third parties seeking to determine whether to join the consultations. The Panel also ignored the fact that, at the first consultations meeting, the United States expressed the view that Brazil's request with respect to export credit guarantees was clearly limited to upland cotton, and that no discussion of export credit guarantees for any commodity other than upland cotton took place during the consultations. The United States also argues that what is determinative of the scope of consultations is the text of Brazil's request for consultations and not the text of Brazil's written questions.

59. The United States contends that the facts in this case are similar to those in *US – Certain EC Products*. In that case, the Appellate Body found that a particular measure was not part of the panel's terms of reference because it was not the subject of consultations.[60] Similarly, in this case, export credit guarantees to other agricultural commodities may not form part of the Panel's terms of reference because they were not the subject of consultations.

60. The United States therefore requests that the Appellate Body reverse the Panel's conclusion that export credit guarantees to United States agricultural commodities other than upland cotton were within the Panel's terms of reference. The United States adds that, because the Panel had no authority

[57]The export credit guarantees at issue are the General Sales Manager 102 and 103 programs and the Supplier Credit Guarantee Program, which are described *infra*, paras. 586-589. See also Panel Report, paras. 7.236-7.244.

[58]United States' appellant's submission, para. 466 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 131).

[59]*Ibid.*, para. 457 (quoting the Request for Consultations by Brazil, *supra*, footnote 26).

[60]United States' appellant's submission, para. 485 (referring to Appellate Body Report, *US – Certain EC Products*, para. 70).

to make findings with respect to export credit guarantees for agricultural commodities other than upland cotton, all of the Panel's findings with respect to such commodities must also be reversed.

(ii) *Statement of available evidence*

61. The United States submits that the Panel erroneously concluded that Brazil provided a statement of available evidence with respect to export credit guarantee measures relating to United States agricultural commodities other than upland cotton, as required by Article 4.2 of the *SCM Agreement*.

62. The United States explains that the statement of evidence that was annexed to Brazil's request for consultations contains two paragraphs specifically referring to the United States' export credit guarantee programs. The Panel correctly noted that the first paragraph is textually limited to upland cotton.[61] The United States submits, however, that the Panel failed to draw the proper conclusion about the second paragraph. Although the second paragraph does not refer to upland cotton, it contains no suggestion that it expands on the programs described in the preceding paragraph, which refers to export credit guarantee programs that allegedly provide certain benefits to United States upland cotton. In the context of the paragraph that precedes it, the second paragraph must be understood to refer to the same programs—that is, to export credit guarantee programs that allegedly provide certain benefits to upland cotton. In addition, the United States points out that the second paragraph in Brazil's request for consultations does not refer to any commodity. Consequently, even if the second paragraph is construed to refer to programs that provide benefits to products other than cotton, it is difficult to see how that paragraph meets the requirements of Article 4.2 of the *SCM Agreement*, as it does not provide information about the "existence" or "nature" of the subsidies allegedly provided by the export credit guarantee programs to products other than upland cotton.

63. The United States therefore requests that the Appellate Body reverse the Panel's finding and that it find, instead, that Brazil did not provide a statement of available evidence with respect to the United States' export credit guarantee programs as they relate to agricultural commodities other than upland cotton.

(iii) *Article 10.2 of the Agreement on Agriculture*

64. The United States alleges that the Panel erred in finding that the United States' export credit guarantee programs in respect of exports of upland cotton and other unscheduled agricultural products, and in respect of one scheduled product (i.e., rice), are export subsidies applied in a manner that results in circumvention of the United States' export subsidy commitments within the meaning of Article 10 of the *Agreement on Agriculture* and are therefore inconsistent with Article 8 of that Agreement. In addition, the United States submits that, although the Panel did not find that the United States had circumvented such commitments with respect to scheduled commodities other than rice, it nevertheless erred in concluding that the programs as applied to these scheduled agricultural products constitute export subsidies within the meaning of the *Agreement on Agriculture*.

65. The United States contends that the Panel erroneously analyzed whether export credit guarantees are export subsidies subject to the disciplines of Article 10.1 solely by reference to the *SCM Agreement*, ignoring important context in Article 10 of the *Agreement on Agriculture*. According to the United States, the proper context in which to analyze the meaning of Article 10.1 with respect to export credit guarantees is Article 10.2 of the *Agreement on Agriculture*, the only provision that explicitly addresses these specific kinds of measures. Article 10.2 reflects the fact that, during the Uruguay Round, WTO Members did not agree on disciplines applicable to agricultural

[61] *Ibid.*, para. 495 (referring to Panel Report, para. 7.84).

export credits, export credit guarantees, or insurance programs. Unable to reach agreement on such disciplines within the Uruguay Round, WTO Members opted to continue discussions, deferring the imposition of substantive disciplines until a consensus was achieved.

66. According to the United States, this interpretation of Article 10.2 is consistent with Article 10 as a whole. Article 10.2 contributes to the prevention of circumvention of export subsidy commitments by imposing two obligations on Members: first, they must undertake to work toward the development of internationally agreed disciplines on export credit guarantees; and, second, "after agreement on such disciplines", they must provide export credit guarantees "only in conformity therewith".[62] Moreover, excluding export credit guarantees from the application of Article 10.1 is consistent with the treatment of food aid transactions under Article 10. Because Article 10.4 of the *Agreement on Agriculture* does not explicitly exempt food aid transactions from the applicability of Article 10.1, the Panel's interpretative approach would mean that all food aid transactions constitute export subsidies under Article 10.1.

67. The United States submits that the negotiating history confirms its interpretation that Article 10.2 excludes export credit guarantees from the export subsidy disciplines in Article 10.1. The negotiating history reflects that WTO Members initially included export credit guarantees as a subject for negotiation but later specifically elected not to include those practices as exports subsidies in respect of goods covered by the *Agreement on Agriculture*. The Panel's explanation that the negotiators deleted the language on export credits from a 1991 draft of Article 9 because it was "mere surplusage"[63] is inconsistent with the fact that other practices included in the Illustrative List of Export Subsidies of the *SCM Agreement* were also listed in Article 9.1 of the *Agreement on Agriculture*, such as direct subsidies contingent upon export performance, or transport and freight charges provided at more favourable rates.

68. The United States argues that reliance on the negotiating history in this case is appropriate, under Article 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*"[64]), because the Panel's interpretation leads to a manifestly unreasonable result. Had export credit guarantees remained in Article 9, then the United States and other providers of export credit guarantees would have been expressly permitted to include such measures in their respective export subsidy reduction commitments. In the absence of a reference in Article 9, the United States was foreclosed from including them. It defies logic, as well as the object and purpose of the *Agreement on Agriculture*, to take the view of the Panel whereby such measures would be treated as already disciplined export subsidies, yet such measures would not be permitted to be included within the applicable reduction commitments expressly contemplated by the text.

69. The United States also requests that the Appellate Body reverse the Panel's finding that export credit guarantees for agricultural commodities are subject to Articles 3.1 and 3.2 of the *SCM Agreement*. The United States explains that export credit guarantees are not listed in Article 9.1 of the *Agreement on Agriculture* and are exempt, through the operation of Article 10.2, from the export subsidy disciplines in Article 10.1. Because export credit guarantees are not subject to export subsidy disciplines under the *Agreement of Agriculture*, the export subsidy disciplines of the *SCM Agreement* are also inapplicable to these measures pursuant to Article 21.1 of the *Agreement on Agriculture* and the introductory language of Article 3.1 of the *SCM Agreement*.

(iv) *Burden of proof*

[62] Quoting from Article 10.2 of the *Agreement on Agriculture*.

[63] United States' appellant's submission, para. 379 (quoting Panel Report, para. 7.940).

[64] Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

70. The United States submits that the Panel erred in three different ways in respect of the application of the burden of proof in assessing the United States' export credit guarantee programs under item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*.

71. First, the United States asserts that the Panel erred by applying the "special rules" on burden of proof provided in Article 10.3 of the *Agreement on Agriculture* in its examination of Brazil's claim under the *SCM Agreement*. The United States argues that the special rules in Article 10.3 of the *Agreement on Agriculture* do not apply in the context of the *SCM Agreement*.

72. In addition, the United States submits that the Panel erred by applying the special rules on burden of proof in Article 10.3 of the *Agreement on Agriculture* in examining whether the United States circumvented its export subsidy commitments with respect to upland cotton and certain other *unscheduled* agricultural products. According to the United States, Article 10.3 does not apply at all in respect of export subsidies to an agricultural good for which the respondent has no reduction commitments.

73. Finally, the United States refers to three specific instances in which the Panel allegedly erred in applying the burden of proof. The first example is the Panel's statement that the premiums charged by the Commodity Credit Corporation (the "CCC") for the export credit guarantees "are not geared toward *ensuring* adequacy to cover long-term operating costs and losses for the purposes of item (j)".[65] The United States asserts that this is a much higher threshold than that provided in the text of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*. Next, the United States takes issue with the Panel's statements that "[i]n terms of the structure, design and operation of the ... programmes [we] believe that the programmes are not designed to avoid a net cost to government"[66] and that the Panel was entitled to inquire whether revenue "would be likely to cover the total of all operating costs and losses under the programme".[67] According to the United States, "[t]o 'avoid a net cost' prospectively is simply not the requirement of item (j)", and the "'likelihood' standard of performance" imposed by the Panel is higher than that found in item (j).[68] The third example cited by the United States is the Panel's statement that "[w]e have not been persuaded that cohort re-estimates over time, will *necessarily* not give rise to a net cost to the United States government."[69] The United States contends, however, that under the applicable burden of proof it is not for the United States to make such incontrovertible demonstrations to the Panel.

(v) *Necessary findings of fact*

74. The United States asserts that the Panel erred by failing to make certain factual findings that were necessary for the Panel's analysis of whether premiums are adequate to cover the long-term costs and losses of the United States' export credit guarantee programs, under item (j) of the Illustrative List of Export Subsidies. According to the United States, the Panel made no findings "on the basis for and

[65]United States' appellant's submission, para. 406 (quoting Panel Report, para. 7.859). (emphasis added by the United States)

[66]*Ibid.*, para. 407 (quoting Panel Report, para. 7.857).

[67]*Ibid.*, para. 407 (quoting Panel Report, para. 7.805).

[68]United States' appellant's submission, para. 407.

[69]*Ibid.*, para. 408 (quoting Panel Report, para. 7.853). (emphasis added by the United States) In the same paragraph, the United States mentions the following statement by the Panel: "[w]hile there may be a possibility (based on the experience of certain of other cohorts) that this figure may diminish over the lifetime of the cohort concerned, there is no assurance that this figure will *necessarily* evolve towards, and conclude as, zero or a negative figure." (Panel Report, footnote 1028 to para. 7.853) (emphasis added by the United States)

monetary extent to which the United States has allegedly not covered its long-term operating costs and losses for the CCC export credit guarantee programs".[70]

75. In particular, the United States asserts that the Panel should have made a specific finding on the treatment of rescheduled debt. The United States explains that the Panel did not conclude that rescheduled debt was an operating cost or loss. Instead, the Panel "stated only vaguely" that it shared Brazil's concern that the United States' treatment of rescheduled debt understates the net cost to the United States government associated with the export credit guarantee programs.[71]

76. The United States argues that the Panel's failure to make these factual findings compels the reversal of the Panel's determination in respect of item (j) of the Illustrative List of Export Subsidies.

B. *Arguments of Brazil – Appellee*

1. Domestic Support

(a) Terms of Reference – Expired Measures

77. Brazil submits that the Appellate Body should reject the United States' request to reverse the Panel's finding that expired production flexibility contract and market loss assistance payments were outside the Panel's terms of reference. Brazil argues that neither Article 4.2 nor Article 6.2 of the DSU precludes a panel from analyzing payments made in the past in the context of serious prejudice claims. Brazil focuses on the context provided by Article 3.3 of the DSU, which states that a purpose of dispute settlement is the "prompt settlement of situations in which a Member considers that any benefits accruing to it ... are being impaired by measures taken by another Member". For Brazil, as long as the impairment is current, then the status in domestic law of the measure causing impairment is irrelevant.

78. Brazil notes that the current case involves allegations of "adverse effects" and "serious prejudice" under the provisions of the *SCM Agreement* and the GATT 1994. A breach of these provisions does not necessarily arise when an actionable subsidy is granted, but only when adverse effects occur, and the breach continues for the entire period during which the adverse effects continue. The effects of an actionable subsidy, which "affect[] the operation of" the *SCM Agreement* in the sense of Article 4.2 of the DSU, may well linger even after the measure providing for the subsidy expires. There is thus no basis for the United States' claim that the subsidies in question "cannot" be measures affecting the operation of any covered agreement. In particular, there is no justification in this context for the distinction, drawn by the United States, between recurring and non-recurring subsidies. The inquiry as to whether a subsidy continues to cause adverse effects beyond the year in which it was granted is a substantive judgment, and cannot be treated as a "jurisdictional hurdle".[72] Brazil finds support for its position in the view of the panel in *Indonesia – Autos*, which found that past, present, and future subsidies can be the subject of dispute settlement, as the effect of such measures may cause serious prejudice to the interests of a Member.

79. Brazil also disputes the United States' claims regarding Article 12.7 of the DSU. In Brazil's view, the Panel fulfilled the requirements of Article 12.7 in its Report. Many of the United States' claims under Article 12.7 are, in reality, allegations of error concerning the Panel's exercise of its discretion under Article 11 of the DSU and should be dismissed for want of specification of a claim under that provision.

[70]United States' appellant's submission, para. 419.

[71]*Ibid.*, para. 416.

[72]Brazil's appellee's submission, para. 255.

(b) Article 13(a) of the *Agreement on Agriculture* – Planting Flexibility Limitations

80. Brazil considers that production flexibility contract and direct payment programs are not green box measures falling under Annex 2 of the *Agreement on Agriculture* and are thus not exempt from actions pursuant to Article 13(a) of that Agreement. Brazil requests the Appellate Body to uphold the Panel's finding, under paragraph 6(b) of Annex 2, that production flexibility contract payments under the FAIR Act of 1996[73] and direct payments under the FSRI Act of 2002 relate the amount of the payment to the type of production undertaken by recipients because these payments are made solely if a producer grows crops other than fruits and vegetables (and, in the case of direct payments, wild rice as well).

81. Brazil relies upon the Panel's finding that paragraph 6(b) of Annex 2 addresses both positive requirements that certain products be produced and negative requirements that certain products not be produced. Brazil submits that the Panel correctly held that the words "related to," in paragraph 6(b) of Annex 2, preclude the establishment of any kind of relationship between the amount of a payment and the type of production undertaken. Accordingly, the text requires that the amount of a decoupled payment not be affected, influenced, or dependent, in any way, upon the type of crop planted. Brazil contends that the United States inappropriately seeks to read into paragraph 6(b) an exception for planting restrictions. Brazil observes that where the drafters intended to provide such an exception, they did so explicitly, as is evidenced by paragraphs 11(b) and 11(e) of Annex 2. For Brazil, Annex 2 cannot simply be reduced to the proposition that a measure is exempt if it is consistent with the fundamental requirement established in paragraph 1 that such measures have no, or at most minimal, trade-distorting effects or effects on production. Such an interpretation would overlook the policy-specific criteria in the other paragraphs of Annex 2.

82. Brazil nevertheless agrees with the United States that the expression in paragraph 6(b) "related to ... the type ... of production" does not preclude a Member from making decoupled payments conditional upon producers undertaking no production at all. Brazil highlights, however, that a total ban on production is different from a partial ban, because payment is conditional upon the planting of certain crops as opposed to others. The Panel's factual findings support this view: the Panel found that the planting flexibility limitations impose a "significant constraint" on production decisions.[74] Brazil argues that, under the production flexibility contract and direct payment measures, the amount of payment is always "related to" the type of production undertaken. If permitted crop "types" are produced exclusively, a full payment is made. If a small quantity of "prohibited" crops is produced, the amount of payment is reduced. If a larger quantity of prohibited crops is produced, no payment is made.

83. Furthermore, the various findings by the Panel contradict the United States' basic assertion that "a condition that a recipient not produce certain products serves the fundamental requirement of Annex 2, that measures have no more than minimal trade-distorting effects and effects on production."[75] Rather, a partial prohibition creates incentives for the production of certain crops, and disincentives for the production of prohibited crops. In essence, the Panel found that planting flexibility limitations *did* channel production away from fruits, vegetables (and wild rice) and towards other commodities, such as upland cotton. Brazil thus disputes the distinction put forward by the United States between measures that make payment contingent upon the production of "permitted" crops and those that make payment contingent upon the non-production of "prohibited" crops. As the

[73]Federal Agriculture Improvement and Reform Act of 1996 (the "FAIR Act of 1996"); Public Law 104-127.

[74]Brazil's appellee's submission, para. 287 (quoting Panel Report, para. 7.386).

[75]Brazil's appellee's submission, para. 291 (quoting the United States' appellant's submission, para. 22).

Panel found on the facts of this case, their effects are the same. The Panel found that "the planting flexibility limitations provide a monetary incentive for payment recipients not to produce the prohibited crops"[76], and that production flexibility contract payments and direct payments have positive production effects by restricting production choices and keeping land dedicated to the production of the permitted crops. Thus, providing income support, whilst also excluding income support when certain types of crop are produced, relates the amount of the income support to the type of production undertaken within the meaning of paragraph 6(b).

84. Finally, Brazil takes issue with the United States' assertion that the Panel's interpretation would require a Member to make decoupled income support payments even if the recipient produced illegal crops or crops damaging to the environment. There was no basis for the Panel to address this issue because the planting flexibility limitations at issue do not pertain to the production of illegal or environmentally-damaging crops. In any event, nothing in the *Agreement on Agriculture* suggests that the word "production" means anything other than *lawful* production. The Panel properly declined to consider the hypothetical situations not created by the United States' measures at issue in the dispute.

(c) Article 13(b) of the *Agreement on Agriculture*

85. Brazil submits that the United States' non-green box domestic support measures are not exempt from actions by virtue of Article 13(b)(ii) of the *Agreement on Agriculture*, and asks the Appellate Body to uphold the Panel's finding that the United States granted implementation period support to upland cotton in excess of that decided in the 1992 marketing year, within the meaning of that provision. Brazil argues that the Panel's interpretation of Article 13(b)(ii) was consistent with its ordinary meaning, context and object and purpose, and that the methodological choices made by the Panel in undertaking the comparison required by Article 13(b)(ii) were reasonable and within the bounds of its discretion as the trier of fact.

(i) *Interpretation of "support to a specific commodity"*

86. Brazil contends that the Panel correctly interpreted the phrase "support to a specific commodity" in Article 13(b)(ii) of the *Agreement on Agriculture* to mean "all non-green box support measures that clearly or explicitly define a commodity as one to which they bestow or confer support".[77] This includes crop insurance and the three subsidies described by the United States as "product-specific" domestic support (marketing loan program payments, Step 2 payments, and cottonseed payments), as well as the four measures characterized by the United States as "decoupled" payments (production flexibility contract payments, direct payments, market loss assistance, and counter-cyclical payments).

87. Brazil submits that the United States' interpretation of the phrase "support to a specific commodity" in Article 13(b)(ii) of the *Agreement on Agriculture* is that support falling within the proviso to Article 13(b)(ii) must require production of only one specific crop. Brazil observes that this argument was rejected by the Panel, which concluded that nothing in the text of Article 13(b)(ii) suggests that relevant measures must provide support only to a single commodity, and noted that a single measure could provide support to multiple specific commodities. Brazil agrees with the Panel that "[i]f a measure specifies more than one commodity, it would be appropriate to measure the amount of support granted to each of them in accordance with the terms of the measure itself."[78] The practical effect of the extremely narrow United States reading of Article 13(b)(ii) is to erase US $4.2

[76]*Ibid*., para. 320 (quoting Panel Report, para. 7.386).

[77]Brazil's appellee's submission, para. 358 (quoting Panel Report, para. 7.494).

[78]*Ibid*., para. 371 (quoting Panel Report, para. 7.483).

billion in production flexibility contract payments, direct payments, market loss assistance, and counter-cyclical payments to recipients who actually grew upland cotton in the 1999-2002 marketing years, even though these four subsidies covered a significant portion of upland cotton producers' costs of production during this period. Brazil contends that the crucial conclusion drawn by the Panel from this data was a clear linkage between historic upland cotton producers and present upland cotton producers. The Panel found that "the overwhelming majority of farms enrolled in the programmes which plant upland cotton also hold upland cotton base", specifically, 96.1 per cent in the 2002 marketing year.[79] For Brazil, the evidence on record and the Panel's findings contradict the United States' factual assertions that there is no connection between current payments under the production flexibility contract, direct payment, market loss assistance, and counter-cyclical payment programs on the one hand, and current upland cotton production on the other.

88. Brazil agrees with the Panel's conclusion that the deliberate decision of the drafters *not* to use in Article 13(b)(ii) readily available terms, such as "product-specific" and "non-product-specific" (and the definitions in Articles 1(a) and (h) of the *Agreement on Agriculture*) means that the drafters intended the term "support to a specific commodity" to have a unique meaning. The Panel properly found that this unique phrase does not mean "product-specific domestic support" because "the class of measures which is covered by paragraph (b) [of Article 13] is broader than either" that term or the phrase "support … provided for an agricultural product in favour of the producers".[80] The Panel correctly focused on the fact that the term "support to a specific commodity" in Article 13(b)(ii) refers to *all* measures set out in the chapeau to Article 13(b). There was therefore no basis in the text to limit the measures covered by Article 13(b)(ii) solely to measures requiring production of a single commodity. Brazil adds that such an interpretation would be contrary to the object and purpose of the *Agreement on Agriculture*, creating a new category of trade-distorting domestic support that would evade the limits set by the Members for exempting domestic support measures from actions under the *SCM Agreement* and the GATT 1994. Under the United States' interpretation, as long as measures do not require production of a *single* commodity, they would *never* be counted as implementation period support for purposes of the peace clause comparison, effectively insulating such measures from serious prejudice actions.

89. In addressing the manner in which the value of support under the production flexibility contract, market loss assistance, direct payment, and counter-cyclical payment programs should be calculated, Brazil submits that the Appellate Body should be wary of setting the evidentiary bar too high for complaining Members seeking to demonstrate precise amounts of support to a specific commodity for purposes of Article 13(b)(ii). Brazil contends that the Appellate Body should affirm the Panel's use of the total budgetary outlays to upland cotton base acres. Brazil observes, however, that the Panel endorsed in the "Attachment to Section VII:D" two other approaches for allocating implementation period support under these programs to upland cotton: the "cotton-to-cotton" methodology and "Brazil's methodology". Brazil maintains that, under any of these approaches, the United States granted support to upland cotton in the years 1999, 2000, 2001, and 2002 in excess of that decided during the 1992 marketing year.

(ii) *Calculation methodology for price-based measures*

90. In addressing the United States' arguments regarding the appropriate methodology for calculating the value of certain United States price-based measures (the marketing loan program payments and deficiency payments), Brazil agrees with the Panel that "the use of the verb 'decided' stands in contrast to the use of the verb 'grant' in relation to the same noun 'support' in the same

[79] *Ibid.*, para. 383 (quoting Panel Report, para. 7.636).

[80] Brazil's appellee's submission, para. 390 (quoting Panel Report, para. 7.491).

proviso."[81] The Panel found that "despite the contrast, the proviso calls for a comparison which necessarily requires the two halves of the comparison to be expressed in the same units of measurement."[82] The Panel further noted that "[a] difference between the support that a government decides and the support that its measures grant is that one is expressed in terms of prior determinations of levels of support and the other in terms of subsequent support provided."[83] The Panel concluded by stating that "'[d]ecided' refers to what the government determines, but 'grant' refers to what its measures provide."[84] Brazil submits that the Panel's explanation and reasoning for its interpretation are consistent with the ordinary meaning of the term in its context, and are supported by the Appellate Body's decision in *Brazil – Aircraft*.

91. Brazil contends that the United States incorrectly implies that the Panel agreed with the United States that the peace clause proviso "compares the support a Member determines through its measures, not 'support [that] was spent due to reasons beyond the control of the government'".[85] Brazil argues that the Panel explicitly rejected this contention and concluded that "the text indicates that implementation period support must be measured in terms of support that measures 'grant', rather than what was budgeted or *estimated*."[86]

92. Against this background, Brazil argues that the plain text of paragraph 10 of Annex 3 to the *Agreement on Agriculture* permits the use of *either* a budgetary outlay *or* a price gap methodology for calculating the value of price-based payments. There is no textual basis for concluding, for purposes of the peace clause, that only price gap methodology may be used. Brazil also notes the Panel's factual finding that the United States adopted a budgetary outlay methodology in accounting for marketing loan program payments in its AMS notifications. Brazil observes that when the United States agreed with other WTO Members on its base level AMS, the United States chose to calculate marketing loan program payments using a budgetary outlay methodology. Brazil argues that the United States' decision to use budgetary outlays instead of price gap methodology for notifying the value of marketing loan program payments is legally binding on the United States. This conclusion follows from the text of Articles 6.3 and 3.2 of the *Agreement on Agriculture*. Nothing in Article 6 or any other provision of the *Agreement on Agriculture* permits a Member to change the methodology used to calculate the value of price-based measures, once that methodology has been used in AMS notifications.

93. Brazil also notes that, although the Panel primarily relied on a budgetary outlay methodology, it also made alternative factual findings regarding the use of price gap methodology for the calculation of marketing loan program payments in the implementation period and for the 1992 benchmark period, as well as for deficiency payments in the 1992 benchmark period only. Brazil highlights the Panel's finding that under *either* approach the United States grants support to upland cotton in excess of that decided in the 1992 marketing year; the Panel found that "both methodologies lead to the same result."[87] As a result, even if the legal grounds for the United States' appeal were valid, the facts on record would require the Appellate Body to uphold the Panel's conclusions that the United States granted support in each of the 1999-2002 marketing years that exceeded the "support decided during the 1992 marketing year".

[81] Brazil's appellee's submission, para. 340 (quoting Panel Report, para. 7.435).

[82] Panel Report, para. 7.435.

[83] *Ibid.*, para. 7.436.

[84] *Ibid.*, para. 7.476.

[85] Brazil's appellee's submission, para. 346 (quoting the United States' appellant's submission, para. 66).

[86] *Ibid.*, para. 346 (quoting Panel Report, para. 7.557). (emphasis added by Brazil)

[87] Panel Report, para. 7.555.

2. Serious Prejudice

(a) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

94. Brazil submits that the Panel properly found that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement* constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*. Brazil asks the Appellate Body to uphold this finding, and to find that the Panel set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind this finding, as required by Article 12.7 of the DSU. Brazil argues that many of the United States' arguments[88], and particularly those concerning serious prejudice, involve allegations that the Panel failed to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case" pursuant to Article 11 of the DSU. Brazil requests the Appellate Body to ignore these arguments because the United States has not made a proper claim of error under Article 11 of the DSU.

95. First, in response to the United States' argument that the market in which a panel assesses significant price suppression under Article 6.3(c) cannot be a "world market", Brazil maintains that the subsidized and like products must be present in the market examined. Brazil submits that the ordinary meaning of the text of Article 6.3(c) of the *SCM Agreement* indicates that this provision "may apply to *any* 'market,' from local to global, and everything in between".[89] This contrasts with paragraphs (a), (b), and (d) of Article 6.3, which expressly qualify the type of market at issue. It is also consistent with the object and purpose of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") (which addresses barriers to "world trade") and the *Agreement on Agriculture* (which addresses "world agricultural markets").[90] Brazil maintains that the Panel found, as a matter of fact, that a world market exists for upland cotton.[91] In addition, contrary to the assertion of the United States, Brazil contends that the Panel did find that United States and Brazilian cotton are present in the world market.[92] However, Brazil agrees with the Panel that the existence of a world market does not preclude the possibility of other markets, and that a world market does not necessarily exist for all products. Brazil refutes the United States' suggestion that the Panel did not find that *Brazilian* prices in the world market for upland cotton were significantly suppressed.[93] In Brazil's view, the Panel found that "Brazilian prices, *i.e.*, prices in Brazil and prices received for Brazilian exports, are significantly suppressed".[94]

96. Secondly, in relation to the United States' allegation that the Panel used circular reasoning to find "significant price suppression", Brazil emphasizes that several factors relate to both the "effect of the subsidy" and "significant price suppression", and the Panel gave separate explanations of these factors in terms of the "effect" and the "suppression". Brazil states that the Panel did take into account supply responses from third countries that would flow from removal of the price-contingent subsidies, in taking into account econometric models that incorporated such supply responses.[95] Brazil also states that the Panel examined the ordinary meaning of the word "significant", properly concluded that it is the degree of price suppression that matters rather than the degree of significance, and provided substantial reasons for its conclusion that the degree of price suppression it had found in the present dispute was significant.

97. Thirdly, in relation to the United States' challenge to the Panel's finding of the "effect" of the price-contingent subsidies, Brazil points out that the Panel did examine the United States' arguments regarding the "farmer's planting decision" and the responsiveness of United States producers to price signals.[96] Brazil explains that United States upland cotton farmers base planting decisions on expected net returns, meaning expected market prices together with expected government support. According to Brazil, the record contains ample evidence to support the Panel's view that the United States exercises a significant influence on the world market price for upland cotton. Even if movements in planted upland cotton acreage of United States producers correspond with those of other producers (which Brazil disputes), this would not detract from the Panel's finding that the overall level of upland cotton production by United States producers would be significantly lower in the absence of the price-contingent subsidies. The Panel properly assessed the nature of the price-contingent subsidies and properly found a temporal coincidence between those payments and suppressed upland cotton prices, based not merely on the end points of the 1998-2001 marketing year period, but on more detailed data. Finally, Brazil maintains that the Panel properly found that United States upland cotton producers were able to continue to produce upland cotton by virtue of the price-contingent subsidies. Although variable costs may be most relevant in the short term, the Panel found that upland cotton producers must cover their total costs of production in the mid- to long-term. According to Brazil, the fact that United States producers might have been able to cover the costs of upland cotton production through other agricultural production as well as "off-farm income"[97] is irrelevant to the question of the effect of the price-contingent subsidies on the United States industry producing upland cotton.

98. Fourthly, in response to the United States' arguments regarding the quantification of subsidies, Brazil states that neither the text nor the context of Articles 5(c) and 6.3 of the *SCM Agreement* imposes a "preliminary requirement to quantify exactly the amount of each subsidy prior to examining whether it causes adverse effects".[98] Brazil supports its interpretation by reference to Article 6.1(a) and Annex IV of the *SCM Agreement*, which, unlike Article 6.3, impose quantification methodologies. Brazil also distinguishes the analysis required under Part III of the *SCM Agreement* from that required under Part V of that Agreement. Under Part V, it is necessary to calculate the exact amount of subsidization in order to avoid imposing excess countervailing duties. However, the remedy under Part III focuses on the effects of the subsidy, rather than the imposition of duties, and, according to Brazil, the size of a subsidy does not necessarily determine its effects. Finally, Brazil contests the United States' reliance on Annex V of the *SCM Agreement*. In Brazil's view, Annex V sets out procedures for the collection of information and does not require the Panel to use such information, and the references to an "amount" in paragraphs 2 and 5 of Annex V are directed towards Article 6.1(a) rather than Article 6.3 of the *SCM Agreement*.

99. In response to the United States' arguments regarding the allocation of counter-cyclical payments and market loss assistance payments to upland cotton, Brazil argues that the methodology in Annex IV of the *SCM Agreement* applies only to Article 6.1 and not to Article 6.3(c), and that Annex IV has now expired. In any case, the Panel did find a "strongly positive relationship" between those payments and the production of upland cotton.[99]

[88]Brazil lists the relevant arguments in Annex A of its appellee's submission.

[89]Brazil's appellee's submission, para. 628. (original emphasis)

[90]*Ibid.*, para. 633. (emphasis omitted)

[91]*Ibid.*, paras. 619 and 622 (referring to Panel Report, paras. 7.1274 and 7.1311).

[92]*Ibid.*, paras. 644 and 808 (referring to Panel Report, paras. 7.1266, 7.1282-7.1284 and 7.1313).

[93]*Ibid.*, paras. 799-801 (referring to Panel Report, paras 7.1311 and 7.1313).

[94]*Ibid.*, para. 802.

[95]*Ibid.*, paras. 793-798 (referring to Panel Report, paras. 7.1205, 7.1209, and 7.1215).

[96]Brazil's appellee's submission, para. 168 (referring to the United States' appellant's submission, para. 324).

[97]*Ibid.*, para. 788 (referring to the United States' appellant's submission, para. 224).

[98]*Ibid.*, para. 467.

[99]Brazil's appellee's submission, para. 523 (quoting Panel Report, para. 7.1226).

100. Brazil contends that the United States' arguments distinguishing between "raw" and "processed" cotton improperly raise new factual and legal issues not before the Panel, including a suggestion that raw cotton is a product distinct from processed cotton. Brazil submits that the Panel found, and the parties agreed, that upland cotton lint is the only subsidized product at issue in this dispute. Moreover, according to Brazil, the Panel found that all price-contingent subsidies benefited the subsidized product (upland cotton), regardless of the stage at which they were provided. Brazil rejects the United States' reliance on the Appellate Body Report in *US – Softwood Lumber IV*.

101. Finally, Brazil responds to the United States' arguments as to the allocation of recurring subsidies to a particular year as follows. Articles 5(c) and 6.3 of the *SCM Agreement* do not explicitly exempt consideration of effects of annually recurring subsidies beyond the year in which they are paid. Furthermore, the United States' interpretation would create a new category of non-actionable subsidies. For example, according to Brazil, the United States' argument would exclude all the subsidies challenged by Brazil because they would be deemed to have no effects after 1 August 2003, well before the Panel circulated its Report. The possibility of making an "as such" claim against the subsidy programs as a whole would provide little comfort because these types of claims can be difficult to prove. Brazil also suggests that "WTO Members provide agricultural subsidies largely on a 'recurring' annual basis"[100] and, therefore, one would have expected an explicit exclusion of such subsidies from the disciplines of particularly Part III of the *SCM Agreement* and the *Agreement on Agriculture* if this were the intention of the drafters. The United States' contrary assertion improperly excludes the possibility for Members to seek the removal of adverse effects of any subsidies (whether recurring or otherwise), as reflected in Article 7.8 of the *SCM Agreement*.

102. In relation to the findings that the Panel made regarding the subsidies at issue in this dispute, Brazil challenges the United States' contention that the Panel made no findings regarding the effects in marketing year 2002 of subsidies paid in marketing years 1999 to 2001. The Panel explained its decision to examine serious prejudice over a period including marketing year 2002, and its findings indicate that it regarded the effects of certain subsidies as continuing in that year. In addition, Brazil submits that no "bright lines"[101] can be drawn between upland cotton subsidies paid in different marketing years, because the marketing year runs from 1 August to 31 July, and upland cotton is planted in one marketing year and harvested in the next.

3. Import Substitution Subsidies and Export Subsidies

(a) Step 2 Payments

(i) *To domestic users*

103. Brazil requests that the Appellate Body uphold the Panel's conclusion that Step 2 payments to domestic users of United States upland cotton, provided under Section 1207(a) of the FSRI Act of 2002, are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*. Brazil submits that the Panel correctly held that the *Agreement on Agriculture* and the *SCM Agreement* apply cumulatively, unless there is an exception or a conflict. Such an exception must be explicitly stated.[102] According to Brazil, in *EC – Bananas III*, the Appellate Body found that the *Agreement on Agriculture* permits inconsistencies with obligations in other covered agreements solely if this is "explicitly" stated in the text.[103] Similarly, an explicit exception would be required for the

[100]*Ibid.*, para. 559.

[101]Brazil's appellee's submission, para. 570.

[102]*Ibid.*, para. 832 (referring to Appellate Body Report, *US – Cotton Yarn*, para. 120).

[103]*Ibid.*, para. 833 (referring to Appellate Body Report, *EC – Bananas III*, para. 157).

Agreement on Agriculture to exempt certain measures from the prohibition in Article 3.1(b) of the *SCM Agreement*.

104. Brazil contends that no such exception is provided in the *Agreement on Agriculture* or in the *SCM Agreement*. The introductory phrase in Article 3.1 of the *SCM Agreement* ("[e]xcept as provided in the Agreement on Agriculture") does not mean that Article 3.1 does not apply to domestic support measures conforming to the *Agreement on Agriculture*; instead, it confirms that Article 3.1 of the *SCM Agreement* applies unless it conflicts with specific provisions of the *Agreement on Agriculture*. This interpretation is confirmed by Article 21.1 of the *Agreement on Agriculture* and by the absence of any exception in Article 13 of the *Agreement on Agriculture* regarding Article 3.1(b).

105. Brazil asserts that, under the *Agreement on Agriculture*, WTO Members are entitled to grant domestic support in favour of agricultural producers. However, this does not create a conflict with Article 3.1(b) of the *SCM Agreement*, because it is perfectly possible for Members to grant domestic support without making payments contingent on domestic content. In other words, Members can fully enjoy their right to grant domestic support and still comply with Article 3.1(b) of the *SCM Agreement*. This interpretation is consistent with a primary objective of the WTO agreements, namely, avoiding discrimination under the national treatment rule. It is also consistent with an adopted GATT panel report regarding a domestic support measure to agricultural producers that was contingent on the purchase of domestic goods. That panel recognized that the GATT contracting parties were entitled to grant support to agricultural producers but found that this could be done without granting domestic content subsidies.[104] The panel held that a domestic content subsidy in favour of agricultural producers was inconsistent with Article III:4 of the GATT 1947. Therefore, Brazil contends that domestic support under the *Agreement on Agriculture* can and must be granted consistently with Article 3.1(b) of the *SCM Agreement*.

(ii) *To exporters*

106. Brazil requests the Appellate Body to uphold the Panel's findings that Step 2 payments to exporters of United States upland cotton are contingent upon export performance and, consequently, are inconsistent with Articles 3.3 and 8 of the *Agreement on Agriculture* and are prohibited under Articles 3.1(a) and 3.2 of the *SCM Agreement*.

107. Brazil agrees with the Panel that the principles set out by the Appellate Body in *US – FSC (Article 21.5 – EC)* apply to Step 2 payments to exporters.[105] In one situation under the Step 2 measure, proof of exportation is required as a condition of payment. This export contingency is not dissolved because the payment can also be made in another situation, on other conditions.

108. Brazil adds that, contrary to the United States' argument on appeal, this is not a measure that establishes a single set of conditions applying to all upland cotton produced in the United States.[106] On its own terms, the measure does not apply to all United States production of upland cotton. Instead, the measure carves out of that overall production two classes of upland cotton that may, on certain conditions, receive subsidies. In so doing, the measure targets two well-defined classes of recipients and does not address either all United States production of upland cotton, or all "uses" of United States upland cotton.

[104]Brazil's appellee's submission, para. 860 (referring to GATT Panel Report, *Italy – Agricultural Machinery*, para. 16).

[105]*Ibid.*, paras. 881-884 (referring to Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 113 and 119 and Appellate Body Report, *Canada – Aircraft*, para. 179).

[106]*Ibid.*, para. 890 (referring to the United States' appellant's submission, para. 444).

109. Brazil also takes issue with the United States' assertion that Step 2 payments are contingent on use and not exportation. According to Brazil, Step 2 payments are not contingent on "use" in any meaningful sense. The measure is indifferent as to whether, how or when the upland cotton is "used." The criterion is not "use", but simply "exportation". Provided that the upland cotton is "shipped" from the United States, it would not matter if the upland cotton were never used, for instance, because its quality deteriorated during shipping or even because the ship carrying it sank. A subsidy would still be paid because of "exportation" from the United States.

110. Finally, Brazil distinguishes the facts in the present dispute from those before the panel in *Canada – Dairy*. In that case, a single regulatory class applied to all Canadian production of milk destined for a particular end-use.[107] In contrast, in the present case, the measure under which Step 2 payments are made explicitly establishes two mutually exclusive regulatory categories that apply to some, but not all, United States production of upland cotton.

111. Brazil requests, therefore, that the Appellate Body reject the United States' appeal and uphold the Panel's finding that Step 2 payments to exporters of United States upland cotton are contingent upon export performance and, consequently, are inconsistent with Articles 3.3 and 8 of the *Agreement on Agriculture* and are prohibited under Articles 3.1(a) and 3.2 of the *SCM Agreement*.

(b) Export Credit Guarantees

(i) *Panel's terms of reference*

112. Brazil asks the Appellate Body to uphold the Panel's conclusion that export credit guarantees to facilitate the export of United States agricultural commodities other than upland cotton were within the Panel's terms of reference.

113. Brazil asserts that the measures included in its request for consultations, as well as in its request for establishment of a panel, were the General Sales Manager 102 ("GSM 102") program, the General Sales Manager 103 ("GSM 103") program, and the Supplier Credit Guarantee Program (the "SCGP"). Under Unites States law, each of these measures applies to all eligible agricultural products. Adding a particular product or products to Brazil's request for establishment would not, therefore, have constituted the addition of *measures*. In any event, Brazil argues that its request for consultations, in fact, identified the United States' export credit guarantee measures in connection with all eligible commodities, without any limitation to upland cotton.

114. Additionally, Brazil asserts that, irrespective of the measures identified in Brazil's request for consultations, the Panel found, as a matter of fact, that "consultations were held" on the export credit guarantee measures in connection with all eligible commodities, as required by Article 6.2 of the DSU.[108] Brazil explains that the Appellate Body has held that as long as consultations were held on a measure included in a request for establishment of a panel, that measure is properly within a panel's terms of reference, irrespective of whether the measure was included in the request for consultations.[109] This is consistent with the purpose of consultations, which is to offer Members the opportunity to engage in good faith discussions with a view to resolving a trade dispute. The process necessarily involves collecting information that will shape the substance and scope of the dispute, should consultations fail.

[107]Brazil's appellee's submission, paras. 894-899 (referring to Panel Report, *Canada – Dairy*, paras. 2.39 and 7.41).

[108]Brazil's appellee's submission, para. 211 (quoting Panel Report, para. 7.61).

[109]*Ibid*., para. 213 (refering to Appellate Body Report, *Brazil – Aircraft*, paras. 132-133).

(ii) *Statement of available evidence*

115. Brazil asks the Appellate Body to deny the United States' claim that the Panel erred in concluding that Brazil provided a statement of available evidence with respect to the United States' export credit guarantee programs as they relate to agricultural commodities other than upland cotton, as required by Article 4.2 of the *SCM Agreement*.

116. According to Brazil, its statement of available evidence not only identified the measures at issue—the export credit guarantee measures—but also indicated the characteristics of those measures that had led Brazil to suspect that they constituted export subsidies. Brazil argues that this is consistent with the Appellate Body's interpretation of the requirements of Article 4.2 of the *SCM Agreement*.[110] Specifically, Brazil's statement describes the failure of the United States' export credit guarantee programs to establish premium rates that cover long-term operating costs and losses, which are central elements in determining whether a program constitutes an export subsidy under item (j) of the Illustrative List of Export Subsidies included as Annex I to the *SCM Agreement*. Further, the Panel found that the documentary evidence cited by Brazil to support its preliminary view was a link to a United States government website with data showing that revenues for the export credit guarantee programs do not cover long-term operating costs and losses.[111] The evidence addressed the failure of the export credit guarantee programs to cover long-term operating costs and losses overall, rather than in connection with upland cotton alone.

117. Thus, Brazil asserts, its statement of available evidence meets the requirements of Article 4.2, by identifying the export credit guarantee programs, and providing and describing available evidence of the character of those measures as export subsidies, across all eligible commodities.

(iii) *Article 10.2 of the Agreement on Agriculture*

118. Brazil requests that the Appellate Body reject the United States' appeal of the Panel's finding that export credit guarantees are subject to the export subsidy disciplines in Article 10.1 of the *Agreement on Agriculture*.

119. Brazil asserts that subsidized export credit guarantees are covered by the general definition of "export subsidies" under Article 1(e) of the *Agreement on Agriculture*. These measures are, therefore, subject to Article 10.1 of the *Agreement on Agriculture*, unless an express exception is provided in Article 10.2. The text of Article 10.2 establishes two obligations, but does not provide an exception. It requires WTO Members to negotiate multilateral rules to regulate agricultural export credit measures specifically, and to apply those rules once they are agreed. The text of Article 10.2 may be contrasted with several other WTO provisions that also require negotiations, but that state explicitly that the existing disciplines do not apply in the meantime.[112] The inclusion of such exceptions in other provisions highlights the lack of an exception in Article 10.2.

120. Brazil argues that the Panel's interpretation is consistent with the context and object and purpose of Article 10.2. Each of the paragraphs in Article 10 pursues the aim of preventing circumvention of export subsidy commitments and, thereby, contributes to the purpose of the *Agreement on Agriculture* of establishing specific binding commitments on export competition. Article 10.1 does so by disciplining export subsidies not listed in Article 9.1, as well as non-

[110]*Ibid*., paras. 228-229 (referring to Appellate Body Report, *US – FSC*, para. 161).

[111]*Ibid*., para. 226 (referring to Panel Report, paras. 7.92-7.93).

[112]Brazil's appellee's submission, paras. 916-917 (referring to footnote 15 to Article 6.1(a) and footnote 24 to Article 8.2(a) of the *SCM Agreement*, and Article XIII of the *General Agreement on Trade in Services*).

commercial transactions. Article 10.3 does so by reversing the usual rules on the burden of proof where Members have exported products in excess of their quantity reduction commitment levels. Article 10.4 does so by providing specific disciplines on food aid that ensure it is used for legitimate purposes and not to circumvent export subsidy commitments. Therefore, Article 10.2 must be interpreted in a manner that ensures that it contributes to the purpose of preventing circumvention of commitments on export competition. The United States' interpretation of Article 10.2 would leave Members free to grant unlimited export subsidies in the form of export credit guarantees and would permit wholesale circumvention of commitments.

121. Brazil takes issue with the United States' assertion that the Panel's interpretation is an "assault" on international food aid.[113] According to Brazil, food aid is subject to the specific disciplines in Article 10.4 of the *Agreement on Agriculture*, as well as the general disciplines in Article 10.1. Article 10.4 pursues the aim of preventing circumvention by ensuring that, consistently with the international regulation of food aid, such transactions do not result in "harmful interference" with trade.[114] Further, Article 10.4(a) adds to the disciplines by prohibiting food aid that is "tied" to or contingent upon "commercial exports" of agricultural products. This is not an "assault" on food aid; rather, it ensures that food aid is used for legitimate humanitarian purposes and not for illegitimate trade-distortion.

122. Brazil, moreover, disagrees with the conclusions drawn by the United States from the negotiating history of the *Agreement on Agriculture*. Brazil explains that the negotiating history confirms that export credit guarantees are, indeed, subject to Article 10.1. Members had known since 1960 that subsidized export credit guarantees were covered by the term "export subsidies". During the negotiations, Members repeatedly expressed the intention to subject these measures to export subsidy disciplines, and they never once expressed the intention to exclude them from such disciplines. In addition, Brazil rejects the United States' contention that the Panel's reading of Article 10.2 gives rise to a result that is "manifestly unreasonable".[115] At the close of the Uruguay Round, Members agreed that they would calculate their respective export subsidy commitment levels exclusively on the basis of the export subsidies listed in Article 9.1. They chose to leave out of that calculation the export subsidies in Article 10.1.[116] This is not an unjust implementation of the Uruguay Round, but the logical consequence of the bargain Members struck. Brazil emphasizes that the Panel's interpretation does not mean that Members cannot grant export credit guarantees. Instead, it means that *subsidized* export credit guarantees are subject to discipline as trade-distorting measures, and cannot be used to override export subsidy commitments.

123. Finally, Brazil asserts that, even if Article 10.2 were to exempt export credit guarantees for agricultural commodities from the disciplines in the *Agreement on Agriculture*, these measures would still be subject to Article 3 of the *SCM Agreement*.[117]

(iv) *Burden of proof*

[113]Brazil's appellee's submission, para. 940 (quoting the United States' appellant's submission, para. 350).

[114]*Ibid.*, para. 940 (quoting paragraph 3, FAO "Principles of Surplus Disposal and Consultative Obligations", and Article IX(d) of the Food Aid Convention).

[115]*Ibid.*, para. 926 (quoting the United States' appellant's submission, para. 384).

[116]*Ibid.*, para. 927.

[117]At the oral hearing, however, Brazil clarified that if Article 10.2 were to exempt export credit guarantees for agricultural commodities from the disciplines in the *Agreement on Agriculture*, Article 3 of the *SCM Agreement* would not be applicable to such measures.

124. Brazil submits that, even if correct, none of the United States' arguments in respect of the Panel's application of the burden of proof would lead to a reversal of the Panel's conclusion that the United States' export credit guarantee programs constitute export subsidies under the *Agreement on Agriculture* and the *SCM Agreement*. Irrespective of which party bore the burden of proof and the role of Article 10.3 of the *Agreement on Agriculture*, the Panel explicitly found that Brazil had established that the premiums charged under the United States' export credit guarantee programs were inadequate to cover long-term operating costs and losses for purposes of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*.[118] Having concluded that Brazil had successfully demonstrated that the United States' export credit guarantee programs constitute export subsidies under item (j) as context for the interpretation of the term "export subsidies" in Articles 10.1 and 8 of the *Agreement on Agriculture*, the Panel similarly concluded that the export credit guarantee programs constitute prohibited export subsidies under item (j) of the Illustrative List of Export Subsidies and Articles 3.1(a) and 3.2 of the *SCM Agreement*.[119]

125. Brazil also takes issue with the United States' assertion that the Panel required the United States to offer "incontrovertible demonstrations to the Panel" that, under the net present value accounting methodology, data trends indicated profits for the programs.[120] Brazil explains that, as the party asserting that these trends existed, the United States bore the burden of proving their existence. In the statement challenged by the United States, the Panel simply found that the United States had not met this burden. The Panel made this finding based on data submitted by the United States. Given that the United States has not alleged that the Panel failed to make an objective assessment of the facts under Article 11 of the DSU, Brazil argues that the United States' appeal should be denied on these grounds alone.

(v) *Necessary findings of fact*

126. Brazil asserts that the United States' claim that the Panel did not make the necessary findings of fact should have been brought under Article 11 of the DSU and that, having failed to bring such a claim, the United States is precluded from challenging the Panel's appreciation of the facts.

127. In any event, Brazil submits that neither item (j), nor Articles 3.1(a) and 3.2 of the *SCM Agreement*, nor Articles 10.1 and 8 of the *Agreement on Agriculture*, required the Panel to make specific factual findings on the "monetary extent to which" premium rates are inadequate to cover the long-term operating costs and losses of the United States' export credit guarantee programs.[121] It was sufficient for the Panel to have found that, under any and all methodologies that it reviewed and accepted, premium rates are *inadequate* to cover the long-term operating costs and losses of the export credit guarantee programs.

128. In addition, Brazil asserts that the Panel made sufficient factual findings for its conclusion that premium rates are inadequate to cover the long-term operating costs and losses of the export credit guarantee programs. Specifically, the Panel assessed the performance of the export credit guarantee programs under the elements of item (j) in various ways. In its assessment of the *past* performance of the export credit guarantee programs during the period 1992-2002, the Panel used two accounting methodologies—net present value accounting and cash basis accounting—to determine whether premium rates are inadequate to cover the long-term operating costs and losses of the programs.

[118]Brazil's appellee's submission, paras. 1023-1024 (referring to Panel Report, para. 7.867).

[119]*Ibid.*, para. 1024 (referring to Panel Report, paras. 7.946-7.948).

[120]*Ibid.*, para. 1025 (quoting the United States' appellant's submission, para. 408).

[121]Brazil's appellee's submission, para. 1046 (quoting the United States' appellant's submission, para. 419).

129. Brazil therefore requests that the Appellate Body uphold the Panel's finding that the United States' export credit guarantee programs constitute export subsidies within the meaning of item (j) of the Illustrative List of Export Subsidies and Articles 3.1 and 3.2 of the *SCM Agreement*.

C. *Claims of Error by Brazil – Appellant*

1. Domestic Support

(a) Article 13(a) of the *Agreement on Agriculture* – Base Period Update

130. Brazil conditionally appeals the Panel's exercise of judicial economy with respect to Brazil's claim that the "updating" of base acreage for direct payments under the FSRI Act of 2002 renders that program inconsistent with paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*. Brazil's appeal is conditional on the Appellate Body reversing the Panel's finding that production flexibility contract payments and direct payments are not decoupled income support under paragraph 6(b) of Annex 2 and thus not entitled to peace clause protection by virtue of Article 13(a) of the *Agreement on Agriculture*.

131. Brazil argues that the Panel made factual findings to the effect that the FSRI Act of 2002 created a new "base period" of time (marketing years 1998-2001) according to which upland cotton producers' eligibility for direct payments could be calculated. This new base period could replace the base period that had prevailed under the FAIR Act of 1996 (i.e., 1993-1995) for the calculation of production flexibility contract payments. In practical terms, the FSRI Act of 2002 gave producers who planted more upland cotton during 1998-2001 the chance to "update", that is, increase, the quantity of base acres for which they received direct payments.

132. Brazil recalls that paragraph 6(a) of Annex 2 states that "[e]ligibility for such payments shall be determined by clearly-*defined criteria* such as income, status as a producer or landowner, *factor use or production level in a defined and fixed base period*".[122] "Factor use" encompasses quantities of eligible farmland used in a historical period, such as the "base acres" used in the production flexibility contract and direct payment programs. Similarly, "production level" encompasses quantities of production based on historical acreage and yields, such as those used under the production flexibility contract and direct payment programs to calculate payments. If either the historical acreage or yields are updated, the result is a change in one of the "clearly-defined criteria". Yet paragraph 6(a) requires that both the "factor use" and "production level" criteria be set out in "a" single "fixed" base period.

133. Brazil notes that the ordinary meaning of the term "fixed" in relation to a base period is that the defined base period cannot be changed or updated. Accordingly, there can be only one period of time to establish these values; there can be no "updating" of the base period. Brazil contends that the context supports its interpretation. Moreover, the object and purpose of paragraph 6 of Annex 2 is to ensure that decoupled payments "have no, or at most minimal, trade-distorting effects or effects on production".[123] Paragraphs 5 and 6 of Annex 2 make clear that the purpose of "decoupled income support" is to break the link between production decisions and the amount of support. If that link is maintained, then domestic support is not entitled to the exemption from reduction commitments. Brazil submits that the United States' interpretation would effectively allow a Member to re-link last year's production to this year's payment. This would void paragraph 6(a) of any *effet utile*.

[122]Brazil's other appellant's submission, para. 246. (emphasis added by Brazil)

[123]*Ibid.*, para. 251 (quoting para. 1 of Annex 2 of the *Agreement on Agriculture*).

134. Brazil submits that the undisputed facts on the record reveal that production flexibility contract payments and direct payments were made to the same persons, on the same land, based on the same yield and payment formula, under the same conditions, and with the same limitations. Given these similarities, the option for a producer to select a new "fixed base period" other than the original "fixed base period" means that the direct payments are not green box measures under paragraph 6(a) of Annex 2. Brazil requests the Appellate Body to find accordingly.

2. Serious Prejudice

(a) World Market Share under Article 6.3(d) of the *SCM Agreement*

135. Brazil appeals the Panel's finding that Brazil failed to establish a *prima facie* case of inconsistency with Articles 5(c) and 6.3(d) of the *SCM Agreement*. Brazil asks the Appellate Body to reverse the Panel's finding that the words "world market share" in Article 6.3(d) mean "the portion of the world's supply that is satisfied by the subsidizing Member's producers"[124] and to find instead that "world market share" means "world market share of *exports*".[125] In addition, if the Appellate Body reverses the Panel's finding that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, Brazil calls on the Appellate Body to complete the analysis under Article 6.3(d) and to find that the effect of these subsidies is an increase in the United States' world market share of exports within the meaning of Article 6.3(d), thereby constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*.

136. As regards the interpretation of the term "world market share" in Article 6.3(d) of the *SCM Agreement*, Brazil first draws support from the text of that provision. Article 6.3(d) does not specify whether "world market share" refers to world market share of production or world market share of something else. However, the use of the word "trade" in footnote 17 to Article 6.3(d) suggests that Article 6.3(d) is directed towards a Member's share of world trade in a product, which requires a focus on *exports* rather than *production*.

137. Secondly, Brazil refers to the context of Article 6.3(d). Brazil argues that Article XVI:3 of the GATT 1994 addresses a Member's "share of world export trade" and that similarities between Article XVI:3 and Article 6.3(d) require the phrase "world market share" in the latter provision to be read in the same way. Brazil also points to the context provided by paragraphs (a) and (b) of Article 6.3, as well as Articles 6.4 and 6.7, and argues that the focus of a serious prejudice analysis under Article 6.3 is on the effects of the subsidies on like products from the complaining Member. According to Brazil, "[t]hese effects are either manifest in aggregated volume effects on the exports of a complaining Member under Articles 6.3(a), 6.3(b) and 6.3(d), or in price effects on the like product of the complaining Member in the 'same market' under Article 6.3(c)".[126]

138. Thirdly, Brazil relies on the object and purpose of Articles 5(c) and 6.3 of the *SCM Agreement*, which it characterizes as being to discipline subsidies causing serious prejudice to the interests of another Member. As stated in Article XVI:1 of the GATT 1994 (to which footnote 13 to Article 5(c) of the *SCM Agreement* refers), serious prejudice is reflected in trade effects, namely decreased imports or increased exports. Increased production is taken into account in a serious prejudice analysis, because it may have trade effects. However, by focusing solely on the United States' share of world upland cotton production, the Panel disregarded the significant increase in the United States' share of world upland cotton exports from 1999 to 2002, which caused serious

[124]Brazil's other appellant's submission, para. 269 (quoting Panel Report, para. 7.1434).

[125]*Ibid.*, para. 380(9). (original emphasis)

[126]Brazil's other appellant's submission, para. 287.

prejudice to other Members' producers who were competing against the subsidized exports. The Panel's interpretation means that the subsidizing Member's world market share may be significantly affected by unrelated increases in production in third countries, even if this additional production is consumed domestically. Brazil suggests that this would render Article 6.3(d) "largely inutile"[127] in disciplining the use of subsidies to increase market share.

139. For these reasons, Brazil asks the Appellate Body to reverse the Panel's interpretation of "world market share" under Article 6.3(d) of the *SCM Agreement* and to find instead that "world market share" means world market share of *exports*. Should it do so, and if the Appellate Body reverses the Panel's finding of significant price suppression under Article 6.3(c) of the *SCM Agreement*, Brazil asks the Appellate Body to complete the analysis under Article 6.3(d).

140. According to Brazil, factual findings by the Panel and undisputed facts on the record would allow the Appellate Body to complete the analysis under Article 6.3(d). The Panel's findings show that the United States' world market share of exports in marketing year 2002 was 39.9 percent, representing an increase over the previous three-year average of 28.4 percent.[128] Moreover, the Panel's assessment of the effects of the subsidies in its analysis under Article 6.3(c) confirms that the subsidies in question result in an increase in world market share, stimulate exports, and enhance the competitiveness of United States producers in world trade. Brazil submits that the Panel's causation and non-attribution analyses under Article 6.3(c) are also relevant for the causation analysis under Article 6.3(d). It is appropriate for the Appellate Body to complete the analysis in this way because the Panel did address all the elements of Brazil's claim under Article 6.3(d) and, even if it had not, Articles 6.3(c) and 6.3(d) claims are "closely related" and "part of a logical continuum".[129] According to Brazil, both claims relate to the adverse effects of and serious prejudice caused by actionable subsidies pursuant to Article 5(c) of the *SCM Agreement*, and Articles 6.3(c) and 6.3(d) are "closely-linked steps in determining the consistency of"[130] actionable subsidies under the *SCM Agreement*.

3. Import Substitution Subsidies and Export Subsidies

(a) Share of World Export Trade under Article XVI:3 of the GATT 1994

141. Brazil appeals the Panel's finding that the second sentence of Article XVI:3 of the GATT 1994 applies only to export subsidies as defined in the *Agreement on Agriculture* and the *SCM Agreement*. Brazil asks the Appellate Body to reverse the Panel's finding that this sentence applies only to export subsidies and to find instead that it applies to "*any form of subsidy* which operates to increase the export of any primary product".[131] In addition, if the Appellate Body reverses the Panel's finding that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, and if the Appellate Body does not find that the effect of these subsidies is an increase in the United States' world market share of exports within the meaning of Article 6.3(d) constituting serious prejudice within the meaning of Article 5(c) of the *SCM Agreement*, Brazil calls on the Appellate Body to complete the analysis and to find that these subsidies are applied in a manner that results in the United States having "more than an equitable share of world export trade in" upland cotton, contrary to the second sentence of Article XVI:3 of the GATT 1994.

142. In relation to the subsidies subject to the second sentence of Article XVI:3 of the GATT 1994, Brazil first refers to the text of this sentence and, in particular, the words "any form of subsidy". The ordinary meaning of these words suggests that Article XVI:3 applies to every subsidy, no matter what kind or how many. In addition, the second sentence specifies that it does not matter whether the subsidy is granted "directly or indirectly". Brazil points out that, in contrast to the first sentence of Article XVI:3, which is concerned with subsidies *on the export* of primary products, the second sentence is concerned with any subsidies that have export-enhancing effects.

143. Secondly, turning to the broader context of Article XVI:3, Brazil contends that Part A of Article XVI disciplines subsidies in general, and Part B of Article XVI disciplines "Export Subsidies" (as specified in the heading to Part B) in particular. The wording of the provisions in Part B shows that "export subsidies" in this context means "subsidies on the export" of a primary product (under the first sentence of Article XVI:3) and subsidies that operate "to increase the export of any primary product" (under the second sentence of Article XVI:3). Brazil argues that, in contrast, the export subsidy disciplines in the *SCM Agreement* and the *Agreement on Agriculture* are concerned with the narrower concept of "subsidies contingent upon export performance".[132]

144. Brazil also refers, for contextual support, to Article 13 of the *Agreement on Agriculture*. Article 13(c)(ii) provides a limited exemption for agricultural export subsidies from Article XVI of the GATT 1994, suggesting that Article XVI:3 could otherwise apply to such subsidies. Similarly, Brazil contends that the conditional exemption in Article 13(a)(ii) suggests that, in principle, green box domestic support is subject to challenge under the second sentence of Article XVI:3.

145. Thirdly, with respect to the object and purpose of Article XVI of the GATT 1994 and Articles 5 and 6 of the *SCM Agreement*, Brazil suggests that these provisions are intended to prevent subsidies granted by Members from having certain adverse outcomes or effects. The purpose of disciplining adverse effects of subsidies in the second sentence of Article XVI:3 of the GATT 1994 would be frustrated if this sentence was interpreted to apply only to subsidies contingent on export performance. This interpretation would deprive the second sentence of Article XVI:3 of *effet utile*, because the disciplines in that sentence would no longer apply to many subsidies having export-enhancing effects.

146. Brazil adds that Article XVI:3 of the GATT 1994 continues to apply despite the disciplines in the *SCM Agreement* and the *Agreement on Agriculture*.[133] In interpreting the covered agreements harmoniously and giving effect to all of them, the second sentence of Article XVI:3 must apply to measures that are also subject to the *SCM Agreement* and the *Agreement on Agriculture*. The rules in Article 21.1 of the *Agreement on Agriculture* and the General Interpretative Note to Annex 1A of the *WTO Agreement* do not apply, because no conflict exists between the second sentence of Article XVI:3 of the GATT 1994 and the disciplines in the *Agreement on Agriculture* and the *SCM Agreement*.

147. For these reasons, Brazil asks the Appellate Body to reverse the Panel's finding that the second sentence of Article XVI:3 of the GATT 1994 applies only to export subsidies as defined in the *Agreement on Agriculture* and the *SCM Agreement* and to find instead that this sentence applies to any form of subsidy that operates to increase the export of any primary product. Should it do so, and

[127] *Ibid.*, para. 295.

[128] *Ibid.*, para. 301.

[129] Brazil's other appellant's submission, paras. 313 and 314 (quoting Appellate Body Report, *Canada – Periodicals*, p. 24, DSR 1997:1, 449 at 469; Appellate Body Report, *EC – Asbestos*, para. 79).

[130] *Ibid.*, para. 314 (quoting Appellate Body Report, *Canada – Periodicals*, p. 24, DSR 1997:1, 449 at 469).

[131] *Ibid.*, para. 317 (quoting the GATT 1994, Article XVI:3). (emphasis added by Brazil)

[132] Brazil's other appellant's submission, para. 333 (quoting Article 1(e) of the *Agreement on Agriculture* and referring to Article 3.1(a) of the *SCM Agreement*).

[133] *Ibid.*, para. 345 (referring to Appellate Body Report, *Korea – Dairy*, para. 75; and Appellate Body Report, *Argentina – Footwear (EC)*, para. 81).

if the Appellate Body reverses the Panel's finding of significant price suppression under Article 6.3(c) of the *SCM Agreement* and does not find serious prejudice pursuant to Articles 5(c) and 6.3(d) of the *SCM Agreement*, Brazil asks the Appellate Body to complete the analysis under Article XVI:3 of the GATT 1994.

148. Brazil contends that the Panel's factual findings and the undisputed facts on the panel record are sufficient for the Appellate Body to find that the price-contingent subsidies caused the United States to have "more than an equitable share of world export trade", contrary to Article XVI:3 of the GATT 1994. The Panel made factual findings, pursuant to Article 6.3(c) of the *SCM Agreement*, regarding the United States' share of world export trade and the effect of the subsidies on that share. Brazil also submits that the Panel's non-attribution analysis would allow the Appellate Body to conclude that it was the subsidies in question that led to the United States' world market share reaching a level that is more than equitable, at the expense of other, more efficient producers.

(b) Export Credit Guarantees

(i) *Threat of circumvention*

149. Brazil asserts that the Panel erred in the interpretation and application of Article 10.1 of the *Agreement on Agriculture* by finding that "threat" of circumvention of export subsidy commitments would arise only if beneficiaries had an "absolute" or "unconditional statutory legal entitlement" to receive the subsidies such that the United States would "necessarily" be required to grant subsidies after the commitment level had been reached.[134] Brazil also takes issue with the Panel's statement that a "threat" could not arise if circumvention was just a *possibility*.[135]

150. According to Brazil, by its very nature, an obligation that covers the "threat" of circumvention deals with a future event whose actual occurrence is merely a possibility that cannot be assured with certainty.[136] Brazil adds that, even though the ordinary meaning of the term "threat" can encompass events that are a possibility or that appear likely, it can also include events whose occurrence is indicated or portended by circumstances. Furthermore, the meaning of the term "threatens" is clarified by its immediate context, particularly the word "[p]revention" in the title of Article 10. Brazil thus contends that, to give proper meaning to the aim of prevention, the threat obligation should be read so as to thwart, forestall, or stop circumvention from occurring by requiring a Member to take appropriate precautionary action. If, on the contrary, the degree of likelihood necessary to trigger the threat obligation were set too high, the threat obligation would fail to prevent circumvention, contrary to the express aim of the provision.

151. Brazil distinguishes the meaning of "threatens" in the context of Article 10.1 of the *Agreement on Agriculture* from the connotation of that term in other covered agreements. It explains that the *Agreement on Safeguards* and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") require a higher degree of likelihood because, under both Agreements, the demonstration of "threat" triggers the right of a WTO Member to apply trade remedy measures involving suspension or modification of WTO commitments. In contrast, Article 10.1 of the *Agreement on Agriculture* aims at the effective enforcement of a Member's export subsidy obligations. Brazil submits that the Panel's reading of Article 10.1 runs counter to the Appellate Body's decision in *US – FSC*, where the Appellate Body held that Article 10.1 applies if a measure "allows for" circumvention[137], whereas the Panel insisted that circumvention must be required by legal entitlement. Brazil submits that the assessment of whether a threat exists under Article 10.1 must be done on a case-by-case basis and suggests a list of factors that could be considered as part of the assessment.[138]

152. Brazil also contends that the Panel erred by confining its examination of threat of circumvention to scheduled agricultural products other than rice and to unscheduled products "not supported"[139] under the United States' export credit guarantee programs.[140] Brazil explains that, in addition to alleging actual circumvention in respect of rice, it also included this product in its claim of threat of circumvention. Brazil observes, furthermore, that it drew no distinctions between supported and unsupported products. Thus, the Panel's analysis of threat of circumvention should have included rice and all unscheduled products eligible to receive support under the export credit guarantee programs, regardless of whether they were in fact supported by such programs in the past.

153. Brazil argues that the Panel should have made a finding of threat of circumvention notwithstanding its conclusion on actual circumvention in respect of rice and unscheduled products supported under the United States' export credit guarantee programs. The prohibitions on actual and threatened circumvention are two separate obligations under Article 10.1 of the *Agreement on Agriculture*. The concepts of actual and threatened circumvention in Article 10.1 are different from the notions of injury and threat of injury in the trade remedies context. Article 10.1 does not confer rights, but imposes obligations. Accordingly, to hold that a Member has actually circumvented its export subsidy commitments in the past does not make it irrelevant to conclude that the Member continues to threaten circumvention in the future.

154. If the Appellate Body agrees with Brazil and modifies the Panel's interpretation of Article 10.1, Brazil requests that the Appellate Body complete the analysis of its claims. Brazil argues that the United States maintains export credit guarantees for a very wide range of scheduled and unscheduled agricultural products. These measures are subject to special budgetary rules that provide permanent and unlimited budget authority to the CCC to grant export credit guarantees. Therefore, Brazil asserts, no budgetary limits are imposed on the value of the subsidies that can be granted.

155. Brazil states that, even though the United States alleged before the Panel that the export credit guarantee programs are not unlimited because they impose certain conditions on the grant of subsidies, these conditions have no rational relationship whatsoever to ensuring respect for the United States' export subsidy commitments. There is no evidence on the record, according to Brazil, to demonstrate that any of the applicable conditions has ever been applied with a view to ensuring respect for the United States' export subsidy commitments. Moreover, none of these conditions has prevented the United States from consistently granting export credit guarantees for both scheduled and unscheduled products in violation of these commitments. Brazil contends that the authority that the United States enjoys to grant export credit guarantees in violation of its export subsidy commitments, coupled with the consistent pattern of granting behaviour in violation of those commitments, establishes that the United States' export credit guarantees are applied in a manner that

[134]Brazil's other appellant's submission, paras. 85-89 (quoting Panel Report, paras. 7.883 and 7.892).

[135]*Ibid.*, paras. 89 and 114 (referring to Panel Report, para. 7.893).

[136]*Ibid.*, para. 94 (referring to Appellate Body Report, *US – Lamb*, para. 125).

[137]Brazil's other appellant's submission, paras. 126-129 (quoting Appellate Body Report, *US – FSC*, para. 152).

[138]*Ibid.*, para. 105.

[139]When the Panel refers to products supported under the export credit guarantee programs, the Panel is referring to products for which there was evidence in the record showing that they were not only eligible under the programs, but that export credit guarantees were in fact received in connection with exports of those products. (Panel Report, para. 6.32)

[140]Brazil's other appellant's submission, para. 132 (quoting Panel Report, para. 7.882).

threatens to lead to circumvention of the United States' export subsidy commitments for all eligible products, under Article 10.1 of the *Agreement on Agriculture*.

(ii) *Actual circumvention*

156. Brazil claims that the Panel erred in the application of Article 10.1 of the *Agreement on Agriculture*, and did not discharge its duties under Article 11 of the DSU, by finding that the United States' export credit guarantees are applied in a manner that results in circumvention of the United States' export subsidy commitments for only one scheduled product, namely rice.

157. Brazil submits that, according to uncontested evidence on the record, supplied by the United States, actual circumvention also occurred for pig meat and poultry meat in 2001.[141] According to figures supplied by the United States, in fiscal year 2001, the volume of pig meat and poultry meat benefiting from export credit guarantees exceeded the United States' reduction commitment levels for these products. The Panel took explicit cognizance of this information, but nonetheless failed to apply a proper interpretation of Article 10.1 to the admitted facts. Likewise, the Panel failed to make an objective assessment of the matter, including of admitted and uncontested facts supplied by the United States, as required by Article 11 of the DSU.

158. Therefore, Brazil requests that the Appellate Body modify the Panel's finding that the United States' export credit guarantees are applied in a manner that results in actual circumvention with respect to only one scheduled product, namely, rice, and that it find, based on the undisputed facts on the record, that export credit guarantees are applied in a manner that also results in actual circumvention with respect to pig meat and poultry meat.

(iii) *Articles 1.1 and 3.1(a) of the SCM Agreement*

159. Brazil appeals the Panel's finding that, having found that the United States' export credit guarantee programs are export subsidies under item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*, it was unnecessary to address Brazil's claim that these programs constitute export subsidies under the terms of Articles 1.1 and 3.1(a) of the *SCM Agreement*. In declining to make a finding under these two Articles, the Panel erred in the interpretation and application of Article 3.1(a) of the *SCM Agreement*, as well as of Article 3.7 of the DSU.

160. According to Brazil, the Panel failed to recognize that Article 3.1(a) includes multiple and distinct obligations that differ from those deriving from item (j) of the Illustrative List of Export Subsidies. Most importantly, while a measure may no longer constitute an export subsidy under item (j), the same measure can still constitute an export subsidy under Articles 1.1 and 3.1(a) of the *SCM Agreement*. In the present dispute, a claim under item (j) of the Illustrative List of Export Subsides requires a determination whether the programs involved a "net cost" to the United States government. In contrast, a claim under Articles 3.1(a) and 1.1 necessitates a determination of whether the programs constitute "financial contributions" that confer a "benefit" (within the meaning of Article 1.1 of the *SCM Agreement*) on recipients of export credit guarantees[142] and are "contingent … upon export performance" (within the meaning of Article 3.1(a) of the *SCM Agreement*). These are two separate claims regarding two separate obligations imposed upon the United States. The first

[141]In its other appellant's submission, Brazil also claimed that the Panel erred by failing to find actual circumvention of the United States' export subsidy reduction commitments for vegetable oil in 2002. (Brazil's other appellant's submission, paras. 208-209) At the oral hearing, however, Brazil indicated that it was no longer pursuing this claim in respect of vegetable oil.

[142]Brazil's other appellant's submission, paras. 29-30 (referring to Appellate Body Report, *Canada – Aircraft*, paras. 154, 157).

obligation of the United States is to refrain from maintaining export credit guarantee programs that entail financial contributions, confer benefits, and are contingent upon export performance, while its second obligation is to refrain from maintaining export credit guarantee programs that incur a net cost to the United States government.

161. Brazil submits that, by failing to examine these distinct claims, the Panel misapplied the principle of judicial economy[143] and failed to provide for a "prompt settlement" and "positive solution" of the dispute as required by Articles 3.3 and 3.7 of the DSU. The Panel's misapplication of the principle of judicial economy means that the recommendations and rulings of the DSB may not be sufficiently precise to resolve the dispute. The Panel left unresolved the dispute between the parties as to whether the export credit guarantee programs involve a "benefit", and the steps that the United States must take to implement its obligations under the *SCM Agreement* will therefore be unclear.

162. If the Appellate Body were to reverse the Panel's finding, Brazil requests that the Appellate Body complete the analysis and find that the United States' export credit guarantee programs constitute export subsidies under Articles 1.1 and 3.1(a) of the *SCM Agreement*. Brazil submits that it is undisputed that export credit guarantees constitute "financial contributions" and that the programs are "contingent … upon export performance". Regarding the third element, i.e. whether the export credit guarantee programs confer a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*, Brazil notes that the Appellate Body has sufficient factual findings and undisputed facts on the record to complete the analysis. Brazil explains that the record demonstrates that the United States' export credit guarantee programs confer a benefit because they: (i) are not risk-based; (ii) are below relevant benchmarks, including the fees charged by the United States Export-Import Bank for its own guarantees; and (iii) enable non-creditworthy purchasers of United States agricultural exports to secure loans they would otherwise be unable to secure.

(iv) *ETI Act of 2000*

163. Brazil appeals the finding of the Panel that Brazil did not establish a *prima facie* case of inconsistency of the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (the "ETI Act of 2000"), and export subsidies granted thereunder in respect of upland cotton, with Articles 8 and 10.1 of the *Agreement on Agriculture*. Brazil acknowledges that the United States enacted legislation, on 25 October 2004, that "seems to repeal most of the illegal aspects of the ETI Act of 2000"[144] and, consequently, Brazil does not ask the Appellate Body to complete the analysis and to find that ETI Act export subsidies provided with respect to upland cotton exports are inconsistent with Articles 8 and 10.1 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.

164. Brazil contends that it challenged before the Panel exactly the same measure that the panel and the Appellate Body in *US – FSC (Article 21.5 – EC)* held to be inconsistent with the *Agreement on Agriculture* and the *SCM Agreement*. Except for the fact that Brazil challenges only the ETI Act export subsidies to upland cotton (and not with respect to all products), the "measure" and the "claims" in the present case are identical to those in *US – FSC (Article 21.5 – EC)*. According to Brazil, the United States has never challenged this identity.

165. Brazil alleges that the United States "effectively admitted" the inconsistency of the ETI Act of 2000 with Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement* and never contested Brazil's claims on their merits.[145] Brazil explains that it presented to the Panel all the evidence and argumentation that had been before the panel and the

[143]*Ibid.*, paras. 33-34 (referring to Appellate Body Report, *Australia – Salmon*, paras. 222-224).

[144]Brazil's other appellant's submission, para. 214.

[145]*Ibid.*, para. 222.

Appellate Body in the earlier dispute relating to the ETI Act of 2000. Brazil incorporated by reference into its submissions (i) the panel report in *US – FSC (Article 21.5 – EC)*, (ii) the Appellate Body Report in *US – FSC (Article 21.5 – EC)*, and (iii) all submissions of the European Communities in that case. Brazil contends that an approach whereby the complaining Member incorporates by reference the reasoning of another panel, as modified by the Appellate Body, is consistent with the Appellate Body's reasoning in *Mexico – Corn Syrup (Article 21.5 – US)*.[146]

166. Brazil asserts that, in addition to referencing the European Communities' claims and arguments in *US – FSC (Article 21.5 – EC)*, it presented arguments and evidence that addressed the specific nature of its claims, in particular with respect to Article 13(c)(ii) of the *Agreement on Agriculture*. Brazil submits that it identified the relevant portions of the *US – FSC (Article 21.5 – EC)* panel report that determined that the ETI Act of 2000 provides export subsidies. Specifically, that panel found that the ETI Act of 2000 (i) provides financial contributions within the meaning of Article 1.1(a)(ii) of the *SCM Agreement*, (ii) confers benefits within the meaning of Article 1.1(b), and thus (iii) bestows subsidies within the meaning of the *SCM Agreement* that (iv) are contingent upon export performance within the meaning of Article 3.1(a) of the *SCM Agreement*. Based on these arguments and findings, the Panel had more than sufficient evidence and arguments before it to conduct an objective examination of the consistency of the measure with the *Agreement on Agriculture* and the *SCM Agreement*. According to Brazil, the distinctions drawn by the Panel between the present dispute and the claims in *US – FSC (Article 21.5 – EC)* have no basis.

167. Brazil adds that, under Article 17.14 of the DSU, the parties to a dispute are unconditionally bound by adopted panel and Appellate Body reports.[147] Therefore, the United States is bound by the decision of the DSB to adopt the panel and Appellate Body Reports in *US – FSC (Article 21.5 – EC)* and the recommendation by the DSB that the United States bring the ETI Act of 2000 into conformity with the *Agreement on Agriculture* and the *SCM Agreement*. Despite the legal impossibility of the United States arguing that an identical measure subject to identical claims is WTO-consistent, the Panel nevertheless refused to take this into account in its assessment of the facts of the case and the matter before it.

168. Brazil states, moreover, that the ETI Act of 2000 is a measure that *all* WTO Members, *including the respondent*, have decided, through the adoption by the DSB of the relevant panel and Appellate Body reports, is inconsistent with the obligations of the United States under a covered agreement. The general rules on the burden of proof under the DSU, in essence, *presume* that a Member is in compliance with its obligations under WTO law and require a complaining Member to make a *prima facie* case that this presumption is misplaced. However, where the Members have decided in the DSB that a measure does not conform to a covered agreement, there is no basis for presuming that the same measure is in compliance with WTO law in another dispute. Any such presumption contradicts a formal DSB decision of the Members of the WTO.

169. Accordingly, Brazil requests the Appellate Body to find that the Panel erred in the interpretation and application of the burden of proof when finding that Brazil had not established *prima facie* that the ETI Act of 2000 violates Articles 8 and 10.1 of the *Agreement on Agriculture* and Article 3.1(a) and 3.2 of the *SCM Agreement*.

[146]*Ibid.*, para. 224 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 109).

[147]Brazil's other appellant's submission, para. 234 (referring to Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97 and Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 90-96).

D. *Arguments of the United States – Appellee*

1. Domestic Support

(a) Article 13(a) of the *Agreement on Agriculture* – Base Period Update

170. The United States submits that the Appellate Body should reject Brazil's conditional appeal that direct payments under the FSRI Act of 2002 are not in conformity with the green box criteria set forth in paragraph 6(a) of Annex 2 to the *Agreement on Agriculture*, because the program uses a "defined and fixed base period" different from that established for the production flexibility contract program under the FAIR Act of 1996. The United States argues that the direct payment program employs "a defined and fixed base period" within the meaning of paragraph 6(a) and Brazil's appeal relies on an erroneous reading of that paragraph, such that once one type of green box payment to producers is made, *all* subsequent measures providing such support must be made with respect to the same base period.

171. The United States argues that the ordinary meaning of the terms "defined and fixed base period", as used in paragraph 6(a), requires a base period to be "set out precisely" and to be kept "stationary or unchanging in relative position."[148] Direct payments under the FSRI Act of 2002 satisfy this requirement because eligibility is determined by historical production of any of a number of crops (including upland cotton) in a base period that is "definite" (set out in the FSRI Act of 2002) and "stationary or unchanging in a relative position" (that is, does not change for the duration of the FSRI Act of 2002). There is no textual requirement in paragraph 6(a) that new decoupled income support measures must utilize the *same* "defined and fixed base period" as any prior measures. Furthermore, the use of "a" defined and fixed base period contrasts with the use of the phrase "*the* base period" in other provisions of Annexes 2 and 3 of the *Agreement on Agriculture*. The United States emphasizes that the direct payment and production flexibility contract programs are different measures. There is thus no legal requirement that they use the same base period, so long as they each make use of a "defined and fixed" base period.

172. The United States argues that Brazil's interpretation would foreclose reform options to Members with past green-box support programs, contrary to the object and purpose of the *WTO Agreement*. In addition, Brazil's interpretation of paragraph 6(a) would render direct payments under the FSRI Act of 2002 non-green box, even though the Panel implicitly found that such payments had no more than minimal trade-distorting effects or effects on production.

2. Serious Prejudice

(a) World Market Share under Article 6.3(d) of the *SCM Agreement*

173. The United States maintains that the Panel correctly found that Brazil did not establish a *prima facie* case of inconsistency with Articles 5(c) and 6.3(d) of the *SCM Agreement*. The United States requests the Appellate Body to uphold this finding. In particular, the United States requests the Appellate Body to dismiss Brazil's argument that the words "world market share" in Article 6.3(d) refer to "world market share of *exports*".[149] Even if the Appellate Body accepts this argument by Brazil, the United States requests the Appellate Body to dismiss the conditional request of Brazil that

[148]United States' appellee's submission, para. 128 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, pp. 618 and 962).

[149]United States' appellee's submission, para. 145 (quoting Brazil's other appellant's submission, para. 271). (original emphasis)

the Appellate Body complete the analysis and find that the effect of the price-contingent subsidies is an increase in the United States' world market share within the meaning of Article 6.3(d), thereby constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*.

174. According to the United States, Brazil's reading of "world market share" as meaning "world market share of export trade" is erroneous. First, the United States endorses the Panel's finding that, by using the term "market", Members intended a meaning broader than the share of "exports" or "trade". The United States contests Brazil's view that the Panel's interpretation of Article 6.3(d) reduces the provision to inutility. The United States agrees with the Panel that Article 6.3(d) calls for an examination of the portion of the world *market* that is satisfied by the subsidizing Member's producers. Nevertheless, the United States stresses that the Panel erroneously equated this examination with an examination of only that portion of the world's *supply* that is satisfied by the subsidizing Member's producers. The United States contends that the Panel should have looked at the level of world *sales* or *consumption* of cotton, rather than simply the world supply.

175. Secondly, as to the context of Article 6.3(d), the United States submits that the Panel was correct to conclude that the use of the phrase "world market share" (as opposed to the different formulations found in Article XVI:3 of the GATT 1994 and Article 27.6 of the *SCM Agreement*) implies that Members did not want to restrict "world market share" to a Member's share of "world export trade" or "world trade". Similarly, unlike paragraphs (a) and (b) of Article 6.3, paragraph (d) of Article 6.3 is not explicitly restricted to any particular exports or imports or geographical area. The United States contends that the use of the word "trade" in footnote 17 to Article 6.3(d), but not in the text of the Article itself, implies that "world market share" does not include merely shares in world "trade".

176. Even if Brazil's interpretation of the words "world market share" in Article 6.3(d) were correct, the United States submits that the Appellate Body would not have sufficient factual findings and uncontroverted facts before it to complete the analysis under Article 6.3(d). The United States emphasizes that the Panel made no analysis with respect to causation and market share under Article 6.3(d). In the United States' submission, the Panel's "flawed"[150] analysis regarding the effect of the subsidy under Article 6.3(c) is not relevant to Brazil's request that the Appellate Body complete the analysis under Article 6.3(d) of the *SCM Agreement*.

3. Import Substitution Subsidies and Export Subsidies

(a) Share of World Export Trade under Article XVI:3 of the GATT 1994

177. The United States submits that the Panel properly found that Article XVI:3 of the GATT 1994 applies only to export subsidies as defined in the *Agreement on Agriculture* and the *SCM Agreement*. However, if the Appellate Body finds that Article XVI:3 applies to subsidies other than export subsidies, the United States asks the Appellate Body to find that Brazil has not established that the United States acted inconsistently with Article XVI:3 of the GATT 1994.

178. Beginning with the scope of Article XVI of the GATT 1994, the United States emphasizes that the text of Article XVI distinguishes between "Subsidies in General" (Part A) and "Additional Provisions on Export Subsidies" (Part B). By locating Article XVI:3 in Part B, Members agreed that Article XVI:3 is an additional provision on export subsidies. The term "export subsidy" is now defined in the *SCM Agreement* and the *Agreement on Agriculture* as referring to subsidies that are contingent on export performance. Both the context provided by these Agreements, as well as their

[150]United States' appellee's submission, para. 164.

drafting history, confirm that the export subsidies referred to in Article XVI:3 are also subsidies contingent on export performance. According to the United States, the Panel was correct to rely on Article 3.1(a) of the *SCM Agreement*, item (l) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement*, and the drafting history of the *Tokyo Round Subsidies Code* in concluding that Article XVI:3 of the GATT 1994 is concerned with certain export subsidies on primary products.

179. The United States contends that, even if the Appellate Body reverses the Panel's interpretation of the scope of Article XVI:3, there would be insufficient undisputed facts on the record or factual findings by the Panel for the Appellate Body to complete the analysis. The United States observes that the Panel made no findings on causation relative to trade share. As the "causation"[151] requirement under Article XVI:3 of the GATT 1994 differs from that under Article 6.3(c) of the *SCM Agreement*, and as the United States has appealed the Panel's analysis under Article 6.3(c), that analysis cannot support a finding of inconsistency under Article XVI:3. Regarding the standard for determining what is "more than an equitable share" of world export trade under Article XVI:3, the United States understands Brazil to argue that the demonstration of "any causal relationship between an increase in exports and the subsidies provided" would suffice.[152] However, the United States regards this standard as inadequate, because it renders the language "more than an equitable share" inutile, and it would transform Article XVI:3 into an outright prohibition on export-enhancing subsidies.

(b) Export Credit Guarantees

(i) *Threat of circumvention*

180. The United States requests that the Appellate Body uphold the Panel's finding that no threat of circumvention exists under Article 10.1 of the *Agreement on Agriculture* with respect to "unsupported" agricultural products for which no export credit guarantees have been provided.

181. The United States asserts that, contrary to Brazil's argument, the Panel's finding that the export credit guarantee programs do not threaten circumvention of export subsidy commitments is not an articulation of a broad standard that circumvention of export subsidy commitments would be "threatened" only "if beneficiaries had an 'absolute' or 'unconditional ... legal entitlement' to receive the subsidies such that the United States would 'necessarily' be ['']required' to grant subsidies after the commitment level had been reached".[153] Rather, in concluding that the programs did not pose a threat of circumvention, the Panel was simply responding to and declining to adopt Brazil's erroneous factual and legal characterizations of the program.

182. The United States submits, furthermore, that the Panel rightly distinguished these programs from the mandatory subsidies at issue in *US – FSC*, and that the Panel's decision presents no conflict with that Appellate Body Report. Brazil effectively argued that a mere possibility of issuance of export credit guarantees presented a threat of circumvention, and the Panel simply did not adopt this theory in the context of the export credit guarantee programs.

183. In addition, the United States asserts that the Appellate Body need not complete the analysis regarding threat of circumvention as requested by Brazil. First, the Panel did not err in its analysis of threat of circumvention. Secondly, the Panel appropriately exercised judicial economy in declining to examine threat of circumvention with respect to those agricultural products for which it found actual circumvention. Further analysis was not necessary to resolve the matter in dispute as it would not

[151]United States' appellee's submission, para. 182.

[152]*Ibid.*, para. 183 (quoting Brazil's other appellant's submission, para. 373).

[153]*Ibid.*, para. 6 (quoting Brazil's other appellant's submission, para. 3).

affect implementation of the obligation to apply export subsidies only in conformity with applicable WTO commitments.

(ii) *Actual circumvention*

184. The United States asserts that the Appellate Body should reject Brazil's request for additional findings of actual circumvention of export subsidy commitments for pig meat and poultry meat.[154] According to the United States, Brazil has not asserted a proper claim under Article 11 of the DSU. The United States points out that Brazil does not appeal the Panel's findings that the facts did not demonstrate that subsidized exports exceeded the United States' quantitative reduction commitments for poultry meat and pig meat. Therefore, Brazil's appeal pursuant to Article 11 of the DSU is improper as it does not "stand by itself" and is not "substantiated with respect to the challenged findings".[155]

185. The United States submits that, in any event, the data do not support the conclusions that Brazil advances. Brazil's allegation of actual circumvention related to the period July 2001 through June 2002. In contrast, quantitative data on exports under the United States' export credit guarantee programs are maintained on a fiscal year basis, which extends from 1 October to 30 September. Even if this difference between periods can be overcome, the United States argues that the actual data also support the Panel's finding that Brazil did not demonstrate actual circumvention for these products.

(iii) *Articles 1.1 and 3.1(a) of the SCM Agreement*

186. The United States asserts that the Appellate Body should reject Brazil's request for further findings under Article 3.1(a) of the *SCM Agreement* in addition to the finding the Panel made in respect of item (j) of the Illustrative List of Export Subsidies. The United States submits that, in the light of the Panel's finding that the United States' export credit guarantee programs constitute a prohibited export subsidy because the premium rates were inadequate to cover the long-term operating costs and losses of the program, any additional findings by the Panel would have been redundant. Neither item (j) nor the Illustrative List of Export Subsidies imposes obligations *per se*; instead, the obligation regarding export subsidies is found in Articles 3.1(a) and 3.2 of the *SCM Agreement*. Furthermore, Brazil's interpretation would render the Illustrative List of Export Subsidies meaningless. In the United States' view, a practice that does not constitute a prohibited export subsidy under the standard set forth in a particular item of the Illustrative List, such as item (j), cannot constitute a prohibited export subsidy under some other standard. This was the approach advocated by Brazil in the *Brazil – Aircraft* dispute. Moreover, the United States argues that an additional finding by the Panel would have had no effect on implementation. Whether or not a separate finding of "benefit" were made under Article 1.1, the Panel's recommendations would remain precisely the same.

187. The United States also observes that Brazil misconstrues what the Panel decided. The Panel did not decline to address a claim raised by Brazil. Instead, the Panel declined to make additional *factual findings* that Brazil requested. In any event, the United States contends that Brazil misinterprets the concept of judicial economy and that, even if Brazil made a separate claim, the Panel was within the bounds of its discretion in exercising judicial economy with respect to that claim.

[154]The United States also rejected the allegations in respect of vegetable oil made by Brazil in its other appellant's submission.

[155]United States' appellee's submission, para. 50 (referring to Appellate Body Report, *US – Steel Safeguards*, para. 498).

188. Finally, the United States disagrees with Brazil's assertion that there are sufficient undisputed facts in the record that would enable the Appellate Body to complete the analysis. According to the United States, it vigorously contested Brazil's allegations of fact in this regard and affirmatively demonstrated that the export credit guarantee programs do not confer such a benefit. The United States explains that no benefit is conferred because identical financial instruments are available in the marketplace in the form of "forfaiting"[156]; there is no correlation between the issuance of the export credit guarantee and the ability of an importer to secure a loan; and the CCC conducts a risk assessment with respect to the foreign banks to whose risk it is exposed.

(iv) *ETI Act of 2000*

189. The United States submits that the Appellate Body should reject Brazil's request that it find that the Panel erred in concluding that Brazil did not make a *prima facie* case that the ETI Act of 2000 is inconsistent with the United States' WTO obligations.

190. According to the United States, the Appellate Body should not rule on Brazil's appeal because Brazil acknowledges that the appeal is not necessary to resolve the dispute between the parties. Brazil states that it does not ask the Appellate Body to complete the analysis with respect to its claims. Brazil, therefore, is not asking the Appellate Body to make findings that would result in DSB rulings and recommendations with respect to the ETI Act of 2000.[157] For that reason alone, the Appellate Body should decline to decide Brazil's appeal.

191. The United States contends that, in any event, Brazil did not make a *prima facie* case with respect to the ETI Act of 2000. Brazil simply did not present any evidence at all regarding the ETI Act of 2000 itself. In its submission, Brazil gave a brief description of the proceedings in the *US – FSC (Article 21.5 – EC)* dispute and then asked the Panel "to apply the reasoning as developed by the panel and as modified by the Appellate Body in that case *mutatis mutandis*".[158] In essence, therefore, Brazil was not asking the Panel to make an objective assessment of the ETI Act of 2000, but merely to adopt findings from a previous proceeding. The Panel acted properly under the DSU, including Article 11, by declining to find that the "short shrift" that Brazil gave to the ETI Act of 2000 satisfied Brazil's burden to make its *prima facie* case concerning that Act.[159]

192. The United States asserts that the rules of burden of proof in the WTO are well settled. Contrary to Brazil's arguments, a finding of inconsistency in one dispute does not establish a finding of inconsistency in another dispute between different parties. Such an approach would in effect impose the concept of *stare decisis* on the WTO dispute settlement system. The United States also disagrees with Brazil's assumption that it is legally impossible for a party to argue that an identical measure subject to identical claims that were successful in a previous WTO dispute is WTO-consistent. The reasoning of a panel or the Appellate Body in one dispute is not binding on another panel or the Appellate Body in a separate dispute. Furthermore, while the measure may remain the same, the circumstances may change. Thus, irrespective of the ruling in the previous dispute, Brazil had the burden of establishing a *prima facie* case.

193. Finally, the United States argues that the Appellate Body's reasoning in *Mexico – Corn Syrup (Article 21.5 – US)* does not support Brazil's approach. Brazil exaggerates the Appellate Body's

[156]United States' appellee's submission, para. 93.

[157]United States' appellee's submission, paras. 101-104 (referring to Appellate Body Report, *US – Steel Safeguards*, para. 483 and Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323 at 340).

[158]*Ibid.*, para. 106 (quoting Brazil's written submission to the Panel, paras. 315-327).

[159]*Ibid.*, para. 12.

statements in that Report and does not explain why a complainant's obligation to make a *prima facie* case should be interpreted similarly to a panel's obligation to set forth its basic rationale pursuant to Article 12.7 of the DSU.

E. *Arguments of the Third Participants*

1. Argentina

(a) Article 13(a) of the *Agreement on Agriculture*

194. Argentina considers that green box measures must respect the "fundamental requirement" of paragraph 1 of Annex 2 of avoiding trade-distorting or production effects. Argentina submits that this requirement is additional to compliance with the policy-specific criteria of paragraph 6.

(i) *Article 13(a) of the Agreement on Agriculture – Planting Flexibility Limitations*

195. Argentina submits that production flexibility contract payments and direct payments do not comply with paragraph 6(b) of Annex 2 of the *Agreement on Agriculture* because the amount of these payments is related to the type of production after the base period. Argentina disagrees with the United States' view that paragraph 6(b) does not prevent the conditioning of payment upon fulfilling the requirement not to produce certain crops. Argentina considers that the Panel rightly affirmed that "the planting flexibility limitations provide a monetary incentive for payment recipients not to produce the prohibited crops".[160] For Argentina, there is effectively little difference between a "positive" and a "negative" list of permitted crops. The context provided by paragraphs 11(b) and 11(e) of Annex 2 supports this view. Although Argentina agrees with the United States that paragraph 6(b) ensures that the amount of payments must not be used to induce a recipient to produce a particular type of crop, the production flexibility contract and direct payments fail to meet this requirement. Argentina considers that the flexibility enjoyed by producers to plant different crops is illusory. The amount of the payments depends on the type of production. The growing of fruits and vegetables is prohibited under these programs, with the effect of channelling production towards other, permitted crops.

(ii) *Article 13(a) of the Agreement on Agriculture – Base Period Update*

196. Argentina agrees with Brazil that the option under the FSRI Act of 2002 to update base acres is inconsistent with paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*. Argentina submits that the term "defined" in paragraph 6(a) refers to the need for the base period to be clearly determined. Likewise, the term "fixed" refers to the need for the base period to be defined in terms that prevent it from being shifted or modified *a posteriori*. The term "fixed" indicates that payments made in accordance with the criteria stipulated in paragraph 6(a) must always rely on the same base period, and no change is possible. Paragraph 6(a) thus allows Members to identify their own base period; however, once that period is determined, the period must remain fixed. Otherwise, the choice of the word "a" in paragraph 6(a) would be difficult to explain. Argentina thus agrees with Brazil that if the structure, design, and eligibility criteria of an original measure containing a "fixed base period" and the structure, design, and eligibility criteria of its successor have not been significantly modified, then it is not legitimate to update the "fixed base period" under the successor measure. Accordingly,

[160]Argentina's third participant's submission, para. 15 (quoting Panel Report, para. 7.386).

the terms of the direct payment program under the FSRI Act of 2002 are inconsistent with the requirements set forth in paragraph 6(a) of Annex 2.

(b) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

197. Argentina agrees with Brazil that the market examined in assessing significant price suppression under Article 6.3(c) of the *SCM Agreement* may be a world market, and that a panel need not quantify precisely the amount of a subsidy in conducting such an assessment.[161]

(c) World Market Share under Article 6.3(d) of the *SCM Agreement*

198. Argentina agrees with Brazil that the words "world market share" in Article 6.3(d) of the *SCM Agreement* refer to the subsidizing Member's share of the world export market.[162]

(d) Step 2 Payments to Domestic Users

199. Argentina agrees with the Panel's conclusion that Step 2 payments to domestic users of upland cotton constitute a subsidy contingent upon the use of domestic over imported goods that is prohibited by Articles 3.1(b) and 3.2 of the *SCM Agreement*, and that WTO Members are not authorized by the *Agreement on Agriculture* to provide such subsidies.

(e) Export Credit Guarantees – Articles 10.1 and 10.2 of the *Agreement on Agriculture*

200. Argentina submits that the United States' export credit guarantee programs constitute export subsidies in breach of the anti-circumvention provision contained in Article 10.1 of the *Agreement on Agriculture* and, consequently, they are inconsistent with Article 8 and are not exempt from action under Article 13(c) of that Agreement. Argentina disagrees with the United States' view that no disciplines apply to export credit guarantee programs. On the contrary, under the terms of Article 10.1 of the *Agreement on Agriculture*, export credit guarantee programs constituting export subsidies should not be applied in a manner that results in, or threatens to lead to, circumvention of export subsidy commitments.

(f) Export Credit Guarantees – Articles 1 and 3.1(a) of the *SCM Agreement*

201. According to Argentina, the Panel's findings in respect of the United States' export credit guarantee programs are not complete. In not finding that such programs are also subsidies in accordance with the definition contained in Article 1 of the *SCM Agreement* and the prohibition in Article 3.1(a) of the same Agreement, the Panel did not bear in mind that different obligations stem from those Articles and that, similarly, the course of implementation adopted by a Member in respect of a finding of inconsistency only on the basis of item (j) of the Illustrative List of Export Subsidies may be different. Accordingly, Argentina contends that a finding of inconsistency in respect of the United States' export credit guarantees programs is also possible and should be made on the basis of Articles 1 and 3.1(a) of the *SCM Agreement*.

[161]Argentina's statement at the oral hearing.

[162]*Ibid.*

2. Australia

(a) Article 13(a) of the *Agreement on Agriculture* – Planting Flexibility Limitations

202. Australia requests that the Appellate Body uphold the Panel's conclusion that production flexibility contract payments, direct payments, and the legislative and regulatory provisions that establish and maintain the direct payment program, do not fully conform to paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*. Australia submits that making a payment conditional upon the non-production of a particular product is one way in which a Member can relate the "amount of ... payment[]" to the current "type or volume of production". Australia contends that the argument advanced by the United States would introduce an exception into paragraph 6(b) of Annex 2 that has no textual basis. Australia submits that the Panel's interpretation does not prevent payments from being disallowed in the case of illegal production because reducing the payment to zero would be based on the illegality of the activity, not "the type or volume of production". In addition, a Member could otherwise justify such a measure pursuant to Article XX of the GATT 1994.

(b) Article 13(a) of the *Agreement on Agriculture* – Base Period Update

203. Australia submits that the updating of base acres by the FSRI Act of 2002 means that the direct payments are not green box measures. Australia argues that the meaning of paragraph 6(b) of Annex 2 of the *Agreement on Agriculture* is that, once a base period has been "defined and fixed" pursuant to paragraph 6(a), decoupled income support payments may not be "connected" to or "[f]ound[ed], buil[t] or construct[ed]" on the type of production or the volume of production undertaken by a producer in a later period.[163] Australia says that the Panel found that the direct payments program is the successor to the production flexibility contract program and that the two programs are identical in a number of important respects. The option under the FSRI Act of 2002 for producers to update their base acres is not consistent with the requirement of paragraph 6(a) that there be one "defined and fixed base period".

(c) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

204. Australia refers to the United States' argument that the Panel failed to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind certain of its findings and recommendations regarding Article 6.3(c) of the *SCM Agreement*, as required by Article 12.7 of the DSU.[164] According to Australia, this argument suggests that the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU. Australia notes that the Appellate Body has recognized the discretion of a panel in choosing the evidence on which it relies.[165]

[163]Australia's third participant's submission, para. 42 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 187 and Vol. 2, p. 2534 in relation to the words "based on" and, "related to" in paragraph 6(b) of Annex 2 to the *Agreement on Agriculture*).

[164]*Ibid.*, para. 19 (referring to the United States' appellant's submission, paras. 150 and 322-331).

[165]*Ibid.*, para. 21 (referring to Appellate Body Report, *EC – Hormones*, para. 135).

(d) Step 2 Payments to Domestic Users and Exporters

205. Australia requests that the Appellate Body uphold the Panel's conclusions that Step 2 payments to domestic users constitute subsidies that are inconsistent with the requirements of Article 3.1(b) of the *SCM Agreement*.

206. Australia submits that the Appellate Body should also uphold the Panel's conclusions that Step 2 payments to exporters are inconsistent with Articles 3.3 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*. In the event that the Appellate Body determines that the Step 2 program is not export-contingent, Australia requests that the Appellate Body find that the Step 2 program *as a whole* is contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the *SCM Agreement*. Furthermore, in that case, the Appellate Body should find that the chapeau to Article 3.1 of the *SCM Agreement* does not serve to exempt such local content subsidies from the application of Article 3.1(b) of that Agreement.

(e) Export Credit Guarantees – Articles 10.1 and 10.2 of the *Agreement on Agriculture*

207. Australia disagrees with the United States' argument that export credit guarantees are excluded from the application of Article 10.1 of the *Agreement on Agriculture* and Article 3.1(a) of the *SCM Agreement*. According to Australia, the United States has incorrectly applied Articles 31 and 32 of the *Vienna Convention* to the interpretation of Article 10.1 of the *Agreement on Agriculture*. Article 10.1 applies to all "[e]xport subsidies not listed in paragraph 1 of Article 9". The meaning of this provision is clearly discernible from its text and it does not provide for any exceptions. The context of Article 10.2 does not support an interpretation that would be contrary to its plain words, particularly because it is not constructed as an exception provision. The object and purpose of Article 10.1 relate to the prevention of circumvention of commitments, in relation to *all* export subsidies other than those listed in Article 9.1 of the *Agreement on Agriculture*. Furthermore, the application of Article 10.1 to export credit guarantees defined as export subsidies does not lead to a result that is manifestly unreasonable because not all export credit guarantees are export subsidies within the meaning of the *Agreement on Agriculture* and the *SCM Agreement*. It is open to the United States, within the existing WTO framework, to design and maintain measures that fall outside the definition of an export subsidy, which is, in fact, what the United States asserts it has done. In contrast, acceptance of the United States' arguments could lead to a result that is manifestly absurd or unreasonable by encouraging other WTO Members to seek to avoid the anti-circumvention obligations of Article 10.1 of the *Agreement on Agriculture*.

208. Australia also rejects the United States' contention that Article 21.1 of the *Agreement on Agriculture* and the chapeau to Article 3.1 of the *SCM Agreement* render Article 3.1(a) of the *SCM Agreement* inapplicable to export credit guarantee programs.

3. Benin and Chad

(a) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

209. Benin and Chad agree with Brazil that the Panel correctly found that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*. Benin and Chad contend that many of the United States' arguments regarding Article 6.3(c) relate to factual findings by the Panel that are not subject to appellate review in the absence of a claim by the United States that the Panel failed to comply with Article 11 of the DSU.

210. Benin and Chad agree with the Panel's finding that it was not required to quantify precisely the amount of the subsidy in assessing Brazil's claim under Article 6.3(c) of the *SCM Agreement*, and that the amount of a subsidy is not necessarily determinative in such an assessment. This is consistent with the different purposes of Parts III and V of the *SCM Agreement*.

(b) World Market Share under Article 6.3(d) of the *SCM Agreement*

211. Benin and Chad support the request by Brazil that the Appellate Body reverse the Panel's interpretation of the term "world market share" in Article 6.3(d) of the *SCM Agreement*. Benin and Chad agree with Brazil that "world market share" means world market share of *exports*. If the Appellate Body adopts this interpretation, Benin and Chad request the Appellate Body to complete the analysis under Article 6.3(d) and to find that the effect of the price-contingent subsidies was an increase in the world market share of the United States contrary to Article 6.3(d). In turn, Benin and Chad ask the Appellate Body to find that they have also suffered serious prejudice under Article 6.3(d) as a result of the increase in the United States' world market share of exports.

212. According to Benin and Chad, the Panel's interpretation of "world market share" as world market share of *production* inappropriately shifts the inquiry away from the *effect* of the subsidy towards unrelated factors, such as production levels in third country markets. A subsidy may have the effect of increasing significantly the exports of a Member, even though the Member's world share of production remains stable or diminishes. Therefore, in the submission of Benin and Chad, the Panel's interpretation could lead to a situation where changes in the supply by a third country determine whether a subsidizing Member's world market share increases or decreases.

213. Benin and Chad state that, if the Appellate Body rejects the Panel's interpretation of "world market share" under Article 6.3(d), there are sufficient undisputed facts on the record for the Appellate Body to complete the analysis and to find that the United States acted inconsistently with Article 6.3(d). The evidence before the Panel indicates that those Members that have lost market share as a result of the price-contingent subsidies include, at least, Brazil and the "Francophone African nations of Benin and Chad".[166] Benin and Chad disagree with the Panel's finding that "the serious prejudice under examination by a WTO panel is the serious prejudice experienced by the complaining Member".[167]

214. Benin and Chad argue that the Appellate Body should take into account the impact of United States upland cotton subsidies on the "fragile economies of West and Central Africa"[168], as reflected in the Panel's findings and evidence on the record. Benin and Chad point out that Article 24.1 of the DSU, which requires particular consideration to be given to the special situation of least-developed country Members, would be given meaning if the Appellate Body acknowledged that the increase in the United States' world market share caused serious prejudice to Benin and Chad by reducing their market share. Furthermore, nothing in the text of Article 6.3(d) limits a finding of serious prejudice to the complaining party. Therefore, Benin and Chad urge the Appellate Body to draw conclusions under Article 6.3(d) that would require the United States to withdraw the subsidy or remove the adverse effects, not only with respect to Brazil, but also with respect to Benin and Chad.

[166]Benin and Chad's third participants' submission, para. 85. (emphasis omitted)

[167]*Ibid.*, para. 6 (quoting Panel Report, para. 7.1403).

[168]*Ibid.*, para. 9.

(c) Export Credit Guarantees – Articles 1 and 3.1(a) of the *SCM Agreement*

215. Benin and Chad support Brazil's position that the Panel improperly exercised judicial economy by refusing to address Brazil's claim that the United States violated Articles 1.1 and 3.1(a) of the *SCM Agreement* with respect to export credit guarantees. Benin and Chad also support Brazil's request that the Appellate Body complete the analysis as it has sufficient factual findings before it to do so.

216. Benin and Chad explain that, under item (j) of the Illustrative List of Export Subsidies, Brazil's claim is that the export credit guarantee programs operate at a loss or below the cost to the government. In contrast, under Article 3.1(a), Brazil's claim is that the programs are financial contributions that confer a benefit on recipients within the meaning of Article 1.1 of the *SCM Agreement* and that they are contingent upon export performance. Thus, Brazil's claims under item (j) of the Illustrative List of Export Subsidies and Article 3.1(a) were distinct, and the Panel's refusal to address Brazil's claim under Article 3.1(a) leaves an important and distinct claim unresolved. Accordingly, it was improper for the Panel to have exercised judicial economy.[169]

4. Canada

(a) Article 13(a) of the *Agreement on Agriculture* – Planting Flexibility Limitations

217. Canada considers that the Panel was correct in finding that production flexibility contract payments and direct payments do not meet the requirements of paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*. For Canada, nothing in the text of paragraph 6(b) supports the distinction the United States seeks to draw between "positive" and "negative" effects on production. If payments are conditioned on a recipient not undertaking a type of production, then the payment is related to the type of production. Canada thus agrees with the Panel's interpretation that paragraph 6(b) excludes any "typ[e] of relationship between the amount of such payments and the type of production after the base period".[170] Canada argues that this approach is supported by the object and purpose of Annex 2 and the context provided by the fundamental requirement set out in paragraph 1 of Annex 2.

218. Canada agrees with the United States that the fundamental requirement in paragraph 1 of Annex 2 is relevant context in understanding the criterion in paragraph 6(b) that the measure not be related to the type or volume of production. However, a Member does not have an independent basis for claiming that the measure qualifies as a "green box" measure because it has minimal trade-distorting effects. Canada disagrees with the United States' conclusion, based on its interpretation of paragraph 6(e), that a Member is not prohibited under paragraph 6(b) from conditioning payment on non-production of a particular product. Canada considers that paragraph 6(e) is a prohibition against requiring production as a condition of payment, but does not necessarily authorize a Member to impose a requirement not to produce a particular crop. With regard to the planting flexibility limitations under the production flexibility contract payment and direct payment programs, Canada disagrees with the United States that the amount of payments "does not relate to fruit or vegetable production since for that base acre there would be *no payment at all*".[171] For Canada, this interpretation is contrary to the ordinary meaning of the term "related to" and leads to the

[169]Benin and Chad's third participants' submission, paras. 105-108 (referring to Appellate Body Report, *Australia – Salmon*, para. 223 and Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133).

[170]Canada's third participant's submission, para. 13 (quoting Panel Report, para. 7.366).

[171]*Ibid.*, para. 20 (quoting the United States' appellant's submission, para. 26). (original emphasis)

unreasonable result that a Member could circumvent the requirement in paragraph 6(b) by encouraging certain types of production as long as it does so through a negative list by excluding certain other types of production.

(b) Article 13(a) of the *Agreement on Agriculture* – Base Period Update

219. Canada argues that the direct payments do not fully conform to paragraph 6(a) of Annex 2 of the *Agreement on Agriculture* because of the base period update in the FSRI Act of 2002. Canada submits that the ordinary meaning of the terms "defined and fixed base period" in paragraph 6(a) indicates that the base period cannot vary or change. This is confirmed by the context provided by paragraphs 6(b) and (d), which refer to "any year after the base period", as well as the object and purpose of paragraph 6, which is to identify the types of payments that are minimally trade-distorting. Canada contends that, as the Panel found that direct payments under the FSRI Act of 2002 are closely related to and a successor to the production flexibility contract payments, the base period for direct payments should not be different from the base period for production flexibility contract payments. The fact that payments are provided under new legislation does not in itself allow a modification to the base period under the predecessor program. Otherwise, the requirement that there be a "fixed base period" would become meaningless. By allowing updating of base acreage, the United States is altering the base period contrary to paragraph 6(a).

(c) Export Credit Guarantees – Articles 10.1 and 10.2 of the *Agreement on Agriculture*

220. Canada submits that the Panel correctly found that, to the extent that export credit guarantees meet the definition of export subsidies, they will be subject to the anti-circumvention disciplines of Article 10.1 of the *Agreement on Agriculture*. The United States' argument that Article 10.2 of the *Agreement on Agriculture* exempts export credit guarantees from the subsidy disciplines under that Agreement has no basis in the text, context, object and purpose, or negotiating history. Canada asserts that the text of Article 10.2 does not explicitly indicate an intention to exclude the application of other, existing disciplines. Indeed, such an interpretation would contradict the stated object and purpose of Article 10 as a whole, which is the "Prevention of Circumvention of Export Subsidy Commitments". Furthermore, the fact that export credit guarantee programs may not be subject to the notification requirement of the *Agreement on Agriculture* does not lead to the conclusion that they are not subject to the other disciplines of that Agreement.

221. Canada also agrees with the Panel's conclusion that the United States violated Articles 3.3 and 8 of the *Agreement on Agriculture* by providing export subsidies otherwise than in conformity with that Agreement with respect to upland cotton and other unscheduled commodities. In addition, Canada states that the Panel's interpretation of Article 10.1 with respect to scheduled products is consistent with the Appellate Body's analysis in *US – FSC*.[172]

(d) Export Credit Guarantees – Articles 1 and 3.1(a) of the *SCM Agreement*

222. Canada asserts that, if the Appellate Body reverses the Panel's finding that the United States' export credit guarantee programs constitute *per se* prohibited export subsidies under item (j) of the Illustrative List of Export Subsidies, it will still be necessary to consider whether the export credit guarantee programs constitute export subsidies under Articles 1 and 3.1(a) of the *SCM Agreement*.

[172]Canada's third participant's submission, para. 40 (referring to Appellate Body Report, *US – FSC*, para. 152).

Even if the United States' export credit programs charge adequate fees under the item (j) standard, they may still confer an export subsidy. If they did, the export credit guarantees would have to be provided in a manner consistent with Article 10.1 of the *Agreement on Agriculture*.

5. China

(a) Terms of Reference – Expired Measures

223. China submits that the Panel was correct to find that expired production flexibility contract and market loss assistance payments were within the Panel's terms of reference. The Panel's interpretation of Articles 4.2 and 6.2 of the DSU is in accordance with the text, context, and object and purpose of the DSU, as well as the intention of the drafters. China recalls that Article 4.2 of the DSU indicates that consultations are to cover "any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former". China "agrees with the Panel that based on the analysis of the context and the object of Article 4.2, the term 'affecting' in Article 4.2 is used as a gerund, describing the way in which they relate to a covered agreement, and has no temporal significance".[173] China notes that Brazil's claims in this case relate to serious prejudice under the provisions of the *SCM Agreement* and the GATT 1994. China agrees with the panel in *Indonesia – Autos* that, "[i]f ...past subsidies were not relevant to [a] serious prejudice analysis as they were 'expired measures'..., it is hard to imagine any situation where a panel would be able to determine the existence of actual serious prejudice".[174] China submits that neither the context cited by the United States nor the decisions of the panel and Appellate Body in *US – Certain EC Products* support the view that expired measures may not fall within the terms of reference of a panel.

(b) Article 13(b) of the *Agreement on Agriculture* - Interpretation of "support to a specific commodity"

224. China supports the Panel's finding that the phrase "support to a specific commodity" in Article 13(b) of the *Agreement on Agriculture* does not mean "product-specific domestic support". China submits that the word "specific" in Article 13(b)(ii) is inserted to avoid lump-sum treatment of measures generally applicable to a number of commodities. Unlike the phrase "product-specific support", the phrase "support to a specific commodity" refers to the level of support delivered to a specific commodity, thus combining both product-specific support and the portion of support attributable to upland cotton under a program that is available to a number of products.

(c) Terms of Reference – Export Credit Guarantees

225. China submits that the Appellate Body should uphold the Panel's conclusion that export credit guarantees to facilitate the export of United States agricultural commodities other than upland cotton were within the Panel's terms of reference. According to China, the Panel correctly concluded that Brazil identified export credit guarantees to agricultural commodities other than upland cotton in its request for consultations. During the consultations, Brazil also posed questions to the United States on the export credit guarantees that related to agricultural commodities other than upland cotton. These questions did not expand the scope of the consultations request, but merely clarified its content. In addition, China states that Brazil's recognition that the United States objected to the questions relating to agricultural commodities other than upland cotton does not lead to the conclusion that consultations were not held on the subject. Finally, China asserts that a WTO Member cannot refuse

[173]China's third participant's submission, para. 19.

[174]*Ibid.*, para. 26 (quoting Panel Report, *Indonesia – Autos*, para. 14.206).

to respond to questions during consultations on the basis of its own uncertainty as to the scope of the consultations.

6. European Communities

(a) Article 13(a) of the *Agreement on Agriculture* – Planting Flexibility Limitations

226. The European Communities supports the United States' appeal of the Panel's finding that planting flexibility limitations disqualify a measure from the coverage of paragraph 6 of Annex 2 of the *Agreement on Agriculture*. The European Communities notes that the United States has placed limitations on the crops that may be grown by farmers receiving production flexibility contract payments and direct payments. In doing so, the United States ensures fair competition domestically and limits distortions internationally. If upheld, the Panel's findings would have the perverse effect of increasing subsidization and the likelihood of trade distortions.

227. The European Communities observes that paragraph 6(b) prevents the amount of the payments from being related to the type of production; it does not address eligibility for payments. With this in mind, the European Communities submits that "the fact of making ineligible for payments the land used to produce a certain commodity is not incompatible with paragraph 6(b)".[175] Furthermore, the Panel correctly noted that paragraphs 6(b) and 6(e) lay down distinct requirements and that each of them must be given meaning. The European Communities considers that the Panel's interpretation of paragraph 6(b) would render redundant paragraph 6(e). The Panel's reading is that any payment conditional upon a production requirement (which, as such, is incompatible with paragraph 6(e)) would be deemed to be "related to" the "volume" of production and would therefore be incompatible with paragraph 6(b). The European Communities argues that the Panel should not have relied upon paragraph 11 of Annex 2 because that provision appears in a context very different from that of the provisions of paragraph 6.

(b) Article 13(a) of the *Agreement on Agriculture* – Base Period Update

228. With regard to Brazil's conditional cross-appeal regarding base period updates, the European Communities notes that the Panel made factual findings that there was no evidence to suggest that farmers expected further updates in future years. The European Communities does not consider that paragraph 6(a) of Annex 2 of the *Agreement on Agriculture* precludes adjustments to base periods, although it agrees with Brazil that a "defined and fixed" base period cannot be determined from the perspective of five-yearly subsidization legislation, but rather should be viewed in a longer-term perspective. The European Communities considers that it cannot be open to a Member to resort to wholesale updating of base periods by linking the criteria of "defined and fixed" to specific legislative packages.

(c) Article 13(b) of the *Agreement on Agriculture*

229. The European Communities supports the Unites States' request for the Appellate Body to reverse the Panel's interpretation of Article 13(b) of the *Agreement on Agriculture*, particularly in respect to the methodology for calculating support and the meaning of "support to a specific commodity". With regard to the methodology, the European Communities agrees with the United States that the Panel should not have used budgetary outlays to calculate support "decided" in respect of price-based measures, but rather should have used price gap methodology. The European

[175]European Communities' third participant's submission, para. 15.

Communities contends that this approach is crucial for the interpretation of the specific term "decided", in contrast to the term "granted". The European Communities also agrees with the United States that the Panel was incorrect in finding that support under schemes based on historical production of specific crops could be considered "support to a specific commodity" in the implementation period in the sense of Article 13(b)(ii).

(d) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

230. In relation to the United States' arguments regarding the quantification of subsidies, the European Communities agrees with Brazil that, in assessing significant price suppression under Article 6.3(c) of the *SCM Agreement*, it is not necessary to determine the precise amount of the subsidy or the amount of the benefit conferred on the subsidized product. This is consistent with the differences between Parts III and V of the *SCM Agreement*. Paragraph 7 of Annex IV of the *SCM Agreement*, to which the United States refers, is an exception to the general rule that a panel need not quantify or allocate a subsidy (other than a pre-WTO subsidy) to the products concerned.

231. The European Communities contests the United States' arguments regarding past "recurring" subsidies. Article 6.3(c) is drafted in the present tense and therefore should apply to the past, present, and future. The European Communities asserts that a subsidy comprises an act (a financial contribution) and that it may have an effect on the recipient (a benefit) and an effect on the market and other Members (adverse effects). However, the United States erroneously equates the concepts of "benefit" and "adverse effects". The subsidies challenged in the present dispute are programs that continue and that therefore may have adverse effects in the future, even if they confer a benefit in only one particular year. Therefore, the European Communities considers that the Panel correctly included past recurring subsidies in its analysis under Article 6.3(c). However, the European Communities maintains that it would have been "desirable"[176] for the Panel to distinguish between programs that had expired and programs that were still in force when the Panel was established.

(e) Relationship between the *Agreement on Agriculture* and the *SCM Agreement*

232. The European Communities raises an issue concerning the Panel's jurisdiction that it considers the Appellate Body should take up on its own motion. According to the European Communities, the *SCM Agreement* does not apply to domestic support and export subsidies in respect of agricultural products because the *Agreement on Agriculture* contains "provisions dealing specifically with the same matter".[177]

(f) Step 2 Payments to Domestic Users

233. The European Communities agrees with the United States' claim that the Panel erred in finding that Step 2 payments to domestic users are inconsistent with Article 3.1(b) of the *SCM Agreement*. In addition to endorsing the arguments put forward by the United States, the European Communities argues that the Panel incorrectly sought an explicit carve out from Article 6.3 of the *Agreement on Agriculture* for import substitution subsidies, when such a carve out is unnecessary in the light of Article 21.1 of that Agreement and the introductory phrase of Article 3.1 of the *SCM Agreement*. The European Communities submits that paragraph 7 of Annex 3 of the *Agreement on*

[176]European Communities' third participant's submission, para. 61.

[177]European Communities' third participant's submission, para. 6 (quoting Appellate Body Report, *EC – Bananas III*, para. 155).

Agriculture recognizes that WTO Members have a right to provide import substitution subsidies. The Panel's interpretation to the contrary renders the language of paragraph 7 of Annex 3 redundant.

7. India

234. Pursuant to Rule 24 of the *Working Procedures*, India chose not to submit a third participant's submission. In its statement at the oral hearing, India disagreed with the United States that Brazil had to establish the amount of the price-contingent subsidies that benefit upland cotton in making its claim of serious prejudice under Articles 5(c) and 6.3 of the *SCM Agreement*.

8. New Zealand

(a) Article 13(a) of the *Agreement on Agriculture* – Base Period Update

235. New Zealand supports Brazil's contention that the direct payments under the FSRI Act of 2002 do not meet the criteria set out in paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*. According to New Zealand, the factual findings made by the Panel establish that direct payments cannot be green box payments because farmers had an opportunity to update base acreage, contrary to this provision. New Zealand notes that the language and context of paragraph 6(a) contemplate a single base period that is fixed and unchanging to ensure that such support is clearly de-linked from production. To conclude otherwise would create an internal inconsistency in paragraph 6, because a Member could avoid obligations under paragraphs 6(b), 6(c), and 6(d) not to link payments to production, prices, or factors of production employed in subsequent years, by establishing a new base period from time to time. New Zealand observes that the Panel found that the direct payment program is a successor to the production flexibility contract program and that the base period update had the effect of increasing the level of payments under the program.

(b) Article 13(b) of the *Agreement on Agriculture*

236. New Zealand contests the United States' appeal of the Panel's finding that the United States' measures at issue are not exempt from action pursuant to Article 13(b)(ii) of the *Agreement on Agriculture*. New Zealand argues that Members drafting the proviso to Article 13(b) were principally concerned with limiting the effect of domestic support measures on trade. New Zealand argues that the manner in which "support" is identified and calculated in the comparison required by Article 13(b)(ii) must reflect Members' intentions to limit the effects of such measures to those that existed in the 1992 marketing year and to ensure that measures are not exempt from actions when their effect is a significantly higher level of trade distortion in the implementation period than in the 1992 marketing year.

(i) *Calculation methodology for price-based measures*

237. New Zealand considers that the Appellate Body should uphold the Panel's finding that, on the facts of this case, budgetary outlays provide an appropriate measurement of support for the purposes of the comparison required by Article 13(b)(ii). New Zealand argues that a Member may not justify a failure to meet its obligations under the *Agreement on Agriculture* on the ground that it has adopted measures that rely on factors beyond the government's control. If a Member adopts a non-green box domestic support measure that determines the amount of support provided on the basis of factors the government cannot control, then the Member must accept the risk that support granted in the implementation period may be in excess of that decided in the 1992 marketing year. Furthermore, New Zealand disagrees with the argument advanced by the United States that only a price gap calculation can reflect support "decided" by the United States' price-based measures. New Zealand argues that this argument would read the term "grant" out of Article 13(b)(ii) altogether.

(ii) *Interpretation of "support to a specific commodity"*

238. New Zealand argues that the Appellate Body should reject the United States' argument that Article 13(b)(ii) of the *Agreement on Agriculture* requires a comparison of only "product-specific" support. For New Zealand, the chapeau of Article 13(b) makes it clear that the measures subject to the proviso of Article 13(b)(ii) are all "domestic support measures that conform fully to the provisions of Article 6" of the *Agreement on Agriculture* (that is, both product-specific and non-product-specific support to upland cotton). The use of the word "specific" in Article 13(b)(ii) refers only to the fact that the comparison is to be made on a commodity-by-commodity basis. In New Zealand's view, the Panel correctly found that "support to a specific commodity" means all support to a commodity, whether product-specific or not. New Zealand also agrees with the Panel's finding that measures that "identify and allocate support based on an express linkage to specific commodities"[178] provide support to those commodities within the meaning of Article 13(b)(ii). Accordingly, even a measure that provides support to a number of different commodities also provides support to those specific commodities individually. New Zealand adds that not only do the words "product-specific support" not appear in Article 13(b)(ii), but the concept of product-specific support is not relevant to the comparison under this provision because Article 13(b)(ii) requires an analysis that is fundamentally different from that required under those provisions of the *Agreement on Agriculture* that distinguish between product-specific and non-product-specific support.

239. Finally, New Zealand disagrees with the United States' assertion that counter-cyclical payments and market loss assistance payments are "decoupled". As the Panel recognized, the amount of payment under these programs is clearly linked to current prices, which means that they cannot be green box measures in terms of Annex 2 of the *Agreement on Agriculture*.

(c) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

240. New Zealand agrees with Brazil that the Panel correctly found that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c), constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*.

241. New Zealand agrees with Brazil that the term "in the same market" in Article 6.3(c) can include a world market, although this does not preclude the possibility of other markets. New Zealand also agrees that, although a world market does not necessarily exist for every product, a world market and a world price do exist for upland cotton.

242. New Zealand submits that the Panel was correct in rejecting the United States' argument that the price-contingent subsidies did not suppress prices because, in the absence of these subsidies, new suppliers would have increased supply and maintained the world price. In response to the United States' arguments regarding the effect of the subsidies on the planting decisions of farmers, New Zealand argues that this effect is a key aspect of the Panel's analysis under Article 6.3(c), which led it to conclude that the subsidies insulated United States cotton producers from declines in world prices. Moreover, the Panel correctly found that the gap between total production costs and market revenue constituted evidence that the price-contingent subsidies enabled United States upland cotton producers to increase supply, leading to price suppression in the world market.

[178]New Zealand's third participant's submission, para. 3.16 (quoting Panel Report, para. 7.484).

243. New Zealand agrees with Brazil that a panel is not required, in assessing significant price suppression under Article 6.3(c), to quantify precisely the amount of the subsidy. As the Panel found, claims under Parts III and V of the *SCM Agreement* differ, and the quantitative and pass-through methodologies applicable under Part V are not necessarily transferable to Part III. Although the magnitude of a subsidy may be relevant in some cases, it is not necessarily determinative of the nature or extent of the effects of the subsidy.

244. New Zealand disagrees with the United States' arguments regarding past recurring subsidies, which would effectively preclude Members from bringing claims of serious prejudice against recurring subsidies, even though payments under subsidy programs over an extended period can have effects in later years.

(d) World Market Share under Article 6.3(d) of the *SCM Agreement*

245. New Zealand supports Brazil's appeal of the Panel's finding that the "world market share" of the subsidizing Member under Article 6.3(d) refers to the share of the world market supplied by the subsidizing Member. Defining "world market share" as including all production, instead of only exports, distracts from the trade focus of the *SCM Agreement* and subverts the underlying rationale of Article 6.3(d). New Zealand supports Brazil's request for the Appellate Body to complete the analysis under Article 6.3(d).

(e) Export Credit Guarantees – Articles 10.1 and 10.2 of the *Agreement on Agriculture*

246. New Zealand asserts that the Panel was correct in finding that export credit guarantee programs are subject to the non-circumvention obligation under Article 10.1 of the *Agreement on Agriculture*, and that the United States' export credit guarantee programs provide export subsidies that breach Article 10.1 and are not exempt from action under the *SCM Agreement*. In New Zealand's view, Article 10.1 clearly applies to export credit guarantee programs that involve the granting of export subsidies. Article 10.2 does not create any exception that may contradict the clear meaning of Article 10.1. The United States' interpretation would create a loophole for WTO Members to circumvent their export subsidy reduction commitments through export credit guarantee programs. In such a case, New Zealand observes that Article 10.2 would, itself, circumvent the anti-circumvention provisions.

(f) Export Credit Guarantees – Articles 1 and 3.1(a) of the *SCM Agreement*

247. New Zealand agrees with Brazil that the Panel erred in exercising judicial economy by refusing to make a finding relating to the United States' export credit guarantee programs under Articles 1.1 and 3.1(a) of the *SCM Agreement*. In New Zealand's view, a measure that no longer constitutes an export subsidy under item (j) of the Illustrative List of Export Subsidies may still constitute an export subsidy under Articles 1.1 and 3.1(a) of the *SCM Agreement*. Therefore, New Zealand requests the Appellate Body to complete the analysis and find that the United States' export credit guarantee programs are export subsidies under Articles 1.1 and 3.1(a) of the *SCM Agreement*.

9. Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

248. Pursuant to Rule 24 of the *Working Procedures*, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu chose not to submit a third participant's submission. In its statement at the oral hearing, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agreed with the United States that using planting flexibility limitations in association with production flexibility contract payments and direct payments does not render these measures inconsistent with paragraph 6(b) of Annex 2 to the *Agreement on Agriculture*.

III. Issues Raised in this Appeal

249. The following issues are raised in this appeal:

(a) as regards procedural matters:

(i) in relation to production flexibility contract payments and market loss assistance payments:

- whether the Panel erred in finding, in paragraphs 7.118, 7.122, 7.128, and 7.194(ii) of the Panel Report, that Articles 4.2 and 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") do not exclude expired measures from the potential scope of consultations or a request for establishment of a panel and, therefore, that production flexibility contract payments and market loss assistance payments fell within the Panel's terms of reference; and

- whether the Panel, contrary to Article 12.7 of the DSU, failed to set out the findings of fact, the applicability of relevant provisions, or the basic rationale behind this finding; and

(ii) in relation to export credit guarantee programs:

- whether the Panel erred in finding, in paragraph 7.69 of the Panel Report, that the United States' export credit guarantees relating to eligible United States agricultural commodities other than upland cotton were within its terms of reference; and

- whether the Panel erred in finding, in paragraph 7.103 of the Panel Report, that Brazil provided a statement of available evidence with respect to export credit guarantees relating to eligible United States agricultural commodities other than upland cotton, as required by Article 4.2 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*");

(b) as regards the application of Article 13 of the *Agreement on Agriculture* to this dispute:

(i) in relation to Article 13(a)(ii):

- whether the Panel erred in finding, in paragraphs 7.388, 7.413, 7.414, and 8.1(b) of the Panel Report, that production flexibility contract payments and direct payments are not green box measures that fully conform to paragraph 6(b) of Annex 2 of the *Agreement on Agriculture* based on its finding, in paragraph 7.385 of the Panel Report, that the amount of production flexibility payments and direct payments is related to the type of production undertaken by a producer after the base period; and, therefore, that these measures

are not exempt from actions based on Article XVI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and Part III of the *SCM Agreement* by virtue of Article 13(a)(ii) of the *Agreement on Agriculture*; and

- whether the updating of base acres for direct payments under the FSRI Act of 2002 means that direct payments are not green box measures that fully conform to paragraph 6(a) of Annex 2 of the *Agreement on Agriculture* and, therefore, that these measures are not exempt from actions based on Article XVI of the GATT 1994 and Part III of the *SCM Agreement* by virtue of Article 13(a)(ii) of the *Agreement on Agriculture*, because they are not determined by clearly-defined criteria in a *defined and fixed base period*[179]; and

(ii) in relation to Article 13(b)(ii), whether the Panel erred in finding, in paragraphs 7.608 and 8.1(c) of the Panel Report, that user marketing (Step 2) payments ("Step 2 payments") to domestic users, marketing loan program payments, production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, and cottonseed payments (the "challenged domestic support measures") granted, in the years 1999, 2000, 2001, and 2002, support to a specific commodity, namely, upland cotton, in excess of that decided during the 1992 marketing year and, therefore, that these measures are not exempt from actions based on Articles 5 and 6 of the *SCM Agreement* and Article XVI:1 of the GATT 1994 by virtue of Article 13(b)(ii) of *Agreement on Agriculture*, based on its findings:

- in paragraph 7.494 of the Panel Report, that the phrase "grant support to a specific commodity" in Article 13(b)(ii) refers to all non-green box support measures that clearly or explicitly define a commodity as one to which they bestow or confer support and does not mean "product-specific domestic support";

- in paragraphs 7.518 and 7.520 of the Panel Report, that the challenged domestic support measures are non-green box support measures that clearly or explicitly define a commodity, namely, upland cotton, as one to which they bestow or confer support; and

- in paragraphs 7.561 and 7.562 of the Panel Report, that an appropriate comparison between the level at which measures "grant support" in the implementation period and that "decided during the 1992 marketing year" may be achieved, with respect to marketing loan program payments and deficiency payments, through the use of a methodology other than the price gap methodology described in paragraph 10 of Annex 3 of the *Agreement on Agriculture*;

(c) as regards serious prejudice:

[179]Brazil's appeal is conditional on the Appellate Body reversing the finding of the Panel that "direct payments, production flexibility contract payments, and the legislative and regulatory provisions that establish and maintain the direct payment program" do not fully conform to paragraph 6(b) of Annex 2 and, consequently, do not satisfy the condition in paragraph (a) of Article 13 of the *Agreement on Agriculture*.

(i) in relation to Article 6.3(c) of the *SCM Agreement*:

- whether the Panel erred in finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, that the effect of the marketing loan program payments, Step 2 payments, market loss assistance payments, and counter-cyclical payments (the "price-contingent subsidies") is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, based on its findings:

  (A) regarding the "market" and "price" in assessing whether "the effect of the subsidy is ... significant price suppression ... in the same market" within the meaning of Article 6.3(c) of the *SCM Agreement*:

  - in paragraphs 7.1238-7.1240 of the Panel Report, that the "same market" may be a "world market";

  - in paragraph 7.1247 of the Panel Report, that a "world market" for upland cotton exists; and

  - in paragraph 7.1274 of the Panel Report, that "the A-Index can be taken to reflect a world price in the world market for upland cotton"; and

  (B) regarding the "effect" of the price-contingent subsidies under Article 6.3(c) of the *SCM Agreement*:

  - in paragraphs 7.1312 and 7.1333 of the Panel Report, that "significant price suppression" occurred within the meaning of Article 6.3(c);

  - in paragraphs 7.1355 and 7.1363 of the Panel Report, that "a causal link exists" between the price-contingent subsidies and the significant price suppression found by the Panel under Article 6.3(c) and that this link is not attenuated by other factors raised by the United States;

  - in paragraphs 7.1173, 7.1186, and 7.1226 of the Panel Report, that it was not required to quantify precisely the benefit conferred on upland cotton by the price-contingent subsidies and, consequently, not identifying the precise amount of counter-cyclical payments and market loss assistance payments that benefited upland cotton; and

  - in paragraph 7.1416 of the Panel Report, that the effect of the price-contingent subsidies for marketing years 1999 to 2002 "is significant price suppression ... in the period MY 1999-2002"; and

- whether the Panel, contrary to Article 12.7 of the DSU, failed to set out the findings of fact, the applicability of relevant provisions, or the basic rationale behind its finding, in paragraphs 7.1416 and 8.1(g)(i)

of the Panel Report, that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*; and

(ii) in relation to Article 6.3(d) of the *SCM Agreement*:

- whether the Panel erred in finding, in paragraph 7.1464 of the Panel Report, that the words "world market share" in Article 6.3(d) of the *SCM Agreement* refer to the "share of the world market supplied by the subsidizing Member of the product concerned"; and

- whether the Appellate Body should complete the analysis of whether the effect of the price-contingent subsidies is an increase in the United States' world market share of exports in upland cotton within the meaning of Article 6.3(d) of the *SCM Agreement*[180];

(d) as regards user marketing (Step 2) payments, whether the Panel erred:

(i) in finding, in paragraphs 7.1088, 7.1097-7.1098, and 8.1(f) of the Panel Report, that Step 2 payments to *domestic users* of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are subsidies contingent upon the use of domestic over imported goods that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*; and

(ii) in finding, in paragraphs 7.748-7.749, 7.760-7.761, and 8.1(e) of the Panel Report, that Step 2 payments to *exporters* of United States upland cotton, pursuant to Section 1207(a) of the FSRI Act of 2002, are subsidies contingent upon export performance within the meaning of Article 9.1(a) of the *Agreement on Agriculture* that are inconsistent with Articles 3.3 and 8 of that Agreement and Articles 3.1(a) and 3.2 of the *SCM Agreement*;

(e) as regards export credit guarantee programs, whether the Panel erred:

(i) in finding, in paragraphs 7.901, 7.911, and 7.932 of the Panel Report, that Article 10.2 of the *Agreement on Agriculture* does not exempt export credit guarantees from the export subsidy disciplines in Article 10.1 of that Agreement;

(ii) in the manner that it applied the burden of proof in finding that the United States' export credit guarantee programs are prohibited export subsidies under Articles 3.1(a) and 3.2 of the *SCM Agreement*;

(iii) by failing to make the necessary findings of fact in assessing whether the United States' export credit guarantee programs are provided at premium rates that are inadequate to cover long-term operating costs and losses within the meaning of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*;

[180]Brazil's request for the Appellate Body to complete the analysis of this issue is conditional on the Appellate Body reversing the finding of the Panel that the effect of the price-contingent subsidies was significant price suppression in terms of Article 6.3(c) of the *SCM Agreement*.

(iv) in finding, in paragraphs 7.947 and 7.948 of the Panel Report, that the United States' export credit guarantee programs are prohibited export subsidies under Article 3.1(a) of the *SCM Agreement* and are consequently inconsistent with Article 3.2 of that Agreement; and

(v) by exercising judicial economy, as noted in paragraph 6.31 of the Panel Report, in respect of Brazil's claim that the United States' export credit guarantee programs are export subsidies within the meaning of Articles 1.1 and 3.1(a) of the *SCM Agreement*, having already found that these measures were export subsidies covered by item (j) of the Illustrative List of Export Subsidies and, therefore, were inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement*;

(f) as regards circumvention of export subsidy commitments, whether the Panel erred:

(i) in the application of Article 10.1 of the *Agreement on Agriculture* and by failing to meet the requirements of Article 11 of the DSU, in finding, in paragraph 7.881 of the Panel Report, that Brazil did not establish that the United States' export credit guarantees are "applied in a manner that results in … circumvention" of the United States' export subsidy commitments with respect to pig meat and poultry meat in 2001[181];

(ii) in paragraphs 7.882-7.883 and 7.896 of the Panel Report, in interpreting and applying the phrase "threatens to lead to ... circumvention" in Article 10.1 of the *Agreement on Agriculture*; and

(iii) in paragraph 7.882 and footnote 1061 of the Panel Report, by confining its examination of threat of circumvention to scheduled products other than rice and unsupported unscheduled products;

(g) as regards the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (the "ETI Act of 2000"), whether the Panel erred in finding that Brazil did not establish a *prima facie* case that the ETI Act of 2000 and the subsidies granted thereunder are inconsistent with Articles 8 and 10.1 of the *Agreement on Agriculture* and Articles 3.1 and 3.2 of the *SCM Agreement*, in respect of upland cotton; and

(h) as regards Article XVI:3 of the GATT 1994:

(i) whether the Panel erred in finding, in paragraph 7.1016 of the Panel Report, that Article XVI:3 of the GATT 1994 "applies only to export subsidies as that term is now defined in the *Agreement on Agriculture* and the *SCM Agreement*"; and

(ii) whether the Appellate Body should complete the analysis of whether the price-contingent subsidies caused the United States to have "more than an

[181]At the oral hearing, Brazil indicated that it was not pursuing this claim in respect of vegetable oil.

equitable share of world export trade" in upland cotton, in violation of the second sentence of Article XVI:3 of the GATT 1994.[182]

IV. Preliminary Issues

A. *Terms of Reference – Expired Measures*

1. Introduction

250. The United States appeals the Panel's finding that two subsidy measures, namely, production flexibility contract payments with the exception of those made in the 2002 marketing year and market loss assistance payments, can be the subject of consultations under the DSU and hence fell within the Panel's terms of reference, notwithstanding the fact that the legislative basis for these payments had expired at the time those terms of reference were set.[183]

251. Production flexibility contract payments were a form of income support under the Federal Agriculture Improvement and Reform Act of 1996 (the "FAIR Act of 1996"); they were discontinued with the passage of the Farm Security and Rural Investment Act of 2002 (the "FSRI Act of 2002") in May 2002. The last production flexibility contract payments were scheduled to be made "not later than" 30 September 2002[184], in connection with the 2002 crop. Market loss assistance payments were *ad hoc* annual payments made through legislation enacted by the United States Congress between 1998 and 2001. Each such payment was made through a separate piece of legislation, the last of which was enacted on 13 August 2001, for the marketing year 2001 (1 August 2001 – 31 July 2002) crop.[185]

252. Before the Panel, the United States argued that production flexibility contract payments and market loss assistance payments could not be within the terms of reference because they had expired prior to Brazil's request for consultations. The United States argued that Article 4.2 of the DSU provides that consultations may cover only "measures affecting" the operation of a covered agreement, and that expired measures are not "measures affecting" the operation of a covered agreement.[186] Brazil asked the Panel to reject the United States' request, submitting that a panel is required to examine the effects flowing from expired measures in order to conduct an objective assessment of a serious prejudice claim.[187]

[182]Brazil's request for the Appellate Body to complete the analysis of this issue is conditional on two events: (i) the Appellate Body reversing the finding of the Panel that the effect of the price-contingent subsidies was significant price suppression in terms of Article 6.3(c) of the *SCM Agreement*; and, (ii) the Appellate Body declining Brazil's request for a ruling that the United States' measures at issue resulted in an increase in the United States' world market share in upland cotton in terms of Article 6.3(d) of the *SCM Agreement*.

[183]Notwithstanding paragraph 9 of the United States' Notice of Appeal, the United States explained during the oral hearing that it does not appeal the Panel's finding, in paragraph 7.132 of the Panel Report, that payments with respect to non-upland cotton base acres were within its terms of reference.

[184]See Panel Report, paras. 7.107 and 7.212-7.215. See also "Answers of the United States to the Panel's Questions Posed Following the First Session of the First Substantive Panel Meeting" (11 August 2003), Panel Report, p. I-84, para. 35.

[185]For further discussion of the nature of production flexibility contract payments and market loss assistance payments, insofar as they are relevant to this issue, see Panel Report, paras. 7.107 and 7.212-7.217.

[186]See Panel Report, paras. 7.104 and 7.113.

[187]See Panel Report, para. 7.105.

253. The Panel noted that Brazil had not pursued claims with respect to the legislation underlying the programs; instead, Brazil's claim was limited to the WTO-consistency of the payments made under those programs.[188] In its reasoning, the Panel said it did:

> ... not consider that Article 4.2 [of the DSU] supports an interpretation that a request for consultations cannot concern measures that have expired, or payments made under programmes that are no longer in effect, where the Member requesting consultations represents that benefits accruing to it directly or indirectly under the covered agreements are being impaired by those measures.[189]

254. It added that "the Panel's terms of reference refer to Brazil's request for establishment of a panel, not its request for consultations."[190] The Panel also recalled that "Article 6.2 of the *DSU* provides that a request for establishment of a panel should identify the 'specific measures at issue' and does not address the issue of the status of the measures at all."[191] On this basis, the Panel indicated that it did not believe that:

> Article 4.2, and hence Article 6.2, of the *DSU* excludes expired measures from the potential scope of a request for establishment of a panel.[192]

255. In the light of this finding (and having rejected a further claim by the United States that market loss assistance payments were not identified with adequate specificity in Brazil's request for establishment of a panel[193]), the Panel concluded:

> Therefore, in light of our conclusion at paragraph 7.122, ... the Panel rules that PFC and MLA payments, as addressed in document WT/DS267/7, fall within its terms of reference.[194]

2. Appeal by the United States

256. The United States claims that the Panel erred in reaching this conclusion and requests the Appellate Body to reverse the Panel's finding that Articles 4.2 and 6.2 of the DSU do not exclude expired measures from the potential scope of consultations or a request for establishment of a panel.[195] It also asserts that the Panel failed to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind this finding, as required by Article 12.7 of the DSU.[196] The

[188]*Ibid.*, para. 7.108.

[189]*Ibid.*, para. 7.118.

[190]*Ibid.*, para. 7.121.

[191]Panel Report, para. 7.121.

[192]*Ibid.*, para. 7.122.

[193]*Ibid.*, para. 7.127. This finding has not been appealed.

[194]*Ibid.*, para. 7.128. This final finding was reiterated in paragraph 7.194(ii) of the Panel Report.

[195]United States' Notice of Appeal, *supra*, footnote 17, para. 14; United States' appellant's submission, para. 515.

[196]United States' appellant's submission, para. 150.

United States submits that it was undisputed that the legislation authorizing both of these types of payments had expired before Brazil submitted its request for consultations.[197]

257. The United States observes that Article 4.2 of the DSU provides that consultations may cover "any representations made by another Member *concerning measures affecting the operation of any covered agreement* taken within the territory of the former".[198] The United States focuses on the present tense of the verb "affecting" in this Article and contends that expired measures cannot be measures "affecting", in the present, the operation of a covered agreement.[199] Thus, according to the United States, production flexibility contract and market loss assistance payments cannot be said to be currently "affecting" the operation of any covered agreement. Consequently, they cannot be measures falling within the scope of "specific measures at issue" in terms of Article 6.2 of the DSU.[200]

258. Brazil responds that neither Article 4.2 nor Article 6.2 of the DSU precludes a panel from analyzing payments made in the past in the context of serious prejudice claims. Brazil focuses on the context provided by Article 3.3 of the DSU, which states that a purpose of dispute settlement is the "prompt settlement of situations in which a Member considers that any benefits accruing to it ... are being impaired by measures taken by another Member". For Brazil, as long as the impairment is *current*, the status in domestic law of the measure causing that impairment is irrelevant. Brazil notes that the present dispute involves allegations of "adverse effects" and "serious prejudice" under the provisions of the *SCM Agreement* and the GATT 1994. A breach of the relevant provisions of these Agreements does not occur when an actionable subsidy is granted, but rather when the adverse effects arise. Brazil finds support for its position in the view of the panel in *Indonesia – Autos*, which found that past, present, and future subsidies can be the subject of dispute settlement, as the effect of such measures may be serious prejudice to the interests of a Member.[201]

3. Scope of Consultations under Article 4.2 of the DSU

259. Article 4.2 of the DSU governs what measures may be the subject of consultations and provides as follows:

> Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former. (footnote omitted)

260. It is clear from Article 4.2 that, although a requested Member is under an obligation to engage in "consultation" on "any" representations made by another Member, such representations must pertain to "measures affecting the operation of any covered agreement". The United States argues that Article 4.2 of the DSU limits the obligation of the requested Member to representations concerning measures that are actually "*affecting*" the operation of any covered agreement. The United States stresses the temporal significance of the present tense of the word "affecting" and asserts that

[197] *Ibid.*, para. 500.

[198] United States' appellant's submission, para. 501 (quoting Article 4.2 of the DSU). (emphasis added by the United States)

[199] *Ibid.*, para. 501.

[200] United States' appellant's submission, paras. 502 and 512.

[201] Brazil's appellee's submission, para. 256 (referring to Panel Report, *Indonesia – Autos*, para. 14.206).

"[m]easures that have expired before a request for consultations *cannot* be measures 'affecting the operation of any covered agreement' at the time the request is made".[202]

261. We agree with the Panel that the word "affecting" refers primarily to "the way in which [measures] relate to a covered agreement".[203] As the Appellate Body stated in *EC – Bananas III*, "[t]he ordinary meaning of the word 'affecting' implies a measure that has 'an effect on'" something else.[204] At the same time, we also concur with the United States that the ordinary meaning of the word "affecting" suggests a temporal connotation. As the United States submits, the present tense of the phrase "affecting the operation of any covered agreement" denotes that the effects of such measures must relate to the present impact of those measures on the operation of a covered agreement. It is not sufficient that a Member alleges that challenged measures affected the operation of a covered agreement in the past; the representations of the Member requesting consultations must indicate that the effects are occurring in the present.[205]

262. Whether or not a measure is still in force is not dispositive of whether that measure is currently affecting the operation of any covered agreement. Therefore, we disagree with the United States' argument that measures whose legislative basis has expired are incapable of affecting the operation of a covered agreement in the present and that, accordingly, expired measures *cannot* be the subject of consultations under the DSU.[206] In our view, the question of whether measures whose legislative basis has expired affect the operation of a covered agreement currently is an issue that must be resolved on the facts of each case. The outcome of such an analysis cannot be prejudged by excluding it from consultations and dispute settlement proceedings altogether.

263. We consider that requesting Members should enjoy a degree of discretion to identify, in their request for consultations under Article 4.2, matters relating to the covered agreements for discussion in consultations. As the Appellate Body observed in *Mexico – Corn Syrup (Article 21.5 – US)*, consultations present an opportunity for clarifying factual and legal issues, and for narrowing the scope of a dispute, and for resolving differences between WTO Members.[207] We do not think it would advance the purpose of consultations if Article 4.2 were interpreted as excluding *a priori* measures whose legislative basis may have expired, but whose effects are alleged to be impairing the benefits accruing to the requesting Member under a covered agreement. Nor, indeed, do we find textual support in the provision itself for doing so. Thus, we do not read Article 4.2 of the DSU as precluding a Member from making representations on measures whose legislative basis has expired, where that Member has reason to believe that such measures are still "affecting" the operation of a covered agreement.

264. We find contextual support for this interpretation in Article 3.3 of the DSU[208], which underscores the importance of the "prompt settlement" of certain situations that, in the absence of settlement, could undermine the effective functioning of the WTO and the maintenance of a proper

[202] United States' appellant's submission, para. 501. (emphasis added)

[203] Panel Report, para. 7.115.

[204] Appellate Body Report, *EC – Bananas III*, para. 220.

[205] This does not exclude the possibility that the effects of a measure may occur in future.

[206] United States appellant's submission, para. 501.

[207] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

[208] Article 3.3 of the DSU provides:

> The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

balance between the rights and obligations of Members. We note, first, that Article 3.3 focuses not upon "existing" measures, or measures that are "currently in force" but, rather, upon "measures taken" by a Member, which includes measures taken in the past.[209] We also observe that Article 3.3 envisages that disputes arise when a Member "considers" that benefits accruing to it are being impaired by measures taken by another Member. By using the word "considers", Article 3.3 focuses on the perception or understanding of an aggrieved Member. This does not exclude the possibility that a Member requesting consultations may have reason to believe that a measure is still impairing benefits even though its legislative basis has expired.[210]

265. We recall that the Panel observed that:

> Brazil's request for consultations alleges that the use of the measures specified in the request "causes adverse effects, i.e. serious prejudice" to its interests. We note the present tense of this allegation. The request concerns the way in which measures were affecting the operation of a covered agreement at the time of consultations, and it states that Brazil had reason to believe that these subsidies were resulting in serious prejudice at that time.[211]

266. For the Panel, these aspects of the request for consultations were sufficient for Brazil to meet the requirements of Article 4.2 of the DSU. We see no error in the Panel's approach to this question. Whether or not a subsidy program is still in force at the time consultations were requested does not answer the question whether any payments previously made under that program are currently affecting the operation of a covered agreement in the sense of Article 4.2. Brazil, in these proceedings, represented in its request for consultations that payments under the production flexibility contract and market loss assistance programs continued to affect its rights under the *SCM Agreement*. In our view, this was sufficient to meet the requirements of Article 4.2 of the DSU.

4. Measure at Issue under Article 6.2 of the DSU

267. In addition to its arguments under Article 4.2 of the DSU, the United States contends that an expired measure cannot be a measure that is "at issue" in terms of Article 6.2 of the DSU. The United States also argues that a finding to the contrary would be difficult to reconcile with the terms of Articles 3.7 and 19.1 of the DSU, which contemplate the "withdrawal" of a measure found to be inconsistent with the covered agreements, or a recommendation that a measure found to be inconsistent with a covered agreement be brought into conformity. The United States argues that the remedies described in Articles 3.7 and 19.1 are essentially prospective in nature.

268. We understand these arguments by the United States to be largely dependent upon its arguments regarding Article 4.2 of the DSU: if, as the United States contends, a measure may not be the subject of consultations then, *ipso facto*, it may not be a measure "at issue" in the sense of Article 6.2. Having rejected the United States' arguments regarding Article 4.2, we do not find the United States' additional arguments under Article 6.2 compelling.

269. The only temporal connotation contained in the ordinary meaning of the expression "at issue", as used in Article 6.2 of the DSU, is expressed by its present tense: measures must be "at issue"—or, putting it another way, "in dispute"—at the time the request is made. Certainly, nothing inherent in the term "at issue" sheds light on whether measures at issue must be currently in force, or whether they may be measures whose legislative basis has expired.

270. The relevant context for Article 6.2 in this regard includes Articles 3.3 and 4.2 of the DSU. As we have concluded above, those provisions do not preclude a Member from making representations with respect to measures whose legislative basis has expired, if that Member considers, with reason, that benefits accruing to it under the covered agreements are still being impaired by those measures. If the effect of such measures remains in dispute following consultations, the complaining party may, according to Article 4.7 of the DSU, request the establishment of a panel, and the text of Article 6.2 does not suggest that such measures could not be the subject of a panel request as "specific measures at issue".

271. The United States purports to find support for its position in the ruling of the Appellate Body in *US – Certain EC Products*, where the Appellate Body reversed the panel's decision to make a recommendation under Article 19.1 of the DSU that the United States bring the measure at issue in that case (the "3 March Measure") into conformity with the covered agreements, on the grounds that the panel had already found that the measure had expired. However, that case involved a situation different from the present one. There, the 3 March Measure had been the subject of consultations, but had expired. The expiry of the 3 March Measure did not prevent it being a "measure at issue" for purposes of Article 6.2 of the DSU. Indeed, neither the panel nor the Appellate Body found that the 3 March Measure was outside the panel's terms of reference, and both the panel and Appellate Body addressed that measure in their rulings.[212]

272. The question whether an expired measure is susceptible to a recommendation under Article 19.1 of the DSU is a different matter. The Appellate Body in *US – Certain EC Products* confirmed that the 3 March Measure had ceased to exist. It noted that there was an obvious inconsistency between the finding of the panel that "the 3 March Measure is no longer in existence" and the panel's subsequent recommendation that the Dispute Settlement Body (the "DSB") request the United States to bring the 3 March Measure into conformity with its WTO obligations.[213] Thus, the fact that a measure has expired may affect what recommendation a panel may make. It is not, however, dispositive of the preliminary question of whether a panel can address claims in respect of that measure.[214]

[209]Indeed, as the Panel noted, in the sense that "PFC and MLA payments had already been made at the date of the establishment of the Panel", "they had not expired, but had simply occurred in the past". (Panel Report, para. 7.110)

[210]Whether the Member's belief proves to be correct is a substantive matter to be addressed in the consultations, or—if consultations fail—before a panel. We note that Brazil's request for consultations in regard to this matter was based not only on Article 4 of the DSU, but also on Article 7.1 of the *SCM Agreement* (as well as Article XXII of the GATT 1994). (See Request for Consultations by Brazil, WT/DS267/1, 3 October 2002, p. 1) Article 7.1 authorizes a Member to request consultations whenever it "has reason to believe" that any subsidy referred to in Article 1 "results in" certain effects listed in that provision. Article 7.1 thus recognizes that questions regarding the results of subsidization are potentially contentious matters.

[211]Panel Report, para. 7.119.

[212]This contrasts with the treatment of the other measure raised in that proceeding (the "19 April action"). It was in force, but had not been the subject of consultations. The panel and Appellate Body both ruled that the absence of consultations on the 19 April action required its exclusion from the terms of reference. (Appellate Body Report, *US – Certain EC Products*, para. 82; Panel Report, *US – Certain EC Products*, paras. 6.89 and 6.128)

[213]Appellate Body Report, *US – Certain EC Products*, paras. 81-82.

[214]This conclusion is consistent with the approach taken by GATT and WTO panels to questions relating to the expiry of measures after the initiation of dispute settlement proceedings, but before those proceedings have been completed. See, for example, GATT Panel Report, *EEC – Apples I (Chile)*, paras. 2.4 and 4.1 ff; Panel Report, *India – Autos*, para. 7.29. GATT and WTO panels have frequently made findings with respect to measures withdrawn after the establishment of the panel. See, for example, GATT Panel Report, *EEC – Animal Feed Proteins*, para. 2.4; GATT Panel Report, *US – Canadian Tuna*, para. 4.3; Panel Report, *US – Wool Shirts and Blouses*, para. 6.2; and Panel Report, *Indonesia – Autos*, para. 14.9. Even in cases where a

273. It is important to recognize the particular characteristics of *subsidies* and the nature of Brazil's claims against the production flexibility contract and market loss assistance subsidy payments. Article 7.8 of the *SCM Agreement* provides that, where it has been determined that "any subsidy has *resulted* in adverse effects to the interests of another Member", the subsidizing Member must "take appropriate steps *to remove the adverse effects* or ... withdraw the subsidy". (emphasis added) The use of the word "resulted" suggests that there could be a time-lag between the payment of a subsidy and any consequential adverse effects.[215] If expired measures underlying past payments could not be challenged in WTO dispute settlement proceedings, it would be difficult to seek a remedy for such adverse effects. Further—in contrast to Articles 3.7 and 19.1 of the DSU—the remedies under Article 7.8 of the *SCM Agreement* for adverse effects of a subsidy are (i) the withdrawal of the subsidy *or* (ii) the removal of adverse effects. Removal of adverse effects through actions other than the withdrawal of a subsidy could not occur if the expiration of a measure would automatically exclude it from a panel's terms of reference.

274. For these reasons, we find the United States' reliance upon the prospective character of the remedies described in Articles 3.7 and 19.1 of the DSU unconvincing. We therefore *reject* the United States' argument that production flexibility contract payments and market loss assistance payments were outside the Panel's terms of reference by virtue of Article 6.2 of the DSU.

5. Article 12.7 of the DSU

275. The United States also alleges that, contrary to Article 12.7 of the DSU, the Panel failed to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind its finding that Articles 4.2 and 6.2 of the DSU do not exclude expired measures from the potential scope of a request for the establishment of a panel.

276. The Appellate Body stated in *Mexico – Corn Syrup (Article 21.5 – US)*:

> Article 12.7 establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations. Panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations.[216]

panel has chosen not to rule on measures that had been terminated during the course of proceedings, panels have recognized that "[o]n several occasions, panels have considered measures that were no longer in force". (Panel Report, *Argentina – Textiles and Apparel*, para. 6.12. (footnote omitted)) In none of these cases has a panel or the Appellate Body premised its decision on the view that, *a priori*, an expired measure could not be within a panel's terms of reference.

[215]We observe, in this regard, that the United States concedes that at least *some* subsidies can have effects for years after the date on which they are paid. Thus, the United States distinguishes between "non-recurring" subsidies and "recurring" subsidies. Although the United States believes that the effects of recurring subsidies are limited to the year for which they are paid, the United States *accepts* that the effects of non-recurring subsidies may spread out well into the future. (United States' appellant's submission, para. 508)

[216]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 106. It also noted that:

> ... the duty of panels under Article 12.7 of the DSU to provide a "basic rationale" reflects and conforms with the principles of fundamental fairness and due process that underlie and inform the provisions of the DSU. In particular, in cases where a Member has been found to have acted inconsistently with its obligations under the covered agreements, that Member is entitled to know the reasons for such finding as a matter of due process. In addition, the requirement to set out a "basic rationale" in the panel report assists such Member to understand the nature of its obligations and to make informed decisions about: (i) what must be done in order to implement the eventual rulings and recommendations made by the DSB; and (ii) whether and what to appeal.

(*Ibid.*, para. 107) (footnote omitted)

The Appellate Body clarified:

> [w]hether a panel has articulated adequately the "basic rationale" for its findings and recommendations must be determined on a case-by-case basis, taking into account the facts of the case, the specific legal provisions at issue, and the particular findings and recommendations made by a panel. Panels must identify the relevant facts and the applicable legal norms. In applying those legal norms to the relevant facts, the reasoning of the panel must reveal how and why the law applies to the facts. In this way, panels will, in their reports, disclose the essential or fundamental justification for their findings and recommendations.[217]

The Appellate Body also explained that this "does not, however, necessarily imply that Article 12.7 requires panels to expound at length on the reasons for their findings and recommendations."[218]

277. We note that compliance with Article 12.7 of the DSU is to be determined on a case-by-case basis. With regard to the current proceedings, as discussed above, we see no error in the Panel's conclusion regarding its ability to make findings with respect to subsidies whose legislative basis had expired at the time of panel establishment. Although the Panel's reasoning with respect to this issue may be brief, the Panel set out the necessary findings of fact, the applicability of relevant provisions, and the basic rationale behind its findings. The Panel noted that the parties agreed on the key factual element that was relevant to this part of its analysis, namely, that the legislation under which production flexibility contract and market loss assistance payments were made had expired, and went on to discuss relevant factual aspects.[219] The Panel cited and discussed Article 4.2, in particular the meaning and significance of the term "affecting" in that provision.[220] As we have done, the Panel interpreted Article 4.2 in the light of the context provided by Article 3.3 of the DSU.[221] It addressed Article 6.2 of the DSU[222], and also situated the question of "expired measures" in the context of the actionable subsidies claims made by Brazil in this case.[223] Given these inquiries and considerations by the Panel, we see no reason to find that the Panel failed to meet the requirements of Article 12.7 of the DSU in relation to whether the expired production flexibility contract and market loss assistance payments fell within its terms of reference.

[217]*Ibid.*, para. 108.

[218]*Ibid.*, para. 109.

[219]Panel Report, para. 7.108.

[220]*Ibid.*, paras. 7.112-7.115.

[221]*Ibid.*, para. 7.116-7.117.

[222]*Ibid.*, para. 7.121.

[223]*Ibid.*, paras. 7.109-7.110.

B. *Terms of Reference – Export Credit Guarantees*

1. Introduction

278. We turn now to the United States' claim that the Panel erred in finding that its terms of reference were not limited to export credit guarantees to upland cotton, but also included export credit guarantees to other eligible United States agricultural commodities.[224]

279. The United States requested the Panel to "rule that export credit guarantee measures relating to eligible United States agricultural commodities (other than upland cotton) are not within its terms of reference because this 'measure' was not the subject of Brazil's request for consultations".[225] Brazil responded that "both its request for consultations and the accompanying statement of available evidence, as well as the questions it posed to the United States during consultations, revealed that they covered export credit guarantee measures relating to *all* eligible United States agricultural commodities".[226]

280. The Panel found that "the *actual* consultations did include export credit guarantee measures relating to all eligible agricultural commodities".[227] The Panel then examined the text of Brazil's request for consultations, "[a]ssuming *arguendo* that the scope of the written request for consultations is determinative, rather than the scope of the actual consultations".[228] It found "that export credit guarantee measures relating to all eligible agricultural commodities were included in Brazil's request for consultations, based on its reading of the text of the request itself".[229] Accordingly, the Panel made the following ruling in response to the United States' request:

> [T]he Panel rules that export credit guarantees to facilitate the export of United States upland cotton, and other eligible agricultural commodities as addressed in document WT/DS267/7, are within its terms of reference.[230]

2. Arguments on Appeal

281. On appeal, the United States asserts that the Panel erred in finding that export credit guarantee measures relating to all eligible agricultural commodities were included in Brazil's request for consultations.[231] In addition, the United States takes issue with the Panel's finding that consultations were *actually* held on the export credit guarantee programs relating to agricultural commodities including, but not limited to, upland cotton.[232] The United States argues, in this regard, that the fact that Brazil posed written questions on the export credit guarantees relating to agricultural commodities including, but not limited to, upland cotton does not mean that consultations were *actually* held on all those products, especially considering that the United States objected to discussing them during the consultations on the basis that they were not included in the request for consultations.[233]

282. Brazil requests that we reject the United States' appeal. It contends that its request for consultations identified three United States export credit programs, namely, the General Sales Manager 102 ("GSM 102") and General Sales Manager 103 ("GSM 103") programs and the Supplier Credit Guarantee Program (the "SCGP").[234] By their own terms, each of these measures applies to all eligible products.[235] Therefore, there was no need to specify the product scope of these measures.[236] Brazil submits that, in any event, its request for consultations in fact identified the export credit guarantee programs in connection with all eligible commodities, without any limitation to upland cotton.[237] Finally, Brazil asserts that, irrespective of the measures identified in Brazil's request for consultations, the Panel found, as a matter of fact, that "consultations were held" on the export credit guarantee programs in connection with all eligible commodities, as required by Article 6.2 of the DSU.[238]

3. Did the Panel's Terms of Reference Include Other Eligible Agricultural Commodities?

283. The United States claims on appeal that the Panel's terms of reference were limited to export credit guarantees to upland cotton, and did not include export credit guarantees to other eligible agricultural commodities. This claim is premised on the allegation that, in its request for the establishment of a panel, Brazil expanded the product scope in respect of which it challenges the United States' export credit guarantee programs to include other eligible agricultural products in addition to upland cotton. The United States submits that the request for consultations and the consultations themselves, however, were limited to export credit guarantees to upland cotton. Brazil contends that its request for consultations and the consultations held covered *all* agricultural products eligible for export credit guarantees.[239]

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[224]We note that, during the interim review, Brazil requested the Panel "to conclude that GSM 102, GSM 103 and SCGP also constitute prohibited export subsidies within the meaning of item (j) and Article 3.1(a) of the *SCM Agreement*, for all products not covered by the *Agreement on Agriculture*". The Panel rejected Brazil's request, explaining that its "terms of reference include[d] export credit guarantees to facilitate the export of United States upland cotton and other eligible *agricultural* commodities as addressed in document WT/DS267/7". (Panel Report, para. 6.37. (original emphasis))

[225]Panel Report, para. 7.55. (footnote omitted)

[226]*Ibid.*, para. 7.57. (footnote omitted; emphasis added)

[227]Panel Report, para. 7.61. (original italics; underlining added)

[228]*Ibid.*, para. 7.62.

[229]*Ibid.*, para. 7.65. The Panel explained that the title of this dispute, "United States – Subsidies on Upland Cotton", "did not appear in the original communication sent from the Permanent Mission of Brazil to the Permanent Mission of the United States", but rather "was added by the [WTO] Secretariat when it circulated a copy of the request for consultations to Members". Consequently, the Panel did not consider the title to be "a legally relevant consideration here". (*Ibid.*, footnote 131 to para. 7.64)

[230]Panel Report, para. 7.69. (footnote omitted)

[231]United States' appellant's submission, para. 474.

[232]*Ibid.*, para. 471.

[233]*Ibid.*, paras. 471-472.

[234]These programs are described *infra*, paras. 586-589.

[235]See Panel Report, footnote 1056 to para. 7.875.

[236]Brazil's appellee's submission, para. 195.

[237]*Ibid.*, para. 202.

[238]Brazil's appellee's submission, paras. 208-209. Brazil reads the Appellate Body Report in *Brazil – Aircraft* as meaning that as long as "consultations were held" on a measure included in a request for establishment of a panel, that measure is properly within a panel's terms of reference, irrespective of whether the measure was included in the request for consultations. (*Ibid.*, para. 213 (referring to Appellate Body Report, *Brazil – Aircraft*, paras. 132-134)) Brazil adds that this is consistent with the purpose of consultations. (*Ibid.*, para. 214)

[239]In addition, Brazil submits that the Panel's terms of reference are determined by the panel request, and that its panel request referred to all agricultural products eligible for the United States' export credit guarantees.

284. Before addressing the question of whether Brazil expanded, in its panel request, the scope of products in respect of which it challenged the United States' export credit guarantee programs, we note that the Appellate Body has explained previously that, "pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the request for establishment of a panel".[240] However, the Appellate Body has also explained that "as a general matter, consultations are a prerequisite to panel proceedings"[241] and has underscored the importance and benefits of consultations:

> We agree ... on the importance of consultations. Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole.[242]

285. The requirements that apply to a request for consultations are set out in Article 4.4 of the DSU, which provides, in relevant part:

> Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

The Appellate Body has stated that "Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[243] At the same time, however, the Appellate Body has said that it does not believe that "Articles 4 and 6 of the DSU ... require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel".[244] We need not elaborate further on the relationship between a panel's terms of reference and the requirement that "consultations were held", because, as we explain below, we are satisfied that, in this case, the Panel had a reasonable basis to conclude that the request for consultations included export credit guarantees to eligible agricultural commodities including, but not limited to, upland cotton.

286. In reviewing the Panel's analysis, we are faced with the question whether the scope of the consultations is determined by the written request for consultations or by what actually happens in the consultations. The Panel looked first at what actually happened during the consultations. It observed that Brazil submitted in writing to the United States 21 questions regarding export credit guarantee programs, seeking information on, *inter alia*, the total volume and value of exports of United States agricultural goods guaranteed by these programs.[245] According to the Panel, "[t]his shows that the *actual* consultations did include export credit guarantee measures relating to all eligible agricultural commodities".[246] The Panel then examined the text of Brazil's request for consultations, "[a]ssuming *arguendo* that the scope of the written request for consultations is determinative, rather than the scope of the actual consultations".[247]

287. We believe that the Panel should have limited its analysis to the request for consultations because we are inclined to agree with the panel in *Korea – Alcoholic Beverages*, which stated that "[t]he only requirement under the DSU is that consultations were in fact held ... [w]hat takes place in those consultations is not the concern of a panel".[248] Examining what took place in the consultations would seem contrary to Article 4.6 of the DSU, which provides that "[c]onsultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings." Moreover, it would seem at odds with the requirements in Article 4.4 of the DSU that the request for consultations be made in writing and that it be notified to the DSB. In addition, there is no public record of what actually transpires during consultations and parties will often disagree about what, precisely, was discussed. Ultimately, however, it is not necessary for us to inquire into this part of the Panel's analysis because the Panel also found "that export credit guarantee measures relating to all eligible agricultural commodities were included in Brazil's request for consultations, based on its reading of the text of the request itself".[249] We turn, therefore, to examine whether there is a sufficient basis for the Panel's conclusion in this regard.

[240]Appellate Body Report, *US – Carbon Steel*, para. 124. Article 7.1 of the DSU provides:

> Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:
>
> > To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

The United States does not dispute that Brazil's request for the establishment of a panel included export credit guarantees to eligible agricultural commodities including, but not limited to, upland cotton.

[241]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 58.

[242]*Ibid.*, para. 54.

[243]Appellate Body Report, *Brazil – Aircraft*, para. 131.

[244]Appellate Body Report, *Brazil – Aircraft*, para. 132. (original emphasis) The Appellate Body found, in that case, that certain measures that came into effect after consultations were held were nevertheless within the Panel's terms of reference, emphasizing that the measures did not change the essence of the challenged export subsidies. In *US – Certain EC Products*, the Appellate Body found that one of the measures challenged by the European Communities was not properly before the Panel. The Appellate Body explained that, although the panel request referred to the measure, it was not possible for it to conclude "on this basis *alone*" that the measure was within the Panel's terms of reference. It noted that the European Communities' request for consultations did not refer to the measure and that the European Communities acknowledged that the measure was not the subject of the consultations. In its ruling, the Appellate Body also emphasized that the particular measure was "separate" and "legally distinct" from another measure challenged by the European Communities. (Appellate Body Report, *US – Certain EC Products*, paras. 69-75) (original emphasis)

[245]The United States acknowledged that Brazil posed questions during the consultations that went beyond upland cotton. (Panel Report, para. 7.61) According to the Panel, the United States declined to respond to these questions during the consultations. (Panel Report, 7.67)

[246]Panel Report, para. 7.61. (original emphasis)

[247]*Ibid.*, para. 7.62.

[248]Panel Report, *Korea – Alcoholic Beverages*, para. 10.19.

[249]Panel Report, para. 7.65.

288. Brazil's request for consultations states, in relevant part[250]:

> The measures that are the subject of this request are prohibited and actionable subsidies provided to US producers, users and/or exporters of upland cotton[1], as well as legislation, regulations, statutory instruments and amendments thereto providing such subsidies (including export credits), grants, and any other assistance to the US producers, users and exporters of upland cotton ("US upland cotton industry"). The measures include the following:
>
> ...
>
> - Export subsidies, exporter assistance, export credit guarantees, export and market access enhancement to facilitate the export of US upland cotton provided under the Agricultural Trade Act of 1978, as amended, and other measures such as the GSM-102, GSM-103, and SCGP programs ...
>
> ...
>
> Regarding export credit guarantees, export and market access enhancement provided under the Agricultural Trade Act of 1978, as amended, and other measures such as the GSM-102, GSM-103, and SCGP programs, Brazil is of the view that these programs, as applied and as such, violate Articles 3.3, 8, 9.1, and 10.1 of the Agreement on Agriculture and are prohibited export subsidies under Article 3.1(a) and item (j) of the Illustrative List of Export Subsidies included as Annex I to the SCM Agreement. Subsidies provided under these programs are also actionable subsidies for the purpose of Brazil's claims under Article 6.3 of the SCM Agreement.

[1] Except with respect to export credit guarantee programs as explained below.

289. According to the Panel, footnote 1 to Brazil's request for consultations "should have indicated to the careful reader that the subject of the request for consultations, with respect to export credit guarantee measures only, was different from those 'provided to US producers, users and/or exporters of upland cotton'".[251] The Panel also observed that the second paragraph after the footnote dealing with export credit guarantee programs referred to the programs as applied and as such, and it did not refer specifically to upland cotton. The Panel therefore concluded that "export credit guarantee measures relating to all eligible agricultural commodities were included in Brazil's request for consultations, based on its reading of the text of the request itself."[252]

290. The United States contends that the Panel ignored the first paragraph after the footnote and drew the wrong conclusion from the second paragraph. According to the United States, "it is simply not the case that a 'plain reading' of the [second] paragraph 'includes all eligible agricultural commodities'." Rather, it "shows that the [second] paragraph mentions *no* commodities at all".[253] The United States also asserts that the Panel "overlooked the context that th[e] first paragraph provided for the second".[254] The first paragraph, the United States points out, refers to exports subsidies, exporter assistance, and export credit guarantees to facilitate the export of *upland cotton* under a series of listed measures. A comparison of the first and second paragraphs shows that "the second did not describe measures, but, rather, described the *legal basis* for Brazil's complaint".[255] The United States submits that the Panel should therefore have concluded that "the two paragraphs complemented one another" and, "[t]hat being the case, there is no reason to believe (and certainly the Panel gave none) that the product scope of the second paragraph was broader than the 'upland cotton' mentioned in the first paragraph".[256] Finally, the United States argues that, "[e]ven assuming that the omission of the words 'upland cotton' from the second paragraph had some significance", the Panel gave no explanation as to "why the omission of those words should extend the product scope to 'all eligible agricultural commodities' rather than some other product scope".[257]

291. We have examined carefully Brazil's request for consultations and we find that it provides a sufficient basis for the Panel to have concluded that the request included export credit guarantees to eligible agricultural commodities including, but not limited to, upland cotton. Footnote 1 of the request for consultations, which states "Except with respect to export credit guarantee programs as provided below", alerts the reader that there is something different about Brazil's claims relating to the United States' export credit guarantee programs. Furthermore, the fact that the footnote follows immediately after the term "upland cotton" suggests that this difference relates to the product scope. It was not unreasonable, therefore, for the Panel to conclude that footnote 1 "should have indicated to the careful reader that the subject of consultations, with respect to export credit guarantee measures only, was different from those 'provided to US producer, users and/or exporters of upland cotton'".[258] In addition, in the second paragraph dealing with export credit guarantees after the footnote, Brazil refers to the programs "as such", which suggests a broad challenge, rather than one limited to a specific agricultural commodity. In our view, therefore, the footnote, together with the reference to the programs "as such" in the second paragraph, provide a reasonable basis for the Panel's conclusion "that export credit guarantee measures relating to all eligible agricultural commodities were included in Brazil's request for consultations, based on its reading of the text of the request itself."[259]

292. The United States also cites the lack of any reference to agricultural commodities other than upland cotton in the statement of available evidence that is annexed to Brazil's request for consultations as "further proof that the request did not extend beyond export credit guarantees for upland cotton".[260] The United States raised this point as a separate claim on appeal and, therefore, we deal with this allegation in the next section of this Report. Below we uphold the Panel's finding that Brazil provided a statement of available evidence with respect to the United States' export credit

[250] Request for Consultations by Brazil, *supra*, footnote 26, pp. 1-2 and 4.

[251] Panel Report, para. 7.63.

[252] *Ibid.*, para. 7.65.

[253] United States' appellant's submission, para. 476 (quoting Panel Report, para. 7.64). (original emphasis)

[254] *Ibid.*, para. 477.

[255] *Ibid.*, (original emphasis)

[256] *Ibid.*, para. 477.

[257] *Ibid.*, para. 479.

[258] Panel Report, para. 7.63.

[259] *Ibid.*, para. 7.65. The facts of this case differ from those in *US – Certain EC Products*, on which the United States relies. In that case, the measure was not mentioned in the request for consultations because it was not even in existence at the time. (Appellate Body Report, *US – Certain EC Products*, para. 70)

[260] United States' appellant's submission, para. 461.

guarantee programs as they relate to eligible agricultural products including, but not limited to, upland cotton[261] and, consequently, this argument does not support the United States' position on this issue.

293. We emphasize that consultations are but the first step in the WTO dispute settlement process. They are intended to "provide the parties an opportunity to define and delimit the scope of the dispute between them".[262] We also note that Article 4.2 of the DSU calls on a WTO Member that receives a request for consultations to "accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member". As long as the complaining party does not expand the scope of the dispute, we hesitate to impose too rigid a standard for the "precise and exact identity"[263] between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request. According to Article 7 of the DSU, it is the request for the establishment of a panel that governs its terms of reference, unless the parties agree otherwise.[264]

294. For these reasons, we uphold the Panel's ruling, in paragraph 7.69 of the Panel Report, that "export credit guarantees to facilitate the export of United States upland cotton, and other eligible agricultural commodities ... are within its terms of reference".

C. *Statement of Available Evidence – Export Credit Guarantees*

1. Introduction

295. We now examine the United States' claim that the Panel erred in finding that Brazil's statement of available evidence was not limited to the United States' export credit guarantees to upland cotton, but also included export credit guarantee measures relating to other eligible United States agricultural products, as required by Article 4.2 of the *SCM Agreement*.

296. The United States requested the Panel to rule that Brazil "could not advance claims under ... Article 4 ... of the *SCM Agreement* with respect to export credit guarantee measures on eligible agricultural commodities other than upland cotton because it did not include a statement of available evidence with respect to such export credit guarantees in accordance with Articl[e] 4.2 ... of that Agreement".[265]

[261]See *infra*, para. 309.

[262]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

[263]Appellate Body Report, *Brazil – Aircraft*, para. 132. (emphasis omitted)

[264]Appellate Body Report, *US – Carbon Steel*, para. 124.

[265]Panel Report, para. 7.70. The Panel explained that the United States initially argued that Brazil's statement of available evidence as regards export credit guarantees was limited to upland cotton and did not extend to other eligible agricultural commodities, demonstrating that Brazil's request for consultations was limited to export credit guarantees relating to upland cotton. The request for a specific ruling on the adequacy of the statement of available evidence was made by the United States in its submission of 30 September 2003. (Panel Report, para. 7.71)

297. In examining the United States' request, the Panel noted that Brazil's statement of available evidence contained two paragraphs specifically referring to the United States' export credit guarantee programs[266], and observed that the first paragraph is "textually limited to upland cotton", while the second paragraph "is not so limited".[267] The Panel then rejected the United States' contention that the lack of a reference to upland cotton in the second paragraph could not expand the scope of the statement of available evidence.[268] According to the Panel, when the second "paragraph is read in light of footnote 1 of the request for consultations, a careful reader should have been alerted to the fact that this paragraph referred to alleged subsidies arising from export credit guarantees under the challenged programmes, without any limitation to upland cotton or any other particular product or products".[269] Furthermore, the Panel stated that Brazil's statement of evidence referred to a website of the United States Congressional Budget Office, which includes data pertaining to the spending and offsetting receipts of the Commodity Credit Corporation (the "CCC"). Neither the reference to the website nor the data on the website "contain any indication of limitation of Brazil's allegations concerning the export credit guarantee programmes to any specific product, such as, for example, upland cotton".[270]

In addition, the Panel noted that the United States had made allegations under both Articles 4.2 and 7.2 of the *SCM Agreement*. The Panel observed that Article 4.2 relates to prohibited subsidies and Article 7.2 relates to claims against actionable subsidies. Then, the Panel stated that it was not necessary for it to rule on the United States' claim relating to Article 7.2 because: (i) Brazil challenged only one United States export credit guarantee program—GSM 102—as an actionable subsidy that caused serious prejudice; (ii) this allegation was limited to upland cotton; and (iii) the Panel had exercised judicial economy with respect to the claim. Thus, the Panel limited its examination to "whether Brazil included a statement of available evidence with respect to export credit guarantees on other eligible agricultural products in accordance with the requirement pertaining to its *export* subsidy allegations in Article 4.2 of the *SCM Agreement*". (Panel Report, paras. 7.73-7.74, 7.76, and 7.78-7.79) (original emphasis)

In its Notice of Appeal, the United States asserted that, in the event that Brazil appealed the Panel's exercise of judicial economy with respect to Brazil's claims concerning the compatibility of the United States' export credit guarantee measures with Part III of the *SCM Agreement*, the United States would conditionally request the Appellate Body to find that Brazil also failed to provide a statement of available evidence as required by Article 7.2 of the *SCM Agreement* and, accordingly, Brazil's claims concerning these measures were not within the Panel's terms of reference. (Notice of Appeal, *supra*, footnote 17, para. 13) The United States did not pursue this claim further in its appellant's submission. In any event, the condition on which the United States' appeal was based was not met, as Brazil did not appeal the Panel's exercise of judicial economy concerning the compatibility of the United States' export credit guarantee measures with Part III of the *SCM Agreement*.

[266]Panel Report, para. 7.83.

[267]*Ibid.*, para. 7.84.

[268]*Ibid.*, para. 7.84.

[269]*Ibid.*, para. 7.85. (footnoted omitted) Footnote 1 of Brazil's request for consultations reads: "Except with respect to export credit guarantee programs as explained below". See *supra*, para. 288.

[270]Panel Report, paras. 7.92-7.93.

298. Therefore, the Panel found:

> [A]ssuming *arguendo* that the United States' request was timely[271], the Panel rules that Brazil provided a statement of available evidence with respect to export credit guarantee measures relating to upland cotton and eligible United States agricultural products other than upland cotton, as required by Article 4.2 of the *SCM Agreement*.[272]

299. On appeal, the United States argues that the Panel's ruling is erroneous. The United States submits that Brazil's statement of evidence contains two paragraphs specifically referring to the United States' export credit guarantee programs.[273] The first paragraph is textually limited to upland cotton, as the Panel correctly found. Although the second paragraph does not refer to upland cotton, it contains no suggestion that it expands on the programs described in the preceding paragraph.[274] The United States further submits that, even if the second paragraph were construed to refer to programs that provide benefits to products other than upland cotton, it is "difficult to see" how that paragraph meets the requirements of Article 4.2 of the *SCM Agreement*, as it does not provide information about the "existence" or "nature" of the subsidies allegedly provided by the export credit guarantee programs to products in addition to upland cotton.[275]

300. Brazil submits that its statement of available evidence not only identifies the measures at issue—the United States' export credit guarantee programs—but also indicates the characteristics of those measures that had led Brazil to suspect that they constituted export subsidies, as required by the Appellate Body in *US – FSC*.[276] Specifically, Brazil's statement describes the failure of the export credit guarantee programs to establish premium rates that cover long-term operating costs and losses, which are central elements in a determination of whether a program constitutes an export subsidy under item (j) of the Illustrative List of Export Subsidies included as Annex I to the *SCM Agreement*.[277] Furthermore, the Panel made a factual finding that the documentary evidence cited by Brazil to support its preliminary view included a link to a United States government website with data showing that revenues for the export credit guarantee programs do not cover long-term operating costs and losses, which addressed the programs overall, rather than in connection with only upland cotton.[278] Thus, according to Brazil, its statement of available evidence met the requirements of Article 4.2, by identifying the export credit guarantee measures, and providing and describing available evidence of "the character of" those measures, across all eligible commodities, as export subsidies.[279]

[271]Brazil had argued that the United States' request was untimely. The Panel found it unnecessary to rule on the timeliness of the United States' request, in the light of its ruling on the substantive question. (Panel Report, footnote 160 to para. 7.103)

[272]Panel Report, para. 7.103. (footnotes omitted)

[273]United States' appellant's submission, para. 494.

[274]*Ibid.*, paras. 495-496.

[275]United States' appellant's submission, para. 497.

[276]Brazil's appellee's submission, paras. 228-229 (referring to Appellate Body Report, *US – FSC*, para. 161).

[277]Brazil's appellee's submission, para. 230.

[278]*Ibid.*, paras. 231-232 (referring to Panel Report, paras. 7.92-7.93).

[279]*Ibid.*, para. 233.

2. Did Brazil's Statement of Available Evidence Include Export Credit Guarantees to Other Eligible Agricultural Commodities?

301. The issue raised on appeal is whether the Panel correctly concluded that Brazil's statement of available evidence was not limited to export credit guarantees to upland cotton and included export credit guarantees to other eligible agricultural commodities.[280] The requirement that a party challenging a prohibited subsidy provide a statement of available evidence is set out in Article 4.2 of the *SCM Agreement*, which provides:

> A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

Article 4.2 is included in Appendix 2 of the DSU as a special or additional rule on dispute settlement.

302. The Appellate Body has stated that Article 4.2 of the *SCM Agreement* must be read and applied together with Article 4.4 of the DSU, which sets out the requirements for the request for consultations, "so that a request for consultations relating to a prohibited subsidy claim under the *SCM Agreement* must satisfy the requirements of both provisions".[281] It has also explained that the "additional requirement of 'a statement of available evidence' under Article 4.2 of the *SCM Agreement* is distinct from—and not satisfied by compliance with—the requirements of Article 4.4 of the DSU".[282]

303. Brazil's statement of available evidence is annexed to its request for consultations. As the Panel noted[283], the statement contains the following two paragraphs referring specifically to the United States' export credit guarantee programs:

> US export credit guarantee programs have caused serious prejudice to Brazilian upland cotton producers by providing below-market financing benefits for the export of competing US upland cotton;
>
> US export credit guarantee programs, since their origin in 1980 and up [to] the present, provide premium rates that are inadequate to cover the long-term operating costs and losses of the programs; in particular there were losses caused by large-scale defaults totalling billions of dollars that have not been reflected in increased premiums to cover such losses[.][284]

304. The United States asserts that Brazil's statement of evidence does not mention any agricultural commodity other than upland cotton when it refers to the United States' export credit guarantee programs. This is correct. At the same time, however, we observe that the second paragraph is not expressly limited to upland cotton. Rather, that paragraph refers to the United States' export credit

[280]The United States does not contest that Brazil submitted a statement of available evidence together with its request for consultations. Nor does the United States contest that Brazil's statement of available evidence referred to the United States' export credit guarantees as they relate to upland cotton.

[281]Appellate Body Report, *US – FSC*, para. 159.

[282]Appellate Body Report, *US – FSC*, para. 161.

[283]Panel Report, para. 7.83.

[284]Statement of available evidence annexed to the Request for Consultations by Brazil, *supra*, footnote 26, para. 3.

guarantee programs in a general way, suggesting that the reference is to the programs as a whole and not just as they relate to one specific agricultural commodity. The allegation in that paragraph that the premium rates are inadequate to cover the long-term operating costs and losses of the programs is equally broad and does not suggest that it is only with respect to upland cotton that premiums are insufficient to offset costs and losses. As the Panel explained, when the second "paragraph is read in light of footnote 1 of the request for consultations, a careful reader should have been alerted to the fact that this paragraph referred to alleged subsidies arising from export credit guarantees under the challenged programmes, without any limitation to upland cotton or any other particular product or products".[285] Thus, we do not find that it was unreasonable for the Panel to have "read Brazil's statement of available evidence, insofar as Brazil's export subsidy claims are concerned, to refer to each of the three challenged United States export subsidy programmes as they relate to upland cotton and other eligible agricultural products".[286]

305. The United States submits that, even if the second paragraph were construed to refer to programs that provide benefits to products in addition to upland cotton, it is "difficult to see"[287] how that paragraph meets the requirements of Article 4.2 of the *SCM Agreement*, as it does not provide information about the "existence" or "nature" of the subsidies allegedly provided by the export credit guarantee programs to products in addition to upland cotton. The Panel rejected the United States' argument because it considered that:

> Brazil's statement of available evidence indicates Brazil's view that the character of the alleged subsidy lay in the provision of export credit guarantees under programmes "at premium rates that are inadequate to cover the long-term operating costs and losses of the programs; in particular there were losses caused by large-scale defaults totalling billions of dollars that have not been reflected in increased premiums to cover such losses."[288]

From this, the Panel concluded that Brazil "had evidence available to it at that time which led it to conclude that the United States was providing a prohibited export subsidy of this nature and character under the three identified export subsidy programmes, without any limitation to a particular product or products".[289]

306. We recall that Article 4.2 requires that the request for consultations "include a statement of available evidence with regard to the existence and nature of the subsidy in question". In *US – FSC*, the Appellate Body explained that this means that "it is available evidence of the character of the measure as a 'subsidy' that must be indicated, and not merely evidence of the existence of the measure".[290] We observe that, in Brazil's statement of available evidence, the second paragraph that deals specifically with the United States' export credit guarantee programs does not simply refer to their existence. In that paragraph, Brazil indicates that the export credit guarantees have the "character" of a subsidy because the premiums charged are insufficient to cover the long-term operating costs and losses. Brazil goes further by stating that this situation is especially due to the fact that the premiums have not increased despite "large-scale defaults totalling billions of dollars".[291]

307. In addition, as the Panel pointed out, Brazil referred to a website of the United States Congressional Budget Office. This website includes projections of the mandatory spending of the United States federal government. One of the tables provided on the website contains a line-item that specifically refers to spending by the CCC, which, according to the title of the table, already takes into account offsetting receipts. Thus, by referring to this website, Brazil's statement of evidence was also indicating that the export credit guarantees have the "character" of a subsidy because the premiums charged are insufficient to cover the long-term operating costs and losses. Therefore, the Panel had a reasonable basis to conclude that Brazil's statement of evidence met the requirements of Article 4.2 of the *SCM Agreement*.

308. We recognize that the statement of available evidence plays an important role in WTO dispute settlement. The adequacy of the statement of available evidence must be determined on a case by case basis. As the Panel stated, moreover, the "statement of available evidence ... is the starting point for consultations, and for the emergence of more evidence concerning the measures by reason of the clarification of the 'situation'".[292] It is, therefore, important to bear in mind that the requirement to submit a statement of available evidence applies in the earliest stages of WTO dispute settlement, and that the requirement is to provide a "statement" of the evidence and not the evidence itself.[293]

309. For these reasons, we *uphold* the Panel's ruling, in paragraph 7.103 of the Panel Report, that "Brazil provided a statement of available evidence with respect to export credit guarantee measures relating to upland cotton and eligible United States agricultural products other than upland cotton, as required by Article 4.2 of the *SCM Agreement*". (footnote omitted)

V. Domestic Support

A. *Article 13(a) of the Agreement on Agriculture – Planting Flexibility Limitations*

1. Introduction

310. We turn now to consider appeals by the United States and Brazil regarding the application of Article 13 of the *Agreement on Agriculture* (often referred to as the "peace clause"). We first

[285]Panel Report, para. 7.85. (footnote omitted) The text of footnote 1 is reproduced, *supra*, footnote 269.

[286]Panel Report, para. 7.86.

[287]United States' appellant's submission, para. 497.

[288]Panel Report, para. 7.89 (quoting statement of available evidence, *supra*, footnote 284, para. 3).

[289]*Ibid.*, para. 7.90.

[290]Appellate Body Report, *US – FSC*, para. 161. In that case, the European Communities did not provide a separate statement of available evidence, but argued that such a statement was contained in the request for consultations itself. The Panel found that the consultations request may have contained a statement of available evidence. The Appellate Body noted that it "would have preferred that the Panel give less relaxed treatment to this important distinction" between the existence and the character of the measure as a subsidy, but it ultimately ruled that the United States' objection to the request for consultations had been untimely and therefore it did not rule on whether the consultations request included a statement of available evidence. (*Ibid.*, paras. 155, 161, and 165)

[291]Statement of available evidence annexed to the Request for Consultations by Brazil, *supra*, footnote 26, para. 3.

[292]Panel Report, para. 7.100.

[293]Panel Report, *Australia – Automotive Leather II*, para. 9.19.

address the issue of whether two types of payment—production flexibility contract payments and direct payments—are entitled to the exemption from action established by paragraph (a) of Article 13.

311. Production flexibility contract payments were introduced by the FAIR Act of 1996 for the 1996-2002 marketing years, and were made to certain historical producers of seven eligible commodities, including upland cotton. Historical producers could enroll acres upon which upland cotton had been grown during a base period and were allocated upland cotton "base acres" (as well as a farm-specific yield per acre), for which payment would be made at a rate specified each year for upland cotton. The production flexibility contract program dispensed with the requirement that producers continue to plant upland cotton in order to receive payments; instead, payments would generally be made regardless of what the producer chose to grow, and whether or not the producer chose to produce anything at all. However, there were limits to this planting flexibility. Specifically, payments were reduced or eliminated if fruits and vegetables (other than lentils, mung beans, and dry peas) were planted on upland cotton base acres, subject to certain other exceptions. [294]

312. Direct payments were introduced by the FSRI Act of 2002 for the 2002-2007 marketing years. They essentially replaced production flexibility contract payments under the FAIR Act of 1996, while also expanding the program to take in historical production of some additional commodities.[295] Both production flexibility contract payments and direct payments were available for the 2002 crop, but production flexibility contract payments made for that crop were deducted from direct payments made for that crop.[296] Like production flexibility contract payments for upland cotton, direct payments for upland cotton were dependent on base acres allocated by reference to the production of upland cotton during certain base periods.[297] The payments were made each year at a rate fixed for the entire 2002-2007 period at 6.67 cents per pound of upland cotton. As was the case under the production flexibility contract program, producers were not required to grow any particular crop in order to receive direct payments, and could choose to grow nothing at all. In addition to fruits and vegetables (other than lentils, mung beans, and dry peas), wild rice was added to the planting flexibility limitations.[298]

313. The Panel found that the amount of payments under the production flexibility contract program and the direct payment program is "related to the type of production undertaken by the producer after the base period."[299] On this basis, the Panel found that these payments and "the legislative and regulatory provisions that provide for the planting flexibility limitations in the DP programme" do not fully conform to paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*.[300]

[294]Panel Report, paras. 7.212-7.215 and 7.376-7.378. The exceptions from planting flexibility limitations related to regions with a history of double cropping or farms with a history of planting fruits or vegetables on contract acreage. (*Ibid.*, para. 7.378)

[295]*Ibid.*, paras. 7.218-7.219 and 7.397. The Panel discusses similarities and differences between the production flexibility contract program and the direct payment program in paragraphs. 7.398-7.399.

[296]*Ibid.*, para. 7.220.

[297]There was a limited opportunity for producers to elect a different base period for the calculation of upland cotton base acres for direct payments under the FSRI Act of 2002 from that prevailing for production flexibility contract payments under the FAIR Act of 1996. (Panel Report, paras. 7.220-7.221) Brazil has conditionally appealed the Panel's exercise of judicial economy in respect of Brazil's claim that this "updating" of base acres contravenes paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*. We address this conditional appeal below at section V.B of this Report.

[298]Panel Report, paras. 7.220, 7.222, and 7.379-7.381. As was the case under the production flexibility contract program, there were limited exceptions to the planting flexibility limitations.

[299]*Ibid.*, para. 7.385.

[300]*Ibid.*, para. 7.388.

The Panel concluded that these measures are thus not green box measures[301], and added that these measures "do not comply with the condition in paragraph (a) of Article 13 of the *Agreement on Agriculture*" and are therefore "non-green box measures covered by paragraph (b) of Article 13."[302]

2. Appeal by the United States

314. The United States appeals the Panel's finding that direct payments, production flexibility contract payments, and the legislative and regulatory provisions that establish and maintain the direct payments program, are not green box measures sheltered from challenge by virtue of Article 13(a) of the *Agreement on Agriculture*. The United States does not dispute that the amount of payments under the production flexibility contract and direct payment programs depended upon a formula that centred on "base acres" tied to the historical production of upland cotton.[303] Nor does the United States dispute that there are limitations on producers' ability to plant any product, if those producers wish to receive production flexibility or direct payments with respect to upland cotton base acres.[304] In the case of production flexibility contract payments, these limitations related to the growing of fruits and vegetables. In the case of direct payments, the limitations extended to wild rice as well.[305] Beyond these limitations, however, the United States stresses that a producer can receive production flexibility contract payments or direct payments regardless of the agricultural products that the producer chooses to grow and irrespective of whether it chooses to produce any product at all.[306]

315. The United States takes issue with the Panel's finding that the planting flexibility limitations mean that the "amount of payments" under the production flexibility contract and direct payment programs is "related to the type of production undertaken by the producer after the base period", within the meaning of paragraph 6(b) of Annex 2 to the *Agreement on Agriculture*.[307] According to the United States, a *negative* direction in respect of production of certain goods—that is, conditioning payment on a producer's *non*-production of certain goods—does not make the amount of payments "related to the type of production". The United States submits that this interpretation serves the "fundamental requirement" found in paragraph 1 of Annex 2 that green box measures "have no, or at most minimal, trade-distorting effects or effects on production".

316. Brazil requests that the Appellate Body uphold the Panel's finding, under paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*, that production flexibility contract and direct payments relate "the amount of" the payment to "the type of production undertaken" by recipients.[308] The grounds for the Panel's finding are that production flexibility contract and direct payments are made solely if production is undertaken of crops other than fruits and vegetables (and, in the case of direct payments, wild rice as well). Brazil agrees with the Panel that this relates the amount of payments to production of the "permitted" crops. As the Panel found, if "permitted" crops alone are produced, a

[301]*Ibid.*, para. 7.413.

[302]*Ibid.*, para. 7.414.

[303]United States' appellant's submission, para. 17.

[304]See, for example, United States' appellant's submission, paras. 17 ff.

[305]United States' appellant's submission, para. 18.

[306]*Ibid.*

[307]Panel Report, para. 7.385; United States' appellant's submission, paras. 22 ff.

[308]Panel Report, para. 7.385; Brazil's appellee's submission, paras. 260 ff.

full payment is made. If a small quantity of "prohibited" crops is produced, the "amount of payment" is reduced. If a larger quantity of "prohibited" crops is produced, no payment is made.[309]

317. Brazil submits that the distinction drawn by the United States between "permitted" (or positive) and "prohibited" (or negative) categories of crops is artificial because the effect of both categories is identical: in both cases, production is channelled *away from* certain "prohibited" crops (for which no payments are made) and *towards* other "permitted" crops (for which payments are made). Thus, the incentives and disincentives are precisely the same. In both cases, "the amount of" the payment is intrinsically "related to" undertaking production of the "permitted" crops, and not undertaking production of the "prohibited" crops. According to Brazil, the Panel's factual findings support this view because it found that the prohibition on fruits and vegetables (and wild rice in respect of direct payments) imposes "significant constraints" on production decisions and creates incentives for the production of eligible crops rather than those crops that are prohibited.[310]

3. Analysis

318. Article 13 of the *Agreement on Agriculture*, entitled "Due Restraint", provides in relevant part that:

> During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):
>
> (a) domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be: ...
>
> (ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement; ...

319. Accordingly, domestic support that conforms fully to the provisions of Annex 2—that is "green box" support, which is exempt from the domestic support reduction obligations of the *Agreement on Agriculture*—is also exempt, during the implementation period[311], from actions based on Article XVI of GATT 1994 and the actionable subsidies provisions of Part III of the *SCM Agreement*.

320. The United States claims that production flexibility contract payments and direct payments are domestic support that conforms fully to the provisions of Annex 2 because they are "[d]ecoupled income support" within the meaning of paragraph 6 of that Annex. Annex 2 is entitled "Domestic Support: The Basis for Exemption from the Reduction Commitments" and provides, in relevant part, as follows:

> 1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the *fundamental requirement* that they have *no, or at most minimal, trade-distorting effects or effects on production*. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:
>
> (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,
>
> (b) the support in question shall not have the effect of providing price support to producers;
>
> plus policy-specific criteria and conditions as set out below.
>
> ...
>
> 5. *Direct payments to producers*
>
> Support provided through direct payments (or revenue foregone, including payments in kind) to producers for which exemption from reduction commitments is claimed shall meet the basic criteria set out in paragraph 1 above, plus specific criteria applying to individual types of direct payment as set out in paragraphs 6 through 13 below. ...
>
> 6. *Decoupled income support*
>
> (a) Eligibility for such payments shall be determined by *clearly-defined criteria* such as income, status as a producer or landowner, factor use or production level in a *defined and fixed base period*.
>
> (b) *The amount of such payments in any given year shall not be related to, or based on, the type or volume of production* (including livestock units) undertaken by the producer in any year *after* the base period.
>
> ...
>
> (e) *No production shall be required* in order to receive such payments. (emphasis added)

321. Paragraph 6, entitled, "[d]ecoupled income support" applies to one type of "direct payment" to producers that may benefit from exemption from reduction commitments and protection under the peace clause. Paragraph 6(a) sets forth that eligibility for payments under a decoupled income support program must be determined by reference to certain "clearly-defined criteria" in a "defined and fixed base period". Paragraph 6(b) requires the severing of any link between the *amount of payments* under such a program and the *type or volume of production* undertaken by recipients of payments under that program in any year after the base period. Paragraphs 6(c) and 6(d) serve to

[309]Brazil's appellee's submission, para. 285 (referring to Panel Report, paras. 7.382-7.383). The participants, like the Panel, refer to "permitted" and "prohibited" crops, in the sense that crops not subject to planting flexibility limitations are eligible to receive payments, while fruits and vegetables (and wild rice) are not eligible to receive payments. We generally prefer to refer to these categories as "covered" or "eligible" crops, on the one hand, and "excluded" crops on the other.

[310]Brazil's appellee's submission, paras. 285-286 (quoting Panel Report, para. 7.386).

[311]The "implementation period" during which Article 13 applies is defined in Article 1(f) of the *Agreement on Agriculture* as "the nine-year period commencing in 1995". "Year", for purposes of Article 1(f) "and in relation to the specific commitments of a Member" is defined in Article 1(i) and is "the calendar, financial or marketing year specified in the Schedule relating to that Member".

require that payments are also decoupled from *prices* and *factors of production employed* after the base period. Paragraph 6(e) makes it clear that "[n]o production shall be required in order to receive ... payments" under a decoupled income support program.

322. As we noted above[312], there is no disagreement between the participants that the amount of payments under the production flexibility contract and direct payment programs depended upon a formula that centred on "base acres", which were established on the basis of the historical production of upland cotton. Nor does the United States dispute that there are limitations on producers' ability to produce certain products, while also receiving production flexibility contract payments or direct payments with respect to upland cotton base acres. Therefore, the question before us regarding the consistency of production flexibility contract payments and direct payments with paragraph 6(b) of Annex 2 is a limited one. It does not concern a measure *requiring* producers to grow certain crops in order to receive payments; it also does not concern a measure with complete planting *flexibility* that provides payments without regard whatsoever to the crops that are grown. Indeed, it does not concern a measure that requires the production of any crop at all; nor does it involve a measure that totally *prohibits* the growing of any crops as a condition for payments. The question before us in this appeal thus concerns a measure with a *partial* exclusion combining planting flexibility and payments with the reduction or elimination of the payments when the excluded crops are produced, while providing payments even when no crops are produced at all.

323. In addressing the question of the consistency of such a measure with paragraph 6(b), we note that under this provision, for income support to be *decoupled*, the "amount of such payments ... shall not be related to ... the type or volume of production ... undertaken by the producer in any year after the base period". It is uncontested that the amount of payments under the production flexibility contract and direct payment programs may be affected, depending upon whether a producer plants a crop that is permitted under the production flexibility contract or direct payment programs, or a crop that is covered by the planting flexibility limitations.[313] The United States focuses on the term "related to" and contends that the amount of payments under the production flexibility contract and direct payment programs is not "related to" the type of production as proscribed by paragraph 6(b).

324. The ordinary meaning of the term "related to" in paragraph 6(b) of Annex 2 denotes some degree of *relationship* or *connection* between two things[314], here the amount of payment, on the one hand, and the type or volume of production, on the other. It covers a broader set of connections than "based on", which term is also used to describe the relationship between two things covered by paragraph 6(b).[315] Nothing in the ordinary meaning of the term "related to" suggests that the connections covered by this expression may not encompass connections of either a "positive" nature

[312]*Supra*, para. 314.

[313]United States' appellant's submission, para. 18.

[314]See *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.), (Oxford University Press, 2002), Vol. 2, p. 2520; see also Panel Report, para. 7.366; United States' appellant's submission, para. 25; and Brazil's appellee's submission, para. 282.

[315]The Panel noted that "base" in this context may be defined as to "found, build, or construct *(up)on* a given base, build up *around* a base (chiefly *fig.*)": Panel Report, para. 7.366 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 187). Like the expression "related to", the expression "based on" also requires a connection between two or more things. However, even though "based on" does not require a strict relationship between two things (see, e.g., Appellate Body Report, *EC – Hormones*, paras. 165-166 and 171), the meaning of "based on" indicates a relatively close connection between the things being linked. By contrast, the meaning of "related to" can apply to connections more general in nature than situations in which one thing is "based on" another (see, e.g., Appellate Body Report, *US – Softwood Lumber IV*, para. 89, where the Appellate Body interpreted broadly the phrase "in relation to" in Article 14(d) of the *SCM Agreement*). Accordingly, the meaning of the term "related to" cannot be entirely subsumed into the meaning of "based on".

(including directions or requirements to do something) or a "negative" nature (including prohibitions or requirements not to do something) or a combination of both. As the Panel indicated, the ordinary meaning of the term "related to" conveys "a very general notion".[316] Indeed, the United States agrees that, as far as its ordinary meaning in the abstract is concerned, the term "related to" may be broad enough to capture both positive and negative connections, but argues that the context of paragraph 6(b) requires a more limited interpretation of the term, namely, only as covering a "positive" connection between the "amount of ... payments" and the "type ... of production".[317] Like the Panel, however, we are of the view that, in the context of paragraph 6(b), the term "related to" covers both positive and negative connections between the amount of payment and the type of production.

325. Paragraph 6 of Annex 2, entitled "[d]ecoupled income support", seeks to decouple or de-link direct payments to producers from various aspects of their production decisions and thus aims at neutrality in this regard. Subparagraph (b) decouples the payments from production; subparagraph (c) decouples payments from prices; and subparagraph (d) decouples payments from factors of production. Subparagraph (e) completes the process by making it clear that no production shall be required in order to receive such payments. Decoupling of payments from production under paragraph 6(b) can only be ensured if the payments are not related to, or based upon, either a positive requirement to produce certain crops or a negative requirement not to produce certain crops or a combination of both positive and negative requirements on production of crops.

326. In contrast to the other subparagraphs of paragraph 6, paragraph 6(e) does explicitly distinguish between positive and negative production requirements, because it prohibits positive requirements to produce. The Panel reasoned that "[i]f paragraph 6(b) could be satisfied by ensuring that no production was required to receive payments, paragraph 6(e) would be redundant".[318] We agree with the Panel that the context provided by paragraph 6(e) indicates that a measure that provided payments, even if a producer undertook no production at all, would not, for that reason alone, necessarily comply with paragraph 6(b). This is because other elements of that measure might still relate the amount of payments to the type or volume of production, contrary to the requirement of paragraph 6(b).

327. The United States seems to argue that the Panel's interpretation of the relationship between paragraphs 6(b) and 6(e) would subsume paragraph 6(e) within the scope of paragraph 6(b), thereby rendering it redundant.[319] In our view, however, paragraph 6(e) continues to serve a purpose distinct from that of paragraph 6(b). It highlights a different aspect of decoupling income support. In prohibiting Members from making green-box measures contingent on production, paragraph 6(e) implies that Members are allowed, in principle, to require no production at all. Accordingly, payments conditioned on a total ban on any production may qualify as decoupled income support under paragraph 6(e). Even assuming that payments contingent on a total production ban could be seen to relate the amount of the payment to the *volume* of production within the meaning of paragraph 6(b)—the volume of production being nil—giving meaning and effect to both paragraphs 6(b) and 6(e) suggests a reading of paragraph 6(b) that would not disallow a total ban on any production.

328. In addressing the United States' argument on this point, we recall that the measures at issue in this appeal do not provide for payments contingent on a *total ban* on production of *any* crops. The measures at issue here combine payments and planting flexibility in respect of certain covered crops with the reduction or elimination of such payments when certain other excluded crops are produced.

[316]Panel Report, para. 7.366.

[317]United States' appellant's submission, para. 25.

[318]Panel Report, para. 7.368.

[319]United States' appellant's submission, paras. 38-42.

The United States argues that, if paragraph 6(e) means that a Member may require a producer not to produce a particular product, "it would not make sense to then prohibit a Member, under paragraph 6(b), from making the amount of payment contingent on fulfilling that requirement".[320] However, in our view, the mere fact that under paragraph 6(e) "[n]o production shall be required in order to receive such payments" does not mean that a partial exclusion of certain crops from payments, coupled with production flexibility regarding other crops, must be consistent with paragraph 6(b).

329. We agree with the Panel that a partial exclusion of some crops from payments has the potential to channel production towards the production of crops that remain eligible for payments.[321] In contrast to a total production ban, the channelling of production that may follow from a partial exclusion of some crops from payments will have *positive* production effects as regards crops eligible for payments. The extent of this will depend on the scope of the exclusion. We note in this regard that the Panel found, as a matter of fact, that planting flexibility limitations at issue in this case "significantly constrain production choices available to PFC and DP payment recipients and effectively eliminate a significant proportion of them".[322] The fact that farmers may continue to receive payments if they produce nothing at all does not detract from this assessment because, according to the Panel, it is not the option preferred by the "overwhelming majority" of farmers, who continue to produce some type of permitted crop.[323] In the light of these findings by the Panel, we are unable to agree with the United States' argument that the planting flexibility limitations only negatively affect the production of crops that are excluded.

330. We are not persuaded otherwise by the United States' reliance upon the terms "amount of such payments" and "undertaken" in the text of paragraph 6(b). According to the United States, the Panel assumes that the "amount of such payments" in paragraph 6(b) can be related to the current type of production because, in some circumstances, a recipient that produces fruits, vegetables or wild rice "receives less payment than that recipient otherwise would have been entitled to".[324] However, for the United States, in that case, the only "amount" of payment that is even arguably "related to" current production is "zero"[325], because those crops are excluded from payment eligibility. The United States further argues, with respect to the phrase "production ... undertaken by the producer", that the ordinary meaning of the term "undertake" includes to "attempt". In this case, the planting flexibility limitations on a certain range of products, with respect to base acreage, would not relate the amount of payments to production "attempted" by the recipient; rather, the amount of payment is related to or based on the type of production *not* "attempted".[326]

331. In our view, the concepts of "type or volume of production ... undertaken by the producer" and the "amount of ... payments" are linked in paragraph 6(b) by the requirement that one "not be related to" the other. This requires a consideration of *the relationship* between the type or volume of production and the amount of payment under a program after the base period. A program that

[320] *Ibid.*, para. 38. (emphasis omitted)

[321] Panel Report, para. 7.367. Indeed, as Brazil submits, this will tend to be the case where the prohibition prevents a producer, intent on maximizing profit, from growing the best alternative crop. In that case, the producer will tend to choose the next best alternative from amongst the permitted crops. (Brazil's appellee's submission, para. 321, citing evidence, referred to in footnote 511 of the Panel Report, from Brazil's expert, Professor Sumner)

[322] Panel Report, para. 7.386.

[323] *Ibid.*, para. 7.386.

[324] United States' appellant's submission, para. 26.

[325] *Ibid.*

[326] United States' appellant's submission, para. 27.

disallows payments when certain crops are produced relates the amount of the payment to the type of production undertaken. The flexibility to produce and receive payment for certain crops covered by a program, combined with the reduction or elimination of such payments when excluded crops are produced, creates a link with the type of production undertaken contrary to paragraph 6(b). This is so because the opportunity for farmers to receive payments for producing covered crops, while less or no such payments are made to farmers who produce excluded crops, provides an incentive to switch from producing excluded crops to producing crops eligible for payments.

332. The United States also contends that its measures, which condition payment on the non-production of certain products, "further the fundamental requirement [in paragraph 1 of Annex 2 to the *Agreement on Agriculture*] that such measures 'have no, or at most minimal, trade-distorting effects or effects on production'"[327], because their only effects are to reduce production of the prohibited crops.[328] It follows, for the United States, that paragraph 6(b) should not address "negative" prohibitions on the production of certain crops, such as the United States' measures, given that they comply, inherently, with the fundamental requirement.[329] Brazil argues that if paragraph 6(b) is violated, this *ipso facto* violates the fundamental requirement of paragraph 1 of Annex 2 and further analysis is not required.[330]

333. We note that the first sentence of paragraph 1 of Annex 2 lays down a "fundamental requirement" for green box measures, such that they must have "no, or at most minimal, trade-distorting effects or effects on production". The second sentence of paragraph 1 provides that, "[a]ccordingly", green box measures must conform to the basic criteria stated in that sentence, "plus" the policy-specific criteria and conditions set out in the remaining paragraphs of Annex 2, including those in paragraph 6.[331]

334. As we have noted, the Panel found that the planting flexibility limitations in this case "significantly constrain" production decisions.[332] However one reads the "fundamental requirement" in paragraph 1 of Annex 2, given the factual findings of the Panel, the facts of this case do not present a situation in which the planting flexibility limitations demonstrably have "no, or at most minimal," trade-distorting effects or effects on production.

335. We find further support for our interpretation of paragraph 6(b) in the context provided by paragraph 11 of Annex 2, entitled "Structural adjustment assistance provided through investment aids". Several of the subparagraphs of paragraph 11 are phrased in similar terms to those of paragraph 6. Indeed, like paragraph 6(b), paragraph 11(b) requires that the "amount of ... payments ... shall not be related to ... the type or volume of production ... undertaken by the producer in any year after the base period." However, unlike paragraph 6(b), paragraph 11(b) ends with the phrase "other than as provided for under criterion (e) below". Criterion 11(e) specifically envisages that "payments shall not mandate or in any way designate the agricultural products to be produced by the recipients except to require them not to produce a particular product".

336. We note that the exception provided by paragraph 11(e) and the link to paragraph 11(e) in paragraph 11(b) explicitly *authorize* the type of "negative" requirements not to produce that the

[327] Paragraph 1 of Annex 2 to the *Agreement on Agriculture*.

[328] United States' appellant's submission, para. 36.

[329] See *ibid.*, paras. 32-35.

[330] Brazil's responses to questioning at the oral hearing.

[331] We note in this regard that the Panel's exercise of judicial economy regarding Brazil's claim that the United States measures at issue fail to conform with the "fundamental requirement" of paragraph 1 of Annex 2 has not been appealed. (See Panel Report, para. 7.412)

[332] *Ibid.*, para. 7.386.

United States argues is implicitly *permitted* by the terms of paragraph 6(b). In the light of the similarity of the language chosen in paragraphs 6(b) and 11(b), like the Panel, we attach significance to the fact that the drafters saw as necessary an explicit authorization of negative requirements not to produce under paragraph 11(b). In our view, this indicates that the ordinary meaning of the terms in paragraph 11(b) would otherwise exclude an interpretation allowing such negative requirements. The use of identical language in paragraphs 6(b) and 11(b), except for the reference in paragraph 11(b) to paragraph 11(e), suggests that the meaning of the terms in paragraph 6(b) must be the same as in paragraph 11(b). Accordingly, a comparison of these provisions confirms that the terms of paragraph 6(b) encompass both positive as well as negative connections between the amount of payments under a program and the type of production undertaken.

337. We note that the United States argues that the context in which paragraphs 11(b) and 6(b) appear is very different. The United States notes that paragraph 11 pertains to payments "to assist the financial or physical restructuring of a producer's operations"[333] and paragraph 6(e) imposes a constraint on the degree to which a government can interfere in the form that restructuring will take. As a requirement not to produce certain products could be understood to fall within the prohibition in paragraph 11(e) against "in any way" designating the products to be produced, it clarifies that negative requirements are permitted. The United States submits that, in the light of the broad prohibition in paragraph 11(e), "the requirement in paragraph 11(b) … could be understood to preclude conditioning payment on not producing certain products since this could be understood as in some way designating the products to be produced".[334] This required the explicit cross-reference to paragraph 11(e). According to the United States, because the same considerations do not apply in the case of paragraph 6(b), no specific authorization of partial prohibitions on production is required, as it remains implicit in the text of the provision.[335]

338. We are not persuaded by this argument. Like Brazil, we believe that a more compelling reason for the specific authorization of negative requirements not to produce a particular crop may be found in the fact that paragraph 11 addresses "structural adjustment", which may be achieved only by providing financial incentives to shift production away from certain products. In our view, the considerations submitted by the United States do not render the meaning of the terms used in paragraph 11(b) different from the meaning of the same terms as used in paragraph 6(b).

339. Finally, we note that the United States has also argued that the Panel's interpretation, with which we agree, would require a Member to continue to make decoupled income support payments, even if a producer's production is *illegal*, for example involving the production of opium poppy, unapproved biotech varieties or environmentally-damaging production.[336] According to the United States, this is a logical consequence of a finding that, to comply with paragraph 6(b) of Annex 2, a measure may not condition payments upon the non-production of certain products, while permitting production of others.

340. In our view, questions regarding the problem of illegal production contrast starkly with the situation addressed in the present case. It remains perfectly *legal* for a holder of upland cotton base acres to grow fruits, vegetables or wild rice in the United States. The consequence of growing such crops is simply the reduction or elimination of production flexibility contract or direct payments to the holders of upland cotton base acres. Our interpretation of paragraph 6(b) would not prevent a WTO Member from making illegal the production of certain crops. Nor would it prevent a Member from providing decoupled income support while at the same time making the production of certain crops

[333]Paragraph 11(a) of Annex 2 to the *Agreement on Agriculture*.

[334]United States' appellant's submission, paras. 45-47.

[335]*Ibid.*, para. 47.

[336]*Ibid.*, paras. 53-55 and footnote 45.

illegal. As Brazil states, there is nothing in the *Agreement on Agriculture* to suggest that the term "production" in paragraph 6 of Annex 2 refers to anything other than *lawful* production.[337] In addition, we observe that specific provisions of the *Agreement on Agriculture* recognize, and exempt from reduction commitments, domestic support programs that address the problem of production of illicit narcotic crops in developing countries[338] or payments under certain environmental programs.[339]

4. Conclusion

341. For all these reasons, we *uphold* the Panel's finding in paragraphs 7.388, 7.413, 7.414 and 8.1(b) of the Panel Report that conditioning production flexibility contract payments and direct payments on a producer's compliance with planting flexibility limitations regarding certain products, coupled with the flexibility to produce certain other products, means that the amount of payments under those measures is related to the type of production undertaken by a producer after the base period, within the meaning of paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*.

342. Accordingly, we also *uphold* the Panel's finding, in paragraphs 7.413 and 7.414 of the Panel Report, that production flexibility contract payments and direct payments are not "decoupled income support" within the meaning of paragraph 6, are not green box measures exempt from the reduction commitments by virtue of Annex 2 of the *Agreement on Agriculture*, and are not, therefore, sheltered from challenge by virtue of paragraph (a) of Article 13 of the *Agreement on Agriculture*. Rather, these measures are support covered by the chapeau to paragraph (b) of Article 13, and are to be taken into account in the analysis of that provision.

B. *Article 13(a) of the Agreement on Agriculture – Base Period Update*

343. The Panel indicated that it had "already found that [direct] payments fail to conform to the provisions of paragraph 6 of Annex 2 due to the planting flexibility limitations". For this reason, it indicated that it was "therefore unnecessary for the purposes of this dispute to make findings on their conformity with paragraph 6 due to the updating" of base acres.[340] Brazil conditionally appeals the Panel's exercise of judicial economy on the issue of whether the base period update under the direct payments program is consistent with paragraph 6(a) of Annex 2.[341] Brazil's appeal is conditional on the Appellate Body reversing the Panel's finding that direct payments, the legislative and regulatory provisions that establish and maintain the direct payments program, as well as payments under the production flexibility contract program, do not fall within the terms of paragraph (a) of Article 13 because they are not consistent with paragraph 6(b) of Annex 2.

344. Having upheld the Panel's finding under paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*, the condition upon which Brazil's appeal regarding the updating of base acres under paragraph 6(a) rests is not fulfilled. It is therefore unnecessary for us to address this issue further.

[337]Brazil's appellee's submission, para. 315.

[338]Article 6.2 of the *Agreement on Agriculture* exempts from domestic support reduction commitments that would otherwise be applicable "domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops".

[339]See paragraph 12 of Annex 2 to the *Agreement on Agriculture*.

[340]Panel Report, para. 7.393.

[341]Brazil's other appellant's submission, paras. 237 ff.

C. *Article 13(b) of the Agreement on Agriculture – Non-Green Box Domestic Support*

1. Introduction

345. Having rejected the United States' appeal of the Panel's finding that production flexibility contract payments under the FAIR Act of 1996 and direct payments under the FSRI Act of 2002 are not green box measures sheltered from challenge by the provisions of Article 13(a) of the *Agreement on Agriculture*, we now turn to consider the United States' appeal regarding the application of Article 13(b) of the *Agreement on Agriculture*.

346. Article 13 of the *Agreement on Agriculture* is entitled "Due Restraint" and applies during the implementation period.[342] Article 13(b) of the *Agreement on Agriculture* provides, in relevant part:

> [D]omestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member's Schedule, as well as domestic support within *de minimis* levels and in conformity with paragraph 2 of Article 6, shall be:
>
> ...
>
> (ii) exempt from actions based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the Subsidies Agreement, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year; ...

347. Subparagraph (ii) to Article 13(b) exempts non-green box domestic support measures described in the chapeau from actions based on Article XVI:1 of GATT 1994 and Articles 5 and 6 of the *SCM Agreement*. This exemption is, however, subject to a proviso and is thus made conditional upon a requirement that "such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year". The dispute in the present appeal relates to the interpretation and application of this proviso to certain United States domestic support measures.[343]

348. Before the Panel, the United States claimed that its non-green box domestic support measures did not "grant support to a specific commodity in excess of that decided during the 1992 marketing year" and thus were consistent with the proviso to subparagraph (ii) of Article 13(b) of the *Agreement on Agriculture*. Hence, they were entitled to the exemption from action provided by Article 13(b).[344]

349. The Panel rejected the United States' argument that its measures did not "grant support to a specific commodity in excess of that decided during the 1992 marketing year". The Panel calculated

[342]The "implementation period" during which Article 13 applies is defined in Article 1(f) of the *Agreement on Agriculture* as "the nine-year period commencing in 1995". "Year", for purposes of Article 1(f) "and in relation to the specific commitments of a Member" is defined in Article 1(i) and "refers to the calendar, financial or marketing year specified in the Schedule relating to that Member".

[343]Step 2 payments to domestic users; marketing loan program payments; production flexibility contract payments; market loss assistance payments; direct payments; counter-cyclical payments; crop insurance payments; and, cottonseed payments for the 2000 crop. (Panel Report, para. 7.337)

[344]The Panel noted that Brazil did not claim that the United States' domestic support measures do not comply with the conditions set out in the chapeau of Article 13(b). (Panel Report, paras. 7.415-7.416)

values of support that were "decided during the 1992 marketing year" (the "1992 benchmark") as well as values of support by which the measures at issue "grant[ed] support to a specific commodity"—namely, upland cotton—in each of the years 1999, 2000, 2001, and 2002 ("implementation period support"). The Panel tabulated support attributable to upland cotton under the relevant United States domestic support measures and concluded that the support granted in each relevant year of the implementation period exceeded the 1992 benchmark.[345] Accordingly, the Panel found that:

> Brazil has discharged its burden to show that the United States domestic support measures at issue grant support to a specific commodity in excess of that decided during the 1992 marketing year.[346]

350. After finding that evidence and arguments presented by the United States did not rebut Brazil's case[347], the Panel concluded:

> [i]n light of the above findings, ... that the [relevant] United States domestic support measures ... grant support to a specific commodity in excess of that decided during the 1992 marketing year and that, therefore, they are not exempt from actions based on paragraph 1 of Article XVI of the *GATT 1994* or Articles 5 and 6 of the *SCM Agreement*.[348]

2. Appeal by the United States

351. The United States appeals the Panel's finding that its relevant domestic support measures granted, during the implementation period, "support to a specific commodity in excess of that decided during the 1992 marketing year", and the consequential finding that these measures are therefore susceptible to challenge under the actionable subsidies provisions of Articles 5 and 6 of the *SCM Agreement* and Article XVI:1 of the GATT 1994.

352. The United States challenges, in particular, two elements of the Panel's reasoning. The United States first appeals the Panel's *interpretation* of the phrase "grant support to a specific commodity" in the proviso to Article 13(b)(ii), and, in particular, its finding that four types of payments made with respect to historical production of upland cotton—production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments—grant support to the specific commodity upland cotton, even though producers have flexibility under these programs to grow crops other than upland cotton or not to plant any crop at all. According to the United States, properly construed, the phrase "support to a specific commodity" refers to "product-specific support"[349], which would exclude payments under these "non-product-specific" base acre dependent measures.[350] It adds that, even if the Panel is correct in its interpretation that "support to a specific commodity" refers to all "non-green box support measures that clearly or explicitly define a

[345]*Ibid.*, paras. 7.596-7.597. The Panel indicated that the United States' implementation period support exceeded the 1992 benchmark regardless of whether, for certain price-based support measures, budgetary outlays or price gap methodology was used. (*Ibid.*, para. 7.597)

[346]*Ibid.*, para. 7.598.

[347]Panel Report, para. 7.607.

[348]*Ibid.*, para. 7.608.

[349]United States' appellant's submission, para. 93.

[350]*Ibid.*, para. 105.

commodity as one to which they bestow or confer support"[351], the Panel erred in the application of its test by allocating to upland cotton all payments to historic upland cotton base acres under these four programs, including those that went to planted commodities other than upland cotton.[352]

353. Secondly, the United States contests the Panel's use of budgetary outlay methodology to measure the value of support, for purposes of the comparison envisaged by Article 13(b)(ii), of two types of price-based payments: marketing loan program payments and deficiency payments.[353] In this regard, the United States argues that the Panel erred in reading the word "grant" in Article 13(b)(ii) as meaning something actually provided, and not in harmony with the term "decided".[354] The United States argues that this led the Panel erroneously to conclude that it could use a calculation methodology other than the price-gap methodology described in paragraph 10 of Annex 3 to the *Agreement on Agriculture* to measure the value of these price-based measures. According to the United States, only the price gap methodology can reflect the nature of the support "decided" under these programs because it filters out fluctuations in market prices; indeed, only the price gap methodology can measure those aspects of support that the government of a Member can control.[355]

354. The United States, having "corrected" the Panel's calculations for its alleged errors using its own methodologies, asserts that its domestic support measures at issue did not grant a level of product-specific support in any relevant year of the implementation period in excess of the 1992 benchmark.[356] On this basis, the United States argues that its domestic support measures are consistent with the proviso to Article 13(b)(ii) of the *Agreement on Agriculture* and are, therefore, exempt from challenge under the peace clause.[357]

355. Brazil argues that if the Appellate Body upholds the Panel's finding with respect to the interpretation of the phrase "support to a specific commodity" and thereby finds that production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments cannot be excluded from the calculation of support under Article 13(b)(ii), then, regardless of the methodology used to calculate the value of marketing loan program payments and deficiency payments, the United States measures would still exceed the 1992 benchmark.[358] Brazil contends that the Panel was correct to find that "support to a specific commodity" does not mean "product-specific support", or support that is directed specifically at only one product, but may capture all "non-green box measures, that clearly or explicitly define a commodity as one to which they bestow or confer support".[359]

356. Brazil also contends that the Panel was correct to use budgetary outlays for its analysis of the United States' price-based measures. Brazil observes that paragraph 10 of Annex 3 of the *Agreement on Agriculture* permits, in principle, the use of *either* budgetary outlays or the price gap

[351]Panel Report, para. 7.494(i).

[352]United States' appellant's submission, paras. 101-107.

[353]Marketing loan program payments in respect of both the 1992 benchmark and the implementation period support, and deficiency payments in respect of the 1992 benchmark only. (United States' appellant's submission, para. 72)

[354]*Ibid.*, paras. 64-68. The United States reiterates this argument in the section of its appellant's submission dealing with the interpretation of the phrase "support to a specific commodity": see *ibid.*, paras. 114-116.

[355]*Ibid.*, paras. 69-75.

[356]*Ibid.*, paras. 120-122.

[357]*Ibid.*, paras. 122-124.

[358]Brazil's appellee's submission, para. 330.

[359]Brazil's appellee's submission, paras. 369 and 385 (quoting Panel Report, para. 7.481).

methodology for payments based on price gaps.[360] There is thus no textual basis to say that only price gaps may be used to measure these types of payments. Brazil also submits that the Panel correctly found that the term "grant" refers to what a measure actually provides[361], and therefore contests the United States' claim that factors beyond the control of government, such as market price fluctuations, must be filtered out of the analysis envisaged by the proviso to Article 13(b)(ii) through use of the price gap methodology.[362] Brazil also points out that the United States notified the level of support conferred by the marketing loan program for purposes of its base level Aggregate Measurement of Support ("AMS"), as well as in subsequent AMS notifications, through use of a budgetary outlay methodology.[363] According to Brazil, WTO Members should be able to rely upon AMS notifications to determine whether the notifying Member was entitled, during the implementation period, to the protection conferred by the peace clause.

357. Finally, Brazil illustrates that, even using the price gap methodology to calculate the level of support under the deficiency payment and marketing loan payment programs, total United States support still exceeded the 1992 benchmark in each relevant year of the implementation period.[364]

3. Analysis

358. The United States appeals the Panel's finding that the United States' non-green box domestic support measures granted "support to a specific commodity", namely, upland cotton, during the implementation period, "in excess of that decided during the 1992 marketing year", and the consequential finding that this support was therefore not sheltered from challenge under Article XVI:1 of the GATT 1994 or Articles 5 and 6 of the *SCM Agreement.* The United States' appeal in this regard has two dimensions. First, the United States challenges the Panel's *interpretation* of the phrase "support to a specific commodity" used in the proviso to Article 13(b)(ii) and its *application* to four of the domestic support measures. These measures are production flexibility contract payments, market loss assistance payments, direct payments, and counter-cyclical payments.[365] The question whether or not these four measures grant "support to a specific commodity" is at the heart of the difference between the participants in regard to the comparison contemplated by Article 13(b) of the *Agreement on Agriculture*.[366] Secondly, the United States takes issue with the Panel's adoption of a budgetary outlay *methodology* to measure the value of two price-based support measures for the comparison under the proviso to Article 13(b)(ii).

(a) Interpretation of "Support to Specific Commodity"

359. We address first the meaning of the phrase "support to a specific commodity" in Article 13(b)(ii). We then discuss the application of this interpretation to four domestic support measures: production flexibility contract payments[367], market loss assistance payments[368], direct

[360]*Ibid.*, para. 350.

[361]*Ibid.*, paras. 344 ff.

[362]*Ibid.*, paras. 346 and 351.

[363]*Ibid.*, paras. 352 ff.

[364]*Ibid.*, paras. 442-445.

[365]The United States characterizes these measures as "decoupled" from production. (United States' appellant's submission, para. 104)

[366]On the basis that these four measures are not "support to a specific commodity", the United States has assigned zero values to them in its calculations under the proviso to Article 13(b)(ii). (*Ibid.*, para. 120)

[367]We describe briefly production flexibility contract payments *supra*, para. 311.

payments[369] and counter-cyclical payments[370]. These four measures did not exist in 1992. Therefore, this part of the United States' appeal affects the calculation of *only* the support granted during the implementation period.[371]

360. We note that payments in respect of each of these measures are calculated by reference to "base acres" upon which certain commodities (including upland cotton) were grown in a base period, but upon which a producer currently may or may not grow upland cotton. We refer to these four types of payment in this section as the "base acre dependent payments".

361. We turn to our analysis of the phrase "such measures ... grant[ing] support to a specific commodity" in Article 13(b)(ii). The Panel found and the participants do not dispute that the relevant United States measures grant "support"[372]; similarly, the Panel found[373] and the participants agree[374] that upland cotton is a "commodity" in the sense of that provision.

362. The key element, however, is the significance of the qualifying word "specific" in this phrase. The Panel described the ordinary meaning of the term "specific" as "clearly or explicitly defined; precise; exact; definite"[375] and as "specially or peculiarly pertaining to a particular thing or person, or

[368]Market loss assistance payments were provided to recipients of production flexibility contract payments through *ad hoc* legislation as additional assistance to producers to make up for losses caused by low commodity prices. Market loss assistance payments were proportionate to the production flexibility contract payments made to the recipient, and the amount paid depended on the amount allocated to market loss assistance payments for the relevant crop year. Accordingly, eligibility criteria for the market loss assistance payments were, essentially, the same as for the production flexibility contract payments. (See Panel Report, paras. 7.216-7.217)

[369]We describe briefly direct payments *supra*, para. 312.

[370]Counter-cyclical payments supplement, for covered commodities, direct payments and any payments made under the marketing loan program. The eligibility requirements and planting flexibility requirements are the same as under the direct payment program, and they are also dependent on base acres. Counter-cyclical payments supplement producer incomes by filling the gap between, on the one hand, the market price and payments under the marketing loan program and the direct payments program and, on the other hand, a target price established for upland cotton at 72.4 cents per pound. (See Panel Report, paras. 7.223-7.226)

[371]We observe that the United States does not dispute that other payments, namely those under the marketing loan program (for a description of marketing loan program payments, see Panel Report, paras. 7.204-7.208), Step 2 payments (for a description of Step 2 payments, see Panel Report, paras. 7.209-7.211), deficiency payments (for a description of deficiency payments, see Panel Report, footnote 294 to para. 7.213), and cottonseed payments (for a description of cottonseed payments, see Panel Report, paras. 7.233-7.235), result in "support to a specific commodity". (United States' appellant's submission, para. 120 and Table 2) Nor does the United States appeal the Panel's finding that the crop insurance program (for a description of the crop insurance program, see Panel Report, paras. 7.227-7.232) results in "support to a specific commodity", although it adds that it disagrees with the conclusion of the Panel. (See United States' appellant's submission, footnote 134)

[372]See Panel Report, paras. 7.518-7.520 and, for example, United States' appellant's submission, para 105. We recognize that the United States qualifies this by emphasizing that, in its view, they grant "non-product-specific" support.

[373]Panel Report, paras. 7.480 and 7.518-7.520.

[374]See United States' appellant's submission, paras. 85 and 104; and Brazil's appellee's submission, para. 385.

[375]Panel Report, para. 7.481 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, p. 2972).

a class of these; peculiar (*to*)".[376] In our view, the term "specific" in the phrase "support to a specific commodity" means the "commodity" must be clearly identifiable. The use of term "to" connecting "support" with "a specific commodity" means that support must "specially pertain" to a particular commodity in the sense of being conferred on that commodity. In addition, the terms "such measures ... grant" indicates that a discernible link must exist between "such measures" and the particular commodity to which support is granted. Thus, it is not sufficient that a commodity happens to benefit from support, or that support ends up flowing to that commodity by mere coincidence. Rather, the phrase "such measures" granting "support to a specific commodity" implies a discernible link between the support-conferring measure and the particular commodity to which support is granted.

363. Therefore, we agree with the Panel insofar as it found that the ordinary meaning of the phrase "such measures ... grant[ing] support to a specific commodity" *includes* "non-green box measures that clearly or explicitly define a commodity as one to which they bestow or confer support".[377] This is because the Panel's test requires that a commodity be specified in the measure, and that the support be conferred on that commodity. We believe, however, that the terms of this definition do not exhaust the scope of measures that may grant "support to a specific commodity". We note in this regard that the Panel looked, in applying its test, to factors such as eligibility criteria and payment rates, as well as the relationship between payments and current market prices of the commodity in question.[378] In our view, the Panel was correct to consider such matters, as the requisite link between a measure granting support and a specific commodity may be discerned not just from an explicit specification of the commodity in the text of a measure, as the Panel's test—on its face—seems to imply, but also from an analysis of factors such as the characteristics, structure or design of that measure.[379]

364. Moving to the context of the proviso to Article 13(b)(ii), we note that the United States argues that "support to a specific commodity" should be interpreted as meaning "product-specific support". The United States emphasizes the similarities between the phrase "support to a specific commodity" in Article 13(b)(ii) and two phrases in Article 1 of the *Agreement on Agriculture* that refer to product-specific support: "support for basic agricultural products"[380] and "support ... provided for an agricultural product in favour of the producers of the basic agricultural product".[381] The United States argues that the meaning of all of these phrases must be the same.

365. These phrases do provide important context for the interpretation of Article 13(b)(ii). In our view, "support to a specific commodity" certainly *includes* "product-specific" support. However, like the Panel, we do not believe that the scope of the phrase "support to a specific commodity" in the proviso to Article 13(b)(ii) is exhausted by taking into account the category of product-specific support alone.

[376]*Ibid.*, para. 7.482 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, p. 2972). The Panel found that this second definition was more appropriate in another context, but we believe that both of these definitions shed light upon the meaning of "specific" in "support to a specific commodity".

[377]Panel Report, para. 7.494(i).

[378]*Ibid.*, paras. 7.510-7.517.

[379]Although we observe that the Panel correctly identified the elements that we believe are inherent in the term "support to a specific commodity", the Panel's articulation of the test was not absolutely clear. We also note that the Panel appears to have misapplied the test for "support to a specific commodity" by attributing to upland cotton the total budgetary outlays with respect to upland cotton base acres. See *infra*, para. 375.

[380]This phrase is found in Article 1(h) of the *Agreement on Agriculture*. (United States' appellant's submission, para. 88)

[381]This phrase is found in Article 1(a) of the *Agreement on Agriculture*. (United States' appellant's submission, para. 88)

366. This is for at least two reasons. First, we note that the drafters chose *not* to use phrases such as support "provided for an agricultural product in favour of the producers of the basic agricultural product" or "support for basic agricultural products" in Article 13(b)(ii), but rather chose the distinct phrase "support to a specific commodity". This choice of different words by the drafters gives a preliminary indication that they may have intended to convey different meanings.[382]

367. Secondly, and more importantly, the United States' argument fails to reckon with the fact that the scope of domestic support measures that may grant "support to a specific commodity" under Article 13(b)(ii) is broader than just "product-specific support" in the sense of Article 1 and Annex 3. The proviso to Article 13(b)(ii) mentions only the term "such measures" granting support; but the meaning of this term can be clarified by reference to the chapeau of Article 13(b) because, as the Panel noted, "[t]he chapeau of paragraph (b) and subparagraph (ii) form part of a single sentence."[383] The chapeau identifies the categories of support measures covered by that provision. These are:

> ... domestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member's Schedule, as well as domestic support within *de minimis* levels and in conformity with paragraph 2 of Article 6 ...

368. Measures covered by Article 6 include both product-specific and non-product-specific amber box support subject to reduction commitments. In addition, measures covered by the chapeau *also* include product-specific and non-product-specific support within *de minimis* levels. They further include blue box support provided in accordance with Article 6.5, as well as development box support, provided according to the provisions of Article 6.2, for both of which the distinction between product-specific and non-product specific support for purposes of the AMS calculation has little practical relevance.[384] Like the Panel, we believe that the use of the term "such measures" in the proviso to Article 13(b)(ii) indicates that all such measures identified in the chapeau of Article 13(b) may qualify as granting "support to a specific commodity" and are eligible to be included in the analysis. By contrast, under the United States' argument, domestic support measures listed in the chapeau (with the exception of product-specific amber box support) could not be "support to a specific commodity" even if they confer support on a specific commodity and there is a discernible link between the measure and that commodity.

369. In addition, the United States supports its position by reference to the obligations in Articles 3 and 6 of the *Agreement on Agriculture*, which lay down reduction commitments for total AMS comprising both product-specific and non-product-specific support, but provide no product-specific caps. In the United States' view, because the reduction commitments do not cap product-specific support, the proviso in Article 13(b)(ii) disciplines the degree to which a Member that is in conformity with its reduction commitments can shift support between particular commodities.[385]

370. Indeed, as the United States correctly points out, Article 13(b)(ii) serves to create a discipline upon Members that seek the shelter of the peace clause during the implementation period. We are not

[382]We note in this regard that, for example, Article 6.4(a)(i) of the *Agreement on Agriculture* mentions "product-specific domestic support", whereas Article 13 does not mention or cross-refer to it.

[383]Panel Report, para. 7.470.

[384]The only type of domestic support clearly excluded from support covered by Article 13(b) is green box support, which does not need to conform with the provisions of Article 6, but rather must conform with the provisions of Annex 2. Green box support, however, qualifies for the exemption from actions provided by Article 13(a).

[385]United States' appellant's submission, para. 98.

convinced, however, that this discipline is limited to "product-specific support" as defined in Article 1 of the *Agreement on Agriculture*. Rather, it extends to all measures that grant "support to a specific commodity", in the sense that the support is conferred on a specific commodity, and there is a discernible link between the measure and the specific commodity concerned.

(b) Application of Article 13(b)(ii) to the Measures at Issue

371. The proviso to Article 13(b)(ii) requires an assessment of whether the relevant United States non-green box domestic support measures grant, during the implementation period, "support to a specific commodity in excess of that decided during the 1992 marketing year".

372. As we have explained above, the term "such measures ... grant support to a specific commodity" comprises two elements: first, a non-green box measure actually confers support on the specific commodity in question; and second, there is a discernible link between the measure and the commodity, such that the measure is directed at supporting that commodity. Such a discernible link may be evident where a measure explicitly defines a specific commodity as one to which it bestows support. Such a link might also be ascertained, as a matter of fact, from the characteristics, structure or design of the measure under examination. Conversely, support that does not actually flow to a commodity or support that flows to a commodity by coincidence rather than by the inherent design of the measure cannot be regarded as falling within the ambit of the term "support to a specific commodity".

373. With these considerations in mind, we turn now to the application of this interpretation to four measures that the United States claims do not grant "support to a specific commodity": the *production flexibility contract payments*, *market loss assistance payments*, *direct payments* and *counter-cyclical payments*. We refer to these measures as "base acre dependent payments" because each of these measures provides payments based on a calculation in which a payment rate, specific to upland cotton, is multiplied by an ascertained quantity of upland cotton, which, in turn, is a product of a farm's historical planting of upland cotton (its "upland cotton base acres") and its historical yield of upland cotton per acre.[386] For purposes of the Article 13(b)(ii) comparison, the Panel outlined three alternative methodologies, and therefore three different calculations, in respect of these measures in its Article 13(b)(ii) analysis.[387] We also note that in calculating support granted to upland cotton the United States has ascribed a zero value to the four aforementioned domestic support measures. For purposes of these proceedings, we do not find it necessary to go beyond the Panel record, and thus limit our consideration to these four alternative calculations.

374. The Panel ultimately based its calculations in respect of the base acre dependent payments on the *total* budgetary outlays with respect to upland cotton base acres under each program.[388] The United States contends that this calculation methodology led the Panel to include, as support to upland cotton, payments to producers who did not plant upland cotton.[389] For the United States, there is "[no] question that payments cannot be deemed to grant support to a crop the recipient does not produce".[390] In addition, the United States contends that the Panel erred in finding that the base acre dependent

[386]We note that each of these programs applied not just to upland cotton, but also to other eligible commodities. We also note that market loss assistance payments did not involve a separate calculation involving these criteria. Rather, market loss assistance payments served to supplement production flexibility contract payments and were made proportionate to a producer's production flexibility contract payments. (Panel Report, para. 7.217)

[387]See Panel Report, para. 7.596 and "Attachment to Section VII:D" (Panel Report, paras. 7.634-7.647).

[388]*Ibid.*, paras. 7.580-7.583.

[389]United States' appellant's submission, para. 106.

[390]*Ibid.*

programs "clearly and explicitly specif[y] upland cotton ... as a commodity to which they grant support".[391] In the view of the United States, these measures do no such thing. The United States emphasizes that producers receive payments under the base acre dependent programs irrespective of whether and how much upland cotton they plant, and regardless of whether they plant anything at all.[392] For the United States, the "Panel's error stems largely from its assertion that merely identifying *historical* criteria relating to a commodity according to which payments will be made would render such payments 'support to a specific commodity'."[393]

375. We agree with the United States that payments made with respect to historical upland cotton base acres to commodities other than upland cotton or to producers who produced no commodities at all cannot be deemed to be support granted to upland cotton for purposes of the Article 13(b)(ii) comparison. The Article 13(b)(ii) assessment must be limited to support conferred on planted upland cotton; support flowing to other commodities that were planted, or support that was given where no commodities were produced must of course be removed from the assessment. We reject, therefore, the Panel's calculation methodology to the extent that it failed to limit the Article 13(b)(ii) calculation to payments with respect to upland cotton base acres corresponding to physical acres actually planted with upland cotton.

376. We observe, however, that the Panel acknowledged that a producer with upland cotton base acres may plant any crop other than the excluded fruits, vegetables, and wild rice, but it found that there was "a strongly positive relationship between those recipients who hold upland cotton base acres and those who continue to plant upland cotton, despite their entitlement to plant other crops".[394] The Panel further observed that data provided by the United States showed that "a very large proportion of farms with upland cotton base acres continue to plant upland cotton in the year of payment"[395], and that "the overwhelming majority of farms enrolled in the programmes which plant upland cotton also hold upland cotton base".[396]

377. We note in this regard that the Panel included, in "Attachment to Section VII:D" to its Report, and described as "appropriate"[397], an alternative calculation using certain methodologies submitted by Brazil for allocating support to acres actually planted with upland cotton under the base acre dependent programs. The first part of this calculation, the "cotton to cotton" methodology, allocated, for each *planted* acre of upland cotton, payments associated with one upland cotton base acre. The second part ("Brazil's methodology") took the results of the "cotton to cotton" methodology and then added to it payments made with respect to non-upland cotton base acres corresponding to physical acres that were actually planted with upland cotton.[398] The "cotton to cotton" methodology limits the Article 13(b)(ii) calculation to payments with respect to cotton base acres corresponding to physical acres that were actually planted with upland cotton.

[391] *Ibid.*, para. 103 (quoting Panel Report, para. 7.518).

[392] United States' appellant's submission, para. 104.

[393] *Ibid.*, para. 105. (original emphasis) The United States points out that "base acres" are not "physical acres" but hypothetical acres for calculation of decoupled payments to producers, who are free to produce whatever crop they choose or to produce no crop at all. (United States' responses to questions during the oral hearing)

[394] Panel Report, para. 7.637.

[395] *Ibid.*, para. 7.636. (footnote omitted)

[396] *Ibid.*, para. 7.636.

[397] *Ibid.*, para. 7.646.

[398] See *Ibid.*, paras. 7.640-7.642.

378. We turn next to the United States' contention that the mere fact that a measure is based on *historical* production of upland cotton is not a sufficient basis for a finding that the measure grants at present "support to [the] specific commodity" upland cotton. We agree that none of the base acre dependent programs expressly ties support to continued production of upland cotton. However, the absence of an express reference in the legislation to continued production of upland cotton does not mean that the payments do not grant support to upland cotton. This is because a link between the four measures at issue and the continued production of upland cotton is discernible from the characteristics, structure and operation of those measures.

379. We note in this regard the reasoning of the Panel:

> Where, for example, these measures specify commodities in the eligibility criteria and payment rates, they constitute support to the commodities specified in that way. This applies *a fortiori* where the payments are determined according to, or are related to, current market prices of the specific commodities.[399]

On this basis, the Panel highlighted several factors revealing a close nexus between payments with respect to historic upland cotton base acres under the production flexibility contract, market loss assistance, direct payment and counter-cyclical payment measures, and the continued production of upland cotton on an equivalent number of physical acres at present. The Panel noted that payments under each program were based on "very specific eligibility criteria", primarily the production of upland cotton in a historical base period.[400] The Panel also observed that, in the case of each of the measures, a particular payment rate was specified for upland cotton.[401] Yield calculations were also specific to upland cotton and related to historical upland cotton yields per acre.[402] In the case of market loss assistance payments, payments were specifically designed to compensate for low prices for upland cotton.[403] In the case of counter-cyclical payments, the payment rate for upland cotton is directly linked to the market price of upland cotton in the year of payment.[404] In our view, these characteristics and operational factors of the measures in question demonstrate a link between payments made with respect to historic upland cotton base acres and the continued production of upland cotton.

380. We underline that these Panel findings do not pertain to *all* payments to *current* producers of upland cotton, but rather are limited to payments to producers with respect to historic *upland cotton* base acres.[405] Indeed, we see little in the Panel's finding or on the record that would allow us to discern a link between the support-conferring measures with respect to non-cotton historical base acres and current production of upland cotton. We do not, therefore, accept the methodology submitted by Brazil that included, in the Article 13(b)(ii) calculation, payments with respect to both cotton and non-cotton base acres flowing to current production of upland cotton. We believe that only the "cotton to cotton" methodology, included by the Panel in "Attachment to Section VII:D" to its

[399] Panel Report, para. 7.484.

[400] *Ibid.*, paras. 7.513-7.516.

[401] *Ibid.*, para. 7.635.

[402] See *ibid.*, paras. 7.513-7.516.

[403] *Ibid.*, para. 7.515.

[404] *Ibid.*, para. 7.516.

[405] See *supra*, footnote 184.

Report as an "appropriate"[406] alternative calculation, sufficiently demonstrates a discernible link between payments under base acre dependent measures (related to upland cotton) and upland cotton.

381. Finally, we address the United States' argument that the calculation methodology under Article 13(b)(ii) must be based on only those factors that the government of a Member can control, excluding, for example, producer decisions regarding what crops to grow within the scope of production flexibility allowed by the measures.[407] In advancing this contention, the United States relies upon the following statement of the Panel:

> [If] the proviso [to Article 13(b)(ii)] focused on where support was spent due to reasons beyond the control of the government, such as producer decisions on what to produce within a programme, it would introduce a major element of unpredictability into Article 13, and render it extremely difficult to ensure compliance.[408]

382. The United States finds support for this view in the terms "grant" and "decided" in Article 13(b)(ii), and claims that "the focus of the Peace Clause comparison is on the support a Member decides".[409] We note that the verbs "grant" and "decided" have distinct meanings. We agree with the observation of the Panel that "'[d]ecided' refers to what the government determines, but 'grant' refers to what its measures provide."[410] In Article 13(b)(ii), each of these words has been chosen to govern one side of the comparison required by that proviso. In the light of the distinct meanings of these words, and the distinct roles they play in the context of Article 13(b)(ii), we reject the idea that the word "grant", which is applicable to implementation period support, must be read to mean the same thing as "decided", which is applicable to the 1992 benchmark level of support.

383. Moreover, we do not accept that unpredictability of producer decisions under planting flexibility rules, *per se*, could modify the specific requirements set out in the proviso to Article 13(b)(ii). What is relevant for the comparison is the support that the measure actually grants during the implementation period. Indeed, we agree with Brazil that a certain degree of unpredictability in the volume of the payments flowing to particular commodities is inherent in many of the support measures disciplined by the *Agreement on Agriculture*, including measures granting support to a specific commodity.[411] The existence of such unpredictability cannot be a ground to alter the basis of comparison under the proviso to Article 13(b)(ii) from what is actually "grant[ed]" in the implementation period to what is only "decided".

384. For the reasons stated above, we conclude that payments with respect to upland cotton base acres to producers currently growing upland cotton under the production flexibility contract, market loss assistance, direct payment and counter-cyclical payment measures, calculated in accordance with

[406]Panel Report, para. 7.646.

[407]United States appellant's submission, paras. 64-67 and 114-117.

[408]Panel Report, para. 7.487.

[409]United States appellant's submission, para. 66.

[410]Panel Report, para. 7.476.

[411]Thus, in the case of measures that compensate for price fluctuations, unless a limit is set on total payments, a government has little control over the eventual amount of payments. In addition, we recall that the export subsidies at issue in *US – FSC* took the form of a foregoing of tax revenue, with the precise amount of the revenue foregone, and the nature of the specific products that it went to support, being dependent upon the actions of private corporations claiming the exemption. In that case, therefore, it could also be said that whether the United States would exceed product-specific export subsidy commitments would also depend on private producers' decisions to claim tax exemptions.

the "cotton to cotton" methodology, are support granted to the specific commodity upland cotton in the sense of Article 13(b)(ii) of the *Agreement on Agriculture*.[412]

(c) Methodology for Calculating the Value of Price-Based Payments

385. The United States' appeal regarding the Panel's decision to use the budgetary outlay methodology and not the price gap methodology described in paragraph 10 of Annex 3 to the *Agreement on Agriculture* for certain price-based payments concerns calculation of the amounts of two types of payments: (i) payments under the *marketing loan program*, which are relevant to the calculation of both the 1992 benchmark level of support and support during the implementation period; and (ii) *deficiency payments*, made in accordance with the FACT Act of 1990, which were replaced by production flexibility contract payments under the FAIR Act of 1996, and which are therefore relevant only to the calculation of the 1992 benchmark level of support.[413]

386. Payments to upland cotton under the marketing loan program could take one of several forms. In each case, however, gains to producers under this program accrued on the basis of a gap between a reference price tied to the market price of upland cotton, known as the "adjusted world price", and the "loan rate" fixed, from time to time, for the marketing loan program.[414] Deficiency payments for upland cotton were based on the gap between either the loan rate under the marketing loan program, or the national average market price for upland cotton (whichever was higher) and a target price of 72.9 cents per pound of upland cotton. In the event that the loan rate or market price fell below the target price, deficiency payments filled the deficit.[415]

387. The United States claims that both of these price-based measures represent "non-exempt direct payments ... dependent on a price gap", the value of which should be calculated by reference to the price gap methodology described in paragraph 10 of Annex 3 to the *Agreement on Agriculture*.[416]

388. In addressing this issue, we—like the Panel—note that Article 13(b)(ii) gives no specific guidance regarding *how* the "support" that measures granted in the implementation period or that was decided during the 1992 marketing year should be calculated. The Panel therefore turned to the broader context of the *Agreement on Agriculture* and chose to "apply the principles of AMS methodology" in accordance with Annex 3 of the *Agreement on Agriculture*, with certain modifications.[417] We observe that, on appeal, neither of the participants, nor indeed any of the third participants that addressed this issue, suggested that the Panel erred in seeking guidance for its calculations in the principles set out in Annex 3.

[412]For the Panel's findings on the value of production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments using the "cotton to cotton" methodology see Panel Report, para. 7.641.

[413]United States' appellant's submission, para. 72; Panel Report, para. 7.213. We observe that the United States' arguments relating to the use of the price gap methodology to measure marketing loan program payments and deficiency payments extend only to the analysis required under Article 13(b)(ii) of the *Agreement on Agriculture*; the United States does not argue that a price gap calculation is required in the context of an analysis of significant price suppression under Article 6.3(c) of the *SCM Agreement*.

[414]For a description of payments under the marketing loan program, see Panel Report, paras. 7.204-7.208.

[415]For a description of deficiency payments, see Panel Report, footnote 294 to para. 7.213.

[416]United States' appellant's submission, paras. 71-73 (quoting paragraph 10 of Annex 3 to the *Agreement on Agriculture*).

[417]Panel Report, para. 7.552.

389. Against this background, we observe that paragraph 10 of Annex 3 provides that "non-exempt direct payments ... dependent on a price gap" may be measured using either price gap methodology or budgetary outlay methodology.[418] The Panel chose to rely upon actual budgetary outlays[419], but included in its Report findings regarding the value of support in each relevant year calculated according to price gap methodology as well.[420]

390. As we explain in the next section, our conclusion that the United States granted, during the relevant years of the implementation period, "support to a specific commodity", namely, upland cotton, "in excess of that decided during the 1992 marketing year" holds irrespective of whether the Panel's budgetary outlay calculations or its price gap calculations are used to attribute values to marketing loan program payments and deficiency payments. Therefore, it is unnecessary for us to decide here which methodology must be used for purposes of the comparison envisaged by Article 13(b)(ii) with respect to these two types of payment.[421]

(d) Conclusion Regarding the Application of Article 13(b)(ii)

391. We recall, once again, that the proviso to Article 13(b)(ii) of the *Agreement on Agriculture* sets forth that, during the implementation period in which Article 13 applies, non-green box domestic support measures must not "grant support to a specific commodity in excess of that decided during the 1992 marketing year", if such measures are to enjoy exemption from actions "based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the Subsidies Agreement".[422]

392. In our review above, we have concluded that, for purposes of the comparison envisaged by Article 13(b)(ii), the values of the four measures, namely, production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments in the years 1999, 2000, 2001, and 2002 are properly determined by using the "cotton to cotton" methodology, and we have therefore modified the Panel's findings in this regard. We further note that the United States has not appealed the Panel's findings regarding the values attributable to three further support measures, namely, Step 2 payments to domestic users, crop insurance and cottonseed payments.[423]

393. Adding, to the values of the seven measures mentioned above, the values for deficiency payments and marketing loan program payments calculated using *either* budgetary outlays[424] *or* price gap methodology[425], we conclude that the United States' domestic support measures in question granted "support to a specific commodity", namely, upland cotton, that was "in excess of that decided during the 1992 marketing year" in each relevant year of the implementation period.

394. It follows that the condition set out in the proviso to Article 13(b)(ii) of the *Agreement on Agriculture* has not been met by the United States. We *uphold*, therefore, the Panel finding, in paragraph 7.608 of its Report, that the United States' domestic support measures challenged by Brazil are not entitled to the exemption provided by the peace clause from actions under Article XVI:1 of the GATT 1994 and Articles 5 and 6 of the *SCM Agreement*.

VI. Serious Prejudice

A. *Significant Price Suppression under Article 6.3(c) of the SCM Agreement*

1. Introduction

395. The United States appeals the Panel's finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, that the effect of marketing loan program payments, Step 2 payments, market loss assistance payments, and counter-cyclical payments (the "price-contingent subsidies") is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement* constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*. The United States raises several objections to the Panel's analysis leading to this finding. The United States also asks us to find that the Panel failed to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind this finding, as required by Article 12.7 of the DSU. Brazil, for its part, raises a preliminary issue under Article 11 of the DSU.

396. In this section of this Report, we begin our analysis by addressing the preliminary argument of Brazil regarding Article 11 of the DSU. We then turn to the various errors that the United States alleges that the Panel made in making its finding of significant price suppression under Article 6.3(c) of the *SCM Agreement*. In doing so, we examine the United States' objections to the "market" and "price" that the Panel examined in its analysis of the price-contingent subsidies pursuant to Article 6.3(c). We then consider the Panel's order of analysis under Article 6.3(c). Next, we assess the other alleged errors in the Panel's reasoning leading to its finding that the effect of the price-contingent subsidies is significant price suppression. These include the Panel's alleged failure to quantify the amount of the price-contingent subsidies benefiting upland cotton or to allocate the effect of the subsidies to the appropriate period of time. We then consider the implications of this appeal for the Panel's finding regarding serious prejudice under Article 5(c) of the *SCM Agreement*. Finally, we address the United States' claim that the Panel failed to comply with the requirements of Article 12.7 of the DSU.

[418]Paragraph 10 of Annex 3 to the *Agreement on Agriculture* sets forth:

> Non-exempt direct payments: non-exempt direct payments which are dependent on a price gap shall be calculated either using the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays.

[419]See, for example, Panel Report, para. 7.596. We reproduce the Panel's findings with respect to the values attributable to deficiency payments and payments under the marketing loan program using budgetary outlays in Table 1 of Annex 2.

[420]See Panel Report, para. 7.564 and footnote 727 to para. 7.565. We reproduce the Panel's findings with respect to the values attributable to deficiency payments and payments under the marketing loan program using price gap methodology in each relevant year in Table 2 of Annex 2.

[421]At the oral hearing, the United States confirmed that it may become unnecessary to rule on its appeal regarding calculation methodology, should the Panel's conclusions with respect to the phrase "support to a specific commodity" in Article 13(b)(ii) be upheld by the Appellate Body. (United States' response to questioning at the oral hearing)

[422]We note at this point that we agree with the Panel that:

> There is no requirement to quantify the excess, but the decisive question is whether there is any excess. Thus, it would not be strictly necessary ... to make a precise calculation of the amount of the excess if it is clear that, on the basis of the proper evidentiary standard, there is an excess of some degree.

(Panel Report, para. 7.419)

We also note, however, that fairly detailed calculations regarding the values attributable to United States implementation period support is available to us in these proceedings.

[423]For Panel findings on the value of support under these programs, see Panel Report, para. 7.596. See also Tables 1 and 2 of Annex 2.

[424]See Table 1 of Annex 2.

[425]See Table 2 of Annex 2.

2. Objective Assessment under Article 11 of the DSU

397. Brazil argues that many of the United States' arguments, particularly those concerning serious prejudice, involve allegations that the Panel failed to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case" pursuant to Article 11 of the DSU.[426] Brazil requests us to dismiss the United States' arguments that Brazil lists in Annex A to its appellee's submission, on the basis that the United States has not made a proper claim of error under Article 11 of the DSU.[427]

398. In its opening statement delivered at the oral hearing, the United States confirmed that it has not made an Article 11 claim in this appeal. Rather, the United States claims that the Panel erred in its interpretation of Article 6.3(c) of the *SCM Agreement* and in applying this interpretation to the facts in this dispute. The United States also requests us not to dismiss certain of its arguments as requested by Brazil. Under these circumstances, there is no need for us to rule that the United States makes no Article 11 claim. We also refrain from ruling on whether the Panel complied with Article 11 of the DSU. Moreover, we decline to dismiss the United States' arguments that Brazil lists in Annex A to its appellee's submission on the basis that an Article 11 claim was not properly set out by the United States.

399. We are nevertheless mindful of the scope of appellate review with respect to legal and factual matters. Pursuant to Article 17.6 of the DSU, appeals are "limited to issues of law covered in the panel report and legal interpretations developed by the panel". To the extent that the United States' arguments concern the Panel's appreciation and weighing of the evidence, we note from the outset that the Appellate Body will not interfere lightly with the Panel's discretion "as the trier of facts".[428] At the same time, the Appellate Body has previously pointed out that the "consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is ... a legal characterization issue".[429] Whether the Panel properly interpreted the requirements of Article 6.3(c) of the *SCM Agreement* and properly applied that interpretation to the facts in this case is a legal question. This question is different from whether the Panel made "an objective assessment of the matter before it, including an objective assessment of the facts of the case", in accordance with Article 11 of the DSU.[430] Therefore, the Panel's application of the legal requirements of Article 6.3(c) of the *SCM Agreement* to the facts of this case falls within the scope of our review in this appeal, despite the fact that the United States does not claim that the Panel erred under Article 11 of the DSU.

3. Relevant Market under Article 6.3(c) of the *SCM Agreement*

400. Turning to the question of the relevant "market", we observe that Article 6.3(c) of the *SCM Agreement* addresses the situation where "the effect of the subsidy is ... significant price suppression ... in the same *market*". (emphasis added) As the Panel suggested[431], and the parties agree[432], it is up to the complaining Member to identify the market in which it alleges that the effect of a subsidy is significant price suppression and to demonstrate that the subsidy has that effect within the meaning of Article 6.3(c). Before the Panel, Brazil identified the following as relevant markets for its claim under Article 6.3(c): (a) the world market for upland cotton; (b) the Brazilian market; (c) the United States market; and (d) 40 third country markets where Brazil exports its cotton and where United States and Brazilian upland cotton are found.[433] In contrast, the United States argued before the Panel that the relevant market under Article 6.3(c) must be "a particular domestic market of a Member", and that it cannot be a "world market".[434]

401. The Panel regarded the absence of any geographic limitation or reference to imports or exports in the text of Article 6.3(c), in contrast to Articles 6.3(a) and (b) and 15.2 of the *SCM Agreement*, as indicating that the "same market" under Article 6.3(c) could be a "world market".[435] Applying this interpretation to the facts of the present dispute, the Panel concluded that a "world market" for upland cotton does exist.[436] The Panel further stated that "[w]here price suppression is demonstrated in [the world] market, it may not be necessary to proceed to an examination of each and every other possible market where the products of both the complaining and defending Members are found".[437] In the present dispute, having found that "price suppression has occurred in the same world market"[438], the Panel decided that it was not "necessary to proceed to any further examination of ... alleged price suppression in individual country markets".[439] Thus, the Panel's analysis of the world market for upland cotton formed the basis for its finding that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c).

402. On appeal, the United States submits that the Panel erred in interpreting the words "same market" in Article 6.3(c) of the *SCM Agreement* as including a "world market".[440] It also submits that the Panel's finding that a "world market" exists for upland cotton is inconsistent with certain of its other findings.[441] The United States also argues that, in any case, the Panel did not make a finding that United States and Brazilian upland cotton compete in the world market that it had identified for upland cotton.[442] Brazil contends that significant price suppression under Article 6.3(c) "may apply to *any* 'market,' from local to global, and everything in between".[443]

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[426]Brazil's appellee's submission, paras. 105 and 146.

[427]*Ibid.*, para. 146.

[428]"Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts." (Appellate Body Report, *EC – Hormones*, para. 132) See also Appellate Body Report, *US – Wheat Gluten*, para. 151; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *US – Carbon Steel*, para. 142; Appellate Body Report, *Japan – Apples*, para. 221.

[429]Appellate Body Report, *EC – Hormones*, para. 132.

[430]On this question, the Appellate Body has made several pronouncements in previous appeals. See, for example, Appellate Body Report, *EC – Hormones*, para. 133; Appellate Body Report, *Korea – Dairy*, para. 137; Appellate Body Report, *Japan – Apples*, para. 222.

[431]Panel Report, para. 7.1246.

[432]The United States and Brazil indicated their agreement on this point in response to questioning during the oral hearing.

[433]Panel Report, para. 7.1230.

[434]*Ibid.*, para. 7.1231.

[435]Panel Report, paras. 7.1238-7.1240.

[436]*Ibid.*, para. 7.1247.

[437]*Ibid.*, para. 7.1252.

[438]*Ibid.*, para. 7.1312.

[439]*Ibid.*, para. 7.1315.

[440]United States' appellant's submission, para. 307.

[441]*Ibid.*, paras. 318 and 319. The United States submits that the Panel failed to reconcile its interpretation of the "same market" in Article 6.3(c) with its reading of the phrase "world market" under Article 6.3(d).

[442]United States' appellant's submission, para. 321.

[443]Brazil's appellee's submission, para. 628. (original emphasis)

403. We begin our analysis of this issue by identifying the ordinary meaning of the word "market" in the context of Article 6.3(c). Article 6.3(c) of the *SCM Agreement* indicates that:

> Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
>
> ...
>
> (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same *market*[.] (emphasis added)

404. The Panel described the ordinary meaning of the word "market" as:[444]

> "a place ... with a demand for a commodity or service"[1355]; "a geographical area of demand for commodities or services"; "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices".[1356]

[1355] *The New Shorter Oxford English Dictionary*, (1993).

[1356] *Merriam-Webster Dictionary online*.

405. We accept that this is an adequate description of the ordinary meaning of the word "market" for the purposes of this dispute, and we do not understand the parties to dispute it.[445] This ordinary meaning does not, of itself, impose any limitation on the "geographical area" that makes up any given market. Nor does it indicate that a "world market" cannot exist for a given product. As the Panel indicated, the "degree to which a market is limited by geography will depend on the product itself and its ability to be traded across distances".[446]

406. The only express qualification on the type of "market" referred to in Article 6.3(c) is that it must be "the same" market. Aside from this qualification (to which we return below), Article 6.3(c) imposes no explicit geographical limitation on the scope of the relevant market. This contrasts with the other paragraphs of Article 6.3: paragraph (a) restricts the relevant market to "the market of the subsidizing Member"; paragraph (b) restricts the relevant market to "a third country market"; and paragraph (d) refers specifically to the "world market share". We agree with the Panel[447] that this difference may indicate that the drafters did not intend to confine, *a priori*, the market examined under Article 6.3(c) to any particular area. Thus, the ordinary meaning of the word "market" in Article 6.3(c), when read in the context of the other paragraphs of Article 6.3, neither requires nor excludes the possibility of a national market or a world market.[448]

[444] Panel Report, para. 7.1236.

[445] As indicated by the United States and Brazil in response to questioning during the oral hearing.

[446] Panel Report, para. 7.1237.

[447] *Ibid.*, paras. 7.1238-7.1240.

[448] This stands to reason, given that the purpose of the "actionable subsidies" provisions in Part III of the *SCM Agreement* is to prevent Members from causing adverse effects to the interests of other Members through the use of specific subsidies, wherever such effects may occur.

407. Turning to the phrase "in the same market", it is clear to us from a plain reading of Article 6.3(c) that this phrase applies to all four situations covered in that provision, namely, "significant price undercutting", "significant price suppression, price depression [and] lost sales". We read the Panel Report and the participants' submissions as endorsing this interpretation.[449] The phrase "in the same market" suggests that the subsidized product in question (United States upland cotton in this case)[450] and the relevant product of the complaining Member must be "in the same market". In this appeal, the Panel and the participants agree that United States upland cotton[451] and Brazilian upland cotton[452] must be "in the same market" for Brazil's claim under Article 6.3(c) to succeed.[453] Furthermore, the participants agree that these are like products.[454]

408. When can two products be considered to be "in the same market" for the purposes of a claim of significant price suppression under Article 6.3(c)? Article 6.3(c) does not provide an explicit answer. However, recalling that one accepted definition of "market" is "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices"[455], it seems reasonable to conclude that two products would be in the same market if they were engaged in actual or potential competition in that market. Thus, two products may be "in the same market" even if they are not necessarily sold at the same time and in the same place or country. As the Panel correctly pointed out, the scope of the "market", for determining the area of competition between two products, may depend on several factors such as the nature of the product, the homogeneity of the conditions of competition, and transport costs.[456] This market for a particular product could well be a "world market". However, we agree with the Panel that the fact that a world market exists for one product does not necessarily mean that such a market exists for every product.[457] Thus the determination of the relevant market under Article 6.3(c) of the *SCM Agreement* depends on the subsidized product in question. If a world market exists for the product in question, Article 6.3(c) does not exclude the possibility of this "world market" being the "same market" for the purposes of a significant price suppression analysis under that Article.

409. According to the United States, if the market examined pursuant to a claim of significant price suppression under Article 6.3(c) is a "world market", then the subsidized product and any like

[449] Panel Report, paras. 7.1248 and 7.1251; United States' appellant's submission, para. 310; Brazil's appellee's submission, paras. 636 and 638.

[450] See *infra*, footnote 451.

[451] Specifically, the subsidized product is United States upland cotton lint. (Panel Report, paras. 7.139, 7.1221-7.1224 and footnote 191 to para. 7.139) The Panel explained that upland cotton, upon harvest, comprises cotton lint and cottonseed. The cotton lint is separated from the cottonseed through "ginning". (Panel Report, footnote 258 to para. 7.197)

[452] Panel Report, footnote 258 to para. 7.197 and paras. 7.1221-7.1224. The United States and Brazil confirmed during the oral hearing that they do not contest this identification of the subsidized product and the other relevant product.

[453] Accordingly, we need not decide whether, in a claim of significant price suppression under Article 6.3(c), the product identified by the complainant must be "like" the relevant subsidized product. We note in this regard that the term "in the same market" appears twice in Article 6.3(c). In the case of *significant price undercutting*, the "subsidized product" must be "compared with the price of a *like product* of another Member in the same market". (emphasis added) This raises the question whether the other three situations mentioned in Article 6.3(c) (namely, "significant price suppression, price depression [and] lost sales") include a requirement that the subsidized product and the relevant product of the complainant be "like".

[454] Panel Report, paras. 7.1248 and 7.1251; United States' appellant's submission, para. 310; Brazil's appellee's submission, paras. 636 and 638.

[455] Panel Report, para. 7.1236 (quoting *Merriam-Webster Dictionary online*).

[456] Panel Report, para. 7.1237 and footnote 1357 to para. 7.1240.

[457] *Ibid.*, footnote 1357 to para. 7.1240.

product will necessarily be in that market and the word "same" in Article 6.3(c) would have no meaning.[458] We do not agree with this argument. As we have explained above, there is no *per se* geographical limitation of a market under Article 6.3(c). It could well be a national market, a world market, or any other market. It is for the complaining party to identify the market where it alleges significant price suppression and to establish that that market exists. In doing so, it is for the complaining party to establish that the subsidized product and its product are in actual or potential competition in that alleged market. If that market is established to be a "world market", it cannot be said, for that reason alone, that the two products are not in the "same market" within the meaning of Article 6.3(c).

410. For these reasons, we agree with the Panel that, depending on the facts of the case, a "world market" may be the "same market" for the purposes of a claim of significant price suppression under Article 6.3(c) of the *SCM Agreement*.[459]

411. We now examine the United States' objection to the Panel's examination of the "world market for upland cotton"[460] in the particular circumstances of this dispute. The United States submits that the Panel's finding that a world market for upland cotton exists is inconsistent with the Panel's suggestion that the United States price for upland cotton is different from the "world price" represented by the A-Index.[461] Essentially, the United States appears to argue that no world market for upland cotton can exist if there is no world price for upland cotton. In our view, whether a world market for upland cotton and a world price for upland cotton exist in the circumstances of this case are factual questions. The Panel Report indicates that the Panel examined the evidence before it and concluded on the basis of that evidence that a world market for upland cotton exists[462] and that a world price in that market also exists and is reflected in the A-Index.[463] We see no reason to disturb the Panel's findings of fact in this regard.[464]

412. The United States also contends that the Panel did not make a finding that United States and Brazilian upland cotton were both in the world market that it had identified for upland cotton.[465] As we explained earlier[466], the words "in the same market" in Article 6.3(c) of the *SCM Agreement* mean that subsidized United States upland cotton and Brazilian upland cotton must be engaged in actual or potential competition in the market in which the effect of the challenged subsidy is alleged to be

[458]"One can speak of a 'same' regional or national market because there are 'other' regional or national markets where the subsidized and like product may (or may not) compete. One cannot speak of a 'same' world market in the same way because there is no 'other' world market where the products can be found." (United States' appellant's submission, para. 311)

[459]Panel Report, paras. 7.1238-7.1244.

[460]*Ibid.*, paras. 7.1247 and 7.1274.

[461]United States' appellant's submission, para. 319 (referring to Panel Report, para. 7.1213).

[462]Panel Report, paras. 7.1245-7.1252.

[463]*Ibid.*, paras. 7.1260-7.1274. The Panel's "four main reasons" for this conclusion regarding the A-Index were: prices of Brazilian and United States upland cotton are "constituent elements" of the A-Index; "key market participants" perceive the A-Index as reflecting the world market price for upland cotton; the International Cotton Advisory Council treats the A-Index in a similar manner; and the Economic Research Service of the United States Department of Agriculture (the "USDA") has itself referred to the A-Index as the world price. In addition, "the United States 'adjusted world price' is *based on* and *derived from* the A-Index". (*Ibid.*, paras. 7.1265-7.1271) (original emphasis)

[464]See Appellate Body Report, *EC – Hormones*, para. 132. See also Appellate Body Report, *US – Wheat Gluten*, para. 151.

[465]United States' appellant's submission, para. 320.

[466]*Supra*, paras. 407-408.

significant price suppression. In this regard, we note that the Panel expressly stated that the market it examined pursuant to Article 6.3(c) had to be a market "in which both Brazilian and United States upland cotton were present and competing for sales"[467] and "where competition exists between Brazilian and United States upland cotton".[468]

413. Whether or not Brazilian and United States upland cotton competed in the "world market for upland cotton"[469] during the period the Panel examined is a factual question. As we stated earlier[470], two products may be "in the same market" even if they are not necessarily sold in the same place and at the same time, as long as they are engaged in actual or potential competition. We recall that, in addition to the "world market", Brazil identified "40 third country markets ... where United States and Brazilian like upland cotton is found".[471] We also note that, based on an assessment of the relevant facts, the Panel concluded, as a matter of fact, that these two products did compete in the world market for upland cotton. In particular, the Panel referred to "the world upland cotton market, and the relative proportion of that market enjoyed by the United States and Brazil".[472]

414. We are therefore not persuaded by the United States' arguments that the Panel erred with respect to whether United States and Brazilian upland cotton were "in the same market" according to Article 6.3(c).

4. Relevant Price under Article 6.3(c) of the *SCM Agreement*

415. We now turn to the United States' arguments on appeal with respect to the relevant "price" under Article 6.3(c). The Panel found that "the A-Index can be taken to reflect a world price in the world market for upland cotton that is sufficient to form the basis for our analysis as to whether there is price suppression in the same world market within the meaning of Article 6.3(c) for the purposes of this dispute".[473] The United States argues that, even if the Panel properly found that the effect of the price-contingent subsidies is significant suppression of the *world price* for upland cotton, this could not constitute significant price suppression for purposes of Brazil's claim under Article 6.3(c) of the *SCM Agreement*. According to the United States, Brazil had to show that the effect of the challenged subsidies is significant suppression of "the price of Brazilian upland cotton in the 'world market.'"[474]

416. We have already found that the "market" referred to in Article 6.3(c), in connection with significant price suppression, can be a "world market"[475], and that the Panel was correct in examining the world market for upland cotton in the present dispute.[476] The question before us is whether it was sufficient for the Panel to analyze the price of upland cotton in general in the world market or whether the Panel was required to analyze the price of Brazilian upland cotton in the world market and find significant price suppression with respect to that price.

[467]Panel Report, para. 7.1248.

[468]*Ibid.*, para. 7.1251.

[469]*Ibid.*, paras. 7.1247 and 7.1274.

[470]*Supra*, para. 408.

[471]Panel Report, para. 7.1230.

[472]*Ibid.*, para. 7.1313. See also *ibid.*, para. 7.1246.

[473]Panel Report, para. 7.1274. According to the Panel, the "A-Index" "is a composite of an average of the five lowest price quotes from a selection of the principal upland cottons traded in the world market obtained by Cotlook, a private UK-based organization". (Panel Report, para. 7.1264)

[474]United States' appellant's submission, para. 239.

[475]*Supra*, para. 410.

[476]*Supra*, para. 414.

417. In our view, it was sufficient for the Panel to analyze the price of upland cotton in general in the world market. The Panel did so by relying on the A-Index. The Panel specifically found, based on its reading of the evidence before it:

> [P]rices for upland cotton transactions throughout the world are ... largely determined by the A-Index price.[477]

Therefore, the Panel found that the A-Index adequately reflected prices in the world market for upland cotton.[478] The Panel also found that "developments in the world upland cotton price would inevitably affect prices" wherever Brazilian and United States upland cotton compete, "due to the nature of the world prices in question and the nature of the world upland cotton market, and the relative proportion of that market enjoyed by the United States and Brazil".[479] It was not necessary, in these circumstances, for the Panel to proceed to a separate analysis of the prices of Brazilian upland cotton in the world market.

418. For these reasons, we reject the United States' contention that the Panel erred in its analysis of significant price suppression under Article 6.3(c) of the *SCM Agreement* "in not examining Brazilian upland cotton prices in the 'world market'".[480]

5. Significant Price Suppression as the Effect of the Price-Contingent Subsidies

(a) Introduction

419. We now address the reasons the Panel provided for its ultimate finding under Article 6.3(c). First, the Panel found that price suppression had occurred within the meaning of Article 6.3(c)[481] after examining three main considerations: "(a) the relative magnitude of the United States' production and exports in the world upland cotton market; (b) general price trends [in the world market as revealed by the A-Index]; and (c) the nature of the subsidies at issue, and in particular, whether or not the nature of these subsidies is such as to have discernible price suppressive effects".[482] Next, the Panel found that the price suppression it had found to exist was "significant" price suppression under Article 6.3(c)[483], "given the relative magnitude of United States production and exports, the overall price trends we identified in the world market, ... the nature of the mandatory United States subsidies in question ... and the readily available evidence of the order of magnitude of the subsidies".[484]

420. The Panel went on to find that "a causal link exists between" the price-contingent subsidies and the significant price suppression it had found[485], for four main reasons:[486]

[477]Panel Report, para. 7.1311.

[478]*Ibid.*, para. 7.1274.

[479]*Ibid.*, para. 7.1313.

[480]United States' appellant's submission, para. 238.

[481]Panel Report, para. 7.1312.

[482]*Ibid.*, para. 7.1280.

[483]*Ibid.*, para. 7.1333.

[484]Panel Report, para. 7.1332. (footnotes omitted) We address the United States' arguments regarding the magnitude or quantification of the subsidies *infra*, paras. 459-472.

[485]Panel Report, para. 7.1355.

[486]*Ibid.*, para. 7.1347.

> [T]he United States exerts a substantial proportionate influence in the world upland cotton market.[487]
>
> [T]he [price-contingent subsidies] are directly linked to world prices for upland cotton, thereby insulating United States producers from low prices.[488]
>
> [T]here is a discern[i]ble temporal coincidence of suppressed world market prices and the price-contingent United States subsidies.[489]
>
> [C]redible evidence on the record concerning the divergence between United States producers' total costs of production and revenue from sales of upland cotton since 1997 ... supports the proposition that United States upland cotton producers would not have been economically capable of remaining in the production of upland cotton had it not been for the United States subsidies at issue and that the effect of the subsidies was to allow United States producers to sell upland cotton at a price lower than would otherwise have been necessary to cover their total costs.[490]

421. Finally, the Panel found that the following "other causal factors alleged by the United States"[491] "do not attenuate the genuine and substantial causal link that we have found between the United States mandatory price-contingent subsidies at issue and the significant price suppression. Nor do they reduce the effect of the mandatory price-contingent subsidies to a level which cannot be considered 'significant'"[492]:

> [W]eakness in world demand for cotton due to competing, low-priced synthetic fibres, and weak world economic growth.[493]
>
> [B]urgeoning United States textile imports, reflecting the strong United States dollar since the mid-1990's and declining United States competitiveness in textile and apparel production[.][494]
>
> [T]he strong United States dollar since the mid-1990's[.][495]
>
> China subsidized the release of millions of bales of government stocks between 1999 and 2001[.][496]

[487]*Ibid.*, para. 7.1348.

[488]*Ibid.*, para. 7.1349.

[489]*Ibid.*, para. 7.1351.

[490]*Ibid.*, para. 7.1353. (footnotes omitted)

[491]*Ibid.*, para. 7.1357.

[492]*Ibid.*, para. 7.1363.

[493]Panel Report, para. 7.1358.

[494]*Ibid.*, para. 7.1359.

[495]*Ibid.*, para. 7.1360.

[496]*Ibid.*, para. 7.1361.

> [U]pland cotton planting decisions ... are driven by other factors such as (1) the effect of technological factors of upland cotton production ... (2) the relative movement of upland cotton prices *vis-à-vis* prices of competing crops ... (3) the expected prices for the upcoming crop year.[497]

(b) Appeal by the United States

422. In addition to the alleged errors already discussed in connection with the relevant "market" and "price", the United States contends on appeal that the Panel erred in finding that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*.[498] These errors, according to the United States, are:

(a) in relation to the effects of the price-contingent subsidies:

(i) failing to analyze "the relevant production decision faced by farmers – that is, the decision on what to plant"[499];

(ii) ignoring data indicating that United States upland cotton production responded to market signals[500];

(iii) "failing to examine supply response in other countries – that is, to what extent other countries would increase supply in response to any alleged decrease in cotton production resulting from the absence of U.S. payments"[501]; and

(iv) "the four main, cumulative grounds the Panel identified supporting a finding of causation do not withstand scrutiny"[502];

(b) in relation to the quantification of subsidies:

(i) "accepting Brazil's argument that, for purposes of a serious prejudice claim, Brazil need not allege and demonstrate, and the Panel need not find, the amount of the challenged subsidy that benefits upland cotton"[503];

(ii) finding "that subsidies not tied to current production of upland cotton (decoupled payments) need not be allocated over the total sales of the recipients"[504]; and

(iii) failing to determine "the extent to which processed cotton benefits from subsidies provided with respect to raw cotton"[505]; and

[497] *Ibid.*, para. 7.1362.

[498] *Ibid.*, paras. 7.1416 and 8.1(g)(i).

[499] United States' appellant's submission, paras. 136 and 154.

[500] *Ibid.*, para. 155.

[501] United States' appellant's submission, para. 227.

[502] *Ibid.*, para. 180.

[503] *Ibid.*, para. 240.

[504] *Ibid.*, para. 264.

(c) in relation to the effect of subsidies over time:

(i) concluding "that the payments need not be allocated to the marketing year to which they relate"[506]; and

(ii) "making a finding of present serious prejudice related to past recurring subsidy payments", in the absence of a finding "that the past recurring subsidy payments at issue (that is, those from marketing years 1999-2001) had continuing effects at the time of panel establishment".[507]

(c) Meaning of "Significant Price Suppression"

423. A central question before the Panel with regard to Article 6.3(c) of the *SCM Agreement* was whether the effect of the subsidy is "significant price suppression".[508] It is worth setting out the Panel's understanding of the meaning of the term "price suppression". In explaining this term, the Panel stated, in paragraph 7.1277 of the Panel Report:

> Thus, "*price suppression*" refers to the situation where "prices" – in terms of the "amount of money set for sale of upland cotton" or the "value or worth" of upland cotton – either are prevented or inhibited from rising (i.e. they do not increase when they otherwise would have) or they do actually increase, but the increase is less than it otherwise would have been. *Price depression* refers to the situation where "prices" are pressed down, or reduced.[1388]

[1388] In the remainder of our analysis, we use the term "price suppression" to refer both to an actual decline (which otherwise would not have declined, or would have done so to a lesser degree) and an increase in prices (which otherwise would have increased to a greater degree). (emphasis added)

424. Although the Panel first identified "price suppression" and "price depression" as two separate concepts in paragraph 7.1277, footnote 1388 of the Panel Report suggests that, for its analysis, the Panel used the term "price suppression" to refer to both price suppression and price depression. We recognize that "the situation where 'prices' ... are prevented or inhibited from rising" and "the situation where 'prices' are pressed down, or reduced"[509] may overlap. Nevertheless, it would have been preferable, in our view, for the Panel to avoid using the term "price suppression" as short-hand for both price suppression and price depression, given that Article 6.3(c) of the *SCM Agreement* refers to "price suppression" and "price depression" as distinct concepts. We agree, however, that the Panel's description of "price suppression" in paragraph 7.1277 of the Panel Report reflects the ordinary meaning of that term, particularly when read in conjunction with the French and Spanish versions of

[505] *Ibid.*, para. 301.

[506] *Ibid.*, para. 277.

[507] *Ibid.*, para. 278.

[508] According to the Panel, Brazil claimed that certain United States subsidies "significantly suppress[ed] upland cotton prices" within the meaning of Article 6.3(c). (Panel Report, para. 7.1108(i))

[509] Panel Report, para. 7.1277.

Article 6.3(c)[510], as required by Article 33(3) of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").[511]

425. The Panel described its task in assessing "price suppression" under Article 6.3(c) as follows:

> We need to examine whether these prices were suppressed, that is, lower than they would have been without the United States subsidies in respect of upland cotton.[512]

426. As regards the word "significant" in the context of "significant price suppression" in Article 6.3(c), the Panel found that this word means "important, notable or consequential".[513]

427. Article 6.3(c) does not set forth any specific methodology for determining whether the effect of a subsidy is significant price suppression. There may well be different ways to make this determination. However, we find no difficulty with the Panel's approach in the particular circumstances of this dispute. We therefore turn to an examination of how the Panel carried out its assessment.

(d) Panel's Order of Analysis

428. In addressing Brazil's claims of serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*, the Panel began by examining whether the effect of the challenged subsidies was significant price suppression within the meaning of Article 6.3(c). The Panel explained that it adopted this order of analysis because both parties agreed that the Panel could not make an affirmative finding of serious prejudice under Article 5(c) without making an affirmative finding that the effect of the challenged subsidies is significant price suppression within the meaning of Article 6.3(c).[514] Neither party appeals this decision by the Panel.

429. Having determined the relevant products, market, and price, the Panel continued its analysis with respect to Article 6.3(c) in the following order:

> Is there "price suppression"?[515]
>
> Is it "significant" price suppression?[516]
>
> "The effect of the subsidy"[517]

[510]The French version states, in part, "la subvention ... a pour effet d'*empêcher des hausses de prix* ou de déprimer les prix ... dans une mesure notable"; the Spanish version states, in part, "la subvención ... tenga un efecto significativo de contención de la *subida de los precios*, reducción de los precios". (emphasis added)

[511]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679. Article 33(3) provides: "The terms of the treaty are presumed to have the same meaning in each authentic text."

[512]Panel Report, para. 7.1288. See also *ibid.*, para. 7.1279.

[513]*Ibid.*, para. 7.1326.

[514]*Ibid.*, para. 7.1228.

[515]*Ibid.*, heading (ii) to paras. 7.1275-7.1315.

[516]*Ibid.*, heading (iii) to paras. 7.1316-7.1333.

[517]*Ibid.*, heading (k) to paras. 7.1334-7.1363.

430. The United States contests the Panel's decision to address "significant price suppression" before addressing "the effect of the subsidy", arguing that "[a] finding of price suppression *without* any prior finding of 'the effect of the subsidy' would be meaningless; how could one know that prices were lower than they otherwise would have been without knowing what allegedly caused the prices to be lower?".[518] The United States also contends that the Panel used "circular" reasoning by assuming causation in finding price suppression and using its conclusion on price suppression to support its finding on causation (the effect of the subsidy).[519]

431. As noted above, Article 6.3(c) is silent as to the sequence of steps to be followed in assessing whether the effect of a subsidy is significant price suppression. We note that Article 6.8 indicates that the existence of serious prejudice pursuant to Articles 5(c) and 6.3(c) is to be determined on the basis of information submitted to or obtained by the panel, including information submitted in accordance with Annex V of the *SCM Agreement*.[520] Annex V provides some limited guidance about the type of information on which a panel might base its assessment under Article 6.3(c). But we find little other guidance on this issue. The text of Article 6.3(c) does not, however, preclude the approach taken by the Panel to examine first whether significant price suppression exists and then, if it is found to exist, to proceed further to examine whether the significant price suppression is the effect of the subsidy. The Panel evidently considered that, in the absence of significant price suppression, it would not need to proceed to analyze the effect of the subsidy. We see no legal error in this approach.

432. One might contend that, having decided to separate its analysis of significant price suppression from its analysis of the effects of the challenged subsidies, the Panel's price suppression analysis should have addressed prices without reference to the subsidies and their effects. For instance, in its significant price suppression analysis, the Panel could have addressed purely price developments in the world market for upland cotton, such as whether prices fell significantly during the period under examination or whether prices were significantly lower during that period than other periods. Then, in its "effects" analysis, the Panel could have addressed causal factors related to the nature of the subsidies, their relationship to prices, their magnitude, and their impact on production and exports. In this causal analysis, the Panel could also have addressed factors other than the challenged subsidies that may have been suppressing the prices in question.

433. However, the ordinary meaning of the transitive verb "suppress" implies the existence of a subject (the challenged subsidies) and an object (in this case, prices in the world market for upland cotton). This suggests that it would be difficult to make a judgement on significant price *suppression* without taking into account the effect of the subsidies.[521] The Panel's definition of price suppression, explained above[522], reflects this problem; it includes the notion that prices "do not increase when they *otherwise* would have" or "they do actually increase, but the increase is less than it *otherwise* would have been".[523] The word "otherwise" in this context refers to the hypothetical situation in which the challenged subsidies are absent. Therefore, the fact that the Panel may have

[518]United States' appellant's submission, para. 230. (original emphasis)

[519]*Ibid.*, para. 131.

[520]Annex V contains "Procedures for Developing Information Concerning Serious Prejudice".

[521]Similarly, it might be difficult to ascertain whether imports or exports are "displace[d]" or "impede[d]" under paragraphs (a) or (b) of Article 6.3 of the *SCM Agreement* without considering the effect of the challenged subsidy. By way of contrast, it might be possible to determine whether the world market share of a subsidizing Member has increased within the meaning of Article 6.3(d) before assessing whether any increase is the effect of the subsidy.

[522]*Supra*, para. 423.

[523]Panel Report, para. 7.1277. (emphasis added)

addressed some of the same or similar factors in its reasoning as to significant price suppression and its reasoning as to "effects" is not necessarily wrong.[524]

434. The specific factors that the Panel examined in determining whether or not "price suppression" had occurred were: "(a) the relative magnitude of the United States' production and exports in the world upland cotton market; (b) general price trends; and (c) the nature of the subsidies at issue, and in particular, whether or not the nature of these subsidies is such as to have discernible price suppressive effects".[525] In the absence of explicit guidance on assessing significant price suppression in the text of Article 6.3(c), we have no reason to reject the relevance of these factors for the Panel's assessment in the present case. An assessment of "general price trends"[526] is clearly relevant to significant price suppression (although, as the Panel itself recognized, price trends alone are not conclusive).[527] The two other factors—the nature of the subsidies and the relative magnitude of the United States' production and exports of upland cotton—are also relevant for this assessment. We are not persuaded that the fact that these latter factors were also considered in connection with the Panel's analysis of "the effect of the subsidy"[528] amounts to legal error for that reason alone.

435. Turning to the Panel's assessment of the "effect of the subsidy"[529], the Panel addressed the question whether there was a "causal link"[530] between the price-contingent subsidies and the significant price suppression it had found. It then addressed the impact of "[o]ther alleged causal factors".[531] We observe that Article 6.3(c) does not use the word "cause"; rather, it states that "the effect of the subsidy is ... significant price suppression". However, the ordinary meaning of the noun "effect" is "[s]omething ... caused or produced; a result, a consequence".[532] The "something" in this context is significant price suppression, and thus the question is whether significant price suppression is "caused" by or is a "result" or "consequence" of the challenged subsidy. The Panel's conclusion that "[t]he text of the treaty requires the establishment of a causal link between the subsidy and the significant price suppression"[533] is thus consistent with this ordinary meaning of the term "effect". This is also confirmed by the context provided by Article 5(c) of the *SCM Agreement*, which provides:

> No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:
>
> ...
>
> (c) serious prejudice to the interests of another Member.

[524]An analysis under Article 6.3(c) *SCM Agreement* could involve assessing similar facts from different perspectives in order to answer different factual and legal questions when addressing "significant price suppression" and "the effect of" the challenged subsidies.

[525]Panel Report, para. 7.1280.

[526]*Ibid.*, para. 7.1286. See also *ibid.*, para. 7.1310.

[527]*Ibid.*, para. 7.1288.

[528]We discuss these factors *infra*, paras. 449 and 450.

[529]Panel Report, heading (k) to paras. 7.1334-7.1363.

[530]*Ibid.*, heading (i) to paras. 7.1347-7.1356.

[531]*Ibid.*, heading (ii) to paras. 7.1357-7.1363.

[532]*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 793.

[533]Panel Report, para. 7.1341.

436. As the Panel pointed out, "Articles 5 and 6.3 ... do not contain the more elaborate and precise 'causation' and non-attribution language" found in the trade remedy provisions of the *SCM Agreement*.[534] Part V of the *SCM Agreement*, which relates to the imposition of countervailing duties, requires, *inter alia*, an examination of "any known factors other than the subsidized imports which at the same time are injuring the domestic industry".[535] However, such causation requirements have not been expressly prescribed for an examination of *serious prejudice* under Articles 5(c) and Article 6.3(c) in Part III of the *SCM Agreement*. This suggests that a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the "effect" of a subsidy is significant price suppression under Article 6.3(c).

437. Nevertheless, we agree with the Panel that it is necessary to ensure that the effects of other factors on prices are not improperly attributed to the challenged subsidies.[536] Pursuant to Article 6.3(c) of the *SCM Agreement*, "[s]erious prejudice in the sense of paragraph (c) of Article 5 may arise" when "the effect of *the subsidy* is ... significant price suppression". (emphasis added) If the significant price suppression found in the world market for upland cotton were caused by factors other than the challenged subsidies, then that price suppression would not be "the effect of" the challenged subsidies in the sense of Article 6.3(c). Therefore, we do not find fault with the Panel's approach of "examin[ing] whether or not 'the effect of the subsidy' is the significant price suppression which [it had] found to exist in the same world market"[537] and separately "consider[ing] the role of other alleged causal factors in the record before [it] which may affect [the] analysis of the causal link between the United States subsidies and the significant price suppression."[538]

438. The Panel's approach with respect to causation and non-attribution is similar to that reflected in Appellate Body decisions in the context of other WTO agreements. In connection with the *Agreement on Safeguards*, the Appellate Body has stated that a causal link "between increased imports of the product concerned and serious injury or threat thereof"[539] "involves a genuine and substantial relationship of cause and effect between these two elements"[540], and it has also required non-attribution of effects caused by other factors.[541] In the context of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"), the Appellate Body has stated: "[i]n order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not 'attributed' to dumped imports, they must appropriately assess the injurious effects of those other factors."[542] It must be borne in mind that these provisions of the *Agreement on Safeguards* and the *Anti-Dumping Agreement*, as well as the provisions of Part V of the *SCM Agreement*, relate to a determination of "injury" rather than "serious prejudice", and they apply in different contexts and with different purposes. Therefore, they must not be automatically transposed into Part III of the *SCM Agreement*. Nevertheless, they may suggest ways of assessing whether the effect of a subsidy is significant price suppression rather than it being the effect of other factors.

[534]*Ibid.*, para. 7.1343.

[535]See Article 15.5 of the *SCM Agreement*. Article 3.5 of the *Anti-Dumping Agreement* and Article 4.2(b) of the *Agreement on Safeguards* are broadly analogous to Article 15.5 of the *SCM Agreement*.

[536]Panel Report, para. 7.1344.

[537]*Ibid.*, para. 7.1345.

[538]*Ibid.*, para. 7.1346.

[539]Article 4.2(b) of the *Agreement on Safeguards*. Compare Article 15.5 of the *SCM Agreement* and Article 3.5 of the *Anti-Dumping Agreement*.

[540]Appellate Body Report, *US – Wheat Gluten*, para. 69.

[541]Appellate Body Report, *US – Line Pipe*, para. 208.

[542]Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

(e) Rationale for the Panel's Finding that the Effect of the Price-Contingent Subsidies is Significant Price Suppression

439. We now address the United States' appeal relating to the specific reasons behind the Panel's conclusion that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*. The United States alleges that the Panel ignored or failed to take into account certain evidence and arguments in analyzing the effect of the price-contingent subsidies, and that the four main grounds on which the Panel based its analysis "do not withstand scrutiny".[543] We begin by addressing the three key elements that the United States alleges the Panel failed to include in its analysis, and then we address the reasons the Panel relied upon for its conclusion that the effect of the price-contingent subsidies is significant price suppression.

440. First, the United States contends that the Panel failed to address the relevant economic decision faced by United States upland cotton farmers at the time of planting, namely, the decision of whether to plant upland cotton or alternative crops (and how much of each). According to the United States, planted acreage of United States upland cotton responds to expected market prices at the time of harvest, rather than current prices at the time of planting.[544] Brazil counters that farmers decide what to plant based on expected market prices as well as expected payments under the challenged subsidy programs, such that planted acreage responds to both these factors.[545] Brazil also points out that farmers sell their upland cotton throughout the course of a year, at whatever prices they can obtain during the year.[546] During the oral hearing, the United States accepted that farmers decide what to plant based on expected market prices as well as expected subsidies.[547] However, according to the United States, for the 1999-2001 and 2003 crop years, when farmers made their planting decisions, the expected upland cotton price (that is, the price the farmers expected to receive upon harvest) was higher than the "income guarantee set by the marketing loan rate, suggesting that the effect of the subsidy on the planting decision was minimal".[548]

441. We note that the United States presented extensive evidence and arguments to the Panel in relation to expected prices and planting decisions.[549] Brazil also points to several questions asked by the Panel and responses to the Panel regarding planting decisions of United States upland cotton producers to demonstrate that the Panel was aware of the United States' arguments in this regard and took them into account.[550] The Panel Report makes it clear that the Panel specifically addressed "upland cotton planting decisions", "expected prices", and "expected market revenue".[551] The way in which United States upland cotton farmers make decisions relating to the production of upland cotton, and the basis on which they make such decisions, are factual matters that fall within the Panel's task of weighing and assessing the relevant evidence, and we will not review these matters. However, in our view, the application of the legal requirements of Article 6.3(c) to the facts determined by the Panel falls within the scope of appellate review.[552]

442. Turning first to Chart 2 at paragraph 7.1293 of the Panel Report, the United States submits that it is defective because it "assumes that cotton production decisions are made continuously throughout the marketing year", it "does not identify the planting decision period", and it "does not identify the expected harvest season prices at the time of that planting decision".[553] The Panel explained that it used this chart to demonstrate "that the per unit payment under the marketing loan programme increases when the gap between the adjusted world price and the loan rate widens"[554] and "that except for a short period in MY 2000, the adjusted world price was *below* the marketing loan rate throughout virtually *the whole period from* MY 1999-2002".[555] The Panel concluded from this graph, in connection with marketing loan program payments, that "[t]he further the adjusted world price drops, the greater the extent to which United States upland cotton producers' revenue is insulated from the decline, numbing United States production decisions from world market signals".[556]

443. The Panel explained how the marketing loan program payments operate and found that these payments accounted for more than half of United States upland cotton producer revenue.[557] This demonstrates that, in assessing the effect of marketing loan program payments under Article 6.3(c), the Panel took into account the magnitude of the payments relative to the revenue of United States upland cotton producers and found that marketing loan program payments made up a significant proportion of producers' revenue.[558]

444. During the oral hearing, the United States presented data to show that, when planting decisions were made for the 1999, 2000, 2001, and 2003 upland cotton crops, the *expected* upland cotton price upon harvest was higher than the marketing loan rate.[559] Accordingly, the United States contends, the marketing loan program payments would have had only a minimal effect on planting decisions, because farmers would have expected to receive a higher price from the sale of their upland cotton and no marketing loan program payments.

445. We note, based on the evidence provided by the United States, that, for four of the five upland cotton crops between 1999 and 2003, the *expected* harvest price at the time of making planting decisions was always substantially higher than the *actual* price realized at the time of harvest of the crop. This suggests that although farmers had expected higher prices in making their planting decisions, they were also aware that if actual prices were ultimately lower, they would be "insulated"[560] by government support, including not only marketing loan program payments but also counter-cyclical payments, which were based on a target upland cotton price of 72.4 cents per pound.[561] We are therefore satisfied that the Panel adopted a plausible view of the facts in connection

[543]United States' appellant's submission, para. 180. See *supra*, para. 420.

[544]United States' appellant's submission, paras. 154 and 155.

[545]Brazil's appellee's submission, para. 692.

[546]Brazil's response to questioning at the oral hearing.

[547]See also United States' further rebuttal submission to the Panel, paras. 95-97.

[548]United States' statement and response to questioning at the oral hearing.

[549]See, for example: United States' further submission to the Panel, paras. 55-60; United States' further rebuttal submission to the Panel, paras. 95-97 and 152-177.

[550]Brazil's appellee's submission, para. 685 (referring, *inter alia*, to Brazil's response to Question 167 posed by the Panel (Panel Report, pp. I-216-217, para.151); United States' response to Question 212 Posed by the Panel (Panel Report, p. I-360, para. 51); Question 213 Posed by the Panel (Panel Report, p. I-361)).

[551]Panel Report, para. 7.1362.

[552]See the discussion *supra*, para. 399.

[553]United States' statement at the oral hearing.

[554]Panel Report, para. 7.1293.

[555]*Ibid.*, para. 7.1294. (original emphasis)

[556]*Ibid.*, para. 7.1294.

[557]*Ibid.*, para. 7.1294.

[558]We return to the issue of quantification of the price-contingent subsidies in section VI.A.5(f) below.

[559]This data corresponds with the United States' written argument that "the uncontroverted evidence before the Panel ... showed that U.S. cotton plantings respond to expected prices *at the time planting decisions are taken*". (United States' appellant's submission, para. 137) (original emphasis) The United States presented similar data to the Panel. (See, for example, United States' further rebuttal submission to the Panel, paras. 162-163)

[560]Panel Report, para. 7.1294.

[561]*Ibid.*, para. 7.225.

with expected prices and planting decisions, even though it attributed to these factors a different weight or meaning than did the United States. As the Appellate Body has said, it is not necessary for panels to "accord to factual evidence of the parties the same meaning and weight as do the parties".[562]

446. Turning to the second key element of the United States' submission, the United States argues that the Panel ignored data showing that "U.S. cotton planted acreage did respond to expected market prices of cotton and other competing crops", "U.S. farmers change cotton acreage commensurately with changes made by cotton farmers in the rest of the world", and "the U.S. share of world cotton production has been stable, again demonstrating that U.S. farmers respond to the same market signals as cotton farmers in the rest of the world do".[563] The Panel Report contains several passages suggesting that the Panel did take into account evidence of this kind. For example, the Panel considered the United States' evidence regarding expected upland cotton prices[564] and set out the United States' share of world upland cotton production during the relevant period.[565] It would not amount to an error in the application of Article 6.3(c) to the facts of this case for the Panel not to address specifically in its Report every item of evidence provided and to refer explicitly to every argument made by the parties, if the Panel considered certain items or arguments less significant for its reasoning than others.[566]

447. We now address the third key element of the United States' submission. The United States argues that "the Panel should have considered to what extent other market participants would increase supply or reduce demand in response to any alleged increase in cotton prices resulting from the absence of U.S. payments".[567] Brazil responds that the Panel took this factor into account because it took into account relevant aspects of certain econometric models incorporating this factor: "the models track price effects that would occur as a result of reduced U.S. upland cotton supply *and* increased supply from other countries".[568] The participants agree that these models incorporate the supply response of third countries.[569] The dispute lies in whether the Panel *took into account* supply responses of third countries, as reflected in these models or otherwise.

448. Whether and to what extent other upland cotton producers would have increased supply or reduced demand in the absence of the United States' price-contingent subsidies is ultimately an empirical inquiry. The answer to this inquiry depends on an assessment of various factors bearing on the ability of cotton producers to assess and respond to supply and demand in the world upland cotton market. We note that the Panel indicated expressly that it had taken the models in question into account.[570] It would have been helpful had the Panel revealed how it used these models in examining

[562]Appellate Body Report, *Australia – Salmon*, para. 267.

[563]United States' appellant's submission, para. 155.

[564]Panel Report, para. 7.1362.

[565]*Ibid.*, para. 7.1282. In this paragraph, the Panel stated: "In the marketing years 1999 to 2002, the respective shares of the United States in world production of upland cotton were approximately 19.2, 19.3, 20.6 and 19.6 per cent, respectively".

[566]Appellate Body Report, *EC – Hormones*, paras. 135 and 138.

[567]United States' appellant's submission, para. 237.

[568]Brazil's appellee's submission, paras. 793-798 (referring to Panel Report, paras. 7.1205, 7.1209, and 7.1215). (original emphasis)

[569]In relation to models presented by Brazil, both parties refer to Brazil's further submission to the Panel of 9 September 2003, paras. 9-10 of Annex I (which is entitled "A Quantitative Simulation Analysis of the Impact of U.S. Cotton Subsidies on Cotton Prices and Quantities by Professor Daniel Sumner"). (United States' appellant's submission, para. 235; Brazil's appellee's submission, para. 793) In relation to third party studies, see United States' appellant's submission, para. 236 and Brazil's appellee's submission, paras. 795-796.

[570]Panel Report, paras. 7.1205, 7.1209 and 7.1215.

the question of third country responses. Nevertheless, we are not prepared to second-guess the Panel's appreciation and weighing of the evidence before it, and we do not see any error on the part of the Panel in the application of the law to the facts in addressing this question.

449. We now turn to the four main grounds[571] on which the Panel based its conclusion that "a causal link exists between" the price-contingent subsidies and the significant price suppression it had found[572], which the United States contests.[573] The first reason the Panel provided for finding a "causal link"[574] was the "substantial proportionate influence" of the United States "in the world upland cotton market ... flow[ing] ... from the magnitude of the United States production and export of upland cotton".[575] The United States counters that, "absent some analysis of how U.S. cotton competes with cotton from other sources, relative sizes are meaningless."[576] We agree that, in and of itself, the degree of influence of the United States in the world market for upland cotton may not be conclusive as to the effect of the price-contingent subsidies on prices in that market. However, if the price-contingent subsidies increased United States production and exports or decreased prices for United States upland cotton, then the fact that United States production and exports of upland cotton significantly influenced world market prices would make it more likely that the effect of the price-contingent subsidies is significant price suppression. Accordingly, this fact seems to support the Panel's conclusion, when read in conjunction with its other findings.

450. The second reason the Panel provided for finding a "causal link"[577] was its view that the price-contingent subsidies "are directly linked to world prices for upland cotton".[578] This conclusion flowed from the Panel's earlier assessment—in connection with its analysis of significant price suppression—of the *nature* of the price-contingent subsidies.[579] The nature of a subsidy plays an important role in any analysis of whether the effect of the subsidy is significant price suppression under Article 6.3(c). With respect to marketing loan program payments, the Panel found that "[t]he further the adjusted world price drops, the greater the extent to which United States upland cotton producers' revenue is insulated from the decline".[580] As a result, during the 1999-2002 marketing years, United States production and exports remained stable or increased, even though prices of United States upland cotton decreased.[581] The Panel found that Step 2 payments stimulate domestic and foreign demand for United States upland cotton[582] by "eliminating any positive difference between United States internal prices and international prices of upland cotton".[583] The Panel stated that Step 2 payments "result in lower world market prices than would prevail in their absence".[584] Finally, the Panel found that market loss assistance payments and counter-cyclical payments are made in response to low prices for upland cotton[585] and stimulate United States production of upland cotton

[571]United States' appellant's submission, para. 180.

[572]Panel Report, para. 7.1355.

[573]United States' appellant's submission, para. 180.

[574]Panel Report, para. 7.1347.

[575]*Ibid.*, para. 7.1348.

[576]United States' appellant's submission, para. 183.

[577]Panel Report, para. 7.1347.

[578]*Ibid.*, para. 7.1349.

[579]*Supra*, para. 434.

[580]Panel Report, para. 7.1294.

[581]Panel Report, para. 7.1296.

[582]*Ibid.*, para. 7.1299.

[583]*Ibid.*, para. 7.1298.

[584]*Ibid.*, para. 7.1299.

[585]*Ibid.*, para. 7.1301.

by reducing the "total and per unit revenue risk associated with price variability".[586] The United States contends that the Panel's analysis of the price-contingent subsidies was "deficient".[587] However, the Panel found that the price-contingent subsidies stimulated United States production and exports of upland cotton and thereby lowered United States upland cotton prices.[588] This seems to us to support the Panel's conclusion that the effect of the price-contingent subsidies is significant price suppression.[589]

451. The third reason the Panel provided for finding a "causal link"[590] was that "there is a discern[i]ble temporal coincidence of suppressed world market prices" and the price-contingent subsidies.[591] The United States describes this as "an exercise in spurious correlation".[592] However, in our view, one would normally expect a discernible correlation between significantly suppressed prices and the challenged subsidies if the effect of these subsidies is significant price suppression. Accordingly, this is an important factor in any analysis of whether the effect of a subsidy is significant price suppression within the meaning of Article 6.3(c). However, we recognize that mere correlation between payment of subsidies and significantly suppressed prices would be insufficient, without more, to prove that the effect of the subsidies is significant price suppression.

452. The fourth reason the Panel provided for finding a "causal link"[593] was the "divergence between United States producers' total costs of production and revenue from sales of upland cotton since 1997".[594] The United States argues that the Panel should have examined variable rather than total costs[595] in assessing whether "United States upland cotton producers would ... have been economically capable of remaining in the production of upland cotton had it not been for the United States subsidies at issue".[596]

453. We agree with the general proposition of the United States that variable costs may play a role in farmers' decision-making as to whether to plant upland cotton or some alternative crop, and how much of each crop to plant. From a short-term perspective, variable costs may be particularly important. However, from a longer-term perspective, total costs may be relevant. Based on the evidence before it regarding upland cotton production in the United States, the Panel concluded that "the six-year period from 1997-2002 ... lends itself to an assessment of the medium- to longer-term examination of developments in the United States upland cotton industry".[597] The Panel found that "the effect of the subsidies was to allow United States producers to sell upland cotton at a price lower than would otherwise have been necessary to cover their total costs".[598] In the circumstances of this

[586]*Ibid.*, para. 7.1302 and footnote 1410 to para. 7.1302.

[587]United States' appellant's submission, para. 185.

[588]Panel Report, para. 7.1291, 7.1295-7.1296, 7.1299, and 7.1308-7.1311.

[589]We do not exclude the possibility that challenged subsidies that are not "price-contingent" (to use the Panel's term) could have some effect on production and exports and contribute to price suppression.

[590]Panel Report, para. 7.1347.

[591]*Ibid.*, para. 7.1351.

[592]United States' appellant's submission, para. 208.

[593]Panel Report, para. 7.1347.

[594]*Ibid.*, para. 7.1353. (footnote omitted)

[595]United States' appellant's submission, para. 215.

[596]Panel Report, para. 7.1353.

[597]*Ibid.*, para. 7.1354.

[598]*Ibid.*, para. 7.1353.

dispute, we do not consider that the Panel's reliance on total rather than variable costs of production amounts to an error vitiating the Panel's analysis under Article 6.3(c).

454. Finally, we consider the "other causal factors alleged by the United States"[599] to have had an effect on prices. The United States argues that the Panel erred in addressing upland cotton planting decisions as an "other causal factor", given that the United States maintained that the price-contingent subsidies did not cause price suppression at all.[600] We disagree. We have already addressed the United States' arguments with respect to planting decisions, and we find no fault in the Panel's consideration of the issue of "planting decisions".[601]

455. The United States also argues that United States upland cotton exports increased during 1998-2002[602] because textile imports increased in the same period, leading to a decline in the use of cotton by domestic mills.[603] The Panel regarded this factor as "concerning support, rather than suppression, of world cotton prices".[604] However, even assuming that increasing textile imports led to increased exports of upland cotton, this does not mean that the price-contingent subsidies did not have the effect of significant price suppression. It was not unreasonable for the Panel to conclude that the "effect" of the price-contingent subsidies was significant price suppression, even if some other factor might also have price-suppressive effects.[605]

456. The remaining three "other causal factors" that the Panel examined were weakness in world demand for upland cotton, the strong United States dollar, and the release by China of government upland cotton stocks between 1999 and 2001.[606] The United States does not specifically address these three factors in its appellant's submission. However, the Panel's discussion of these "other factors" was part of the reasoning leading to the Panel's conclusion under Article 6.3(c), which the United States does appeal.[607] The Panel found that the United States' argument that weak demand caused low prices was inconsistent with the increase in United States upland cotton production and the absence of "pronounced declines" in world upland cotton consumption.[608] With regard to the United States dollar, the Panel stated that exchange rates would affect market prices, but that market prices did not guide "United States producer decisions (except to the extent that, when they are lower than the marketing loan rate, they dictate the magnitude of United States government subsidies to producers)".[609] The Panel pointed to evidence on the record confirming that marketing loan program payments and Step 2 payments "offset" declines in market prices.[610] With respect to upland cotton stocks released by China, the Panel agreed with the United States (and Brazil) that "an infusion of a large amount of supply onto the market would exert a downward pressure on prices".[611] However, the

[599]*Ibid.*, para. 7.1357.

[600]United States' appellant's submission, para. 138.

[601]*Supra*, paras. 440-445.

[602]The United States also argues that 1998 was an inappropriate base year for the Panel's examination because of unusually weak world demand and reduced United States production due to drought. (United States' appellant's submission, para. 209)

[603]United States' appellant's submission, para. 211.

[604]Panel Report, para. 7.1359.

[605]In this regard, see *supra*, para. 437 and *infra*, para. 457.

[606]Panel Report, paras. 7.1358, 7.1360, and 7.1361.

[607]In appealing this finding, the United States refers in a footnote to paras. 7.1107-7.1416 and 8.1(g)(i) of the Panel Report. (United States' appellant's submission, footnote 531 to para. 516(8))

[608]Panel Report, para. 7.1358.

[609]*Ibid.*, para. 7.1360.

[610]*Ibid.*, footnote 1477 to para. 7.1360.

[611]*Ibid.*, para. 7.1361.

Panel pointed out that the stock released by the Chinese government "was smaller in magnitude than the United States exports over this period".[612]

457. The Panel concluded:

> Although some of these factors may have contributed to lower, and even suppressed, world upland cotton prices during MY 1999-2002, they do not attenuate the genuine and substantial causal link that we have found between the United States mandatory price-contingent subsidies at issue and the significant price suppression. Nor do they reduce the effect of the mandatory price-contingent subsidies to a level which cannot be considered "significant".[613]

In sum, the Panel Report shows that it examined the other factors raised by the United States. Although the Panel found that some of them had price-suppressive effects, it did not attribute those effects to the United States' price-contingent subsidies.

458. Unlike in certain other instances under the WTO agreements, a panel conducting an analysis under Article 6.3(c) of the *SCM Agreement* is the first trier of facts, rather than a reviewer of factual determinations made by a domestic investigating authority. Bearing this in mind, we underline the responsibility of panels in gathering and analyzing relevant factual data and information in assessing claims under Article 6.3(c) in order to arrive at reasoned conclusions. In this case, the voluminous evidentiary record before the Panel included several economic studies, and substantial data and information. For its part, the Panel posed a large number of questions to which the parties submitted detailed answers. Overall, the Panel evidently conducted an extensive analysis, but we believe that, in its reasoning, the Panel could have provided a more detailed explanation of its analysis of the complex facts and economic arguments arising in this dispute. The Panel could have done so in order to demonstrate precisely how it evaluated the different factors bearing on the relationship between the price-contingent subsidies and significant price suppression. Nevertheless, in the light of the Panel's examination of the relevant evidence, coupled with its legal reasoning, we find no legal error in the Panel's causation analysis.

(f) Amount of the Price-Contingent Subsidies

459. In reaching the conclusion that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, the Panel made the following statements with respect to the amount of the price-contingent subsidies as a whole:

> We have readily available information on the record showing us that the price-contingent subsidies in question involve very large amounts of United States government money benefiting United States upland cotton.[614]

> [W]hile we do not believe that it is strictly necessar[y] to calculate precisely the amount of the subsidies in question, we observe that we have readily available information on the record showing us that the price-contingent subsidies in question involve very large amounts of United States government money benefiting United States upland cotton production.[615]

In addition, the Panel made statements regarding the amount of individual price-contingent subsidies, namely marketing loan program payments and Step 2 payments.[616]

460. On appeal, the United States raises several points. First, the United States argues that the Panel was required to quantify the amount of the price-contingent subsidies benefiting upland cotton.[617] Secondly, the United States submits that counter-cyclical and market loss assistance payments to recipients who did not produce upland cotton did not benefit upland cotton at all and therefore could not have caused serious prejudice.[618] As for counter-cyclical and market loss assistance payments to recipients who produced both upland cotton and other products, the Panel should have "allocated [the subsidies] over the total sales of the recipients".[619] Thirdly, the United States maintains that the Panel erred, in its Article 6.3(c) analysis, by failing to identify the amount of benefit flowing to processed cotton from price-contingent subsidies paid to producers of raw cotton.[620]

461. Beginning with the text of Article 6.3(c), we note that this provision does not state explicitly that a panel needs to quantify the amount of the challenged subsidy. However, in assessing whether "the effect of the subsidy is ... significant price suppression", and ultimately serious prejudice, a panel will need to consider the effects of the subsidy on prices. The magnitude of the subsidy is an important factor in this analysis.[621] A large subsidy that is closely linked to prices of the relevant product is likely to have a greater impact on prices than a small subsidy that is less closely linked to prices. All other things being equal, the smaller the subsidy for a given product, the smaller the degree to which it will affect the costs or revenue of the recipient, and the smaller its likely impact on the prices charged by the recipient for the product. However, the size of a subsidy is only one of the factors that may be relevant to the determination of the effects of a challenged subsidy. A panel needs to assess the effect of the subsidy taking into account all relevant factors.

462. In order for a panel to find that a subsidy has the effect of significant price suppression, or some other effect mentioned in Article 6.3(c), the panel must determine that the payment is a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*.[622] The Panel did so in this

[612]Panel Report, para. 7.1361.

[613]*Ibid.*, para. 7.1363.

[614]Panel Report, para. 7.1308.

[615]*Ibid.*, para. 7.1349.

[616]"While we do not believe it is necessary to calculate the precise amount of the subsidies in question, we observe that we have this information readily available on the record. This is a very large amount". (Panel Report, paras. 7.1297 and 7.1300) (footnote omitted)

[617]United States' appellant's submission, para. 240. The United States does not contest the Panel's view that, in assessing the price-contingent subsidies under Article 6.3(c), it was not required to quantify *precisely* the amount of the subsidies benefiting upland cotton. (See United States' appellant's submission, para. 258; Panel Report, paras. 7.1173, 7.1186 and 7.1226) The United States clarified this point in response to questioning during the oral hearing.

[618]United States' appellant's submission, para. 242.

[619]*Ibid.*, para. 264.

[620]*Ibid.*, para. 301 and footnote 314 to para. 301. In response to questioning during the oral hearing, the United States confirmed that its appeal regarding "raw" and "processed" cotton relates to all the price-contingent subsidies.

[621]*Supra*, para. 432.

[622]As the United States points out, the word "subsidy" in Article 6.3(c) is defined in Article 1.1 of the *SCM Agreement*, and the subsidies subject to the disciplines in Part III of the *SCM Agreement* (including Articles 5(c) and 6.3(c)) must be "specific" pursuant to Article 1.2. A "subsidy" as defined in the *SCM Agreement* involves the conferral of a "benefit" under Article 1.1(b). (See United States' appellant's submission, paras. 244 and 245)

dispute[623], and we do not understand the United States to contest this conclusion. Rather, the United States argues that a panel needs to quantify the amount of the "benefit" conferred on the subsidized product by a challenged subsidy.[624] However, the definitions of a specific subsidy in Articles 1 and 2 do not expressly require the quantification of the "benefit" conferred by the subsidy on any particular product.

463. Turning to the context of Article 6.3(c), we note that Article 6.1(a)—which has now expired—contains the only reference in Part III of the *SCM Agreement* to a calculation of *ad valorem* subsidization of a product. Footnote 14 to Article 6.1(a) explains that this calculation is to be performed in accordance with Annex IV on the "Calculation of the Total Ad Valorem Subsidization (Paragraph 1(a) of Article 6)". No similar provisions are found in Article 6.3(c), which suggests that no precise quantification is envisaged in that provision.

464. The United States does not argue, as a general matter, that the methodologies in Part V of the *SCM Agreement* apply directly to a serious prejudice analysis under Part III of the *SCM Agreement*.[625] However, the United States identifies Part V as providing relevant context for the interpretation of Articles 5(c) and 6.3(c) of the *SCM Agreement*.[626] We note that the apparent rationale for Part III differs from that for Part V of the *SCM Agreement*. Under Part V, the amount of the subsidy must be calculated because, under Article 19.4 of the *SCM Agreement* and Article VI:3 of the GATT 1994, countervailing duties cannot be levied in excess of that amount. In contrast, under Part III, the remedy envisaged under Article 7.8 of the *SCM Agreement* is the withdrawal of the subsidy or the removal of the adverse effects. This remedy is not specific to individual companies. Rather, it targets the effects of the subsidy more generally. Article 6.3(c) thus goes in the same vein and does not require a precise quantification of the subsidies at issue.

465. The provisions of the *SCM Agreement* regarding quantification of subsidies reveal that the methodological approaches to quantification may be quite different, depending on the context and purpose of quantification.[627] The absence of any indication in Article 6.3(c) as to whether one of these methods, or any other method, should be used suggests to us that no such precise quantification was envisaged as a necessary prerequisite for a panel's analysis under Article 6.3(c).

466. Pursuant to Article 6.8, "the existence of serious prejudice" under Article 6.3(c) "should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V" of the *SCM Agreement*. The United States is correct that Annex V refers to "information ... as necessary to establish the existence and amount of subsidization" (in paragraph 2) and "data concerning the amount of the subsidy in question" (in paragraph 5)[628], but Annex V also refers to other information.[629] This demonstrates that the amount of the subsidy, as well as other elements, are relevant for the assessment of whether price suppression exists. But we do not read Annex V as mandating the precise quantification of subsidies in order to determine their effect under Article 6.3(c).

467. In sum, reading Article 6.3(c) in the context of Article 6.8 and Annex V suggests that a panel should have regard to the magnitude of the challenged subsidy and its relationship to prices of the product in the relevant market when analyzing whether the effect of a subsidy is significant price suppression. In many cases, it may be difficult to decide this question in the absence of such an assessment. Nevertheless, this does not mean that Article 6.3(c) imposes an obligation on panels to quantify precisely the amount of a subsidy benefiting the product at issue in every case. A precise, definitive quantification of the subsidy is not required.

468. In the present case, the Panel could have been more explicit and specified what it meant by "very large amounts"[630], beyond including cross-references to its earlier findings regarding certain subsidies. Nevertheless, the information before the Panel clearly supports the Panel's general statements regarding the magnitude of the price-contingent subsidies.[631]

469. In addition to its arguments regarding quantification, the United States contends that the Panel should have used an allocation methodology to determine the amount of "decoupled" market loss assistance payments and counter-cyclical payments that benefits a given product. It argues that Annex IV of the *SCM Agreement* contains an "economically neutral"[632] allocation methodology agreed by WTO Members, pursuant to which "the subsidy would be allocated to the product according to the ratio of sales of that product to the total value of the recipient firm's sales".[633] It is clear that use of the Annex IV methodology is not expressly *required* by Article 6.3(c). We also observe that the Panel described as "appropriate"[634] certain alternative allocation methodologies to the one it relied upon that sought to reduce the amount of payments with respect to upland cotton base acres within the base acre dependent programs to account only for payments corresponding to acres that were actually planted with upland cotton.[635] In our view, even using these alternative allocation methodologies for market loss assistance payments and counter-cyclical payments, the Panel's conclusion regarding the order of magnitude of the price-contingent subsidies stands.[636]

470. Finally, we address the related United States argument that the Panel failed to determine the extent to which the "benefit" of price-contingent subsidies paid to producers of "raw" cotton flowed through to "processed" cotton. We note that the Panel seemed to regard market loss assistance payments and counter-cyclical payments as benefiting the production of upland cotton lint.[637] As for marketing loan program payments and Step 2 payments, the Panel suggested that it is a condition of

[623]Panel Report, paras. 7.1120 and 7.1154.

[624]United States' appellant's submission, para. 246.

[625]*Ibid.*, para. 258, as confirmed during the oral hearing.

[626]United States' appellant's submission, para. 260.

[627]In relation to countervailing duties, Article 19.4 of the *SCM Agreement* specifies that the amount of the subsidy is to be "calculated in terms of subsidization per unit of the subsidized and exported product". Article 14 of the *SCM Agreement* adds that this calculation is to be done "in terms of the benefit to the recipient". In contrast, under Article 6.1(a) and paragraph 1 of Annex IV of the *SCM Agreement*, which relate to a claim of serious prejudice as mentioned above, the "total ad valorem subsidization of a product" is to be calculated "in terms of the cost to the granting government". (footnote omitted)

[628]United States' appellant's submission, paras. 247-252.

[629]For example, paragraph 3 of Annex V refers to information such as "customs data concerning imports and declared values of the products concerned". Paragraph 5 of Annex V refers to information such as "prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares".

[630]*Supra*, para. 459.

[631]Panel Report, paras. 7.596 and 7.641; United States' response to questions posed by the Panel (Panel Report, p. I-126, para. 211).

[632]United States' appellant's submission, para. 269.

[633]*Ibid.*, para. 268.

[634]Panel Report, para. 7.646.

[635]*Ibid.*, "Attachment to Section VII:D", paras. 7.634-7.647.

[636]Table 3 of Annex 2.

[637]Panel Report, para. 7.1226 and footnote 258 to para. 7.197. See *supra*, para. 407 and footnote 451.

eligibility for these payments that harvested cotton containing cotton lint and cottonseed "be 'baled' and/or 'ginned'".[638]

471. The United States contends that the Appellate Body's reasoning in *US – Softwood Lumber IV* indicates that it cannot be presumed that a "subsidy", as defined in Article 1.1 of the *SCM Agreement*, provided to a producer of an input (such as raw cotton) "passes through" to the producer of the processed product (in this case, upland cotton lint).[639] However, the Appellate Body's reasoning in that dispute focuses not on the requirements for establishing serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*, but on the conduct of countervailing duty investigations pursuant to Part V of the *SCM Agreement*.[640]

472. As we have already noted[641], the requirement in Article VI:3 of the GATT 1994 and Article 19.4 of the *SCM Agreement* that countervailing duties on a product be limited to the amount of the subsidy accruing to that product finds no parallel in the provisions on actionable subsidies and pertinent remedies under Part III of the *SCM Agreement*. Therefore, the need for a "pass-through" analysis under Part V of the *SCM Agreement* is not critical for an assessment of significant price suppression under Article 6.3(c) in Part III of the *SCM Agreement*. Nevertheless, we acknowledge that the "subsidized product" must be properly identified for purposes of significant price suppression under Article 6.3(c) of the *SCM Agreement*. And if the challenged payments do not, in fact, subsidize that product, this may undermine the conclusion that the effect of the subsidy is significant suppression of prices of that product in the relevant market.

473. For these reasons, we find that the Panel did not err in its assessment of the amount of the subsidies for the purpose of its analysis under Article 6.3(c) of the *SCM Agreement*.

(g) Effect of the Price-Contingent Subsidies Over Time

474. The United States asserts that the Panel erred in making serious prejudice findings with respect to the price-contingent subsidies provided in marketing years 1999 to 2001.[642] According to the United States, a "recurring" subsidy payment does not confer a benefit after the year for which it is paid, and therefore it is no longer a "subsidy" under Article 1 of the *SCM Agreement*. A subsidy that is paid annually must be "allocated" or "expensed"[643] to the year "for which the payment is made"[644], and the effect of such a payment cannot be "significant price suppression" in any other year. The price-contingent subsidies "are made annually with respect to a particular marketing year"[645], and therefore the effect of those subsidies cannot extend to any later marketing year. In any case, the United States argues that the Panel did not find that these subsidy payments had "continuing effects".[646] The Panel was established in marketing year 2002[647] and, therefore, the Panel could not have found that the effect of the price-contingent subsidies for marketing years 1999 to 2001 is significant price suppression.[648]

475. We observe that the United States' contention that the effect of a subsidy must be "allocated" or "expensed" to the year in which it is paid is confined to "recurring" subsidies, that is, subsidies paid on an annual basis. The United States acknowledges that "non-recurring" subsidies could be "allocated" to subsequent years as well. Article 6.3(c) of the *SCM Agreement* applies to a subsidy whether it is "recurring" or "non-recurring". This Article does not suggest that the effect of a subsidy is limited to or continues only for a specified period of time.

476. In this appeal, we are asked to address the limited question of whether the effect of a subsidy may continue beyond the year in which it was paid, in the context of a significant price suppression analysis under Article 6.3(c) of the *SCM Agreement*. Whether the effect of a subsidy begins and expires in the year in which it is paid or begins in one year and continues in any subsequent year, and how long a subsidy can be regarded as having effects, are fact-specific questions. The answers to these questions may depend on the nature of the subsidy and the product in question. We see nothing in the text of Article 6.3(c) that excludes *a priori* the possibility that the effect of a "recurring" subsidy may continue after the year in which it is paid. Article 6.3(c) deals with the "effect" of a subsidy, and not with the financial accounting of the amount of the subsidy.[649]

477. The context of Article 6.3(c) within Part III of the *SCM Agreement* does not support the suggestion that the effect of a subsidy is immediate, short-lived, or limited to one year, regardless of whether or not it is paid every year. Article 6.2 of the *SCM Agreement* refers to the possibility of the subsidizing Member demonstrating that "the subsidy in question *has not resulted* in any of the effects enumerated in paragraph 3".[650] (emphasis added) The word "resulted" in this sentence highlights the temporal relationship between the subsidy and the effect, in that one might expect a time lag between the provision of the subsidy and the resulting effect.[651] In addition, the use of the

[638]Panel Report, footnote 258 to para. 7.197. See also *ibid*., footnotes 1339 and 1340 to para. 7.1225.

[639]United States' appellant's submission, paras. 304 and 305 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 142).

[640]Appellate Body Report, *US – Softwood Lumber IV*, paras. 140-142. The Appellate Body there addressed the need for authorities to ensure that the subsidy at issue confers a benefit on the product against which countervailing duties are to be imposed (pursuant to Article 1.1 of the *SCM Agreement*) and that those duties do not exceed the total amount of the subsidy accruing to that product (pursuant to Article VI:3 of the GATT 1994). The facts in that case are also quite different from those in the present dispute. In *US – Softwood Lumber IV*, it was undisputed that lumber is a distinct product from trees or logs, and countervailing duties were imposed on exported lumber and not on trees or logs. (Appellate Body Report, *US – Softwood Lumber IV*, para. 124) In contrast, in the present dispute, no such clear distinction exists between cotton lint and "raw cotton", meaning (presumably) harvested cotton containing cottonseed and cotton lint.

[641]*Supra*, para. 464.

[642]See *supra*, para. 422(c). "Because the recurring subsidies provided in each of marketing years 1999, 2000, and 2001 ceased to exist when the benefit was used up for production in those years, the effect of those subsidies cannot be the subject of subsidies claims in marketing year 2002." (United States' appellant's submission, para. 284)

[643]United States' appellant's submission, para. 284.

[644]The United States argues that "recurring" subsidies should be "allocated ... to the marketing year to which they relate". (United States' appellant's submission, para. 275) In response to questioning during the oral hearing, the United States clarified that when it refers to the year to which a subsidy *relates* it means "the year for which the payment is made".

[645]United States' appellant's submission, para. 291.

[646]*Ibid*., para. 278.

[647]The DSB established the Panel on 18 March 2003. (WT/DS267/15; Panel Report, para. 1.2) "The date on which the Panel was established fell during the 2002 marketing year for upland cotton in the United States, which began on 1 August 2002 and ended on 31 July 2003." (Panel Report, para. 7.185)

[648]United States' appellant's submission, para. 278.

[649]Although the accounting treatment of a subsidy may be relevant, it does not control the assessment of the effect of the subsidy under Article 6.3(c).

[650]The French version of Article 6.2 states that "la subvention ... n'a eu aucun des effets énumérés au paragraphe 3". The Spanish version of Article 6.2 states "la subvención en cuestión no ha producido ninguno de los efectos enumerados en el párrafo 3".

[651]The Spanish version of Article 6.2 uses the word "producido" for "resulted", again suggesting a time lag between the provision of the subsidy and the resulting effect. The French version of Article 6.2 uses a more neutral term, "eu", which includes but perhaps does not emphasize this temporal connotation as strongly. See *supra*, footnote 650.

present perfect tense in this provision implies that some time may have passed between the granting of the subsidy and the demonstration of the absence of its effects.[652]

478. Article 6.4 of the *SCM Agreement* is also relevant context for interpreting Article 6.3(c). Article 6.4 requires that the displacement or impeding of exports be demonstrated "over an appropriately representative period", which "shall be at least one year", so that "clear trends" in changes in market share can be demonstrated.[653] This suggests that the effect of a subsidy under Article 6.4 must be examined over a sufficiently long period of time and is not limited to the year in which it was paid. As the Panel has also pointed out in the context of Article 6.3(c), "[c]onsideration of developments over a period of longer than one year ... provides a more robust basis for a serious prejudice evaluation than merely paying attention to developments in a single recent year".[654]

479. The United States supports its arguments regarding the "allocation" of "recurring" and "non-recurring" subsidies by referring to several sources.[655] The United States submits that "the Appellate Body has acknowledged that 'non-recurring' subsidies may be allocated over time"[656], citing the following statement of the Appellate Body in *US – Lead and Bismuth II*:

> [W]e agree with the Panel that while an investigating authority may presume, in the context of an administrative review under Article 21.2, that a "benefit" continues to flow from an untied, non-recurring "financial contribution", this presumption can never be "irrebuttable".[657]

In our view, this statement does not support the United States' argument. A proper reading of this statement reveals that it was made in the context of Part V of the *SCM Agreement*, and it focuses on the *benefit* flowing from a "non-recurring" financial contribution rather than the *effect* of a subsidy. Indeed, the Appellate Body's conclusion that investigating authorities cannot adopt an irrebuttable presumption that a benefit continues to flow from certain non-recurring financial contributions highlights the importance of examining the particular characteristics of a given subsidy in evaluating its impact.

[652]The French and Spanish versions of Article 6.2 also use the present perfect tense. See *supra*, footnote 650.

[653]Article 6.4 reads in relevant part:

> [T]he displacement or impeding of exports shall include any case in which ... it has been demonstrated that there has been a *change* in relative shares of the market to the disadvantage of the non-subsidized like product (*over an appropriately representative period* sufficient to demonstrate clear *trends* in the development in the market for the product concerned, which, in normal circumstances, shall be *at least one year*). ... (emphasis added)

[654]Panel Report, para. 7.1199.

[655]United States' appellant's submission, paras. 282 and 283, citing: *SCM Agreement*, paragraph 7 of Annex IV; Guidelines on Amortization and Depreciation adopted by the Tokyo Round Committee on Subsidies and Countervailing Measures, SCM/64, BISD 32S/154 (25 April 1985), para. 1; *Anti-Dumping Agreement*, Article 2.2.1.1; Appellate Body Report, *US – Lead and Bismuth II*, para. 62; Report by the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures, G/SCM/W/415/Rev.2 (15 May 1998), Recommendation 1 and paras. 1-12.

[656]United States' appellant's submission, para. 283.

[657]Appellate Body Report, *US – Lead and Bismuth II*, para. 62.

480. In addition, the United States refers to paragraph 7 of Annex IV to the *SCM Agreement*[658], which provides that "[s]ubsidies granted prior to the entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization." Although this provision recognizes that the benefits of some subsidies may be allocated to future production, it does not specify that this applies exclusively to "non-recurring" subsidies. In any event, as the Panel noted, the "effect" of a subsidy cannot be equated with the "benefit" of a subsidy.[659]

481. The United States also points to Article 2.2.1.1 of the *Anti-Dumping Agreement*, which relates to the calculation of costs in constructing a normal value under Article 2.2, in order to calculate a dumping margin in certain circumstances. Article 2.2.1.1 states, in relevant part, that "costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production". However, this provision pertains to the method of calculation of producers' costs in constructing the normal value of a product, which is a different inquiry. It does not apply in assessing the effect of a subsidy under Article 6.3(c) of the *SCM Agreement*.

482. For these reasons, we are not persuaded by the United States' contention that the effect of annually paid subsidies must be "allocated" or "expensed" solely to the year in which they are paid and that, therefore, the effect of such subsidies cannot be significant price suppression in any subsequent year. We do not agree with the proposition that, if subsidies are paid annually, their effects are also necessarily extinguished annually.

483. Turning to the effect of the subsidies at issue in this appeal, we note that the Panel found that the effect of the price-contingent subsidies for marketing years 1999 to 2002[660] "is significant price suppression ... in the period MY 1999-2002".[661] The Panel did not specify which subsidies had effects in which years; nor did it specifically state that the effect of the subsidies for marketing years 1999-2001 was significant price suppression in marketing year 2002. This is consistent with the Panel's earlier statement regarding the way in which it would conduct its analysis:

> [I]n our price suppression analysis under Article 6.3(c), we examine one effects-related variable – prices – and one subsidized product – upland cotton. To the extent a sufficient nexus with these exists among the subsidies at issue so that their effects manifest themselves collectively, we believe that we may legitimately treat them as a "subsidy" and group them and their effects together.[662]

484. For this reason, the Panel examined the price-contingent subsidies for marketing years 1999 to 2002 as a group[663], and its finding of significant price suppression in marketing years 1999 to 2002[664] applied to this group of subsidies. As we noted above, the effects of a "recurring" subsidy

[658]The title of Annex IV of the *SCM Agreement* is "Calculation of the Total Ad Valorem Subsidization (Paragraph 1(a) of Article 6)". (footnote omitted)

[659]Panel Report, para. 7.1179.

[660]*Ibid.*, para. 7.1108.

[661]*Ibid.*, para. 7.1416. Before the Panel, Brazil also claimed that United States subsidies to be granted from marketing year 2003 to marketing year 2007 threaten to cause serious prejudice to Brazil's interests. (*Ibid.*, para. 7.1478) However, the payments to be made in marketing years 2003-2007 and the issue of *threat* of serious prejudice under the *SCM Agreement* do not form part of this appeal.

[662]*Ibid.*, para. 7.1192.

[663]Panel Report, para. 7.1290.

[664]*Ibid.*, para. 7.1416.

may continue after the year in which it is paid.[665] Given that the Panel found significant price suppression in the period 1999 to 2002 as a whole, and this period includes the marketing year 2002, we are unable to agree with the United States' assertion that the Panel erred in not making a specific finding that the price-contingent subsidies for marketing years 1999 to 2001 "had continuing effects at the time of panel establishment".[666]

6. Serious Prejudice under Article 5(c) of the *SCM Agreement*

485. Having found that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*[667], the Panel then considered whether the United States had caused adverse effects in the form of serious prejudice to the interests of Brazil through the use of these subsidies, contrary to Article 5(c) of the *SCM Agreement*. The Panel found that the significant price suppression it had found under Article 6.3(c) of the *SCM Agreement* amounted to serious prejudice within the meaning of the Article 5(c) of the *SCM Agreement*[668], based on the following findings:

> [A]n affirmative conclusion that the effects-based situation in Article 6.3(c) exists is a sufficient basis for an affirmative conclusion that "serious prejudice" exists for the purposes of Article 5(c) of the *SCM Agreement*.[669]
>
> [A]ssuming *arguendo* that any sort of additional demonstration is necessary to establish that the "significant price suppression" we have found to exist in the same world market constitutes prejudice amounting to "serious prejudice" within the meaning of Article 5(c), ... Brazil has also fulfilled that burden.[670]

486. Thus, the Panel provided two alternative reasons for finding that the significant price suppression it had found amounted to serious prejudice within the meaning of the Article 5(c) of the *SCM Agreement*.[671] The Panel's primary reason was that if the effect of a subsidy is significant price suppression within the meaning of Article 6.3(c), this is sufficient, without more, to conclude that the subsidizing Member has caused serious prejudice to the interests of another Member within the meaning of Article 5(c).[672] The Panel's alternative reason was that, even if this is not sufficient, Brazil had fulfilled the burden of demonstrating that the United States had caused serious prejudice to the interests of Brazil within the meaning of Article 5(c).[673]

487. In its Notice of Appeal, and in the "Conclusion" section of its Appellant's Submission, the United States challenged the Panel's finding "that 'significant price suppression' is sufficient to establish 'serious prejudice' for purposes of Articles 5(c) and 6.3 of the SCM Agreement".[674] Brazil asks us to dismiss this claim because the United States did "not appear to have advanced arguments in its Appellant's Submission" in relation to it.[675] In response to questioning during the oral hearing, the United States clarified that, in its Notice of Appeal, it intended to challenge only the first of the two findings mentioned above (that is, the Panel's finding in paragraph 7.1390 of the Panel Report). However, the United States indicated that it did not pursue this claim in its appellant's submission.

488. As neither party has appealed the Panel's finding in paragraph 7.1390 of the Panel Report (regarding the sufficiency of a finding of an effect under Article 6.3(c) for a finding of serious prejudice under Article 5(c), in general terms) or the Panel's alternative finding in paragraph 7.1391 of the Panel Report (regarding serious prejudice to the interests of Brazil in the particular circumstances of this dispute), we express no opinion on either of those findings. Nor do we address the Panel's consequential finding that the significant price suppression that it had found to be the effect of the price-contingent subsidies under Article 6.3(c) of the *SCM Agreement* amounted to serious prejudice within the meaning of Article 5(c) of the *SCM Agreement*.[676] Accordingly, upon adoption of the Panel Report by the DSB, the Panel's findings in paragraphs 7.1390 and 7.1391 of the Panel Report as mentioned above[677] would stand, without endorsement or rejection by the Appellate Body.

7. Basic Rationale under Article 12.7 of the DSU

489. The United States contends that, contrary to Article 12.7 of the DSU, the Panel failed to set out the basic rationale behind its finding that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*. Article 12.7 of the DSU requires a panel to set out in its report "the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes".

490. The United States submits that the Panel "provided no explanation of what degree of price suppression it had found to be 'significant.'"[678] In fact, the Panel based its reasoning in this regard on the ordinary meaning of "significant"[679], explaining that the "significance" of price suppression could, depending on the circumstances, have both quantitative and qualitative aspects.[680] We find that the Panel adequately explained the basis for its conclusion that the price suppression it had found was "significant" with the meaning of Article 6.3(c).[681] We therefore see no failure on the part of the Panel to comply with Article 12.7 of the DSU in this regard.

491. The United States also argues that the Panel "failed to set out the basic rationale behind its findings and recommendations ... with respect to the amount of the subsidy".[682] We have already held that the Panel did not err in interpreting or applying Article 6.3(c) of the *SCM Agreement* in relation to the amount of the challenged subsidies.[683] In addition, we note that the Panel articulated a basic

[665] *Supra*, para. 482.

[666] United States' appellant's submission, para. 278.

[667] Panel Report, paras. 7.1355-7.1356 and 7.1363.

[668] *Ibid.*, paras. 7.1395 and 8.1(g)(i).

[669] *Ibid.*, para. 7.1390.

[670] *Ibid.*, para. 7.1391.

[671] Panel Report, paras. 7.1395 and 8.1(g)(i).

[672] *Ibid.*, para. 7.1390.

[673] *Ibid.*, para. 7.1391.

[674] United States' Notice of Appeal (WT/DS267/17, 18 October 2004, attached as Annex 1 to this Report), para. 8(i); United States' appellant's submission, para. 516(8)(i).

[675] Brazil's appellee's submission, para. 1084.

[676] Panel Report, paras. 7.1395 and 8.1(g)(i).

[677] *Supra*, para. 485.

[678] United States' appellant's submission, para. 330.

[679] Panel Report, para. 7.1325 (referring to *The New Shorter Oxford English Dictionary* (1993)).

[680] "The 'significance' of any degree of price suppression ... may not solely depend upon a given level of numeric significance". (Panel Report, para. 7.1329)

[681] Panel Report, paras. 7.1316-7.1333.

[682] United States' appellant's submission, para. 326.

[683] *Supra*, para. 473.

rationale for its conclusions in this regard.[684] Accordingly, we decline to find an error on the part of the Panel under Article 12.7 of the DSU.

492. In addition, the United States contends that, contrary to Article 12.7 of the DSU, the Panel failed to set out the basic rationale behind several steps in its reasoning leading to the conclusion that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*. The United States contends that the Panel "prejudged ... the outcome of its causation analysis" in making its finding of price suppression[685] and that the Panel "never explained why it did not analyze the farmer's planting decision and the use of expected prices".[686] In the present dispute, the Panel set out the basic rationale for its findings on "significant price suppression" and the "causal link" with the price-contingent subsidies.[687] As we have already explained, the Panel did address the "planting decision" and "expected prices"[688], and the overlap between different sections of the Panel's analysis stemmed in part from the elements that constitute "price suppression" under Article 6.3(c).[689]

493. In its appellant's submission, the United States argues that the Panel failed to comply with Article 12.7 of the DSU, *inter alia*, in making its findings as to: (i) "why the processed cotton was a 'subsidized product' and why [the Panel] could assume that all of the subsidies paid to cotton producers for raw cotton passed through to the processor"[690]; and (ii) "why any price suppression that it found meant that there was serious prejudice to the interests of Brazil".[691]

494. However, paragraph 10 of the United States' Notice of Appeal (which contains the United States' allegations in connection with Article 12.7 of the DSU) does not refer to the "subsidized product", "pass through", or "serious prejudice". Nor does the general statement in paragraph 10 of

[684]Panel Report, paras. 7.1166-7.1190. In assessing the need to quantify the benefit conferred on upland cotton by the subsidies at issue, the Panel compared the specific provisions in Parts III and V of the *SCM Agreement*, as well as certain aspects of Articles VI and XVI of the GATT 1994. It highlighted the different remedies contained in the provisions of Part III and V and the rationale behind these different parts. The Panel identified the specific arguments of the United States that it was addressing as well as the relevant Appellate Body pronouncements. The Panel's basic rationale for deciding that it need not quantify precisely the benefit conferred on upland cotton by the subsidies at issue appears to have been that "the more precise quantitative concepts and methodologies found in Part V of the *SCM Agreement* are not directly applicable in our examination of Brazil's actionable subsidy claims under Part III of the *SCM Agreement*". (Panel Report, para. 7.1167)

[685]United States' appellant's submission, para. 325.

[686]*Ibid.*, para. 324.

[687]Panel Report, paras. 7.1275-7.1363. The Panel referred to and addressed a great deal of factual evidence provided by the parties. The Panel also clearly identified the provisions of the covered agreements that it considered relevant to this issue and gave detailed explanations for its conclusions at each step.

[688]*Supra*, para. 441.

[689]*Supra*, para. 433.

[690]United States' appellant's submission, para. 328.

[691]*Ibid.*, para. 329.

the issues covered in the United States' claim under Article 12.7 of the DSU appear to extend to these two findings.[692]

495. We acknowledge that the wording of paragraph 10 of the United States' Notice of Appeal (and, in particular, the use of the words "for example") suggests that the findings listed in this paragraph are simply *examples* of findings challenged in connection with Article 12.7 of the DSU, and that the United States' claim of error under Article 12.7 extends to other Panel findings. In other words, paragraph 10 purports to provide an illustrative rather than exhaustive list of the findings that the United States intends to challenge under Article 12.7 of the DSU. However, the fact that paragraph 10 purports to provide an illustrative list is not conclusive as to whether the Notice of Appeal contains a sufficient reference to the Panel's findings described in paragraph 493 above for us to conclude that these findings are included in the United States' appeal. The significance of terms such as "for example" is likely to depend on the particular claim in question and the particular context in which the term is used in a given appeal. In our view, the United States' Notice of Appeal did not provide adequate notice to Brazil, as contemplated by Rule 20(2) of the *Working Procedures for Appellate Review* (the "*Working Procedures*")[693], that the United States intended to make a claim of error under Article 12.7 of the DSU with respect to the Panel's findings described in paragraph 493 above. We therefore decline to rule on these findings in connection with Article 12.7 of the DSU.

8. Conclusion

496. For these reasons, the United States has not persuaded us that the Panel committed a legal error in interpreting the relevant legal requirements of Article 6.3(c) or in applying its interpretation to the facts of this case. We therefore *uphold* the Panel's finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, that the effect of marketing loan program payments, Step 2 payments, market loss assistance payments, and counter-cyclical payments is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*.[694] We also find that the Panel set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind this finding, as required by Article 12.7 of the DSU.

B. *World Market Share under Article 6.3(d) of the SCM Agreement*

1. Introduction

497. In addition to its claim that it had suffered serious prejudice resulting from price suppression under Article 6.3(c) of the *SCM Agreement*, Brazil also made claims before the Panel alleging that the effect of the challenged subsidies was serious prejudice resulting from an increase in the United States' world market share in upland cotton under Article 6.3(d) of that Agreement.[695] The principal

[692]It could be argued that the "pass-through" issue is encompassed in the reference to "the amount of the challenged subsidies" in paragraph 10. However, if the United States wished to include this issue in its claim of error under Article 12.7, as described in paragraph 10 of the Notice of Appeal, one might have expected it to do so more explicitly, given that a substantive claim of error regarding the need for a "pass-through" analysis is raised specifically in paragraph 8(d) of the Notice of Appeal in respect of the issues appealed regarding "serious prejudice".

[693]See *supra*, footnote 18.

[694]See *supra*, para. 488.

[695]The Panel listed the following as subsidies at issue for purposes of Brazil's claim under Article 6.3(d) of the *SCM Agreement*: "user marketing (Step 2) payments to domestic users and exporters; marketing loan programme payments; [production flexibility contract] payments; [market loss assistance] payments; [direct] payments; [counter-cyclical] payments; crop insurance payments; and cottonseed payments". (Panel Report, para. 7.1418) (footnote omitted)

disagreement between the parties regarding the application of Article 6.3(d) related to the meaning of the phrase contained therein, "world market share". Brazil submitted that this phrase meant "a Member's share of the world market for exports"[696], and put forward evidence regarding increases in the United States' share of the world market for exports of upland cotton. The United States contended that the United States' share of the "world market" for upland cotton encompassed all consumption of all upland cotton, including consumption by a country of its own cotton production.[697]

498. The Panel rejected Brazil's contention that the "world market share" referred to in Article 6.3(d) was limited to the world market for exports.[698] The Panel also rejected the United States' argument that "world market share" focuses on a Member's share of consumption, based largely upon an interpretation of the object and purpose of subsidies disciplines[699] and logical inconsistencies in the United States' arguments.[700] Instead, the Panel reached the view that:

> ... the phrase "world market share" of the subsidizing Member in Article 6.3(d) of the *SCM Agreement* refers to share of the world market supplied by the subsidizing Member of the product concerned.[701]

499. In view of the fact that the evidence and argumentation submitted by Brazil "focused exclusively upon a different, and in [the Panel's] view erroneous, legal interpretation of the phrase 'world market share' in Article 6.3(d)", the Panel found that "Brazil has not established a prima facie case of violation of Article 6.3(d) or Article 5(c) of the *SCM Agreement*".[702]

500. Brazil appeals the Panel's finding that it failed to make a *prima facie* case of violation under Article 6.3(d) (and Article 5(c)) of the *SCM Agreement*. Its appeal has two sequential elements. First, Brazil appeals the Panel's legal interpretation of Article 6.3(d). Brazil stresses that its appeal regarding the Panel's legal interpretation of the phrase "world market share" is *not conditional*.[703] Brazil suggests that the text of Article 6.3(d) is silent on the question of whether "world market share" refers to world market share of *exports* or world market share of something else.[704] However, the use of the word "*trade*" in footnote 17 to Article 6.3(d) (in the context of "multilaterally agreed specific rules apply to the trade in the product or commodity") suggests that the focus of the provision is upon a Member's share of world *trade* in a product, which requires a focus on *exports*, not *production*, as the Panel found.[705] Brazil argues that Article XVI:3 of the GATT 1994 addresses a Member's "share of world export trade" and that structural similarities between Article XVI:3 and Article 6.3(d) require the phrase "world market share" in the latter provision to be read in the same way.[706] Brazil also points to the context provided by paragraphs (a) and (b) of Article 6.3, as well as Articles 6.4 and 6.7, and argues that the focus of a serious prejudice analysis under Article 6.3 is on

[696]Panel Report, para. 7.1424. (footnote omitted)

[697]*Ibid.*, para. 7.1425.

[698]*Ibid.*, paras. 7.1438-7.1450, and 7.1455-7.1463.

[699]*Ibid.*, paras. 7.1451-7.1453.

[700]*Ibid.*, footnote 1527 to para. 7.1451.

[701]*Ibid.*, para. 7.1464. (underlining added)

[702]*Ibid.*, para. 7.1465. (footnote omitted)

[703]Brazil's other appellant's submission, para. 264.

[704]*Ibid.*, para. 275.

[705]Brazil's other appellant's submission, paras. 276-277.

[706]*Ibid.*, paras. 275-280.

the effects of the subsidies on like products from the complaining Member.[707] In addition, Brazil argues that the Panel's reasoning subverts the object and purpose of the *SCM Agreement*, which is to reduce trade distortions caused by subsidies. The Panel's reading denies any remedy to countries that lose market share to subsidized products.[708]

501. Secondly, Brazil requests us to complete the analysis of its claim of serious prejudice under Article 6.3(d). Brazil makes this element of its appeal *conditional* upon us reversing the Panel's findings that United States price-contingent subsidies[709] caused significant price suppression in terms of Article 6.3(c) of the *SCM Agreement*. Brazil submits that findings by the Panel and undisputed facts on the record would allow us to complete the analysis and find a violation of Article 6.3(d) by the United States.[710]

502. The United States counters that the Panel was correct to reject the Brazilian interpretation that "world market share" in Article 6.3(d) means "world market share of exports". The Panel correctly reasoned that nothing in the ordinary meaning of "world market share" suggests that it should not include the domestic market of the Member concerned.[711] The United States recalls that the Panel distinguished between Article 6.3(d) (which deals with "world market share") and Article XVI:3 of GATT 1994 (which deals with "share of world export trade") and suggests that the distinct choice of words reflected in these provisions contains important context to suggest that the coverage of Article 6.3(d) is different from that of Article XVI:3.[712] The United States rebuts Brazil's arguments regarding footnote 17 to Article 6.3(d) by stressing that the term "trade" in the footnote does not purport to limit the scope of the otherwise broad term "world market share" in the text of Article 6.3(d) itself.[713] Other elements of the context in which Article 6.3(d) appears, such as paragraphs (a) and (b) of Article 6.3 and Articles 6.4 and 6.7 of the *SCM Agreement*, explicitly limit the aspects of the market that they address. This contrasts with Article 6.3(d), which focuses only upon the general concept "world market share". The United States also contests Brazil's view that the Panel's interpretation of Article 6.3(d) reduces the provision to inutility.[714] With respect to Brazil's conditional request to complete the analysis, the United States submits that, even if the Appellate Body accepts Brazil's arguments with respect to the interpretation of Article 6.3(d), there are insufficient facts available for the Appellate Body to complete the analysis of Brazil's claim on this matter. The United States observes that the Panel did not undertake an analysis regarding a causal link between the subsidies at issue and an increase in the United States' world market share of exports in upland cotton, and that the causation analysis regarding price suppression under 6.3(c) could not be transposed into an analysis of world market share under Article 6.3(d).[715]

[707]*Ibid.*, paras. 281-288.

[708]*Ibid.*, paras. 289-294.

[709]That is, marketing loan program payments, Step 2 payments, market loss assistance payments and counter-cyclical payments.

[710]Brazil's other appellant's submission, paras. 296-315.

[711]Indeed (and although the United States does not appeal this point), the United States stresses that the Panel's interpretation that the focus in the phrase "world market share" is upon production is too narrow, because it focuses only on *supply* in the world "market" and not upon *demand*. A correct interpretation would take into account demand—that is *consumption*—as well. On this basis, the focus in Article 6.3(d) is not upon a share of the world's supply or production, but rather upon total *sales*. (United States' appellee's submission, paras. 148-152)

[712]United States' appellee's submission, para. 153.

[713]*Ibid.*, paras. 154-156.

[714]*Ibid.*, para. 161.

[715]*Ibid.*, paras. 163-165.

503. Benin and Chad, third participants in this appeal, support Brazil's interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement*.[716] Benin and Chad argue that, in the event we agree with Brazil that "world market share" refers to a Member's share of world exports, then we should complete the analysis. In the view of Benin and Chad, the undisputed evidence on record demonstrates that the effect of the United States' subsidies is serious prejudice to the interests of Benin and Chad as well, within the meaning of Articles 6.3(d) and 5(c) of the *SCM Agreement*. Benin and Chad submit that the "interests of another Member" in Article 5(c) are not limited only to the interests of the complaining Member and ask us to find accordingly.[717]

2. Analysis

504. Article 6.3 of the *SCM Agreement* provides, in relevant part:

> Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
>
> ...
>
> (d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[17] as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

[17] Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

505. As we have noted above, the four subparagraphs of Article 6.3 describe circumstances in which a subsidy has certain effects, which, in turn, may constitute serious prejudice under Article 5(c).[718] Article 6.3(d) addresses a situation in which subsidies have the effect of increasing the "world market share of the subsidizing Member in a particular subsidized product or commodity". The Panel held that the phrase "world market share" of the subsidizing Member in Article 6.3(d) of the *SCM Agreement* "refers to share of the world market *supplied* by the subsidizing Member of the product concerned".[719] As Brazil had failed to submit evidence pertaining to this legal interpretation, the Panel found that Brazil had failed to make a *prima facie* case of violation of this provision.[720]

506. Brazil's appeal with respect to the application of Article 6.3(d) of the *SCM Agreement* has two elements. First, Brazil appeals the Panel's interpretation of the phrase "world market share" in that provision. Second, Brazil requests us to complete the analysis of this issue and rule that the effect of certain United States subsidies is an increase in the world market share of the United States in upland cotton. This second element of Brazil's appeal is *conditional* upon us reversing the Panel's findings with respect to the interpretation of Article 6.3(c) of the *SCM Agreement*.

[716]Benin and Chad's third participants' submission, paras. 75-79.

[717]*Ibid.*, paras. 80-91.

[718]On the relationship between Articles 5(c) and 6.3 of the *SCM Agreement*, see *supra*, paras. 485-488.

[719]Panel Report, para. 7.1464. (emphasis added)

[720]*Ibid.*, para. 7.1465.

507. We observe with regard to the interpretation of the phrase "world market share" in Article 6.3(d) that, above[721], we upheld the Panel's finding that the effect of the price-contingent subsidies at issue in these proceedings is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*. We observe, therefore, that the condition upon which the second part of Brazil's appeal is contingent is *not* fulfilled, and thus there is no need for us to complete the analysis and to examine whether or not the United States subsidies at issue have the effect of increasing the United States' world market share in upland cotton.

508. Nor do we believe that it is necessary to make a finding on the interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement*. We recall that Article 17.12 of the DSU requires that the "Appellate Body shall address each of the issues raised in accordance with paragraph 6 [of Article 17] during the appellate proceeding". In addition, we note that Article 3.3 of the DSU explains that:

> The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

For its part, Article 3.4 of the DSU provides that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter". Similarly, Article 3.7 states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute".

509. In *US – Wool Shirts and Blouses*, the Appellate Body cautioned that:

> Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute.[722]

510. With this in mind, we observe that although an interpretation by the Appellate Body, in the abstract, of the meaning of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement* might offer at best some degree of "guidance" on that issue, it would not affect the resolution of this particular dispute.[723] Indeed, irrespective of whether we were to uphold or reverse the Panel's finding on this issue, upon adoption of the recommendations and rulings by the DSB, the United States would be under no additional obligation regarding implementation. Thus, although we recognize that there may be cases in which it would be useful for us to review an issue, despite the fact that our ruling would not result in rulings and recommendations by the DSB, we find no compelling reason for doing so in this case.

[721]*Supra*, para. 496.

[722]Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323 at 340.

[723]We note, in this regard, that, in *US – Steel Safeguards*, the Appellate Body noted that "several participants expressed an interest in having [it] rule on causation as it would provide guidance to Members on applying safeguard measures in the future consistently with their WTO obligations". (Appellate Body Report, *US – Steel Safeguards*, para. 484) Despite this request for guidance, the Appellate Body declined to make a ruling on this specific aspect of the case. (Appellate Body Report, *US – Steel Safeguards*, para. 483)

511. Accordingly, we believe that an interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement* is unnecessary for purposes of resolving this dispute. We emphasize that we neither uphold nor reverse the Panel's findings on the interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement*.

512. Finally, we recall that Article 24.1 of the DSU requires that "[a]t all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members". We fully recognize the importance of this provision. However, we recall that Benin and Chad request us to find that their interests have suffered serious prejudice in the sense of Article 5(c) of the *SCM Agreement*, if we find Brazil has suffered serious prejudice as a result of an increase in the United States' world market share in upland cotton in the sense of Article 6.3(d) of the *SCM Agreement*. As we do not find it necessary to rule on Brazil's appeal regarding the interpretation of the phrase "world market share" in Article 6.3(d), we therefore are not in a position to accede to Benin and Chad's request to complete the analysis and to find that, in addition to Brazil, Benin and Chad also have suffered serious prejudice to their interests in the sense of Articles 6.3(d) and 5(c) of the *SCM Agreement*. We note that Benin and Chad's request to complete the analysis was predicated upon us reversing the Panel's interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement*.[724] This condition is not met.

VII. Import Substitution Subsidies and Export Subsidies

A. *Step 2 Payments to Domestic Users*

1. Introduction

513. We examine next the United States' claims against the Panel's findings relating to the Step 2 payments provided to domestic users and exporters of United States upland cotton under Section 1207(a) of the FSRI Act of 2002.

514. According to the Panel[725], the program pursuant to which Step 2 payments are granted has been authorized since 1990 under successive legislation, including the FAIR Act of 1996[726] and the FSRI Act of 2002.[727] Under the program, marketing certificates or cash payments (collectively referred to by the Panel as "user marketing (Step 2) payments")[728] are issued to eligible domestic users and exporters of eligible upland cotton when certain market conditions exist such that United States cotton pricing benchmarks are exceeded. "Eligible upland cotton" is defined as "domestically produced baled upland cotton which bale is opened by an eligible domestic user ... or exported by an eligible exporter".[729] An "eligible domestic user" of upland cotton is defined under the regulations as:

> A person regularly engaged in the business of opening bales of eligible upland cotton for the purpose of manufacturing such cotton into cotton products in the United States (domestic user), who has entered into an agreement with CCC[730] to participate in the upland cotton user marketing certificate program.[731]

515. For its part, an "eligible exporter" of upland cotton is:

> A person, including a producer or a cooperative marketing association ... regularly engaged in selling eligible upland cotton for exportation from the United States (exporter), who has entered into an agreement with CCC to participate in the upland cotton user marketing certificate program.[732]

516. The Panel explained that, under the FAIR Act of 1996, the United States Secretary of Agriculture "issued user marketing (Step 2) payments to domestic users and exporters of upland cotton for documented purchases by domestic users and sales for export by exporters made in a week following a consecutive four-week period when the lowest price quotation for United States cotton delivered to Northern Europe exceeded the Northern Europe price quotation by more than 1.25 cents per pound, and the adjusted world price did not exceed 130 per cent of the marketing loan rate for upland cotton."[733] The payments to domestic users and exporters are calculated "at a rate per pound equal to the difference between the two price quotations during the fourth week of the period, minus the 1.25 cents per pound threshold".[734] Step 2 payments continued to be authorized under the FSRI Act of 2002, although with certain modifications. The Panel pointed out that "[i]n particular, application of the 1.25 cents per pound threshold has been delayed until 1 August 2006 (i.e. for the 2002 through 2005 marketing years)".[735] The consequence of this, the Panel explained, is that "Step 2 payments are issued following a consecutive four-week period when the lowest price quotation for United States cotton delivered to Northern Europe exceeded the Northern Europe price quotation by any amount and the adjusted world price did not exceed 134 per cent (not 130 per cent, as under the FAIR Act of 1996) of the marketing loan rate".[736] Domestic users and exporters receive payments that are calculated "at a rate per pound equal to the difference between the two price quotations during the fourth week of the period, with no reduction for the threshold".[737]

517. We address first the United States' appeal of the Panel findings in respect of Step 2 payments to *domestic users* of United States upland cotton. We examine the United States' appeal of the Panel's finding in respect of Step 2 payments to *exporters* of United States upland cotton in the next Section of this Report.

[724]Benin and Chad's third participants' submission, para. 83.

[725]Panel Report, para. 7.209.

[726]Section 136 of the FAIR Act of 1996, reproduced in Exhibits BRA-28 and US-22.

[727]Section 1207 of the FSRI Act of 2002, reproduced in Exhibits BRA-29 and US-1, implemented under 7 CFR 1427, Subpart C, reproduced in Exhibit BRA-37.

[728]The Panel explained that "[f]or the purposes of this dispute, on the basis of the views of the parties, we make no distinction between user marketing (Step 2) cash payments and marketing certificates". (Panel Report, footnote 284 to para. 7.209, referring to Brazil's and the United States' respective responses to Panel Question No. 110 (a))

[729]7 CFR Section 1427.103(a).

[730]Additional information about the CCC is provided, *infra*, footnote 859; see also Panel Report, para. 7.702.

[731]7 CFR Section 1427.104(a)(1).

[732]7 CFR Section 1427.104(a)(2).

[733]Panel Report, para. 7.210.

[734]*Ibid.*, para. 7.210 (referring to Section 136(a) of the FAIR Act of 1996 reproduced in Exhibits BRA-28 and US-22). The Panel added that Section 136(a)(5) limited total expenditures under this program to $701 million, but this was later repealed. (*Ibid.*, footnote 286 to para. 7.210)

[735]*Ibid.*, para. 7.211.

[736]*Ibid.*

[737]*Ibid.*, para. 7.211 (referring to Section 1207(a) of the FSRI Act of 2002, reproduced in Exhibits BRA-29 and US-1, and 7 CFR 1427.107 (1 January 2003 edition), reproduced in Exhibit BRA-37).

2. Panel Findings

518. Before the Panel, Brazil argued that Step 2 payments to domestic users of upland cotton are *per se* import substitution subsidies that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*.[738] Brazil explained that Step 2 payments to domestic users are "contingent on the use of domestic over imported goods within the meaning of Article 3.1(b) of the *SCM Agreement*" because the payments "are 'conditional' on proof of consumption of domestically produced upland cotton".[739]

519. The United States did not dispute that Step 2 payments are "subsidies" and that to receive a Step 2 payment a domestic user must "open a bale of domestically produced baled upland cotton".[740] The United States, however, asserted that Step 2 payments to domestic users of upland cotton are included, and they comply with, the United States' domestic support reduction commitments pursuant to Article 6.3 of the *Agreement on Agriculture*.[741] As Step 2 payments to domestic users are permitted under the *Agreement on Agriculture*, the United States argued that these payments cannot be contrary to Article 3 of the *SCM Agreement*. This is because the introductory language of Article 3.1 of the *SCM Agreement* makes it clear that that provision applies "[e]xcept as provided in the *Agreement on Agriculture*".[742] The United States additionally asserted that "pursuant to Article 21 of the *Agreement on Agriculture*, all of the Annex 1A agreements (including the *SCM Agreement*) apply subject to the provisions of the *Agreement on Agriculture*".[743]

520. The Panel began its examination by observing that "[t]he introductory clause of Article 3.1 of the *SCM Agreement* ('[e]xcept as provided in the Agreement on Agriculture') indicates that any examination of the WTO-consistency of a subsidy for agricultural products under the *SCM Agreement* may depend upon the provisions of the *Agreement on Agriculture*.[744] The Panel then examined Article 21.1 of the *Agreement on Agriculture* and observed that this provision "expressly acknowledges the application of the *GATT 1994* and the *SCM Agreement* to agricultural products, while indicating that the *Agreement on Agriculture* would take precedence in the event, and to the extent, of any conflict".[745] The Panel described the situations in which, in its view, Article 21.1 of the *Agreement on Agriculture* applies[746], and then turned to "the relevant provisions of the *Agreement on Agriculture* in order to discern whether, and/or to what extent, these provisions affect a claim concerning the prohibition on import substitution subsidies in Article 3.1(b) of the *SCM Agreement*."[747] The Panel concluded that "none of the situations" it described arises in this dispute from the relevant provisions in the *Agreement on Agriculture*.[748]

521. The Panel examined Article 13 of the *Agreement on Agriculture*, but concluded that this provision did not affect its analysis of Brazil's claims under Article 3.1(b) of the *SCM Agreement*.[749] The Panel then looked at Article 6.3 and paragraph 7 of Annex 3 of the *Agreement on Agriculture*, rejecting the United States' contention that "user marketing (Step 2) payments to upland cotton domestic users that provide support to domestic producers contingent on the use of domestic goods [are] consistent with the *Agreement on Agriculture*".[750] The Panel reasoned instead that:

> Article 6.3 does *not* provide that compliance with such "domestic support reduction commitments" shall necessarily be considered to be in compliance with other applicable WTO obligations. Nor does it contain an explicit textual indication that otherwise prohibited measures are necessarily justified by virtue of compliance with the domestic support reduction commitments. The obligations are parallel, and the operation of Article 6.3 of the *Agreement on Agriculture* does not pre-empt or exclude the operation of the obligation under Article 3.1(b) of the *SCM Agreement*.[751]

522. From this the Panel concluded that "Article 3.1(b) of the *SCM Agreement* can be read together with the *Agreement on Agriculture* provisions relating to domestic support in a coherent and consistent manner which gives full and effective meaning to all of their terms".[752] Accordingly, the Panel found no conflict between the domestic support provisions of the *Agreement on Agriculture* and Article 3.1(b) of the *SCM Agreement* and, therefore, saw no necessity to apply the rules in Article 21.1 of the *Agreement on Agriculture*.[753]

523. Having examined the relationship between the relevant provisions of the *Agreement on Agriculture* and the *SCM Agreement*, the Panel proceeded to examine whether the Step 2 payments to domestic users are contingent on the use of domestic products contrary to Article 3.1(b) of the *SCM Agreement*. The Panel noted that the United States had acknowledged that "to receive a payment under the user marketing (Step 2) programme, a domestic user must open a bale of domestically produced baled upland cotton" and, therefore, did "not dispute that user marketing (Step 2) payments to domestic users constitute a subsidy conditional or dependent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the *SCM Agreement*".[754] The Panel also conducted its own examination and found that:

[738]Panel Report, para. 7.1019. Before the Panel, Brazil also claimed that Step 2 payments to *domestic users* are contrary to Article III:4 of the GATT 1994 and that they are not justified under Article III:8(b) because they are not exclusively paid to domestic *producers* of cotton, but rather to domestic *users*.

The Panel exercised judicial economy in respect of this claim, in the light of the fact that it had already found the same measure to be inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*. Brazil has not appealed the Panel's exercise of judicial economy. (*Ibid.*, paras. 7.1099 and 7.1106)

[739]*Ibid.*, para. 7.1019.

[740]*Ibid.*, para. 7.1022 (quoting the United States' response to Question 144 Posed by the Panel (Panel Report, p. I-128, para. 217 and p. I-249, para. 58)).

[741]*Ibid.*, para. 7.1023.

[742]*Ibid.*, para. 7.1024.

[743]*Ibid.*

[744]Panel Report, para. 7.1034. (footnote omitted)

[745]*Ibid.*, para. 7.1036.

[746]*Ibid.*, para. 7.1038. See *infra*, para. 532.

[747]*Ibid.*, para. 7.1041. (footnote omitted)

[748]*Ibid.*, para. 7.1039.

[749]*Ibid.*, para. 7.1052.

[750]*Ibid.*, para. 7.1056.

[751]*Ibid.*, para. 7.1058. (original emphasis)

[752]*Ibid.*, para. 7.1071.

[753]Panel Report, para. 7.1071.

[754]*Ibid.*, para. 7.1082 (referring to the United States' response to Question 144 Posed by the Panel (Panel Report, p. I-249, para. 58) and Appellate Body Report, *Canada – Autos*, para. 126). (footnotes omitted)

> ... user marketing (Step 2) payments to domestic users under section 1207(a) of the FSRI Act of 2002 will not be made except upon proof of consumption of eligible upland cotton – which must be "domestically produced", and "not imported". It is not just that it will invariably be easier for domestic users to meet the conditions for user marketing (Step 2) payments to domestic users by using domestic -- rather than imported -- upland cotton. The text of the measure explicitly *requires* the use of domestically produced upland cotton as a pre-condition for receipt of the payments.
>
> The use of United States domestically produced upland cotton is a condition for obtaining the subsidy. User marketing (Step 2) payments to domestic users under section 1207(a) of the FSRI Act of 2002 are clearly conditional, or dependent upon, such use.[755]

524. The Panel, furthermore, recalled its finding that the "fact that the user marketing (Step 2) payments are also available in another factual situation ... —i.e. exporters—would not have the effect of dissolving such contingency in respect of domestic users, particularly ... where the other factual contingency (upon export performance) also gives rise to a prohibited subsidy".[756]

525. Therefore, the Panel concluded that "section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to domestic users is inconsistent with Article 3.1(b) of the *SCM Agreement*".[757] In addition, the Panel found that "[t]o the extent that section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to domestic users is inconsistent with Article 3.1(b), it is, consequently, also inconsistent with Article 3.2 of the *SCM Agreement*".[758]

3. Arguments on Appeal

526. On appeal, the United States requests us to reverse the Panel's findings. According to the United States, the Panel's conclusion fails to give meaning to the introductory phrase "[e]xcept as provided in the Agreement on Agriculture" of Article 3.1 of the *SCM Agreement*.[759] This phrase not only applies to export subsidies covered by Article 3.1(a) of the *SCM Agreement*, but also to import substitution subsidies covered by Article 3.1(b). The United States contends that Step 2 payments to domestic users are properly classified as domestic support subject to reduction commitments under Article 6 of the *Agreement on Agriculture*.[760] Indeed, paragraph 7 of Annex 3 requires that measures directed at agricultural processors shall be included in the AMS to the extent that such measures benefit the producers of the basic agricultural products. This approach is consistent with the objective of the *Agreement on Agriculture* of providing for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time.[761] Furthermore, the United States argues that the lack of any reference to domestic content subsidies in Article 13(b) of the *Agreement on Agriculture* does not support the Panel's interpretation.[762] Article 13(b) does not refer to Article 3 of the *SCM Agreement* because the substantive obligation of Article 3.1(b) does not apply in the case of domestic content subsidies in favour of agricultural producers.

527. Brazil requests that we uphold the Panel's findings. According to Brazil, "[t]he obligations in the *Agreement on Agriculture* and the *SCM Agreement* apply cumulatively, unless there is an exception or a conflict".[763] In Brazil's view, no conflict arises. Under the *Agreement on Agriculture*, WTO Members enjoy a right to grant domestic support in favour of agricultural producers. However, this does not create a conflict with Article 3.1(b) of the *SCM Agreement*, because it is perfectly possible for Members to grant domestic support without making payments contingent on domestic content. In other words, Members can fully enjoy their right to grant domestic support *and* comply with Article 3.1(b).[764]

528. Brazil asserts that this interpretation is consistent with a primary objective of the covered agreements, namely, avoiding discrimination under the national treatment rule. It is also consistent with an adopted 1958 GATT panel report involving a subsidy to agricultural producers that was contingent on purchase of domestic goods.[765] Thus, Brazil states that domestic content subsidies in favour of agricultural producers have been understood to be impermissible since 1958, so there is nothing novel about Brazil's complaint.[766] The *Agreement on Agriculture* did not mark a step back to allowing discrimination and protection that was prohibited under the GATT 1947. Therefore, domestic support under the *Agreement on Agriculture* can and must be granted consistently with Article 3.1(b) of the *SCM Agreement* and Article III:4 of the GATT 1994.[767]

4. Does Article 3.1(b) of the *SCM Agreement* Apply to Agricultural Products?

529. At the outset, we note that the United States did not dispute before the Panel that, if the *SCM Agreement* were applicable, "user marketing (Step 2) payments to domestic users [would] constitute a subsidy conditional or dependent upon the use of domestic over imported goods within the meaning of Article 3.1(b)" of that Agreement.[768] Instead, before the Panel and on appeal, the United States asserts that Article 3.1(b) of the *SCM Agreement* is inapplicable to Step 2 payments to domestic users because these payments are consistent with the United States' domestic support reduction commitments under the *Agreement on Agriculture*.[769]

530. Article 3.1(b) of the *SCM Agreement* provides:

> *Article 3*
>
> *Prohibition*
>
> Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> ...

[755] *Ibid.*, paras. 7.1085-7.1086. (original emphasis)

[756] *Ibid.*, para. 7.1087.

[757] Panel Report, para. 7.1097. (footnote omitted)

[758] *Ibid.*, para. 7.1098.

[759] United States' appellant's submission, paras. 429-430.

[760] *Ibid.*, para. 434.

[761] *Ibid.*, para. 435.

[762] *Ibid.*, paras. 431-432.

[763] Brazil's appellee's submission, para. 75.

[764] Brazil's appellee's submission, para. 867.

[765] *Ibid.*, para. 860 (referring to GATT Panel Report, *Italy – Agricultural Machinery*, para. 16). According to Brazil, that panel recognized that the GATT contracting parties were entitled to grant support to agricultural producers but found that this could be done without granting domestic content subsidies.

[766] Brazil's appellee's submission, para. 861.

[767] *Ibid.*, paras. 863-865.

[768] Panel Report, para. 7.1082.

[769] *Ibid.*, para. 7.1023; United States' appellant's submission, paras. 434-436.

> (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

We note that the introductory language of the chapeau makes it clear that the *Agreement on Agriculture* prevails over Article 3 of the *SCM Agreement*, but only to the extent that the former contains an exception.

531. Article 21.1 of the *Agreement on Agriculture*, which deals more broadly with the relationship between that Agreement and the other covered agreements relating to the trade in goods, provides:

> The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.[770]

532. We agree that Article 21.1 could apply in the three situations described by the Panel, namely:

> ... where, for example, the domestic support provisions of the *Agreement on Agriculture* would prevail in the event that an explicit carve-out or exemption from the disciplines in Article 3.1(b) of the *SCM Agreement* existed in the *text* of the *Agreement on Agriculture*. Another situation would be where it would be impossible for a Member to comply with its domestic support obligations under the *Agreement on Agriculture* and the Article 3.1(b) prohibition simultaneously. Another situation might be where there is an explicit authorization in the text of the *Agreement on Agriculture* that would authorize a measure that, in the absence of such an express authorization, would be prohibited by Article 3.1(b) of the *SCM Agreement*.[771]

The Appellate Body has interpreted Article 21.1 to mean that the provisions of the GATT 1994 and of other Multilateral Trade Agreements in Annex 1A apply, "except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter".[772] There could be, therefore, situations other than those identified by the Panel where Article 21.1 of the *Agreement on Agriculture* may be applicable.

533. The key issue before us is whether the *Agreement on Agriculture* contains "specific provisions dealing specifically with the same matter" as Article 3.1(b) of the *SCM Agreement*, that is, subsidies contingent upon the use of domestic over imported goods. We, therefore, turn to the relevant provisions of the *Agreement on Agriculture*.

534. The United States draws our attention to the domestic support provisions in the *Agreement on Agriculture*, particularly to Article 6.3 and to paragraph 7 of Annex 3. Article 6 of the *Agreement on Agriculture* deals with domestic support commitments. Pursuant to Article 6, WTO Members have committed themselves to reduce the domestic support that they provide to their agricultural sector.[773] For this purpose, domestic support is calculated using what is known as the AMS, which is defined in Article 1(a) as:

> ... the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement ...

A WTO Member's domestic support reduction commitments are registered in Part IV of its Schedule.

535. Article 6.3 of the *Agreement on Agriculture*, the particular provision relied on by the United States, reads:

> A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule.

The United States also relies on paragraph 7 of Annex 3 of the *Agreement on Agriculture*. This Annex explains how WTO Members are to calculate AMS. Paragraph 7 of Annex 3 states, in relevant part, that "[m]easures directed at agricultural processors shall be included [in the AMS calculation] to the extent that such measures benefit the producers of the basic agricultural products".

536. Before determining whether Article 6.3 and paragraph 7 of Annex 3 of the *Agreement on Agriculture* deal specifically with the same matter as Article 3.1(b) of the *SCM Agreement*, we must address the question whether the Step 2 payments to domestic users of United States upland cotton fall within paragraph 7 of Annex 3 because the United States claims that they are "[m]easures directed at agricultural processors" and "benefit the producers of the basic agricultural products". The United States argues that Step 2 payments to domestic users fall within paragraph 7 of Annex 3 because, even though the payment is provided to persons opening a bale of cotton, the payment *benefits* producers of United States cotton. The United States explains that this is the case "because [the program] serves to maintain the price competitiveness of U.S. cotton vis-a-vis foreign cotton through a payment to capture some differential between prevailing foreign and domestic cotton prices."[774]

537. We recall that "domestic users" are defined, under the United States' regulations, as "person[s] regularly engaged in the business of opening bales of eligible upland cotton for the purpose of manufacturing such cotton into cotton products in the United States".[775] The United States has acknowledged that the domestic users of United States cotton that receive Step 2 payments include textile mills.[776] There is no dispute between the parties that the producers of United States cotton are "producers of ... basic agricultural products" for purposes of paragraph 7 of Annex 3. Moreover,

[770]The *SCM Agreement* is among the Multilateral Trade Agreements in Annex 1A to the *WTO Agreement*.

[771]Panel Report, para. 7.1038. (original emphasis) The Panel concluded that "none of the situations just mentioned arise[s] in this dispute from the relevant provisions in the *Agreement on Agriculture*". (Panel Report, para. 7.1039)

[772]Appellate Body Report, *EC – Bananas III*, para. 155. (See also Appellate Body Report, *Chile – Price Band System*, para. 186)

[773]Certain domestic measures are exempted from these reduction commitments under Articles 6.4 and 6.5 and Annex 2 of the *Agreement on Agriculture*.

[774]United States' appellant's submission, para. 428.

[775]See *supra*, para. 514.

[776]United States' response to questioning at oral hearing.

Brazil has not disputed the United States' claim that Step 2 payments to domestic users may "benefit" the producers of United States cotton. Therefore, we will proceed with our examination on the *assumption* that Step 2 payments to domestic users of United States cotton are contemplated by paragraph 7 of Annex 3 of the *Agreement on Agriculture*.[777]

538. We thus turn to the issue raised by the United States' appeal, that is, whether Article 6.3 and paragraph 7 of Annex 3 of the *Agreement on Agriculture* are "specific provisions dealing specifically with the same matter" as Article 3.1(b) of the *SCM Agreement*, namely, subsidies contingent upon the use of domestic over imported goods.

539. The United States finds in the second sentence of paragraph 7 of Annex 3 of the *Agreement on Agriculture* an exception to the broad prohibition against subsidies contingent upon the use of domestic over imported goods that is established in Article 3.1(b) of the *SCM Agreement*. We note that Annex 3 sets out instructions on how to calculate WTO Members' AMS. Paragraph 7 is one of 13 paragraphs contained in Annex 3. It reads:

> The AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products.

540. Neither of the two sentences in paragraph 7 of Annex 3 refers to import substitution subsidies. Paragraph 7 of Annex 3 reflects a preference for calculating domestic support as near as possible to the stage of production of an agricultural good. Hence, the first sentence of paragraph 7 of Annex 3 provides that "[t]he AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned". The second sentence of paragraph 7 recognizes situations where subsidies are not provided directly to the agricultural producer, but rather to an agricultural processor, yet the measures may benefit the producers of the basic agricultural good. This sentence also clarifies that only the portion of the subsidy that benefits the producers of the basic agricultural good, and not the entire amount, shall be included in a Member's AMS.

541. It may well be that a measure that is an import substitution subsidy could fall within the second sentence of paragraph 7 as "[m]easures directed at agricultural processors [that] shall be included [in the AMS calculation] to the extent that such measures benefit the producers of the basic agricultural products". There is nothing, however, in the text of paragraph 7 that suggests that such measures, when they are import substitution subsidies, are exempt from the prohibition in Article 3.1(b) of the *SCM Agreement*. We agree with the Panel that there is a clear distinction between a provision that requires a Member to include a certain type of payment (or part thereof) in its AMS calculation and one that would authorize subsidies that are contingent on the use of domestic over imported goods.[778]

542. The United States argues that, if payments to processors that fall within paragraph 7 are not exempted from the prohibition in Article 3.1(b) of the *SCM Agreement*, paragraph 7 would be rendered inutile.[779] According to the United States, if domestic users were allowed to claim Step 2 payments, regardless of the origin of the cotton, this "would cause the benefit to [domestic] cotton

[777]In this dispute we do not decide whether subsidies paid to textile manufacturers on their purchases of cotton could be regarded as measures directed at "agricultural processors" within the meaning of paragraph 7 of Annex 3.

[778]Panel Report, para. 7.1059.

[779]United States' appellant's submission, para. 428.

producers to evaporate" and the "subsidy would be transformed from a subsidy 'in favor of agricultural producers' to a simple input subsidy".[780] Rather than "a cotton subsidy", it would become a "textile subsidy".[781] Like the Panel, we do not believe that the scope of paragraph 7 is limited to measures that have an import substitution component in them. There could be other measures covered by paragraph 7 of Annex 3 that do not necessarily have such a component. Indeed, Brazil submits that if the Step 2 payments were provided to United States processors of cotton, regardless of the origin of the cotton, these processors "would still buy *at least* some U.S. upland cotton, so producers would continue to derive *some* benefit".[782] Thus, paragraph 7 of Annex 3 refers more broadly to measures directed at agricultural processors that benefit producers of a basic agricultural product and, contrary to the United States' assertion, it is not rendered inutile by the Panel's interpretation. WTO Members may still provide subsidies directed at agricultural processors that benefit producers of a basic agricultural commodity in accordance with the *Agreement on Agriculture*, as long as such subsidies do not include an import substitution component.

543. In addition to paragraph 7 of Annex 3, the United States draws our attention to Article 6.3 of the *Agreement on Agriculture*. The United States points out that Article 6.3 explicitly provides that a WTO Member "shall be considered to be *in compliance* with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level". (emphasis added)

544. Like paragraph 7 of Annex 3, Article 6.3 does not explicitly refer to import substitution subsidies. Article 6.3 deals with domestic support. It establishes only a *quantitative* limitation on the amount of domestic support that a WTO Member can provide in a given year. The quantitative limitation in Article 6.3 applies generally to all domestic support measures that are included in a WTO Member's AMS. Article 3.1(b) of the *SCM Agreement* prohibits subsidies that are contingent—that is, "conditional"[783]—on the use of domestic over imported goods.[784]

545. Article 6.3 does not authorize subsidies that are contingent on the use of domestic over imported goods. It only provides that a WTO Member shall be considered to be in compliance with its domestic support *reduction commitments* if its Current Total AMS does not exceed that Member's annual or final bound commitment level specified in its Schedule. It does not say that compliance with Article 6.3 of the *Agreement on Agriculture* insulates the subsidy from the prohibition in Article 3.1(b). We, therefore, agree with the Panel that:

> Article 6.3 does *not* provide that compliance with such "domestic support reduction commitments" shall necessarily be considered to be in compliance with other applicable WTO obligations. Nor does it contain an explicit textual indication that otherwise prohibited measures are necessarily justified by virtue of compliance with the domestic support reduction commitments.[785]

546. For these reasons, we find that paragraph 7 of Annex 3 and Article 6.3 of the *Agreement on Agriculture* do not deal specifically with the same matter as Article 3.1(b) of the *SCM Agreement*, that is, subsidies contingent upon the use of domestic over imported goods.

[780]United States' appellant's submission, para. 428.

[781]*Ibid.* (emphasis omitted)

[782]Brazil's appellee's submission, footnote 1242 to para. 854. (original emphasis)

[783]Appellate Body Report, *Canada – Autos*, para. 123.

[784]See Panel Report, para. 7.1067.

[785]Panel Report, para. 7.1058. (original emphasis)

547. We are mindful that the introductory language of Article 3.1 of the *SCM Agreement* clarifies that this provision applies "[e]xcept as provided in the Agreement on Agriculture". Furthermore, as the United States has pointed out, this introductory language applies to both the export subsidy prohibition in paragraph (a) and to the prohibition on import substitution subsidies in paragraph (b) of Article 3.1. As we explained previously, in our review of the provisions of the *Agreement on Agriculture* relied on by the United States, we did not find a provision that deals specifically with subsidies that have an import substitution component. By contrast, the prohibition on the provision of subsidies contingent upon the use of domestic over imported goods in Article 3.1(b) of the *SCM Agreement* is explicit and clear. Because Article 3.1(b) treats subsidies contingent on the use of domestic over imported products as prohibited subsidies, it would be expected that the drafters would have included an equally explicit and clear provision in the *Agreement on Agriculture* if they had indeed intended to authorize such prohibited subsidies provided in connection with agricultural goods. We find no provision in the *Agreement on Agriculture* dealing specifically with subsidies contingent upon the use of domestic over imported agricultural goods.

548. Our approach in this case is consistent with the Appellate Body's approach in *EC – Bananas III*. In that case, the European Communities relied on Article 4.1 of the *Agreement on Agriculture* in arguing that the market access concessions it made for agricultural products pursuant to the *Agreement on Agriculture* prevailed over Article XIII of the GATT 1994.[786] The Appellate Body, however, found that "[t]here is nothing in Articles 4.1 or 4.2, or in any other article of the *Agreement on Agriculture*, that deals specifically with the allocation of tariff quotas on agricultural products".[787] It further explained that "[i]f the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly".[788] The situation before us is similar. We have found nothing in Article 6.3, paragraph 7 of Annex 3 or anywhere else in the *Agreement on Agriculture* that "deals specifically" with subsidies that are contingent on the use of domestic over imported agricultural products.

549. We recall that the *Agreement on Agriculture* and the *SCM Agreement* "are *both* Multilateral Agreements on Trade in Goods contained in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), and, as such, are *both* 'integral parts' of the same treaty, the *WTO Agreement*, that are 'binding on all Members'".[789] Furthermore, as the Appellate Body has explained, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously".[790] We agree with the Panel that "Article 3.1(b) of the *SCM Agreement* can be read together with the *Agreement on Agriculture* provisions relating to domestic support in a coherent and consistent manner which gives full and effective meaning to all of their terms".[791]

550. In sum, we are not persuaded by the United States' submission that the prohibition in Article 3.1(b) of the *SCM Agreement* is inapplicable to import substitution subsidies provided in connection with products falling under the *Agreement on Agriculture*. WTO Members may still

[786]Appellate Body Report, *EC – Bananas III*, para. 153.

[787]Appellate Body Report, *EC – Bananas III*, para. 157.

[788]*Ibid.*

[789]Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 (quoting from *WTO Agreement*, Article II:2). (original emphasis) In that case, the Appellate Body was referring to the GATT 1994 and the *Agreement on Safeguards*.

[790]Appellate Body, *Argentina – Footwear (EC)*, para. 81 and footnote 72 thereto (referring to Appellate Body Report, *Korea – Dairy*, para. 81; Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3 at 21; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:I, 97 at 106; and Appellate Body Report, *India – Patents (US)*, para. 45). (original emphasis)

[791]Panel Report, para. 7.1071.

provide domestic support that is consistent with their reduction commitments under the *Agreement on Agriculture*. In providing such domestic support, however, WTO Members must be mindful of their other WTO obligations, including the prohibition in Article 3.1(b) of the *SCM Agreement* on the provision of subsidies that are contingent on the use of domestic over imported goods.

551. Turning to the particular measure before us in this dispute, we recall that the United States acknowledged before the Panel that, if the *SCM Agreement* were applicable, "user marketing (Step 2) payments to domestic users [would] constitute a subsidy conditional or dependent upon the use of domestic over imported goods within the meaning of Article 3.1(b)" of that Agreement.[792] The Panel also conducted its own analysis and concluded that:

> The use of United States domestically produced upland cotton is a condition for obtaining the subsidy. User marketing (Step 2) payments to domestic users under section 1207(a) of the FSRI Act of 2002 are clearly conditional, or dependent upon, such use.[793]

The United States has not appealed this finding and, therefore, we need not review it.

552. Accordingly, we *uphold* the Panel's findings, in paragraphs 7.1088, 7.1097-7.1098 and 8.1(f) of the Panel Report, that Step 2 payments to domestic users of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are subsidies contingent on the use of domestic over imported goods that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*.

B. *Step 2 Payments to Exporters*

553. We turn to the United States' claim that the Panel erred in finding that Step 2 payments provided to *exporters* of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are subsidies contingent on exportation and, therefore, are inconsistent with Articles 3.3 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*. We described the Step 2 payments program in the previous Section of this Report, where we examined the Panel's findings relating to Step 2 payments provided to *domestic users* of United States upland cotton.[794]

554. Before the Panel, Brazil argued that Step 2 payments to exporters are *per se* export subsidies listed in Article 9.1(a) of the *Agreement on Agriculture* and are inconsistent with Article 3.3 and/or Article 8 of the *Agreement on Agriculture*, as well as with Articles 3.1 and 3.2 of the *SCM Agreement*.[795] The United States denied that Step 2 payments constitute export subsidies for purposes of the *Agreement on Agriculture* or Articles 3.1(a) and 3.2 of the *SCM Agreement*, arguing that these payments are available not only to exporters, but also to domestic users of upland cotton.[796]

555. Because Brazil challenged the alleged United States export subsidies under the *Agreement on Agriculture* and the *SCM Agreement*, the Panel first examined the relationship between these Agreements. The Panel explained what it considered to be the proper order of analysis as follows:

[792]Panel Report, para. 7.1082.

[793]*Ibid.*, para. 7.1086.

[794]See also *ibid.*, paras. 7.209-7.211.

[795]*Ibid.*, para. 7.649(i). Brazil also made an alternative claim under Article 10.1 of the *Agreement on Agriculture*, but the Panel found it unnecessary to examine this claim because of its findings under Article 9. (*Ibid.*, para. 7.750)

[796]*Ibid.*, para. 7.651(i).

> ... it is appropriate to examine an alleged export subsidy in respect of an agricultural product first under the *Agreement on Agriculture* before, if and as appropriate, turning to any examination of the same measure under the *SCM Agreement*.[797]

556. Accordingly, the Panel began its examination of Brazil's claims against the Step 2 payments to exporters with Article 9.1 of the *Agreement on Agriculture*. In this respect, the Panel observed that the United States did not appear to dispute that Step 2 payments are subsidies provided by a government to producers of agricultural products, or to cooperatives or associations of such producers for purposes of Article 9.1(a) of the *Agreement on Agriculture*.[798] The "key issue" before it, the Panel explained, was whether Step 2 payments to exporters are subsidies "contingent on export performance" within the meaning of Article 9.1(a) of the *Agreement on Agriculture*.[799]

557. The Panel then noted that the *Agreement on Agriculture* does not define the phrase "contingent on export performance". Given that a similar phrase is used in the *SCM Agreement*, the Panel saw no reason to read the phrase differently in the *Agreement on Agriculture*.[800] The Panel also equated Brazil's claim that Step 2 payments to exporters are "*per se*" export subsidies with a claim that the subsidies are *de jure* export contingent under Article 3.1(a) of the *SCM Agreement*.[801] Such a claim of *de jure* export contingency had to be demonstrated, according to the Panel, "on the basis of the words of the relevant legislation, regulation or other legal instrument"[802] or "where the condition to export can be derived by necessary implication from the words actually used in the measure".[803]

558. In assessing whether the Step 2 payments to exporters are contingent on export performance under Article 9.1(a) of the *Agreement on Agriculture*, the Panel found:

> It is undeniable that a condition of the receipt of user marketing (Step 2) payments to exporters under section 1207(a) of the FSRI Act of 2002 will always and inevitably be proof of exportation. The only way to receive such a payment is through exportation. Export performance is, therefore, a condition of receipt for this discrete segment of eligible recipients.
>
> Every user marketing (Step 2) payment to an eligible exporter is contingent upon export.[804]

559. The Panel rejected the United States' contention that Step 2 payments are not contingent on export performance because they are available to both exporters and domestic users. According to the Panel, the program under which Step 2 payments are granted "involves payment to two distinct sets of recipients (exporters or domestic users) in two distinct factual situations (export or domestic use)".[805] In the Panel's view, "[t]he fact that the subsidies granted in the second situation may not be export contingent does not dissolve the export contingency arising in the first situation".[806]

560. Having found that Step 2 payments to exporters are mandatory when certain market conditions exist[807], the Panel concluded:

> We therefore find that section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters constitutes a subsidy "contingent on export performance" within the meaning of Article 9.1(a) of the *Agreement on Agriculture*.[808]

561. Consequently, the Panel also found:

> User marketing (Step 2) payments to exporters under section 1207(a) of the FSRI Act of 2002 are an export subsidy listed in Article 9.1 of the *Agreement on Agriculture*. In providing such subsidies, the United States has acted inconsistently with its obligation under Article 3.3 of the *Agreement on Agriculture* to "not provide subsidies in respect of any agricultural product not specified in ... its Schedule". The United States has furthermore acted inconsistently with its obligation in Article 8 of the *Agreement on Agriculture* "not to provide export subsidies otherwise than in conformity with [the *Agreement on Agriculture*] and with the commitments as specified in [its] Schedule".[809]

562. As for Brazil's claims under the *SCM Agreement*, the Panel found "that section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters is inconsistent with Article 3.1(a) of the *SCM Agreement*".[810] The Panel additionally found that "[t]o the extent that section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters is inconsistent with Article 3.1(a), it is, consequently, also inconsistent with Article 3.2 of the *SCM Agreement*".[811]

563. On appeal, the United States requests us to reverse the Panel's findings that Step 2 payments provided to exporters of United States upland cotton are export subsidies within the meaning of Article 9.1(a) of the *Agreement on Agriculture* and, therefore, are inconsistent with Articles 3.3 and 8 of that Agreement. The United States also requests that we reverse the Panel's finding that Step 2 payments to exporters are inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement*, because they are not exempted from action by Article 13(c) of the *Agreement on Agriculture*.[812]

[797] Panel Report, para. 7.673. The order of analysis was not an issue on appeal.

[798] *Ibid.*, para. 7.695. The Panel also conducted it own assessment and concluded that the measure meets the description in Article 9.1(a). (*Ibid.*, para. 7.696)

[799] *Ibid.*, para. 7.697.

[800] *Ibid.*, para. 7.700 and footnote 872 thereto (relying on Appellate Body Report, *US – FSC*, para. 141 and Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 192).

[801] *Ibid.*, para. 7.702.

[802] *Ibid.*, (relying on Appellate Body Report, *Canada – Aircraft*, para. 167).

[803] *Ibid.*, para. 7.702 (relying on Appellate Body Report, *Canada – Autos*, para. 100 and Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 112).

[804] Panel Report, paras. 7.734 and 7.735.

[805] *Ibid.*, para. 7.732.

[806] *Ibid.*, para. 7.739 and footnote 907 thereto (relying on Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 119).

[807] *Ibid.*, paras. 7.7745 and 7.746.

[808] *Ibid.*, para. 7.748.

[809] Panel Report, para. 7.749.

[810] *Ibid.*, para. 7.760.

[811] *Ibid.*, para. 7.761.

[812] United States' appellant's submission, para. 516(6).

564. The United States does not contest that Step 2 payments are subsidies to producers of an agricultural product for purposes of Article 9.1(a) of the *Agreement on Agriculture*; nor does it contest the Panel's finding in this regard. The focus of the United States' appeal is the Panel's finding that Step 2 payments are contingent on export performance under Article 9.1(a).[813] In support of its claim, the United States reiterates on appeal the arguments that it made before the Panel. The United States asserts that Step 2 payments are not contingent on export performance because Step 2 payments are also available to domestic users of United States upland cotton.[814] The United States contends that the payments are contingent on use, not exportation.

565. Brazil requests that we uphold the Panel's finding that Step 2 payments to exporters are contingent upon export performance.[815] According to Brazil, the measure pursuant to which Step 2 payments are granted establishes two mutually exclusive conditions of payment that address two different factual situations where a Step 2 payment can be made.[816] These situations are mutually exclusive because the same bale of cotton cannot be both opened for domestic use and exported.[817] In one situation under the Step 2 measure, proof of exportation is required as a condition of payment. This export contingency is not dissolved because the payment can also made in another situation to domestic users, on other conditions.[818]

566. In addition, Brazil rejects the United States' contention that Step 2 payments are contingent on use and not on exportation. Brazil explains that Step 2 payments do not apply to all United States production of upland cotton because domestic brokers, resellers and other persons not regularly engaged in opening bales of cotton for manufacturing are not eligible to receive the payments.[819] Furthermore, Brazil asserts that, in the case of Step 2 payments to exporters, the payment is not contingent on use because the measure is indifferent to whether, how or when the upland cotton is used so long as it is exported.[820]

567. The issue raised on appeal is whether the Step 2 payments provided to exporters of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are contingent on export performance within the meaning of Article 9.1(a) of the *Agreement on Agriculture* and Article 3.1(a) of the *SCM Agreement*.

568. Article 9.1(a) of the *Agreement on Agriculture* reads :

> [T]he provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance[.]

[813] *Ibid.*, para. 442.

[814] United States' appellant's submission, para. 443. The United States submits that its position is consistent with the reasoning of the panel in *Canada – Dairy*. (*Ibid.*, para. 444 (relying on Panel Report, *Canada – Dairy*, para. 7.41))

[815] Brazil's appellee's submission, para. 872.

[816] *Ibid.*, para. 888.

[817] *Ibid.*

[818] Brazil finds support for its argument in the Appellate Body's reasoning in *US – FSC (Article 21.5 – EC)*. See *supra*, footnote 806. (Brazil's appellee's submission, paras. 883-884)

[819] Brazil's appellee's submission, para. 886.

[820] *Ibid.*, para. 891.

569. Article 3.1(a) of the *SCM Agreement* provides:

> *Article 3*
>
> *Prohibition*
>
> Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5];
>
> [4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.
>
> [5] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

570. In previous appeals, the Appellate Body has explained that the WTO-consistency of an export subsidy for agricultural products has to be examined, in the first place, under the *Agreement on Agriculture*[821]; the examination under the *SCM Agreement* would follow if necessary. Turning, then, to the *Agreement on Agriculture*, we note that Article 1(e) of that Agreement defines "export subsidies" as "subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement".

571. Although an export subsidy granted to agricultural products must be examined, in the first place, under the *Agreement on Agriculture*, we find it appropriate, as has the Appellate Body in previous disputes, to rely on the *SCM Agreement* for guidance in interpreting provisions of the *Agreement on Agriculture*. Thus, we consider the export-contingency requirement in Article 1(e) of the *Agreement on Agriculture* having regard to that same requirement contained in Article 3.1(a) of the *SCM Agreement*.[822]

572. The Appellate Body has indicated, in this regard, that the ordinary meaning of "contingent" is "conditional" or "dependent"[823] and that Article 3.1(a) of the *SCM Agreement* prohibits subsidies that are conditional upon export performance, or are dependent for their existence on export performance.[824] It has also emphasized that "a 'relationship of conditionality or dependence', namely that the granting of a subsidy should be 'tied to' the export performance, lies at the 'very heart' of the legal standard in Article 3.1(a) of the *SCM Agreement*".[825] We are also mindful that in demonstrating

[821] See, for example, Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 123.

[822] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 192.

[823] Appellate Body Report, *Canada – Aircraft*, para. 166.

[824] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47. See also Appellate Body Report, *Canada – Aircraft*, para. 166.

[825] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil*), para. 47 (quoting Appellate Body Report, *Canada – Aircraft*, para. 171).

export contingency in the case of subsidies that are contingent in law upon export performance, the "existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure".[826]

573. It is clear that the legal provisions pursuant to which Step 2 payments are granted to exporters of United States upland cotton, on their face, apply to exporters of United States upland cotton. Section 1207(a) of the FSRI Act of 2002 provides that, when certain market conditions exist, the United States Secretary of Agriculture:

> ... shall issue marketing certificates or cash payments, at the option of the recipient, to domestic users and *exporters* for documented purchases by domestic users and *sales for export by exporters*. (emphasis added)

The regulations define "eligible exporters" as:

> A person, including a producer or a cooperative marketing association ... regularly engaged in selling eligible upland cotton for exportation from the United States (exporter), who has entered into an agreement with CCC[827] to participate in the upland cotton user marketing certificate program.[828]

"Eligible upland cotton" is defined as "domestically produced baled upland cotton which bale is opened by an eligible domestic user ... or *exported* by an eligible *exporter*."[829]

574. Furthermore, in order to claim Step 2 payments, exporters must submit an application and provide supporting documentation to the CCC, including "proof of export of eligible cotton by the exporter".[830] This provision confirms that the payment is "tied to" exportation. As the Panel explained, "a condition of the receipt of user marketing (Step 2) payments to exporters under section 1207(a) of the FSRI Act of 2002 will always and inevitably be proof of exportation".[831] Thus, on the face of the statute and regulations pursuant to which Step 2 payments are granted to exporters, the payments are "conditional upon export performance" or "dependent for their existence on export performance".[832]

575. The United States directed the Panel's attention to the fact that the same statute and regulations also provide for similar payments to domestic users conditioned on the domestic use of United States upland cotton. According to the United States, Step 2 payments to exporters and domestic users are governed by a single legislative provision and a single set of regulations. In addition, the form and payment rate to domestic users and exporters are identical, and the payments are made from a single fund.[833] As Step 2 payments are available to both domestic users and exporters, the United States submits that exportation is not a condition to receive payment and, therefore, the payments are not export-contingent.[834]

576. We are not persuaded by the United States' arguments. Like the Panel, we recognize that Step 2 payments to exporters and domestic users are governed by a single legislative provision and a single set of regulations, that the form and rate of payment to exporters and domestic users are identical, and that the fund from which payments are made is a single fund.[835] Nevertheless, we agree with the Panel that the statute and regulations pursuant to which Step 2 payments are granted do not establish a "single class" of recipients of the payments; rather, the statute and regulations clearly distinguish between two types of eligible recipients, namely, eligible exporters and eligible domestic users.[836] As we have seen, an eligible exporter must be "[a] person, including a producer or a cooperative marketing association ... regularly engaged in selling eligible upland cotton for *exportation* from the United States".[837] In contrast, an "eligible domestic user" is "[a] person regularly engaged in the business of opening bales of eligible upland cotton for the purpose of manufacturing such cotton into cotton products in the United States".[838] Thus, the statute and regulations themselves clearly distinguish between exporters and domestic users.

577. In addition, the statute and regulations establish different conditions that eligible exporters and eligible domestic users must meet to receive Step 2 payments. An eligible domestic user must "open" a bale of cotton to qualify for payment.[839] For its part, an eligible exporter must demonstrate the upland cotton has been exported. These are distinct conditions that the statute and regulations themselves set out for the two distinct recipients of Step 2 payments. Because the conditions to qualify for payment are different, the documentation required from eligible domestic users and eligible exporters is also different. An eligible exporter must submit proof of exportation; an eligible domestic user must provide documentation indicating the number of bales opened.[840] We agree, therefore, with the Panel's view that the statute and regulations pursuant to which Step 2 payments are granted "involve[] payment to two distinct sets of recipients (exporters or domestic users) in two distinct factual situations (export or domestic use)".[841]

578. Furthermore, we agree with the Panel's conclusion that the fact that the subsidy is also available to domestic users of upland cotton does not "dissolve" the export-contingent nature of the Step 2 payments to exporters.[842] The Panel's reasoning is consistent with the approach taken by the Appellate Body in *US – FSC (Article 21.5 – EC)*.[843] In that case, the United States argued that the tax

[826]The legal instrument does not have to provide expressly for the export contingency; the conditionality may be derived by necessary implication from the text of the measure. (Appellate Body Report, *Canada – Autos*, para. 100)

[827]Additional information about the CCC is provided, *infra*, footnote 859; see also Panel Report, para. 7.702.

[828]7 CFR Section 1427.104(a)(2).

[829]7 CFR Section 1427.103(a). (emphasis added)

[830]7 CFR Section 1427.108(d).

[831]Panel Report, para. 7.734.

[832]See Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47.

[833]United States' appellant's submission, para. 442.

[834]*Ibid.*, para. 454.

[835]Panel Report, para. 7.709.

[836]*Ibid.*, paras. 7.721-7.723.

[837]7 CFR Section 1427.104(a)(2). (emphasis added)

[838]7 CFR Section 1427.104(a)(1).

[839]United States' response to questioning at oral hearing. 7 CFR Section 1427.103(a).

[840]Panel Report, para. 7.727.

[841]*Ibid.*, para. 7.732.

[842]*Ibid.*, para. 7.739.

[843]The Panel also found support for its reasoning in the Appellate Body's statement, in *Canada – Aircraft*, that:

> ... the fact that some of TPC's contributions, in some industry sectors, are *not* contingent upon export performance, does not necessarily mean that the same is true for all of TPC's contributions. It is enough to show that one or

exclusion at issue was not an export-contingent subsidy because it was available for both (i) property produced within the United States and held for use outside the United States and (ii) property produced outside the United States and held for use outside the United States. The United States asserted that, as the tax exemption was available in both circumstances, it was "export-neutral".[844] According to the United States, the panel's separate examination of each situation in which the tax exemption was available "artificially bifurcat[ed]" the measure.[845]

579. The Appellate Body rejected the United States' contention in *US – FSC (Article 21.5 – EC)* because it considered it necessary, under Article 3.1(a) of the *SCM Agreement*, "to examine separately the conditions pertaining to the grant of the subsidy in the two different situations".[846] It then confirmed the Panel's finding that the tax exemption in the first situation, namely for property produced within the United States and held for use outside the United States, is an export-contingent subsidy.[847] In its reasoning, the Appellate Body explained that whether or not the subsidies were export-contingent in both situations envisaged by the measure would not alter the conclusion that the tax exemption in the first situation was contingent upon export:

> Our conclusion that the ETI measure grants subsidies that are export contingent in the first set of circumstances is not affected by the fact that the subsidy can also be obtained in the second set of circumstances. The fact that the subsidies granted in the second set of circumstances *might* not be export contingent does not dissolve the export contingency arising in the first set of circumstances. Conversely, the export contingency arising in these circumstances has no bearing on whether there is an export contingent subsidy in the second set of circumstances.[848]

580. As in *US – FSC (Article 21.5 – EC)*, the Panel in this case found that Step 2 payments are available in two situations, only one of which involves export contingency.[849] The Panel's conclusion, therefore, is consistent with the Appellate Body's holding in *US – FSC (Article 21.5 – EC)* quoted above that "the fact that the subsidies granted in the second set of circumstances *might* not be export contingent does not dissolve the export contingency arising in the first set of circumstances".

581. The United States submits that the facts in this case are similar to those before the panel in *Canada – Dairy*.[850] In that dispute, the complaining parties argued that the provision of milk to exporters/processors under various mechanisms (described as "special milk classes") constituted export-contingent subsidies. The panel in *Canada – Dairy* found, nevertheless, that certain special milk classes were *not* export-contingent because the "milk under such other classes is also available

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> some of TPC's contributions do constitute subsidies "contingent ... in fact … upon export performance".

(Appellate Body Report, *Canada – Aircraft*, para. 179) (original emphasis)

[844]Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 110.

[845]*Ibid.*

[846]*Ibid.*, para. 115.

[847]*Ibid.*, para. 120.

[848]*Ibid.*, para. 119. (original emphasis; footnote omitted)

[849]See, *supra*, para. 577.

[850]United States' appellant's submission, paras. 444-445 (referring to Panel Report, *Canada – Dairy*, para. 7.41 and footnote 496 to para. 7.124).

(often exclusively) to processors which produce for the domestic market".[851] The Panel, in this dispute, did not see any relevance in the Panel Report in *Canada – Dairy* because, in that case, "there was no explicit condition limiting a discrete segment of the payments of the subsidies concerned to exporters".[852] Brazil also seeks to distinguish the factual situation in *Canada – Dairy*, explaining that it involved a single regulatory class of milk instead of two mutually exclusive regulatory categories, as is the case in the present dispute.[853] We agree with the Panel and Brazil that the facts in *Canada – Dairy* differ from those of the present dispute. In this case, we have before us a statute and regulations that clearly distinguish between two sets of recipients—that is, eligible exporters and eligible domestic users—that must meet different conditions to receive payment.[854] In the case of one set of recipients, eligible exporters, exportation is a necessary condition to receive payment.

582. In sum, we agree with the Panel's view that Step 2 payments are export-contingent and, therefore, an export subsidy for purposes of Article 9 of the *Agreement on Agriculture* and Article 3.1(a) of the *SCM Agreement*. The statue and regulations pursuant to which Step 2 payments are granted, on their face, condition payments to exporters on exportation.[855] In order to claim payment, an exporter must show proof of exportation. If an exporter does not provide proof of exportation, the exporter will not receive a payment. This is sufficient to establish that Step 2 payments to exporters of United States upland cotton are "conditional upon export performance" or "dependent for their existence on export performance".[856] That domestic users may also be eligible to receive payments under different conditions does not eliminate the fact that an exporter will receive payment only upon proof of exportation.

583. For these reasons, we *uphold* the Panel's findings, in paragraphs 7.748-7.749 and 8.1(e) of the Panel Report, that Step 2 payments to exporters of United States upland cotton, pursuant to Section 1207(a) of the FSRI Act of 2002, constitute subsidies contingent upon export performance within the meaning of Article 9.1(a) of the *Agreement on Agriculture* and that, therefore, in providing such subsidies the United States has acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*.

584. Having explained that there is no reason to read the export-contingency requirement in the *Agreement on Agriculture* differently from that contained in Article 3.1(a) of the *SCM Agreement*[857], and having found that Step 2 payments to exporters of United States upland cotton are contingent upon export performance within the meaning of Article 9.1 of the *Agreement on Agriculture*, we also find that such payments are export-contingent for purposes of Article 3.1(a) of the *SCM Agreement*.[858] Consequently, we *uphold* the Panel's findings, in paragraphs 7.760-7.761 and 8.1(e) of the Panel Report, that Step 2 payments provided to exporters of United States upland cotton, pursuant to Section 1207(a) of the FSRI Act of 2002, are inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement*.

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[851]Panel Report, *Canada – Dairy*, para. 7.41.

[852]Panel Report, para. 7.718.

[853]Brazil's appellee's submission, paras. 898-899.

[854]See *supra*, para. 577.

[855]Panel Report, para. 7.734.

[856]See Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47.

[857]See *supra*, para. 571.

[858]As the Panel observed, pursuant to Article 13(c)(ii) of the *Agreement on Agriculture*, "to the extent that the export subsidy at issue does not conform fully to the provisions of Part V of the *Agreement on Agriculture*, it is not exempt from actions based on Articles 3.1(a) and 3.2 of the *SCM Agreement*". (Panel Report, para. 7.751)

C. *Export Credit Guarantees – Article 10.2 of the Agreement on Agriculture*

585. We turn next to the United States' and Brazil' appeals of the Panel's findings relating to the United States' export credit guarantee programs.

1. United States' Export Credit Guarantee Programs

586. Brazil challenges three types of export credit guarantee programs. The first two programs, GSM 102 and GSM 103, provide guarantees to exporters when credit is extended by foreign financial institutions. The third type, the SCGP, applies when credit is extended by the exporter to the purchaser of United States agricultural products.[859]

587. The GSM 102 program is available to cover commercial exports of United States agricultural commodities on credit terms of between 90 days and 3 years. To obtain the credit guarantee under GSM 102, the exporter must have received a letter of credit in its favour from the foreign bank and must apply for the guarantee before making the exportation. The exporter will pay a fee for the guarantee based on a schedule of rates that vary according to the credit period, but are capped by law at one per cent of the guaranteed dollar value of the transaction. In the event that the foreign bank fails to make a payment, the exporter informs the CCC of the default and "[t]he CCC generally covers 98 per cent of the principal and a portion of the interest".[860]

588. The GSM 103 is similar to the GSM 102. The difference between the two programs is that GSM 103 guarantees export credits that have longer terms. Specifically, GSM 103 guarantees credits with terms of between 3 and 10 years. An additional difference is that, contrary to GSM 102, the fee that an exporter must pay to obtain a guarantee under GSM 103 is not capped by law.

589. The SCGP guarantees credits extended by the exporter itself to foreign buyers of United States agricultural commodities. Under the SCGP, the United States exporter is required to submit to the CCC a promissory note signed by the importer prior to exportation. The exporter will pay a fee at a rate that varies according to the term of the loan, and, like GSM 102, is capped by law at one per cent of the guaranteed dollar value of the transaction. If the importer defaults on the promissory note, then the CCC will pay the exporter 65 per cent of the dollar value of the exported product (excluding interest).

2. Panel Findings

590. Before the Panel, Brazil asserted that these three United States export credit guarantee programs—GSM 102, GSM 103 and SCGP—violate Articles 10.1 and 8 of the *Agreement on Agriculture* and are therefore not exempt, under Article 13(c)(ii) of the *Agreement on Agriculture*, from actions based on Articles 3.1(a) and 3.2 of the *SCM Agreement*.[861] Brazil also argued that the three programs violate Articles 3.1(a) and 3.2 of the *SCM Agreement*.[862]

591. The United States responded that Article 10.2 of the *Agreement on Agriculture* makes it clear that the export subsidy disciplines in the *Agreement on Agriculture* and the *SCM Agreement* are not applicable to export credit guarantee programs. According to the United States, Article 10.2 of the *Agreement on Agriculture* "reflects the deferral of disciplines on export credit guarantee programs contemplated by WTO Members".[863] The United States argued that, even if the export subsidy disciplines in the *SCM Agreement* were applicable, its export credit guarantee programs are not prohibited export subsidies under Article 3.1(a) because they do not meet the criteria in item (j) of the Illustrative List of Export Subsidies attached to the *SCM Agreement* as Annex I, namely that the premiums are inadequate to cover the programs' long-term operating costs and losses.[864]

592. At the outset of its analysis, the Panel observed that it would adopt the parties' shared view that "export credit guarantees are not included in the non-exhaustive list of export subsidies in Article 9.1, and that Article 10 of the *Agreement on Agriculture* is the relevant provision".[865] The Panel then stated that Article 10.1 "covers any subsidy contingent on export performance that is not listed in Article 9.1".[866] The Panel observed that, other than the list of export subsidies listed in Article 9.1, the *Agreement on Agriculture* does not specify what is a subsidy contingent upon export performance.[867] Thus, the Panel sought contextual guidance in the *SCM Agreement*, to assist it in its interpretation of the term "export subsidies" in Article 10.1 of the *Agreement on Agriculture*. In particular, the Panel looked at item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*, observing that "there is no disagreement between the parties ... that, if an export credit guarantee programme meets the elements of item (j), it is a *per se* export subsidy".[868]

593. The Panel then examined whether the United States' export credit guarantee programs challenged by Brazil met the criteria set out in item (j) and concluded that:

> On the basis of the totality of the record evidence, including approaches regularly relied upon by the United States government itself, we find that Brazil has established that the United States CCC provides the GSM 102, GSM 103 and SCGP export credit guarantee programmes "at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes" within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement*.[869]

594. Having reached this general conclusion, the Panel next examined Brazil's claims that the United States' export credit guarantees "result[ ] in" or "threaten[ ] to lead to" circumvention of the United States' export subsidy commitments, contrary to Article 10.1 of the *Agreement on Agriculture*. In its analysis, the Panel distinguished between, on the one hand, "supported" and "unsupported"

[859]These export credit guarantee programs are established under Section 5622 of Title 7 of the United States Code and implemented in Part 1493 of Title 7 of the United States Code of Federal Regulations. (See Panel Report, para. 7.250(vi)) Subpart B of Part 1493 relates to the GSM 102 and the GSM 103 programs and Subpart D deals with the SCGP program. GSM 102 and 103 export credit guarantees have been issued since late 1980, while the SCGP program began in 1996. (United States' first written submission to the Panel, paras. 151 and 152 and footnote 133 thereto) Export credit guarantee programs are administered through the CCC, created under the Commodity Credit Corporation Charter Act of 1948. The CCC is a federal corporation established within the USDA. (Panel Report, para. 7.236 and footnote 346 thereto) A further description of the GSM 102, GSM 103 and SGCP is provided in Panel Report, paras. 7.236-7.244.

[860]Panel Report, para. 7.242.

[861]Panel Report, para. 7.765.

[862]*Ibid.*, para. 7.765.

[863]United States' first written submission to the Panel, para. 160 (quoted in Panel Report, para. 7.770).

[864]Panel Report, para. 7.772.

[865]*Ibid.*, para. 7.788.

[866]*Ibid.*, para. 7.796.

[867]*Ibid.*, para. 7.797.

[868]*Ibid.*, para. 7.803.

[869]Panel Report, para. 7.867.

products, and, on the other, "scheduled" and "unscheduled" products. The Panel used the term "supported products" to refer to products for which there was evidence in the record showing that they were not only eligible under the programs, but that export credit guarantees were in fact received in connection with exports of those products.[870] "Scheduled products" are those for which a WTO Member has assumed a commitment to limit the amount of export subsidies in terms of budgetary outlays and quantities exported pursuant to Articles 3, 8, and 9 of the *Agreement on Agriculture*.[871]

595. The Panel found that, "in respect of upland cotton and other such [supported] *unscheduled* agricultural products on record, the United States applies export credit guarantees constituting export subsidies in a manner which results in circumvention of its export subsidy commitments inconsistently with Article 10.1 of the *Agreement on Agriculture*".[872] In addition, the Panel found that "the United States has applied export credit guarantees constituting export subsidies within the meaning of Article 10.1 – and therefore, necessarily, not listed in Article 9.1 – in a manner which results in circumvention of export subsidy commitments in respect of" rice (a scheduled commodity).[873] The Panel, nonetheless, found that "[i]t has not been established, however, that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities".[874] Finally, the Panel "decline[d] to find that the export credit guarantee programmes at issue are generally applied to scheduled agricultural products other than rice and other unscheduled agricultural products (not supported under the programmes) in a manner which threatens to lead to circumvention of United States' export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*."[875]

596. After making these findings, the Panel turned to the United States' argument that "the text of Article 10.2 of the *Agreement on Agriculture* reflects the deferral of disciplines on export credit guarantee programmes contemplated by [WTO] Members".[876] This argument was rejected by the Panel, which was of the opposite view, namely, that the text of Article 10.1 "clearly indicat[es] that export credit guarantee programmes constituting export subsidies for the purposes of Article 10.1 must not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments".[877] The Panel found support for this interpretation in the provision's context and in its object and purpose, emphasizing in particular that Article 10.2 is a subparagraph of Article 10. According to the Panel, "[t]he title of Article 10, and the text of Article 10.1, indicates an

[870] *Ibid.*, para. 6.32; see also footnote 1056 to para. 7.875. At the oral hearing, the participants confirmed that this is also their understanding of what the Panel meant by the distinction that it drew between "supported" and "unsupported" products. In respect of "supported" products, the Panel stated that "[t]o the extent that it identifies products within the product coverage of the *Agreement on Agriculture* that are within our terms of reference, we consider Exhibit BRA-73 to be the relevant record evidence of such products for the purposes of this dispute". (Panel Report, footnote 1056 to para. 7.875; see also *ibid.*, footnote 1575 to para. 8.1(d)(i))

[871] The Panel noted that "[t]he United States has scheduled export subsidy reduction commitments in respect of the following thirteen commodities: wheat, coarse grains, rice, vegetable oils, butter and butter oil, skim milk powder, cheese, other milk products, bovine meat, pigmeat, poultry meat, live dairy cattle, eggs". (Panel Report, footnote 1057 to para. 7.876 (referring to Schedule XX of the United States of America, Part IV, Section II, entitled "Export Subsidies: Budgetary Outlays and Quantitative Reduction Commitments", reproduced in Exhibit BRA-83 and Exhibit US-13))

[872] Panel Report, para. 7.875. (original emphasis)

[873] Panel Report, para. 7.881.

[874] *Ibid.*

[875] *Ibid.*, para. 7.896.

[876] *Ibid.*, para. 7.900.

[877] *Ibid.*, para. 7.901.

intention to prevent Members from circumventing or 'evading' their 'export subsidy commitments'".[878] The Panel also rejected the United States' arguments based on subsequent practice and the drafting history.[879] In respect of the United States' argument on subsequent practice, the Panel stated that "[t]he record ... does not suggest that there is a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the United States' interpretation of Article 10.2".[880] Although the Panel did not see a need to examine the drafting history, it found that "nothing in the drafting history of [Article 10.2] would compel [the Panel] to reach a different conclusion".[881]

597. Finally, the Panel turned to Brazil's claims under Articles 3.1(a) and 3.2 of the *SCM Agreement*, and found:

> To the extent that the United States export credit guarantee programmes at issue – GSM 102, GSM 103 and SCGP – do not conform fully to these provisions in Part V of the *Agreement on Agriculture* and do not benefit from the exemption from actions provided by Article 13(c)(ii) of the *Agreement on Agriculture*, they are also export subsidies prohibited by Article 3.1(a) ...
>
> ...
>
> To the extent that the three United States export credit guarantee programmes at issue are inconsistent with Article 3.1(a), they are, consequently, also inconsistent with Article 3.2 of the *SCM Agreement*.[882]

3. Arguments on Appeal

598. The United States contends that the Panel erred in analyzing whether export credit guarantees are export subsidies subject to the disciplines of Article 10.1 solely by reference to the *SCM Agreement*. According to the United States, the proper context in which to analyze the meaning of Article 10.1 with respect to export credit guarantees is Article 10.2 of the *Agreement on Agriculture*.[883] This provision reflects the fact that, during the Uruguay Round, WTO Members did not agree on disciplines to be applied to agricultural export credits, export credit guarantees, and insurance programs, opting instead to continue discussions, deferring the imposition of substantive disciplines until a consensus was achieved.

599. According to the United States, this interpretation of Article 10.2 is consistent with Article 10 as a whole.[884] Article 10.2 contributes to the prevention of circumvention of export subsidy commitments by imposing two obligations on Members: first, they must undertake to work toward the development of internationally agreed disciplines on export credit guarantees; and second "after

[878] *Ibid.*, para. 7.912. (footnote omitted)

[879] *Ibid.*, paras. 7.928-7.944.

[880] *Ibid.*, para. 7.929. (footnotes omitted)

[881] Panel Report, para. 7.933. The Panel did not see a need to examine the drafting history because it considered that its "examination of the text of Article 10.2 of the *Agreement on Agriculture*, in its context and in light of the object and purpose of that agreement leads to a clear interpretation of the text". (Panel Report, para. 7.933)

[882] *Ibid.*, paras. 7.947 and 7.948. (footnote omitted)

[883] United States' appellant's submission, para. 341.

[884] *Ibid.*, para. 346.

agreement on such disciplines", they must provide export credit guarantees "only in conformity therewith".[885] Moreover, excluding export credit guarantees from the application of Article 10.1 is also consistent with the treatment of food aid transactions under Article 10. Because Article 10.4 of the *Agreement on Agriculture* does not explicitly exempt food aid transactions from the applicability of Article 10.1, the Panel's interpretative approach would mean that all food aid transactions constitute export subsidies under Article 10.1.[886]

600. The United States submits that the negotiating history confirms its interpretation that Article 10.2 makes the export subsidy disciplines in Article 10.1 inapplicable to export credit guarantees.[887] In addition, the United States argues that it defies logic, as well as the object and purpose of the *Agreement on Agriculture*, to take the view of the Panel whereby export credit guarantees, export credits and insurance programs would be treated as already disciplined export subsidies, yet would not be permitted to be included within the applicable reduction commitments expressly contemplated by the text.[888] The United States therefore requests that we reverse the Panel's finding that export credit guarantees are subject to the disciplines of Article 10.1. In addition, the United States requests that we reverse the Panel's findings that export credit guarantees to agricultural commodities are subject to Articles 3.1 and 3.2 of the *SCM Agreement*. The United States asserts that, because export credit guarantees currently are not subject to export subsidy disciplines under the *Agreement on Agriculture*, the export subsidy disciplines of the *SCM Agreement* are also inapplicable to these measures pursuant to Article 21.1 of the *Agreement on Agriculture* and the introductory language of Article 3.1 of the *SCM Agreement*.[889]

601. Brazil requests that we reject the United States' appeal from the Panel's finding that export credit guarantees are subject to the export subsidy disciplines in Article 10.1 of the *Agreement on Agriculture*. Brazil asserts that subsidized export credit guarantees are covered by the general definition of "export subsidies" under Article 1(e) of the *Agreement on Agriculture* and that these measures are, therefore, subject to Article 10.1 of the *Agreement on Agriculture*, unless an exception is provided in Article 10.2.[890] The text of Article 10.2 establishes two obligations, but does not provide an exception.[891]

602. According to Brazil, the Panel's interpretation is consistent with the context and object and purpose of Article 10.2. Each of the paragraphs in Article 10 pursues the aim of "preventing circumvention" of export subsidy commitments and, thereby, contributes to the purpose of the *Agreement on Agriculture* of establishing specific binding commitments on export competition. Therefore, Article 10.2 also must be interpreted in a manner that ensures that it contributes to the purpose of preventing circumvention of commitments on export competition.[892] The United States' interpretation of Article 10.2 would tend in the opposite direction, leaving Members free to grant unlimited export subsidies in the form of export credit guarantees and would permit wholesale circumvention of commitments.[893] Brazil, furthermore, disagrees with the United States' assertion that the Panel's interpretation is an "assault" on international food security.[894] According to Brazil, food aid is subject to the specific disciplines in Article 10.4 of the *Agreement on Agriculture*, as well as to the general disciplines in Article 10.1.[895]

603. In addition, Brazil disagrees with the conclusions drawn by the United States from the negotiating history of the *Agreement on Agriculture*.[896] Brazil also rejects the United States' contention that the Panel's reading of Article 10.2 is "manifestly unreasonable".[897] Brazil explains that, at the close of the Uruguay Round, Members agreed that they would calculate their respective export subsidy commitment levels using exclusively the export subsidies listed in Article 9.1 and thus chose to leave out of the calculation export subsidies referred to in Article 10.1. Finally, Brazil emphasizes that the Panel's interpretation does not mean that Members cannot grant export credit guarantees. Instead, it means that subsidized export credit guarantees are subject to disciplines as trade-distorting measures, and cannot be used to override export subsidy commitments.[898]

604. Argentina, Australia, Canada, and New Zealand are of the view that Article 10.2 of the *Agreement on Agriculture* does not provide an exception from WTO export subsidy disciplines for export credit guarantees, export credits or insurance programs, and assert that the Panel correctly interpreted this provision.[899] Before the Panel, the European Communities submitted that Article 10.2 of the *Agreement on Agriculture* cannot be seen as exempting export credit guarantees granted to agricultural products from WTO disciplines as this provision makes it clear that export credit guarantees are not one of the types of export subsidies listed in Article 9.1 that a Member is given a limited authorization to apply[900]; the European Communities did not express a view on this issue on appeal.

4. Does Article 10.2 Exempt Export Credit Guarantee Programs from Export Subsidy Disciplines?[901]

605. The United States argues that because export credit guarantees are specifically dealt with in Article 10.2, and this provision expressly acknowledges that Uruguay Round negotiators did not reach an agreement on the disciplines that apply to them, they cannot properly be considered to be included within the "export subsidies" covered by Article 10.1.

606. As usual, our analysis begins with the text of the provision in question. Article 10.2 reads:

> Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith.

[885]Quoting Article 10.2 of the *Agreement on Agriculture*.

[886]United States' appellant's submission, paras. 349 and 358.

[887]*Ibid.*, paras. 367-380.

[888]*Ibid.*, paras. 384-385.

[889]*Ibid.*, para. 391.

[890]Brazil's appellee's submission, paras. 905-906.

[891]*Ibid.*, para. 912.

[892]Brazil's appellee's submission, paras. 951-952.

[893]*Ibid.*, para. 953.

[894]United States' appellant's submission, para. 350.

[895]Brazil's appellee's submission, para. 940.

[896]*Ibid.*, para. 975.

[897]*Ibid.*, paras. 926-934 (referring to the United States' appellant's submission, para. 384).

[898]*Ibid.*, paras. 977-978.

[899]Argentina's third participant's submission, para. 39; Australia's third participant's submission, para. 71; Canada's third participant's submission, para. 42; and New Zealand's third participant's submission, para. 3.65.

[900]Panel Report, para. 7.781.

[901]A separate opinion on this issue of one of the Members of the Division is set out *infra*, paras. 631-641. The relevant findings and conclusions for purposes of the recommendations and rulings to be adopted by the DSB in this dispute, pursuant to Article 17.14 of the DSU, are those set out in paragraph 763(e) and (f) of this Report.

607. Article 10.2 refers expressly to export credit guarantee programs, along with export credits and insurance programs. Under Article 10.2, WTO Members have taken on two distinct commitments in respect of these three types of measures: (i) to work toward the development of internationally agreed disciplines to govern their provision; and (ii) after agreement on such disciplines, to provide them only in conformity therewith. The text includes no temporal indication with respect to the first commitment. There is no deadline for beginning or ending the negotiations. The second commitment does have a temporal connotation, in the sense that it is triggered only "after agreement on such disciplines". This means that "after" international disciplines have been agreed upon, Members shall provide export credit guarantees, export credits and insurance programs only in conformity with those agreed disciplines. There is no dispute between the parties that, to date, no disciplines have been agreed internationally pursuant to Article 10.2.

608. Article 10.2 does not, however, expressly define the disciplines that *currently* apply to export credits, export credit guarantees and insurance programs under the *Agreement on Agriculture*. The Panel reasoned that "in order to carve out or exempt particular categories of measures from general obligations such as the prevention of circumvention of export subsidy commitments in Article 10.1 of the *Agreement on Agriculture*, it would be reasonable to expect an explicit indication revealing such an intention in the text of the Agreement".[902] The Panel saw "no language in Article 10.2 which would modify the scope of application of the general export subsidy disciplines in Article 10.1 in the *Agreement on Agriculture* so as to carve out or exempt export credit guarantees from the export subsidy disciplines imposed by that Agreement".[903]

609. We agree with the Panel's view that Article 10.2 does not expressly exclude export credit guarantees from the export subsidy disciplines in Article 10.1 of the *Agreement on Agriculture*. As the Panel observes, were such an exemption intended, it could have been easily achieved by, for example, inserting the words "[n]otwithstanding the provisions of Article 10.1", or other similar language at the beginning of Article 10.2.[904] Article 10.2 does not include express language suggesting that it is intended as an exception, nor does it expressly state that the application of any export subsidy disciplines to export credits or export credit guarantees is "deferred", as the United States suggests. Given that the drafters were aware that subsidized export credit guarantees, export credits and insurance programs could fall within the export subsidy disciplines in the *Agreement on Agriculture* and the *SCM Agreement*, it would be expected that an exception would have been clearly provided had this been the drafters' intention.

610. Moreover, as the Panel explained, Article 10.2 "contrasts starkly with the text of other provisions in the covered agreements, which clearly carve out or exempt certain products or measures from certain obligations that would otherwise apply pending the development of further multilateral disciplines".[905] The Panel referred to Article 6.1(a) and the footnote 24 to Article 8.2(a) of the *SCM Agreement* and Article XIII of the *General Agreement on Trade in Services*, which expressly indicate that existing disciplines do not apply pending the negotiation of future disciplines.[906] However, Article 10.2 does not expressly exclude the application of the existing disciplines in the *Agreement on Agriculture* until such time as the specific disciplines on export credits, export credit guarantees and insurance programs are internationally agreed upon.

[902]Panel Report, para. 7.903. (footnote omitted)

[903]*Ibid.*, para. 7.904.

[904]*Ibid.*, para. 7.909.

[905]*Ibid.*, para. 7.906.

[906]*Ibid.*, paras. 7.907-7.908.

611. The Panel rejected the United States' submission[907] that Brazil's approach would render Article 10.2 irrelevant.[908] In the Panel's view, "the purpose of any eventual disciplines could be further to facilitate the determination of when export credit guarantee programmes in respect of agricultural products constitute export subsidies *per se* by developing and refining existing disciplines".[909] Put another way, "the work envisaged in Article 10.2 would presumably elaborate further and more specific disciplines that could facilitate identification of the extent to which such export credit guarantee programmes constitute export subsidies, or to what extent export credit guarantee programmes are not permitted".[910] The use of the term "development" in Article 10.2 is consistent with this view. The definitions of the term "development" include: "[t]he action or process of developing; evolution, growth, maturation; ... a gradual unfolding, a fuller working-out" and "[a] developed form or product ... an addition, an elaboration".[911] This suggests that the disciplines to be internationally agreed will be an elaboration of the export subsidy disciplines that are currently applicable.

612. This interpretation is consistent with the reference in Article 10.2 to internationally agreed disciplines "to govern the provision of" export credits, export credit guarantees or insurance programs; alternatively, Article 10.2 could have referred to internationally agreed disciplines "to govern" export credits, export credit guarantees or insurance programs. The latter formulation ("to govern") would have been broader in scope, whereas the formulation used in Article 10.2 ("to govern the provision") is narrower. If the drafters had intended that currently no disciplines at all would apply to export credit guarantees, export credits and insurance programs, it would have made more sense for them to have chosen the broader formulation "to govern". The drafter's choice of the narrower formulation "to govern the provision of" suggests that export credit guarantees, export credits and insurance programs are not "undisciplined" in all respects, and that the disciplines to be developed have to do *only* with their *provision*. In other words, export credit guarantees, export credits and insurance programs are governed by Article 10.1 of the *Agreement on Agriculture*, but WTO Members will develop specific disciplines on the provision of these instruments.

613. The Panel's interpretation of Article 10.2, which is based on a plain reading of the text, is confirmed when, in accordance with the customary rules of treaty interpretation codified in Article 31 of the *Vienna Convention*, that provision is examined in its context and in the light of the object and purpose of the *Agreement on Agriculture*, and in particular Article 10, which is entitled "Prevention of Circumvention of Export Subsidy Commitments".

614. We note that Article 10.1 of the *Agreement on Agriculture*, the provision that immediately precedes Article 10.2, reads:

> Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

615. Although Article 10.2 commits WTO Members to work toward the development of internationally agreed disciplines on export credit guarantees, export credits and insurance programs, it is in Article 10.1 that we find the disciplines that currently apply to export subsidies not listed in

[907]United States' first written submission to the Panel, paras. 163-165.

[908]Panel Report, para. 7.925.

[909]*Ibid.*

[910]*Ibid.*, para. 7.926. (footnote omitted)

[911]*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 662.

Article 9.1. A plain reading of Article 10.1 indicates that the only export subsidies that are excluded from its scope are those "listed in paragraph 1 of Article 9". The United States and Brazil agreed that export credit guarantees are not listed in Article 9.1.[912] Thus, to the extent that an export credit guarantee meets the definition of an "export subsidy" under the *Agreement on Agriculture*, it would be covered by Article 10.1. Article 1(e) of the *Agreement on Agriculture* defines "export subsides" as "subsidies contingent upon export performance, *including* the export subsidies listed in Article 9 of this Agreement". (emphasis added) The use of the word "including" suggests that the term "export subsidies" should be interpreted broadly and that the list of export subsidies in Article 9 is not exhaustive. Even though an export credit guarantee may not necessarily include a subsidy component, there is nothing inherent about export credit guarantees that precludes such measures from falling within the definition of a subsidy.[913] An export credit guarantee that meets the definition of an export subsidy would be covered by Article 10.1 of the *Agreement on Agriculture* because it is not an export subsidy listed in Article 9.1 of that Agreement.

616. We find it significant that paragraph 2 of Article 10 is included in an Article that is titled the "Prevention of Circumvention of Export Subsidy Commitments". As Brazil correctly points out, each paragraph in Article 10 pursues this aim.[914] Article 10.1 provides that WTO Members shall not apply export subsidies not listed in Article 9.1 of the *Agreement on Agriculture* "in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments". Article 10.3 pursues the aim of preventing circumvention of export subsidy commitments by providing special rules on the reversal of burden of proof where a Member exports an agricultural product in quantities that exceed its reduction commitment level; in such a situation a WTO Member is treated as if it has granted WTO-*inconsistent* export subsidies for the excess quantities, unless the Member presents adequate evidence to "establish" the contrary.[915] Article 10.4 provides disciplines to prevent WTO Members from circumventing their export subsidy commitments through food aid transactions. Similarly, Article 10.2 must be interpreted in a manner that is consistent with the aim of preventing circumvention of export subsidy commitments that pervades Article 10. Otherwise, it would not have been included in that provision.

617. The United States submits that Article 10.2 contributes to the prevention of circumvention because it commits WTO Members to work toward the development of internationally agreed disciplines and to provide export credit guarantees, export credits and insurance programs only in conformity with these disciplines once an agreement has been reached.[916] We are not persuaded by this argument. The necessary implication of the United States' interpretation of Article 10.2 is that, until WTO Members reach an agreement on international disciplines, export credit guarantees, export credits and insurance programs are subject to no disciplines *at all*. In other words, under the United States' interpretation, WTO Members are free to "circumvent" their export subsidy commitments

[912]Panel Report, para. 7.788.

[913]For discussion of the definitional elements of a subsidy in the context of the *Agreement on Agriculture*, see Appellate Body Report, *US – FSC*, para. 136, and Appellate Body Report, *Canada – Dairy*, para. 87.

[914]Brazil's appellee's submission, para. 951. See Appellate Body Report, *US – FSC*, para. 148 and Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 74.

[915]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 74. Article 10.3 of the *Agreement on Agriculture* provides:

> Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question.

[916]United States' appellant's submission, para. 346.

through the use of export credit guarantees, export credits and insurance programs until internationally agreed disciplines are developed, whenever that may be. We find it difficult to believe that the negotiators would not have been aware of and did not seek to address the potential that subsidized export credit guarantees, export credits and insurance programs could be used to circumvent a WTO Member's export subsidy reduction commitments. Indeed, such an interpretation would *undermine* the objective of preventing circumvention of export subsidy commitments, which is central to the *Agreement on Agriculture*.

618. The United States submits that, under the Panel's approach, international food aid transactions would be subject to the "full array of export subsidy disciplines" because they are not expressly excluded from Article 10.1.[917] According to the United States, this would adversely affect food security in the less developed world, which cannot be construed as the intent of the drafters.[918] Furthermore, the United States asserts, the Panel's approach would mean that international food aid transactions are subject to both the specific disciplines in Article 10.4 and those in Article 10.1 of the *Agreement on Agriculture*.[919]

619. We are unable to subscribe to the United States' arguments because we do not see Article 10.4[920] as excluding international food aid from the scope of Article 10.1.[921] International food aid is covered by the second clause of Article 10.1 to the extent that it is a "non-commercial transaction". Article 10.4 provides specific disciplines that may be relied on to determine whether international food aid is being "used to circumvent" a WTO Member's export subsidy commitments. There is no contradiction in the Panel's approach to Article 10.2 and its approach to Article 10.4. The measures in Article 10.2 and the transactions in Article 10.4 are both covered within the scope of Article 10.1. As Brazil submits, "Article 10.4 provides an example of specific disciplines that have been agreed upon for a particular type of measure and that complement the general export subsidy rules" but, like Article 10.2, it does not "establish any exceptions for the measures that [it] covers".[922] WTO Members are free to grant as much food aid as they wish, provided that they do so consistently with Articles 10.1 and 10.4. Thus, Article 10.4 does not support the United States' reading of Article 10.2.

[917]United States' appellant's submission, para. 349.

[918]*Ibid.*, para. 350.

[919]*Ibid.*, para. 358.

[920]Article 10.4 of the *Agreement on Agriculture* provides:

> 4. Members donors of international food aid shall ensure:
>
> (a) that the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries;
>
> (b) that international food aid transactions, including bilateral food aid which is monetized, shall be carried out in accordance with the FAO "Principles of Surplus Disposal and Consultative Obligations", including, where appropriate, the system of Usual Marketing Requirements (UMRs); and
>
> (c) that such aid shall be provided to the extent possible in fully grant form or on terms no less concessional than those provided for in Article IV of the Food Aid Convention 1986.
>
> A new Food Aid Convention was concluded in 1999.

[921]Brazil's appellee's submission, para. 940.

[922]Brazil's appellee's submission, para. 950.

620. The United States also relies on the negotiating history of the *Agreement on Agriculture* to support its position.[923] The Panel identified the drafting history in the record. It referred to paragraph 22 of the Framework Agreement on Agriculture Reform Programme (known as the "DeZeeuw Text"), circulated in July 1990, which envisaged "concurrent negotiations to govern the use of export assistance, including 'disciplines on export credits'".[924] There was also a "Note on Options in the Agriculture Negotiations" of June 1991, in which the Chairman of the negotiations "requested decisions by the principals on 'whether subsidized export credits and related practices ... would be subject to reduction commitments unless they meet appropriate criteria to be established in terms of the rules that would govern export competition'".[925] An addendum circulated in August of 1991 set out an Illustrative List of Export Subsidy Practices and included, as item (i), "[s]ubsidized export credit guarantees or insurance programs".[926] In December 1991, a "Draft Text on Agriculture" was circulated by the Chairman, Article 9.3 of which stated that "[f]or the purposes of this Article, whether export credits, export credit guarantees or insurance programmes provided by governments or their agencies constitute export subsidies shall be determined on the basis of paragraphs (j) and (k) of Annex 1 to the [*SCM Agreement*]."[927] That paragraph was omitted from the "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations"[928], which was circulated later that month. Article 10.2 of the Draft Final Act reads as follows:

> Participants undertake not to provide export credits, export credit guarantees or insurance programs otherwise than in conformity with internationally agreed disciplines.

This language was subsequently replaced by the current text of Article 10.2.[929]

621. The Panel did not consider that this negotiating history supported the United States' position that "the drafters intended to defer the application of any and all disciplines on agricultural export credit guarantees".[930] According to the Panel, "[t]he omission of paragraph 3 of Article 9 of the December 1991 Draft Text is consistent with a decision that the words were mere surplusage, because export credits, export credit guarantees and insurance programmes were within the disciplines on export subsidies according to the terms of the agreement captured".[931] "The omission", the Panel added, "is much less consistent with a decision to exclude such programmes from the disciplines altogether, considering the clear textual ability of the disciplines to extend to such programmes and the lack of any attention to an explicit carve-out of such programmes from the disciplines".[932]

622. On appeal, the United States again relies on the drafting history of the *Agreement on Agriculture*, which it considers "reflects that the Members very early specifically included export credits and export credit guarantees as a subject for negotiation and specifically elected *not* to include such practices among export subsidies in the WTO Agreements with respect to those goods within the scope of ... the *Agreement on Agriculture*".[933] The United States adds that "[b]y deleting an explicit reference to export credit guarantees from the illustrative list of export subsidies in Article 9.1, Members demonstrated that they had not agreed in the case of agricultural products that export credit guarantees constitute export subsidies that should be subject to export subsidy disciplines".[934] Finally, the United States takes issue with the Panel's explanation that draft Article 9.3 was omitted because it was mere surplusage.[935]

623. We agree with the Panel that the meaning of Article 10.2 is clear from the provision's text, in its context and in the light of the object and purpose of the *Agreement on Agriculture*, consistent with Article 31 of the *Vienna Convention*.[936] The Panel did not think it necessary to resort to negotiating history for purposes of its interpretation of Article 10.2. Even if the negotiating history were relevant for our inquiry, we do not find that it supports the United States' position. This is because it does not indicate that the negotiators did not intend to discipline export credit guarantees, export credits and insurance programs *at all*. To the contrary, it shows that negotiators were aware of the need to impose disciplines on export credit guarantees, given their potential as a mechanism for subsidization and for circumvention of the export subsidy commitments under Article 9. Although the negotiating history reveals that the negotiators struggled with this issue, it does not indicate that the disagreement among them related to whether export credit guarantees, export credits and insurance programs were to be disciplined at all. In our view, the negotiating history suggests that the disagreement between the negotiators related to which kinds of specific disciplines were to apply to such measures. The fact that negotiators felt that internationally agreed disciplines were necessary for these three measures also suggests that the disciplines that currently exist in the *Agreement on Agriculture* must apply pending new disciplines because, otherwise, it would mean that subsidized export credit guarantees, export credits, and insurance programs could currently be extended without any limit or consequence.

624. The United States contends that the Panel's interpretation leads to a result that is "manifestly absurd or unreasonable".[937] According to the United States, it "defies logic ... to take the view of the Panel in which such practices would be treated as already disciplined export subsidies yet not permitted to be included within the applicable reduction commitments expressly contemplated by the text".[938] The Panel's interpretation thus results in an enormous "windfall" for Brazil because the United States would have been permitted to grant export credit guarantees had such measures been listed in Article 9 of the *Agreement on Agriculture*.[939] The United States also submits that exemption of export credit guarantees from export subsidy disciplines of the *Agreement on Agriculture* is further demonstrated by the fact that "no export credit guarantees are reported in the schedules of the

[923]The United States refers to the negotiating history pursuant to Article 32 of the *Vienna Convention*. (United States' appellant's submission, para. 367; see also Panel Report, footnote 1112 to para. 7.933) Article 32 provides that recourse may be had to supplementary means of interpretation, including negotiating history, to determine the meaning when the interpretation according to Article 31 "leads to a result which is manifestly absurd or unreasonable".

[924]Panel Report, para. 7.934.

[925]*Ibid.*, para. 7.935.

[926]*Ibid.*, para. 7.936. Item (h) referred to"[e]xport credits provided by governments or their agencies on less than fully commercial terms."

[927]Panel Report, para. 7.937. Article 8.2 of that text listed export subsidies subject to reduction commitments "somewhat resembling the current Article 9.1 of the *Agreement on Agriculture*", while Article 9.1 was similar to the current Article 10.1. (Panel Report, para. 7.937)

[928]MTN.TNC/W/FA (20 December 1991), reproduced in Exhibit US-29.

[929]Panel Report, paras. 7.938-7.939.

[930]*Ibid.*, para. 7.939.

[931]*Ibid.*, para. 7.940.

[932]*Ibid.*

[933]United States' appellant's submission, para. 377. (original emphasis)

[934]*Ibid.*, para. 378.

[935]*Ibid.*, para. 379.

[936]Panel Report, para. 7.933.

[937]United States' appellant's submission, para. 383.

[938]*Ibid.*, para. 384.

[939]*Ibid.*

United States or any other Members ... nor are they currently subject to reporting as export subsidies".[940]

625. We do not agree with the United States' submission in this regard. There could have been several reasons why Members chose not to include export credit guarantees, export credits and insurance programs under Article 9.1 of the *Agreement on Agriculture*. One reason, for instance, may be that they considered that their export credit guarantee, export credit or insurance programs did not include a subsidy component, so that there was no need to subject them to export subsidy reduction commitments. There could have been other reasons. Thus, the fact that export credit guarantees, export credits and insurance programs were not included in Article 9.1 does not support the United States' interpretation of Article 10.2. We also observe that whether WTO Members with export credit guarantee programs have reported them in their export subsidy notifications is not determinative for purposes of our inquiry into the meaning of Article 10.2. In any event, the United States and Brazil disagree about whether such programs are subject to notification requirements.[941]

626. Accordingly, we do not believe that Article 10.2 of the *Agreement on Agriculture* exempts export credit guarantees, export credits and insurance programs from the export subsidy disciplines in the *Agreement on Agriculture*. This does not mean that export credit guarantees, export credits and insurance programs will necessarily constitute export subsidies for purposes of the *Agreement on Agriculture*. Export credit guarantees are subject to the export subsidy disciplines in the *Agreement on Agriculture* only to the extent that such measures include an export subsidy component. If no such export subsidy component exists, then the export credit guarantees are not subject to the Agreement's export subsidy disciplines. Moreover, even when export credit guarantees contain an export subsidy component, such an export credit guarantee would not be inconsistent with Article 10.1 of the *Agreement on Agriculture* unless the complaining party demonstrates that it is "applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments". Thus, under the *Agreement on Agriculture*, the complaining party must first demonstrate that an export credit guarantee program constitutes an export subsidy. If it succeeds, it must then demonstrate that such export credit guarantees are applied in a manner that results in, or threatens to lead to, circumvention of the responding party's export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*.

627. For these reasons, we *uphold* the Panel's finding, in paragraphs 7.901, 7.911 and 7.932 of the Panel Report, that Article 10.2 of the *Agreement on Agriculture* does not exempt export credit guarantees from the export subsidy disciplines in Article 10.1.

628. Before proceeding further, we refer to the order followed by the Panel in its analysis of Brazil's claims against the United States' export credit guarantee programs. We do not find that the Panel's order of analysis was wrong or that it constituted legal error. Nor has the United States made such a claim on appeal. Nevertheless, we are struck by the fact that the Panel addressed Article 10.2 only at the end of its analysis, especially given that this provision constituted the core of the United States' defence that the disciplines of the *Agreement on Agriculture* currently do not apply to export credit guarantees at all.

[940] *Ibid.*, para. 385. (footnote omitted) The United States makes this argument within the context of its assertion that the Panel's interpretation leads to a result that is "manifestly absurd or unreasonable".

[941] The notification requirements are set out in *Notification Requirements and Formats under the WTO Agreement on Agricultur*e (PC/IPL/12, 2 December 1994), submitted by the United States to the Panel as Exhibit US-99. The United States argues that the absence of a reporting requirement for export credit guarantees provides further proof that such measures are not subject to export subsidy disciplines under the *Agreement on Agriculture*. (United States' appellant's submission, paras. 384-385) Brazil disagrees and submits that, to the extent export credit guarantees constitute export subsidies, such measures are subject to notification requirements. (Brazil's appellee's submission, para. 934)

5. Articles 3.1 and 3.2 of the *SCM Agreement*

629. We turn to the United States' appeal of the Panel's findings under Articles 3.1 and 3.2 of the *SCM Agreement*. According to the United States, "Article 3 of the *SCM Agreement* ... is subject in its application to Article 21.1 of the *Agreement on Agriculture*".[942] The United States then argues that, because "export credit guarantees are not subject to the disciplines of export subsidies for purposes of the *Agreement on Agriculture*, Article 21.1 of that Agreement renders Article 3.1(a) of the *SCM Agreement* inapplicable to such measures".[943] Furthermore, the United States asserts that "the exemption from action under Article 13(c) is inapplicable, because it only is effective with respect to export subsidies disciplined under the *Agreement on Agriculture*."[944]

630. The United States' argument is premised on the proposition that Article 10.2 of the *Agreement on Agriculture* exempts export credit guarantees from the export subsidy disciplines in that Agreement. The Panel rejected this proposition and we have upheld the Panel's finding in this regard. Therefore, because it is premised on an incorrect interpretation of Article 10.2 of the *Agreement on Agriculture*, we reject the United States' argument. We examine the United States' appeals from other aspects of the Panel's assessment of the export credit guarantee programs under Article 3 of the *SCM Agreement* in the following section of our Report.

6. Separate Opinion

631. One Member of the Division hearing this appeal wishes to set out a brief separate opinion. At the outset, I would like to make it absolutely clear that I agree with the findings and conclusions and reasoning set out in all preceding Sections of this Report, but one, namely, Section C above, which relates to Article 10.2 of the *Agreement on Agriculture*. It is only on the interpretation of Article 10.2 that I must respectfully disagree.

632. First I wish to point out that although Article 10.1 of the *Agreement on Agriculture* covers a range of export subsidies that do not fall within the ambit of Article 9.1 of the Agreement, Members considered that it was necessary to carve out three types of programs, namely export credit guarantees, export credits and insurance programs, and to spell out in Article 10.2 their commitments with respect to those three areas. The fact that they chose to deal with these three types of measures in Article 10.2 shows that this special treatment of the three types of measures must be given meaning and weight. Put differently, Article 10.2 is the only provision in the *Agreement on Agriculture* that speaks directly to export credit guarantees, export credits and insurance programs provided in connection with agricultural goods. I read Article 10.2 as saying that WTO Members have committed to two specific undertakings: (1) "to work *toward* the *development*" of international agreed disciplines and (2) to provide export credit guarantees in conformity with these disciplines "*after* agreement on such disciplines". (emphasis added) Thus, the text of Article 10.2 obliges Members to "work toward the *development*" of internationally agreed disciplines to regulate the provision of export credit guarantees, as well as export credits and insurance programs.

633. A specific provision that calls on Members to "work toward the development" of disciplines strongly suggests to me that disciplines do not yet exist. Certainly reference is not made in Article 10.2 to any other disciplines found in the *Agreement on Agriculture* that apply to export credit guarantees, export credits and insurance programs provided in connection with agricultural goods. Furthermore, the second part of Article 10.2 clearly limits the application of disciplines to *after* such time as the international disciplines have been agreed upon. This is a further indication

[942] United States' appellant's submission, para. 393.

[943] *Ibid.*

[944] *Ibid.*, para. 395.

that there are no current disciplines under the *Agreement on Agriculture* that apply to export credit guarantees, export credit and insurance programs.

634. I recognize that the language of this provision is not free from ambiguity. As noted by my colleagues on the Division, the drafters could have—dare I say, should have—made their intentions even more plain. If there were no Article 10.2, then I might concur with my colleagues that to the extent that an export credit guarantee provided an export subsidy then the *Agreement on Agriculture* envisions that that subsidy portion should be addressed by Article 10.1. However, Article 10.2 does exist and the meaning of the words as I read them is entirely prospective, at least with respect to the existence of applicable disciplines.

635. I do not see my reading of Article 10.2 to be inconsistent with the provision's context and with the object and purpose of the *Agreement on Agriculture*. Article 10 is entitled "Prevention of Circumvention of Export Subsidy Commitments". I see the first part of Article 10.1 as setting out a catch-all provision, designed to potentially cover an export subsidy that is used to circumvent the reduction commitments under Article 9. In contrast, as discussed above, Article 10.2 is designed to *specifically* deal with export credit programs, export credits and insurance programs, and its provisions are controlling with respect to any such programs. Although it speaks to prospective development and application of agreed disciplines, Article 10.2 is also consistent with the objective of prevention of circumvention. Its placement in Article 10 suggests a recognition that export credits, export credit guarantees and insurance programs can have the potential to circumvent export subsidy commitments.[945] Article 10.3 pursues the aim of preventing circumvention of export subsidy commitments by providing special rules on reversal of burden of proof when a Member's exports exceed the quantitative reduction commitments, and Article 10.4 itemizes a series of specific commitments or disciplines that apply in the area of international food aid. It is accurate, as my colleagues reason, that the language of Article 10.2 is quite different from that used in Article 10.4. While Article 10.4 establishes disciplines for food aid transactions, Article 10.2 merely foresees that disciplines will be established, in the future, for export credit guarantees, export credits and insurance programs. The fact that a single Article contains commitments with varying degrees of temporal effect and both specific and general provisions, does not support an interpretation that the general undertaking (Article 10.1) overrides the specific and prospective provision (that is, Article 10.2).

636. I also find support for my view in the negotiating history. Of course, care must be taken in relying on negotiating history and I do not wish to imply that resort to Article 32 of the *Vienna Convention* is strictly necessary in these circumstances.[946] Nevertheless, as I read it this history confirms my view that at the end of the Uruguay Round, negotiators had not agreed to subject export credit guarantees, export credits and insurance programs provided in connection with agricultural goods to the disciplines of the *Agreement on Agriculture* or to any other disciplines that existed at that time. Article 10.2, in my view, was intended to reflect this outcome. At one point in the negotiations, there was a proposal for applying to agricultural products the disciplines in the Illustrative List of Export Subsidies annexed to the *SCM Agreement*.[947] This proposal was dropped in

[945]In this sense, I find the United States' term "deferral" to be more meaningful than "exception" in thinking about the nature of Article 10.2 in that it acknowledges that Members are already under an obligation to develop such disciplines, albeit in the future.

[946]I also recognize that the negotiating materials referred to by the Panel may not formally constitute *travaux préparatoires* for purposes of Article 32 of the *Vienna Convention*.

[947]Panel Report, para. 7.937. Specifically, in December 1991, a "Draft Text on Agriculture" was circulated by the Chairman. Article 9.3 of the draft text stated that "[f]or the purposes of this Article, whether export credits, export credit guarantees or insurance programmes provided by governments or their agencies constitute export subsidies shall be determined on the basis of paragraphs (j) and (k) of Annex 1 to the [SCM Agreement]". (*Ibid.*, para. 7.937) Later, the Draft Final Act was circulated and it omitted paragraph 3 of Article 9 that had appeared in the previous draft. (*Ibid.*, para. 7.938)

the Draft Final Act in favour of an "undertak[ing] not to provide export credits, export credit guarantees or insurance programs otherwise than in conformity with internationally agreed disciplines"[948], which in turn was replaced by the current version of Article 10.2. The previous version of Article 10.2 (in the Draft Final Act) reflected an immediate undertaking "not to provide export credit guarantees, export credits or insurance programs otherwise than in conformity with internationally agreed disciplines", whatever those may have been. In contrast, no immediate commitment is evident from the current version of Article 10.2, which instead calls for continued negotiations and for WTO Members to provide export credits, export credit guarantees or insurance programs only in conformity with internationally agreed disciplines *after* agreement on such disciplines. This suggests to me that the negotiators were aware of the need to impose disciplines on export credit guarantees, given their potential as a mechanism for circumvention, but they were unable to agree upon and identify the disciplines that were to apply to such measures until disciplines were developed in the future. Thus, in my view, the negotiating history supports an interpretation that Article 10.2 was inserted to commit WTO Members to continue negotiating on the disciplines that would apply, in the future, and that no disciplines would apply to such measures until such time as disciplines were internationally agreed upon.

637. As noted by my colleagues on the Division, the United States argues that "it defies logic, as well as the obvious object and purpose of the agreement, to take the view of the Panel in which such practices would be treated as already disciplined export subsidies yet not permitted to be included within the applicable reduction commitments expressly contemplated by the text".[949] Brazil argues that the United States was never willing to accept that its export credit guarantee programs constituted an export subsidy and took a calculated risk by not including them under its Article 9 reduction commitments.[950]

638. I agree with my colleagues on the Division that the decisions of WTO Members regarding how to schedule their export subsidy commitments have limited value for purposes of an interpretation of Article 10. However, it seems anomalous that WTO Members with export credit guarantee programs would not have sought to preserve some flexibility to provide subsidies through such programs, which flexibility would have been available to them had such programs been included under Article 9 of the *Agreement on Agriculture*. My colleagues' reading of Article 10 perceives that WTO Members intended to impose upon themselves the more onerous obligation of immediately subjecting export credit guarantees, export credits and insurance programs to the export subsidy disciplines of the *Agreement on Agriculture* rather than the less demanding obligation of working toward the development of such disciplines. We are bound to rely upon what we have before us in the treaty provisions, and I find the same text and context leads me in the opposite direction. Namely, that the absence of reference in Article 9 to export credit guarantees, export credits and insurance programs suggests that it was believed that such measures would not be subject to any disciplines until such time as disciplines were internationally agreed upon pursuant to Article 10.2.

639. In conclusion, for these reasons and particularly my reading of the text, it is my view that, pursuant to Article 10.2, export credit guarantees, export credits and insurance programs are not currently subject to export subsidy disciplines under the *Agreement on Agriculture*, including the disciplines found in Article 10.1. In the light of Article 21.1 of the *Agreement on Agriculture* and the introductory language to Article 3.1 of the *SCM Agreement*, I am also of the view that export credit guarantees, export credits and insurance programs provided in connection with agricultural goods are not subject to the prohibition in Article 3.1(a) of the *SCM Agreement*.

[948]Panel Report, para. 7.938.

[949]United States' appellant's submission, para. 384.

[950]Brazil's response to questioning at the oral hearing.

640. I recognize that this interpretation of Article 10.2 perceives a significant gap in the *Agreement on Agriculture* with respect to export credit guarantees, export credits and insurance programs that apply to agricultural products. This underscores the importance of working "toward the development of international disciplines" as envisioned by Article 10.2.

641. I also recognize that this interpretation of Article 10.2 has consequential results for some of the other claims on appeal brought by both the United States and Brazil in connection with the United States' export credit guarantee programs. As to the other Sections of this Report dealing with export credit guarantees[951], I agree that the legal interpretation and analyses contained therein follow logically from the view of my colleagues on the Division with respect to Article 10.2, as set forth in paragraphs 605 through 630 of this Report.[952]

D. *Export Credit Guarantees – Burden of Proof*

642. The United States submits that the Panel erred in three different ways in respect of the application of the burden of proof in assessing the United States' export credit guarantee programs under item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*. First, the United States asserts that the Panel erred by applying the special rules on the burden of proof provided in Article 10.3 of the *Agreement on Agriculture* in its examination of Brazil's claim under the *SCM Agreement*. The United States emphasizes that "the burden of proof articulated in ... Article 10.3 has no application to the *SCM Agreement*".[953] Secondly, the United States argues that the Panel erred by applying the special rules on burden of proof in Article 10.3 of the *Agreement on Agriculture* in examining whether the United States circumvented its export subsidy commitments in respect of upland cotton and certain other *unscheduled* agricultural products.[954] According to the United States, Article 10.3 does not apply at all in respect of export subsidies to an agricultural good for which the respondent has no reduction commitments.[955] Finally, the United States refers to three specific instances in which the Panel allegedly applied the wrong burden of proof.[956]

643. Brazil responds by highlighting the Panel's finding that, whichever party bore the burden of proof, Brazil had demonstrated that the export credit guarantee programs constitute export subsidies under the terms of item (j) of the Illustrative List of Export Subsidies.[957]

644. Before examining the specific points raised by the United States on appeal relating to the Panel's application of the burden of proof, we recall the general rule that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".[958] Article 10.3 of the *Agreement on Agriculture*, however, "provides a special rule for

[951]I am referring to Sections D. *Export Credit Guarantees – Burden of Proof*, E. *Export Credit Guarantees – Necessary Findings of Fact*, F. *Export Credit Guarantees – Circumvention*, G. *Export Credit Guarantees – Articles 1.1 and 3.1(a) of the SCM Agreement* of this Report.

[952]The relevant findings and conclusions for purposes of the recommendations and rulings to be adopted by the DSB in this dispute, pursuant to Article 17.14 of the DSU, are those set out in paragraph 763(e) and (f) of this Report.

[953]United States' appellant's submission, para. 400. (emphasis omitted)

[954]*Ibid.*, para. 403.

[955]*Ibid.*, para. 404.

[956]*Ibid.*, paras. 405-408.

[957]Brazil's appellee's submission, paras. 95 and 1015 (referring to Panel Report, para. 7.793 and footnote 948 thereto and para. 7.867).

[958]Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323 at 335.

proof of export subsidies that applies in certain disputes under Articles 3, 8, 9 and 10 of the *Agreement on Agriculture*".[959] The text of Article 10.3 reads:

> Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question.

This provision "cleaves the complaining Member's claim" into two parts: a quantitative aspect, and an export subsidization aspect, "allocating to different parties the burden of proof with respect to the two parts".[960]

645. As the Appellate Body has explained in a previous dispute, the burden of proof under Article 10.3 operates in the following manner:

> ... where a Member exports an agricultural product in quantities that exceed its quantity commitment level, that Member will be treated as if it has granted WTO-*inconsistent* export subsidies, for the excess quantities, unless the Member presents adequate evidence to "establish" the contrary. This reversal of the usual rules obliges the responding Member to bear the consequences of any doubts concerning the evidence of export subsidization.[961] (original emphasis)

Pursuant to Article 10.3 "the complaining Member ... is relieved of its burden, under the usual rules, to establish a *prima facie* case of export subsidization, provided that [it] has established the quantitative part of [its] claim".[962]

646. Having briefly set out the applicable rules on the burden of proof, we now turn to the specific points raised by the United States in this appeal. First, the United States alleges that the Panel erred by applying the "special rule" on the burden of proof set out in Article 10.3 of the *Agreement on Agriculture* to its examination of the export credit guarantees under the *SCM Agreement*, where such a rule "has *no* application at all".[963] To support its contention that the Panel applied Article 10.3 in the context of examining Brazil's claim under the *SCM Agreement*, the United States points to the following statement by the Panel:

> Moreover, recalling the burden of proof articulated in Article 10.3 of the *Agreement on Agriculture*, the United States has not established that it does not provide these export credit guarantee programmes at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.[964]

647. We agree with the United States that Article 10.3 of the *Agreement on Agriculture* does not apply to claims brought under the *SCM Agreement*. However, the Panel did not make the error

[959]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 69.

[960]*Ibid.*, para. 71.

[961]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 74.

[962]*Ibid.*, para. 75.

[963]United States' appellant's submission, para. 399. (emphasis added)

[964]Panel Report, para. 7.868.

attributed to it by the United States. The Panel made the statement relied on by the United States in the context of its assessment of the United States' export credit guarantee program under the *Agreement on Agriculture*. Although the Panel made use of the criteria set out in item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement* (providing these programs at premium rates inadequate to cover long-term operating costs and losses) it did so as contextual guidance for its analysis under the *Agreement on Agriculture*, and both the United States and Brazil appear to have agreed with the appropriateness of this approach.[965] Thus, the Panel's reference to Article 10.3 did not relate to its assessment of the United States' export credit guarantee programs under the *SCM Agreement*.

648. Moreover, we note that in the immediately preceding paragraph, which the United States fails to mention, the Panel stated:

> We have conducted a detailed examination of the relevant evidence and argumentation submitted by the parties. On the basis of the totality of the record evidence, including approaches regularly relied upon by the United States government itself, we find that Brazil has established that the United States CCC provides the GSM 102, GSM 103 and SCGP export credit guarantee programmes "at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes" within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement*. Our view is based on a careful consideration of the evidence, taken as a whole, and no one element, in isolation, is determinative.[966] (underlining added)

It is clear from this paragraph that the Panel placed the burden of proof on Brazil and determined that Brazil met its burden of proving that the United States' export credit guarantees are provided at premium rates that are inadequate to cover long-term operating costs and losses. The Panel's statement on which the United States relies simply makes the point that the United States did not rebut the case that was made out by Brazil. The reference to Article 10.3 does not, by itself, change the fact that the Panel ultimately placed the burden of proof on Brazil.

649. After making its findings under the *Agreement on Agriculture*, the Panel examined the United States' export credit guarantees under the *SCM Agreement*. There is no reference to Article 10.3 of the *Agreement on Agriculture* in this discussion.[967] We are aware that the Panel applied the "'contextual' analysis" that it had conducted "under item (j) of the Illustrative List of Export Subsidies ... for the purposes of determining whether or not an export subsidy exists within the meaning of Article 10.1 of the *Agreement on Agriculture*" to its examination of "Brazil's claims under item (j)/Article 3.1(a) of the *SCM Agreement*".[968] In doing so, it would have been useful for the Panel to have clarified that the special rules on the burden of proof in Article 10.3 of the *Agreement on Agriculture*, to which it had referred previously in its "contextual" analysis of item (j) under the *Agreement on Agriculture*, were not applicable for purposes of its analysis under the *SCM Agreement*.[969] Because we have found that the Panel did not ultimately relieve Brazil of its burden of proof in determining that the United States' export credit guarantee programs constituted export subsides under the *Agreement on Agriculture*, we do not believe that the Panel's failure to clarify that Article 10.3 of the *Agreement on Agriculture* did not apply to its examination of the same measures under the *SCM Agreement* constitutes reversible legal error.

650. Secondly, the United States submits that the Panel erred by applying the special rules on the burden of proof in Article 10.3 of the *Agreement on Agriculture* in examining whether the United States circumvented its export subsidy commitments in respect of upland cotton and certain other *unscheduled* agricultural products.[970] According to the United States, Article 10.3 applies only to agricultural products for which a WTO Member has assumed export subsidy reduction commitments in its schedule, pursuant to Article 9.1 of the *Agreement on Agriculture*.[971]

651. The Panel's view was that Article 10.3 does apply to unscheduled products:

> With respect to upland cotton and other unscheduled products, the Panel considers that the United States' reduction commitment level, for the purposes of Article 10.3, is zero for each unscheduled product. By virtue of the second clause of Article 3.3, that is the level to which a Member must reduce any Article 9.1 export subsidies that were not in fact specifically made subject to "scheduled" reduction commitments. Accordingly, in the case of upland cotton and other unscheduled products the same sequence is to be followed, with Brazil as the complaining party first having to prove that United States' exports of unscheduled products exceed that "zero" level.[972]

652. We disagree with the Panel's view that Article 10.3 applies to *unscheduled* products. Under the Panel's approach, the only thing a complainant would have to do to meet its burden of proof when bringing a claim against an *unscheduled* product is to demonstrate that the respondent has exported that product. Once that has been established, the respondent would have to demonstrate that it has not provided an export subsidy.[973] This seems to us an extreme result. In effect, it would mean that any export of an unscheduled product is *presumed* to be subsidized. In our view, the presumption of subsidization when exported quantities exceed the reduction commitments makes sense in respect of a *scheduled* product because, by including it in its schedule, a WTO Member is reserving for itself the right to apply export subsidies to that product, within the limits in its schedule. In the case of *unscheduled* products, however, such a presumption appears inappropriate. Export subsidies for both unscheduled agricultural products and industrial products are completely prohibited under the *Agreement on Agriculture* and under the *SCM Agreement*, respectively. The Panel's interpretation implies that the burden of proof with regard to the same issue would apply differently, however, under each Agreement: it would be on the respondent under the *Agreement on Agriculture*, while it would be on the complainant under the *SCM Agreement*.

653. Although we disagree with the Panel's interpretation of Article 10.3 of the *Agreement on Agriculture* in respect of unscheduled products, we do not believe that the Panel's ultimate finding is

[965]Panel Report, para. 7.803.

[966]*Ibid.*, para. 7.867.

[967]See *ibid.*, paras. 7.946-7.948.

[968]*Ibid.*, para. 7.946 (footnote omitted)

[969]Panel Report, paras. 7.946-7.948.

[970]United States' appellant's submission, para. 403 (referring to Panel Report, para. 7.875).

[971]*Ibid.*, para. 404.

[972]Panel Report, para. 7.793. (footnote omitted)

[973]As the Appellate Body explained, when the special rule on burden of proof in Article 10.3 applies, then "the complaining party is not required to lead in the presentation of evidence to panels, and it might well succeed in its claim even if it presents no evidence—should the responding Member fail to meet its legal burden to establish that no export subsidy has been granted with respect to the excess quantity". (Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and the US II)*, para. 75)

erroneous. This is because the Panel did not rely on its interpretation of Article 10.3. In a footnote to the paragraph quoted above, the Panel stated:

> In any event, even if there is *no* reduction commitment level in respect of unscheduled products, affecting the rules of burden of proof that apply to Brazil's claims pertaining to unscheduled products so as to remove the burden entirely from Brazil or to place the entire burden on Brazil to prove not only that exports have been made, but even that export subsidies have been provided in respect of such exported products, this would not materially affect our analysis, as we are of the view that Brazil has discharged this burden as well, and the United States has failed to discharge its burden in this respect.[974] (original emphasis)

Thus the Panel placed the burden on Brazil to establish that the United States provided export subsidies, through export credit guarantees, to upland cotton and other unscheduled products. This is confirmed in the following paragraph:

> Recalling our discussion of the applicable burden of proof, we find that Brazil has shown that export credit guarantees – constituting export subsidies within the meaning of Article 10.1 (and therefore, necessarily, not listed in Article 9.1) – have been provided under the programmes in question during the period we have examined in respect of exports of upland cotton and certain other unscheduled agricultural products. The United States has not shown that no export subsidy has been granted in respect of such products. We therefore conclude that, in respect of upland cotton and other such *unscheduled* agricultural products on record, the United States applies export credit guarantees constituting export subsidies in a manner which results in circumvention of its export subsidy commitments inconsistently with Article 10.1 of the *Agreement on Agriculture*.[975] (footnote omitted; original emphasis)

654. It is clear from the first sentence in this paragraph that the Panel imposed on Brazil the burden of demonstrating that export subsidies have been granted to upland cotton and other unscheduled agricultural products supported under the programs. The second sentence, on which the United States relies in its submission, simply indicates that the United States did not rebut the evidence and arguments put forward by Brazil; it does not indicate that the Panel erroneously placed the burden of proof on the United States.

655. Finally, the United States refers to three specific instances in which the Panel allegedly erred by improperly placing the burden of proof on the United States. The first example cited by the United States is the Panel's statement that the premiums charged by the CCC for the export credit guarantees "are not geared toward *ensuring* adequacy to cover long-term operating costs and losses for the purposes of item (j)".[976] The United States assert that this is "a much higher threshold" than that provided in text of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*.[977] Next, the United States takes issue with the Panel's statements that "[i]n terms of the structure, design, and operation of the export credit guarantee programmes [we] believe that the programmes are not designed to avoid a net cost to government"[978] and that the Panel was entitled to inquire whether revenue "would be likely to cover the total of all operating costs and losses under the programme".[979] According to the United States, "to 'avoid a net cost' prospectively is simply not the requirement of item (j)" and the "'likelihood' standard of performance" imposed by the Panel is "higher than that found in item (j)".[980] The third example cited by the United States is the Panel's statement that "[w]e have not been persuaded that cohort re-estimates over time, will *necessarily* not give rise to a net cost to the United States government."[981] The United States contends that "[u]nder the applicable burden of proof, however, it is not for the United States to make such incontrovertible demonstrations to the Panel, and the Panel erred in requiring it".[982]

[974]Panel Report, footnote 948 to para. 7.793.

[975]Panel Report, para. 7.875.

[976]United States' appellant's submission, para. 406 (referring to Panel Report, para. 7.859). (emphasis added by the United States)

656. In our view, none of these statements demonstrates that the Panel improperly applied the rules on burden of proof. The United States is selecting statements made by the Panel within its broader analysis of how the United States' export credit guarantee programs operate, reading them in isolation, and disregarding the context in which they were made. As indicated earlier[983], it is clear that the Panel imposed on Brazil the overall burden of proving that the premiums charged under the United States' export credit guarantee programs are inadequate to cover long-term operating costs and losses. This approach is consistent with the usual rules on the allocation of the burden of proof whereby the complaining party is responsible for proving its claim.[984] As for the Panel's rejection of the United States' submissions relating to the cohort re-estimates[985], we agree with Brazil that "[a]s the party asserting that the trends existed, the United States bore the burden of proving that they existed".[986] Thus, the Panel cannot be said to have improperly reversed the burden of proof. Accordingly, the isolated statements referred to by the United States do not demonstrate an error by the Panel in the application of the burden of proof.

657. We, therefore, *reject* the United States' allegations that the Panel improperly applied the burden of proof in finding that the United States' export credit guarantee programs are prohibited export subsidies under Article 3.1(a) of the *SCM Agreement* and are consequently inconsistent with Article 3.2 of that Agreement.

[977]*Ibid.*, para. 406.

[978]*Ibid.*, para. 407 (referring to Panel Report, para. 7.857).

[979]*Ibid.*, para. 407 (referring to Panel Report, paras. 7.805 and 7.835).

[980]United States' appellant's submission, para. 407.

[981]*Ibid.*, para. 408 (quoting Panel Report, para. 7.853). (emphasis added by the United States) The United States also mentions the following statement by the Panel: "[w]hile there may be a possibility (based on the experience of certain of other cohorts) that this figure may diminish over the lifetime of the cohort concerned, there is no assurance that this figure will *necessarily* evolve towards, and conclude as, zero or a negative figure." (Panel Report, footnote 1028 to para. 7.853) (emphasis added by the United States)

[982]United States' appellant's submission, para. 408.

[983]See *supra*, para. 648 (quoting Panel Report, para. 7.867).

[984]We emphasize that the United States' argument on this specific point is limited to the Panel's application of the burden of proof. The United States has not argued that the Panel incorrectly *interpreted* item (j) as requiring that export credit guarantee programs be "geared toward ensuring adequacy to cover long-term operating costs and losses" or that such programs "'avoid a net cost' prospectively".

[985]Panel Report, para. 7.853; see *supra*, para. 655.

[986]Brazil's appellee's submission, para. 1027.

E. *Export Credit Guarantees – Necessary Findings of Fact*

658. We turn to the United States' claim that the Panel erred by failing to make factual findings that were allegedly necessary for the Panel's analysis of whether premiums are adequate to cover the long-term operating costs and losses of the United States' export credit guarantee programs under item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*.

659. In the United States' view, "the absence of a specific factual finding on the basis for and monetary extent to which the United States has allegedly not covered its long-term operating costs and losses for the CCC export credit guarantee programs, compels the reversal of the Panel's finding in respect of item (j)".[987] The United States explained that item (j) requires a determination whether premium rates are inadequate to cover long-term costs and losses and that this requires some determination as to what the operating costs and losses are. The United States further argued that the Panel's failure consisted in not making any determination about how to treat the rescheduled debt within operating costs and losses.[988]

660. Brazil responds that the United States has not made a proper claim under Article 11 of the DSU and is thus precluded from challenging the Panel's appreciation of the facts.[989] In any event, Brazil submits that neither item (j), nor Articles 3.1(a) and 3.2 of the *SCM Agreement*, nor Articles 10.1 and 8 of the *Agreement on Agriculture*, required the Panel to make specific factual findings on the "monetary extent to which" premium rates are inadequate to cover the long-term operating costs and losses of the United States' export credit guarantee programs. It was sufficient for the Panel to have found that, under any and all methodologies that it reviewed and accepted, premium rates are *inadequate* to cover the long-term operating costs and losses of the export credit guarantee programs.[990]

661. In addition, Brazil asserts that the Panel made sufficient factual findings "on the basis for"[991] its conclusion that premium rates are inadequate to cover the long-term operating costs and losses of the export credit guarantee programs. Specifically, the Panel assessed the performance of the export credit guarantee programs under the elements of item (j) in various ways. In its assessment of the *past performance* of the ECG programs during the period 1992-2002, the Panel used two accounting methodologies—*net present value accounting*, and *cash basis accounting*—to determine whether premium rates are inadequate to cover the long-term operating costs and losses of the programs.[992]

662. Before proceeding to the merits of the United States' claim, we examine first Brazil's allegation that the United States had to bring its claim, that the Panel did not make the necessary findings of fact, under Article 11 of the DSU. Article 11 of the DSU provides that a "panel should make an objective assessment of the matter before it, including an objective assessment of the facts of

[987]United States' appellant's submission, para. 419.

[988]United States' response to questioning at the oral hearing.

[989]Brazil's appellee's submission, para. 1065.

[990]*Ibid*., para. 99.

[991]*Ibid*., para. 100.

[992]Brazil's appellee's submission, para. 101.

the case".[993] The Appellate Body stated in *Canada – Wheat Exports and Grain Imports* that "an appellant is free to determine how to characterize its claims on appeal"[994], but observed that "due process requires that the legal basis of the claim be sufficiently clear to allow the appellee to respond effectively."[995]

663. The United States has styled its claim as related to the interpretation and application of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*. According to the United States, the Panel could not have reached a legal conclusion under item (j) without having necessarily determined what were the long-term operating costs and losses of the United States' export credit guarantee programs, and more specifically, made a determination in respect of the treatment of rescheduled debt. We find no difficulty with the United States' approach. Its claim relates to the Panel's application of item (j) to the specific facts of the case. The United States is not asking us to review the Panel's factual findings, nor is it arguing that the Panel's assessment of the matter was not objective. Instead, the United States' claim relates to the application of the legal standard set out in item (j) of the Illustrative List of Export Subsidies to the specific facts of this case.[996] It is an issue of legal characterization.[997] Thus, we do not agree with Brazil's contention that the United States was under an obligation to bring its claim under Article 11 of the DSU. Consequently, our inquiry will be limited to the Panel's application of the law to the facts in this case.

664. Turning to the merits of the United States' allegation, we note that item (j) of the Illustrative List of Export Subsidies, which is attached to the *SCM Agreement* as Annex I, reads:

> The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

665. The Panel provided the following explanation of the examination that is required under item (j) of the Illustrative List of Export Subsidies:

[993]The Appellate Body has emphasized that "a claim, by an appellant, that a panel erred under Article 11 of the DSU, and a request for a finding to this effect, must be included in the Notice of Appeal, and clearly articulated and substantiated in an appellant's submission with specific arguments". (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 60 to para. 71; see also Appellate Body Report, *Japan – Apples*, para. 127; Appellate Body Report, *US – Steel Safeguards*, para. 498; and Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 177)

[994]Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 177.

[995]The Appellate Body, however, did not need to decide in that appeal whether to reject the appellant's claim on the basis that it was brought under the substantive provision at issue, rather than Article 11 of the DSU. (Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 177)

[996]Appellate Body Report, *Canada – Periodicals*, p. 22, DSR 1997:1, 449 at 468.

[997]Appellate Body Report, *EC – Hormones*, para. 132.

> ... item (j) calls for an examination of whether the premium rates of the export credit guarantee programme at issue are inadequate to cover the long-term operating costs and losses of the programmes. Beyond that, item (j) does not set forth, or require us to use, any one particular methodological approach nor accounting philosophy in conducting our examination. Nor are we required to quantify precisely the amount by which costs and losses exceeded premiums paid.[998]

We agree with the Panel's approach. The text of item (j) does not suggest that this provision requires a Panel to choose one particular basis for the calculation and then to make a precise quantification of the difference between premiums and long-term operating costs and losses on that basis. Indeed, at the oral hearing, the United States acknowledged that the text of item (j) does not, by its own terms, require precise quantification, but asserted that the Panel should have precisely quantified the long-term operating costs and losses "in this particular case".[999]

666. In our view, the focus of item (j) is on the inadequacy of the premiums.[1000] To us, this focus suggests that what is required is a finding on whether the premiums are insufficient and thus whether the specific export credit guarantee program at issue constitutes an export subsidy, and not a finding of the precise difference between premiums and long-term operating costs and losses.[1001]

667. Having said this, we recognize that item (j) sets out a test that is essentially financial, as it requires a panel to look at the financial performance of an export credit guarantee program, that is, its revenues from premiums and its long-term operating costs and losses. Our review of the Panel record confirms that, in this case, the Panel conducted a financial analysis of the United States' export credit guarantee programs using three approaches. First, the Panel looked at the method used by the United States government, which "utilizes a 'net present value' approach to budget accounting for its export credit guarantee programmes".[1002] The Panel explained that "a positive net present value means that the United States government is extending a 'subsidy' to borrowers; a negative present value means that the programme generates a 'profit' (excluding administrative costs) to the United States government".[1003] Having explained the method used by the United States government, the Panel then observed that:

[998]Panel Report, para. 7.804.

[999]United States' response to questioning at the oral hearing.

[1000]The Panel observed that there was no disagreement between the parties in this case about the meaning of the term "premiums" for purposes of item (j). According to the Panel, "[u]nder the GSM 102, GSM 103 and SCGP export credit guarantee programmes, such 'premiums' are the fees paid by the applicant exporter constituting the consideration for the payment guarantee provided by the CCC". (Panel Report, paras. 7.817-7.818)

[1001]"Inadequate" is defined as "Not adequate; insufficient". (*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1338)

[1002]Panel Report, para. 7.842. According to the Panel, the United States government adopted the "net present value" approach starting with fiscal year 1992, pursuant to the Federal Credit Reform Act of 1990 (the "FCR Act of 1990"). A specific formula is provided under the FCR Act of 1990 for the "net present value" calculation. (*Ibid.*, footnotes 996 and 997 to para. 7.842)

[1003]*Ibid.*, para. 7.842.

> The annual entries in the "guaranteed loan subsidy" line in the United States budget, 1992-2002 (plus 2003 and 2004 estimates) show us that, according to this formula, there has been a positive "guaranteed loan subsidy" every year. If administrative expenses are added thereto, the annual amount of cost to the United States government increases under this formula by approximately $39 million.[1004]

This shows that the Panel viewed the accounting data provided under this method used by the United States government as evidence that the premiums charged for the export credit guarantees are inadequate to cover long-term operating costs and losses.[1005]

668. Next, the Panel examined data submitted by Brazil based on a constructed "cost" formula.[1006] This formula compares the revenues and costs of the export credit guarantee programs.[1007] The revenue column includes premiums collected, recovered principal and interest, and interest revenue.[1008] The costs column includes administrative expenses, default claims, and interest expense.[1009] The data used in this formula are "taken from the 'prior year' column of the United States government budget".[1010] The formula shows that there was a difference of a little more than US$ 1 billion between premiums and long-term costs and losses for the period 1993-2002.[1011] Accordingly, the data submitted by Brazil showed that the export credit guarantee programs of the United States did not charge premiums that were adequate to cover long-term operating costs and losses.

669. After examining the data submitted by Brazil, the Panel then referred to "fiscal year/cash basis" evidence submitted by the United States. According to the United States, these data reflect "actual performance of the programmes, unlike the data in the US budget to which Brazil alludes ... which ... are based on estimates and re-estimates required under the Federal Credit Reform Act of 1990".[1012] The data submitted by the United States showed that, during the same period, total revenues exceeded total expenses by approximately US$ 630 million.[1013]

[1004]*Ibid.*, para. 7.842. (footnotes omitted)

[1005]The Panel recognized that the "net present value" approach relies on "*initial estimates* of the long-term costs to the United States government". The Panel, however, stated that these were not "random guesses" but rather were based on "[a]ctual historical experience". Furthermore, the Panel reasoned that "[t]he consistently positive numbers in the United States budget guaranteed loan subsidy line indicate to us that the United States government believes, based upon its own assessment, that it may not, even over the long term, be able to operate the export credit guarantee programmes without some net cost to government". (Panel Report, para. 7.843) (original emphasis)

[1006]*Ibid.*, para. 7.844.

[1007]In its appellee's submission, Brazil describes this method as following a "cash basis accounting" approach, in which the programs' receipts are netted against disbursements on a fiscal year basis. The data on receipts and disbursements "reflect actual cash flows". (Brazil's appellee's submission, para. 985)

[1008]Brazil states that this is a "conservative" formula that credits the programs with interest revenue, even though item (j) calls for only an assessment of revenue from premiums. (Brazil's appellee's submission, para. 985)

[1009]See Table 3 in Panel Report, para. 7.845.

[1010]Panel Report, para. 7.846.

[1011]*Ibid.*, paras. 7.845-7.846.

[1012]United States' response to Question 264 Posed by the Panel (Panel Report, p. I-673, para. 21). The data were presented in a spreadsheet and submitted to the Panel as Exhibit US-128. See also Panel Report, para. 7.846.

[1013]Panel Report, para. 7.846.

670. The Panel proceeded to compare the two sets of data.[1014] In contrasting the results under the two methods, the Panel came to the conclusion that the difference between the two was mainly due to treatment of rescheduled debt. This rescheduled debt amounted to approximately US$ 1.6 billion.[1015] The United States asserts that "the Panel did not make any determination about how to treat rescheduled debt".[1016] We disagree. In fact, the Panel rejected the approach suggested by the United States for the treatment of rescheduled debt. Under the United States' approach, rescheduled debt is not treated as an outstanding claim, but rather as a new direct loan.[1017] In the Panel's view, however, this approach "understates the net cost to the United States government associated with the export credit guarantee programmes at issue".[1018] Thus, contrary to the United States' submission, the Panel did make a determination in respect of the treatment of rescheduled debt.[1019] Furthermore, we read this as indicating that the Panel considered that the data submitted by the United States, once rescheduled debt was properly taken into account, also showed that premiums did not offset long-term operating costs and losses.

671. The Panel went further in its analysis and considered the evidence submitted by the United States concerning re-estimates. According to the Panel, this evidence showed a subsidy of approximately US$ 230 million, without including administrative expenses of approximately US$ 39 million.[1020] The Panel was not persuaded by the United States' submission that "over time" the re-estimates would necessarily do away with the subsidy shown by the current figures.[1021] In addition, we note that the Panel looked not only at the past financial performance of the United States' export credit guarantee programs, but also at the structure, design, and operation of the programs. The Panel concluded that the programs "are not designed to avoid a net cost to government"[1022] and "the premiums are not geared toward ensuring adequacy to cover long-term operating costs and losses for the purposes of item (j)".[1023]

[1014]The Panel acknowledged certain limitations inherent in the comparison, including the fact that some of the data "may not directly correlate", that "United States budget data may not always reflect 'actual performance'" and the need to be especially "sensitive" to "the particular time periods covered by the data". Nevertheless, the Panel concluded that "none of these considerations undermine[s] the comparison made". (Panel Report, footnote 1006 to para. 7.846)

[1015]*Ibid.*, para. 7.846.

[1016]United States' response to questioning at the oral hearing.

[1017]Panel Report, para. 7.851. In its appellee's submission, Brazil states that it "accepted that repayments made pursuant to re-scheduled debt agreements should be included as receipts under the [export credit guarantee] programs ... [but] disagreed that the full amount of re-scheduled debt should be treated as received the moment the re-scheduling agreement is completed". Instead, according to Brazil, "the default claim should continue to be treated as a loss unless the United States receives payment from the debtor, and only then should be credited as a receipt in the amount actually received from the debtor". (Brazil's appellee's submission, para. 988)

[1018]Panel Report, para. 7.851. The Panel was struck by the fact that "no amounts have actually been determined uncollectible, written off or forgiven" after 1992. (*Ibid.*, para. 7.848)

[1019]We recall that the United States has not challenged the Panel's assessment of the matter, including the assessment of the facts of the case, pursuant to Article 11 of the DSU. Thus, the United States has not asked us to review the evidentiary basis on which the Panel relied to reject the treatment of rescheduled debt by the United States.

[1020]Panel Report, para. 7.852. The Panel noted that figures submitted by Brazil showed a subsidy of US$ 211 million, without administrative expenses.

[1021]*Ibid.*, para. 7.853.

[1022]*Ibid.*, para. 7.857.

[1023]*Ibid.*, para. 7.859.

672. In the light of the above, it is clear that the Panel undertook a sufficiently detailed examination of the financial performance of the United States' export credit guarantee programs. Its analysis showed that none of the methods proposed by the parties indicated that the premiums charged under the United States' export credit guarantee programs are adequate to cover long-term costs and losses. In these circumstances, we agree with the Panel that, in this particular case, it was not necessary to choose a particular method nor determine the precise amount by which long-term operating costs and losses exceeded premiums. Although it did not provide a final figure for the long-term operating costs and losses of the United States' export credit guarantee programs, as the United States suggests it should have, the Panel found that the various methods put forward by the parties led to the same conclusion, namely, that the premiums for the United States' export credit guarantee programs are inadequate to cover the programs' long-term operating costs and losses. The Panel's decision not to choose between methods or make a finding on the precise difference between premiums and long-term costs and losses does not, in our view, invalidate the Panel's ultimate findings under Articles 3.1(a) and 3.2 of the *SCM Agreement*.

673. For these reasons, we reject the United States' claim that the Panel failed to make the "necessary" findings of fact.

674. Consequently, we *uphold* the Panel's finding in paragraph 7.869 of the Panel Report that "the United States export credit guarantee programmes at issue – GSM 102, GSM 103 and SCGP – constitute a *per se* export subsidy within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement*". In addition, we *uphold* the Panel's findings, in paragraphs 7.947 and 7.948 of the Panel Report, that these export credit guarantee programs are export subsidies for purposes of Article 3.1(a) of the *SCM Agreement* and are inconsistent with Articles 3.1(a) and 3.2 of that Agreement.

F. *Export Credit Guarantees – Circumvention*

1. Introduction

675. We turn to the issues raised by Brazil in relation to the Panel's findings under Article 10.1 of the *Agreement on Agriculture*.

676. The Panel divided its analysis of Brazil's claims under Article 10.1 into different categories, distinguishing between scheduled and unscheduled products, and supported and unsupported products (and rice as a result of its finding in respect of this product). "Scheduled products" are those for which a WTO Member has assumed a commitment to limit the amount of export subsidies in terms of budgetary outlays and quantities exported pursuant to Articles 3, 8, and 9 of the *Agreement on Agriculture*.[1024] The Panel used the term "supported products" to refer to products for which there

[1024]The Panel noted that "[t]he United States has scheduled export subsidy reduction commitments in respect of the following thirteen commodities: wheat, coarse grains, rice, vegetable oils, butter and butter oil, skim milk powder, cheese, other milk products, bovine meat, pigmeat, poultry meat, live dairy cattle, eggs". (Panel Report, footnote 1057 to para. 7.876 (referring to Schedule XX of the United States of America, Part IV, Section II, entitled "Export Subsidies: Budgetary Outlays and Quantitative Reduction Commitments", reproduced in Exhibit BRA-83 and Exhibit US-13))

was evidence in the record showing that they were not only eligible under the programs, but that export credit guarantees were in fact received in connection with exports of those products.[1025]

677. The Panel first examined whether the United States' export credit guarantees to exports of upland cotton and other unscheduled agricultural products supported under the export credit guarantee programs are applied in a manner that "results in" circumvention for purposes of Article 10.1 of the *Agreement on Agriculture*. In other words, the Panel examined whether there is actual circumvention with respect to exports of these products. The Panel found that, "in respect of upland cotton and other such *unscheduled* agricultural products on record, the United States applies export credit guarantees constituting export subsidies in a manner which results in circumvention of its export subsidy commitments inconsistently with Article 10.1 of the *Agreement on Agriculture*".[1026] This finding has not been appealed.

678. The Panel next examined whether the United States' export credit guarantees to scheduled products supported under the export credit guarantee programs are applied in a manner that "results in" circumvention for purposes of Article 10.1 of the *Agreement on Agriculture*. The Panel found that "the United States has applied export credit guarantees constituting export subsidies within the meaning of Article 10.1 – and therefore, necessarily, not listed in Article 9.1 – in a manner which results in circumvention of export subsidy commitments in respect of" rice.[1027] In addition, the Panel found, that "[i]t has not been established, however, that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities".[1028] Brazil appeals the latter finding by the Panel. According to Brazil, the Panel erred in finding that the United States' export credit guarantee programs are not applied in a manner that "results in" circumvention of the United States' export subsidy commitments with respect to pig meat and poultry meat in 2001.[1029] Brazil further submits that "[i]n making this finding, the Panel erred in the interpretation and application of Article 10.1 of the *Agreement on Agriculture*, and also of Article 11 of the DSU".[1030]

679. The Panel also examined whether the United States' export credit guarantees to scheduled products other than rice and unscheduled products not supported under the United States' export credit guarantee programs are applied in a manner that "threatens to lead to" circumvention of the United States' export subsidy commitments for purposes of Article 10.1 of the *Agreement on Agriculture*. The Panel "decline[d] to find that the export credit guarantee programmes at issue are generally applied to scheduled agricultural products other than rice and other unscheduled agricultural products (not supported under the programmes) in a manner which threatens to lead to circumvention of United States' export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*."[1031]

[1025]Panel Report, para. 6.32; see also footnote 1056 to para. 7.875. At the oral hearing, the participants confirmed that this is also their understanding of what the Panel meant by the distinction that it drew between "supported" and "unsupported" products. In respect of "supported" products, the Panel stated that "[t]o the extent that it identifies products within the product coverage of the *Agreement on Agriculture* that are within our terms of reference, we consider Exhibit BRA-73 to be the relevant record evidence of such products for the purposes of this dispute". (Panel Report, footnote 1056 to para. 7.875; see also *ibid.*, footnote 1575 to para. 8.1(d)(i))

[1026]*Ibid.*, para. 7.875.

[1027]*Ibid.*, para. 7.881.

[1028]*Ibid.*

[1029]Brazil's other appellant's submission, para. 65. Brazil initially included vegetable oil in this claim. At the oral hearing, however, Brazil indicated that it was no longer pursuing this claim in respect of vegetable oil. See *infra*, para. 683.

[1030]*Ibid.*, para. 76.

680. Brazil makes two claims on appeal in relation to the Panel's examination of threat of circumvention. First, Brazil submits that the Panel erred in the interpretation and application of Article 10.1 in examining Brazil's claims that the United States' export credit guarantee programs "threaten[] to lead to" circumvention of the United States' export subsidy commitments.[1032] If the Appellate Body were to agree with Brazil and modify the Panel's interpretation, Brazil requests that the Appellate Body complete the analysis and determine that, contrary to Article 10.1 of the *Agreement on Agriculture*, export credit guarantees have been applied in a manner that threatens to lead to circumvention of the United States' export subsidy commitments for all agricultural products eligible to receive these subsidies.[1033] Secondly, Brazil argues that the Panel erred "by confining its examination of threatened circumvention to scheduled products other than rice and unsupported unscheduled products", despite the fact that Brazil's claim "extended to all scheduled and unscheduled agricultural products eligible to receive [export credit guarantees] export subsidies".[1034] We examine Brazil's allegations, in turn, below.

2. Actual Circumvention

681. We begin with Brazil's claim that the Panel erred by failing to find that the United States' export credit guarantees are applied in a manner that led to *actual* circumvention of the United States' export subsidy commitments with respect to pig meat and poultry meat in 2001.[1035]

682. The Panel found:

> We note that the United States has not specifically discharged its burden of establishing that it did not grant WTO-inconsistent export subsidies, for the excess quantities of rice exported. Therefore, we find that the United States has applied export credit guarantees constituting export subsidies within the meaning of Article 10.1 – and therefore, necessarily, not listed in Article 9.1 – in a manner which results in circumvention of export subsidy commitments in respect of this particular scheduled commodity. It has not been established, however, that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities.[1036]

683. In its appellant's submission, Brazil states that "according to uncontested evidence of record, supplied by the United States, actual circumvention also occurred for pig meat and poultry meat in 2001, and for vegetable oils in 2002".[1037] Brazil adds that the Panel "failed to properly apply a proper

[1031]Panel Report, para. 7.896.

[1032]Brazil's other appellant's submission, para. 63.

[1033]*Ibid.*, para. 64.

[1034]*Ibid.*, para. 75.

[1035]The United States has scheduled export subsidy reduction commitments for pig meat and poultry meat. Consequently, the special rule on the burden of proof established in Article 10.3 applies to any quantities exported that exceed the United States' reduction commitment levels. In respect of these quantities, the United States would be "treated as if it has granted WTO-*inconsistent* export subsidies ... unless the [United States] presents adequate evidence to 'establish' the contrary". (Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 74. (original emphasis))

[1036]Panel Report, para. 7.881.

[1037]Brazil's other appellant's submission, para. 204. (footnote omitted)

interpretation of Article 10.1 to the admitted facts".[1038] "By failing to do so", Brazil submits that the Panel "erred in the application of Article 10.1 to uncontested facts", and also "failed to make an objective assessment of the matter, including of admitted and uncontested facts supplied by the United States, as required by Article 11 of the DSU".[1039] In its statement at the oral hearing, Brazil acknowledged that data submitted by the United States indicated that the United States did not exceed its reduction commitment levels for vegetable oil in 2001-2002. We understand from Brazil's statement that it no longer wished to pursue this claim in respect of vegetable oil.

684. The United States responds that Brazil has not made a proper claim under Article 11 of the DSU. According to the United States, Brazil "is contesting findings of the Panel on matters of disputed fact".[1040] Because "Brazil does *not* appeal the Panel's factual findings that the facts did not demonstrate that subsidized exports exceeded U.S. quantitative reduction commitments for poultry, pig meat, and vegetable oils", the United States submits that Brazil's appeal is improper as it does not "stand by itself" and is not "substantiated with respect to the challenged findings".[1041]

685. In addition, the United States points out that Brazil's allegation of actual circumvention related to the period July 2001 through June 2002.[1042] In contrast, quantitative data on exports under the United States' export credit guarantee program are maintained on a fiscal year basis, which extends from 1 October to 30 September of the following year.[1043] In any event, even if this difference between periods can be overcome, the United States argues that "the actual data also support[ ] the Panel's finding that Brazil had not demonstrated actual circumvention for these products".[1044]

686. We understand Brazil to argue that the Panel erred both in the application of Article 10.1 of the *Agreement on Agriculture* and in its assessment of the matter pursuant to Article 11 of the DSU.[1045] As we explained earlier, the application of a legal rule to the specific facts of a case is an issue of legal characterization.[1046] In this case, we understand that Brazil's claim under Article 11 of the DSU is additional to its claim of legal error in respect of Article 10.1. We thus turn first to Brazil's claim that the Panel erred in it application of Article 10.1 of the *Agreement on Agriculture* to the facts before it.

687. It will be recalled that Article 10.1 provides:

[1038]*Ibid.*, para. 210.

[1039]*Ibid.*, para. 211. (footnote omitted)

[1040]United States' appellee's submission, para. 50 (footnote omitted)

[1041]*Ibid.*, para. 50 (referring to Appellate Body Report, *US – Steel Safeguards*, para. 498). (original emphasis; footnote omitted)

[1042]*Ibid.*, para. 56 (referring to Panel Report, para. 7.878 and Brazil's first written submission to the Panel, para. 265 and Figure 18). We note that the period from July of one year to June of the next year is the period used in the United States' schedule of concessions for its quantitative export subsidy commitments. See Schedule XX of the United States submitted by Brazil to the Panel as Exhibit BRA-83.

[1043]The fiscal year of the United States federal government is designated according to the calendar year in which it ends. Therefore, fiscal year 2001 ran from 1 October 2000 to 30 September 2001.

[1044]United States' appellee's submission, para. 56.

[1045]Brazil's response to questioning at the oral hearing; Brazil's other appellant's submission, para. 211.

[1046]Appellate Body Report, *EC – Hormones*, para. 132.

> Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

688. Brazil asserts that "the Panel's legal analysis of the circumstances in which actual circumvention occurs for scheduled products was correct" and draws our attention to the Panel's statement that "where the United States exports an agricultural product in quantities that exceed its quantity commitment level, it will be treated for the purposes of Article 10.1 as if it has granted WTO-inconsistent export subsidies, for the excess quantities, unless it presents adequate evidence to 'establish' the contrary".[1047] Brazil adds that although the Panel correctly applied this interpretation to rice, it failed to do so in respect of pig meat and poultry meat.[1048]

689. We observe that after finding that the United States had circumvented its commitments for rice, the Panel went on to reject Brazil's claim in respect of the other scheduled products supported under the programs without providing an explanation of the basis for its conclusion. Looking at the Panel's analysis, we note that, in paragraph 7.878, the Panel recognized that Brazil's claim of actual circumvention extended to thirteen agricultural products, including pig meat and poultry meat. In the next paragraph, the Panel refers to the United States' submission that it was in compliance with respect to nine of the products mentioned by Brazil", and that, in fiscal year 2002 it would also be true for poultry meat".[1049] Pig meat is not mentioned at all. As for poultry meat, the use of the conditional "would also be true" suggests some question about compliance with respect to that product as well, as the condition is not identified. Oddly, however, these issues are not taken up by the Panel, which does not examine any further whether there was actual circumvention for these products.

690. Instead, from that point on, the Panel focused exclusively on rice, in respect of which the Panel found that the United States failed to establish "that it did not grant WTO-inconsistent export subsidies, for the excess quantities of rice exported."[1050] It would appear that the Panel satisfied itself with what it considered to be an admission by the United States in respect of rice, and declined to examine further Brazil's claim in respect of the other products. In concluding, the Panel merely stated that "[i]t has not been established, however, that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities".[1051] There is no further explanation of the reasons leading to this conclusion.

691. The Panel may have decided to satisfy itself with the United States' admission regarding rice because it allowed it to avoid having to resolve the problem posed by the different time periods used, on the one hand, to track exports under the United States' export credit guarantee programs and, on the other, to determine the export subsidy reduction commitments under the United States' schedule. Exports under the United States' export credit guarantee programs are tracked on a fiscal year basis, extending from 1 October to 30 September of the following year. Meanwhile, the United States' export reduction commitments are based on a year that extends from 1 July to 30 June of the following year. These periods overlap, albeit only in part.

692. We find nothing wrong in the Panel having relied on an admission by the United States relating to rice to conclude that the United States had failed to rebut Brazil's initial allegation of

[1047]Brazil's other appellant's submission, para. 205 (quoting Panel Report, para. 7.877).

[1048]*Ibid.*, paras. 206-207.

[1049]Panel Report, para. 7.879.

[1050]*Ibid.*, para. 7.881.

[1051]*Ibid.*

circumvention.[1052] This did not excuse the Panel, however, from specifically analyzing Brazil's claim in respect of the other products. Consequently, we find no basis to support the Panel's finding that "[i]t has not been established, however, that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities".[1053]

693. We must determine next whether there are sufficient uncontested facts in the record to permit us to complete the analysis with respect to the other commodities.[1054] In our view, there are not. First, the parties disagree about the time period covered by Brazil's claim. The United States asserts that Brazil's claim was limited to the period July 2001 to June 2002, while Brazil contends that its claim was not limited to that period.[1055] Second, as we noted previously[1056], different time periods are used for the sets of data that have to be compared. The data regarding United States exports under the export credit guarantee programs are maintained on a fiscal year basis, which extends from 1 October to 30 September of the following year.[1057] The United States' export subsidy commitments are registered based on a year that extends from 1 July to 30 June of the following year. Both Brazil and the United States have sought to reconcile the data.[1058] In each case, Brazil and the United States assert that the data support their position. Given the differences between the participants in respect of the data that we would have to examine to determine whether the United States applied export credit guarantees in a manner that results in circumvention of its export subsidy commitments for pig meat and poultry meat, we do not believe there are sufficient undisputed facts in the record to enable us to complete the analysis.

694. We recall that Brazil's claim on appeal is limited to the Panel's findings relating to pig meat and poultry meat. For the reasons mentioned above, we *reverse* the Panel's finding, in paragraph 7.881 of the Panel Report, that Brazil did not establish actual circumvention in respect of poultry meat and pig meat. Nevertheless, because there are insufficient uncontested facts in the record to enable us to do so, we do not complete the legal analysis to determine whether the United States' export credit guarantees to poultry meat and pig meat have been applied in a manner that "results in" circumvention of the United States' export subsidy commitments.

695. Brazil has made an additional claim that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU. Having reversed the Panel's ultimate finding, we find that it is not necessary for us to rule on Brazil's additional claim under Article 11 of the DSU. This is because, even if we were to agree with Brazil, it would lead to the same result that we have reached after examining the Panel's application of Article 10.1 of the *Agreement on Agriculture* to the facts before it.

[1052]Panel Report, footnote 1060 to para. 7.880.

[1053]*Ibid*., para. 7.881.

[1054]Appellate Body Report, *US – Section 211 Appropriations Act*, para. 343.

[1055]Brazil's and the United States' responses to questioning at the oral hearing.

[1056]*Supra*, para. 691.

[1057]The fiscal year of the United States federal government is designated according to the calendar year in which it ends. Therefore, fiscal year 2001 ran from 1 October 2000 to 30 September 2001.

[1058]United States' appellee's submission, paras. 58-60; Brazil's statement at the oral hearing.

3. Threat of Circumvention

(a) Scheduled Products Other than Rice and Unscheduled Products not Supported under the Export Credit Guarantee Programs

696. We move next to Brazil's two claims on appeal relating to the Panel's examination of *threat* of circumvention. We recall that the Panel examined whether the United States' export credit guarantees are applied in a manner that "threatens to lead to" circumvention of the United States' export subsidy commitments in respect of *scheduled products other than rice* and *unscheduled products not supported* under the export credit programs.

697. For ease of reference, we note again the text of Article 10.1, which reads:

> Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

698. The Panel explained that its conclusion on whether the United States' export credit guarantees are applied in a manner that threatens to lead to circumvention would depend on whether the Panel considered that:

> ... the United States export credit guarantee programmes require the provision of an 'unlimited amount' of subsidies, so that scheduled commodities other than rice and unscheduled agricultural products not supported under the programmes, therefore, benefit from those subsidies when the reduction commitment levels specified in the United States' Schedule for those agricultural products have been reached.[1059]

The Panel cautioned, however, that even if it made an affirmative finding, "if these programmes are not such as to necessarily create an *unconditional legal entitlement* to receive them, then there would not necessarily be such a threat".[1060] The Panel therefore proceeded to "examine whether an unconditional statutory legal entitlement to an export credit guarantee exists in respect of such products".[1061]

699. In its examination, the Panel noted that "United States export credit guarantee programmes are classified as 'mandatory' under the United States Budget Enforcement Act of 1990."[1062] It went on to explain, however, that it did "not believe that the 'mandatory/discretionary' distinction is the sole legally determinative one for [its] examination of whether or not 'threat' of circumvention of export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture* has been proven to the required standard".[1063] The Panel, moreover, stated that, "[i]n order to pose a 'threat' within the meaning of Article 10.1 of the *Agreement on Agriculture*, [it did] not believe that it is

[1059]Panel Report, para. 7.882. (footnote omitted)

[1060]*Ibid*., para. 7.883. (emphasis added)

[1061]*Ibid*., para. 7.883.

[1062]*Ibid*., para. 7.884. (footnote omitted)

[1063]*Ibid*., para. 7.886.

sufficient that an export credit guarantee programme might possibly, or theoretically, be used in a manner which threatens to lead to circumvention of export subsidy commitments".[1064]

700. After examining the statutory and regulatory framework of the United States' programs under which the export credit guarantees are issued, the Panel concluded that this statutory and regulatory framework "is such that the CCC would not necessarily be required to issue guarantees in respect of any other unscheduled agricultural product (not supported under the programmes), or in respect of scheduled agricultural products other than rice, in a manner which 'threatens to lead to' circumvention of export subsidy commitments".[1065] The Panel, therefore, found:

> Keeping the applicable burden of proof in mind, we therefore decline to find that the export credit guarantee programmes at issue are generally applied to scheduled agricultural products other than rice and other unscheduled agricultural products (not supported under the programmes) in a manner which threatens to lead to circumvention of United States export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*.[1066]

701. Brazil asserts that the Panel erred in interpreting and applying Article 10.1 of the *Agreement on Agriculture*. According to Brazil, "[by] declaring that a 'possibility' of circumvention was not sufficient for a 'threat' finding under Article 10.1, the Panel mischaracterized the threat obligation, reducing it to situations of near certainty".[1067] Brazil explains that the ordinary meaning of the term "threat" can "encompass events that are a possibility or that appear likely; the word can also include events whose occurrence is indicated or portended by circumstances".[1068] Furthermore, Brazil asserts, that the meaning of the term "threatens" is clarified by its immediate context, particularly by the use of the word "prevent" in the title of Article 10.[1069] Brazil explains that "[t]o give proper meaning to the aim of 'prevention,' the threat obligation should, therefore, be read in a way that it thwarts, forestalls, or stops circumvention from occurring by requiring a Member to take appropriate precautionary action".[1070] If, on the contrary, "the degree of likelihood necessary to trigger the threat obligation were set too high, the threat obligation would fail to 'prevent' circumvention, contrary to the express aim of the provision".[1071]

702. Having set out its views on the meaning of the term "threatens" as used in Article 10.1 of the *Agreement on Agriculture*, Brazil then distinguishes it from the connotation that the same term is given in other covered agreements. Brazil submits that the *Agreement on Safeguards* and the *Anti-Dumping Agreement* require a higher degree of likelihood because, under both Agreements, the demonstration of "threat" triggers the *right* of a WTO Member to apply trade remedy measures involving suspension or modification of WTO commitments.[1072] In contrast, "Article 10.1 of the *Agreement on Agriculture* aims at the effective *enforcement* of a Member's export subsidy *obligations*".[1073] Finally, Brazil submits that the assessment of whether a threat exists under Article 10.1 must be done on a case-by-case basis and suggests a list of factors that could be considered as part of the assessment.[1074]

[1064] *Ibid.*, para. 7.893.

[1065] Panel Report, para. 7.895.

[1066] *Ibid.*, para. 7.896.

[1067] Brazil's other appellant's submission, para. 95. Brazil is referring to the Panel's statement that "[i]n order to pose a 'threat' within the meaning of Article 10.1 of the *Agreement on Agriculture*, we do not believe that it is sufficient that an export credit guarantee programme might possibly, or theoretically, be used in a manner which threatens to lead to circumvention of export subsidy commitments". (Panel Report, para. 7.893)

[1068] Brazil's other appellant's submission, para. 97.

[1069] *Ibid.*, paras. 98-99. The title of Article 10 is "Prevention of Circumvention of Export Subsidy Commitments".

[1070] *Ibid.*, para. 100. According to Brazil, "[t]his reading of Article 10.1 of the *Agreement on Agriculture* is consistent with the Appellate Body's observation, in *US – FSC*, that the FSC measure did not provide a mechanism for "stemming or otherwise controlling" the "flow" of export subsidies. (Appellate Body Report, *US – FSC*, para. 149)

[1071] Brazil's other appellant's submission, para. 101.

703. The United States responds by asserting that Brazil mischaracterizes the Panel's findings. Contrary to Brazil's argument, the Panel's finding that the export credit guarantee programs do not threaten circumvention of export subsidy commitments is not an articulation of a broad standard that circumvention of export subsidy commitments would only be "threatened" if beneficiaries had an "absolute" or "unconditional statutory legal entitlement" to receive the subsidies such that the United States would "necessarily" be required to grant subsidies after the commitment level had been reached.[1075] Rather, in concluding that the programs did not pose a threat of circumvention, the United States argues, the Panel simply was responding to and declining to adopt Brazil's erroneous factual and legal characterizations of the program.[1076] The United States submits, furthermore, that the Panel rightly distinguished these programs from the mandatory subsidies at issue in *US – FSC*, and the Panel's decision presents no conflict with that Appellate Body Report.[1077] According to the United States, Brazil effectively argued that a mere possibility of issuance of export credit guarantees presented a threat of circumvention, and the Panel simply did not adopt this theory in the context of the export credit guarantee programs.[1078]

704. The Appellate Body has explained that "under Article 10.1, it is not necessary to demonstrate *actual* 'circumvention' of 'export subsidy commitments'".[1079] It suffices that "export subsidies" are "applied in a manner which … threatens to lead to circumvention of export subsidy commitments".[1080] We note that the ordinary meaning of the term "threaten" includes "[c]onstitute a threat to", "be likely to injure" or "be a source of harm or danger".[1081] Article 10.1 is concerned not with injury, but rather with "circumvention". Accordingly, based on its ordinary meaning, the phrase "threaten[] to lead to ... circumvention" would imply that the export subsidies are applied in a manner that is "likely to" lead to circumvention of a WTO Member's export subsidy commitments. Furthermore, we observe that the ordinary meaning of the term "threaten" refers to a *likelihood* of something happening; the ordinary meaning of "threaten" does not connote a sense of certainty.[1082]

705. The concept of "threat" has been discussed by the Appellate Body within the context of the *Agreement on Safeguards* and the *Anti-Dumping Agreement*. It has explained that "threat" refers to

[1072] Brazil's other appellant's submission, para. 103.

[1073] *Ibid.*, para. 104. (original emphasis)

[1074] *Ibid.*, para. 105.

[1075] United States' appellee's submission, paras. 6 and 27 (referring to Brazil's other appellant's submission, para. 89).

[1076] *Ibid.*, paras. 6 and 30.

[1077] *Ibid.*, para. 32.

[1078] *Ibid.*, paras. 6 and 35.

[1079] Appellate Body Report, *US – FSC*, para. 148. (original emphasis)

[1080] *Ibid.*, para. 148.

[1081] *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 3251.

[1082] Both participants agree that the determination of threat of circumvention has to be done on a case-by-case basis. (Brazil's and the United States' responses to questioning at the oral hearing.)

something that "has *not* yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty".[1083] In *US – Line Pipe*, the Appellate Body stated that there is a continuum that ascends from a "threat of serious injury" up to the "serious injury" itself.[1084] We emphasize that the Appellate Body's discussion of the concept of "threat" in previous appeals related to the interpretation of other covered agreements that contain obligations relating to injury that differ from those relating to circumvention of export subsidy reduction commitments contained in Article 10.1 of the *Agreement on Agriculture*. Our interpretation of "threat" in Article 10.1 of the *Agreement on Agriculture* is consistent with the Appellate Body's interpretation of the term "threat" in these other contexts.

706. The Panel explained that, in its view, "threat" of circumvention under Article 10.1 requires that there be a "an unconditional legal entitlement".[1085] We see no basis for this requirement in Article 10.1. The Panel also stated that "[i]n order to pose a 'threat' within the meaning of Article 10.1 of the *Agreement on Agriculture*, [it did] not believe that it is sufficient that an export credit guarantee programme might possibly, or theoretically, be used in a manner which threatens to lead to circumvention of export subsidy commitments".[1086] In both of these statements, the Panel seems to conflate the phrase "threaten to lead to .... circumvention" with certainty that the circumvention will happen. We find it difficult, moreover, to reconcile the Panel's interpretation with the ordinary meaning of the term "threaten", which, as we indicated earlier, connotes that something is "likely" to happen.[1087] We also find it difficult to reconcile these statements of the Panel with its own view that it did "not believe that the 'mandatory/discretionary' distinction is the sole legally determinative one for our examination of whether or not 'threat' of circumvention of export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture* has been proven to the required standard".[1088]

707. Nor are we prepared to accept Brazil's suggestion that the concept of "threat" in Article 10.1 should be read in a manner that requires WTO Members to take "anticipatory or precautionary action".[1089] The obligation not to apply export subsidies in a manner that "threatens to lead to" circumvention of their export subsidy commitments does not extend that far. There is no basis in Article 10.1 for requiring WTO Members to take affirmative, precautionary steps to ensure that circumvention of their export subsidy reduction commitments does not occur.[1090]

708. In concluding as it did, the Panel appears to have relied on the Appellate Body Report in *US – FSC* for guidance.[1091] In our view, however, the Panel misapplies that analysis. We recall that, in *US – FSC*, the Appellate Body underscored the importance of considering "the structure and other characteristics of [the] measure" when examining whether the specific measure at issue is "applied in a manner which ... threatens to lead to circumvention of export subsidy commitments".[1092] The Appellate Body then went on to note that the specific measure at issue in that dispute created "a *legal entitlement* for recipients to receive export subsidies, not listed in Article 9.1, with respect to agricultural products, both scheduled and unscheduled".[1093] This meant that there was "no discretionary element in the provision by the government of the FSC export subsidies".[1094] Furthermore, the Appellate Body noted that the "legal entitlement that the FSC measure establishes is unqualified as to the *amount* of export subsidies that may be claimed".[1095] This meant that the measure was "unlimited" because there was "no mechanism in the measure for stemming, or otherwise controlling the flow of ... subsidies that may be claimed with respect to any agricultural products".[1096]

709. A proper reading of the Appellate Body's statement in *US – FSC*, however, reveals that it did not intend to provide an exhaustive interpretation of threat of circumvention under Article 10.1 of the *Agreement on Agriculture*. In noting that the measure at issue in that dispute created a "legal entitlement" and had no "discretionary element", the Appellate Body was merely describing characteristics of the measure at issue in that case that it found relevant for its analysis of "threat". In other words, the Appellate Body did not foreclose, in *US – FSC*, the possibility that a measure that does not create a "legal entitlement" or that has a "discretionary element" could be found to "threaten[] to lead to circumvention" under Article 10.1 of the *Agreement on Agriculture*.

710. We therefore modify the Panel's interpretation, in paragraphs 7.882-7.883 and 7.896 of the Panel Report, of the phrase "threatens to lead to .... circumvention" in Article 10.1 of the *Agreement on Agriculture* to the extent that the Panel's interpretation requires "an unconditional legal entitlement" to receive the relevant export subsidies as a condition for a finding of threat of circumvention.

711. Having interpreted the phrase "threatens to lead to ... circumvention", we turn to Brazil's request that we complete the legal analysis and find that, contrary to Article 10.1 of the *Agreement on Agriculture*, the United States' export credit guarantee programs have been applied in a manner that threatens to lead to circumvention of the United States' export subsidy reduction commitments for all agricultural products eligible to receive these subsidies.[1097] According to Brazil, the alleged discretion retained by the CCC, as found by the Panel, does not operate in a manner that "mitigates the threat of circumvention".[1098] Brazil submits that the initial allocations by country of funds available for export credit guarantees "are repeatedly increased during the year".[1099] "The same is also true", Brazil

[1083]Appellate Body Report, *US – Lamb*, para. 125. (original emphasis) The Appellate Body was interpreting the phrase "threat of serious injury" within the context of Article 4.1(b) of the *Agreement on Safeguards*. Article 4.1(b) defines "threat of serious injury" as "serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility".

[1084]The Appellate Body explained that "[i]n terms of the rising continuum of an injurious condition of a domestic industry that ascends from a 'threat of serious injury' up to 'serious injury', we see 'serious injury'—because it is something *beyond* a 'threat'—as necessarily *including* the concept of a 'threat' and *exceeding* the presence of a 'threat'". (Appellate Body Report, *US – Line Pipe*, para. 170) (original emphasis)

[1085]Panel Report, para. 7.883.

[1086]*Ibid*., para. 7.893.

[1087]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 85.

[1088]Panel Report, para. 7.886.

[1089]Brazil's other appellant's submission, para. 100.

[1090]We note in this respect that Article 10 is titled "Prevention of Circumvention of Export Subsidy Commitments". Brazil's assertion that Article 10.1 requires WTO Members to take precautionary action would imply that the aim of the provision would also include the prevention of *threat* of circumvention.

[1091]In a footnote, the Panel states that the United States' export credit guarantee programs that it was "examining are of a fundamentally different nature than the mandatory and essentially unlimited subsidy (in the form of revenue forgone that is otherwise due) examined in *US – FSC*". (Panel Report, footnote 1082 to para. 7.894)

[1092]Appellate Body Report, *US – FSC*, para. 149.

[1093]*Ibid*. (original emphasis)

[1094]*Ibid*., para. 149.

[1095]*Ibid*. (original emphasis)

[1096]*Ibid*., para. 149.

[1097]Brazil's other appellant's submission, paras. 63-64 and 140.

[1098]*Ibid*., para. 187.

[1099]*Ibid*., para. 188.

asserts, "of product allocations, although the CCC makes relatively limited use of these".[1100] In addition, Brazil points out that "the record does not contain one single example of a situation where the CCC was unable to provide [export credit guarantees] because a country or product allocation had been exhausted ... [i]nstead, the record discloses that country and product allocations are repeatedly increased, by significant amounts, during the fiscal year as demand for [export credit guarantees] exhausts existing allocations".[1101]

712. Brazil also questions the significance attributed by the Panel to the fact that, under United States law, export credit guarantees may not be provided in relation to exports to a country that the Secretary of Agriculture determines "cannot adequately service the debt associated with such sale".[1102] According to Brazil, this statutory provision does not constrain the overall amount of export credit guarantees because "the possible exclusion of a country does not prevent the CCC from using all the [export credit guarantees] that would have gone to that country to support exports to other, eligible countries".[1103] Moreover, Brazil submits that the record shows that the Secretary of Agriculture has used this authority "other than sparingly" and that the current list of countries that are eligible under the United States' export credit guarantee programs include "the very large majority of the world's highly indebted poor countries".[1104]

713. We are not persuaded that the arguments put forward by Brazil establish that the United States' export credit guarantee programs are applied in a manner that threatens to lead to circumvention of the United States' export subsidy commitments in respect of scheduled products other than rice and unscheduled products not supported under the programs. In our view, the fact alone that exports of certain products are eligible for export credit guarantees is not sufficient to establish a threat of circumvention. This is particularly the case where there is no evidence in the record that exports of such products have been "supported" by export credit guarantees in the past.[1105] As we stated earlier, Article 10.1 of the *Agreement on Agriculture* does not require WTO Members to take affirmative, precautionary steps to ensure that circumvention of their export subsidy reduction commitments never happens. Nor is it sufficient for Brazil to have alleged that the United States has provided export credit guarantees to exports of *other* unscheduled products or to exports of scheduled products in excess of its export subsidy reduction commitments. Therefore, we agree with the Panel that Brazil has not established that the United States applies its export credit guarantee programs to scheduled agricultural products other than rice and other unscheduled agricultural products (not "supported" under the programs) "in a manner ... which threatens to lead to ... circumvention" of the United States' export subsidy commitments.

714. We thus *uphold*, albeit for different reasons, the Panel's finding, in paragraph 7.896, that Brazil has not established that "the export credit guarantee programmes at issue are generally applied to scheduled agricultural products other than rice and other unscheduled agricultural products (not supported under the programmes) in a manner which threatens to lead to circumvention of United States export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*".

[1100] *Ibid.*, para. 189. According to Brazil, less than eight percent of allocations were product-specific in 2003.

[1101] Brazil's other appellant's submission, para. 191. (footnote omitted)

[1102] Panel Report, para. 7.888 (quoting 7 USC 5622(f)(1)). The Panel stated that "[w]hile this does not curtail the amount of guarantees that may ultimately be made available, it does indicate to us that there exists a discretion (on the part of the Secretary [of Agriculture]) to determine situations in which guarantees cannot be made available". (*Ibid.*, para. 7.888)

[1103] Brazil's other appellant's submission, para. 195.

[1104] *Ibid.*, para. 196.

[1105] "Supported" products are described, *supra*, para. 676.

(b) Rice and Unscheduled Products Supported by the Export Credit Guarantee Programs

715. We turn to Brazil's claim that the Panel improperly confined its examination of Brazil's threat claim to scheduled products other than rice and unscheduled products not supported under the programs. Put another way, Brazil submits that the Panel's analysis of "threat" of circumvention should have also included rice (a scheduled product) and unscheduled products supported by the programs (including upland cotton).[1106]

716. As Brazil acknowledges, the products that the Panel allegedly excluded from its "threat" analysis had been the subject of the Panel's analysis of "actual" circumvention.[1107] In fact, for these products, the Panel had *already* found that the United States' export credit guarantees are applied in a manner that "results in" circumvention. That is, the Panel found *actual* circumvention.[1108] The Panel, however, explained that it was unnecessary for it to examine whether export credit guarantees for the same products were also applied in a manner that "threatens to lead to" circumvention:

> Article 10.1 of the *Agreement on Agriculture* provides that export subsidies not listed in Article 9.1 "shall not be applied in a manner which results in, *or* which threatens to lead to, circumvention of export subsidy commitments ..." (emphasis added). With respect to rice and to unscheduled agricultural products supported under programmes, we have found, in paragraphs 7.875 and 7.881, that the United States applies export credit guarantee programmes constituting export subsidies in a manner which *results in* circumvention of its export subsidy commitments inconsistently with Article 10.1. We consider that the "or" in Article 10.1 indicates that either one (resulting in circumvention) or the other (threatening to lead to circumvention) or both in combination would be adequate to trigger the remedies associated with this provision. We also see "resulting in circumvention" as including and exceeding the concept of "threatening to lead to circumvention". ... We therefore do not believe that it is necessary to conduct any additional examination here.[1109] (original emphasis)

717. We believe the Panel was within its discretion in declining to examine whether scheduled products other than rice and unscheduled products supported by the programs are applied in a manner that "threatens to lead to" circumvention. The Panel had already found that the United States acted inconsistently with Article 10.1 of the *Agreement on Agriculture* because it applied its export credit guarantee program in a manner that "results in" (actual) circumvention of its export subsidy commitments for these products. We do not see why the Panel had to examine also whether the United States acted inconsistently with the *same* provision in respect of the *same* products, but on the basis of there being a *threat* of circumvention, rather than *actual* circumvention.

718. The Appellate Body has stated that panels may exercise judicial economy and refrain from addressing claims beyond those necessary to resolve the dispute.[1110] In this case, the Panel did not

[1106] Brazil's other appellant's submission, para. 75.

[1107] *Ibid.*, para. 135 (referring to Panel Report, paras. 7.875 and 7.881).

[1108] Panel Report, para. 7.875.

[1109] Panel Report, footnote 1061 to para. 7.882.

[1110] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

expressly state it was exercising judicial economy.[1111] We agree with the United States, however, that the Panel's approach can be properly characterized as an exercise of judicial economy.[1112] Moreover, we believe that the Panel was within its discretion in refraining from making additional findings and it was not improper for the Panel to have exercised judicial economy given that its finding of *actual* circumvention resolved the matter.[1113]

719. Therefore, we reject Brazil's appeal that the Panel erred in confining its examination of Brazil's threat of circumvention claim to scheduled products other than rice and unscheduled products not supported under the United States' export credit guarantee programs.

G. *Export Credit Guarantees – Articles 1.1 and 3.1(a) of the SCM Agreement*

720. We turn now to Brazil's allegation that the Panel erred by exercising judicial economy in respect of Brazil's claim that the United States' export credit guarantees are export subsidies within the meaning of Articles 1.1 and 3.1(a) of the *SCM Agreement*.

721. The Panel first examined the United States' export credit guarantees under the *Agreement on Agriculture* using the benchmark provided in item (j) of the Illustrative List of Export Subsidies attached to the *SCM Agreement* as Annex 1, albeit as context.[1114] The Panel found:

> On the basis of the totality of the record evidence, including approaches regularly relied upon by the United States government itself, we find that Brazil has established that the United States CCC provides the GSM 102, GSM 103 and SCGP export credit guarantee programmes "at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes" within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement*.
>
> ...
>
> We therefore find that the United States export credit guarantee programmes at issue – GSM 102, GSM 103 and SCGP – constitute a *per se* export subsidy within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement*.[1115]

722. After completing its examination under the *Agreement on Agriculture*, the Panel moved to Brazil's claims under the *SCM Agreement*. The Panel noted that it had "conducted a 'contextual' analysis under item (j) ... for the purposes of determining whether or not an export subsidy exists within the meaning of Article 10.1 of the *Agreement on Agriculture*" and, therefore, saw "no reason

[1111] The Panel stated that it did not believe it "necessary to conduct any additional examination". (Panel Report, footnote 1061 to para. 7.882)

[1112] The United States asserts that "the Panel properly exercised judicial economy in not examining threat of circumvention for agricultural products with respect to which it found actual circumvention". (United States' appellee's submission, para. 42)

[1113] Appellate Body Report, *Australia – Salmon*, para. 223. See also Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

[1114] Panel Report, para. 7.803.

[1115] *Ibid.*, paras. 7.867 and 7.869.

... why this analysis may not also be applied directly in an examination of the merits of Brazil's claims under item (j)/Article 3.1(a) of the *SCM Agreement* in respect of the export credit guarantee programmes in this factual situation".[1116] The Panel found:

> To the extent that the United States export credit guarantee programmes at issue – GSM 102, GSM 103 and SCGP – do not conform fully to these provisions in Part V of the *Agreement on Agriculture* and do not benefit from the exemption from actions provided by Article 13(c)(ii) of the *Agreement on Agriculture*, they are also export subsidies prohibited by Article 3.1(a) for the reasons we have already given.[1125]
>
> Article 3.2 of the *SCM Agreement* provides: "A Member shall neither grant nor maintain subsidies referred to in paragraph 1" of Article 3. To the extent that the three United States export credit guarantee programmes at issue are inconsistent with Article 3.1(a), they are, consequently, also inconsistent with Article 3.2 of the *SCM Agreement*.[1117]

[1125] We recall that Article 3.1(a) of the *SCM Agreement* sets out a prohibition on subsidies contingent upon export performance, "including those illustrated in Annex I". Annex I - the Illustrative List of Export Subsidies - contains item (j). We have found that the challenged United States export credit guarantee programmes meet the definitional elements of a *per se* export subsidy in item (j). As they are among those "illustrated in Annex I" for the purposes of Article 3.1(a), they are included in the subsidies contingent upon export performance prohibited by Article 3.1(a) of the *SCM Agreement*.

723. During the interim review, Brazil requested the Panel "to make certain additional 'factual' findings regarding the parties' evidence and argumentation relating to Brazil's allegation that the CCC export credit guarantee programmes at issue constitute prohibited export subsidies under the elements of Articles 1 and 3.1(a) of the *SCM Agreement*".[1118] Brazil asserted that "in the event one of the parties appeals and the Appellate Body reverses the Panel's conclusion on item (j), it might not have the necessary facts at its disposal to 'complete the analysis' with respect to Brazil's claims under Articles 1 and 3.1(a) of the *SCM Agreement*".[1119]

724. The United States asked the Panel to reject Brazil's request, asserting that "the Panel ha[d] already made findings on the claims cited by Brazil" and, therefore, Brazil was improperly requesting the Panel "to make unnecessary and unsupported additional factual findings with respect to its *SCM Agreement* claims, and to reverse the applicable burden of proof".[1120]

725. The Panel declined Brazil's request because, in its view:

> Brazil's allegation invoking the elements of Articles 1 and 3.1(a) of the *SCM Agreement* is not a separate claim, but merely another

[1116] Panel Report, para. 7.946. (footnote omitted)

[1117] *Ibid.*, paras. 7.947-7.948. (footnote 1124 omitted)

[1118] *Ibid.*, para. 6.31.

[1119] *Ibid.*

[1120] Panel Report, para. 6.31.

> argument, on a different factual basis, as to how the United States export credit guarantee programmes would meet the definition of an export subsidy in Article 3.1(a) of the *SCM Agreement*. Given our finding in paragraphs 7.946-7.948, we do not believe that it is necessary to address Brazil's additional arguments about how the Article 3.1(a) definitional elements would be fulfilled on another factual basis in order to resolve this dispute. For greater clarity, we have inserted footnote 1125.[1121]

726. On appeal, Brazil asserts that the Panel's rejection of Brazil's request constitutes a false exercise of judicial economy. According to Brazil, "[i]n concluding that Brazil's allegations under item (j) and under Articles 1.1 and 3.1(a) of the *SCM Agreement* constitute alternative 'arguments, on a different factual basis,' the Panel failed to recognize the distinct obligations that flow from Article 3.1(a), and the potentially distinct course of implementation triggered by a Member's maintenance of export subsidies within the meaning of Articles 1.1 and 3.1(a)".[1122] Brazil explains that "because of the different benchmarks that apply under item (j), on the one hand, and Articles 1.1 and 3.1(a), on the other, a measure that no longer constitutes an export subsidy under item (j) may still constitute an export subsidy under Articles 1.1 and 3.1(a)".[1123]

727. Brazil asserts that a "panel is obligated to address all claims on which a finding is necessary to enable the Dispute Settlement Body to make sufficiently precise recommendations and rulings to allow for 'prompt settlement' of the dispute, and for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"[1124] It then adds that "[b]ecause a measure that no longer constitutes an export subsidy under item (j) may still constitute an export subsidy under Articles 1.1 and 3.1(a), the Panel's exercise of judicial economy in this case was in error".[1125] Brazil further explains that the United States "could comply with its obligations under item (j) but still fail to comply with its obligations under Articles 1.1 and 3.1(a)".[1126] Therefore, in Brazil's view, the Panel's failure "to examine Brazil's claim ... leaves open a dispute and creates uncertainty concerning the scope of the United States' obligations, and the consistency of its existing measures with those obligations".[1127] If the Appellate Body were to agree with Brazil's assertion that the Panel's exercise of judicial economy was improper, then Brazil requests that the Appellate Body complete the analysis, and find that the United States' export credit guarantee programs constitute export subsidies under Articles 1.1 and 3.1(a) of the *SCM Agreement*.[1128]

728. The United States requests us to reject Brazil's claim. According to the United States, any further findings by the Panel would have been redundant as the Panel had already determined that the export credit guarantees "constitute *per se* export subsidies prohibited by Articles 3.1(a) and 3.2 of the *SCM Agreement*."[1129] The United States explains that "[n]either item (j) nor the Illustrative List imposes obligations *per se*".[1130] Rather, the obligations regarding export subsidies are found in Articles 3.1(a) and 3.2.[1131] The United States asserts, furthermore, that an additional finding by the Panel on the issue of whether the export credit guarantees programs confer a "benefit" would not change the United States' compliance obligations.[1132]

729. In addition, the United States submits that Brazil mischaracterizes what the Panel did as a failure to address a claim by Brazil when, in fact, Brazil's request at the interim review stage was for the Panel to make additional factual findings.[1133] Even if Brazil had made a separate claim before the Panel under Articles 1.1 and 3.1 of the *SCM Agreement*, the United States submits that the Panel could have properly exercised judicial economy, as the Appellate Body recognized, in *US – Wool Shirts and Blouses*, that panels "need only address those *claims* which must be addressed to resolve the matter in issue in the dispute".[1134] Finally, the United States rejects the contention that Brazil has demonstrated that the United States' export credit guarantees confer a "benefit".[1135]

730. We observe that Brazil premises its claim on appeal on its submission that item (j) of the Illustrative List of Export Subsides annexed to the *SCM Agreement* is a distinct obligation from that contained in Article 3.1(a), read together with Article 1.1.[1136] In other words, Brazil submits that the requirement in item (j) for an export credit guarantee program to charge premiums that are adequate to cover long-term operating costs and losses is distinct from the requirement, under Articles 1.1 and 3.1(a), not to confer a "benefit". The United States rejects the premise of Brazil's argument, asserting instead that the Illustrative List of Export Subsidies, and more specifically item (j), do not establish a separate obligation from that in Article 3.1(a).[1137] Rather, the Illustrative List provides examples (hence "illustrative") of the types of measures that constitute "export subsidies" within the meaning of Article 3.1(a) and "to the extent that it does address a practice this constitutes the standard to determine whether a particular practice constitutes a prohibited export subsidy".[1138]

731. We need not decide, in this case, whether an export credit guarantee program that meets the standard of item (j) of the Illustrative List of Export Subsidies—because the premiums charged are adequate to cover long-term operating costs and losses—may nevertheless be challenged as a prohibited export subsidy under Article 3.1(a) on the basis that it confers a benefit. This is because, even if we were to assume that such a claim were possible, we would conclude that the Panel was within its discretion in exercising judicial economy in respect of Brazil's claim.[1139]

[1121] *Ibid.* See *supra*, para. 722.

[1122] Brazil's other appellant's submission, para. 22 (quoting Panel Report, para. 6.31).

[1123] *Ibid.*, para. 22.

[1124] *Ibid.*, para. 23 (quoting Articles 3.2 and 21.1 of the DSU). (footnotes omitted)

[1125] *Ibid.*, para. 23.

[1126] Brazil's other appellant's submission, para. 23.

[1127] *Ibid.*

[1128] *Ibid.*, para. 42.

[1129] United States' appellee's submission, para. 62 (referring to Panel Report, para. 8.1(d)(i)).

[1130] *Ibid.*, para. 66

[1131] *Ibid.*, para. 66. The United States submits that, under Brazil's reading, the Illustrative List would be deprived of meaning. (*Ibid.*, para. 67)

[1132] *Ibid.*, para. 80.

[1133] *Ibid.*, paras. 81-82 (referring to Panel Report, para. 6.31).

[1134] *Ibid.*, para. 85 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:1, 323 at 339). (emphasis added)

[1135] *Ibid.*, paras. 92-99.

[1136] Brazil's other appellant's submission, para. 22.

[1137] United States' appellee's submisison, para. 66.

[1138] *Ibid.*, para. 70.

[1139] The Panel did not expressly state that it was exercising judicial economy. Instead, the Panel stated that it did not believe that it was "necessary to address Brazil's additional *arguments*". (Panel Report, para. 6.31) (emphasis added) Brazil initially describes the Panel's failure as an error by the Panel in the "interpretation and application of Article 3.1(a) of the *SCM Agreement*, as well as of Article 3.7 of the DSU". (Brazil's other appellant's submission, para. 22) Later in its submission, however, Brazil describes the Panel's error as a "misapplication of the principle of judicial economy". (*Ibid.*, para. 23; see also *ibid.*, paras. 33 and 39-41)

732. As we explained earlier, panels may refrain from ruling on every claim as long as it does not lead to a "partial resolution of the matter".[1140] The Panel found that the United States' export credit guarantee programs constitute a prohibited export subsidy under Article 3.1(a) because they do not meet the criteria in item (j) of the Illustrative List of Export Subsidies. This finding, in our view, is sufficient to resolve the matter. Therefore, we are not persuaded that the Panel's exercise of judicial economy was improper, as Brazil has not demonstrated that it has led to "a partial resolution of the matter".[1141]

733. For these reasons, we reject Brazil's claim that the Panel erred by exercising judicial economy in respect of Brazil's allegation that the United States' export credit guarantees are prohibited export subsidies, under Article 3.1(a) of the *SCM Agreement*, because they confer a "benefit" within the meaning of Article 1.1.

H. *ETI Act of 2000*

734. We turn to Brazil's claim that the Panel erred in the "interpretation and application of the burden of proof"[1142], in connection with its finding that Brazil did not establish a *prima facie* case that the ETI Act of 2000[1143] and the subsidies granted thereunder are inconsistent with Articles 8 and 10.1 of the *Agreement on Agriculture* and Articles 3.1 and 3.2 of the *SCM Agreement*, in respect of upland cotton.

735. Before the Panel, Brazil argued that the ETI Act of 2000 provides an export subsidy to upland cotton, within the meaning of Article 10.1 of the *Agreement on Agriculture*, because it eliminates tax liabilities for exporters who sell upland cotton in foreign markets. According to Brazil, the ETI Act of 2000 threatens to circumvent the United States' export subsidy commitments by providing an export subsidy to upland cotton, despite the fact that the United States has not scheduled any export subsidy reduction commitments for that commodity, thereby violating Articles 8 and 10.1 of the *Agreement on Agriculture*. In addition, Brazil asserted that the ETI Act of 2000 provides prohibited export subsidies to upland cotton within the meaning of Articles 3.1(a) and 3.2 of the *SCM Agreement*.[1144]

[1140]Appellate Body Report, *Australia – Salmon*, para. 223.

[1141]Appellate Body Report, *Australia – Salmon*, para. 223. As the United States argues, the circumstances of this case are different from those in *Australia – Salmon.* In that case, the panel limited its findings for other Canadian salmon to Article 5.1 of the *SPS Agreement* and "gave no convincing reason why it examined Article 5.5 and 5.6 for only one category of the products in dispute, i.e., ocean-caught Pacific salmon, and did not undertake the same analysis for other categories, i.e., other Canadian salmon". (Appellate Body Report, *Australia – Salmon*, para. 225) The present case does not involve a panel incorrectly limiting its findings under other provisions to certain products. Instead, Brazil is questioning the Panel's refusal to make an additional finding of inconsistency with the same provision for the same products.

[1142]Brazil's other appellant's submission, para. 7.

[1143]Public Law 106-519. The ETI Act of 2000 is a measure that was taken by the United States to comply with the recommendations and rulings of the DSB after the original FSC measure was found to be WTO-inconsistent in *US – FSC*. (Appellate Body Report, *US – FSC*, para. 178) It is the same measure that the European Communities challenged in *US – FSC (Article 21.5 – EC)*, part of which the panel and Appellate Body found, in that dispute, to be inconsistent with the United States' WTO obligations. (Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 1 and 256(d)) Brazil acknowledges that, after the Panel Report was circulated, the "United States enacted legislation ... that seems to repeal most of the illegal aspects of the ETI Act of 2000". (Brazil's other appellant's submission, para. 214) Brazil is referring to the American Jobs Creation Act of 2004, enacted as Public Law 108-357.

[1144]Panel Report, para. 7.950. (footnote omitted) Brazil explained that the subsidies granted to upland cotton under the ETI Act of 2000 do not fully conform to Part V of the *Agreement on Agriculture* and, therefore, are not exempt from action under the *SCM Agreement* pursuant to Article 13(c) of the *Agreement on Agriculture*.

Brazil pointed out that, in *US – FSC (Article 21.5 – EC)*, both the panel and Appellate Body found that the ETI Act of 2000 violates Articles 8 and 10.1 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*. Brazil requested the Panel to apply the reasoning developed by that panel, as modified by the Appellate Body, *mutatis mutandis*, to this dispute.[1145]

736. The United States responded that the Panel should reject Brazil's claim because Brazil failed to make a *prima facie* case.[1146] According to the United States, "[a]s a result of Brazil's '*mutatis mutandis*' approach, the Panel [was] in no position to exercise its judgment to follow, or decline to follow, prior dispute settlement findings concerning the ETI Act of 2000, nor even in a position to make factual findings concerning the Act".[1147]

737. The Panel began its analysis by noting that, apart from referring the Panel to the European Communities' claims and arguments in *US – FSC (Article 21.5 – EC)*, Brazil had submitted no direct evidence reflecting the nature, function or WTO-inconsistency of the ETI Act of 2000.[1148] It then observed that Brazil appeared to:

> ... seek a Panel process whereby we would simply apply the reasoning, and findings and conclusions of the panel, as modified by the Appellate Body, in the *US – FSC (Article 21.5 – EC)* dispute, without going through the ordinary procedural steps constituting panel proceedings set out in the *DSU*, including the examination of the legal claims against the measures constituting the matter before this Panel on the basis of direct evidence and argumentation submitted by the complaining and defending parties in this dispute. While Brazil has supplemented the evidence and argumentation in that dispute, it has not purported directly to establish the elements comprising the basis of the findings and conclusions in that dispute.[1149]

The Panel saw "no basis in the text of the *DSU* ... for such incorporation by reference of claims and arguments made in a previous dispute nor for a quasi-automatic application of findings, recommendations and rulings from a previous dispute".[1150] In addition, the Panel rejected Brazil's reliance on Article 17.14 of the DSU[1151] to support its claim, reasoning that, because Brazil was not a party in *US – FSC (Article 21.5 – EC)*, the panel and Appellate Body reports in that case "cannot be

[1145]Panel Report, para. 7.949. (footnotes omitted) Brazil incorporated by reference into its submissions (i) the Panel Report in *US – FSC (Article 21.5 – EC)*, (ii) the Appellate Body Report in *US – FSC (Article 21.5 – EC)*, and (iii) all submissions of the European Communities in that case. Brazil contends that an approach whereby the complaining Member incorporates by reference the reasoning of another panel, as modified by the Appellate Body, is consistent with the Appellate Body's reasoning in *Mexico – Corn Syrup (Article 21.5 – US)*. (Brazil's other appellant's submission, para. 224 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 109))

[1146]Panel Report, para. 7.951.

[1147]*Ibid*.

[1148]*Ibid*., para. 7.959.

[1149]Panel Report, para. 7.961. (footnotes omitted)

[1150]*Ibid*., para. 7.962.

[1151]Article 17.14 of the DSU provides:

> An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. (footnote omitted)

taken as a providing a final resolution to the part of the matter before [it] concerning the ETI Act of 2000".[1152]

738. The Panel then identified other differences between the present dispute and *US – FSC (Article 21.5 – EC)*.[1153] These differences meant, according to the Panel, that the evidence and argumentation relating to the present dispute are distinct from those in *US – FSC (Article 21.5 – EC)*.[1154] The differences in the evidence and argumentation, in turn, led the Panel to decide that "no direct transposition or incorporation of the panel and Appellate Body findings and conclusions would, in any event, be appropriate on the basis of the evidence and argumentation submitted in this dispute".[1155] Moreover, the Panel observed that, in a written communication to the parties after the first meeting, it had "put Brazil on notice that the evidence and arguments submitted up to that point in the Panel proceedings did not provide sufficient basis for [the Panel] to make a finding".[1156]

739. For these reasons, the Panel concluded:

> [O]n the basis of the evidence and arguments submitted, we are not in a position to conclude that Brazil has established a *prima facie* case that the ETI Act of 2000 and subsidies granted thereunder are inconsistent with Articles 8 and 10.1 of the *Agreement on Agriculture* in respect of upland cotton.[1157]

740. On appeal, Brazil asserts that the Panel erred in the "interpretation and application of the burden of proof under Articles 8 and 10.1 of the *Agreement on Agriculture*, and Articles 3.1(a) and 3.2 of the *SCM Agreement*, in light of the goal of the WTO dispute settlement system, under Article 3.3 of the DSU, to provide for the 'prompt settlement' of disputes".[1158] Brazil submits that it challenged before the Panel exactly the same measure that the panel and the Appellate Body in *US – FSC (Article 21.5 – EC)* held violated the *Agreement on Agriculture* and the *SCM Agreement*. This measure had not changed since it was enacted in 2000[1159] and thus the legislation that forms the basis for the United States measure that is subject to Brazil's claims is identical to the legislation at issue in *US – FSC (Article 21.5 – EC)*.[1160] According to Brazil, the United States did not dispute the identity between the measures.[1161]

741. In addition, Brazil asserts that the United States never rebutted Brazil's arguments, or the supporting documents that Brazil referenced, that demonstrate the inconsistency of the ETI Act of 2000 with Articles 8 and 10.1 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.[1162] Brazil refers to *Mexico – Corn Syrup (Article 21.5 – US)*, where the Appellate Body held that a panel may incorporate the reasoning of another panel by reference and still meet the requirement in Article 12.7 of the DSU to set out the "basic rationale" for its findings and conclusions.[1163] Brazil sees no reason why this reasoning should not also apply to submissions by a complaining Member that incorporate by reference the reasoning of another panel, as modified by the Appellate Body, addressing the exact same measure.[1164]

742. Brazil acknowledges that the "United States enacted legislation ... that seems to repeal most of the illegal aspects of the ETI Act of 2000".[1165] Consequently, Brazil expressly states that, were we to modify the Panel's "interpretation and application of the burden of proof"[1166], it is not requesting us to complete the legal analysis and find that the export subsidies to upland cotton, provided under the ETI Act of 2000, are inconsistent with Articles 8 and 10.1 of *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.[1167]

743. The United States responds that we should not decide Brazil's appeal because Brazil acknowledges that the appeal is not necessary to resolve the dispute between the parties. Brazil explicitly does not ask the Appellate Body to complete the analysis with respect to its claims. The United States argues that the Appellate Body should abstain from deciding this issue because Brazil is not asking "the Appellate Body to make findings that would result in DSB rulings and recommendations with respect to the ETI Act".[1168] For that reason alone, the Appellate Body should decline to decide Brazil's appeal.[1169]

[1152]Panel Report, para. 7.967. (footnote omitted)

[1153]The Panel explained that, in *US – FSC (Article 21.5 – EC)*, the claims under the *SCM Agreement* were examined before those under the *Agreement on Agriculture*, an order contrary to that adopted by the Panel in this case. (Panel Report, para. 7.971) Also, the Panel pointed out that, in *US – FSC (Article 21.5 – EC)*, there was no discussion relating to issues under Article 13 of the *Agreement on Agriculture*. (Panel Report, para. 7.972) Finally, the Panel observed that the findings in *US – FSC (Article 21.5 – EC)* were not specific to upland cotton. (Panel Report, para. 7.973)

[1154]*Ibid*., para. 7.975.

[1155]*Ibid.*

[1156]Panel Report, para. 7.980. The written communication is dated 5 September 2003 and in it the Panel "indicated to the parties that, 'on the basis of the evidence and arguments presented to date, it is unable to form any view on whether the ETI Act of 2000 satisfies the relevant provisions of the *Agreement on Agriculture*'".

The Panel also referred to "its discretionary authority to put questions to the parties to clarify the factual and legal aspects of the matter". (*Ibid*., para. 7.983) In this respect, the Panel explained that its authority to ask questions or seek information is not conditional on a party having established a *prima facie* case. Nevertheless, the Panel observed that it was "not permitted to make Brazil's case for Brazil". (*Ibid*., para. 7.985)

[1157]*Ibid*., para. 7.986. The Panel also concluded that:

> ... in accordance with Article 13(c)(ii) of the *Agreement on Agriculture*, to the extent that Brazil has not demonstrated that the United States ETI Act of 2000 is not in conformity with the United States export subsidy commitments under Part V of the *Agreement on Agriculture* in respect of upland cotton, the United States is "exempt from actions based on" Articles 3.1(a) and 3.2 of the *SCM Agreement*. We therefore decline to examine Brazil's claims based on those provisions.

(*Ibid*., para. 7.987) (footnote omitted)

[1158]Brazil's other appellant's submission, para. 7.

[1159]Brazil notes that legislation "that seems to repeal most of the illegal aspects of the ETI Act of 2000" was enacted in 2004. (Brazil's other appellant's submission, para. 214) See *supra*, footnote 1143.

[1160]Brazil's other appellant's submission, para. 221.

[1161]*Ibid*.

[1162]Brazil's other appellant's submission, para. 222.

[1163]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 109.

[1164]In addition, Brazil states that it submitted to the Panel arguments and evidence that addressed the specific nature of its claims, in particular with respect to Article 13(c)(ii) of the *Agreement on Agriculture*. (Brazil's other appellant's submission, para. 225)

[1165]*Ibid*., para. 214.

[1166]*Ibid*., para. 7.

[1167]*Ibid*., para. 214.

[1168]United States' appellee's submission, para. 100. The United States relies for support on the Appellate Body Reports in *US – Steel Safeguards* and *US – Wool Shirts and Blouses*.

[1169]United States' appellee's submission, para. 100.

744. In any event, the United States submits that the Panel correctly concluded that Brazil did not make a *prima facie* case with respect to the ETI Act of 2000. Brazil simply did not present any evidence at all regarding the ETI Act of 2000 itself. According to the United States, the Panel acted properly under the text of the DSU, including Article 11, by declining to find that the "short shrift" that Brazil gave to the ETI Act of 2000 satisfied Brazil's burden to make its *prima facie* case concerning that Act.[1170]

745. At the outset, we observe that Article 17.6 of the DSU provides that appeals "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". Furthermore, Article 17.12 of the DSU states that "[t]he Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding". The United States does not argue that Brazil has failed to appeal an issue of law or a legal interpretation. Thus, the United States is not asserting that Brazil could not have brought this claim on appeal or that we are legally precluded from addressing it. The United States' assertion is that it is not *necessary* for us to resolve Brazil's claim because Brazil is not requesting us to make findings that would result in DSB rulings and recommendations.

746. We agree. Article 3.3 of the DSU explains that the aim of the WTO's dispute settlement system is the "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member". For its part, Article 3.4 of the DSU provides that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter". Similarly, Article 3.7 states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". The Appellate Body, moreover, has cautioned that "[g]iven the explicit aim of dispute settlement that permeates the *DSU*, ... Article 3.2 of the *DSU* is [not] meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute".[1171]

747. In this case, Brazil's claim on appeal is limited to the Panel's application of the burden of proof. Brazil has expressly stated that it is not requesting us to complete the analysis. In view of Brazil's request, our ruling would not result in recommendations or rulings by the DSB in respect of the ETI Act of 2000. In these circumstances, we fail to see how our examination of Brazil's claim would contribute to the "prompt" or "satisfactory settlement" of this matter or would contribute to "secure a positive solution" to this dispute.[1172] Even if we were to disagree with the manner in which the Panel applied the burden of proof, we would not make any findings in respect of the WTO-consistency of the ETI Act of 2000. We recognize that there may be cases in which it would be useful for us to make a finding on an issue, despite the fact that our decision would not result in rulings and recommendations by the DSB. In this case, however, we find no compelling reason for doing so on this particular issue.

[1170]United States' appellee's submission, para. 112.

[1171]Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:1, 323 at 340.

[1172]Our approach is consistent with the approach of the Appellate Body in *US – Steel Safeguards*, where it did not find it necessary to examine the Panel's findings on the causation analysis because it had "already found that the measures before [it] are inconsistent with Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 3.1 and 4.2 of the *Agreement on Safeguards*". (Appellate Body Report, *US – Steel Safeguards*, para. 483)

The Appellate Body noted, in that appeal, that "several participants expressed an interest in having [it] rule on causation as it would provide guidance to Member on applying safeguard measures in the future consistently with their WTO obligations". (Appellate Body Report, *US – Steel Safeguards*, para. 484) Despite this request for guidance, the Appellate Body declined to make a ruling on this specific aspect of the case. (Appellate Body Report, *US – Steel Safeguards*, paras. 485-491)

748. For these reasons, we decline Brazil's request that we reverse the Panel's conclusion that Brazil did not make a *prima facie* case that the ETI Act of 2000 is inconsistent with the United States' WTO obligations. In declining to rule on Brazil's request, we neither endorse nor reject the manner in which the Panel applied the burden of proof in the context of examining Brazil's claim against the ETI Act of 2000.

I. *Interpretation of Article XVI:3 of the GATT 1994*

1. Introduction

749. Before the Panel, Brazil claimed that the United States applied its domestic and export subsidies to upland cotton during the 1999-2002 marketing years in a manner that resulted in the United States having more than an equitable share of world export trade within the meaning of Article XVI:3 of the GATT 1994, and thereby caused serious prejudice within the meaning of Article XVI:1 of the GATT 1994.[1173]

750. In addressing this claim, the Panel considered whether paragraphs 1 and 3 of Article XVI could be considered together, to address both the domestic support and export subsidy measures at issue. The Panel said that "we do not believe that these provisions are susceptible to such joint application", on the grounds that "each provision – Article XVI:1 and Article XVI:3 – requires application in accordance with its own terms in respect of measures that fall within its respective scope of application".[1174]

751. The Panel dealt with Brazil's allegation that the subsidies at issue resulted in the United States enjoying "more than an equitable share of world export trade" under Article XVI:3 of the GATT 1994 in the section of the Panel Report dealing with "Export Subsidies".[1175] The Panel examined whether Article XVI:3 applies only to export subsidies, or whether it also applied to all of the types of subsidies covered by Article XVI:1 as well. The Panel found that:

> Article XVI:3 applies only to export subsidies as that term is now defined in the *Agreement on Agriculture* and the *SCM Agreement*.[1176]

752. Because the Panel had concluded that Step 2 payments to exporters and export credit guarantees under the GSM 102, GSM 103 and SCGP programs constituted export subsidies prohibited by the relevant provisions of the *Agreement on Agriculture* and the *SCM Agreement*, the Panel—as it had done in respect of Brazil's claims under Article XVI:1 of the GATT 1994—exercised judicial economy with respect to Brazil's claim under Article XVI:3 of the GATT 1994.[1177]

753. Brazil's appeal regarding the Panel's findings with respect to the application of Article XVI:3 of the GATT 1994 has two elements. First, Brazil appeals the Panel's finding that Article XVI:3

[1173]Brazil's further submission to the Panel, para. 277.

[1174]Panel Report, para. 7.992. The Panel thus addressed elements of Brazil's claim in different parts of its Report. The Panel's response to Brazil's allegation of "serious prejudice" under Article XVI:1 of the GATT 1994 is dealt with in the section of the Panel Report addressing "Actionable Subsidies: Claims of 'Present' Serious Prejudice". (*Ibid.*, Section VII:G) In the light of its findings of present serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*, the Panel exercised judicial economy with respect to Brazil's claim of serious prejudice under Article XVI:1 of the GATT 1994. (*Ibid.*, para. 7.1476)

[1175]*Ibid.*, Section VII:E.

[1176]*Ibid.*, para. 7.1016.

[1177]*Ibid.*, para. 7.1017.

applies only to export subsidies as that term is now defined in the *Agreement on Agriculture* and the *SCM Agreement*. Brazil stresses that its appeal in this regard, that is, the Panel's legal interpretation of the second sentence of Article XVI:3 of the GATT 1994, is *not conditional*.[1178] Brazil argues that, in reaching the view that Article XVI:3 applies only to export subsidies, as currently defined in the *SCM Agreement* and the *Agreement on Agriculture*, the Panel misinterpreted the second sentence of Article XVI:3, which establishes disciplines upon "any form of subsidy which operates to increase the export of any primary product", that is, all subsidies that have an export-enhancing effect, and not just subsidies that are contingent on export performance. According to Brazil, the focus of Article XVI:3 is upon the effect of subsidies in enhancing exports, and not upon formal distinctions between export contingent and other subsidies.[1179]

754. Secondly, Brazil *conditionally* requests the Appellate Body to complete the analysis of its claim that United States price-contingent subsidies[1180] result in the United States having a "more than equitable share of world export trade" in upland cotton, in violation of Article XVI:3, second sentence.[1181] Brazil's request to complete the analysis is conditional upon two events: (i) a reversal by the Appellate Body of the Panel's finding regarding *significant price suppression* (resulting in serious prejudice in terms of Articles 6.3(c) and 5(c) of the *SCM Agreement*); and, (ii) denial by the Appellate Body of Brazil's request for a ruling that the United States' measures at issue resulted in an increase of the United States' *world market share* in upland cotton (resulting in serious prejudice in terms of Articles 6.3(d) and 5(c) of the *SCM Agreement*).[1182] Brazil submits that there are sufficient factual findings by the Panel or undisputed facts on the record to allow the Appellate Body to complete the analysis of Brazil's claim regarding violation of Article XVI:3 by the United States price-contingent subsidies.[1183]

755. The United States emphasizes that the text of Article XVI distinguishes between "Subsidies in General" (Section A) and "Additional Provisions on Export Subsidies" (Section B). By locating Article XVI:3 in Section B, Members agreed that Article XVI:3 is a provision on export subsidies.[1184] The term "export subsidy" is now defined in the *SCM Agreement* and the *Agreement on Agriculture* as referring to subsidies that are contingent on export performance.[1185] Both the context provided by these Agreements, as well as their negotiating history, confirm that the export subsidies referred to in Article XVI:3 are also subsidies contingent on export performance.[1186]

756. With respect to Brazil's conditional request to complete the analysis, the United States contends that, even if the Appellate Body reverses the Panel's interpretation regarding the scope of Article XVI:3, there would be insufficient undisputed facts on the record or factual findings by the Panel to complete the analysis. The United States observes that the Panel did not make any findings

[1178]Brazil's other appellant's submission, para. 319.

[1179]Brazil's other appellant's submission, paras. 323-327.

[1180]That is, marketing loan payments, Step 2 payments, market loss assistance payments and counter-cyclical payments.

[1181]Brazil's other appellant's submission, para. 318.

[1182]*Ibid.*, para. 319. We observe that Brazil does *not appeal* the Panel's findings with regard to Article XVI:1 and the relationship between Articles XVI:1 and XVI:3 (Panel Report, paras. 7.1470-7.1476), and does not appear to rely to any great extent on Article XVI:1 in its arguments relating to this part of its appeal.

[1183]Brazil's other appellant's submission, paras. 371-379.

[1184]United States' appellee's submission, para. 167.

[1185]*Ibid.*, para. 168.

[1186]*Ibid.*, paras. 169-180.

on causation relative to trade shares. Nor has Brazil put forward a tenable standard for assessing what is more than an "equitable" trade share.[1187]

2. Analysis

757. Article XVI of the GATT 1994 contains two sections. "Section A" lays down certain rules for "Subsidies in General". "Section B", containing paragraphs 2-5 of Article XVI, provides "Additional Provisions on Export Subsidies". In Article XVI:2, the Members "recognize" that the provision of "a subsidy on the export of any product may have harmful effects ...". Article XVI:3, the provision at issue in this part of Brazil's appeal, sets forth that "[a]ccordingly":

> Members should seek to avoid the use of subsidies on the export of primary products. *If, however, a Member grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory*, such subsidy shall not be applied in a manner which results in that Member having more than an equitable share of world export trade in that product, account being taken of the shares of the Members in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.* (*ad note* omitted; emphasis added)

758. The Panel found "that Article XVI:3 applies only to export subsidies as that term is now defined in the *Agreement on Agriculture* and the *SCM Agreement*".[1188] In the light of its rulings under the *Agreement on Agriculture* and the *SCM Agreement* with regard to the United States' export subsidies at issue in the proceedings, the Panel exercised judicial economy with respect to Brazil's claims under Article XVI:3 of the GATT 1994.[1189]

759. Brazil's appeal of these findings has two elements. First, Brazil's appeal focuses on the phrase "any form of subsidy which operates to increase the export of any primary product". It argues that the ordinary meaning of this phrase encompasses all subsidies with an export-enhancing effect, not just those that are *contingent* on export performance. Second, Brazil requests the Appellate Body to complete the analysis and find that the United States' price-contingent subsidies violate Article XVI:3, second sentence, *conditional* upon two events: reversal by the Appellate Body of the Panel's finding of significant price suppression and serious prejudice within the meaning of Articles 6.3(c) and 5(c) of the *SCM Agreement*, as well as denial, by the Appellate Body, of Brazil's appeal concerning the interpretation and application of Articles 6.3(d) and 5(c) of the *SCM Agreement*.

760. With respect to the second element of Brazil's appeal, we note that, above, we upheld the Panel's finding that the effect of the price-contingent subsidies at issue in these proceedings is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*.[1190] We observe, therefore, that the initial condition upon which Brazil's request to complete the analysis of this claim rests is *not* made out, and thus there is no need for us to complete the analysis and to examine whether or not the United States subsidies challenged by Brazil resulted in the United States having more than an equitable share of world export trade in upland cotton.

[1187]United States' appellee's submission, paras. 181-187.

[1188]Panel Report, para. 7.1016.

[1189]*Ibid.*, para. 7.1017

[1190]*Supra*, para. 496.

761. Nor do we believe that it is necessary to make a finding on the interpretation of the phrase "any form of subsidy which operates to increase the export of any primary product" in the second sentence of Article XVI:3 of the GATT 1994 in order to resolve this dispute. Given our ruling under Article 6.3(c) of the *SCM Agreement*, we observe that, although any ruling by the Appellate Body on the scope of the subsidies covered by Article XVI:3 of the GATT 1994 in the abstract might at best offer some degree of "guidance", it would not affect the resolution of this dispute.[1191] Indeed, irrespective of whether we were to uphold or reverse the Panel's finding on this issue, upon adoption of the recommendations and rulings by the DSB, the United States would be under no additional obligation regarding implementation. Thus, although we recognize that there may be cases in which it would be useful for us to make a finding on an issue, despite the fact that our finding would not result in recommendations and rulings by the DSB, we find no compelling reason for doing so in this case in respect of this particular issue.

762. We therefore believe that an interpretation of the phrase "any form of subsidy which operates to increase the export" in Article XVI:3 of the GATT 1994 is unnecessary for purposes of resolving this dispute. We emphasize that we neither uphold nor reverse the Panel's interpretation of this phrase in the second sentence of Article XVI:3.

VIII. Findings and Conclusions

763. For the reasons set out in this Report, the Appellate Body:

(a) as regards procedural matters:

(i) in relation to production flexibility contract payments and market loss assistance payments:

- upholds the Panel's finding, in paragraphs 7.118, 7.122, 7.128, and 7.194(ii) of the Panel Report, that Articles 4.2 and 6.2 of the DSU do not exclude expired measures from the potential scope of consultations or a request for establishment of a panel and, therefore, that production flexibility contract payments and market loss assistance payments fell within the Panel's terms of reference; and

- finds that the Panel set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind this finding, as required by Article 12.7 of the DSU; and

(ii) in relation to export credit guarantee programs:

- upholds the Panel's ruling, in paragraph 7.69 of the Panel Report, that "export credit guarantees to facilitate the export of United States upland cotton, and other eligible agricultural commodities ... are within its terms of reference"; and

[1191]We note in this regard that, in *US – Steel Safeguards*, the Appellate Body noted that "several participants expressed an interest in having [it] rule on causation as it would provide guidance to Members on applying safeguard measures in the future consistently with their WTO obligations". (Appellate Body Report, *US – Steel Safeguards*, para. 484) (original emphasis) Despite this request for guidance, the Appellate Body declined to make a ruling on this specific aspect of the case. (Appellate Body Report, *US – Steel Safeguards*, paras. 485-491)

- upholds the Panel's ruling, in paragraph 7.103 of the Panel Report, that "Brazil provided a statement of available evidence with respect to export credit guarantee measures relating to upland cotton and eligible United States agricultural products other than upland cotton, as required by Article 4.2 of the *SCM Agreement*";

(b) as regards the application of Article 13 of the *Agreement on Agriculture* to this dispute:

(i) in relation to Article 13(a)(ii):

- upholds the Panel's finding, in paragraphs 7.388, 7.413, 7.414, and 8.1(b) of the Panel Report, that production flexibility contract payments and direct payments are not green box measures that fully conform to paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*; and, therefore, are not exempt from actions under Article XVI of GATT 1994 and Part III of the *SCM Agreement* by virtue of Article 13(a)(ii) of the *Agreement on Agriculture*; and

- declines to rule on Brazil's conditional request that the Appellate Body find that the updating of base acres for direct payments under the FSRI Act of 2002 means that direct payments are not green box measures that fully conform to paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*; and, therefore, are not exempt from actions under Article XVI of GATT 1994 and Part III of the *SCM Agreement* by virtue of Article 13(a)(ii) of the *Agreement on Agriculture*; and

(ii) in relation to Article 13(b)(ii):

- modifies the Panel's interpretation, set out in paragraph 7.494 of the Panel Report, of the phrase "support to a specific commodity" in Article 13(b)(ii) of the *Agreement on Agriculture*; but upholds the Panel's finding, in paragraphs 7.518 and 7.520 of the Panel Report, that Step 2 payments to domestic users, marketing loan program payments, production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, and cottonseed payments (the "challenged domestic support measures") granted "support to a specific commodity", namely, upland cotton;

- declines to rule on the United States' appeal that only the price gap methodology described in paragraph 10 of Annex 3 of the *Agreement on Agriculture* may be used to measure the value of marketing loan program payments and deficiency payments for the purposes of the comparison required by Article 13(b)(ii) of the *Agreement on Agriculture*; and

- upholds the Panel's finding, in paragraphs 7.608 and 8.1(c) of the Panel Report, that the "challenged domestic support measures" granted, in the years 1999, 2000, 2001 and 2002, support to a specific commodity, namely, upland cotton, in excess of that decided during the 1992 marketing year; and, therefore, that these measures are not exempt from actions based on Articles 5 and 6 of the *SCM*

Agreement and Article XVI:1 of the GATT 1994 by virtue of Article 13(b)(ii) of the *Agreement on Agriculture*;

(c) as regards serious prejudice:

(i) in relation to Article 6.3(c) of the *SCM Agreement*:

- upholds the Panel's finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, that the effect of the marketing loan program payments, Step 2 payments, market loss assistance payments, and counter-cyclical payments (the "price-contingent subsidies") is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, by in turn upholding the Panel's findings:

  (A) regarding the "market" and "price" in assessing whether "the effect of the subsidy is ... significant price suppression ... in the same market" within the meaning of Article 6.3(c) of the *SCM Agreement*:

  - in paragraphs 7.1238-7.1240 of the Panel Report, that the "same market" may be a "world market";
  - in paragraph 7.1247 of the Panel Report, that a "world market" for upland cotton exists; and
  - in paragraph 7.1274 of the Panel Report, that "the A-Index can be taken to reflect a world price in the world market for upland cotton"; and

  (B) regarding the "effect" of the price-contingent subsidies under Article 6.3(c) of the *SCM Agreement*:

  - in paragraphs 7.1312 and 7.1333 of the Panel Report, that "significant price suppression" occurred within the meaning of Article 6.3(c);
  - in paragraphs 7.1355 and 7.1363 of the Panel Report, that "a causal link exists" between the price-contingent subsidies and the significant price suppression found by the Panel under Article 6.3(c) and that this link is not attenuated by other factors raised by the United States;
  - in paragraphs 7.1173, 7.1186, and 7.1226 of the Panel Report, that it was not required to quantify precisely the benefit conferred on upland cotton by the price-contingent subsidies and, consequently, not identifying the precise amount of counter-cyclical payments and market loss assistance payments that benefited upland cotton; and
  - in paragraph 7.1416 of the Panel Report, that the effect of the price-contingent subsidies for marketing years 1999 to 2002 "is significant price suppression ... in the period MY 1999-2002"; and

- finds that the Panel, as required by Article 12.7 of the DSU, set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind its finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*; and

(ii) in relation to Article 6.3(d) of the *SCM Agreement*:

- finds it unnecessary, for the purposes of resolving this dispute, to rule on the interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement*, and neither upholds nor reverses the Panel's findings in this regard; and
- declines to rule on Brazil's conditional request for the Appellate Body to find that the effect of the price-contingent subsidies is an increase in the United States' world market share in upland cotton within the meaning of Article 6.3(d) of the *SCM Agreement*;

(d) as regards user marketing (Step 2) payments:

(i) upholds the Panel's findings, in paragraphs 7.1088, 7.1097-7.1098, and 8.1(f) of the Panel Report, that Step 2 payments to *domestic users* of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are subsidies contingent on the use of domestic over imported goods that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*; and

(ii) upholds the Panel's findings, in paragraphs 7.748-7.749, 7.760-7.761, and 8.1(e) of the Panel Report, that Step 2 payments to *exporters* of United States upland cotton, pursuant to Section 1207(a) of the FSRI Act of 2002, are subsidies contingent upon export performance within the meaning of Article 9.1(a) of the *Agreement on Agriculture* that are inconsistent with Articles 3.3 and 8 of that Agreement and Articles 3.1(a) and 3.2 of the *SCM Agreement*;

(e) as regards export credit guarantee programs:

(i) upholds the Panel's finding, in paragraphs 7.901, 7.911, and 7.932 of the Panel Report, that Article 10.2 of the *Agreement on Agriculture* does not exempt export credit guarantees from the export subsidy disciplines in Article 10.1 of that Agreement[1192];

(ii) finds that the Panel did not improperly apply the burden of proof in finding that the United States' export credit guarantee programs are prohibited export subsidies under Article 3.1(a) of the *SCM Agreement* and are consequently inconsistent with Article 3.2 of that Agreement;

(iii) declines to find that the Panel erred by failing to make the necessary findings of fact in assessing whether the export credit guarantee programs are

[1192]See Separate Opinion, *supra*, paras. 631-641.

provided at premium rates that are inadequate to cover long-term operating costs and losses within the meaning of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*; and, consequently,

(iv) upholds the Panel's finding, in paragraph 7.869 of the Panel Report, that "the United States export credit guarantee programmes at issue—GSM 102, GSM 103 and SCGP—constitute a *per se* export subsidy within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement*", and upholds the Panel's findings, in paragraphs 7.947 and 7.948 of the Panel Report, that these export credit guarantee programs are export subsidies for purposes of Article 3.1(a) of the *SCM Agreement* and are inconsistent with Articles 3.1(a) and 3.2 of that Agreement; and

(v) finds that the Panel did not err in exercising judicial economy in respect of Brazil's allegation that the United States' export credit guarantee programs are prohibited export subsidies, under Article 3.1(a) of the *SCM Agreement*, because they confer a "benefit" within the meaning of Article 1.1 of that Agreement;

(f) as regards circumvention of export subsidy commitments:

(i) reverses the Panel's finding, in paragraph 7.881 of the Panel Report, that Brazil did not establish actual circumvention in respect of poultry meat and pig meat; finds, however, that there are insufficient uncontested facts in the record to complete the legal analysis to determine whether the United States' export credit guarantees to poultry meat and pig meat have been applied in a manner that "results in" circumvention of the United States' export subsidy commitments, within the meaning of Article 10.1 of the *Agreement on Agriculture*;

(ii) modifies the Panel's interpretation, in paragraphs 7.882-7.883 and 7.896 of the Panel Report, of the phrase "threatens to lead to .... circumvention" in Article 10.1 of the *Agreement on Agriculture* to the extent that the Panel's interpretation requires "an unconditional legal entitlement" to receive the relevant export subsidies as a condition for a finding of threat of circumvention, but upholds, for different reasons, the Panel's finding, in paragraph 7.896 of the Panel Report, that Brazil has not established that "the export credit guarantee programmes at issue are generally applied to scheduled agricultural products other than rice and other unscheduled agricultural products (not supported under the programmes) in a manner which threatens to lead to circumvention of United States export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*"; and

(iii) finds that the Panel did not err in confining its examination of Brazil's threat of circumvention claim to scheduled products other than rice and unscheduled products not supported under the United States' export credit guarantee programs;

(g) as regards the ETI Act of 2000, declines Brazil's request that the Appellate Body reverse the Panel's conclusion that Brazil did not make a *prima facie* case that the ETI Act of 2000 is inconsistent with the United States' WTO obligations; and

(h) as regards Article XVI:3 of the GATT 1994:

(i) finds it unnecessary, for the purposes of resolving this dispute, to rule on the interpretation of the phrase "any form of subsidy which operates to increase the export" in Article XVI:3 of the GATT 1994, and neither upholds nor reverses the Panel's findings in this regard; and

(ii) declines to rule on Brazil's conditional request for the Appellate Body to find that the price-contingent subsidies cause the United States to have "more than an equitable share of world export trade" in upland cotton, in violation of the second sentence of Article XVI:3 of the GATT 1994.

764. The Appellate Body recommends that the Dispute Settlement Body request the United States to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *Agreement on Agriculture* and the *SCM Agreement*, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 10th day of February 2005 by:

_____

Merit E. Janow
Presiding Member

_____ _____

Luiz Olavo Baptista
Member

A.V. Ganesan
Member

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS267/17
20 October 2004
(04-4441)

Original: English

UNITED STATES – SUBSIDIES ON UPLAND COTTON

Notification of an Appeal by the United States
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes ("DSU")

The following notification, dated 18 October 2004, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Subsidies on Upland Cotton* (WT/DS267/R) and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that certain U.S. decoupled income support measures – that is, production flexibility contract payments under the Federal Agricultural Improvement and Reform Act of 1996 ("1996 Act"), direct payments under the Farm Security and Rural Investment Act of 2002 ("2002 Act"), and "the legislative and regulatory provisions which establish and maintain the [direct payments] programme" – are not exempt from actions under Article 13(a) of the *Agreement on Agriculture*.[1] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, that these decoupled income support measures do not conform to Annex 2.

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that certain U.S. domestic support measures[2] are not exempt from actions under Article 13(b) of the *Agreement on Agriculture*.[3] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that the challenged U.S. measures granted support to a specific commodity in excess of that decided in marketing year 1992 and therefore breached the proviso of Article 13(b) in each year from marketing year 1999-2002.

3. The United States seeks review by the Appellate Body of the Panel's legal conclusion that U.S. export credit guarantees under the GSM 102, GSM 103, and SCGP export credit guarantee programs in respect of unscheduled agricultural products supported under the programs and one scheduled commodity (rice) are "export subsidies applied in a manner which results in circumvention of United States export subsidy commitments, within the meaning of Article 10.1 of the *Agreement on Agriculture*," are therefore inconsistent with Article 8 of the *Agreement on Agriculture*, and are not exempt from actions under Article 13(c) of the *Agreement on Agriculture*.[4] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings, include, for example, the Panel's finding that export credit guarantees, notwithstanding Article 10.2 of the *Agreement on Agriculture*, constitute measures subject to Article 10.1 of the *Agreement on Agriculture.*

4. The United States seeks review by the Appellate Body of the Panel's legal conclusion that U.S. export credit guarantees under the GSM 102, GSM 103, and SCGP export credit guarantee programs in respect of other scheduled agricultural products constitute export subsidies within the meaning of Article 10.1 of the *Agreement on Agriculture*.[5] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings, include, for example, the Panel's finding that export credit guarantees, notwithstanding Article 10.2 of the *Agreement on Agriculture*, constitute measures subject to Article 10.1 of the *Agreement on Agriculture.*

5. The United States seeks review by the Appellate Body of the Panel's legal conclusion that U.S. export credit guarantees under the GSM 102, GSM 103, and SCGP export credit guarantee programs in respect of unscheduled agricultural products supported under the programs and one scheduled commodity (rice) are *per se* export subsidies prohibited by Articles 3.1(a) and 3.2 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[6] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that the program for each product constitutes an export subsidy for purposes of the WTO Agreements and is provided by the United States at premium rates which are inadequate to cover long-term operating costs and losses of the programs within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement.

6. The United States seeks review by the Appellate Body of the Panel's legal conclusion that section 1207(a) of the 2002 Act, which provides for user marketing (Step 2) payments to exporters of upland cotton, is an export subsidy that is listed in Article 9.1(a) of the *Agreement on Agriculture* that is inconsistent with U.S. obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*, is not exempt from actions under Article 13(c) of the *Agreement on Agriculture*, and is inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.[7] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that payments under the user marketing (Step 2) program are contingent on export performance.

7. The United States seeks review by the Appellate Body of the Panel's legal conclusion that section 1207(a) of the 2002 Act providing for user marketing (Step 2) payments to domestic users of upland cotton is an import substitution subsidy prohibited under Articles 3.1(b) and 3.2 of the *Agreement on Subsidies and Countervailing Measures*.[8] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings

[1] *See, e.g.*, Panel Report, paras. 8.1(b), 7.337-7.414.

[2] *See* Panel Report, para. 7.337.

[3] *See, e.g.,* Panel Report, paras. 8.1(c), 7.415-7.647.

[4] *See, e.g.,* Panel Report, paras. 8.1(d)(1), 7.762-7.945.

[5] *See, e.g.,* Panel Report, paras. 8.1(d)(2), 7.762-7.945.

[6] *See, e.g.,* Panel Report, paras. 8.1(d)(1), 7.787-7.869, 7.946-7.948.

[7] *See, e.g.,* Panel Report, paras. 7.678-7.761, 8.1(e).

[8] *See, e.g.,* Panel Report, paras. 7.1018-7.1098, 8.1(f).

include, for example, the Panel's finding that domestic support payments that are consistent with a Member's domestic support reduction commitments under the *Agreement on Agriculture* may nonetheless be prohibited under the SCM Agreement.

8. The United States seeks review by the Appellate Body of the Panel's legal conclusion that "the effect of the mandatory, price contingent United States subsidies at issue – that is, marketing loan programme payments, user marketing (Step 2) payments and MLA payments and CCP payments – is significant price suppression in the same world market for upland cotton in the period MY 1999-2002 within the meaning of Articles 6.3(c) and 5(c)" of the SCM Agreement.[9] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the following:

(a) the Panel's finding that Brazil need not demonstrate, and the Panel need not find, the amount of the challenged subsidy that benefits the subsidized product, upland cotton;

(b) the Panel's finding that subsidies not directly tied to current production of upland cotton (decoupled payments) need not be allocated to all products produced and sold by the firms receiving such subsidies;

(c) that the Panel could make findings concerning subsidies that no longer existed at the time of panel establishment and that present serious prejudice could be, and was, caused by such subsidies;

(d) the Panel's finding that the challenged subsidies provided to cotton producers "passed through" to cotton exporters;

(e) the Panel's finding that there was price suppression "in the same market";

(f) the Panel's finding that significant price suppression existed;

(g) the Panel's finding that the price suppression it found under an erroneous legal standard was "significant";

(h) the Panel's finding that "the effect of" the U.S. subsidies "is" significant price suppression;

(i) the Panel's finding that "significant price suppression" is sufficient to establish "serious prejudice" for purposes of Articles 5(c) and 6.3 of the SCM Agreement; and

(j) the Panel's finding that its "'present' serious prejudice findings include findings of inconsistency that deal with the FSRI Act of 2002 and subsidies granted thereunder in MY 2002."[10]

9. The United States seeks review by the Appellate Body of the Panel's finding that decoupled payments made with respect to non-upland cotton base acres were within its terms of reference.[11] This finding is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that these payments were measures at issue within the meaning of Articles 4.4 and 6.2 of the DSU.

[9]Panel Report, paras. 7.1416, 7.1107-7.1416, 8.1(g)(i).

[10]*See, e.g.*, Panel Report, para. 7.1501.

[11]*See, e.g.*, Panel Report, paras. 7.129-7.136.

10. The United States requests the Appellate Body to find that the Panel failed to set out the findings of fact, the applicability of the relevant provisions, and the basic rationale behind its findings and recommendations, as required by Article 12.7 of the DSU. The Panel's failure to set these out include, for example, the findings or lack of findings concerning the following areas: the amount of the challenged subsidies, including the amount of payments not directly tied to current production of upland cotton (decoupled payments); that significant price suppression existed; the degree of price suppression it deemed "significant"; that "the effect of" the U.S. subsidies "is" significant price suppression; that decoupled payments made with respect to non-upland cotton base acres were within its terms of reference; and the basis for its ability to make findings with respect to subsidies that no longer existed at the time of panel establishment.

11. The United States seeks review by the Appellate Body of the Panel's finding that export credit guarantees to facilitate the export of "other eligible agricultural commodities" besides upland cotton were within its terms of reference.[12] This finding is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that such export credit guarantees were included in Brazil's consultation request and its finding that, contrary to Articles 4.2, 4.4, and 6.2 of the DSU, it could examine measures that were not included in Brazil's request for consultations.

12. The United States seeks review by the Appellate Body of the Panel's finding that Brazil provided the statement of available evidence required by Article 4.2 of the SCM Agreement with respect to export credit guarantee measures relating to eligible United States agricultural products other than upland cotton, and that accordingly, Brazil's claims concerning these measures were within the terms of reference of this dispute.[13] This finding is in error and is based on erroneous findings on issues of law and related legal interpretations.

13. In the event Brazil appeals the Panel's exercise of judicial economy with respect to Brazil's claims concerning the compatibility of U.S. export credit guarantee measures with Part III of the SCM Agreement,[14] in this U.S. appeal the United States conditionally requests the Appellate Body to find that Brazil also failed to provide a statement of available evidence as required by Article 7.2 of the SCM Agreement, and that accordingly, Brazil's claims concerning these measures would not be within the terms of reference of this dispute.

14. The United States seeks review by the Appellate Body of the Panel's legal conclusion that two types of expired measures, production flexibility contract payments and market loss assistance payments, were within the Panel's terms of reference. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that measures that are no longer in existence as of the date of establishment of a panel are nonetheless within a panel's terms of reference.[15]

[12]*See, e.g.*, Panel Report, para. 7.69.

[13]*See, e.g.*, Panel Report, para. 7.103.

[14]*See, e.g.*, Panel Report, para. 7.78.

[15]*See, e.g.*, Panel Report, para. 7.104-7.122.

ANNEX 2

Table 1: Comparison of Support for Purposes of Article 13(b)(ii) of the *Agreement on Agriculture* (using budgetary outlays for marketing loan program payments and deficiency payments)

$ million	MY 1992	MY 1999	MY 2000	MY 2001	MY 2002
Step 2 payments (domestic users) *	102.7	165.8	260	144.8	72.4
Crop insurance payments *	26.6	169.6	161.7	262.9	194.1
Cottonseed payments *	0	79	184.7	0	50
PFC payments [+]	0	434.9	411.7	329.5	0
MLA payments [+]	0	432.8	438.3	452.3	0
DP payments [+]	0	0	0	0	391.8
CCP payments [+]	0	0	0	0	864.9
Marketing loan program *	866	1761	636	2609	897.8
Deficiency payments *	1017.4	0	0	0	0
Total	**2012.7**	**3043.1**	**2092.4**	**3798.5**	**2471**

Table 2: Comparison of Support for Purposes of Article 13(b)(ii) of the *Agreement on Agriculture* (using price gap methodology for marketing loan program payments and deficiency payments)

$ million	MY 1992	MY 1999	MY 2000	MY 2001	MY 2002
Step 2 payments (domestic users) *	102.7	165.8	260	144.8	72.4
Crop insurance payments *	26.6	169.6	161.7	262.9	194.1
Cottonseed payments *	0	79	184.7	0	50
PFC payments [+]	0	434.9	411.7	329.5	0
MLA payments [+]	0	432.8	438.3	452.3	0
DP payments [+]	0	0	0	0	391.8
CCP payments [+]	0	0	0	0	864.9
Marketing loan program [§]	-84	-133	-136	-162	-130
Deficiency payments [§]	867	0	0	0	0
Total	**912.3**	**1149.1**	**1320.4**	**1027.5**	**1443.2**

Table 3: Values Attributable to the Price-Contingent Subsidies

$ million	MY 1999	MY 2000	MY 2001	MY 2002
Marketing loan program *	1761	636	2609	897.8
Step 2 payments (domestic users & exporters) [#]	279.3	445.3	235.7	177.8
MLA payments [+]	432.8	438.3	452.3	0
CCP payments [+]	0	0	0	864.9
Total	**2473.1**	**1519.6**	**3297**	**1940.5**

Notes to Tables:

For the panel's findings regarding the values of support relevant for the analysis under Article 13(b)(ii) of the *Agreement on Agriculture*, see Panel Report, para. 7.596.

* Panel Report, para. 7.596.

[+] The values of production flexibility contract payments, market loss assistance payments, direct payments, and counter-cyclical payments are based on the "*cotton to cotton*" *methodology*, discussed *supra*, paras. 377-380. Figures are drawn from Panel Report, para. 7.641.

[§] Panel Report, para. 7.564 and footnote 727 to para. 7.565.

[#] For the value of Step 2 payments to domestic users, see Panel Report, para. 7.596. To these figures we have added data submitted by the United States for the value of Step 2 payments *to exporters*: see United States' response to questions posed by the Panel, Panel Report, p. I-126, para. 211.

Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 12 October 1998

WORLD TRADE ORGANIZATION

WT/DS58/AB/R
12 October 1998

(98-3899)

Original: English

UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS

AB-1998-4

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Import Prohibition of Certain Shrimp and Shrimp Products

United States, *Appellant*
India, Malaysia, Pakistan, Thailand, *Appellees*

Australia, Ecuador, the European Communities, Hong Kong, China, Mexico and Nigeria, *Third Participants*

AB-1998-4

Present:

Feliciano, Presiding Member
Bacchus, Member
Lacarte-Muró, Member

I. Introduction : Statement of the Appeal

1. This is an appeal by the United States from certain issues of law and legal interpretations in the Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*.[1] Following a joint request for consultations by India, Malaysia, Pakistan and Thailand on 8 October 1996[2], Malaysia and Thailand requested in a communication dated 9 January 1997[3], and Pakistan asked in a communication dated 30 January 1997[4], that the Dispute Settlement Body (the "DSB") establish a panel to examine their complaint regarding a prohibition imposed by the United States on the importation of certain shrimp and shrimp products by Section 609 of Public Law 101-162[5] ("Section 609") and associated regulations and judicial rulings. On 25 February 1997, the DSB established two panels in accordance with these requests and agreed that these panels would be consolidated into a single Panel, pursuant to Article 9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), with standard terms of reference.[6] On 10 April 1997, the DSB established another panel with standard terms of reference in accordance with a request made by India in a communication dated 25 February 1997[7], and agreed that this third panel, too, would be merged into the earlier Panel established on 25 February 1997.[8] The Report rendered by the consolidated Panel was circulated to the Members of the World Trade Organization (the "WTO") on 15 May 1998.

[1] WT/DS58/R, 15 May 1998.

[2] WT/DS58/1, 14 October 1996.

[3] WT/DS58/6, 10 January 1997.

[4] WT/DS58/7, 7 February 1997.

[5] 16 United States Code (U.S.C.) §1537.

[6] WT/DSB/M/29, 26 March 1997.

[7] WT/DS58/8, 4 March 1997.

[8] WT/DSB/M/31, 12 May 1997.

2. The relevant factual and regulatory aspects of this dispute are set out in the Panel Report, in particular at paragraphs 2.1-2.16. Here, we outline the United States measure at stake before the Panel and in these appellate proceedings. The United States issued regulations in 1987 pursuant to the Endangered Species Act of 1973[9] requiring all United States shrimp trawl vessels to use approved Turtle Excluder Devices ("TEDs") or tow-time restrictions in specified areas where there was a significant mortality of sea turtles in shrimp harvesting.[10] These regulations, which became fully effective in 1990, were modified so as to require the use of approved TEDs at all times and in all areas where there is a likelihood that shrimp trawling will interact with sea turtles, with certain limited exceptions.

3. Section 609 was enacted on 21 November 1989. Section 609(a) calls upon the United States Secretary of State, in consultation with the Secretary of Commerce, *inter alia*, to "initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of … sea turtles" and to "initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles; … ." Section 609(b)(1) imposed, not later than 1 May 1991, an import ban on shrimp harvested with commercial fishing technology which may adversely affect sea turtles. Section 609(b)(2) provides that the import ban on shrimp will not apply to harvesting nations that are certified. Two kinds of annual certifications are required for harvesting nations, details of which were further elaborated in regulatory guidelines in 1991, 1993 and 1996[11]: First, certification shall be granted to countries with a fishing environment which does not pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting.[12] According to the 1996 Guidelines, the Department of State "shall certify any harvesting nation meeting the following criteria without the need for action on the part of the government of the harvesting nation: (a) Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction; (b) Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, *e.g.*, any nation that harvests shrimp exclusively by artisanal means; or (c) Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur."[13]

4. Second, certification shall be granted to harvesting nations that provide documentary evidence of the adoption of a regulatory program governing the incidental taking of sea turtles in the course of shrimp trawling that is comparable to the United States program *and* where the average rate of incidental taking of sea turtles by their vessels is comparable to that of United States vessels.[14] According to the 1996 Guidelines, the Department of State assesses the regulatory program of the harvesting nation and certification shall be made if the program includes: (i) the required use of TEDs that are "comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the United States program … "; and (ii) "a credible enforcement effort that includes monitoring for compliance and appropriate sanctions."[15] The regulatory program may be in the form of regulations, or may, in certain circumstances, take the form of a voluntary arrangement between industry and government.[16] Other measures that the harvesting nation undertakes for the protection of sea turtles will also be taken into account in making the comparability determination.[17] The average incidental take rate "will be deemed comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the U.S. program … ."[18]

5. The 1996 Guidelines provide that all shrimp imported into the United States must be accompanied by a Shrimp Exporter's Declaration form attesting that the shrimp was harvested either in the waters of a nation currently certified under Section 609 or "under conditions that do not adversely affect sea turtles", that is: (a) "Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in ponds prior to being harvested"; (b) "Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States"; (c) "Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the U.S. program … , would not require TEDs"; and (d) "Species of shrimp, such as the pandalid species, harvested in areas where sea turtles do not occur."[19] On 8 October 1996, the United States Court of International Trade ruled that the 1996 Guidelines were in violation of Section 609 in allowing the import of shrimp from non-certified countries if accompanied by a Shrimp Exporter's Declaration form attesting that they were caught with commercial fishing technology that did not adversely affect sea turtles.[20] A 25 November 1996 ruling of the United States Court of International Trade clarified that shrimp harvested by manual methods which did not harm sea turtles could still be imported from non-certified countries.[21] On 4 June 1998, the United States Court of Appeals for the Federal Circuit vacated the decisions of the United States Court of International Trade of 8 October and 25 November 1996.[22] In practice, however, exemption from the import ban for TED-caught shrimp from non-certified countries remained unavailable while this dispute was before the Panel and before us.[23]

6. The 1991 Guidelines limited the geographical scope of the import ban imposed by Section 609 to countries in the wider Caribbean/western Atlantic region[24], and granted these countries a three-year phase-in period. The 1993 Guidelines maintained this geographical limitation. On 29 December 1995, the United States Court of International Trade held that the 1991 and 1993 Guidelines violated Section 609 by limiting its geographical scope to shrimp harvested in the wider Caribbean/western Atlantic region, and directed the Department of State to extend the ban worldwide not later than 1 May 1996.[25] On 10 April 1996, the United States Court of International Trade refused

[9]Public Law 93-205, 16 U.S.C. 1531 *et. seq*.

[10]52 Fed. Reg. 24244, 29 June 1987 (the "1987 Regulations"). Five species of sea turtles fell under the regulations: loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Eretmochelys imbricata*).

[11]Hereinafter referred to as the "1991 Guidelines" (56 Federal Register 1051, 10 January 1991), the "1993 Guidelines" (58 Federal Register 9015, 18 February 1993) and the "1996 Guidelines" (61 Federal Register 17342, 19 April 1996), respectively.

[12]Section 609(b)(2)(C).

[13]1996 Guidelines, p. 17343.

[14]Section 609(b)(2)(A) and (B).

[15]1996 Guidelines, p. 17344.

[16]*Ibid.*

[17]*Ibid.*

[18]*Ibid.*

[19]1996 Guidelines, p. 17343.

[20]*Earth Island Institute v. Warren Christopher*, 942 Fed. Supp. 597 (CIT 1996).

[21]*Earth Island Institute v. Warren Christopher*, 948 Fed. Supp. 1062 (CIT 1996).

[22]1998 U.S. App. Lexis 11789.

[23]Response by the United States to questioning at the oral hearing.

[24]Specifically, Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guyana and Brazil.

[25]*Earth Island Institute v. Warren Christopher*, 913 Fed. Supp. 559 (CIT 1995).

a subsequent request by the Department of State to postpone the 1 May 1996 deadline.[26] On 19 April 1996, the United States issued the 1996 Guidelines, extending Section 609 to shrimp harvested in *all* foreign countries effective 1 May 1996.

7. In the Panel Report, the Panel reached the following conclusions:

> In the light of the findings above, we conclude that the import ban on shrimp and shrimp products as applied by the United States on the basis of Section 609 of Public Law 101-162 is not consistent with Article XI:1 of GATT 1994, and cannot be justified under Article XX of GATT 1994.[27]

and made this recommendation:

> The Panel *recommends* that the Dispute Settlement Body request the United States to bring this measure into conformity with its obligations under the WTO Agreement.[28]

8. On 13 July 1998, the United States notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a notice of appeal[29] with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review*. On 23 July 1998, the United States filed an appellant's submission.[30] On 7 August 1998, India, Pakistan and Thailand ("Joint Appellees") filed a joint appellees' submission and Malaysia filed a separate appellee's submission.[31] On the same day, Australia, Ecuador, the European Communities, Hong Kong, China, and Nigeria each filed separate third participants' submissions.[32] At the invitation of the Appellate Body, the United States, India, Pakistan, Thailand and Malaysia filed additional submissions on certain issues arising under Article XX(b) and Article XX(g) of the GATT 1994 on 17 August 1998. The oral hearing in the appeal was held on 19-20 August 1998. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

II. Arguments of the Participants and Third Participants

A. *Claims of Error by the United States – Appellant*

1. Non-requested Information from Non-governmental Organizations

9. The United States claims that the Panel erred in finding that it could not accept non-requested submissions from non-governmental organizations. According to the United States, there is nothing in the DSU that prohibits panels from considering information just because the information was unsolicited. The language of Article 13.2 of the DSU is broadly drafted to provide a panel with discretion in choosing its sources of information. When a non-governmental organization makes a submission to a panel, Article 13.2 of the DSU authorizes the panel to "seek" such information. To find otherwise would unnecessarily limit the discretion that the DSU affords panels in choosing the sources of information to consider.

2. Article XX of the GATT 1994

10. In the view of the United States, the Panel erred in finding that Section 609 was outside the scope of Article XX. The United States stresses that under the Panel's factual findings and undisputed facts on the record, Section 609 is within the scope of the Article XX chapeau and Article XX(g) and, in the alternative, Article XX(b), of the GATT 1994. The Panel was also incorrect in finding that Section 609 constitutes "unjustifiable discrimination between countries where the same conditions prevail". The Panel interprets the chapeau of Article XX as requiring panels to determine whether a measure constitutes a "threat to the multilateral trading system". This interpretation of Article XX has no basis in the text of the GATT 1994, has never been adopted by any previous panel or Appellate Body Report, and would impermissibly diminish the rights that WTO Members reserved under Article XX.

11. The United States contends that the Panel's findings are not based on the ordinary meaning and context of the term "unjustifiable discrimination". That term raises the issue of whether a particular discrimination is "justifiable". During the Panel proceeding, the United States presented the rationale of Section 609 for restricting imports of shrimp from some countries and not from others: sea turtles are threatened with extinction worldwide; most nations, including the appellees, recognize the importance of conserving sea turtles; and shrimp trawling without the use of TEDs contributes greatly to the endangerment of sea turtles. In these circumstances, it is reasonable and justifiable for Section 609 to differentiate between countries whose shrimp industries operate without TEDs, and thereby endanger sea turtles, and those countries whose shrimp industries do employ TEDs in the course of harvesting shrimp.

12. The Panel, the United States believes, did not address the rationale of the United States for differentiating between shrimp harvesting countries. Rather, the Panel asked a different question: would the United States measure and similar measures taken by other countries "undermine the multilateral trading system"? The distinction between "unjustifiable discrimination" -- the actual term used in the GATT 1994 -- and the Panel's "threat to the multilateral trading system" test is crucial, in the view of the United States, and is posed sharply in paragraph 7.61 of the Panel Report, where the Panel states: "even though the situation of turtles is a serious one, we consider that the United States adopted measures which, irrespective of their environmental purpose, were clearly a threat to the multilateral trading system ... ." An environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the *Marrakesh Agreement Establishing the World Trade Organization*[33] (the "*WTO Agreement*") acknowledges that the rules of trade should be "in accordance with the objective of sustainable development", and should seek to "protect and preserve the environment". Moreover, Article XX neither defines nor mentions the "multilateral trading system", nor conditions a Member's right to adopt a trade-restricting measure on the basis of hypothetical effects on that system.

13. In adopting its "threat to the multilateral trading system" analysis, the Panel fails to apply the ordinary meaning of the text: whether a justification can be presented for applying a measure in a manner which constitutes discrimination. Instead, the Panel expands the ordinary meaning of the text to encompass a much broader and more subjective inquiry. As a result, the Panel would add an entirely new obligation under Article XX of the GATT 1994: namely that Members may not adopt

[26] *Earth Island Institute v. Warren Christopher*, 922 Fed. Supp. 616 (CIT 1996).

[27] Panel Report, para. 8.1.

[28] Panel Report, para. 8.2.

[29] WT/DS58/11, 13 July 1998.

[30] Pursuant to Rule 21(1) of the *Working Procedures for Appellate Review*.

[31] Pursuant to Rule 22(1) of the *Working Procedures for Appellate Review*.

[32] Pursuant to Rule 24 of the *Working Procedures for Appellate Review*.

[33] Done at Marrakesh, 15 April 1994.

measures that would result in certain effects on the trading system. Under the ordinary meaning of the text, there is sufficient justification for an environmental conservation measure if a conservation purpose justifies a difference in treatment between Members. Further inquiry into effects on the trading system is uncalled for and incorrect.

14. In the view of the United States, the Panel also fails to take account of the context of the term "unjustifiable discrimination". The language of the Article XX chapeau indicates that the chapeau was intended to prevent the abusive application of the exceptions for protectionist or other discriminatory aims. This is consistent with the approach of the Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline*[34] ("*United States – Gasoline*") and with the preparatory work of the GATT 1947. In context, an alleged "discrimination between countries where the same conditions prevail" is not "unjustifiable" where the policy goal of the Article XX exception being applied provides a rationale for the justification.

15. In the context of the GATT/WTO dispute settlement system, measures within the scope of Article XX can be expected to result in reduced market access or discriminatory treatment. To interpret the prohibition of "unjustifiable discrimination" in the Article XX chapeau as excluding measures which result in "reduced market access" or "discriminatory treatment" would, in effect, erase Article XX from the GATT 1994. The Panel's "threat to the multilateral trading system" analysis erroneously confuses the question of whether a measure reduces market access with the further and separate question arising under the chapeau as to whether that measure is nevertheless "justifiable" under one of the general exceptions in Article XX. The proper inquiry under the Article XX chapeau is whether a non-protectionist rationale, such as a rationale based on the policy goal of the applicable Article XX exception, could justify any discrimination resulting from the measure. Here, any "discrimination" resulting from the measure is based on, and in support of, the goal of sea turtle conservation.

16. The United States also argues that the Panel incorrectly applies the object and purpose of the *WTO Agreement* in interpreting Article XX of the GATT 1994. It is legal error to jump from the observation that the GATT 1994 is a trade agreement to the conclusion that trade concerns must prevail over all other concerns in all situations arising under GATT rules. The very language of Article XX indicates that the state interests protected in that article are, in a sense, "pre-eminent" to the GATT's goals of promoting market access.

17. Furthermore, the Panel failed to recognize that most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the *WTO Agreement*. Thus, while the first clause of the preamble to the *WTO Agreement* calls for the expansion of trade in goods and services, this same clause also recognizes that international trade and economic relations under the *WTO Agreement* should allow for "optimal use of the world's resources in accordance with the objective of sustainable development", and should seek "to protect and preserve the environment". The Panel in effect took a one-sided view of the object and purpose of the *WTO Agreement* when it fashioned a new test not found in the text of the Agreement.

18. The additional bases, the United States continues, invoked by the Panel to support its "threat to the multilateral trading system" analysis -- i.e. the protection of expectations of Members as to the competitive relationship between their products and the products of other Members; the application of the international law principle according to which international agreements must be applied in good faith; and the *Belgian Family Allowances*[35] panel report -- are without merit.

19. The United States submits that Section 609 does not threaten the multilateral trading system. The Panel did not find Section 609 to be an *actual* threat to the multilateral trading system. Rather, the Panel found that if other countries in other circumstances were to adopt the same type of measure here adopted by the United States *potentially* a threat to the system might arise. The United States urges that in engaging in hypothetical speculations regarding the effects of other measures which might be adopted in differing situations, while ignoring the compelling circumstances of this case, the Panel violated the Appellate Body's prescription in *United States - Gasoline*[36] that Article XX must be applied on a "case-by-case basis", with careful scrutiny of the specific facts of the case at hand. The Panel's "threat to the multilateral trading system" analysis adds a new obligation under Article XX of the GATT 1994 and is inconsistent with the proper role of the Panel under the DSU, in particular Articles 3.2 and 19.2 thereof.

20. To the United States, Section 609 reasonably differentiates between countries on the basis of the risk posed to endangered sea turtles by their shrimp trawling industries. Considering the aim of the Article XX chapeau to prevent abuse of the Article XX exceptions, an evaluation of whether a measure constitutes "unjustifiable discrimination where the same conditions prevail" should take account of whether the differing treatment between countries relates to the policy goal of the applicable Article XX exception. If a measure differentiates between countries on a basis "legitimately connected" with the policy of an Article XX exception, rather than for protectionist reasons, that measure does not amount to an abuse of the applicable Article XX exception.

21. The contention of the United States is that its measure does not treat differently those countries whose shrimp trawling industries pose similar risks to sea turtles. Only nations with shrimp trawling industries that harvest shrimp in waters where there is a likelihood of intercepting sea turtles, and that employ mechanical equipment which harms sea turtles, are subject to the import restrictions. The Panel properly recognized that certain naturally-occurring conditions relating to sea turtle conservation (namely, whether sea turtles and shrimp occur concurrently in a Member's waters) and at least certain conditions relating to how shrimp are caught (namely, whether shrimp nets are retrieved mechanically or by hand) are relevant factors in applying the Article XX chapeau. However, the Panel found that another condition relating to how shrimp are caught -- namely, whether a country requires its shrimp fishermen to use TEDs -- did not provide a basis under the chapeau for treating countries differently. Differing treatment based on whether a country had adopted a TEDs requirement was, in the Panel's view, "unjustifiable".

22. The United States believes that the analysis employed by the Appellate Body in *United States - Gasoline*[37] leads to the conclusion that Section 609 does not constitute "unjustifiable discrimination". Section 609 is applied narrowly and fairly. The United States does not apply sea turtle conservation rules differently to United States and foreign shrimp fishermen. Moreover, the United States has taken steps to assist foreign shrimp fishermen in adopting conservation measures and has undertaken efforts to transfer TED technology to governments and industries in other countries, including the appellees. In addition, Section 609 is limited in coverage and focuses on sea turtle conservation.

23. During the Panel proceeding, the United States presented "compelling evidence", reaffirmed by five independent experts, that Section 609 was a *bona fide* conservation measure under Article XX, imbued with the purpose of conserving a species facing the threat of extinction. To uphold the findings of the Panel would impermissibly change the basic terms of the bargain agreed to by WTO Members in agreeing to the GATT 1994. Further, to condone the Panel's adoption of a vague and subjective "threat to the multilateral trading system" test would fundamentally alter the intended role

[34] Adopted 20 May 1996, WT/DS2/AB/R.

[35] Adopted 7 November 1952, BISD 1S/59.

[36] Adopted 20 May 1996, WT/DS2/AB/R.

[37] Adopted 20 May 1996, WT/DS2/AB/R.

of panels under the DSU, and could call into question the legitimacy of the WTO dispute settlement process.

24. The United States states that neither it nor the appellees have appealed the decisions of the Panel to address first the Article XX chapeau and not to reach the issues regarding Article XX(b) and Article XX(g). Because the Panel made no findings regarding the applicability of Article XX(b) and XX(g), there are no findings in respect thereof that could even be the subject of appeal. Accordingly, issues regarding the applicability of Article XX(b) and Article XX(g) are not initially presented to the Appellate Body. However, the United States concurs with Joint Appellees that the Appellate Body may address Article XX(b) or Article XX(g) if it finds that Section 609 meets the criteria of the Article XX chapeau. In that case, the United States asserts that Article XX(g) should be applied first as it is the "most pertinent" of the Article XX exceptions, and that issues relating to Article XX(b) need be reached only if Article XX(g) were found to be inapplicable. The United States incorporates by reference and briefly summarizes the submissions that it made to the Panel regarding Article XX(b) and Article XX(g).

25. The essential claim of the United States is that Section 609 meets each element required under Article XX(g). Sea turtles are important natural resources. They are also an exhaustible natural resource since all species of sea turtles, including those found in the appellees' waters, face the danger of extinction. All species of sea turtles have been included in Appendix I of the Convention on International Trade in Endangered Species of Wild Flora and Fauna[38] (the "CITES") since 1975, and other international agreements also recognize the endangered status of sea turtles.[39] In paragraph 7.58 of the Panel Report, the Panel noted: "The endangered nature of the species of sea turtles mentioned in [CITES] Annex I as well as the need to protect them are consequently not contested by the parties to the dispute."

26. The United States maintains Section 609 "relates to" the conservation of sea turtles. A "substantial relationship" exists between Section 609 and the conservation of sea turtles. Shrimp trawl nets are a major cause of human-induced sea turtle deaths, and TEDs are highly effective in preventing such mortality. The Panel noted that "TEDs, when properly installed and used and adapted to the local area, would be an effective tool for the preservation of sea turtles."[40] By encouraging the use of TEDs, Section 609 promotes sea turtle conservation.

27. The United States contends that Section 609 is also "made effective in conjunction with restrictions on domestic production or consumption" within the meaning of Article XX(g). The United States requires its shrimp trawl vessels that operate in waters where there is a likelihood of intercepting sea turtles to use TEDs at all times, and Section 609 applies comparable standards to imported shrimp. Section 609 is also "even-handed": it allows any nation to be certified -- and thus avoid any restriction on shrimp exports to the United States -- if it meets criteria for sea turtle conservation in the course of shrimp harvesting that are comparable to criteria applicable in the United States. With respect to nations whose shrimp trawl vessels operate in waters where there is a likelihood of intercepting sea turtles, Section 609 provides for certification where those nations adopt TEDs-use requirements comparable to those in effect in the United States.

[38]Done at Washington, 3 March 1973, 993 U.N.T.S. 243, 12 International Legal Materials 1085.

[39]The United States states that all species of sea turtle except the flatback are listed in Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 23 June 1979, 19 International Legal Materials 15; and in Appendix II of the Protocol concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 29 March 1983, T.I.A.S. No. 11085.

[40]The United States refers to Panel Report, para. 7.60, footnote 674.

28. The United States submits, moreover, that Section 609 is a measure "necessary to protect human, animal or plant life or health" within the meaning of Article XX(b). Section 609 is intended to protect and conserve the life and health of sea turtles, by requiring that shrimp imported into the United States shall not have been harvested in a manner harmful to sea turtles. Section 609 is "necessary" in two different senses. First, efforts to reduce sea turtle mortality are "necessary" because all species of sea turtles are threatened with extinction. Second, Section 609 relating to the use of TEDs is "necessary" because other measures to protect sea turtles are not sufficient to allow sea turtles to move back from the brink of extinction.

B. *India, Pakistan and Thailand – Joint Appellees*

1. Non-requested Information from Non-governmental Organizations

29. Joint Appellees submit that the Panel's ruling rejecting non-requested information is correct and should be upheld. According to Joint Appellees, the United States misinterprets Article 13 of the DSU in arguing that nothing in the DSU prohibits panels from considering information merely because the information was unsolicited. The Panel correctly noted that, "pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel."[41] It is evident from Article 13 that Members have chosen to establish a formalized system for the collection of information, which gives a panel discretion to determine the information it needs to resolve a dispute. Panels have no obligation to consider unsolicited information, and the United States is wrong to argue that they do.

30. According to Joint Appellees, when a panel does seek information from an individual or body within a Member's jurisdiction, that panel has an obligation to inform the authorities of that Member. This demonstrates that a panel retains control over the information sought, and also that the panel is required to keep the Members informed of its activities. The process accepted by the Members necessarily implies three steps: a panel's decision to seek technical advice; the notification to a Member that such advice is being sought within its jurisdiction; and the consideration of the requested advice. In the view of Joint Appellees, the interpretation offered by the United States would eliminate the first two of these three steps, thereby depriving a panel of its right to decide whether it needs supplemental information, and what type of information it should seek; as well as depriving Members of their right to know that information is being sought from within their jurisdiction.

31. Joint Appellees point to Appendix 3 of the DSU, which sets out Working Procedures for panels, and especially paragraphs 4 and 6 thereof, which limit the right to present panels with written submissions to parties and third parties. Thus, Joint Appellees argue, Members that are not parties or third parties cannot avail themselves of the right to present written submissions. It would be unreasonable, in the view of Joint Appellees, to interpret the DSU as granting the right to submit an unsolicited written submission to a non-Member, when many Members do not enjoy a similar right.

32. Joint Appellees maintain that, if carried to its logical conclusion, the appellant's argument could result in panels being deluged with unsolicited information from around the world. Such information might be strongly biased, if nationals from Members involved in a dispute could provide unsolicited information. They argue that this would not improve the dispute settlement mechanism, and would only increase the administrative tasks of the already overburdened Secretariat.

[41]Joint Appellees refer to Panel Report, para. 7.8.

33. Joint Appellees argue as well that parties to a panel proceeding might feel obliged to respond to all unsolicited submissions -- just in case one of the unsolicited submissions catches the attention of a panel member. Due process requires that a party know what submissions a panel intends to consider, and that all parties be given an opportunity to respond to all submissions. Finally, because Article 12.6 of the DSU requires that second written submissions of the parties be submitted simultaneously, if a party is permitted to append *amicus curiae* briefs to its second submission, other parties can be deprived of their right to respond and be heard.

2. Article XX of the GATT 1994

34. Joint Appellees maintain that the Panel's ruling on the chapeau of Article XX is correct and should be upheld by the Appellate Body. They underline that the appellant does not appeal either the Panel's conclusion that Section 609 violated Article XI:1 of the GATT 1994, or the Panel's decision to address the chapeau of Article XX before addressing sub-paragraph (b) or (g) of that Article. Nor does the United States dispute that it bears the burden of proving that its measure is within Article XX. The United States takes issue with the Panel's alleged application of the chapeau to protect against a "threat to the multilateral trading system", submitting that the Panel developed a new chapeau "interpretation", "analysis" or "test" to invalidate Section 609, thus impermissibly diminishing the rights of WTO Members. According to Joint Appellees, the appellant's argument is baseless and results from a mischaracterization of the Panel's decision. The Panel did not invent a new "interpretation", "analysis" or "test", nor did it simply interpret "unjustifiable" to mean "a threat to the multilateral trading system". Instead, the Panel rendered a well-reasoned decision fully supported by the *WTO Agreement*, past GATT/WTO practice, and the accepted rules of interpretation set forth in the Vienna Convention on the Law of Treaties[42] (the "Vienna Convention").

35. Joint Appellees argue that the flaw in Section 609, and in the appellant's argument, is the appellant's failure to accept that conditioning access to markets for a given product upon the adoption of certain policies by exporting Members, can violate the *WTO Agreement*. A Member must seek multilateral solutions to trade-related environmental problems. The threat to the multilateral trade system cited by the Panel is unrelated to the appellant's support for TEDs or turtle conservation. The threat is much simpler: the United States has abused Article XX by unilaterally developing a trade policy, and unilaterally imposing this policy through a trade embargo, as opposed to proceeding down the multilateral path. The multilateral trade system is based on multilateral cooperation. If every WTO Member were free to pursue its own trade policy solutions to what it perceives to be environmental concerns, the multilateral trade system would cease to exist. By preventing the abuse of Article XX, the chapeau protects against threats to the multilateral trading system. The prevention of abuse and the prevention of threats to the multilateral trading system are therefore inextricably linked to the object, purpose and goals of Article XX of the GATT 1994.

36. Joint Appellees submit that on the basis of its interpretation of the term "unjustifiable" in the chapeau and in light of the object and purpose of Article XX of the GATT 1994 and the object and purpose of the *WTO Agreement*, the Panel concluded that the chapeau of Article XX permits Members to derogate from GATT provisions, but prohibits derogations which would constitute abuse of the exceptions contained in Article XX, thereby undermining the WTO multilateral trading system. According to Joint Appellees, what the appellant claims to be a new "test" for justifiability is nothing more than a restatement of the principle that the chapeau's object and purpose is to prevent the abuse of the Article XX exceptions, specifying more clearly what may result from such abuse. In the light of recent and past GATT/WTO practice, in particular the panel report in *United States – Restrictions on Imports of Tuna*[43], the Panel correctly interpreted the chapeau, identifying its object and purpose as the prevention of abuse of the Article XX exceptions, and associating the prevention of such abuse with the preservation of the multilateral trading system.

37. In the view of Joint Appellees, the Panel's decision mirrors the Appellate Body's reasoning in *United States – Gasoline*[44] and is therefore correct. The Appellate Body made three pronouncements in *United States – Gasoline* that influenced the Panel's ruling: first, that the chapeau, by its express terms, addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which the measure is applied[45]; second, that it is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of abuse of the exceptions of Article XX[46]; and, third, that the Appellate Body cautioned against the application of Article XX exceptions so as to "frustrate or defeat" legal obligations of the holder of rights under the GATT 1994.[47]

38. Joint Appellees state that, in examining Section 609, the Panel paid particular attention to the manner in which the embargo is applied, and the Panel noted that the appellant conditioned market access on the adoption by exporting Members of conservation policies comparable to its own. The Panel also found that the United States did not enter into negotiations before it imposed its import ban. The Panel concluded that Section 609 abused Article XX and posed a threat to the multilateral trading system. The Panel equated the prevention of the abuse of Article XX with the avoidance of measures that would "frustrate or defeat the purposes and objects of the General Agreement and the WTO Agreement or its legal obligations under the substantive rules of GATT by abusing the exception contained in Article XX."[48] The Panel buttressed its conclusion by referring to the related principles of good faith and *pacta sunt servanda*, and by citing the *Belgian Family Allowances*[49] panel report.

39. Should the Appellate Body decide to reverse the Panel's findings with respect to the chapeau of Article XX, Joint Appellees request that the Appellate Body rule that Section 609 is "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" in violation of the chapeau of Article XX. Consistently with its decision in *United States - Gasoline*[50], the Appellate Body should examine the manner in which Section 609 has been applied, and decide whether an Article XX exception is being abused so as to frustrate or defeat the substantive rights of the appellees under the GATT 1994.

40. Joint Appellees submit that, even leaving aside the "threat to the multilateral trading system" language of the Panel, there is "compelling evidence" in the record that the appellant abused Article XX and its exceptions. Joint Appellees maintain that this abuse takes several forms, each instance "grave", and, by itself, adequate to support a finding that Section 609 has been applied in an abusive manner so as to frustrate the substantive rights of the appellees under the *WTO Agreement*.

41. First, Section 609 was applied without a serious attempt to reach a cooperative multilateral solution with Joint Appellees. The importance of multilateralism should be clear to the United States

[42]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 33; 8 International Legal Materials 679.

[43]Unadopted, DS29/R, 16 June 1994, para 5.26.

[44]Adopted 20 May 1996, WT/DS2/AB/R.

[45]*United States – Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, page 22.

[46]*Ibid.*

[47]*Ibid.*

[48]Joint Appellees refer to Panel Report, para 7.40.

[49]Adopted 7 November 1952, BISD 1S/59.

[50]Adopted 20 May 1996, WT/DS2/AB/R.

because it is an integral provision of Section 609, has been emphasised at numerous GATT and WTO meetings, is reflected in Article 23.1 of the DSU and in Principle 12 of the Rio Declaration on Environment and Development[51], and was underscored by the Appellate Body in *United States - Gasoline*.[52] The chapeau violation that the United States committed in *United States - Gasoline* is, Joint Appellees believe, the same violation committed by the United States in this dispute.

42. Second, the United States discriminated impermissibly among exporting countries, and between exporting countries and the United States in, *inter alia*, the following ways: (a) "[t]he Panel found that the Appellant negotiated an agreement to protect and conserve sea turtles with some WTO Members, but did not propose the negotiation of such an agreement with the … Appellees until after having concluded its negotiations with the other Members. The Panel also found that Section 609 was already in effect against the Appellees by the time such negotiations were proposed"; (b) "[p]hase-in periods for the use of TEDs differed depending on the countries involved. 'Initially affected countries' had a three year phase-in period, while 'newly affected nations' were given four months or less to change shrimp harvesting practices"; and (c) Section 609 "discriminates between products based on non-product-related processes and production methods."

43. Third, Joint Appellees contend that the appellant's argument misconstrues key portions of the chapeau and of the Panel Report. The appellant's starting-point is that the Panel's findings are not based on the ordinary meaning of the phrase "unjustifiable discrimination" in the context in which it appears. The appellant also suggests that the only object and purpose of the chapeau is the prevention of "indirect protection". This interpretation is contradicted by recent WTO practice. The Appellate Body Report in *United States - Gasoline*[53] stands for the proposition that "unjustifiable discrimination" has a meaning larger than "indirect protection". The appellant, in effect, suggests that justifiability should be determined by reference to the specific Article XX exception invoked. If discrimination were to be justified merely on the basis of the policy goals of the particular exception invoked, all trade measures that meet the requirements of an Article XX exception would, *ipso facto,* satisfy the requirements of the chapeau. The chapeau would be rendered meaningless -- in violation of the commonly accepted rule of treaty interpretation which requires that meaning and effect be given to all treaty terms. The principles enunciated in the Appellate Body Report in *United States - Gasoline* would also become null.

44. Joint Appellees argue that both the Appellate Body in *United States – Gasoline*[54] and the Panel in the present case, recognized that the Article XX chapeau must be interpreted in light of the object and purpose of the *WTO Agreement*. This does not mean re-incorporating substantive GATT provisions into the analysis through the chapeau; it means instead examining a proposed Article XX derogation from the perspective of the broader policy goals of the *WTO Agreement*. The Panel identified two such goals: endeavouring to find cooperative solutions to trade problems; and preventing the risk that a multiplicity of conflicting trade requirements, each justified by reference to Article XX, could emerge. Section 609 jeopardizes both goals and poses a threat to the multilateral trading system.

45. Should the Appellate Body decide to reverse the Panel's legal findings with respect to the chapeau of Article XX and rule that Section 609 meets the requirements of the chapeau, Joint Appellees request that the Appellate Body make legal findings on Article XX(b) and Article XX(g) of the GATT 1994. They incorporate by reference their submissions to the Panel with respect to the

[51]UN Doc. A/CONF. 151/5/Rev.1, 13 June 1992, 31 International Legal Materials 874.

[52]Adopted 20 May 1996, WT/DS2/AB/R, pp. 27-28.

[53]Adopted 20 May 1996, WT/DS2/AB/R.

[54]*Ibid.*

interpretation of Article XX(b) and Article XX(g), while noting at the same time that there are persuasive reasons for following the interpretative approach adopted by the Panel in examining the chapeau first. Not only does the concept of judicial economy favour such an analysis, but also none of the participants has questioned the Panel's interpretative approach in their submissions (although, Joint Appellees note, one third participant, Australia, did comment with disapproval on this approach).

C. *Malaysia - Appellee*

1. Non-requested Information from Non-governmental Organizations

46. Malaysia submits that the Panel ruled correctly on this issue and that its ruling should be upheld as there is nothing in the DSU that *permits* the admission of unsolicited briefs from non-governmental organizations. Malaysia does not agree with the United States that there is nothing in the DSU *prohibiting* panels from considering information just because the information was offered unsolicited. Under Article 13 of the DSU, the prerequisite for invocation of that provision is that a panel must "seek" information. In the view of Malaysia, the Panel correctly noted that the initiative to seek information and to select the source of information rests with the Panel. The Panel could not consider unsolicited information. In the alternative, should the Appellate Body accept the United States argument that panels may accept *amicus curia* briefs, it must be left to the complete discretion of panel members whether or not to read them. A panel's decision not to read the briefs cannot constitute a procedural mistake and cannot influence the outcome of a panel report.

2. Article XX of the GATT 1994

47. Malaysia maintains that the Panel's decision concerning Article XX of the GATT 1994 represents a balanced view of the requirements of the provisions of the *WTO Agreement*, rules of treaty interpretation and GATT practice. The appellant misconceives the Panel's findings: the Panel did not in any way allude to the supremacy of trade concerns over non-trade concerns, and did not fail to recognize that most treaties have no single, undiluted object and purpose but a variety of different objects and purposes. The Panel in fact alluded to the first, second and third paragraphs of the preamble to the *WTO Agreement*, which make reference to different objects and purposes. Moreover, in Malaysia's view, the appellant misapplies the principle in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*[55] to the facts of this case, and misconstrues the Panel's application of the *Belgian Family Allowances*[56] panel report.

48. To Malaysia, the Panel's "threat to the multilateral trading system" analysis does not constitute a new test, but is in fact a restatement of the approach taken by the Panel that Members are not allowed to resort to measures that would undermine the multilateral trading system and thus abuse the exceptions contained in Article XX. The Panel itself states that its findings are the result of the application of the interpretative methods required by Article 3.2 of the DSU and that its process of interpretation does not add to Members' obligations in contravention of Article 3.2 of the DSU.

49. It was also noted by Malaysia that the Panel found on the facts that the import ban is applied even on TED-caught shrimp, as long as the country has not been certified; certification is only granted if comprehensive requirements regarding the use of TEDs by fishing vessels are applied by the exporting country concerned or if shrimp trawling operations of the exporting country take place exclusively in waters in which sea turtles do not occur. On the basis of these findings, the Panel

[55]Adopted 16 January 1998, WT/DS50/AB/R.

[56]Adopted 7 November 1952, BISD 1S/59.

concluded that the United States measure constitutes unjustifiable discrimination between countries where the same conditions prevail.

50. Malaysia believes that the Panel relied in large measure on the Appellate Body Report in *United States – Gasoline*.[57] Although the requirement of use of TEDs is applied to both United States and foreign shrimp trawlers, Malaysia contends that Section 609 violates the chapeau prohibition of "unjustifiable discrimination between countries where the same conditions prevail": not all species of sea turtles covered by Section 609 and found in Malaysia and the United States are alike -- Kemp's ridley and loggerhead turtles, which occur in the United States, are absent or occur only in negligible numbers in Malaysian waters; the habitats of these turtles do not coincide with areas of shrimp trawling operations in Malaysia; certain countries which have been exempted from TED requirements are harvesting sea turtles commercially and exploiting the eggs; and the time given to countries to comply with the requirements of Section 609 varied.

51. In response to the appellant's statement that it has taken steps to assist foreign shrimp fishermen in adopting turtle conservation measures, Malaysia states that there has been no transfer of TEDs technology to the government and industries in Malaysia, apart from participation by Malaysia in one regional workshop.

52. Malaysia's submissions on legal issues arising under Article XX(b) and Article XX(g) have been addressed by the Panel, at paragraphs 3.213, 3.218-3.221, 3.231, 3.233, 3.236, 3.240, 3.247, 3.257, 3.266, 3.271-3.275, 3.286-3.288 and 3.293 of the Panel Report.

D. *Arguments of Third Participants*

1. Australia

53. Australia states that with respect to unsolicited submissions to the Panel by non-governmental organizations, the United States appears to suggest that the Panel's legal interpretation of the provisions of the DSU would limit the discretion the DSU affords to panels in choosing the sources of information they should consider. However, in the view of Australia, nothing in the Panel Report suggests that the Panel saw any legal obstacles to its requesting information from the non-governmental sources, if it had so wished. The decision of the Panel not to seek such information would appear to reflect the exercise of its discretion as provided by the DSU, and was not the result of any perceived legal obstacles. Australia notes that the United States has not claimed that the Panel's exercise of its discretion in this matter was inappropriate or involved an error in law.

54. Australia believes that the Panel correctly found that Section 609 constitutes "unjustifiable discrimination between countries where the same conditions prevail". However, Australia supports the appeal by the United States of the Panel's finding that Section 609 "is not within the scope of measures permitted under the chapeau of Article XX." Australia submits that the Appellate Body should complete the analysis under Article XX and find that the United States has not demonstrated that its measure is in conformity with Article XX, including the provisions of the chapeau. Australia's concerns are that the United States has sought to impose a unilaterally determined conservation measure through restrictions on trade, and has not explored the scope for working cooperatively with other countries to identify internationally shared concerns about sea turtle conservation issues and consider ways to address these concerns. Therefore, the United States has imposed Section 609 in a manner that constitutes unjustifiable discrimination between countries where the same conditions prevail and also a disguised restriction on international trade.

[57]Adopted 20 May 1996, WT/DS2/AB/R.

55. Australia agrees with the United States that the Panel failed to interpret the terms of the chapeau of Article XX requiring that measures not be applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" in accordance with customary rules of interpretation of public international law, in particular, with its ordinary meaning and in context.

56. In Australia's view, the Panel's decision to examine first whether Section 609 met the requirements of the chapeau before considering whether it met the requirements of any of the paragraphs of Article XX may not necessarily have been an error in law, but contributed to the Panel's errors in its examination of Section 609 under Article XX. Australia argues that it is preferable to begin examination of the legal issues raised by Article XX by considering the policy objective of the measure, and the connection between the policy objective and the measure, before turning to the chapeau. This approach would enable the examination of all aspects of the case that may be relevant in determining whether a particular measure meets the requirements of the chapeau. There is nothing in the wording of Article XX, read in its context and in the light of the object and purposes of the GATT 1994 and the *WTO Agreement*, to suggest that it is intended to exclude particular classes or types of measures from its coverage. The Panel erred in law in conducting this generalized inquiry. By its terms, Article XX would seem capable of application only on a case-by-case basis.

57. Article XX contains a series of tests designed to ensure that its provisions cannot be abused. There must be a presumption that a measure which meets the requirements of Article XX will not "undermine the WTO multilateral trading system." According to Australia, there is no textual basis for interpreting "unjustifiable discrimination" in such a broad manner that it becomes an independent test of this issue. Under the Panel's interpretation, the chapeau of Article XX could serve to nullify the effects of the paragraphs of that Article, rather than acting as a safeguard against their abuse.

58. Australia agrees with the United States that the Panel's interpretation of "unjustifiable discrimination" is based on an incorrect interpretation and application of the object and purpose of the *WTO Agreement* in construing the GATT 1994. The Panel has projected a view of the relationship between the objectives of the WTO multilateral trading system and environmental considerations which is at odds with the Ministerial Decision on Trade and Environment.[58]

59. At the same time, to Australia, the alternative interpretation of "unjustifiable discrimination" put forward by the United States -- i.e. that discrimination is not "unjustifiable" where the policy goal of the Article XX exemption being applied provides a rationale for the justification -- is in error. This interpretation would weaken the important safeguard represented by the chapeau of Article XX of avoiding the abuse or illegitimate use of the Article XX exceptions. This interpretation confuses the tests applied under the two tiers of Article XX, fails to give effect to all the terms of the treaty and is not based on the ordinary meaning of "unjustifiable discrimination" in its context and in the light of the object and purpose of the *WTO Agreement* and the GATT 1994.

60. Australia maintains that Section 609 is applied by the United States in a manner constituting an unjustifiable discrimination and a disguised restriction on international trade. Australia observes that the only justification the United States appears to offer for Section 609 is that it is required to enforce a unilaterally determined conservation measure. However, Australia argues that the United States has not demonstrated that it has adequately explored means of addressing its concerns about shrimp harvesting practices and turtle conservation in other countries through cooperation with the governments concerned.

[58]Adopted by Ministers at the Meeting of the Trade Negotiations Committee at Marrakesh, 14 April 1994.

61. It is the view of Australia that Section 609 does not reasonably and properly differentiate between countries based on the risks posed to sea turtles in the exporting country's shrimp fishery. The Panel focused on exports of wild shrimp, and it is misleading to suggest that the Panel drew conclusions about whether the same conditions prevailed in certain other circumstances with respect to shrimp not subject to the import prohibition. Furthermore, the United States has provided no evidence that it took into account the views of other countries about sea turtle conservation issues within their jurisdictions, or their respective national programs, in making its determination of "countries where the same conditions prevail". In particular, the United States has provided no evidence that it considered the possibility that other Members may have had sea turtle conservation programs in place which differed from that of the United States but which were comparable and appropriate for their circumstances. Australia argues that the United States refused to certify Australia under Section 609 even though Australia's sea turtle conservation regime "extends well beyond protecting turtles from shrimping nets and … includes cooperative programs with the shrimp industry to limit turtle bycatch."

62. In Australia's view, the legal obligations of the United States under the chapeau of Article XX required the United States to explore adequately means of mitigating the discriminatory and trade restrictive application of its measure. In particular, given the transboundary and global character of the environmental concern involved in this dispute, the United States should have consulted with affected Members to see whether the discrimination imposed by the measure in dispute could have been avoided, whether the restrictions on trade were required, whether alternative approaches were available, and whether the incidence of any trade measures could have been reduced.

2. Ecuador

63. Ecuador endorses the Panel's finding that Section 609 is inconsistent with Article XI:1 of the GATT 1994 and cannot be justified under Article XX of the GATT 1994. Ecuador is participating as a third party in this case in order to defend basic principles, such as the principle reaffirming that relations among states should be established on the basis of international law -- since it is unacceptable that one state impose its domestic policy objectives upon other states -- as well as the observance of more specific principles and aspects set forth in the agreements governing the multilateral trading system. These include non-discrimination in national treatment, the protection of the environment and the implementation of environmental policy.

64. According to Ecuador, this dispute does not concern the desirability of implementing some kind of conservation policy, to which Ecuador attaches the utmost importance, but rather the manner in which such a policy should be implemented. It is unacceptable that internal legislation is applied in an arbitrary manner, creating a high degree of uncertainty, and consequently prejudice, in a sector that is central to Ecuador's national economy. Ecuador endorses the Panel's view that Members are free to establish their own environmental policies in a manner consistent with their WTO obligations.

3. European Communities

65. With respect to unsolicited submissions to a panel by non-governmental organizations, the European Communities asserts that Article 13 of the DSU clearly gives a panel the "pro-active discretion" to "seek" certain information that the panel believes may be relevant to the case at hand. In addition, non-governmental organizations are free to publish their views so that their opinion is heard by the general public, which could include the parties to a dispute, the WTO Secretariat or the members of a panel. However, the European Communities "wonders whether the text of the DSU could be interpreted so widely" as to give non-governmental organizations the right to file submissions directly to a panel.

66. The European Communities contends that Article 13 of the DSU "does not oblige panels to 'accept' non-requested information which was not 'sought' for the purposes of a dispute settlement procedure." Panels should therefore reject submissions from non-governmental organizations when the panel itself had not requested such submissions. However, in the view of the European Communities, if a panel were interested in the information contained in an *amicus curiae* brief from a non-governmental organization, it would have the right to request and receive (to "seek") exactly the same information as had first been sent to it in an unsolicited manner. The European Communities agrees with the Panel that a Member, party to a dispute, is free to put forward as part of its own submission, a submission of a non-governmental organization that it considers relevant. The European Communities notes that its comments are based on the current language of Article 13 of the DSU.

67. The European Communities states further that the issues at stake in this dispute concern principles to which it attaches great importance, such as respect for the environment and the functioning of the multilateral trading system. The European Communities is bound by the text of the Treaty Establishing the European Community[59] to ensure a harmonious and balanced development of economic activities with respect for the environment. The principle of sustainable development, also laid down in the first paragraph of the preamble to the *WTO Agreement*, as well as the precautionary principle, play an important role in the implementation of all EC policies. The EC position is mirrored in public international law by statements of the International Court of Justice, stressing the significance of respect for the environment.[60]

68. The European Communities is convinced that international cooperation is the most effective means to address global and transboundary environmental problems, rather than unilateral measures which may be less environmentally effective and more trade disruptive. Economic performance and environmental performance are not necessarily incompatible. The European Communities asserts that "[w]hile countries have the sovereign right to design and implement their own environmental policies through the measures they consider appropriate to protect their domestic environment -- including the life and health of humans, animals and plants -- all countries have a responsibility to contribute to the solution of international environmental problems." Thus, the European Communities considers that, "in general, the most effective means to attain the shared objectives relating to the conservation of global resources is by proceeding through the process of international co-operation."

69. To the European Communities, the approach to Article XX developed by previous panels and followed by the Appellate Body in *United States - Gasoline*[61] -- that is, first examining whether a measure falls under one of the exceptions set out in paragraphs (a) to (j) of Article XX and, then, making an inquiry under the chapeau -- makes logical sense and could reasonably have been applied by the Panel in this case.

70. The European Communities agrees with the United States that it would be wrong for trade concerns to prevail over all other concerns in all situations under WTO rules. Article XX should not be construed so that trade concerns always prevail over the non-trade concerns reflected in that Article, including environmental concerns and those related to health and other legitimate policy objectives. It is up to panels and the Appellate Body to judge each case on its own merits, taking into account Members' rights and obligations.

[59]Done at Rome, 25 March 1957, as amended.

[60]The European Communities refers to: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996), I.C.J Rep. pp. 241-242, para. 29; *Case Concerning the Gabcikovo-Nagymoros Project*, (1998) 37 International Legal Materials 162, para. 140.

[61]Adopted 20 May 1996, WT/DS2/AB/R.

71. The European Communities also agrees with the United States that the adoption of the Panel's "test" -- namely, whether a measure is of a type that would threaten the security and predictability of the multilateral trading system -- would make trade concerns paramount to all other concerns and is thus inconsistent with the object and purpose of the *WTO Agreement*.

72. In the view of the European Communities, certain species, in particular migratory species, may require application of protective measures beyond usual territorial boundaries. Sea turtles should be considered a globally shared environmental resource because they are included in Annex I of CITES and are a species protected under the Convention on the Conservation of Migratory Species of Wild Animals.[62] The appropriate way for Members concerned with the preservation of globally shared environmental resources to ensure such preservation is through internationally agreed solutions. Measures taken pursuant to such multilateral agreements would in general be allowed under the chapeau of Article XX.

73. However, the European Communities would not want to exclude the possibility, as a last resort, for a WTO Member, on its own, to take a "reasonable" measure with the aim of protecting and preserving a particular global environmental resource. However, such a measure would only be justified under exceptional circumstances and if consistent with general principles of public international law on "prescriptive jurisdiction". The Member would have to demonstrate that its environmentally protective measure was "reasonable", that is, no more trade restrictive than required to protect the globally shared environmental resource. Such a measure should be directly connected to the environmental objective and not go beyond what was required to limit the environmental damage. Finally, in such a case, the Member should have made genuine efforts to enter into cooperative environmental agreements with other Members. This is consistent with Principle 12 of the Rio Declaration on Environment and Development.

74. Given the Panel's factual finding that the United States did not enter into negotiations with the appellees before it imposed the import ban, the European Communities concludes that the United States has not demonstrated that a negotiated solution in respect of measures to protect sea turtles could not be found.

4. Hong Kong, China

75. Hong Kong, China states that it would be a "serious misunderstanding of the role of the WTO" if the multilateral trading system were viewed as impervious to environmental concerns. The WTO system does not, and should not, impede the adoption of non-arbitrary and justifiable measures to protect the environment. Hong Kong, China fully shares the Panel's concern that the chapeau of Article XX should not be interpreted in a way that will threaten the security and predictability of trade relations under the *WTO Agreement*. With reference to the Appellate Body Report in *United States – Gasoline*[63], Hong Kong, China contends that an examination under the chapeau should focus on the manner in which the measure is applied, and answer the key question of whether the manner of application constitutes an abuse of the exceptions. Questions pertaining to the policy objective of the measure concerned should be set aside in examining the consistency of a measure with the chapeau.

76. Hong Kong, China argues that in line with the views of the Appellate Body in *United States – Gasoline*[64], Article XX should not be read to establish an unqualified deviation from the GATT principle of non-discrimination. Taken together, the three elements of the chapeau of Article XX impose an obligation not to discriminate based on the origin of the product. With respect to "non-discrimination", the standard of obligation imposed by the chapeau is different from that imposed by Articles I and III of the GATT 1994, which is based on a strict interpretation of the concept of "like products". The chapeau of Article XX requires governments that intervene in order to achieve one of the objectives laid down in the sub-paragraphs of Article XX to ensure that the competitive conditions resulting from their intervention do not *de jure* or *de facto* favour their domestic products, nor the products of a certain specific origin. There should be no ambiguity about the exact content of the level of protection and the competitive conditions established as a result of government intervention. In the view of Hong Kong, China, a legal finding of inconsistency of a measure with the chapeau of Article XX is predicated on a factual finding that a particular measure does not respect the principle of non-discrimination. If this requirement is satisfied, a panel then can proceed to examine whether the requirements laid down in a sub-paragraph of Article XX have been satisfied as well.

77. Hong Kong, China contends that Section 609 violates the chapeau of Article XX to the extent that, after the October 1996 ruling of the United States Court of International Trade, shrimp caught by fishermen in uncertified countries are subject to the import ban even if they were caught with nets that are equipped with TEDs. The resulting competitive conditions show that Section 609 does not meet the requirement of no arbitrary or unjustifiable discrimination between countries where the same conditions prevail. In addition, the 1993 Guidelines removed the possibility available to foreign producers to use any form of fishing other than TEDs in shrimp harvesting to avoid the incidental taking of sea turtles. This would be consistent with the Article XX chapeau only if the use of TEDs is proven to be the sole means by which the stated objective can be achieved. Otherwise, it must be acknowledged that other means may exist whose effectiveness can be demonstrated to be comparable to TEDs, and the United States must give the same treatment to shrimp harvested with measures that exporters could demonstrate are comparable in effectiveness to TEDs. Failure to do so renders Section 609 a means of arbitrary and unjustifiable discrimination between countries where the same conditions prevail. If the Appellate Body finds it necessary to examine the measure in question under sub-paragraphs (b) and (g) of Article XX, Hong Kong, China invites the Appellate Body to consider its arguments submitted to the Panel and reflected in the Panel Report, in particular, at paragraphs 4.44 and 4.45.

5. Nigeria

78. Nigeria confirms its views expressed in paragraph 4.53 of the Panel Report and requests the Appellate Body to uphold the Panel's decision. Nigeria shares the concern about the conservation and protection of sea turtles but, however, objects to the methods and measures for doing so. Nigeria's position is defined by paragraphs 169 and 171 of the Report (1996) of the Committee on Trade and Environment.[65]

[62]Done at Bonn, 23 June 1979, 19 International Legal Materials 15.

[63]Adopted 20 May 1996, WT/DS2/AB/R, page 22.

[64]*Ibid.*

[65]Nigeria refers to WT/CTE/1, 12 November 1996. Paragraph 169 of the Report states: "WTO Member governments are committed not to introduce WTO-inconsistent or protectionist trade restrictions or countervailing measures in an attempt to offset any real or perceived adverse domestic economic or competitiveness effects of applying environmental policies; not only would this undermine the open, equitable and non-discriminatory nature of the multilateral trading system, it would also prove counterproductive to meeting environmental objectives and promoting sustainable development. Equally, and bearing in mind the fact that governments have the right to establish their national environmental standards in accordance with their respective environmental and developmental conditions, needs and priorities, WTO Members note that it would be inappropriate for them to relax their existing national environmental standards or their enforcement in order to promote their trade. The CTE notes the statement in the 1995 Report on Trade and Environment to the OECD Council at Ministerial Level that there has been no evidence of a systematic relationship between existing environmental policies and competitiveness impacts, nor of countries deliberately resorting to low environmental standards to gain competitive advantages. The CTE welcomes similar policy statements made in other inter-governmental fora."

III. Procedural Matters and Rulings

A. *Admissibility of the Briefs by Non-governmental Organizations Appended to the United States Appellant's Submission*

79. The United States attached to its appellant's submission, filed on 23 July 1998, three Exhibits, containing comments by, or "*amicus curiae* briefs" submitted by, the following three groups of non-governmental organizations[66]: 1. the Earth Island Institute; the Humane Society of the United States; and the Sierra Club; 2. the Center for International Environmental Law ("CIEL"); the Centre for Marine Conservation; the Environmental Foundation Ltd.; the Mangrove Action Project; the Philippine Ecological Network; Red Nacional de Accion Ecologica; and Sobrevivencia; and 3. the Worldwide Fund for Nature and the Foundation for International Environmental Law and Development. On 3 August 1998, CIEL *et al.* submitted a slightly revised version of their brief.

80. In their joint appellees' submission, filed on 7 August 1998, Joint Appellees object to these briefs appended to the appellant's submission, and request that the Appellate Body not consider these briefs. Joint Appellees argue that the appellant's submission, including its three Exhibits, is not in conformity with the stipulation in Article 17.6 of the DSU that an appeal "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel", nor with Rule 21(2) of the *Working Procedures for Appellate Review*. They ask the Appellate Body to reject as irrelevant the factual assertions made in certain paragraphs of the appellant's submission, as well as the factual information presented in the Exhibits. In their view, because of the incorporation of unauthorized material through the attachment of the Exhibits, the appellant's submission could no longer be considered a "precise statement" as required by Rule 21(2) of the *Working Procedures for Appellate Review*. Rather, a number of the factual and legal assertions contained in the Exhibits go beyond the position taken by the appellant, resulting in confusion concerning the exact nature and linkage between the appeal and the three Exhibits.

81. Joint Appellees state further that the submission of Exhibits that present the views of non-governmental organizations, as opposed to the views of the appellant Member, is not contemplated in, or authorized by, the DSU or the *Working Procedures for Appellate Review*. Such submissions were not in conformity with Article 17.4 of the DSU, nor with Rule 28(1) of the *Working Procedures for Appellate Review*, which vests the discretion to request additional submissions with the Appellate Body. According to Joint Appellees, the decision of the appellant to attach the Exhibits to its submission gives rise both to contradictions and internal inconsistencies, and raises serious procedural and systemic problems. Joint Appellees maintain that by virtue of their incorporation into the appellant's submission, these pleadings are no longer "*amicus curiae* briefs", but instead have become a portion of the appellant's submission, and thus have also become what would appear to be the official United States position.

82. In its appellee's submission, also filed on 7 August 1998, Malaysia similarly urges the Appellate Body to rule that the three Exhibits appended to the United States appellant's submission are inadmissible in this appeal. Malaysia refers to its argument before the Panel that briefs from non-governmental organizations do not fall within Article 13 of the DSU. In addition, according to Malaysia, admission of the Exhibits would not be consonant with Article 17.6 of the DSU, or with Rule 21(2) of the *Working Procedures for Appellate Review*, as the United States appellant's submission and Exhibit 2 contain statements of facts. Moreover, Article 17.4 of the DSU only grants the right to make written and oral submissions to third parties. Articles 11 and 17.12 of the DSU are significant and serve to safeguard the admissibility of evidence before the Appellate Body. In the alternative, in the event the Appellate Body ruled that Exhibits 1-3 of the appellant's submission should be admitted, Malaysia submits rebuttals to each of the Exhibits.

83. On 11 August 1998, we issued a ruling on this preliminary procedural matter addressed to the participants and third participants, as follows:

> We have decided to accept for consideration, insofar as they may be pertinent, the legal arguments made by the various non-governmental organizations in the three briefs attached as exhibits to the appellant's submission of the United States, as well as the revised version of the brief by the Center for International Environmental Law *et al.*, which was submitted to us on 3 August 1998. The reasons for our ruling will be given in the Appellate Body Report.

84. In the same ruling, we addressed the following questions to the appellant, the United States:

> to what extent do you agree with or adopt any one or more of the legal arguments set out in the three briefs prepared by the non-governmental organizations and appended as exhibits to your appellant's submission? In particular, do you adopt the legal arguments stated therein relating to paragraphs (b) and (g) and the chapeau of Article XX of the GATT 1994?

85. We asked the United States to respond in writing to these questions by 13 August 1998, and offered an opportunity to the appellees and the third participants to respond, by 17 August 1998, to the answer filed by the United States concerning which aspects of these briefs it accepted and endorsed as part of its appeal as well as to the legal arguments made in the briefs by the non-governmental organizations. We noted at the time that Malaysia had already done the latter in Exhibits 1 through 3 attached to its appellee's submission.

86. On 13 August 1998, the United States replied as follows:

> The main U.S. submission reflects the views of the United States on the legal issues in this appeal. As explained in our appellant's submission, the three submissions prepared by non-governmental organizations reflect the independent views of those organizations ….

Paragraph 171 of the Report states: "The CTE notes that governments have endorsed in the results of the 1992 U.N. Conference on Environment and Development their commitment to Principle 12 of the *Rio Declaration* that "Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global problems should, as far as possible, be based on an international consensus." There is a clear complementarity between this approach and the work of the WTO in seeking cooperative multilateral solutions to trade concerns. The CTE endorses and supports multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them due respect must be afforded to both."

[66]In respect of these Exhibits, the United States stated the following: "Encouraging the use of TEDs in order to promote sea turtle conservation is a matter of great importance to a number of nongovernmental environmental organizations. Three groups of these organizations – each with specialized expertise in conservation of sea turtles and other endangered species – have prepared submissions reflecting their respective independent views with respect to the use of TEDs and other issues. The United States is submitting these materials to the Appellate Body for its information attached hereto as U.S. Appellant Exhibits 1-3." United States appellant's submission, para. 2, footnote 1.

> These non-governmental organizations have a great interest, and specialized expertise, in sea turtle conservation and related matters. It is appropriate therefore that the Appellate Body be informed of those organizations' views. The United States is not adopting these views as separate matters to which the Appellate Body must respond.
>
> The United States agrees with the legal arguments in the submissions of the non-governmental organizations to the extent those arguments concur with the U.S. arguments set out in our main submission … .

87. On 17 August 1998, Joint Appellees filed a joint response, and Malaysia filed a separate one, to the matters raised in the reply of the United States, as well as in the Exhibits. Without prejudice to their view that the receipt and consideration by the Appellate Body of the briefs of non-governmental organizations attached to the appellant's submission is not authorized by the DSU or the *Working Procedures for Appellate Review*, Joint Appellees responded to certain legal arguments made in the briefs. Malaysia incorporated by reference its rebuttals to the briefs contained in its appellee's submission of 7 August 1998, and made certain additional comments in respect of each of the briefs. Also, on 17 August 1998, Hong Kong, China and Mexico filed statements in respect of the same matters. Hong Kong, China stated that the reply by the United States was unclear and that it was not possible, at that stage, to comment further on the legal arguments. For its part, Mexico stated that if the Appellate Body were to make use of arguments which are outside the terms of Article 17.6 of the DSU and which are not clearly and explicitly attributable to a Member that is a party to the dispute, the Appellate Body would exceed its powers under the DSU.

88. The admissibility of the briefs by certain non-governmental organizations which have been appended to the appellant's submission of the United States is a legal question raised by the appellees. This is a legal issue which does not relate to a finding of law made, or a legal interpretation developed, by the Panel in the Panel Report. For this reason, it has seemed appropriate to us to deal with this issue separately from the issues raised by the appellant and addressed in the succeeding portions of this Appellate Body Report.

89. We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission. On the one hand, it is of course for a participant in an appeal to determine for itself what to include in its submission. On the other hand, a participant filing a submission is properly regarded as assuming responsibility for the contents of that submission, including any annexes or other attachments.

90. In the present appeal, the United States has made it clear that its views "on the legal issues in this appeal" are found in "the main U.S. submission." The United States has confirmed its agreement with the legal arguments in the attached submissions of the non-governmental organizations, to the extent that those arguments "concur with the U.S. arguments set out in [its] main submission."

91. We admit, therefore, the briefs attached to the appellant's submission of the United States as part of that appellant's submission. At the same time, considering that the United States has itself accepted the briefs in a tentative and qualified manner only, we focus in the succeeding sections below on the legal arguments in the main U.S. appellant's submission.

B. Sufficiency of the Notice of Appeal

92. In their joint appellee's submission, filed on 7 August 1998, Joint Appellees contend that the notice of appeal by the United States is defective in form and that the action is, therefore, not properly

before the Appellate Body. They contend that the appellant's notice of appeal is both vague and cursory, and is, accordingly, not in compliance with the procedural requirements set forth in Rule 20(2)(d) of the *Working Procedures for Appellate Review*. It is also not a proper "submission" filed "within the required time periods" pursuant to Rule 29 of the *Working Procedures for Appellate Review*. As a result, it is argued, the United States' appeal should be dismissed by the Appellate Body on this ground alone. The appellant's notice of appeal does not identify any legal errors in a manner sufficient for the appellees to develop a defence, and this, in the appellees' view, made it impossible for them to discern the issues that were going to be the subject of the appeal until the appellant filed its written submission 10 days later. This reduced the time available for all appellees to draft their responsive submissions from 25 days to 15 days.

93. According to Joint Appellees, vague notices of appeal should not be tolerated for at least two reasons. First, considerations of fundamental fairness and good faith mandate that the appellant should not be permitted to gain a tactical advantage through its failure to fulfil the requirements of the *Working Procedures for Appellate Review*. Second, carefully considered and well-drafted submissions benefit the decision-making process of the Appellate Body.

94. The United States in turn submits that the notice of appeal provided just the type of "*brief* statement of the nature of the appeal, including the allegations of error in the issues of law covered in the panel report and legal interpretations developed by the panel" (emphasis in the original) called for in Rule 20(2)(d) of the *Working Procedures for Appellate Review*. First, the notice of appeal explained that the United States was appealing from the findings on issues of law and related legal interpretations leading to the panel's conclusion that the United States measure was outside the scope of the Article XX chapeau. Second, the notice of appeal stated that the United States was appealing the Panel's procedural finding that the Panel lacked discretion to accept materials received from non-governmental sources. The appellees did not explain what additional information they believed should have been included in the notice of appeal. Furthermore, according to the United States, the appellees' allegation of prejudice was unfounded. The appellees well knew the basic argument that the United States would present to support its claim of legal error. Indeed, the appellees themselves had pointed out that the United States appeal rests solely on one leg, that is, that the Panel created a "threat to the multilateral trading system" test, and that the United States already raised this same issue at the interim review stage. In short, the appeal did not result in any unfair surprise to the appellees.

95. Rule 20(2) of the *Working Procedures for Appellate Review* provides, in relevant part:

> (2) A Notice of Appeal shall include the following information:
>
> …
>
> (d) a *brief statement of the nature of the appeal, including the allegations of errors* in the issues of law covered in the panel report and legal interpretations developed by the panel.(emphasis added)

The *Working Procedures for Appellate Review* enjoin the appellant to be *brief* in its notice of appeal in setting out "the nature of the appeal, including the allegations of errors". We believe that, in principle, the "nature of the appeal" and "the allegations of errors" are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel which are being

appealed as erroneous. The notice of appeal is not expected to contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission.

96. In this instance, the notice of appeal does communicate the decision by the United States to appeal certain legal issues covered and certain legal interpretations developed in the Panel Report. The notice then refers to the two allegedly erroneous findings of the Panel being appealed from -- the finding that the United States measure at issue is not within the scope of measures permitted under the chapeau of Article XX; and the finding that accepting non-requested information from non-governmental sources is incompatible with the DSU. The notice did not cite the numbered paragraphs of the Panel Report containing the above findings, but Joint Appellees do not assert that that is necessary. The references in the notice of appeal to these two findings of the Panel are terse[67], but there is no mistaking which findings or interpretations of the Panel the Appellate Body is asked to review. We accordingly hold that the notice of appeal by the United States meets the requirements of Rule 20(2)(d) of the *Working Procedures for Appellate Review*, and deny the request of Joint Appellees to dismiss the entire appeal summarily on the sole ground of insufficiency of the notice of appeal.

97. It remains only to recall that the right of a party to appeal from legal findings and legal interpretations reached by a panel in a dispute settlement proceeding is an important new right established in the DSU resulting from the Uruguay Round. We believe that the provisions of Rule 20(2) and other Rules of the *Working Procedures for Appellate Review* are most appropriately read so as to give full meaning and effect to the right of appeal and to give a party which regards itself aggrieved by some legal finding or interpretation in a panel report a real and effective opportunity to demonstrate the error in such finding or interpretation. It is scarcely necessary to add that an appellee is, of course, always entitled to its full measure of due process. In the present appeal, perhaps the best indication that that full measure of due process was not in any degree impaired by the notice of appeal filed by the United States, is the developed and substantial nature of the appellees' submissions.

IV. Issues Raised in This Appeal

98. The issues raised in this appeal by the appellant, the United States, are the following:

(a) whether the Panel erred in finding that accepting non-requested information from non-governmental sources would be incompatible with the provisions of the DSU as currently applied; and

(b) whether the Panel erred in finding that the measure at issue constitutes unjustifiable discrimination between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX of the GATT 1994.

V. Panel Proceedings and Non-requested Information

99. In the course of the proceedings before the Panel, on 28 July 1997, the Panel received a brief from the Center for Marine Conservation ("CMC") and the Center for International Environmental Law ("CIEL"). Both are non-governmental organizations. On 16 September 1997, the Panel received another brief, this time from the World Wide Fund for Nature. The Panel acknowledged receipt of the two briefs, which the non-governmental organizations also sent directly to the parties to this dispute. The complaining parties -- India, Malaysia, Pakistan and Thailand -- requested the Panel not to consider the contents of the briefs in dealing with the dispute. In contrast, the United States urged the Panel to avail itself of any relevant information in the two briefs, as well as in any other similar communications.[68] The Panel disposed of this matter in the following manner:

> *We had not requested such information* as was contained in the above-mentioned documents. We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel. In any other situations, only parties and third parties are allowed to submit information directly to the Panel. *Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. We therefore informed the parties that we did not intend to take these documents into consideration.* We observed, moreover, that it was usual practice for parties to put forward whatever documents they considered relevant to support their case and that, *if any party in the present dispute wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so. If this were the case, the other parties would have two weeks to respond to the additional material.* We noted that the United States availed themselves of this opportunity by designating Section III of the document submitted by the Center for Marine Conservation and the Center for International Environmental Law as an annex to its second submission to the Panel.[69](emphasis added)

100. We note that the Panel did two things. First, the Panel declared a legal interpretation of certain provisions of the DSU: i.e., that accepting non-requested information from non-governmental sources would be "incompatible with the provisions of the DSU as currently applied." Evidently as a result of this legal interpretation, the Panel announced that it would not take the briefs submitted by non-governmental organizations into consideration. Second, the Panel nevertheless allowed any party to the dispute to put forward the briefs, or any part thereof, as part of its own submissions to the Panel, giving the other party or parties, in such case, two additional weeks to respond to the additional material. The United States appeals from this legal interpretation of the Panel.

101. It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel.[70] Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those

[67]The interpretation of the Panel concerning non-requested information, and its finding on the inconsistency of Section 609 with Article XX of the GATT 1994, are themselves cast in fairly terse language; Panel Report, paras. 7.8, fourth sentence, 7.49 and 7.62.

[68]Panel Report, para. 3.129

[69]Panel Report, para. 7.8.

[70]See Articles 4, 6, 9 and 10 of the DSU.

submissions considered by, a panel.[71] Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is *authorized* to do under the DSU.

102. Article 13 of the DSU reads as follows:

> *Article 13*
> *Right to Seek Information*
>
> 1. *Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate.* However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. *A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.* Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
>
> 2. *Panels may seek information from any relevant source* and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.(emphasis added)

103. In *EC Measures Affecting Meat and Meat Products (Hormones)*, we observed that Article 13 of the DSU[72] "enable[s] panels to seek information and advice as they deem appropriate in a particular case."[73] Also, in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, we ruled that:

> Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. *This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision.* We recall our statement in *EC Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves "to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate." *Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all.*
>
> …
>
> In this case, we find that the *Panel acted within the bounds of its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information from, nor to consult with, the IMF.*[74] (emphasis added)

104. The comprehensive nature of the authority of a panel to "seek" information and technical advice from "any individual or body" it may consider appropriate, or from "any relevant source", should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.

105. It is also pertinent to note that Article 12.1 of the DSU authorizes panels to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU, and in effect to develop their own Working Procedures, after consultation with the parties to the dispute. Article 12.2 goes on to direct that "[p]anel procedures should provide *sufficient flexibility* so as to *ensure high-quality panel reports* while *not unduly delaying the panel process.*"(emphasis added)

106. The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements* … ." (emphasis added)

107. Against this context of broad authority vested in panels by the DSU, and given the object and purpose of the Panel's mandate as revealed in Article 11, we do not believe that the word "seek" must necessarily be read, as apparently the Panel read it, in too literal a manner. That the Panel's reading of the word "seek" is unnecessarily formal and technical in nature becomes clear should an "individual or body" first ask a panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested. If, in the exercise of its sound discretion in a particular case, a panel concludes *inter alia* that it could do so without "unduly delaying the panel process", it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate. The exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute. In this kind of situation, for all practical and pertinent purposes, the distinction between "requested" and "non-requested" information vanishes.

[71] Articles 10 and 12, and Appendix 3 of the DSU. We note that Article 17.4 of the DSU limits the right to appeal a panel report to parties to a dispute, and permits third parties which have notified the DSB of their substantial interest in the matter to make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

[72] As well as Article 11.2 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

[73] Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 147.

[74] Adopted 22 April 1998, WT/DS56/AB/R, paras. 84-86.

108. In the present context, authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged.*

109. Moreover, acceptance and rejection of the information and advice of the kind here submitted to the Panel need not exhaust the universe of possible appropriate dispositions thereof. In the present case, the Panel did not reject the information outright. The Panel suggested instead, that, if any of the parties wanted "to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so." [75] In response, the United States then designated Section III of the document submitted by CIEL/CMC as an annex to its second submission to the Panel, and the Panel gave the appellees two weeks to respond. We believe that this practical disposition of the matter by the Panel in this dispute may be detached, as it were, from the legal interpretation adopted by the Panel of the word "seek" in Article 13.1 of the DSU. When so viewed, we conclude that the actual disposition of these briefs by the Panel does not constitute either legal error or abuse of its discretionary authority in respect of this matter. The Panel was, accordingly, entitled to treat and take into consideration the section of the brief that the United States appended to its second submission to the Panel, just like any other part of the United States pleading.

110. We find, and so hold, that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU. At the same time, we consider that the Panel acted within the scope of its authority under Articles 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non-governmental organizations, or any portion thereof, to its own submissions.

VI. Appraising Section 609 Under Article XX of the GATT 1994

111. We turn to the second issue raised by the appellant, the United States, which is whether the Panel erred in finding that the measure at issue[76] constitutes unjustifiable discrimination between countries where the same conditions prevail and, thus, is not within the scope of measures permitted under Article XX of the GATT 1994.

A. *The Panel's Findings and Interpretative Analysis*

112. The Panel's findings, from which the United States appeals, and the gist of its supporting reasoning, are set forth below *in extenso*:

> … [W]e are of the opinion that the *chapeau* [of] *Article XX*, interpreted within its context and in the light of the object and purpose of GATT and of the WTO Agreement, *only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system*, thus also abusing the exceptions contained in Article XX. Such undermining and abuse would occur when a Member jeopardizes the operation of the WTO Agreement in such a way that guaranteed market access and nondiscriminatory treatment within a multilateral framework would no longer be possible. … We are of the view that a *type of measure adopted by a Member* which, on its own, may appear to have a relatively minor impact on the multilateral trading system, *may* nonetheless *raise a serious threat to that system if similar measures are adopted by the same or other Members*. Thus, by allowing such type of measures even though their individual impact may not appear to be such as to threaten the multilateral trading system, one would affect the security and predictability of the multilateral trading system. We consequently find that when considering a measure under Article XX, we must determine not only whether the measure *on its own* undermines the WTO multilateral trading system, but also whether *such type of measure*, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system.[77]
>
> In our view, if an interpretation of the chapeau of Article XX were to be followed which would allow a Member *to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies*, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened. This follows because, if one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements. … Market access for goods could become subject to an increasing number of conflicting policy requirements for the same product and this would rapidly lead to the end of the WTO multilateral trading system.[78]
>
> … Section 609, as applied, is a measure conditioning access to the US market for a given product on the adoption by exporting Members of conservation policies that the United States considers to be comparable to its own in terms of regulatory programmes and incidental taking.[79]
>
> … it appears to us that, in light of the context of the term "unjustifiable" and the object and purpose of the WTO Agreement, *the US measure at issue constitutes unjustifiable discrimination* between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX.[80]

[75]Panel Report, para. 7.8.

[76]The United States measure at issue is referred to in this Report as "Section 609" or "the measure". By these terms, we mean Section 609 and the 1996 Guidelines.

[77]Panel Report, para. 7.44.

[78]Panel Report, para. 7.45.

[79]Panel Report, para. 7.48.

[80]Panel Report, para. 7.49.

...

> We therefore find that *the US measure* at issue is *not within the scope of measures permitted under the chapeau of Article XX*.[81](emphasis added)

113. Article XX of the GATT 1994 reads, in its relevant parts:

> Article XX
> *General Exceptions*
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> ...
>
> (*b*) necessary to protect human, animal or plant life or health;
>
> ...
>
> (*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

114. The Panel did not follow all of the steps of applying the "customary rules of interpretation of public international law" as required by Article 3.2 of the DSU. As we have emphasized numerous times[82], these rules call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved. A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.[83]

115. In the present case, the Panel did not expressly examine the ordinary meaning of the words of Article XX. The Panel disregarded the fact that the introductory clauses of Article XX speak of the "manner" in which measures sought to be justified are "applied". In *United States - Gasoline*, we pointed out that the chapeau of Article XX "by its express terms addresses, not so much the questioned measure or its specific contents as such, *but rather the manner in which that measure is applied*."[84](emphasis added) The Panel did not inquire specifically into how the *application* of Section 609 constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." What the Panel did, in purporting to examine the consistency of the measure with the chapeau of Article XX, was to focus repeatedly on the *design of the measure itself*. For instance, the Panel stressed that it was addressing "a particular situation where a Member has taken unilateral measures which, *by their nature*, could put the multilateral trading system at risk." [85](emphasis added)

116. The general design of a measure, as distinguished from its application, is, however, to be examined in the course of determining whether that measure falls within one or another of the paragraphs of Article XX following the chapeau. The Panel failed to scrutinize the *immediate* context of the chapeau: i.e., paragraphs (a) to (j) of Article XX. Moreover, the Panel did not look into the object and purpose of the *chapeau of Article XX*. Rather, the Panel looked into the object and purpose of the *whole of the GATT 1994 and the WTO Agreement*, which object and purpose it described in an overly broad manner. Thus, the Panel arrived at the very broad formulation that measures which "undermine the WTO multilateral trading system"[86] must be regarded as "not within the scope of measures permitted under the chapeau of Article XX."[87] Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the *WTO Agreement*; but it is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the chapeau of Article XX. In *United States - Gasoline*, we stated that it is "important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of '*abuse of the exceptions of* [*Article XX*]'."[88](emphasis added) The Panel did not attempt to inquire into how the measure at stake was being *applied in such a manner* as to constitute *abuse or misuse of a given kind of exception*.

117. The above flaws in the Panel's analysis and findings flow almost naturally from the fact that the Panel disregarded the sequence of steps essential for carrying out such an analysis. The Panel defined its approach as first "determin[ing] whether the measure at issue satisfies the conditions contained in the chapeau."[89] If the Panel found that to be the case, it said that it "shall then examine whether the US measure is covered by the terms of Article XX(b) or (g)." [90] The Panel attempted to justify its interpretative approach in the following manner:

> As mentioned by the Appellate Body in its report in the *Gasoline* case, in order for the justification of Article XX to be extended to a given measure, it must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clause of Article XX. We note that panels have in the past considered the specific paragraphs

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[81]Panel Report, para. 7.62.

[82]See, for example, the Appellate Body Reports in: *United States - Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 17; *Japan - Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp. 10-12; *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, paras. 45-46; *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, adopted 13 February 1998, WT/DS56/AB/R, para. 47; and *European Communities - Customs Classification of Certain Computer Equipment*, adopted 22 June 1998, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 85.

[83]I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), pp. 130-131.

[84]Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

[85]Panel Report, para. 7.60. The Panel also stated, in paras. 7.33-7.34 of the Panel Report:

> ... Pursuant to the chapeau of Article XX, a measure may discriminate, but not in an 'arbitrary' or 'unjustifiable' manner.
>
> We therefore move to consider *whether the US measure* conditioning market access on the adoption of certain conservation policies by the exporting Member *could be considered as 'unjustifiable' discrimination* ... .(emphasis added)

[86]See, for example, Panel Report, para. 7.44.

[87]Panel Report, para. 7.62.

[88]Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

[89]Panel Report, para. 7.29.

[90]*Ibid.*

> of Article XX before reviewing the applicability of the conditions contained in the chapeau. However, *as the conditions contained in the introductory provision apply to any of the paragraphs of Article XX, it seems equally appropriate to analyse first the introductory provision of Article XX.*[91](emphasis added)

...

118. In *United States - Gasoline*, we enunciated the appropriate method for applying Article XX of the GATT 1994:

> In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) -- listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. *The analysis is,* in other words, *two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.*[92](emphasis added)

119. The sequence of steps indicated above in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX. The Panel appears to suggest, albeit indirectly, that following the indicated sequence of steps, or the inverse thereof, does not make any difference. To the Panel, reversing the sequence set out in *United States - Gasoline* "seems equally appropriate."[93] We do not agree.

120. The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the *application* of a measure "in a manner which would constitute a means of *arbitrary* or *unjustifiable discrimination* between countries where the same conditions prevail" or "a *disguised restriction* on international trade."(emphasis added) When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies. What is appropriately characterizable as "arbitrary discrimination" or "unjustifiable discrimination", or as a "disguised restriction on international trade" in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of "arbitrary discrimination", for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.

121. The consequences of the interpretative approach adopted by the Panel are apparent in its findings. The Panel formulated a broad standard and a test for appraising measures sought to be justified under the chapeau; it is a standard or a test that finds no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States. The Panel, in effect, constructed an *a priori* test that purports to define a category of measures which, *ratione materiae*, fall outside the justifying protection of Article XX's chapeau.[94] In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It

[91]Panel Report, para. 7.28.

[92]Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

[93]Panel Report, para 7.28.

[94]See, for example, Panel Report, para. 7.50.

appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.

122. We hold that the findings of the Panel quoted in paragraph 112 above, and the interpretative analysis embodied therein, constitute error in legal interpretation and accordingly reverse them.

123. Having reversed the Panel's legal conclusion that the United States measure at issue "is not within the scope of measures permitted under the chapeau of Article XX" [95], we believe that it is our duty and our responsibility to complete the legal analysis in this case in order to determine whether Section 609 qualifies for justification under Article XX. In doing this, we are fully aware of our jurisdiction and mandate under Article 17 of the DSU. We have found ourselves in similar situations on a number of occasions. Most recently, in *European Communities - Measures Affecting the Importation of Certain Poultry Products,* we stated:

> In certain appeals, … the reversal of a panel's finding on a legal issue may require us to make a finding on a legal issue which was not addressed by the panel.[96]

In that case, having reversed the panel's finding on Article 5.1(b) of the *Agreement on Agriculture*, we completed the legal analysis by making a finding on the consistency of the measure at issue with Article 5.5 of the *Agreement on Agriculture.* Similarly, in *Canada - Certain Measures Concerning Periodicals*[97], having reversed the panel's findings on the issue of "like products" under the first sentence of Article III:2 of the GATT 1994, we examined the consistency of the measure with the second sentence of Article III:2. And, in *United States – Gasoline* [98], having reversed the panel's findings on the first part of Article XX(g) of the GATT 1994, we completed the analysis of the terms of Article XX(g), and then examined the application of the measure at issue in that case under the chapeau of Article XX.

124. As in those previous cases, we believe it is our responsibility here to examine the claim by the United States for justification of Section 609 under Article XX in order properly to resolve this dispute between the parties. We do this, in part, recognizing that Article 3.7 of the DSU emphasizes that: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Fortunately, in the present case, as in the mentioned previous cases, we believe that the facts on the record of the panel proceedings permit us to undertake the completion of the analysis required to resolve this dispute.

[95]Panel Report, para. 7.62.

[96]Adopted 23 July 1998, WT/DS69/AB/R, para. 156.

[97]Adopted 30 July 1997, WT/DS31/AB/R, pp. 23 and 24.

[98]Adopted 20 May 1996, WT/DS2/AB/R, pp. 19 ff.

B. *Article XX(g): Provisional Justification of Section 609*

125. In claiming justification for its measure, the United States primarily invokes Article XX(g). Justification under Article XX(b) is claimed only in the alternative; that is, the United States suggests that we should look at Article XX(b) only if we find that Section 609 does not fall within the ambit of Article XX(g).[99] We proceed, therefore, to the first tier of the analysis of Section 609 and to our consideration of whether it may be characterized as provisionally justified under the terms of Article XX(g).

126. Paragraph (g) of Article XX covers measures:

> relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

1. "Exhaustible Natural Resources"

127. We begin with the threshold question of whether Section 609 is a measure concerned with the conservation of "exhaustible natural resources" within the meaning of Article XX(g). The Panel, of course, with its "chapeau-down" approach, did not make a finding on whether the sea turtles that Section 609 is designed to conserve constitute "exhaustible natural resources" for purposes of Article XX(g). In the proceedings before the Panel, however, the parties to the dispute argued this issue vigorously and extensively. India, Pakistan and Thailand contended that a "reasonable interpretation" of the term "exhaustible" is that the term refers to "finite resources such as minerals, rather than biological or renewable resources."[100] In their view, such finite resources were exhaustible "because there was a limited supply which could and would be depleted unit for unit as the resources were consumed."[101] Moreover, they argued, if "all" natural resources were considered to be exhaustible, the term "exhaustible" would become superfluous.[102] They also referred to the drafting history of Article XX(g), and, in particular, to the mention of minerals, such as manganese, in the context of arguments made by some delegations that "export restrictions" should be permitted for the preservation of scarce natural resources.[103] For its part, Malaysia added that sea turtles, being living creatures, could only be considered under Article XX(b), since Article XX(g) was meant for "nonliving exhaustible natural resources".[104] It followed, according to Malaysia, that the United States cannot invoke both the Article XX(b) and the Article XX(g) exceptions simultaneously.[105]

128. We are not convinced by these arguments. Textually, Article XX(g) is *not* limited to the conservation of "mineral" or "non-living" natural resources. The complainants' principal argument is rooted in the notion that "living" natural resources are "renewable" and therefore cannot be "exhaustible" natural resources. We do not believe that "exhaustible" natural resources and "renewable" natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, "renewable", are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as "finite" as petroleum, iron ore and other non-living resources.[106]

129. The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* -- which informs not only the GATT 1994, but also the other covered agreements -- explicitly acknowledges "the objective of *sustainable development*[107]":

> The *Parties* to this Agreement,
>
> *Recognizing* that their relations in the field of trade and economic endeavour should be conducted *with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand*, and *expanding the production of and trade in goods and services*, while allowing for the optimal use of the world's resources in accordance with the *objective of sustainable development*, *seeking both to protect and preserve the environment and to enhance the means for doing so* in a manner consistent with their respective needs and concerns at different levels of economic development, …[108](emphasis added)

130. From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary".[109] It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources. For instance, the 1982 United Nations Convention on the Law of the Sea[110] ("UNCLOS"), in defining the jurisdictional rights of coastal states in their exclusive economic zones, provides:

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[99]Additional submission of the United States, dated 17 August, 1998, para. 5.

[100]Panel Report, para. 3.237.

[101]*Ibid.*

[102]*Ibid.*

[103]Panel Report, para 3.238. India, Pakistan and Thailand referred, *inter alia*, to E/PC/T/C.II/QR/PV/5, 18 November 1946, p. 79.

[104]Panel Report, para. 3.240.

[105]*Ibid.*

[106]We note, for example, that the World Commission on Environment and Development stated: "The planet's species are under stress. There is growing scientific consensus that species are disappearing at rates never before witnessed on the planet … ." World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 13.

[107]This concept has been generally accepted as integrating economic and social development and environmental protection See e.g., G. Handl, "Sustainable Development: General Rules versus Specific Obligations", in *Sustainable Development and International Law* (ed. W. Lang, 1995), p. 35; World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 43.

[108]Preamble of the *WTO Agreement*.

[109]See *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31. The International Court of Justice stated that where concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent development of law … . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." See also *Aegean Sea Continental Shelf Case*, (1978) I.C.J. Rep., p. 3; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's, 1992), p. 1282 and E. Jimenez de Arechaga, "International Law in the Past Third of a Century", (1978-I) 159 *Recueil des Cours* 1, p. 49.

[110]Done at Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122; 21 International Legal Materials 1261. We note that India, Malaysia and Pakistan have ratified the UNCLOS. Thailand has signed, but not ratified the Convention, and the United States has not signed the Convention. In the oral hearing, the

Article 56
Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the *natural resources, whether living or non-living*, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, …(emphasis added)

The UNCLOS also repeatedly refers in Articles 61 and 62 to "living resources" in specifying rights and duties of states in their exclusive economic zones. The Convention on Biological Diversity[111] uses the concept of "biological resources". Agenda 21[112] speaks most broadly of "natural resources" and goes into detailed statements about "marine living resources". In addition, the Resolution on Assistance to Developing Countries, adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals, recites:

> Conscious that an important element of development lies in the conservation and management of *living natural resources* and that migratory species constitute a significant part of these resources; …[113](emphasis added)

131. Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. [114] Moreover, two adopted GATT 1947 panel reports previously found fish to be an

United States stated: "… we have not ratified this Convention although, with respect to fisheries law, for the most part we do believe that UNCLOS reflects international customary law." Also see, for example, W. Burke, *The New International Law of Fisheries* (Clarendon Press, 1994), p. 40:

> [the] coastal state sovereign rights over fisheries in a 200-mile zone are now considered part of customary international law. The evidence of state practice supporting this derives not only from the large number of coastal states claiming an EEZ [exclusive economic zone] in which such rights are advanced, but also from the fact that many of those states not claiming an EEZ assert rights not appreciably different than those in an EEZ. The provision for sovereign rights of the coastal state in [Article 56.1(a) of] the 1982 Convention is also a part of this evidence, but has particular weight because of the uniformity of state practice outside the Convention.

[111]Done at Rio de Janeiro, 5 June 1992, UNEP/Bio.Div./N7-INC5/4; 31 International Legal Materials 818. We note that India, Malaysia and Pakistan have ratified the Convention on Biological Diversity, and that Thailand and the United States have signed but not ratified the Convention.

[112]Adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF. 151/26/Rev.1. See, for example, para. 17.70, ff.

[113]Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 23 June 1979, 19 International Legal Materials 11, p. 15. We note that India and Pakistan have ratified the Convention on the Conservation of Migratory Species of Wild Animals, but that Malaysia, Thailand and the United States are not parties to the Convention.

[114]Furthermore, the drafting history does not demonstrate an intent on the part of the framers of the GATT 1947 *to exclude* "living" natural resources from the scope of application of Article XX(g).

"exhaustible natural resource" within the meaning of Article XX(g).[115] We hold that, in line with the principle of effectiveness in treaty interpretation[116], measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g).

132. We turn next to the issue of whether the living natural resources sought to be conserved by the measure are "exhaustible" under Article XX(g). That this element is present in respect of the five species of sea turtles here involved appears to be conceded by all the participants and third participants in this case. The exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are today listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). The list in Appendix 1 includes "all species *threatened with extinction* which are or may be affected by trade."[117](emphasis added)

133. Finally, we observe that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas. In the Panel Report, the Panel said:

> … Information brought to the attention of the Panel, including documented statements from the experts, tends to *confirm the fact that sea turtles, in certain circumstances of their lives, migrate through the waters of several countries and the high sea.* …[118](emphasis added)

The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction.[119] Of course, it is not claimed that *all* populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat -- the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in

[115]*United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted 22 February 1982, BISD 29S/91, para. 4.9; *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted 22 March 1988, BISD 35S/98, para. 4.4.

[116]See the following Appellate Body Reports: *United States - Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 23; *Japan – Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12; and *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, adopted 25 February 1997, WT/DS24/AB/R, p. 16. See also Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's, 1992), pp. 1280-1281; M.S. McDougal, H.D. Lasswell and J. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven/Martinus Nijhoff, 1994), p. 184; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), p. 118; D. Carreau, *Droit International* (Editions A. Pedone, 1994), para. 369; P. Daillier and A. Pellet, *Droit International Public*, 5th ed. (L.G.D.J., 1994), para. 172; L.A. Podesta Costa and J.M. Ruda, *Derecho Internacional Público* (Tipografica Editora Argentina, 1985), pp. 109-110 and M. Diez de Velasco, *Instituciones de Derecho Internacional Público*, 11th ed. (Tecnos, 1997), p. 169.

[117]CITES, Article II.1.

[118]Panel Report, para. 7.53.

[119]See Panel Report, para. 2.6. The 1987 Regulations, 52 Fed. Reg. 24244, 29 June 1987, identified five species of sea turtles as occurring within the areas concerned and thus falling under the regulations: loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Eretmochelys imbricata*). Section 609 refers to "those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on 29 June, 1987."

Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).

134. For all the foregoing reasons, we find that the sea turtles here involved constitute "exhaustible natural resources" for purposes of Article XX(g) of the GATT 1994.

2. "Relating to the Conservation of [Exhaustible Natural Resources]"

135. Article XX(g) requires that the measure sought to be justified be one which "relat[es] to" the conservation of exhaustible natural resources. In making this determination, the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources. It is well to bear in mind that the policy of protecting and conserving the endangered sea turtles here involved is shared by all participants and third participants in this appeal, indeed, by the vast majority of the nations of the world.[120] None of the parties to this dispute question the genuineness of the commitment of the others to that policy.[121]

136. In *United States - Gasoline*, we inquired into the relationship between the baseline establishment rules of the United States Environmental Protection Agency (the "EPA") and the conservation of natural resources for the purposes of Article XX(g). There, we answered in the affirmative the question posed before the panel of whether the baseline establishment rules were "primarily aimed at" the conservation of clean air.[122] We held that:

> … The baseline establishment rules whether individual or statutory, were designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the "non-degradation" requirements. Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule's objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated. … We consider that, given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g).[123]

The substantial relationship we found there between the EPA baseline establishment rules and the conservation of clean air in the United States was a close and genuine relationship of ends and means.

137. In the present case, we must examine the relationship between the general structure and design of the measure here at stake, Section 609, and the policy goal it purports to serve, that is, the conservation of sea turtles.

138. Section 609(b)(1) imposes an import ban on shrimp that have been harvested with commercial fishing technology which may adversely affect sea turtles. This provision is designed to influence countries to adopt national regulatory programs requiring the use of TEDs by their shrimp

[120]There are currently 144 states parties to CITES.

[121]We note that all of the participants in this appeal are parties to CITES.

[122]Adopted 20 May 1996, WT/DS2/AB/R, p. 19.

[123]*Ibid.*

fishermen. In this connection, it is important to note that the general structure and design of Section 609 *cum* implementing guidelines is fairly narrowly focused. There are two basic exemptions from the import ban, both of which relate clearly and directly to the policy goal of conserving sea turtles. First, Section 609, as elaborated in the 1996 Guidelines, excludes from the import ban shrimp harvested "under conditions that do not adversely affect sea turtles". Thus, the measure, by its terms, excludes from the import ban: aquaculture shrimp; shrimp species (such as *pandalid* shrimp) harvested in water areas where sea turtles do not normally occur; and shrimp harvested exclusively by artisanal methods, even from non-certified countries.[124] The harvesting of such shrimp clearly does not affect sea turtles. Second, under Section 609(b)(2), the measure exempts from the import ban shrimp caught in waters subject to the jurisdiction of certified countries.

139. There are two types of certification for countries under Section 609(b)(2). First, under Section 609(b)(2)(C), a country may be certified as having a fishing environment that does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting. There is no risk, or only a negligible risk, that sea turtles will be harmed by shrimp trawling in such an environment.

140. The second type of certification is provided by Section 609(b)(2)(A) and (B). Under these provisions, as further elaborated in the 1996 Guidelines, a country wishing to export shrimp to the United States is required to adopt a regulatory program that is comparable to that of the United States program and to have a rate of incidental take of sea turtles that is comparable to the average rate of United States' vessels. This is, essentially, a requirement that a country adopt a regulatory program requiring the use of TEDs by commercial shrimp trawling vessels in areas where there is a likelihood of intercepting sea turtles.[125] This requirement is, in our view, directly connected with the policy of conservation of sea turtles. It is undisputed among the participants, and recognized by the experts consulted by the Panel[126], that the harvesting of shrimp by commercial shrimp trawling vessels with mechanical retrieval devices in waters where shrimp and sea turtles coincide is a significant cause of sea turtle mortality. Moreover, the Panel did "not question … the fact generally acknowledged by the experts that TEDs, when properly installed and adapted to the local area, would be an effective tool for the preservation of sea turtles."[127]

141. In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake[128], it appears to us that Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in *United States - Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.

142. In our view, therefore, Section 609 is a measure "relating to" the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994.

[124]See the 1996 Guidelines, p. 17343.

[125]See the 1996 Guidelines, p. 17343.

[126]For example, Panel Report, paras. 5.91-5.118.

[127]Panel Report, para. 7.60, footnote 674.

[128]We focus on the *application* of the measure below, in Section VI.C of this Report.

3. "If Such Measures are Made Effective in conjunction with Restrictions on Domestic Production or Consumption"

143. In *United States – Gasoline*, we held that the above-captioned clause of Article XX(g),

> … is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.[129]

In this case, we need to examine whether the restrictions imposed by Section 609 with respect to imported shrimp are also imposed in respect of shrimp caught by United States shrimp trawl vessels.

144. We earlier noted that Section 609, enacted in 1989, addresses the mode of harvesting of imported shrimp only. However, two years earlier, in 1987, the United States issued regulations pursuant to the Endangered Species Act requiring all United States shrimp trawl vessels to use approved TEDs, or to restrict the duration of tow-times, in specified areas where there was significant incidental mortality of sea turtles in shrimp trawls.[130] These regulations became fully effective in 1990 and were later modified. They now require United States shrimp trawlers to use approved TEDs "in areas and at times when there is a likelihood of intercepting sea turtles" [131], with certain limited exceptions.[132] Penalties for violation of the Endangered Species Act, or the regulations issued thereunder, include civil and criminal sanctions.[133] The United States government currently relies on monetary sanctions and civil penalties for enforcement.[134] The government has the ability to seize shrimp catch from trawl vessels fishing in United States waters and has done so in cases of egregious violations.[135] We believe that, in principle, Section 609 is an even-handed measure.

145. Accordingly, we hold that Section 609 is a measure made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g).

C. *The Introductory Clauses of Article XX: Characterizing Section 609 under the Chapeau's Standards*

146. As noted earlier, the United States invokes Article XX(b) only if and to the extent that we hold that Section 609 falls outside the scope of Article XX(g). Having found that Section 609 does come within the terms of Article XX(g), it is not, therefore, necessary to analyze the measure in terms of Article XX(b).

[129]Adopted 20 May 1996, WT/DS2/AB/R, pp. 20-21.

[130]52 Fed. Reg. 24244, 29 June 1987.

[131]See the 1996 Guidelines, p. 17343.

[132]According to the 1996 Guidelines, p. 17343, the exceptions are: vessels equipped exclusively with certain special types of gear; vessels whose nets are retrieved exclusively by manual rather than mechanical means; and, in exceptional circumstances, where the National Marine Fisheries Service determines that the use of TEDs would be impracticable because of special environmental conditions, vessels are permitted to restrict tow-times instead of using TEDs.

[133]Endangered Species Act, Section 11.

[134]Statement by the United States at the oral hearing.

[135]Statement by the United States at the oral hearing.

147. Although provisionally justified under Article XX(g), Section 609, if it is ultimately to be justified as an exception under Article XX, must also satisfy the requirements of the introductory clauses -- the "chapeau" -- of Article XX, that is,

> Article XX
>
> *General Exceptions*
>
> Subject to the requirement that such measures are *not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail*, or *a disguised restriction on international trade*, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (emphasis added)

We turn, hence, to the task of appraising Section 609, and specifically the manner in which it is applied under the chapeau of Article XX; that is, to the second part of the two-tier analysis required under Article XX.

1. General Considerations

148. We begin by noting one of the principal arguments made by the United States in its appellant's submission. The United States argues:

> In context, *an alleged "discrimination between countries where the same conditions prevail" is not "unjustifiable" where the policy goal of the Article XX exception being applied provides a rationale for the justification*. If, for example, a measure is adopted for the purpose of conserving an exhaustible natural resource under Article XX(g), it is relevant whether the conservation goal justifies the discrimination. In this way, the Article XX chapeau guards against the misuse of the Article XX exceptions for the purpose of achieving indirect protection.[136]
>
> …
>
> [A]n evaluation of whether a measure constitutes "unjustifiable discrimination [between countries] where the same conditions prevail" should take account of *whether differing treatment between countries relates to the policy goal of the applicable Article XX exception. If a measure differentiates between countries based on a rationale legitimately connected with the policy of an Article XX exception*, rather than for protectionist reasons, *the measure does not amount to an abuse of the applicable Article XX exception*.[137] (emphasis added)

149. We believe this argument must be rejected. The policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX. The legitimacy of the declared policy objective of the measure, and the relationship of that objective with the measure

[136]United States appellant's submission, para. 28.

[137]United States appellant's submission, para. 53.

itself and its general design and structure, are examined under Article XX(g), and the treaty interpreter may then and there declare the measure inconsistent with Article XX(g). If the measure is not held provisionally justified under Article XX(g), it cannot be ultimately justified under the chapeau of Article XX. On the other hand, it does not follow from the fact that a measure falls within the terms of Article XX(g) that that measure also will necessarily comply with the requirements of the chapeau. To accept the argument of the United States would be to disregard the standards established by the chapeau.

150. We commence the second tier of our analysis with an examination of the ordinary meaning of the words of the chapeau. The precise language of the chapeau requires that a measure not be applied in a manner which would constitute a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on international trade." There are three standards contained in the chapeau: first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade. In order for a measure to be applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist. First, the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.[138] Second, the discrimination must be *arbitrary* or *unjustifiable* in character. We will examine this element of *arbitrariness* or *unjustifiability* in detail below. Third, this discrimination must occur *between countries where the same conditions prevail*. In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned.[139] Thus, the standards embodied in the language of the chapeau are not only different from the requirements of Article XX(g); they are also different from the standard used in determining that Section 609 is violative of the substantive rules of Article XI:1 of the GATT 1994.

151. In *United States – Gasoline*, we stated that "the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [Article XX]'."[140] We went on to say that:

> … The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.[141]

152. At the end of the Uruguay Round, negotiators fashioned an appropriate preamble for the new *WTO Agreement,* which strengthened the multilateral trading system by establishing an international organization, *inter alia,* to facilitate the implementation, administration and operation, and to further the objectives, of that Agreement and the other agreements resulting from that Round.[142] In recognition of the importance of continuity with the previous GATT system, negotiators used the preamble of the GATT 1947 as the template for the preamble of the new *WTO Agreement*. Those negotiators evidently believed, however, that the objective of "full use of the resources of the world" set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990's. As a result, they decided to qualify the original objectives of the GATT 1947 with the following words:

> … while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, …[143]

153. We note once more[144] that this language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.[145]

154. We also note that since this preambular language was negotiated, certain other developments have occurred which help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment. The most significant, in our view, was the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment (the "CTE"). In their Decision on Trade and Environment, Ministers expressed their intentions, in part, as follows:

> … *Considering* that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other, …[146]

In this Decision, Ministers took "note" of the Rio Declaration on Environment and Development [147], Agenda 21[148], and "its follow-up in the GATT, as reflected in the statement of the Council of

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[138]In *United States – Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 23, we stated: "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."

[139]*Ibid.*, pp. 23-24.

[140]*Ibid.*, p. 22.

[141]*Ibid.*

[142]*WTO Agreement*, Article III:1.

[143]Preamble of the *WTO Agreement*, first paragraph.

[144]*Supra*, para. 129.

[145]*Supra*, para. 131.

[146]Preamble of the Decision on Trade and Environment.

[147]We note that Principle 3 of the Rio Declaration on Environment and Development states: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Principle 4 of the Rio Declaration on Environment and Development states that: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

Representatives to the CONTRACTING PARTIES at their 48th Session in 1992 … ."[149] We further note that this Decision also set out the following terms of reference for the CTE:

> (a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
>
> (b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:
>
> - the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and
>
> - the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and
>
> - surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade affects, and of effective implementation of the multilateral disciplines governing those measures.[150]

155. With these instructions, the General Council of the WTO established the CTE in 1995, and the CTE began its important work. Pending any specific recommendations by the CTE to WTO Members on the issues raised in its terms of reference, and in the absence up to now of any agreed amendments or modifications to the substantive provisions of the GATT 1994 and the *WTO Agreement* generally, we must fulfill our responsibility in this specific case, which is to interpret the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX. It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the *WTO Agreement*, which, we have said, gives colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular.

156. Turning then to the chapeau of Article XX, we consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on

[148]Agenda 21 is replete with references to the shared view that economic development and the preservation and protection should be mutually supportive. For example, paragraph 2.3(b) of Agenda 21 states: "The international economy should provide a supportive international climate for achieving environment and development goals by … [m]aking trade and environment mutually supportive … ." Similarly, paragraph 2.9(d) states that an "objective" of governments should be: "To promote and support policies, domestic and international, that make economic growth and environmental protection mutually supportive."

[149]Preamble of the Decision on Trade and Environment.

[150]Decision on Trade and Environment.

the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences.

157. In our view, the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau.[151] This interpretation of the chapeau is confirmed by its negotiating history.[152] The language initially proposed by the United States in 1946 for the chapeau of what would later become Article XX was unqualified and unconditional.[153] Several proposals were made during the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in 1946 suggesting modifications.[154] In November 1946, the United Kingdom proposed that "in order to prevent abuse of the exceptions of Article 32 [which would subsequently become

[151]This view is consistent with the approach taken by the panel in *United States – Section 337 of the United States Tariff Act of 1930,* which stated:

> Article XX is entitled "General Exceptions" and … the central phrase in the introductory clause reads: "nothing in this Agreement shall be construed to prevent the adoption or enforcement … of measures…". Article XX(d) thus provides *a limited and conditional exception from obligations under other provisions*.[151] (emphasis added) Adopted 7 November 1989, BISD 365/345, para. 5.9.

[152]Article 32 of the Vienna Convention permits recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Here, we refer to the negotiating history of Article XX to confirm the interpretation of the chapeau we have reached from applying Article 31 of the Vienna Convention.

[153]The chapeau of Article 32 of the United States Draft Charter for an International Trade Organization, which formed the basis for discussions at the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in late 1946, read, in relevant part:

> Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any member of measures: …

[154]For example, the Netherlands, Belgium and Luxembourg stated that the exceptions should be qualified in some way:

> Indirect protection is an undesirable and dangerous phenomenon. … Many times, the stipulations to 'protect animal or plant life or health' are misused for indirect protection. It is recommended to insert a clause which prohibits expressly to direct such measures that they constitute an indirect protection or, in general, to use these measures to attain results, which are irreconsiliable [*sic*] with the aim of chapters IV, V and VI. E/PC/T/C.II/32, 30 October 1946

Article XX]", the chapeau of this provision should be qualified.[155] This proposal was generally accepted, subject to later review of its precise wording. Thus, the negotiating history of Article XX confirms that the paragraphs of Article XX set forth *limited and conditional* exceptions from the obligations of the substantive provisions of the GATT. Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. This is a fundamental part of the balance of rights and obligations struck by the original framers of the GATT 1947.

158. The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably."[156] An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.[157]

159. The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.

[155]The United Kingdom's proposed text for the chapeau read:

> The undertaking in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the adoption or enforcement by any member of measures for the following purposes, provided that they are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. E/PC/T/C.II/50, pp. 7 and 9; E/PC/T/C.II/54/Rev.1, 28 November 1946, p. 36.

[156]B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, in particular, p. 125 elaborates:

> … A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect). It should at the same time be *fair and equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty. …(emphasis added)

Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed, Vol. I (Longman's, 1992), pp. 407-410, *Border and Transborder Armed Actions Case*, (1988) I.C.J. Rep. 105; *Rights of Nationals of the United States in Morocco Case*, (1952) I.C.J. Rep. 176; *Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Rep. 142.

[157]Vienna Convention, Article 31(3)(c).

160. With these general considerations in mind, we address now the issue of whether the *application* of the United States measure, although the measure itself falls within the terms of Article XX(g), nevertheless constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or "a disguised restriction on international trade". We address, in other words, whether the application of this measure constitutes an abuse or misuse of the provisional justification made available by Article XX(g). We note, preliminarily, that the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an arbitrary or unjustifiable manner. The standards of the chapeau, in our view, project both substantive and procedural requirements.

2. "Unjustifiable Discrimination"

161. We scrutinize first whether Section 609 has been applied in a manner constituting "unjustifiable discrimination between countries where the same conditions prevail". Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers. As enacted by the Congress of the United States, the *statutory* provisions of Section 609(b)(2)(A) and (B) do not, in themselves, *require* that other WTO Members adopt *essentially the same* policies and enforcement practices as the United States. Viewed alone, the statute appears to permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries.[158] However, any flexibility that may have been intended by Congress when it enacted the statutory provision has been effectively eliminated in the implementation of that policy through the 1996 Guidelines promulgated by the Department of State and through the practice of the administrators in making certification determinations.

162. According to the 1996 Guidelines, certification "shall be made" under Section 609(b)(2)(A) and (B) if an exporting country's program includes a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use, at all times, TEDs comparable in effectiveness to those used in the United States.[159] Under these Guidelines, any exceptions to the requirement of the use of TEDs must be comparable to those of the United States program.[160] Furthermore, the harvesting country must have in place a "credible enforcement

[158]Pursuant to Section 609(b)(2), a harvesting nation may be certified, and thus exempted from the import ban, if:

> (A) the government of the harvesting nation has provided documentary evidence of the adoption of a program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and
>
> (B) the average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting…

[159]1996 Guidelines, p. 17344.

[160]As already noted, these exceptions are extremely limited and currently include only: vessels equipped exclusively with certain special types of gear; vessels whose nets are retrieved exclusively by manual rather than mechanical means; and, in exceptional circumstances, where the National Marine Fisheries Services determines that the use of TEDs would be impracticable because of special environmental conditions, vessels

effort".[161] The language in the 1996 Guidelines is mandatory: certification "shall be made" if these conditions are fulfilled. However, we understand that these rules are also applied in an *exclusive* manner. That is, the 1996 Guidelines specify the *only* way that a harvesting country's regulatory program can be deemed "comparable" to the United States' program, and, therefore, they define the *only* way that a harvesting nation can be certified under Section 609(b)(2)(A) and (B). Although the 1996 Guidelines state that, in making a comparability determination, the Department of State "shall also take into account other measures the harvesting nation undertakes to protect sea turtles"[162], in practice, the competent government officials only look to see whether there is a regulatory program requiring the use of TEDs or one that comes within one of the extremely limited exceptions available to United States shrimp trawl vessels.[163]

163. The actual *application* of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of administrators, *requires* other WTO Members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels. Thus, the effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States. Other specific policies and measures that an exporting country may have adopted for the protection and conservation of sea turtles are not taken into account, in practice, by the administrators making the comparability determination.[164]

164. We understand that the United States also applies a uniform standard throughout its territory, regardless of the particular conditions existing in certain parts of the country. The United States requires the use of approved TEDs at all times by domestic, commercial shrimp trawl vessels operating in waters where there is any likelihood that they may interact with sea turtles, regardless of the actual incidence of sea turtles in those waters, the species of those sea turtles, or other differences or disparities that may exist in different parts of the United States. It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.

165. Furthermore, when this dispute was before the Panel and before us, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609. In other words, *shrimp caught using methods identical to those employed in the United States* have been excluded from the United States market solely because they have been caught in waters of *countries that have not been certified by the United States*. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.

166. Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members. The relevant factual finding of the Panel reads:

> … However, *we have no evidence that the United States actually undertook negotiations on an agreement on sea turtle conservation techniques which would have included the complainants before the imposition of the import ban as a result of the CIT judgement*. From the replies of the parties to our question on this subject, in particular that of the United States, we understand that the United States did not propose the negotiation of an agreement to any of the complainants until after the conclusion of negotiations on the Inter-American Convention for the Protection and Conservation of Sea Turtles, in September 1996, i.e. well after the deadline for the imposition of the import ban of 1 May 1996. Even then, it seems that the efforts made merely consisted of an exchange of documents. We therefore conclude that, in spite of the possibility offered by its legislation, the United States did not enter into negotiations before it imposed the import ban. As we consider that the measures sought by the United States were of the type that would normally require international cooperation, we do not find it necessary to examine whether parties entered into negotiations in good faith and whether the United States, absent any result, would have been entitled to adopt unilateral measures.[165](emphasis added)

167. *A propos* this failure to have prior consistent recourse to diplomacy as an instrument of environmental protection policy, which produces discriminatory impacts on countries exporting shrimp to the United States with which no international agreements are reached or even seriously attempted, a number of points must be made. First, the Congress of the United States expressly recognized the importance of securing international agreements for the protection and conservation of the sea turtle species in enacting this law. Section 609(a) *directs* the Secretary of State to:

> (1) *initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations* for the protection and conservation of such species of sea turtles;
> (2) *initiate negotiations as soon as possible* with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, *for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles*;

are permitted to restrict tow-times instead of using TEDs. See the 1996 Guidelines, p. 17343. In the oral hearing, the United States informed us that the exception for restricted tow-times is no longer available.

[161]1996 Guidelines, p. 17344.

[162]*Ibid.*

[163]Statements by the United States at the oral hearing.

[164]Statement by the United States at the oral hearing.

[165]Panel Report, para. 7.56.

> (3) *encourage such other agreements* to promote the purposes of this section *with other nations* for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;
> (4) *initiate the amendment of any existing international treaty* for the protection and conservation of such species of sea turtles to which the United States is a party *in order to make such treaty consistent with the purposes and policies of this section*; and
> (5) provide to the Congress by not later than one year after the date of enactment of this section: …
>
> (C) a full report on:
> (i) the results of his efforts under this section; …
> (emphasis added)

Apart from the negotiation of the Inter-American Convention for the Protection and Conservation of Sea Turtles[166] (the "Inter-American Convention") which concluded in 1996, the record before the Panel does not indicate any serious, substantial efforts to carry out these express directions of Congress.[167]

168. Second, the protection and conservation of highly migratory species of sea turtles, that is, the very policy objective of the measure, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations. The need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations. As stated earlier, the Decision on Trade and Environment, which provided for the establishment of the CTE and set out its terms of reference, refers to both the Rio Declaration on Environment and Development and Agenda 21.[168] Of particular relevance is Principle 12 of the Rio Declaration on Environment and Development, which states, in part:

> Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. *Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.*(emphasis added)

In almost identical language, paragraph 2.22(i) of Agenda 21 provides:

> Governments should encourage GATT, UNCTAD and other relevant international and regional economic institutions to examine, in accordance with their respective mandates and competences, the following propositions and principles: …
>
> (i) Avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country. *Environmental measures addressing transborder problems should, as far as possible, be based on an international consensus*.(emphasis added)

Moreover, we note that Article 5 of the Convention on Biological Diversity states:

> … each contracting party shall, as far as possible and as appropriate, cooperate with other contracting parties directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.

The Convention on the Conservation of Migratory Species of Wild Animals, which classifies the relevant species of sea turtles in its Annex I as "Endangered Migratory Species", states:

> The contracting parties [are] convinced that conservation and effective management of migratory species of wild animals requires the concerted action of all States within the national boundaries of which such species spend any part of their life cycle.

Furthermore, we note that WTO Members in the Report of the CTE, forming part of the Report of the General Council to Ministers on the occasion of the Singapore Ministerial Conference, endorsed and supported:

> … *multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature*. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue *shared goals*, and in the development of a mutually supportive relationship between them, *due respect must be afforded to both*. [169] (emphasis added)

169. Third, the United States did negotiate and conclude one regional international agreement for the protection and conservation of sea turtles: The Inter-American Convention. This Convention was opened for signature on 1 December 1996 and has been signed by five countries[170], in addition to the United States, and four of these countries are currently certified under Section 609.[171] This Convention has not yet been ratified by any of its signatories. The Inter-American Convention provides that each party shall take "appropriate and necessary measures" for the protection, conservation and recovery of sea turtle populations and their habitats within such party's land territory and in maritime areas with respect to which it exercises sovereign rights or jurisdiction.[172] Such measures include, notably,

> [t]he reduction, to the greatest extent practicable, of the incidental capture, retention, harm or mortality of sea turtles in the course of fishing activities, through the appropriate regulation of such activities, as well as the development, improvement and use of appropriate gear,

[166]First written submission of the United States to the Panel, Exhibit AA.

[167]Panel Report, para. 7.56.

[168]See Decision on Trade and Environment, preamble and para. 2(b). See *Supra*, para. 154.

[169]Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996, para. 171, Section VII of the Report of the General Council to the 1996 Ministerial Conference, WT/MIN(96)/2, 26 November 1996.

[170]Brazil, Costa Rica, Mexico, Nicaragua and Venezuela.

[171]As of 1 January 1998, Brazil was among those countries certified as having adopted programs to reduce the incidental capture of sea turtles in shrimp fisheries comparable to the United States' program. See Panel Report, para. 2.16. However, according to information provided by the United States at the oral hearing, Brazil is not currently certified under Section 609.

[172]Inter-American Convention, Article IV.1.

> devices or techniques, including the use of turtle excluder devices (TEDs) pursuant to the provisions of Annex III [of the Convention].[173]

Article XV of the Inter-American Convention also provides, in part:

> Article XV
> Trade Measures
>
> 1. *In implementing this Convention, the Parties shall act in accordance with the provisions of the Agreement establishing the World Trade Organization* (WTO), as adopted at Marrakesh in 1994, including its annexes.
>
> 2. In particular, and *with respect to the subject-matter of this Convention, the Parties shall act in accordance with the provisions of* the Agreement on Technical Barriers to Trade contained in Annex 1 of the WTO Agreement, as well as *Article XI of the General Agreement on Tariffs and Trade of 1994*. …(emphasis added)

170. The juxtaposition of (a) the *consensual* undertakings to put in place regulations providing for, *inter alia*, use of TEDs *jointly determined* to be suitable for a particular party's maritime areas, with (b) the reaffirmation of the parties' obligations under the *WTO Agreement*, including the *Agreement on Technical Barriers to Trade* and Article XI of the GATT 1994, suggests that the parties to the Inter-American Convention together marked out the equilibrium line to which we referred earlier. The Inter-American Convention demonstrates the conviction of its signatories, including the United States, that consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles. Moreover, the Inter-American Convention emphasizes the continuing validity and significance of Article XI of the GATT 1994, and of the obligations of the *WTO Agreement* generally, in maintaining the balance of rights and obligations under the *WTO Agreement* among the signatories of that Convention.

171. The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609. It is relevant to observe that an import prohibition is, ordinarily, the heaviest "weapon" in a Member's armoury of trade measures. The record does not, however, show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States, attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles[174] before imposing the import ban.

172. Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when

[173]Inter-American Convention, Article IV.2(h).

[174]While the United States is a party to CITES, it did not make any attempt to raise the issue of sea turtle mortality due to shrimp trawling in the CITES Standing Committee as a subject requiring concerted action by states. In this context, we note that the United States, for example, has not signed the Convention on the Conservation of Migratory Species of Wild Animals or UNCLOS, and has not ratified the Convention on Biological Diversity.

we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements.[175] The principal consequence of this failure may be seen in the resulting unilateralism evident in the application of Section 609. As we have emphasized earlier, the policies relating to the necessity for use of particular kinds of TEDs in various maritime areas, and the operating details of these policies, are all shaped by the Department of State, without the participation of the exporting Members. The system and processes of certification are established and administered by the United States agencies alone. The decision-making involved in the grant, denial or withdrawal of certification to the exporting Members, is, accordingly, also unilateral. The unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability.

173. The application of Section 609, through the implementing guidelines together with administrative practice, also resulted in other differential treatment among various countries desiring certification. Under the 1991 and 1993 Guidelines, to be certifiable, fourteen countries in the wider Caribbean/western Atlantic region had to commit themselves to require the use of TEDs on all commercial shrimp trawling vessels by 1 May 1994. These fourteen countries had a "phase-in" period of three years during which their respective shrimp trawling sectors could adjust to the requirement of the use of TEDs. With respect to all other countries exporting shrimp to the United States (including the appellees, India, Malaysia, Pakistan and Thailand), on 29 December 1995, the United States Court of International Trade directed the Department of State to apply the import ban on a world-wide basis not later than 1 May 1996.[176] On 19 April 1996, the 1996 Guidelines were issued by the Department of State bringing shrimp harvested in *all* foreign countries within the scope of Section 609, effective 1 May 1996. Thus, all countries that were not among the fourteen in the wider Caribbean/western Atlantic region had only four months to implement the requirement of compulsory use of TEDs. We acknowledge that the greatly differing periods for putting into operation the requirement for use of TEDs resulted from decisions of the Court of International Trade. Even so, this does not relieve the United States of the legal consequences of the discriminatory impact of the decisions of that Court. The United States, like all other Members of the WTO and of the general community of states, bears responsibility for acts of all its departments of government, including its judiciary.[177]

174. The length of the "phase-in" period is not inconsequential for exporting countries desiring certification. That period relates directly to the onerousness of the burdens of complying with the requisites of certification and the practical feasibility of locating and developing alternative export markets for shrimp. The shorter that period, the heavier the burdens of compliance, particularly where an applicant has a large number of trawler vessels, and the greater the difficulties of re-orienting the harvesting country's shrimp exports. The shorter that period, in net effect, the heavier the influence of the import ban. The United States sought to explain the marked difference between "phase-in" periods granted to the fourteen wider Caribbean/western Atlantic countries and those allowed the rest of the shrimp exporting countries. The United States asserted that the longer time-period was justified by the then undeveloped character of TED technology, while the shorter period was later made possible by the improvements in that technology. This explanation is less than persuasive, for it does not address the administrative and financial costs and the difficulties of

[175]Section 609(a).

[176]*Earth Island Institute* v. *Warren Christopher*, 913 F. Supp. 559 (CIT 1995).

[177]See *United States - Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 28. Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's 1992), p. 545; and I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 450.

governments in putting together and enacting the necessary regulatory programs and "credible enforcement effort", and in implementing the compulsory use of TEDs on hundreds, if not thousands, of shrimp trawl vessels.[178]

175. Differing treatment of different countries desiring certification is also observable in the differences in the levels of effort made by the United States in transferring the required TED technology to specific countries. Far greater efforts to transfer that technology successfully were made to certain exporting countries -- basically the fourteen wider Caribbean/western Atlantic countries cited earlier -- than to other exporting countries, including the appellees.[179] The level of these efforts is probably related to the length of the "phase-in" periods granted -- the longer the "phase-in" period, the higher the possible level of efforts at technology transfer. Because compliance with the requirements of certification realistically assumes successful TED technology transfer, low or merely nominal efforts at achieving that transfer will, in all probability, result in fewer countries being able to satisfy the certification requirements under Section 609, within the very limited "phase-in" periods allowed them.

176. When the foregoing differences in the means of application of Section 609 to various shrimp exporting countries are considered in their cumulative effect, we find, and so hold, that those differences in treatment constitute "unjustifiable discrimination" between exporting countries desiring certification in order to gain access to the United States shrimp market within the meaning of the chapeau of Article XX.

3. "Arbitrary Discrimination"

177. We next consider whether Section 609 has been applied in a manner constituting "arbitrary discrimination between countries where the same conditions prevail". We have already observed that Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification under Section 609(b)(2)(A) and (B) adopt a comprehensive regulatory program that is essentially the same as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries.[180] Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions.[181] In our view, this rigidity and inflexibility also constitute "arbitrary discrimination" within the meaning of the chapeau.

178. Moreover, the description of the administration of Section 609 provided by the United States in the course of these proceedings highlights certain problematic aspects of the certification processes applied under Section 609(b). With respect to the first type of certification, under Section 609(b)(2)(A) and (B), the 1996 Guidelines set out certain elements of the procedures for acquiring certification, including the requirement to submit documentary evidence of the regulatory program adopted by the applicant country. This certification process also generally includes a visit by United States officials to the applicant country.[182]

179. With respect to certifications under Section 609(b)(2)(C), the 1996 Guidelines state that the Department of State "shall certify" any harvesting nation under Section 609(b)(2)(C) if it meets the criteria in the 1996 Guidelines "without the need for action on the part of the government of the harvesting nation … ."[183] Nevertheless, the United States informed us that, in all cases where a country has not previously been certified under Section 609, it waits for an application to be made before making a determination on certification.[184] In the case of certifications under Section 609(b)(2)(C), there appear to be certain opportunities for the submission of written evidence, such as scientific documentation, in the course of the certification process.[185]

180. However, with respect to neither type of certification under Section 609(b)(2) is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes under Section 609 consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service.[186] With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C).[187] Countries which are granted certification are included in a list of approved applications published in the Federal Register; however, they are not notified specifically. Countries whose applications are denied[188] also do not receive notice of such denial (other than by omission from the list of approved applications) or of the reasons for the denial.[189] No procedure for review of, or appeal from, a denial of an application is provided.[190]

181. The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. There appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, *vis-à-vis* those Members which are granted certification.

[178]For example, at the oral hearing, India stated that its "number of mechanized nets is estimated at about 47,000. Most of these are mechanized vessels … ."

[179]Response by the United States to questioning by the Panel; statements by the United States at the oral hearing.

[180]*Supra*, paras. 161-164.

[181]In the oral hearing, the United States stated that "as a policy matter, the United States government believes that all governments should require the use of turtle excluder devices on all shrimp trawler boats that operate in areas where there is a likelihood of intercepting sea turtles" and that "when it comes to shrimp trawling, we know of only one way of effectively protecting sea turtles, and that is through TEDs."

[182]Statement by the United States at the oral hearing.

[183]1996 Guidelines, p. 17343.

[184]Statement by the United States at the oral hearing.

[185]Statement by the United States at the oral hearing.

[186]Statement by the United States at the oral hearing.

[187]Statement by the United States at the oral hearing.

[188]We were advised at the oral hearing by the United States that these include: Australia, Pakistan and Tunisia.

[189]Statement by the United States at the oral hearing.

[190]Statement by the United States at the oral hearing.

182. The provisions of Article X:3[191] of the GATT 1994 bear upon this matter. In our view, Section 609 falls within the "laws, regulations, judicial decisions and administrative rulings of general application" described in Article X:1. Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other Members.

183. It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and *ex parte* nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994.

184. We find, accordingly, that the United States measure is applied in a manner which amounts to a means not just of "unjustifiable discrimination", but also of "arbitrary discrimination" between countries where the same conditions prevail, contrary to the requirements of the chapeau of Article XX. The measure, therefore, is not entitled to the justifying protection of Article XX of the GATT 1994. Having made this finding, it is not necessary for us to examine also whether the United States measure is applied in a manner that constitutes a "disguised restriction on international trade" under the chapeau of Article XX.

185. In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

186. What we *have* decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable

[191]Article X:3 states, in part:

> (a) Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.
>
> (b) Each Member shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters … .

discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in *United States – Gasoline*, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the *WTO Agreement*.[192]

VII. Findings and Conclusions

187. For the reasons set out in this Report, the Appellate Body:

(a) reverses the Panel's finding that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU;

(b) reverses the Panel's finding that the United States measure at issue is not within the scope of measures permitted under the chapeau of Article XX of the GATT 1994, and

(c) concludes that the United States measure, while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994.

188. The Appellate Body *recommends* that the DSB request the United States to bring its measure found in the Panel Report to be inconsistent with Article XI of the GATT 1994, and found in this Report to be not justified under Article XX of the GATT 1994, into conformity with the obligations of the United States under that Agreement.

[192]Adopted 20 May 1996, WT/DS2/AB/R, p. 30.

Report of the Appellate Body,
United States – Import Prohibition of Certain Shrimp and Shrimp Products; Recourse to Article 21.5 of the DSU by Malaysia,
WT/DS58/AB/RW, adopted 22 October 2001

WORLD TRADE ORGANIZATION

WT/DS58/AB/RW
22 October 2001
(01-5166)

Original: English

UNITED STATES – IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MALAYSIA

AB-2001-4

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Import Prohibition of Certain Shrimp and Shrimp Products

Recourse to Article 21.5 of the DSU by Malaysia

Malaysia, *Appellant*
United States, *Appellee*

Australia, *Third Participant*
European Communities, *Third Participant*
Hong Kong, China, *Third Participant*
India, *Third Participant*
Japan, *Third Participant*
Mexico, *Third Participant*
Thailand, *Third Participant*

AB-2001-4

Present:

Bacchus, Presiding Member
Ganesan, Member
Lacarte-Muró, Member

I. Introduction

1. Malaysia appeals from certain issues of law and legal interpretations in the Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* (the "Panel Report").[1] In accordance with Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Malaysia requested that the Dispute Settlement Body (the "DSB") refer to a panel its complaint with respect to whether the United States had complied with the recommendations and rulings of the DSB in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*").

2. The background to this dispute is set out in detail in the Panel Report.[2] On 6 November 1998, the DSB adopted the reports of the original panel and the Appellate Body in *United States – Shrimp*.[3] The DSB recommended that the United States bring its import prohibition into conformity with its obligations under the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"). On 6 December 1999, the period of time for implementation established by the parties under Article 21.3(b) of the DSU expired.[4] At the DSB meeting of 23 October 2000, Malaysia informed the DSB that it was not satisfied that the United States had complied with the

[1]WT/DS58/RW, 15 June 2001.

[2]Panel Report, paras. 1.1-1.5 and 2.12-2.21.

[3]Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998; original panel report, WT/DS58/R and Corr.1, as modified by the Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998.

[4]WT/DS58/15, 15 July 1999.

recommendations and rulings of the DSB, and announced that it wished to seek recourse to a panel under Article 21.5 of the DSU.[5] The DSB referred the matter to the original panel.

3. Malaysia's complaint relates to a measure taken by the United States in the form of an import prohibition to protect and conserve certain species of sea turtles, considered to be an endangered species. This original measure, Section 609 of the United States Public Law 101-162 ("Section 609"), and its application are described in detail in the Appellate Body Report in *United States – Shrimp*.[6] The Appellate Body found that Section 609 was provisionally justified under Article XX(g) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). In implementing the recommendations and rulings of the DSB, the United States did not amend Section 609, with the result that the import prohibition is still in effect. However, the United States Department of State issued the Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations (the "Revised Guidelines").[7] These Revised Guidelines replace the guidelines issued in April 1996 that were part of the original measure. This dispute between Malaysia and the United States arises in relation to the import prohibition of shrimp and shrimp products provided for by Section 609, and its application by the United States.

4. Section 609, the Revised Guidelines, and their application, are described in the Panel Report.[8] In the following paragraphs, we set out those aspects of the Revised Guidelines that are pertinent to the consideration of the issues raised in this appeal.

5. Section 609(b)(2) provides that the import prohibition on shrimp does not apply to harvesting nations that are "certified" according to criteria set by the United States. The Revised Guidelines set forth the criteria for certification. The stated goal of the programme set out in the Revised Guidelines is the same as that set out in the programme of the original guidelines, namely, to protect endangered sea turtle populations from further decline by reducing their incidental mortality in commercial shrimp trawling. A central element of the United States programme is that commercial shrimp trawlers are required to use Turtle Excluder Devices ("TEDs") approved in accordance with standards established by the United States National Marine Fisheries Service. Where the government of a harvesting country seeks certification on the basis of having adopted a programme that is based on TEDs, certification will be granted if this government's programme includes a requirement that commercial shrimp trawlers use TEDs that are "*comparable in effectiveness*" to those used in the United States, and a credible enforcement effort that includes monitoring for compliance.[9]

6. Under the original guidelines, the practice of the Department of State was to certify countries *only after* they had shown that they required the use of TEDs. Under the Revised Guidelines, countries may apply for certification even if they do not require the use of TEDs. In such cases, a harvesting country has to demonstrate that it has implemented, and is enforcing, a "*comparably effective*" regulatory programme to protect sea turtles without the use of TEDs. The Department of State is required "to take fully into account any demonstrated differences between the shrimp fishing

[5]Malaysia's recourse to a panel was also in accordance with a bilateral agreement it had concluded with the United States in respect of the procedures to be followed under Articles 21.5 and 22 of the DSU. *See*, WT/DS58/16, 12 January 2000.

[6]*Supra,* footnote 3, paras. 3-6.

[7]United States Department of State, Federal Register Vol. 64, No. 130, 8 July 1999, Public Notice 3086, pp. 36946 – 36952. The Revised Guidelines are attached to the Panel Report.

[8]Panel Report, paras. 2.5 – 2.11 and 2.22 – 2.32.

[9]Panel Report, para. 2.25.

conditions in the United States and those in other nations, as well as information available from other sources."[10]

7. An exporting country may also be certified if its shrimp fishing environment does not pose a threat of incidental capture of sea turtles. The Revised Guidelines provide that the Department of State shall certify a harvesting country pursuant to Section 609 if it meets any of the following criteria: the relevant species of sea turtles do not occur in waters subject to that country's jurisdiction; in that country's waters, shrimp is harvested exclusively by means that do not pose a threat to sea turtles, for example, any country that harvests shrimp exclusively by artisanal means; or, commercial shrimp trawling operations take place exclusively in waters in which sea turtles do not occur.[11]

8. Before the Panel, Malaysia argued that the United States had failed to comply with the recommendations and rulings of the DSB, and that, consequently, the United States continued to violate its obligations under the GATT 1994. In its Report circulated on 15 June 2001, the Panel found as follows:

> (a) [t]he measure adopted by the United States in order to comply with the recommendations and rulings of the DSB violates Article XI.1 of the GATT 1994;
>
> (b) in light of the recommendations and rulings of the DSB, Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied.[12]

9. The Panel urged "Malaysia and the United States to cooperate fully in order to conclude as soon as possible an agreement which will permit the protection and conservation of sea turtles to the satisfaction of all interests involved and taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment."[13] (footnote omitted)

10. On 23 July 2001, Malaysia notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 2 August 2001, Malaysia filed its appellant's submission.[14] On 17 August 2001, the United States filed an appellee's submission.[15] On the same day, Australia, the European Communities, Hong Kong, China, India, Japan, Mexico and Thailand each filed a third participant's submission.[16]

11. On 13 August 2001, the United States requested that the Division hearing this appeal change the date of the oral hearing set out in the working schedule for this appeal. After inviting the participants to make their views known with respect to this request, the Division ruled that it would not change the date of the oral hearing. Accordingly, the oral hearing in the appeal was held on 4 September 2001. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division.

[10] *Ibid.*, para. 2.28.

[11] *Ibid.*, para. 2.29.

[12] Panel Report, para. 6.1.

[13] *Ibid.*, para. 7.2.

[14] Pursuant to Rule 21 of the *Working Procedures.*

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by Malaysia – Appellant*

1. Terms of Reference

12. Malaysia submits that the Panel erred in its examination of the new measure taken by the United States to comply with the recommendations and rulings of the DSB in *United States – Shrimp.*

13. Malaysia submits that it is a legal principle that an implementing measure must be examined for conformity with the covered agreements rather than for conformity with the recommendations and rulings of the DSB. This principle is borne out in the case in *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU* ("*Canada – Aircraft (21.5)*")[17], where the Appellate Body held that the scope of Article 21.5 dispute settlement proceedings is not limited to the issue of whether or not a WTO Member has implemented the recommendations and rulings of the DSB. The Appellate Body ruled that the task of the panel was to determine whether the new measure is consistent with the disputed provisions of the *WTO Agreement*.

14. Malaysia submits that, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measure taken to comply" only from the perspective of the claims, arguments and factual circumstances that relate to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Malaysia submits that Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure that was not before the original panel. In Malaysia's view, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure.

15. Malaysia argues that the Panel erred in its treatment of the Appellate Body Report in *United States – Shrimp*. First, Malaysia asserts that in relying solely on the reasoning of the Appellate Body, the Panel has in fact relied on the claims and arguments brought by the parties that related to the original measure. Second, Malaysia argues that the Panel erred in treating the Appellate Body

[15] Pursuant to Rule 22 of the *Working Procedures*.

[16] Pursuant to Rule 24 of the *Working Procedures*. Ecuador, a third party in the proceedings before the Panel, did not file a third participant's submission, but requested permission to attend the oral hearing as a "passive observer". After consulting the participants and third participants, the Division hearing this appeal granted Ecuador permission to attend the oral hearing in this capacity.

[17] Appellate Body Report, WT/DS70/AB/RW, adopted 4 August 2000.

Report in *United States – Shrimp* as having proposed alternative courses of conduct or alternative measures as *conditions* which, if fulfilled, would necessarily render the implementing measure consistent with the relevant covered agreement. In Malaysia's view, the alternative courses of conduct or alternative measures referred to by the Appellate Body were *dicta*, and, therefore, the Panel erred in interpreting these *dicta* as positive conditions for determining GATT-consistency.

2. The Chapeau of Article XX of the GATT 1994

16. Malaysia appeals certain of the Panel's conclusions under the chapeau of Article XX of the GATT 1994. In particular, Malaysia submits that the Panel erred in considering the obligation of the United States as an obligation to *negotiate*, as opposed to an obligation to *conclude* an international agreement.

17. Malaysia notes that the Appellate Body made pertinent observations and comments in its analysis of the chapeau of Article XX of the GATT 1994 with respect to "arbitrary or unjustifiable discrimination". In its treatment of "unjustifiable discrimination" the Appellate Body stated "[a]nother aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members".[18] In Malaysia's view, these remarks of the Appellate Body emphasize the need for the *conclusion* of an international agreement.

18. Malaysia submits that these remarks of the Appellate Body constitute *dicta*. The Panel misunderstood these remarks to mean that alternative actions, in particular a demonstration of prior good faith negotiation, would "insulate" a unilateral measure from being characterized as "unjustifiable discrimination". It is further submitted that in the context of the new measure, the Panel failed to examine whether, in the circumstances, the United States acted in a manner constituting "unjustifiable discrimination".

19. Malaysia further contends that if the conclusion of the Panel is allowed to stand, it will lead to the "incongruous" result that any WTO Member would be able to offer to negotiate in good faith an agreement incorporating its "unilaterally defined standards" before claiming that its measure is justified under the pertinent exceptions of Article XX of the GATT 1994. According to Malaysia, the conclusion of the Panel will thus lead to the result that if a WTO Member fails to *conclude* an agreement, it could still claim that its application of a unilateral measure does not constitute "unjustifiable discrimination".

20. In addition, Malaysia submits that the Panel erred in concluding that the Inter-American Convention for the Protection and Conservation of Sea Turtles (the "Inter-American Convention") can reasonably be considered as a benchmark of what can be achieved through multilateral negotiations in the field of protection and conservation. The Panel did not provide any reasoning for taking this view. The Appellate Body cited the Inter-American Convention merely as an "example" of efforts made by the United States to reach a multilateral solution in relation to the conservation of sea turtles. In no sense was that convention considered as a "legal standard" by the Appellate Body. Moreover, the Appellate Body stated that one of the obligations which the United States had to fulfill in order to avoid "unjustifiable discrimination" was to engage in serious efforts to negotiate in good faith *before* the enforcement of a "unilateral" import prohibition.

[18]Appellate Body Report, *United States – Shrimp*, *supra*, footnote 3, para. 166.

21. Malaysia submits that the Panel's legal interpretation is erroneous because the United States had not proven that the unilateral and non-consensual procedures of the import prohibition had been eliminated. On the contrary, the ongoing negotiations on the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asian Region (the "South-East Asian MOU") demonstrated that an alternative and less trade restrictive course of action for securing the legitimate goals of the United States measure, was available. The logical consequence of the above argument is that the negotiations are underway, and, therefore, the import prohibition should be lifted.

22. Malaysia also appeals the Panel's conclusions under the heading "[m]easures comparable in effectiveness to the United States measure". Malaysia submits that the Appellate Body spoke of measures comparable in effectiveness to the United States measures in the context of illustrating the difference between the design and the application of the original measure.[19] The Appellate Body noted that while the design of the measure permitted certification of countries with measures comparable in effectiveness to United States measures, this was not the way in which the measure was applied in fact. The Panel misread this observation of the Appellate Body to mean that a measure requiring that exporting countries adopt regulatory programmes that are comparable in effectiveness to that of an importing country could not constitute "unjustifiable discrimination".

23. Malaysia contends that the Appellate Body did not accept the legitimacy of "comparable measures" – either implicitly or otherwise. Rather, it was merely describing the intended operation of the original measure. This is evident, *inter alia*, from the fact that the term "comparable in effectiveness" is the language of the 1996 Guidelines, which implemented the original measure. The Appellate Body was in no way authorizing importing Members to impose unilateral measures conditioning market access on an exporting Member having measures "comparable in effectiveness" to their own measures. The Panel, therefore, erred in assuming that the new measure, which imposed this requirement of measures "comparable in effectiveness to the United States regulatory programme", could not constitute unjustifiable discrimination.

24. Malaysia also submits that the Panel erred in finding that the Revised Guidelines allowed for *flexibility*, as they take account of situations where sea turtles are not endangered by shrimp trawling. Malaysia submits that the Revised Guidelines address only the incidental capture of sea turtles in the course of shrimp trawl harvesting. Close scrutiny of the Revised Guidelines discloses that they do not address the fact that the same conditions do not prevail in Malaysia. Malaysia does not practise shrimp trawling and the incidental capture of sea turtles in Malaysian waters is due to fish trawling and not shrimp trawling. Thus the Revised Guidelines fail to take into account the specific conditions prevailing in Malaysia and they, therefore, violate the chapeau of Article XX of the GATT 1994.

25. Malaysia appeals the Panel's treatment of the decision of the United States Court of International Trade (the "CIT") in *Turtle Island Restoration Network, et al. v. Robert L. Mallett, et al.*[20] (the "*Turtle Island* case"). Malaysia is of the view that, in declining to consider this decision, the Panel erred in taking the view that municipal law is insulated from scrutiny by panels. Malaysia submits that had the Panel scrutinized the decision in the *Turtle Island* case, and assessed the likelihood and consequences of the Revised Guidelines being modified in the future, it would have found that the "unjustifiable discrimination" under the chapeau of Article XX of the GATT 1994 has not been eliminated.

[19]Appellate Body Report, *United States – Shrimp*, *supra*, footnote 3, para. 163.

[20]110 Fed. Supp. 2d 1005 (CIT, 2000).

26. Finally, Malaysia requests that the Appellate Body recommend that the import prohibition be lifted so as to give effect to the recommendations and rulings of the DSB as per the Appellate Body Report.

B. *Arguments of the United States – Appellee*

1. Terms of Reference

27. The United States submits that Malaysia's argument that the Panel failed to apply the correct scope of review in accordance with Article 21.5 of the DSU is without merit. Malaysia's reliance in this regard on the Appellate Body Report in *Canada – Aircraft (21.5)* is misplaced. The issue in that appeal was whether the Panel's review was limited to issues considered in the original panel and Appellate Body proceedings. The Appellate Body found that the DSU imposed no such limitation. In the present case, however, the Panel's scope of review was fully consistent with the Appellate Body findings in *Canada – Aircraft (21.5)*.

28. The United States observes that the Panel in this case quoted at length from the Appellate Body Report in *Canada – Aircraft (21.5)*. The Panel then concluded that it was fully entitled to address *all* the claims of Malaysia under Article XI and Article XX of the GATT 1994, whether or not these claims, the arguments and the facts supporting them were made before the original panel and the Appellate Body proceedings.

29. The United States argues that Malaysia's argument is based solely on the Panel's use of the phrase "recommendations and rulings of the DSB". In the view of the United States, the Panel's use of the phrase "complied with the recommendations and rulings of the DSB", is entirely appropriate, and indicates no limitation in its scope of review. In the context of this case, the recommendations and rulings of the DSB are that the United States "bring its measure … into conformity with the obligations of the United States under [the GATT 1994]". The GATT 1994 is the only covered agreement at issue in the dispute.

2. The Chapeau of Article XX of the GATT 1994

30. The United States submits that the Panel correctly found that the United States has remedied the aspect of discrimination relating to differences in efforts to negotiate a bilateral or multilateral agreement. In its previous ruling in *United States - Shrimp*, the Appellate Body found that certain aspects of the application of Section 609, in their "cumulative effect", amounted to unjustifiable discrimination between countries where the same conditions prevail. One of those aspects related to efforts to negotiate. The Appellate Body then cited, and relied upon, the factual findings of the original panel concerning the absence of serious efforts of the United States to negotiate a conservation agreement with the complaining WTO Members.

31. The United States contends that it has proceeded to remedy this aspect of unjustifiable discrimination identified by the Appellate Body. In particular, the United States has made substantial efforts to negotiate a sea turtle conservation agreement in the Indian Ocean and South-East Asia region. The Panel found that these efforts did remedy this aspect of unjustifiable discrimination.

32. The United States submits that Malaysia does not contest the core findings of the Panel, namely, that the United States has engaged in serious, good faith efforts to negotiate a sea turtle conservation agreement with the countries in the Indian Ocean and South-East Asia region. The Panel considered whether the United States had addressed the effort-to-negotiate aspect of "unjustifiable discrimination" identified by the Appellate Body, and properly found that the United States had indeed remedied this aspect of discrimination.

33. The United States submits that, instead of addressing the pertinent findings of the Panel, Malaysia makes a number of arguments that are either based on mischaracterization of the Panel

Report, or that amount to a request for a reversal of the key findings of the Appellate Body Report in *United States – Shrimp*. Malaysia argues that the Panel found that "a demonstration of prior good faith negotiation would insulate a unilateral measure from being characterized as unjustifiable discrimination."[21] In the United States view, this argument fails to take into account the context of the Panel's discussions of efforts to negotiate, and thus amounts to a mischaracterization of the findings of the Panel.

34. The United States submits that the discussions by the Appellate Body and the Panel concerning negotiations arise in the context of applying the Article XX chapeau to the specific facts of this case. The language of the chapeau of Article XX requires that the WTO Member imposing the measure demonstrates that a measure is not applied in a manner that constitutes a means of unjustifiable discrimination. In the view of the United States, no single aspect of the application of the measure can, as Malaysia puts it, "insulate" the measure from an examination of other aspects of alleged discrimination.

35. The United States contends that it has addressed the "unjustifiable discrimination" test of the chapeau by making the *prima facie* case that the United States measure does not result in unjustifiable discrimination between countries where the same conditions prevail. In particular, in the original panel and Appellate Body proceedings, the United States showed the absence of any "unjustifiable discrimination between countries where the same conditions prevail" by demonstrating that it applies the import restrictions even-handedly with respect to all countries that engage in shrimp trawl fishing in waters inhabited by endangered sea turtles.

36. The United States notes Malaysia's argument that the Panel "erred" in concluding that the Inter-American Convention on sea turtle conservation "can reasonably be considered as a benchmark of what can be achieved through multilateral negotiations."[22] The United States submits that Malaysia has cited the Panel Report out of context. The Panel properly considered the United States efforts to negotiate for the purpose of determining whether the United States had remedied this aspect of discrimination identified by the Appellate Body. In this context, the Panel examined the efforts to negotiate involved in concluding the Inter-American Convention, and compared them with the efforts made by the United States to negotiate a sea turtle conservation agreement for the Indian Ocean and South-East Asia region. It was only in this sense that the Panel considered the Inter-American Convention to be a "benchmark".

37. Regarding Malaysia's argument that the Panel erred in finding the United States measure to be consistent with the *WTO Agreement* because "the United States had not proven that the unilateral and non-consensual procedures of the import prohibition had been eliminated", the United States submits that this argument runs counter to the finding in the Appellate Body Report reaffirming that nothing in the text of Article XX requires the elimination of a measure simply by virtue of it being "unilateral".

38. The United States refers to Malaysia's argument that the Panel erred in finding the United States measure to be consistent with the *WTO Agreement* because the Indian Ocean and South-East Asia negotiations constitute an "alternative course of action for securing the legitimate goals of the United States measure which was less restrictive." According to the United States, this argument is based on the flawed premise that a WTO Member must exhaust all possibilities for achieving its goals in other ways. The *WTO Agreement* contains no such requirement, and the Appellate Body made no such finding.

[21]Malaysia's appellant's submission, para. 3.11.

[22]Malaysia's appellant's submission, para. 3.13.

39. The United States submits that the Panel was correct in finding that the United States had remedied the aspect of unjustifiable discrimination identified in the Appellate Body Report relating to flexibility and consideration of local conditions.

40. The Appellate Body found that the most conspicuous flaw in the application of Section 609 was an apparent requirement that all other exporting Members adopt essentially the same policy as that applied to domestic shrimp trawlers of the United States. The Appellate Body noted that the statutory provisions of Section 609 do not, in themselves, require that other WTO Members adopt essentially the same policies and enforcement practices as the United States, but that the guidelines then in effect appeared to lack flexibility. The Appellate Body also found that the guidelines did not appear to allow for flexibility in the consideration of different conditions that may exist in different harvesting nations.

41. The United States argues that Malaysia does not take issue with the Panel's analysis of the language in the Revised Guidelines. In addition, Malaysia did not seek to test the flexibility of the guidelines in practice by seeking certification of the Malaysian programme for conserving sea turtles in shrimp trawl fisheries.

42. The United States refers to Malaysia's argument that the Revised Guidelines do not address Malaysia's claim that "Malaysia does not practise shrimp trawling and the incidental catch of sea turtles is due to fish trawling and not shrimp trawling."[23] According to the United States, this "vague, undeveloped argument" does not rebut the *prima facie* case that the revised United States guidelines do in fact allow for flexibility and consideration of local conditions.

43. In the view of the United States, Malaysia's argument that the Panel "erred in taking the view that the issue of municipal law is insulated from scrutiny by panels" mischaracterizes the Panel's findings, and is without merit. The Panel considered the record before it, and properly concluded that under the Revised Guidelines, the importation of shrimp harvested by vessels using TEDs is allowed, even if the exporting nation has not been certified pursuant to Section 609.

44. With respect to the *Turtle Island* case, the United States submits that Malaysia does not present any arguments as to why the Panel was incorrect in its reasoning with respect to the relevant domestic law. As the Panel noted, the domestic court expressly declined to order any change in the Revised Guidelines, and those provisions of the Revised Guidelines that allow the importation of TED-caught shrimp from non-certified countries remain in effect.

C. *Arguments of the Third Participants*

1. Australia

(a) Terms of Reference

45. Australia submits that, in accordance with the provisions of Article 21.5 of the DSU, a panel is required to examine the consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB. This requires the relevant panel to conduct a fresh factual and legal analysis of the revised or new measure.

46. It is Australia's view that the Panel in this case did not examine the measures taken to comply on that basis. Had it done so, Australia submits that the Panel would not have had sufficient grounds

[23]Malaysia's appellant's submission, para. 3.21.

to arrive at the finding that Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the United States authorities, is justified under Article XX of the GATT 1994.

(b) The Chapeau of Article XX of the GATT 1994

47. Australia argues that the Panel erred in its conclusion that engagement by the United States in good faith negotiations would, in itself, necessarily be sufficient to meet the requirement of the chapeau of Article XX that its measure not be applied in a manner involving unjustifiable discrimination. This approach is inconsistent with the text of the chapeau of Article XX, and misapplies the reasoning of the Appellate Body Report.

48. Australia is of the view that the Panel misconstrued the Appellate Body findings, and the requirements of the chapeau of Article XX, in concluding that the United States would be entitled to maintain the implementing measure if it were demonstrated that it was making serious, good faith efforts to conclude an international agreement on the protection and conservation of sea turtles. This interpretation would seriously impair the delicate balance of rights and obligations embodied in Article XX and open the door for WTO Members to justify unilaterally-imposed trade restrictions simply on the basis of simultaneous entry into international negotiations. Article XX does not proscribe unilateral trade restrictions, but a reasonable degree of limitation must be imposed on their use – in line with the wording of the chapeau – if the balance of rights and obligations is to be preserved.

49. Australia submits that it is for the United States to demonstrate what serious, good faith efforts it had undertaken to obviate or eliminate the unjustifiably discriminatory nature of the ban – including in the design, extent and implementation of the measure. The progress of the Indian Ocean initiative has demonstrated the existence of a viable, non-discriminatory alternative to the unilateral import restriction. Given this progress, the United States has not established why its unilateral import restriction is no longer a form of unjustifiable discrimination.

50. Australia argues that the Panel did not ensure that the United States effectively met its burden of proof in seeking to justify its measure pursuant to Article XX. In particular, the United States did not prove that its measure was consistent with the requirements of the chapeau of Article XX. The fact that the United States did not present sufficient evidence to demonstrate that the measure was not a means of unjustifiable discrimination meant that the Panel could not have found that the United States measure met the requirements of the chapeau.

2. European Communities

(a) Terms of Reference

51. The European Communities submits that, given that measures taken to comply with the recommendations and rulings of the DSB are, by definition, new and different measures that may be inconsistent with provisions of the *WTO Agreement* that were not examined by the original panel, it is correct that a panel acting pursuant to Article 21.5 of the DSU will, as a consequence, have to address a new and different factual and legal situation.

52. However, the European Communities submits that all panels are bound by their terms of reference that are determined, pursuant to Article 7.1 of the DSU, by the "request for the establishment of a panel". The European Communities observes that, in its "request for the establishment of a panel", Malaysia referred only to the GATT 1994, and to the recommendations

and rulings of the DSB. On the basis of Malaysia's "request for the establishment of a panel", and on its subsequent submissions, the Panel found that the claims of Malaysia are exclusively based on the findings of the Appellate Body and on non-compliance with them. Malaysia does not make any new claim under Article XX.

53. Given that the terms of reference of a panel "established" pursuant to Article 21.5 of the DSU are based on the same claims and legal bases as the terms of reference of the original panel, the Panel's treatment of Malaysia's complaint pursuant to Article 21.5 of the DSU does not appear to be in error. The Panel was not at liberty to examine other issues.

(b) The Chapeau of Article XX of the GATT 1994

54. The European Communities believes that international cooperation and negotiation must be preferred over unilateral action, particularly in the area of the protection of the environment, for all the reasons set out in the original Appellate Body Report. The European Communities emphasizes that international cooperation by its own nature is a process and not a result. Such cooperation is necessarily based on reciprocal efforts to resolve a common concern in the mutual interest.

55. Under the circumstances of the present case, it appears to the European Communities that international cooperation requires as a minimum the exchange of data and readily available scientific knowledge between all interested parties. Under the Revised Guidelines, the United States would admit Malaysian shrimp to the United States market provided that Malaysia shows, on the basis of relevant data, that either its turtle conservation programme is "comparable in effectiveness" to the conservation method chosen by the United States or, in the alternative, that such conservation methods are unnecessary under the conditions prevailing in the waters in which Malaysia's trawlers are operating. The United States is thus apparently seeking Malaysia's participation in international cooperation in the form of an exchange of available data.

56. The application of the new measure has become more flexible in comparison with the application of the original measure, and this is the basis for the Panel's finding that the contested United States measure is currently not in conflict with the prohibition of "unjustifiable discrimination" under the chapeau of Article XX of the GATT 1994.

57. With respect to the *Turtle Island* case, the European Communities submits that the Panel correctly concluded that it was not for it to second-guess the outcome of a domestic dispute on the correct interpretation of a United States statute where a certain interpretation had been chosen by a domestic court, and that interpretation was challenged by the United States administration on appeal in the domestic courts.

58. The European Communities contends that it flows from the findings of the Panel that the ruling of the domestic court did not oblige the United States to violate its WTO obligations under the circumstances of the present case, particularly because the ruling was not final and because requests for interim relief were rejected. This appears to be a correct reading of the situation under the domestic law of the United States. In particular, the Revised Guidelines continue to be fully applied and therefore represent the situation that prevails under United States law.

59. In conclusion, the European Communities reiterates its position before the Panel that the complaint by Malaysia in this case is somewhat premature. Malaysia has not yet applied for certification. It is, therefore, not yet clear how the contested legislation would apply to imports of shrimp and shrimp products from Malaysia.

3. Hong Kong, China

(a) Terms of Reference

60. Hong Kong, China recalls that in its submission to the Panel, it expressed the view that the issue before a panel acting pursuant to Article 21.5 of the DSU is whether a new measure is in itself consistent with the *WTO Agreement*, particularly with the specific provisions with which the original panel or Appellate Body found the original measure inconsistent.

61. In the view of Hong Kong, China, panels should limit their review to the new measure, that is the measure adopted after the original panel (or the Appellate Body, as the case may be) has pronounced on the WTO-inconsistency; examine the new measure's consistency with the *WTO Agreement*; and further, examine to what extent the WTO Member has adequately implemented the recommendations and rulings of the original panel or the Appellate Body in adopting the new measure.

62. With respect to the judgment of the CIT in the *Turtle Island* case, Hong Kong, China, notes that in the absence of a clear mandate given to international adjudicating bodies, they commonly interpret only international law and treat domestic law, whenever warranted, as a factual matter. The same approach seemed to have been adopted by the Panel in the present case. Accordingly, Hong Kong, China, is of the view that the Panel was not called upon to speculate on the results of the appeal of the CIT judgment and make a ruling on that basis. Further, Hong Kong, China is mindful that the CIT decision is under appeal and it could be upheld by the highest domestic United States court.

4. India

(a) Terms of Reference

63. India submits that, as the measures taken to comply with the recommendations and rulings of the DSB are, by definition, new and different measures, it is possible that the new implementing measures could be inconsistent with provisions of WTO covered agreements that were not examined by the original panel. Therefore, a panel "established" under Article 21.5 of the DSU would have to address a new and different factual and legal situation. India, therefore, agrees with Malaysia that a correct reading of Article 21.5 of the DSU required the Panel to examine the alleged inconsistency also with regard to WTO provisions that were not relevant for the resolution of the dispute in the original proceedings.

64. With respect to the *Turtle Island* case, India agrees with Malaysia that the Panel erroneously refrained from examining municipal law by treating it as a fact. In order to evaluate the WTO-consistency of municipal law, the interpretation given by a domestic court is of prime importance. India also concurs with Malaysia that the United States bears responsibility for the actions of all branches of its government, including the judiciary. The CIT is a judicial organ of the United States. Its interpretation that Section 609 did not permit the import of TED-caught shrimp from non-certified countries should be treated as an authoritative interpretation of United States law. In the light of the Appellate Body's finding in *United States – Shrimp*, the Panel should have concluded that Section 609 was inconsistent with the chapeau of Article XX of the GATT 1994.

5. Japan

(a) The Chapeau of Article XX of the GATT 1994

65. Japan is of the view that as the provisions in Article XX of the GATT 1994 are "exceptions" to the basic principles of the GATT 1994, they should be applied in a strict manner. This applies especially when a unilateral measure is claimed to be justified under this Article.

66. Although Japan agrees with most of the conclusions reached by the Panel, it is Japan's view that the Panel Report does not describe in detail the reasoning or process by which the Panel reached those conclusions. Considering the importance attached to the requirements of the chapeau of Article XX as a tool for prevention of abuse, the chapeau of Article XX must be applied in a manner that fully accounts for the strict standard required of the "General Exceptions" under Article XX.

67. Malaysia's argument that negotiations are not alternative actions for the United States to rectify and address the problem of "arbitrary and unjustifiable discrimination" is based on an incorrect reading of the original Appellate Body Report. As the lack of serious good faith negotiation was one of the reasons for the Appellate Body finding of "arbitrary or unjustifiable discrimination", it seems logical to assume that by engaging in sufficiently "serious good faith" negotiations and meeting other requirements, the United States has addressed the "arbitrary or unjustifiable discrimination". Thus, Japan agrees with the Panel's finding that the United States was not under the obligation to conclude an agreement for the protection and conservation of sea turtles before taking the measure.

68. Japan submits however, that as the notion of "serious" and "good faith" is subjective in nature, a more objective test, such as a common recognition by other negotiating countries on the necessity of the measure in question, may be needed in addition to the criterion of "serious good faith efforts". Japan considers that the Panel should have included explicitly in its Report such a test of support for, or recognition of, the measure in question by other negotiating countries as a part of the negotiation requirement.

6. Mexico

(a) Terms of Reference

69. Mexico agrees with Malaysia that the terms of reference of a panel "established" pursuant to Article 21.5 of the DSU are to examine whether the measures taken to comply with the recommendations and rulings are consistent with the covered agreements, rather than with its own recommendations and rulings.

70. Mexico submits that the Panel in this case should have paid particular attention to the question whether the United States measure could be justified under Article XX of the GATT 1994 because it was not applied in a manner that would constitute a means of "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail, or a disguised restriction on international trade. Mexico considers that the Panel should also have paid greater attention to the legal provisions themselves rather than to the Report of the Appellate Body which considered the original measure. In Mexico's view, it is not valid to argue that a WTO Member is authorized to adopt measures that would otherwise be inconsistent with Article XX of the GATT 1994, basing itself on an interpretation of Article XX limited to the circumstances and reasoning in a previous dispute settlement case.

7. Thailand

(a) Terms of Reference

71. Thailand is of the view that, in accordance with Article 21.5 of the DSU, the Panel was bound to evaluate the consistency of the "measures taken to comply" with the covered agreement concerned, which in the present case is the GATT 1994. Thailand agrees with the Panel that this was to be done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the original panel and subsequently by the Appellate Body.

72. However, Thailand's view differs from that of the Panel with respect to the scope of the "measures taken to comply" by the United States. Thailand disagrees with the approach of the Panel of examining only the consistency with the GATT 1994 of the Revised Guidelines, and disregarding Section 609.

73. Thailand submits that had the Panel examined the consistency of Section 609 as part of the United States implementing measure, the Panel would have found that, with regard to the import of TED-caught shrimp from non-certified countries, Section 609 is inconsistent with the chapeau of Article XX of GATT 1994, read in the light of the Appellate Body's finding in *United States – Shrimp*. To examine the consistency of Section 609 in this regard, had the Panel decided to do so, it would be necessary for the Panel to "seek a detailed understanding" of the legislation. As it is not for the Panel to interpret Section 609 itself, such understanding must be based on an authoritative interpretation of the legislation under the United States domestic legal system, at least in cases where authoritative interpretation is available.

74. Thailand argues that the fact that the Revised Guidelines have not been modified following the CIT judgment does not remove the current inconsistency of Section 609 with the GATT 1994. A breach of a treaty obligation does not necessarily involve an act of the executive branch. It can also involve an act of the legislature or the judiciary, or, as in this case, both of these branches of government.

III. Preliminary Procedural Matter

75. On 13 August 2001, we received a brief from the American Humane Society and Humane Society International (the "Humane Society brief"). This brief was also attached as an exhibit to the appellee's submission filed by the United States in this appeal.

76. As we have previously stated in our Report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States – Shrimp*"), attaching a brief or other material to the submission of either an appellant or an appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission.[24] In that Report, we stated further that it is for a participant in an appeal to determine for itself what to include in its submission.[25]

77. At the oral hearing in this appeal, held on 4 September 2001, we asked the United States to clarify the extent to which it adopted the arguments set out in the Humane Society brief. The United States stated: "[t]hose are the independent views of that organization. We adopt them to the

[24]Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, para. 89.

[25]*Ibid.*

extent they are the same as ours but otherwise they are their independent views. We submit them for your consideration but not like our arguments where, for example, the panel is expected to address each one." Accordingly, we focus our attention on the legal arguments in the appellee's submission of the United States.

78. On 20 August 2001, we received a brief from Professor Robert Howse, a professor of international trade law at the University of Michigan Law School in Ann Arbor, Michigan, in the United States. In rendering our decision in this appeal, we have not found it necessary to take into account the brief submitted by Professor Howse.

IV. Issues Raised in this Appeal

79. The measure at issue in this dispute consists of three elements: Section 609 of the United States Public Law 101-162 ("Section 609"); the Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations (the "Revised Guidelines")[26]; and the application of both Section 609 and the Revised Guidelines in the practice of the United States. Both the United States and Malaysia agree on this definition of the measure.[27] So does the Panel.[28] So do we.

[26]United States Department of State, Federal Register Vol. 64, No. 130, 8 July 1999, Public Notice 3086, pp. 36946 – 36952. The Revised Guidelines are attached to the Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* (the "Panel Report"), WT/DS58/RW, 15 June 2001.

[27]In response to our questions at the oral hearing, the United States submitted that:

> The measure at issue in this appeal would be Section 609 as currently applied through the [United States] guidelines currently in effect.

In response to the same question, Malaysia stated that:

> Malaysia's contention is that the measure at issue is the 1999 revised guidelines which are the guidelines to implement Section 609 and their application.

[28]The Panel stated:

> The "implementing measure" is composed of Section 609 of Public Law 101-162, of the revised guidelines pursuant to Section 609, dated 8 July 1999, Federal Register, Vol. 64, No. 130, Public Notice 3086, p. 36946 (hereafter the "Revised Guidelines"), as well as of any practice under those Revised Guidelines.

(Panel Report, footnote 154 to para. 5.1)

80. With respect to this measure, the following issues are raised in this appeal:

(a) whether the Panel correctly fulfilled its mandate under Article 21.5 of the DSU of examining the consistency with the relevant provisions of the GATT 1994 of the United States measure that was taken to comply with the recommendations and rulings of the DSB in *United States – Shrimp*; and

(b) whether the Panel erred in finding that the measure at issue is now applied in a manner that no longer constitutes a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and is, therefore, within the scope of measures permitted under Article XX of the GATT 1994.[29]

81. With respect to the measure at issue in this dispute, the United States has not appealed the conclusion of the Panel that the measure violates Article XI:1 of the GATT 1994.[30] Thus, we do not address that issue in this appeal.

82. Malaysia has not appealed the conclusion of the Panel that Section 609 is provisionally justified under subparagraph (g) of Article XX of the GATT 1994.[31] Also, Malaysia confirmed at the oral hearing in this appeal that it has also not appealed the conclusion of the Panel that the measure at issue is not applied in a manner that constitutes "a disguised restriction on international trade" under the chapeau of Article XX of the GATT 1994.[32] Thus, we do not address those issues in this appeal.

V. Terms of Reference

83. The first issue raised by Malaysia in this appeal is whether the Panel properly examined the United States measure taken to comply with the recommendations and rulings of the DSB in *United States – Shrimp*. Malaysia argues that the Panel improperly limited its analysis to the recommendations and rulings of the DSB, and thus failed to fulfill its mandate under Article 21.5 of the DSU because it did not examine the consistency of the United States implementing measure with the relevant provisions of the GATT 1994. Malaysia argues as well that the Panel erroneously based its analysis entirely on our Report in *United States – Shrimp*.

84. Malaysia's appeal on this point goes to the heart of what a panel is required to do in proceedings under Article 21.5 of the DSU, which states, in pertinent part:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

[29] Panel Report, para. 5.137.

[30] *Ibid.*, para. 5.23.

[31] *Ibid.*, para. 5.42.

[32] The Panel's findings on this issue are set out in paragraph 5.144 of the Panel Report. At the oral hearing, we noted that Malaysia had made no reference in its appellant's submission to the findings of the Panel with respect to whether the United States measure was applied in a manner that constitutes "a disguised restriction on international trade". We asked Malaysia to confirm that it was not appealing those findings. Malaysia did so.

85. In *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU* ("*Canada – Aircraft (21.5)*"), we discussed one aspect of a panel's task under Article 21.5 of the DSU. In that case, the Panel declined to examine an argument by Brazil on the ground that the argument "did not form part" of the reasoning of the original panel and was "not relevant to the present dispute, which concerns the issue of whether or not Canada had implemented the DSB recommendation".[33] We disagreed with that ruling, and stated there that:

> It follows then that the task of the Article 21.5 Panel in this case is, in fact, to determine whether the new measure – the revised TPC programme – is consistent with Article 3.1(a) of the *SCM Agreement*.
>
> Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. . . .[34]

We stated further that:

> Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.[35]

86. As we ruled in our Report in *Canada – Aircraft (21.5)*, panel proceedings pursuant to Article 21.5 of the DSU involve, in principle, not the original measure, but a new and different measure that was not before the original panel. Therefore, "in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measure[] taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings."[36]

87. When the issue concerns the consistency of a new measure "taken to comply"[37], the task of a panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure in its totality. The fulfilment of this task requires that a panel consider both the measure itself and the measure's application. As the title of Article 21 makes clear, the task of panels under Article 21.5 forms part of the process of the "*Surveillance of Implementation of the Recommendations and Rulings*" of the DSB. Toward that end, the task of a panel under Article 21.5 is to examine the "consistency with a covered agreement of measures taken to comply with the

[33] Appellate Body Report, WT/DS70/AB/RW, adopted 4 August 2000, para. 39.

[34] *Ibid.*, paras. 40-41.

[35] Appellate Body Report, WT/DS70/AB/RW, adopted 4 August 2000, para. 41.

[36] *Ibid.*, para. 41.

[37] As opposed to a debate on the "existence … of measures taken to comply", which is not at issue here.

recommendations and rulings" of the DSB. That task is circumscribed by the specific claims made by the complainant when the matter is referred by the DSB for an Article 21.5 proceeding. It is not part of the task of a panel under Article 21.5 to address a claim that has not been made.

88. Malaysia relies in this appeal on our ruling in *Canada – Aircraft (21.5)*. We understand Malaysia to argue, based in part on our ruling in *Canada – Aircraft (21.5),* that the Panel in this case had a duty to review the *totality* of the United States measure, and to assess it for its consistency with the relevant provisions of the GATT 1994. That is indeed a panel's task under Article 21.5 of the DSU. Yet, as we have said, it is not part of a panel's task to go beyond the particular claims that have been made with respect to the consistency of a new measure with a covered agreement when a matter is referred to it by the DSB for an Article 21.5 proceeding. Thus, it would not have been appropriate in this case for the Panel to address a claim that was *not* made by Malaysia when requesting that this matter be referred by the DSB for an Article 21.5 proceeding.

89. With respect to a claim that *has* been made when a matter is referred by the DSB for an Article 21.5 proceeding, Malaysia seems to suggest as well that a panel must re-examine, for WTO-consistency, even those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO – consistent* in that dispute, and that remain unchanged as part of the new measure.

90. In considering this argument, we examine what the Panel did in this case in fulfilling its task under the DSU. As we have said, the Panel was required to review the new measure in its totality and in its application when examining the matter referred by the DSB for the Article 21.5 proceeding. In this case, the question whether it did or did not fulfil this requirement arises from the treatment by the Panel of a particular part of the new measure that was also part of the original measure in the original proceedings — Section 609.

91. Section 609 — a United States statute enacted by the United States Congress — is a common aspect of both the original measure at issue in the previous case and appeal, and the new measure at issue in this case and appeal. As Section 609 is part of the new measure, it is not immune from scrutiny under Article 21.5. However, it will be recalled that, in the previous case, we found that Section 609 was entitled to "provisional justification" under subparagraph (g) of Article XX of the GATT 1994. It will be recalled as well that, in the previous case, the deficiencies we found in the *application* of the original measure by the United States that denied that original measure the benefit of the exception provided by Article XX of the GATT 1994 were unrelated to Section 609 itself. Those deficiencies related to the original guidelines that were promulgated by the United States Department of State for the purpose of implementing Section 609, and to the practice of the United States in applying those original guidelines to WTO Members.

92. In its analysis of the consistency of Section 609 in this new case, the Panel stated that:

> The Panel considers that two questions have to be addressed in order to determine whether the implementing measure meets the requirements of paragraph (g) of Article XX. First, the Panel notes that the Appellate Body found that Section 609 was "provisionally justified" under Article XX(g). We understand this to mean that, in the process of determining whether Section 609 was justified under Article XX, the Appellate Body concluded that Section 609 satisfied the first tier of the analysis defined in its report on *United States – Gasoline*, i.e. the *characterization* of the measure under Article XX(g). This implies that, as long as the implementing measure before us is identical to the measure examined by the Appellate Body in relation to paragraph (g), we should not reach a different conclusion from the Appellate Body.[38] (footnote omitted)

The Panel went on to conclude that:

> … the United States did not amend Section 609, whereas it has issued revised implementing guidelines. We therefore conclude that since Section 609 as such has not been modified, the findings of the Appellate Body regarding paragraph (g) remain valid and the consistency of Section 609 as such with the requirements of paragraph (g) also remains valid, to the extent that the Revised Guidelines do not modify the *interpretation* to be given to Section 609 in that respect. We have no evidence that the Revised Guidelines have modified in any way the meaning of Section 609 *vis-à-vis* the requirements of paragraph (g), as interpreted by the Appellate Body.[39]

93. We agree. It is not disputed that the wording of Section 609 has not been changed since the first case. The Congress of the United States has not amended the statute. In addition, the meaning of Section 609 has not been changed by the decision of the United States Court of International Trade (the "CIT") in *Turtle Island Restoration Network, et al. v. Robert L. Mallett, et al.* (the "*Turtle Island* case").[40]

94. The CIT ruling in the *Turtle Island* case addressed the Revised Guidelines: that ruling made no change to the interpretation of Section 609. Moreover, as stated by the Panel, the ruling in the *Turtle Island* case is declaratory: the CIT has not ordered the United States Department of State to modify either the content or the interpretation of the Revised Guidelines; in the legal interpretation of the United States authorities entrusted with enforcing them, the Revised Guidelines remain the same.[41] Rightly, when examining the United States measure, the Panel took into account the status of municipal law at the time. In particular, the Panel took note of the fact that the CIT ruling in the *Turtle Island* case has not altered the content of the Revised Guidelines, and has not prevented the United States government from authorizing the importation of TED-caught shrimp from uncertified countries. In response to our questions at the oral hearing, the United States confirmed that the

[38]Panel Report, para. 5.39.

[39]Panel Report., para. 5.41.

[40]110 Fed. Supp. 2d 1005 (CIT, 2000). *See*, Panel Report, para. 5.109.

[41]Panel Report, para. 5.109.

Department of State has received no order from the CIT to change its practice, and, therefore, the Department of State continues to apply the Revised Guidelines as before.[42] Malaysia has not shown otherwise.

95. There is no way of knowing or predicting when or how that particular legal proceeding will conclude in the United States. The *Turtle Island* case has been appealed and could conceivably go as far as the Supreme Court of the United States.[43] It would have been an exercise in speculation on the part of the Panel to predict either when or how that case may be concluded, or to assume that injunctive relief ultimately would be granted and that the United States Court of Appeals or the Supreme Court of the United States eventually would compel the Department of State to modify the Revised Guidelines. The Panel was correct not to indulge in such speculation, which would have been contrary to the duty of the Panel, under Article 11 of the DSU, to make "an objective assessment of the matter … including an objective assessment of the facts of the case".

96. As we see it, then, the Panel properly examined Section 609 as part of its examination of the totality of the new measure, correctly found that Section 609 had not been changed since the original proceedings, and rightly concluded that our ruling in *United States – Shrimp* with respect to the consistency of Section 609, therefore, still stands.

97. We wish to recall that panel proceedings under Article 21.5 of the DSU are, as the title of Article 21 states, part of the process of the "*Surveillance of Implementation of Recommendations and Rulings*" of the DSB. This includes Appellate Body Reports. To be sure, the right of WTO Members to have recourse to the DSU, including under Article 21.5, must be respected. Even so, it must also be kept in mind that Article 17.14 of the DSU provides not only that Reports of the Appellate Body "shall be" adopted by the DSB, by consensus, but also that such Reports "shall be … unconditionally accepted by the parties to the dispute. …" Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, "… unconditionally accepted by the parties to the dispute", and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute. In this regard, we recall, too, that Article 3.3 of the DSU states that the "prompt settlement" of disputes "is essential to the effective functioning of the WTO".

98. Therefore, so far as the examination of the measure at issue in this appeal is concerned, the task of the Panel with respect to Section 609, as part of that new measure, was limited to examining its *application.* More specifically, the task of the Panel as it related to Section 609 was to decide whether Section 609 has been *applied* by the United States in a way that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" in violation of the chapeau of Article XX of the GATT 1994. Thus, given the structure of the new measure, the task of the Panel was to determine whether Section 609 has been *applied* by the United States, through the Revised Guidelines, either on their face, or in their application, in a manner that constitutes "arbitrary or unjustifiable discrimination".

[42]The United States submitted that:

> We do not believe that the court decision in the litigation changes the measure. The measure is the statute and the guidelines. There is litigation and controversy in the United States about what those guidelines might look like. However, for today and the foreseeable future, the guidelines stand. They are what governs. That is what happens at the ports.

(United States response to questioning at the oral hearing)

[43]Panel Report, para. 5.109.

99. This is precisely what the Panel did in this case. Therefore, we consider what the Panel did to be an appropriate fulfilment of its task under the DSU.

100. Malaysia argues with respect to the terms of reference that the Panel confined itself inappropriately to an examination of whether the new measure complied with the rulings and recommendations of the DSB, and, more specifically, with the rulings of the Appellate Body that were adopted by the DSB in the previous case relating to the original measure. In support of this argument, Malaysia quotes various selected passages from the Panel Report.[44]

101. In our view, a reading of the Panel Report as a whole does not provide support for Malaysia's contention. Indeed, the Panel appears to have done precisely the opposite of what Malaysia asserts. For example, we note that, in identifying its terms of reference, the Panel explicitly quoted the terms of Article 21.5 of the DSU[45] as well as our Report in *Canada – Aircraft (21.5).*[46]

102. The Panel then stated:

> The terms of reference of this Panel do not differ from the standard terms of reference applied in other Article 21.5 cases. In light of the reasoning of the Appellate Body mentioned above, the Panel considers that it is fully entitled to address all the claims of Malaysia under Article XI and Article XX of the GATT 1994, whether or not these claims, the arguments and the facts supporting them were made before the Original Panel and in the Appellate Body proceedings *provided*, as recalled by the panel on *Australia – Measures Affecting Importation of Salmon – Recourse by Canada to Article 21.5 of the DSU,* that the claims are identified in the request for referring the matter to a panel under Article 21.5 of the DSU.[47] (footnotes omitted)

[44]Malaysia's appellant's submission, para. 3.2. Malaysia refers to footnote 211 of paragraph 5.66 and paragraphs 5.116, 5.120, 5.125 and 5.134 of the Panel Report.

[45]Panel Report, para. 5.7.

[46]*Ibid.*, para. 5.8. After quoting our Report in *Canada – Aircraft (21.5)*, the Panel concluded that:

> In light of the reasoning of the Appellate Body [in *Canada – Aircraft (21.5)]*, the Panel considers that it is fully entitled to address all the claims of Malaysia under Article XI and Article XX of the GATT 1994, whether or not these claims, the arguments and the facts supporting them were made before the Original Panel and in the Appellate Body proceedings . . . .

(*Ibid.*, para. 5.9)

We agree with the Panel. However, we do not agree with Malaysia's reading of our Report in *Canada – Aircraft (21.5)*. As the United States submits: "[t]he issue in *Canada Aircraft* was whether the Article 21.5 Panel's review was limited to issues considered in the original panel and Appellate Body proceedings, and the Appellate Body found that the DSU provides no such limitation". (footnote omitted) (United States appellee's submission, para. 11) With respect to this case, the United States notes: "[t]he Panel's report makes no limitations on its consideration of Malaysia's arguments". (United States appellee's submission, para.13) On this, we agree with the United States. The Panel in this case examined all of Malaysia's arguments, and did not decline to consider an argument on its merits on the ground that such argument had not been raised before the original panel or the Appellate Body.

[47]Panel Report, para. 5.9.

103. Furthermore, in its analysis, the Panel examined Malaysia's claim that the new measure taken by the United States continued to violate Article XI:1 of the GATT 1994, and stated as follows:

> The Panel notes that the elements of the original measure found to be incompatible with Article XI:1 in the Original Panel Report are still part of the implementing measure, i.e. Section 609 as currently applied by the United States. In particular, the United States continues to apply an import prohibition on shrimp and shrimp products harvested in a manner determined to be harmful to sea turtles. We note that the United States does not contest the fact that it applies such a prohibition of import. We consider that the prohibition at issue falls within the "prohibitions or restrictions, other than duties, taxes or other charges" maintained by a Member on the importation of a product from another Member, in contravention of Article XI:1.
>
> The Panel therefore concludes that the measure taken by the United States to comply with the recommendations and rulings of the DSB in this case *violates Article XI:1 of the GATT 1994*.[48] (emphasis added)

104. The Panel then examined the provisional justification under Article XX(g) of the GATT 1994 of Section 609, which it had correctly found to be unchanged, in the following terms:

> As a result, when considering the arguments of the United States, we shall first determine the consistency of the implementing measure under paragraph (g) of Article XX. If we find the implementing measure to be "provisionally justified" under paragraph (g), we shall proceed to determine whether it is applied in *conformity with the chapeau of Article XX*.[49] (emphasis added)
>
> …
>
> We therefore conclude that the implementing measure is provisionally justified *under paragraph (g) of Article XX*. We proceed with the second tier of the method applied by the Appellate Body in this case, i.e. the "further appraisal of the *same measure* under the introductory clause of Article XX."[50] (emphasis added, footnote omitted)

105. This analysis shows clearly that the Panel properly understood the scope of its mandate. Furthermore, the Panel's examination of whether the measure applied by the United States constitutes a "disguised restriction on international trade" under the chapeau of Article XX of the GATT 1994 demonstrates that the Panel understood very well the scope of its mandate. The Panel stated:

[48]Panel Report, paras. 5.22-5.23.

[49]*Ibid.*, para. 5.28.

[50]*Ibid.*, para. 5.42.

> The Panel notes that it is instructed by Article 21.5 of the DSU to review "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. The fact that the Appellate Body did not have to make a finding that the original measure was a disguised restriction on trade does not mean that the measure adopted to implement the DSB recommendations and rulings is not a disguised restriction on trade. The Panel also recalls that, as the party invoking Article XX, the United States bears the burden of proving that its implementing measure meets *all* the relevant requirements of the chapeau. This implies that the United States make a *prima facie* case that the implementing measure is not a disguised restriction on trade.[51]

106. Thus, the Panel examined the measure in the light of the relevant provisions of the GATT 1994, and, in doing so, made numerous references both to whether a violation of the GATT 1994 had occurred and to whether such a violation was nonetheless justified under Article XX. Accordingly, in reading the Panel Report as a whole, we find no support for Malaysia's argument that the Panel examined the new measure applied by the United States *only* in the light of the recommendations and rulings of the DSB.

107. Malaysia also objects to the frequent references made by the Panel to our reasoning in our Report in *United States – Shrimp*. The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not *dicta*; it was essential to our ruling. The Panel was right to use it, and right to rely on it. Nor are we surprised that the Panel made frequent references to our Report in *United States – Shrimp*. Indeed, we would have expected the Panel to do so. The Panel had, necessarily, to consider our views on this subject, as we had overruled certain aspects of the findings of the original panel on this issue and, more important, had provided interpretative guidance for future panels, such as the Panel in this case.

108. In this respect, we note that in our Report in *Japan – Taxes on Alcoholic Beverages*, we stated that:

> Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.[52]

109. This reasoning applies to adopted Appellate Body Reports as well. Thus, in taking into account the reasoning in an adopted Appellate Body Report — a Report, moreover, that was directly relevant to the Panel's disposition of the issues before it — the Panel did not err. The Panel was correct in using our findings as a tool for its own reasoning. Further, we see no indication that, in doing so, the Panel limited itself merely to examining the new measure from the perspective of the recommendations and rulings of the DSB.

110. We find, therefore, that the Panel correctly fulfilled its mandate under Article 21.5 of the DSU of examining the consistency, with the relevant provisions of the GATT 1994, of the United States measure taken to comply with the recommendations and rulings of the DSB in *United States – Shrimp*.

[51]Panel Report, para. 5.138.

[52]Appellate Body Report, ("*Japan – Alcoholic Beverages*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 108.

VI. The Chapeau of Article XX of the GATT 1994

111. The second issue raised in this appeal is whether the Panel erred in finding that the new measure at issue is applied in a manner that no longer constitutes a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and is, therefore, within the scope of measures permitted under Article XX of the GATT 1994.[53]

112. In its Notice of Appeal, Malaysia appeals the finding of the Panel that "Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious, good faith efforts to reach a multilateral agreement, remain satisfied."[54] In its appellant's submission, Malaysia has put forward six points of disagreement with respect to the reasoning and findings of the Panel that lead Malaysia to conclude that, despite the changes made by the United States to the original measure, elements of "arbitrary or unjustifiable discrimination" still remain in the manner in which the new measure is applied by the United States.

113. Malaysia argues that:

— the Panel erred in interpreting our previous ruling in *United States – Shrimp* as imposing upon the United States an obligation to *negotiate* rather than an obligation to *conclude* an international agreement[55];

— the Panel's finding results in "the absurd situation where any WTO Member would be able to offer to negotiate in good faith on an agreement incorporating its unilaterally defined standards before claiming that its measure is justified under Article XX of the GATT 1994 and in the event of failure to conclude an agreement, claim that the measure applying the unilateral standards could not constitute unjustifiable discrimination"[56];

— the Panel erred in concluding that the Inter-American Convention can reasonably be regarded as a "benchmark" of what can be achieved through multilateral negotiations in the field of protection and conservation[57];

— the Panel misconstrued the usage of the term "measures comparable in effectiveness to United States measures" by the Appellate Body to mean that the Appellate Body accepted the legitimacy of such "comparable measures"[58];

— the Panel erred in concluding that the Revised Guidelines are sufficiently flexible, even though the Revised Guidelines do not provide explicitly for the particular conditions prevailing in Malaysia[59]; and

[53]Panel Report, para. 5.137.

[54]*Ibid.*, para. 6.1.

[55]Malaysia's appellant's submission, para 3.10(b)(i).

[56]Executive summary of Malaysia's appellant's submission, para. 2(b)(ii).

[57]Malaysia's appellant's submission, para 3.13.

[58]*Ibid.*, paras. 3.17-3.18. *See also*, Executive summary of Malaysia's appellant's submission, para. 2(iv);

— the Panel erred in its treatment of the CIT ruling in the *Turtle Island* case and, thus, in its conclusion about the legal validity of those portions of the Revised Guidelines that permit the importation of TED-caught shrimp from non-certified harvesting countries.[60]

114. Malaysia's first three arguments relate to the nature and extent of the duty of the United States to pursue international cooperation in protecting and conserving endangered sea turtles. Malaysia's last three arguments relate to the flexibility of the Revised Guidelines. Our analysis will address each of these arguments made by Malaysia.

A. *The Nature and the Extent of the Duty of the United States to Pursue International Cooperation in the Protection and Conservation of Sea Turtles*

115. Before the Panel, Malaysia asserted that the United States should have negotiated and *concluded* an international agreement on the protection and conservation of sea turtles before imposing an import prohibition. Malaysia argued that "by continuing to apply a unilateral measure after the end of the reasonable period of time pending the conclusion of an international agreement, the United States failed to comply with its obligations under the GATT 1994".[61] The United States replied that it had in fact made serious, good faith efforts to negotiate and *conclude* a multilateral sea turtle conservation agreement that would include both Malaysia and the United States, and that these efforts, as detailed and documented before the Panel, should, in view of our previous ruling, be seen as sufficient to meet the requirements of the chapeau of Article XX. The Panel found as follows:

> … The Panel first recalls that the Appellate Body considered "the *failure of the United States to engage the appellees*, as well as other Members exporting shrimp to the United States, in serious across-the-board negotiations *with the objective of concluding bilateral or multilateral agreements* for the protection and conservation of sea turtles, *before* enforcing the import prohibition against the shrimp exports of those other Members" bears heavily in any appraisal of justifiable or unjustifiable discrimination within the meaning of the chapeau of Article XX. From the terms used, it appears to us that the Appellate Body had in mind a negotiation, not the conclusion of an agreement. If the Appellate Body had considered that an agreement had to be concluded before any measure can be taken by the United States, it would not have used the terms "with the objective"; it would have simply stated that an agreement had to be concluded.
>
> …

[59]Malaysia's appellant's submission, paras. 3.20-3.21.

[60]*Ibid.*, paras. 3.22-3.25.

[61]Panel Report, para. 5.1.

> We are consequently of the view that the Appellate Body could not have meant in its findings that the United States had the obligation to conclude an agreement on the protection and conservation of sea turtles in order to comply with Article XX. However, we reach the conclusion that the United States has an obligation to make serious good faith efforts to reach an agreement before resorting to the type of unilateral measure currently in place. We also consider that those efforts cannot be a "one-off" exercise. There must be a continuous process, including once a unilateral measure has been adopted pending the conclusion of an agreement. Indeed, we consider the reference of the Appellate Body to a number of international agreements promoting a multilateral solution to the conservation concerns subject to Section 609 to be evidence that a multilateral, ideally non-trade restrictive, solution is generally to be preferred when dealing with those concerns, in particular if it is established that it constitutes "an alternative course of action reasonably open".
>
> …
>
> We understand the Appellate Body findings as meaning that the United States has an obligation to make serious good faith efforts to address the question of the protection and conservation of sea turtles at the international level. We are mindful of the potentially subjective nature of the notion of serious good faith efforts and of how difficult such a test may be to apply in reality.[62] (footnotes omitted)

116. Malaysia appeals these findings of the Panel. According to Malaysia, demonstrating serious, good faith efforts to *negotiate* an international agreement for the protection and conservation of sea turtles is not sufficient to meet the requirements of the chapeau of Article XX.[63] Malaysia maintains that the chapeau requires instead the *conclusion* of such an international agreement. As Malaysia sees it, the "pertinent observations and comments" that we made in *United States – Shrimp* that could be construed to suggest otherwise "constitute dicta" in our previous Report.[64] On this basis, Malaysia argues that the Panel used that Report improperly in attempting to justify its reasoning that serious, good faith efforts alone would be enough to meet the requirements of the chapeau.[65] Further, Malaysia submits that the Panel misread our Report with respect to the Inter-American Convention, and, consequently, did not use that Convention properly in its analysis.[66]

[62]Panel Report, paras. 5.63, 5.67 and 5.76.

[63]Malaysia's appellant's submission, para. 3.11.

[64]*Ibid.,* paras. 3.10-3.11.

[65]*Ibid*., para. 3.11.

[66]*Ibid*., para. 3.13.

117. The chapeau of Article XX states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: …

118. The chapeau of Article XX establishes three standards regarding the *application* of measures for which justification under Article XX may be sought: first, there must be no "arbitrary" discrimination between countries where the same conditions prevail; second, there must be no "unjustifiable" discrimination between countries where the same conditions prevail; and, third, there must be no "disguised restriction on international trade".[67] The Panel's findings appealed by Malaysia concern the first and second of these three standards.[68]

119. It is clear from the language of the chapeau that these two standards operate to prevent a Member from applying a measure provisionally justified under a sub-paragraph of Article XX in a manner that would result in "arbitrary or unjustifiable discrimination".[69] In *United States – Shrimp*, we stated that the measure at issue there resulted in "unjustifiable discrimination", in part because, as applied, the United States treated WTO Members differently. The United States had adopted a cooperative approach with WTO Members from the Caribbean/Western Atlantic region, with whom it had concluded a multilateral agreement on the protection and conservation of sea turtles, namely the Inter-American Convention. Yet the United States had not, we found, pursued the negotiation of such a multilateral agreement with other exporting Members, including Malaysia and the other complaining WTO Members in that case.

[67]Appellate Body Report, *United States – Shrimp*, *supra*, footnote 24, para. 150; Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at 21-22.

[68]The Panel also made findings regarding disguised restriction on trade but these are not appealed. Panel Report, paras. 5.138-5.144.

[69]Appellate Body Report, *United States – Shrimp*, *supra*, footnote 24, paras. 156 and 160; Appellate Body Report, *United States – Gasoline*, *supra*, footnote 67 at 21-22.

120. Moreover, we observed there that Section 609, which was part of that original measure and remains part of the new measure at issue here, calls upon the United States Secretary of State to "initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of … sea turtles" and to "initiate negotiations as soon as possible with all foreign governments which are engaged in commercial fishing operations … for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles."[70] We concluded in that appeal that the United States had failed to comply with this statutory requirement in Section 609.

121. As we pointed out there:

> Apart from the negotiation of the Inter-American Convention for the Protection and Conservation of Sea Turtles … which concluded in 1996, the record before the Panel does not indicate any serious, substantial efforts to carry out these express directions of Congress.[71] (footnotes omitted)

We also stated:

> Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable.[72]

122. We concluded in *United States – Shrimp* that, to avoid "arbitrary or unjustifiable discrimination", the United States had to provide all exporting countries "similar opportunities to negotiate" an international agreement. Given the specific mandate contained in Section 609, and given the decided preference for multilateral approaches voiced by WTO Members and others in the international community in various international agreements for the protection and conservation of endangered sea turtles that were cited in our previous Report, the United States, in our view, would be expected to make good faith efforts to reach international agreements that are comparable from one forum of negotiation to the other. The negotiations need not be identical. Indeed, no two negotiations can ever be identical, or lead to identical results. Yet the negotiations must be *comparable* in the sense that comparable efforts are made, comparable resources are invested, and comparable energies are devoted to securing an international agreement. So long as such comparable efforts are made, it is more likely that "arbitrary or unjustifiable discrimination" will be avoided between countries where an importing Member concludes an agreement with one group of countries, but fails to do so with another group of countries.

123. Under the chapeau of Article XX, an importing Member may not treat its trading partners in a manner that would constitute "arbitrary or unjustifiable discrimination". With respect to this measure, the United States could conceivably respect this obligation, and the conclusion of an international agreement might nevertheless not be possible despite the serious, good faith efforts of the United States. Requiring that a multilateral agreement be *concluded* by the United States in order to avoid "arbitrary or unjustifiable discrimination" in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement

[70]Section 609(a). *See also*, Appellate Body Report, *United States – Shrimp*, *supra*, footnote 24, para. 167.

[71]Appellate Body Report, *supra*, footnote 24, para. 167.

[72]*Ibid.*, para. 172.

would not be reasonable. For a variety of reasons, it may be possible to conclude an agreement with one group of countries but not another. The conclusion of a multilateral agreement requires the cooperation and commitment of many countries. In our view, the United States cannot be held to have engaged in "arbitrary or unjustifiable discrimination" under Article XX solely because one international negotiation resulted in an agreement while another did not.

124. As we stated in *United States – Shrimp*, "the protection and conservation of highly migratory species of sea turtles … demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations".[73] Further, the "need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations".[74] For example, Principle 12 of the Rio Declaration on Environment and Development states, in part, that "[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus".[75] Clearly, and "as far as possible", a multilateral approach is strongly preferred. Yet it is one thing to *prefer* a multilateral approach in the application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding "arbitrary or unjustifiable discrimination" under the chapeau of Article XX. We see, in this case, no such requirement.

125. Malaysia also disagrees with certain statements made by the Panel with respect to the Inter-American Convention. The Panel found that:

> With respect to the absence of or insufficient negotiation with some Members compared with others, the reference of the Appellate Body to the Inter-American Convention is evidence that the efforts made by the United States to negotiate with the complainants before imposing the original measure were largely insufficient. The Inter-American Convention was negotiated as a binding agreement and has entered into force on 2 May 2001. We conclude that the Inter-American Convention can reasonably be considered as a benchmark of what can be achieved through multilateral negotiations in the field of protection and conservation. While we agree that factual circumstances may influence the duration of the process or the end result, we consider that any effort alleged to be a "serious good faith effort" must be assessed against the efforts made in relation to the conclusion of the Inter-American Convention.[76]

126. Malaysia maintains that the word "benchmark", as used by the Panel, has the connotation of a "legal standard", and asserts that nothing in the Appellate Body Report in *United States – Shrimp* suggests that the Inter-American Convention has the status of a legal standard.[77] Malaysia sees a distinction between a "benchmark", which would have the value of a "legal standard", and an "example", which would not have such a value.[78]

[73]Appellate Body Report, *supra*, footnote 24, para. 168.

[74]*Ibid.*

[75]*Ibid.*

[76]Panel Report, para. 5.71.

[77]Malaysia's appellant's submission, para. 3.13.

[78]*Ibid.*

127. It should be recalled how we viewed the Inter-American Convention in *United States – Shrimp*. We stated there:

> The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609. It is relevant to observe that an import prohibition is, ordinarily, the heaviest "weapon" in a Member's armoury of trade measures. The record does not, however, show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States, attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles before imposing the import ban.[79]

128. Thus, in the previous case, in examining the original measure, we relied on the Inter-American Convention in two ways. First, we used the Inter-American Convention to show that "consensual and multilateral procedures are available and feasible for the establishment of programmes for the conservation of sea turtles."[80] In other words, we saw the Inter-American Convention as evidence that an alternative course of action based on cooperation and consensus was reasonably open to the United States. Second, we used the Inter-American Convention to show the existence of "unjustifiable discrimination". The Inter-American Convention was the result of serious, good faith efforts to negotiate a regional agreement on the protection and conservation of turtles, including efforts made by the United States. In the original proceedings, we saw a clear contrast between the efforts made by the United States to conclude the Inter-American Convention and the absence of serious efforts on the part of the United States to negotiate other similar agreements with other WTO Members. We concluded there that such a disparity in efforts to negotiate an international agreement amounted to "unjustifiable discrimination".[81]

129. With this in mind, we examine what the Panel did here. In its analysis of the Inter-American Convention in the context of Malaysia's argument on "unjustifiable discrimination", the Panel relied on our original Report to state that "the Inter-American Convention is evidence that the efforts made by the United States to negotiate with the complainants before imposing the original measure were largely insufficient".[82] The Panel went on to say that "the Inter-American Convention can reasonably be considered as a benchmark of what can be achieved through multilateral negotiations in the field of protection and conservation."[83]

130. At no time in *United States – Shrimp* did we refer to the Inter-American Convention as a "benchmark". The Panel might have chosen another and better word — perhaps, as suggested by

[79]Appellate Body Report, *supra*, footnote 24, para. 171.

[80]*Ibid.*, para. 170.

[81]*Ibid.*, para. 172.

[82]Panel Report, para. 5.71.

[83]Panel Report, para. 5.71.

Malaysia, "example".[84] Yet it seems to us that the Panel did all that it should have done with respect to the Inter-American Convention, and did so consistently with our approach in *United States – Shrimp*. The Panel compared the efforts of the United States to negotiate the Inter-American Convention with one group of exporting WTO Members with the efforts made by the United States to negotiate a similar agreement with another group of exporting WTO Members. The Panel rightly used the Inter-American Convention as a factual reference in this exercise of comparison. It was all the more relevant to do so given that the Inter-American Convention was the only international agreement that the Panel could have used in such a comparison. As we read the Panel Report, it is clear to us that the Panel attached a relative value to the Inter-American Convention in making this comparison, but did not view the Inter-American Convention in any way as an absolute standard. Thus, we disagree with Malaysia's submission that the Panel raised the Inter-American Convention to the rank of a "legal standard". The mere use by the Panel of the Inter-American Convention *as a basis for a comparison* did not transform the Inter-American Convention into a "legal standard". Furthermore, although the Panel could have chosen a more appropriate word than "benchmark" to express its views, Malaysia is mistaken in equating the mere use of the word "benchmark", as it was used by the Panel, with the establishment of a legal standard.

131. The Panel noted that while "factual circumstances may influence the duration of the process or the end result, … any effort alleged to be a 'serious good faith effort' must be assessed against the efforts made in relation to the conclusion of the Inter-American Convention."[85] Such a comparison is a central element of the exercise to determine whether there is "unjustifiable discrimination". The Panel then analyzed the negotiation process in the Indian Ocean and South-East Asia region to determine whether the efforts made by the United States in those negotiations were serious, good faith efforts comparable to those made in relation with the Inter-American Convention. In conducting this analysis, the Panel referred to the following elements:

— A document communicated on 14 October 1998 by the United States Department of State to a number of countries of the Indian Ocean and the South-East Asia region. This document contained possible elements of a regional convention on sea turtles in this region.[86]

— The contribution of the United States to a symposium held in Sabah on 15-17 July 1999. The Sabah Symposium led to the adoption of a Declaration calling for the negotiation and implementation of a regional agreement throughout the Indian Ocean and South-East Asia region.[87]

— The Perth Conference in October 1999, where participating governments, including the United States, committed themselves to developing an international agreement on sea turtles for the Indian Ocean and South-East Asia region.[88]

— The contribution of the United States to the Kuantan round of negotiations, 11-14 July 2000. This first round of negotiations towards the conclusion of a regional agreement resulted in the adoption of the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia (the "South-East Asian MOU"). The Final Act of the

[84]Malaysia's appellant's submission, para. 3.13.

[85]Panel Report, para. 5.71.

[86]Panel Report, para. 5.79.

[87]*Ibid.*

[88]*Ibid.*

> Kuantan meeting provided that before the South-East Asian MOU can be finalized, a Conservation and Management Plan must be negotiated and annexed to the South-East Asian MOU.[89] At the time of the Panel proceedings, the Conservation and Management Plan was still being drafted.[90]

132. On this basis and, in particular, on the basis of the "contribution of the United States to the steps that led to the Kuantan meeting and its contribution to the Kuantan meeting itself"[91], the Panel concluded that the United States had made serious, good faith efforts that met the "standard set by the Inter-American Convention."[92] In the view of the Panel, whether or not the South-East Asian MOU is a legally binding document does not affect this comparative assessment because differences in "factual circumstances have to be kept in mind".[93] Furthermore, the Panel did not consider as decisive the fact that the final agreement in the Indian Ocean and South-East Asia region, unlike the Inter-American Convention, had not been concluded at the time of the Panel proceedings. According to the Panel, "at least until the Conservation and Management Plan to be attached to the MOU is completed, the United States efforts should be judged on the basis of its active participation and its financial support to the negotiations, as well as on the basis of its previous efforts since 1998, having regard to the likelihood of a conclusion of the negotiations in the course of 2001." [94]

133. We note that the Panel stated that "any effort alleged to be a 'serious good faith effort' must be assessed against the efforts made in relation to the conclusion of the Inter-American Convention."[95] In our view, in assessing the serious, good faith efforts made by the United States, the Panel did not err in using the Inter-American Convention as an *example*. In our view, also, the Panel was correct in proceeding then to an analysis broadly in line with this principle and, ultimately, was correct as well in concluding that the efforts made by the United States in the Indian Ocean and South-East Asia region constitute serious, good faith efforts comparable to those that led to the conclusion of the Inter-American Convention. We find no fault with this analysis. [96]

134. In sum, Malaysia is incorrect in its contention that avoiding "arbitrary and unjustifiable discrimination" under the chapeau of Article XX requires the *conclusion* of an international

[89] *Ibid.*, para. 5.81.

[90] *Ibid.*, para. 5.84.

[91] *Ibid.*, para. 5.82.

[92] *Ibid.*

[93] Panel Report. It appears that the United States was in favour of a legally binding agreement for the Indian Ocean and South-East Asia region, but a number of other parties were not, and the latter view prevailed. *See,* Panel Report, para. 5.83.

[94] Panel Report, para. 5.84.

[95] *Ibid.*, para. 5.71.

[96] We note that a multilateral conference on sea turtles was held in Manila and resulted in the adoption of the Conservation and Management Plan to be annexed to the South-East Asian MOU. We also note that the South-East Asian MOU came into effect on 1 September 2001. To our mind, these events only reinforce the finding of the Panel that the efforts made by the United States to negotiate an international agreement in the Indian Ocean and South-East Asia region constitute serious, good faith efforts comparable to those made in relation to the Inter-American Convention. The Inter-American Convention, in Article IV.2(h), provides for the use of TEDs to reduce the incidental capture and mortality of sea turtles in the course of fishing activities. Objective 1.4 of the Conservation and Management Plan attached to the South-East Asian MOU requires signatory states to "[r]educe to the greatest extent practicable the incidental capture and mortality of marine turtles in the course of fishing activities". In this respect, signatory states are directed to "[d]evelop and use gear, devices and techniques to minimise incidental capture of marine turtles in fisheries, such as devices that effectively allow the escape of marine turtles, and spatial and seasonal closures".

agreement on the protection and conservation of sea turtles. Therefore, we uphold the Panel's finding that, in view of the serious, good faith efforts made by the United States to negotiate an international agreement, "Section 609 is now applied in a manner that no longer constitutes a means of unjustifiable or arbitrary discrimination, as identified by the Appellate Body in its Report".[97]

B. The Flexibility of the Revised Guidelines

135. We now turn to Malaysia's arguments relating to the flexibility of the Revised Guidelines. Malaysia argued before the Panel that the measure at issue results in "arbitrary or unjustifiable discrimination" because it conditions the importation of shrimp into the United States on compliance by the exporting Members with policies and standards "unilaterally" prescribed by the United States.[98] Malaysia asserted that the United States "unilaterally" imposed its domestic standards on exporters.[99] With respect to this argument, the Panel found:

> It seems that whereas the Appellate Body found that requiring the adoption of essentially the same regime constituted arbitrary discrimination, it accepted - at least implicitly - that a requirement that the US and foreign programmes be "comparable in effectiveness" would be compatible with the obligations of the United States under the chapeau of Article XX. This is because it would "permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries." We therefore conclude that if, *in practice*, the implementing measure provides for "comparable effectiveness", the finding of the Appellate Body in terms of lack of flexibility will have been addressed.[100] (footnote omitted)

136. Malaysia disagrees with the Panel that a measure can meet the requirements of the chapeau of Article XX if it is flexible enough, both in design and application, to permit certification of an exporting country with a sea turtle protection and conservation programme "comparable" to that of the United States. According to Malaysia, even if the measure at issue allows certification of countries having regulatory programs "comparable" to that of the United States, and even if the measure is applied in such a manner, it results in "arbitrary or unjustifiable discrimination" because it conditions access to the United States market on compliance with policies and standards "unilaterally" prescribed by the United States. Thus, Malaysia puts considerable emphasis on the "unilateral" nature of the

[97] Panel Report, para. 5.137. We do wish to note, though, that there is one observation by the Panel with which we do not agree. In assessing the good faith efforts made by the United States, the Panel stated that:

> The United States is a *demandeur* in this field and given its scientific, diplomatic and financial means, it is reasonable to expect rather more than less from that Member in terms of serious good faith efforts. Indeed, the capacity of persuasion of the United States is illustrated by the successful negotiation of the Inter-American Convention.

(Panel Report, para. 5.76)

We are not persuaded by this line of reasoning. As we stated in our previous Report, the chapeau of Article XX is "but one expression of the principle of good faith". (Appellate Body Report, *United States – Shrimp, supra*, footnote 24, para. 158) This good faith notion applies to all WTO Members equally.

[98] Panel Report, para. 3.131.

[99] *Ibid.*, paras. 3.125 and 3.127.

[100] *Ibid.*, para. 5.93.

measure, and Malaysia maintains that our previous Report does not support the conclusion of the Panel on this point.[101]

137. We recall that, in *United States – Shrimp*, we stated:

> It appears to us … that *conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.* Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.[102] (emphasis added)

138. In our view, Malaysia overlooks the significance of this statement. Contrary to what Malaysia suggests, this statement is not "*dicta*". As we said before, it appears to us "that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX." This statement expresses a principle that was central to our ruling in *United States – Shrimp*.

139. A separate question arises, however, when examining, under the chapeau of Article XX, a measure that provides for access to the market of one WTO Member for a product of other WTO Members *conditionally*. Both Malaysia and the United States agree that this is a common aspect of the measure at issue in the original proceedings and the new measure at issue in this dispute.

140. In *United States - Shrimp*, we concluded that the measure at issue there did not meet the requirements of the chapeau of Article XX relating to "arbitrary or unjustifiable discrimination" because, through the application of the measure, the exporting members were faced with "a single, rigid and unbending requirement"[103] to adopt *essentially the same* policies and enforcement practices as those applied to, and enforced on, domestic shrimp trawlers in the United States. In contrast, in this dispute, the Panel found that this new measure is more flexible than the original measure and has been applied more flexibly than was the original measure. In the light of the evidence brought by the United States, the Panel satisfied itself that this new measure, in design and application, does *not* condition access to the United States market on the adoption by an exporting Member of a regulatory programme aimed at the protection and the conservation of sea turtles that is *essentially the same* as that of the United States.

[101]Malaysia's appellant's submission, paras. 3.17-3.19.

[102]Appellate Body Report, *supra*, footnote 24, para. 121.

[103]Appellate Body Report, *supra*, footnote 24, para. 177.

141. As the Panel's analysis suggests, an approach based on whether a measure requires "essentially the same" regulatory programme of an exporting Member as that adopted by the importing Member applying the measure is a useful tool in identifying measures that result in "arbitrary or unjustifiable discrimination" and, thus, do *not* meet the requirements of the chapeau of Article XX. However, this approach is not sufficient for purposes of judging whether a measure *does* meet the requirements of the chapeau of Article XX. Therefore, in construing our previous Report, the Panel inferred from our reasoning there that a measure requiring United States and foreign regulatory programmes to be "comparable in effectiveness", as opposed to being "essentially the same", would, absent some other shortcoming, comply with the chapeau of Article XX. On this, the Panel stated:

> It seems that whereas the Appellate Body found that requiring the adoption of essentially the same regime constituted arbitrary discrimination, it accepted - at least implicitly - that a requirement that the US and foreign programmes be "comparable in effectiveness" would be compatible with the obligations of the United States under the chapeau of Article XX. This is because it would "permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries." We therefore conclude that if, *in practice*, the implementing measure provides for "comparable effectiveness", the finding of the Appellate Body in terms of lack of flexibility will have been addressed.[104] (footnote omitted)

142. The Panel reads our previous Report to state that a major deficiency of the original measure was its lack of flexibility, in both design and application. The Panel sees our previous Report as suggesting that the original measure was applied in a manner which constituted "unjustifiable discrimination" essentially "because the application of the measure at issue did not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in the exporting countries."[105] The Panel reasons that a measure that, in its design and application, allows certification of exporting Members having regulatory programmes "comparable in effectiveness" to that of the United States does take into account the specific conditions prevailing in the exporting WTO Members and is, therefore, flexible enough to meet the requirements of the chapeau of Article XX.

143. Given that the original measure in that dispute required "essentially the same" practices and procedures as those required in the United States, we found it necessary in that appeal to rule only that Article XX did not allow such inflexibility. Given the Panel's findings with respect to the flexibility of the new measure in this dispute, we find it necessary in this appeal to add to what we ruled in our original Report. The question raised by Malaysia in this appeal is whether the Panel erred in inferring from our previous Report, and thereby finding, that the chapeau of Article XX permits a measure which requires only "comparable effectiveness".

144. In our view, there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme *comparable in effectiveness*. Authorizing an importing Member to condition market access on exporting Members putting in place regulatory programmes *comparable in effectiveness* to that of the importing Member gives sufficient latitude to the exporting Member with respect to the programme it may adopt to achieve the level of effectiveness required. It allows the exporting

[104]Panel Report, para. 5.93.

[105]Panel Report, para. 5.92.

Member to adopt a regulatory programme that is suitable to the specific conditions prevailing in its territory. As we see it, the Panel correctly reasoned and concluded that conditioning market access on the adoption of a programme *comparable in effectiveness*, allows for sufficient flexibility in the application of the measure so as to avoid "arbitrary or unjustifiable discrimination". We, therefore, agree with the conclusion of the Panel on "comparable effectiveness".

145. Malaysia also argues that the measure at issue is not flexible enough to meet the requirement of the chapeau of Article XX relating to "unjustifiable or arbitrary discrimination" because the Revised Guidelines do not provide explicitly for the specific conditions prevailing in Malaysia.[106]

146. We note that the Revised Guidelines contain provisions that permit the United States authorities to take into account the specific conditions of Malaysian shrimp production, and of the Malaysian sea turtle conservation programme, should Malaysia decide to apply for certification. The Revised Guidelines explicitly state that "[if] the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs, that nation will also be eligible for certification."[107] Likewise, the Revised Guidelines provide that the "Department of State will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations as well as information available from other sources." [108]

147. Further, the Revised Guidelines provide that the import prohibitions that can be imposed under Section 609 do not apply to shrimp or products of shrimp "harvested in any other manner or under any other circumstances that the Department of State may determine, following consultations with the [United States National Marine Fisheries Services], does not pose a threat of the incidental taking of sea turtles."[109] Under Section II.B(c)(iii) of the Revised Guidelines (*Additional Sea Turtle Protection Measures*), the "Department of State recognizes that sea turtles require protection throughout their life-cycle, not only when they are threatened during the course of commercial shrimp

[106]According to Malaysia, the specificity of its case rests on the fact that shrimp trawling is not practised in Malaysia; shrimp is a by-catch from fish trawling and therefore, the incidental catch of sea turtles is due to fish trawling, not shrimp trawling. *See*, Malaysia's appellant's submission, para. 3.21 and Panel Report, para. 3.128. In addition, Malaysia stated:

> Malaysia is a nesting ground but it is not known to be a feeding ground for sea turtles and the nesting season in Malaysia does not overlap with the shrimp season. The Loggerheads and the Kemps released rarely nested on Malaysian beaches and did not occur in Malaysian waters respectively and the high mortality of sea turtles that is reported in the shrimp trawls in the United States relate to both these sea turtles. The Green Turtle, the Hawksbill, Leatherback and Olive Ridley are the major sea turtle species in Malaysia. Green turtles were resident in sea grass beds which were found in shallow coastal waters, whilst the Hawksbills were found in coral reef. Trawling was prohibited in these areas. During the nesting season, the Green turtles remain close to the shore in areas where trawling was also prohibited. During long distance migrations between feeding and nesting grounds, turtles were actively swimming close to the surface of the water which made them more vulnerable to drift nets and long lines rather than trawl nets. In Malaysia, trawling targeted fish for the most part of the year and thus the incidental capture of sea turtles was due to fish trawls and not shrimp trawls.
>
> (Malaysia's response to questioning at the oral hearing)

[107]Revised Guidelines, Section II.B; *see*, Panel Report, p. 105.

[108]*Ibid*.

[109]Revised Guidelines, Section I.B; *see*, Panel Report, p. 103.

trawl harvesting."[110] Additionally, Section II.B(c)(iii) states that "[i]n making certification determinations, the Department shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles, including national programmes to protect nesting beaches and other habitat, prohibitions on the direct take of sea turtles, national enforcement and compliance programmes, and participation in any international agreement for the protection and conservation of sea turtles."[111] With respect to the certification process, the Revised Guidelines specify that a country that does not appear to qualify for certification will receive a notification that "will explain the reasons for this preliminary assessment, suggest steps that the government of the harvesting nation can take in order to receive a certification, and invite the government of the harvesting nation to provide … any further information." Moreover, the Department of State commits itself to "actively consider any additional information that the government of the harvesting nation believes should be considered by the Department in making its determination concerning certification."[112]

148. These provisions of the Revised Guidelines, on their face, permit a degree of flexibility that, in our view, will enable the United States to consider the particular conditions prevailing in Malaysia if, and when, Malaysia applies for certification. As Malaysia has not applied for certification, any consideration of whether Malaysia would be certified would be speculation. [113]

149. We need only say here that, in our view, a measure should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in *any* exporting Member, including, of course, Malaysia.[114] Yet this is not the same as saying that there must be specific provisions in the measure aimed at addressing specifically the particular conditions prevailing in *every individual* exporting Member. Article XX of the GATT 1994 does not require a Member to anticipate and provide explicitly for the specific conditions prevailing and evolving in *every individual* Member.

150. We are, therefore, not persuaded by Malaysia's argument that the measure at issue is not flexible enough because the Revised Guidelines do not explicitly address the specific conditions prevailing in Malaysia.

151. Malaysia argues, finally, that the Panel should have scrutinized the decision of the CIT in the *Turtle Island* case and assessed, in the light of that decision, the likelihood and consequences of the Revised Guidelines being modified in the future. According to Malaysia, the Panel should have come to the conclusion that the Revised Guidelines are not flexible enough because the CIT ruled that the part of the Revised Guidelines allowing TED-caught shrimp from non-certified harvesting countries to be imported into the United States is contrary to Section 609.[115] As we have already ruled[116], we

[110]Revised Guidelines, Section II.B(c)(iii); *see*, Panel Report, p. 106.

[111]*Ibid.*

[112]Revised Guidelines, Section II.C, Panel Report, p. 107. *See also*, Revised Guidelines, Section II.D, Panel Report, p. 108.

[113]In this respect, we note that the European Communities stated that:

> … the complaint by Malaysia in this case is somewhat premature. As it appears Malaysia has not yet applied for certification and it is therefore not yet clear how the contested legislation would apply to imports of shrimp and shrimp products from Malaysia.
>
> (European Communities' third participant's submission, para. 27)

[114]Appellate Body Report, *United States – Shrimp*, *supra*, footnote 24, para. 164.

[115]Malaysia's appellant's submission, para. 3.25.

[116]*See*, *supra*, para. 95.

are of the view that, when examining the United States measures, the Panel took into account the status of municipal law at the time, and reached the correct conclusion. The CIT decision in the *Turtle Island* case has not modified the legal effect or the application of the Revised Guidelines; hence, we are not persuaded by this argument of Malaysia.

152. For all these reasons, we uphold the finding of the Panel, in paragraph 6.1 of the Panel Report, that "Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious, good faith efforts to reach a multilateral agreement, remain satisfied".[117]

VII. Findings and Conclusions

153. For the reasons set out in this Report, the Appellate Body:

(a) *finds* that the Panel correctly fulfilled its mandate under Article 21.5 of the DSU of examining the consistency, with the relevant provisions of the GATT 1994, of the United States measure taken to comply with the recommendations and rulings of the DSB in *United States - Shrimp*; and

(b) *upholds* the finding of the Panel, in paragraph 6.1 of its Report, that "Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the [United States] authorities, is justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied".

154. As we have upheld the Panel's finding that the United States measure is now applied in a manner that meets the requirements of Article XX of the GATT 1994, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU.

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[117]Panel Report, para. 6.1. The Panel stated that its findings of justification stand, "*as long as*" certain conditions it set out in its Report, in particular, the good faith efforts to reach a multilateral agreement, continue to be met. In this respect, we note that the United States negotiated and concluded a Memorandum of Understanding with certain countries in the Indian Ocean and South-East Asia region, the South-East Asian MOU. *See*, *supra,* footnote 96. This agreement took effect on 1 September 2001, almost two and a half months after the circulation of the Panel Report. The participants have not disputed the existence of this agreement. There was some dispute at the oral hearing as to the legally binding nature of this agreement. Basic Principle 4 of that agreement states:

> This Memorandum of Understanding, including the Conservation and Management Plan, may be amended by consensus of the signatory States. When appropriate, the signatory States will consider amending this Memorandum of Understanding to make it legally binding.

At the oral hearing, the United States stated that "[The South-East Asian MOU] is considered a political undertaking that does not have binding consequences under international law". Malaysia stated that "The [South-East Asian] MOU … would have the status of a treaty under the Vienna Convention of the law of treaties, because "treaty" has been defined as an international agreement that is concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, whatever its particular designation." We need not judge this issue, and we do not. Even so, we note that, whether legally binding or not, the Memorandum of Understanding reinforces the Panel's finding that the United States had indeed made serious good faith efforts to negotiate a multilateral agreement.

Report of the Appellate Body,
Brazil – Measures Affecting Imports of Retreaded Tyres,
WT/DS332/AB/R, adopted 3 December 2007

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Brazil – Retreaded Tyres	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, circulated to WTO Members 12 June 2007
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
Chile – Price Band System (Article 21.5 – Argentina)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report, WT/DS302/AB/R, DSR 2005:XV, 7425
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
EC – Asbestos	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report, WT/DS135/AB/R, DSR 2001:VIII, 3305
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, 6365
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97

Short Title	Full case title and citation
Japan – Apples	Appellate Body Report, *Japan - Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
Mexico – Taxes on Soft Drinks	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006
Turkey – Textiles	Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R and Corr.1, adopted 20 April 2005, DSR 2005:XII, 5663
US – Gambling	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report, WT/DS285/AB/R, DSR 2005:XII, 5797
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Line Pipe	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report, WT/DS202/AB/, DSR 2002:IV, 1473
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
US – Section 337 Tariff Act	GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, L/6439, adopted 7 November 1989, BISD 36S/345

Short Title	Full case title and citation
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Shrimp (Article 21.5 – Malaysia)	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 21 November 2001, upheld by Appellate Body Report, WT/DS58/AB/RW, DSR 2001:XIII, 6529
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
ABR	Associação Brasileira do Segmento de Reforma de Pneus (Brazilian Association of the Retreading Industry)
ABR Report	Report of the ABR on tyre retreading activities in Brazil, 26 May 2006 (Exhibit BRA-95)
CONAMA	Conselho Nacional do Meio Ambiente (National Council for the Environment of the Ministry of the Environment)
CONAMA Resolution 258/1999	CONAMA Resolution No. 258 of 26 August 1999 (Exhibits BRA-4 and EC-47)
CRTA	Committee on Regional Trade Agreements
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
Enabling Clause	*GATT 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, L/4903, 28 November 1979, BISD 26S/203
GATS	*General Agreement on Trade in Services*
GATT 1994	*General Agreement on Tariffs and Trade 1994*
Import Ban	Prohibition imposed by Brazil on imports of retreaded tyres
INMETRO	Instituto Nacional de Metrologia, Normalização e Qualidade Industrial (National Institute for Metrology, Standardization and Industrial Quality)
LAFIS	LAFIS Consultoria, Análises Sectoriais e de Empresas
MERCOSUR or Mercosur	Mercado Común del Sur (Southern Common Market) – a regional trade agreement between Brazil, Argentina, Uruguay, and Paraguay, founded in 1991 by the Treaty of Asunción, amended and updated by the 1994 Treaty of Ouro Preto
MERCOSUR exemption	Exemption from the Import Ban afforded by Brazil to imports of retreaded tyres originating in MERCOSUR countries
OECD	Organisation for Economic Co-operation and Development
Panel Report	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*
Portaria SECEX 8/2000	Portaria SECEX No. 8 of 25 September 2000 (Exhibits BRA-71 and EC-26)
Portaria SECEX 14/2004	Portaria No. 14 of the SECEX, dated 17 November 2004 (Exhibits BRA-84 and EC-29)
SECEX	Secretaria de Comércio Exterior (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade)

Abbreviation	Description
Understanding on Article XXIV of the GATT 1994	*Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization

WORLD TRADE ORGANIZATION
APPELLATE BODY

Brazil – Measures Affecting Imports of Retreaded Tyres

European Communities, *Appellant*
Brazil, *Appellee*

Argentina, *Third Participant*
Australia, *Third Participant*
China, *Third Participant*
Cuba, *Third Participant*
Guatemala, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Mexico, *Third Participant*
Paraguay, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, *Third Participant*
Thailand, *Third Participant*
United States, *Third Participant*

AB-2007-4

Present:

Abi-Saab, Presiding Member
Baptista, Member
Taniguchi, Member

I. Introduction

1. The European Communities appeals certain issues of law and legal interpretations developed in the Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (the "Panel Report").[1] The Panel was established to consider a complaint by the European Communities concerning the consistency of certain measures imposed by Brazil on the importation and marketing of retreaded tyres[2] with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

2. Before the Panel, the European Communities claimed that Brazil imposed a prohibition on the importation of retreaded tyres, notably by virtue of Article 40 of Portaria No. 14 of the Secretaria de Comércio Exterior ("SECEX") (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade), dated 17 November 2004 ("Portaria SECEX 14/2004")[3], and that this prohibition was inconsistent with Article XI:1 of the GATT 1994.[4] The European Communities also contended that certain Brazilian measures providing for the imposition of fines on the importation of retreaded tyres, and on the marketing, transportation, storage, keeping, or warehousing of imported retreaded tyres[5], were similarly inconsistent with Article XI:1 or, alternatively, Article III:4 of the GATT 1994.[6] In addition, the European Communities made claims under Article III:4 of the GATT 1994 in respect of certain state measures prohibiting the marketing of, and/or imposing disposal obligations on the importers of, imported retreaded tyres.[7] Finally, the European Communities challenged the exemption from the import prohibition on retreaded tyres and associated fines provided by Brazil to retreaded tyres originating in countries of the Mercado Común del Sur ("MERCOSUR") (Southern Common Market).[8] The European Communities contended that these exemptions were inconsistent with Articles I:1 and XIII:1 of the GATT 1994.[9]

[1]WT/DS332/R, 12 June 2007.

[2]Retreaded tyres are used tyres that are reconditioned for further use by stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread, and sometimes with new material also covering parts or all of the sidewalls. (See Panel Report, para. 2.1) Retreaded tyres can be produced through different methods, all indistinctively referred to as "retreading". These methods are: (i) top-capping, which consists of replacing only the tread; (ii) re-capping, which entails replacing the tread and part of the sidewall; and (iii) remoulding, which consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. (See *ibid.*, para. 2.2) The retreaded tyres covered in this dispute are classified under subheadings 4012.11 (motor cars), 4012.12 (buses and lorries), 4012.13 (aircraft), and 4012.19 (other types) of the *International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels, 14 June 1983. In contrast, used tyres are classified under subheading 4012.20. New tyres are classified under heading 4011. (See *ibid.*, para. 2.4)

[3]Exhibits BRA-84 and EC-29 submitted by Brazil and the European Communities, respectively, to the Panel. Article 40 of Portaria SECEX 14/2004 reads as follows:

> Article 40 – An import license will not be granted for retreaded and used tires, whether as a consumer product or feedstock, classified under NCM code 4012, except for remoulded tires, classified under NCM codes 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, originating and proceeding from the MERCOSUR Member States under the Economic Complementation Agreement No. 18.

(See Panel Report, para. 2.7)

[4]*Ibid.*, paras. 3.1 and 7.1.

[5]Article 47-A of Presidential Decree 3.179 of 21 September 1999, as amended by Article 1 of Presidential Decree 3.919 of 14 September 2001, provides:

> Importing used or recycled tires:
>
> Fine of R$ 400.00 (four hundred reais) per unit.
>
> Sole paragraph: The same penalty shall apply to whosoever trades, transports, stores, keeps or maintains in a depot a used or recycled tire imported under such conditions.

(*Ibid.*, para. 2.10 (referring to Exhibit BRA-72 submitted by Brazil to the Panel); see also Exhibit EC-34 submitted by the European Communities to the Panel)

[6]Panel Report, paras. 3.1 and 7.358.

[7]*Ibid.*, para. 7.391. The measures of the State of Rio Grande do Sul are identified in paragraphs 2.11 and 2.12 of the Panel Report.

[8]The exemption from the import prohibition afforded to MERCOSUR countries is provided in Article 40 of Portaria SECEX 14/2004 (see *supra*, footnote 3) and applies exclusively to remoulded tyres, a subcategory of retreaded tyres. (See Panel Report, footnote 1440 to para. 7.265) The exemption from the fines associated with the import prohibition on retreaded tyres is provided in Article 1 of Presidential Decree 4.592 of 11 February 2003 (Exhibit BRA-79 submitted by Brazil to the Panel), and exempts imports of all categories of retreaded tyres originating in MERCOSUR countries from the fines provided in Article 47-A of Presidential Decree 3.179, as amended, in the following terms:

> Article 1: Article 47-A of Decree 3.179 of 21 September 1999 shall apply with the addition of the following paragraph, and the current sole paragraph shall be renumbered as (1):
>
> paragraph (2) – Imports of retreaded tyres classified under heading MCN 4012.1100, 4012.1200, 4012.1300 and 4012.1900, originating in the MERCOSUR member countries under Economic Complementation Agreement No. 18 shall be exempt from payment of the fine referred to in this Article.

(See *supra*, footnote 5; see also Panel Report, para. 2.16)

[9]Panel Report, para. 7.448.

3. Brazil did not contest that the prohibition on the importation of retreaded tyres and associated fines were *prima facie* inconsistent with Article XI:1[10]; or that state measures prohibiting the marketing of, and/or imposing disposal obligations on the importers of, imported retreaded tyres were *prima facie* inconsistent with Article III:4[11]; or that the exemptions from both the import prohibition and associated fines afforded to retreaded tyres imported from MERCOSUR countries were *prima facie* inconsistent with Articles I:1 and XIII:1 of the GATT 1994.[12] Instead, Brazil submitted that the prohibition on the importation of retreaded tyres and associated fines, and state measures restricting the marketing of imported retreaded tyres, were all justified under Article XX(b) of the GATT 1994.[13] Brazil contended that the fines associated with the import prohibition on retreaded tyres were justified also under Article XX(d) of the GATT 1994.[14] Brazil further maintained that the exemption from the import prohibition and associated fines afforded to imports of *remoulded* tyres from MERCOSUR countries was justified under Articles XX(d) and XXIV of the GATT 1994.[15]

4. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 12 June 2007. The Panel found that the import prohibition on retreaded tyres was inconsistent with Article XI:1 and not justified under Article XX of the GATT 1994.[16] In its analysis, the Panel found that the import prohibition on retreaded tyres was provisionally justified as "necessary to protect human, animal or plant life or health" under Article XX(b).[17] However, the Panel also found that the importation of used tyres under court injunctions resulted in the import prohibition on retreaded tyres being applied by Brazil in a manner that constituted both "a means of unjustifiable discrimination [between countries] where the same conditions prevail"[18] and "a disguised restriction on international trade"[19], within the meaning of the chapeau of Article XX of the GATT 1994.

5. The Panel found further that the fines associated with the import prohibition on retreaded tyres were inconsistent with Article XI:1 and not justified under either paragraph (b) or (d) of Article XX of the GATT 1994.[20] The Panel also determined that state law restrictions on the marketing of imported retreaded tyres and associated disposal obligations were inconsistent with Article III:4 and not justified under Article XX(b) of the GATT 1994.[21] The Panel exercised judicial economy with respect to the European Communities' claims that the exemption from the import prohibition and associated fines afforded to retreaded tyres imported from MERCOSUR countries was inconsistent with Articles I:1 and XIII:1 of the GATT 1994, and with respect to Brazil's related defence under Articles XX(d) and XXIV of the GATT 1994.[22] The Panel accordingly recommended

[10]*Ibid.*, paras. 7.2 and 7.359. Brazil did not acknowledge any inconsistency of the fines with Article III:4 of the GATT 1994. (See *ibid.*, para. 7.359)

[11]*Ibid.*, para. 7.392.

[12]*Ibid.*, para. 7.449.

[13]*Ibid.*, paras. 7.2, 7.217, 7.359, and 7.392.

[14]*Ibid.*, para. 7.359.

[15]*Ibid.*, para. 7.449.

[16]Panel Report, paras. 7.357 and 8.1(a)(i) and (ii).

[17]*Ibid.*, para. 7.215.

[18]*Ibid.*, para. 7.310; see also para. 7.306.

[19]*Ibid.*, para. 7.349.

[20]*Ibid.*, para. 8.1(b). The Panel did not rule on the European Communities' alternative claim that the fines associated with the prohibition on the importation of retreaded tyres were inconsistent with Article III:4 of the GATT 1994. (See *ibid.*, para. 7.364)

[21]*Ibid.*, para. 8.1(c).

[22]*Ibid.*, paras. 7.456 and 8.2.

that the Dispute Settlement Body (the "DSB") request Brazil to bring those measures found to be inconsistent into conformity with its obligations under the GATT 1994.[23]

6. At its meeting on 10 August 2007, the DSB agreed to a joint request by Brazil and the European Communities to extend the time period for adoption of the Panel Report until no later than 20 September 2007.[24] On 3 September 2007, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal[25] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[26] On 10 September 2007, the European Communities filed an appellant's submission.[27] On 28 September 2007, Brazil filed an appellee's submission.[28] On the same day, Argentina, Australia, Japan, Korea, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, and the United States each filed a third participant's submission.[29] Also on 28 September 2007, China, Cuba, Guatemala, Mexico, and Thailand each notified its intention to appear at the oral hearing as a third participant.[30] On 5 October 2007, Paraguay notified its intention to appear at the oral hearing as a third participant.[31]

7. On 28 September 2007, the Appellate Body received an *amicus curiae* brief from the Humane Society International. On 11 October 2007, the Appellate Body further received an *amicus curiae* brief submitted jointly by a group of nine non-governmental organizations.[32] The Appellate Body Division hearing the appeal did not find it necessary to take these *amicus curiae* briefs into account in rendering its decision.

8. The oral hearing in this appeal was held on 15 and 16 October 2007. The participants and the third participants, with the exception of Argentina, China, Guatemala, Mexico, Paraguay, and Thailand, made oral statements. The participants and the third participants responded to questions posed by the Members of the Division hearing the appeal.

[23]*Ibid.*, para. 8.4.

[24]WT/DS332/8, 31 July 2007. The minutes of the DSB meeting are set out in WT/DSB/M/237.

[25]WT/DS332/9, 3 September 2007 (attached as Annex I to this Report).

[26]WT/AB/WP/5, 4 January 2005.

[27]Pursuant to Rule 21 of the *Working Procedures*.

[28]Pursuant to Rule 22 of the *Working Procedures*.

[29]Pursuant to Rule 24(1) of the *Working Procedures*.

[30]Pursuant to Rule 24(2) of the *Working Procedures*.

[31]Pursuant to Rule 24(4) of the *Working Procedures*.

[32]These non-governmental organizations are: Associação de Combate aos Poluentes (ACPO), Brazil; Associação de Proteção ao Meio Ambiente de Cianorte (APROMAC), Brazil; Centro de Derechos Humanos y Ambiente (CEDHA), Argentina; Center for International Environmental Law (CIEL), United States and Switzerland; Conectas Direitos Humanos, Brazil; Friends of the Earth Europe, Belgium; The German NGO Forum on Environment and Development, Germany; Justiça Global, Brazil; and Instituto O Direito por Um Planeta Verde, Brazil.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the European Communities – Appellant*

1. The Necessity Analysis

9. The European Communities claims that the Panel erred in finding that the import prohibition on retreaded tyres imposed by Brazil (the "Import Ban") was necessary to protect human, animal, or plant life or health, within the meaning of Article XX(b) of the GATT 1994. The European Communities requests the Appellate Body to reverse this finding and to find, instead, that the Import Ban is not "necessary" within the meaning of Article XX(b).

10. The European Communities' claims of error are directed at three distinct aspects of the Panel's necessity analysis: first, the Panel's finding that the Import Ban contributed to the realization of its stated objective; secondly, the Panel's finding that there were no reasonably available alternatives to the Import Ban; and thirdly, the Panel's alleged failure to conduct the process of weighing and balancing the relevant factors and the alternatives that was required to determine whether the Import Ban was "necessary" under Article XX(b). The arguments advanced by the European Communities in relation to each of these claims of error are addressed in turn.

(a) The Contribution Analysis

11. The European Communities argues that the Panel erred in finding that the Import Ban contributed to the protection of human, animal, or plant life or health. The European Communities maintains that the Panel "applied an erroneous legal standard"[33] by examining whether the Import Ban could make, or *could have* made, a contribution to the protection of human life or health, rather than establishing the *actual* contribution of the measure to its objective. By applying a standard of potential contribution, rather than one of actual contribution, the Panel acted inconsistently with the case law of the Appellate Body[34], which requires the Panel to have assessed the extent of the contribution made by the Import Ban to the reduction of waste tyres arising in Brazil. The European Communities reasons that "no meaningful weighing and balancing is possible"[35] absent a proper determination of the extent of the contribution made by the measure, and that, for necessity to be demonstrated, the contribution required is "more than mere suitability", it must be "verifiable and significant".[36] In this case, assessing the contribution of the measure to the achievement of its stated goals involved assessing whether the Import Ban reduced the number of waste tyres in Brazil. The European Communities does not see how this could have been done in any way *other than* through quantification, and stresses that this is *not* a case involving scientific uncertainty about the existence of risks. Rather, that "[t]he very indirect nature of the alleged risks attributed to imported retreaded tyres should have called for a particularly diligent examination of the contribution made by the ban to the reduction of the number of waste tyres arising in Brazil."[37]

[33]European Communities' appellant's submission, para. 166.

[34]*Ibid.*, para. 169 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 164).

[35]*Ibid.*, para. 171.

[36]*Ibid.*, para. 172.

[37]European Communities' appellant's submission, para. 177. For the European Communities, the indirect nature of the alleged risk distinguishes this case from *EC – Asbestos*, as the factual context of this case does not concern the evaluation of risk in quantitative or qualitative terms. Rather, it concerns the quantification of the contribution of the measure to achieving its stated objective. (See *ibid.*, para. 175)

12. In addition, the European Communities claims that the Panel did not make an objective assessment of the facts of the case, as required by Article 11 of the DSU, in determining the contribution of the Import Ban to the realization of the ends pursued by it. The European Communities asserts that the Panel ignored significant facts and arguments in its analysis, and failed to conduct an overall assessment of the evidence, instead, referring to the evidence before it in a selective and distorted manner.

13. According to the European Communities, in concluding that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres"[38] that were not capable of being retreaded, the Panel ignored evidence that demonstrated "the existence ... of low-quality non-retreadable tyres"[39] in Brazil. The Panel's finding that "at least some domestic used tyres are being retreaded in Brazil"[40] is based exclusively on a statement contained in a report by the Associação Brasileira do Segmento de Reforma de Pneus (the "ABR") (Brazilian Association of the Retreading Industry) (the "ABR Report")[41] and on Technical Note 001/2006 of the Instituto Nacional de Metrologia, Normalização e Qualidade Industrial ("INMETRO") (National Institute for Metrology, Standardization and Industrial Quality).[42] The European Communities submits that the Panel failed to consider that the former is directly contradicted by a second report by the ABR[43], or to discount the evidentiary value of the latter given that it was issued during the course of the Panel proceedings and contradicts the earlier INMETRO Technical Note 83/2000.[44]

14. Moreover, the European Communities contends that the Panel ignored evidence that contradicted its findings regarding the retreadability of used tyres in Brazil, namely, a study by the consultancy LAFIS [45], and the fact that domestic retreaders have sought court injunctions to obtain the right to import used tyres for further retreading in Brazil. The European Communities also denounces the Panel's references to measures that Brazil might adopt in the future (such as more frequent automotive inspections), emphasizing that the question of whether the Import Ban contributed to the achievement of its stated objective had to be determined at the time of the establishment of the Panel, and speculation about future events is not a sufficient basis for an objective assessment of the facts.

(b) Alternatives to the Import Ban

15. The European Communities argues that the Panel committed multiple errors in holding that there were no reasonably available alternatives to the Import Ban that would ensure the same level of protection of human life and health. The European Communities points out that it presented two categories of alternative measures: measures to reduce the *accumulation* of waste tyres; and measures to improve the *management* of waste tyres.

[38]*Ibid.*, para. 183 (quoting Panel Report, para. 7.137).

[39]*Ibid.* (referring to Exhibits EC-15 and EC-67 to EC-71 submitted by the European Communities to the Panel; European Communities' oral statement at the first Panel meeting, para. 28; and European Communities' response to Question 11 posed by the Panel, Panel Report, pp. 254-255).

[40]Panel Report, para. 7.136.

[41]European Communities' appellant's submission, para. 186 (referring to the report of the ABR on tyre retreading activities in Brazil, 26 May 2006 (Exhibit BRA-95 submitted by Brazil to the Panel), para. 6)).

[42]Exhibit BRA-163 submitted by Brazil to the Panel.

[43]European Communities' appellant's submission, para. 187 (referring to the report of the ABR on the reformed tyres sector in Brazil, 23 June 2006 (Exhibit BRA-157 submitted by Brazil to the Panel), para. 6)).

[44]European Communities' appellant's submission, paras. 188 and 189; Exhibit EC-45 submitted by the European Communities to the Panel.

[45]*Ibid.*, para. 190 (referring to the report by LAFIS, "Auto Parts and Vehicles: Tyres", 20 April 2006 (Exhibit EC-92 submitted by the European Communities to the Panel), p. 11). This study indicates that, in Brazil, the overall rate of retreading for all types of vehicles is 9.9 per cent.

16. In the view of the European Communities, the Panel improperly excluded measures to ensure a better implementation and enforcement of the import ban on *used* tyres from its analysis of possible alternatives to the Import Ban on *retreaded* tyres. The most relevant and obvious alternative that would allow Brazil to prevent the risks associated with the accumulation of waste tyres would be to put an end to the importation of used tyres. Thus, the European Communities insists, the Panel should have analyzed this alternative irrespective of whether it also considered the implementation of the import ban on used tyres as part of its analysis under the chapeau of Article XX.

17. The European Communities adds that the Panel incorrectly defined as "alternatives" to the Import Ban only measures that avoid the generation of waste tyres specifically from imported retreaded tyres. Such a narrow definition of "alternatives" wrongly links the notion of alternative measures to the *means* (avoidance or non-generation of waste tyres) employed by the measure at issue to achieve its objective, rather than to the objective itself. Available alternatives to the Import Ban are not, therefore, as the Panel found, limited to non-generation measures, but include any alternatives that would allow Brazil to attain the stated objective of the Import Ban, namely, the protection of life and health from mosquito-borne diseases and from tyre fire emissions. In the European Communities' view, the Panel's narrow conception of "alternative" resulted in the erroneous rejection of several alternatives that were capable of achieving this objective, such as measures to improve the domestic retreading and retreadability of tyres, the collection and disposal scheme imposed by the Conselho Nacional do Meio Ambiente ("CONAMA") (National Council for the Environment of the Ministry of the Environment), and measures relating to the management of waste tyres, such as co-incineration.

18. The European Communities points to two additional errors in the Panel's conception of alternative measures. First, the Panel refused to consider as alternatives measures that could be "cumulative rather than substitutable"[46] with the Import Ban. For the European Communities, a measure that is cumulative or complementary to the Import Ban is capable of achieving the same objective as the ban and, therefore, is an alternative that must be taken into account. Secondly, in examining the CONAMA scheme and co-incineration of waste tyres, the Panel did not inquire whether the proposed options exist and are reasonably available, but, instead, examined whether those options are actually being employed.

19. Moreover, the European Communities argues that the Panel erred by excluding as alternatives a correct and complete implementation of certain state measures merely on the basis that these measures have already been implemented in Brazil. Specifically, the European Communities submits that evidence before the Panel demonstrated that Brazil neither implements correctly the obligations under the CONAMA scheme, nor enforces properly its collection and disposal system. Therefore, a better enforcement of the CONAMA scheme is an alternative that would be more effective than the Import Ban in reducing risks associated with tyre waste. The Panel also erroneously ignored the European Communities' contention that collection and disposal programmes, such as Paraná Rodando Limpo[47] should be adopted by all states in Brazil.

20. The European Communities also challenges the Panel's findings that most of the material recycling alternatives it proposed could not constitute reasonably available alternatives to the Import Ban because they "are only capable of disposing [of] a small ... number of waste tyres".[48] The case law of the Appellate Body regarding Article XX(b) does not require that one single alternative measure achieve the same objective as the challenged measure. Therefore, the Panel erred in rejecting several alternative measures on the grounds that, taken individually, each measure did not fully attain

[46]European Communities' appellant's submission, para. 225 (quoting Panel Report, para. 7.169).

[47]See Exhibit EC-49 submitted by the European Communities to the Panel.

[48]European Communities' appellant's submission, para. 238 (referring to Panel Report, paras. 7.201, 7.205, and 7.206). (underlining omitted)

the objective of the challenged measure. The European Communities also considers that the Panel erred in its analysis by requiring alternatives to be capable of dealing with the management of *all* waste tyres in Brazil, rather than with the number of waste tyres attributable to imported *retreaded* tyres.

21. Finally, the European Communities submits that the Panel's factual findings regarding reasonably available alternatives were not based on an objective assessment of the facts, as required by Article 11 of the DSU. More specifically, the Panel's rejection of landfilling of waste tyres as an alternative to the Import Ban was based on evidence related exclusively to landfilling of *whole* tyres, when the only alternative proposed was the landfilling of *shredded* tyres, and the Panel did not take into account legislation that permits the landfilling of shredded tyres in Brazil. As regards controlled stockpiling, the Panel erred in rejecting this alternative on the grounds that stockpiling does not dispose of waste tyres, and that it entails some risk to human health and the environment. As recognized in the *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal*[49], controlled stockpiling is a disposal operation that is used for temporary storage. It is a crucial element in managing waste tyres, and the mere fact that it does not avoid *all* the risks that the Import Ban seeks to eliminate does not mean that it could not be an alternative. Regarding co-incineration, the European Communities argues that the Panel relied on evidence on co-incineration activities in countries other than Brazil[50], and failed to require Brazil to explain why unused capacity in its existing incineration facilities could not be used to burn more waste tyres as an available alternative to the Import Ban. The European Communities adds that the Panel's finding that co-incineration "may potentially pose health risks to humans"[51] is based on outdated evidence that does not represent the current state of the art on energy recovery.

22. The European Communities contends further that the Panel's rejection of material recycling as an alternative to the Import Ban is also not based on an objective assessment of the facts. The Panel disregarded evidence presented by the European Communities and, instead, relied on a brief paper by an unidentified organization, which related to a single material recycling application—civil engineering—to conclude that "it is not clear that these [material recycling] applications are entirely safe".[52] The European Communities adds that the Panel's conclusion that material recycling alternatives, such as civil engineering and rubber asphalt, would not be "reasonably" available due to their prohibitive costs was based on evidence adduced exclusively in relation to a single material recycling application—devulcanization.

23. Finally, the European Communities claims that the Panel failed to analyze one of the possible alternative measures identified by the European Communities, and which has already been adopted by Brazil—the National Dengue Control Programme[53]—and that this failure constitutes a violation of Article 11 of the DSU.

[49]Adopted 1989; entry into force 1992 (Exhibit EC-24 submitted by the European Communities to the Panel).

[50]European countries and the United States. See also Panel Report, footnote 1339 to para. 7.192.

[51]European Communities' appellant's submission, para. 262 (quoting Panel Report, para. 7.192).

[52]European Communities' appellant's submission, para. 274 (referring to Panel Report, para. 7.208). The European Communities also criticizes the Panel for reaching its finding on high costs of rubber asphalt applications on the basis of a piece of evidence describing this application as a "promising outlet for recycled rubber because rubberised asphalt lasts longer than conventional asphalt". (*Ibid.*, para. 279 (quoting Panel Report, footnote 1367 to para. 7.205, in turn quoting the report of the Organisation for Economic Co-operation and Development ("OECD"), Working Group on Waste Prevention and Recycling, ENV/EPOC/WGWPR(2005)3/FINAL, 26 September 2005 (Exhibit EC-16 submitted by the European Communities to the Panel)))

[53]Brazil's Ministry of Health National Dengue Control Programme (NDCP), adopted 24 July 2002 (Exhibit EC-93 submitted by the European Communities to the Panel).

(c) The Weighing and Balancing Process

24. The European Communities claims that the Panel failed to conduct the process of weighing and balancing the relevant factors and the alternatives that was required in order to determine whether the Import Ban was "necessary" under Article XX(b) of the GATT 1994. For the European Communities, weighing and balancing involves, first, an individual assessment of each element (importance of the objective pursued; trade restrictiveness of the measure; contribution of the measure to the achievement of the objective) and, then, a consideration of the role and relative importance of each element together with the other elements, for the purposes of deciding whether the challenged measure is necessary to achieve the relevant objective. The Panel, however, failed to weigh properly the trade restrictiveness of the Import Ban. Because the Panel incorrectly analyzed the extent of the contribution of the Import Ban to the reduction in the number of waste tyres and, indirectly, to the protection of human life and health, the Panel was also incapable of properly weighing and balancing this contribution against any of the other elements. The Panel failed to consider that the risks addressed by the Import Ban were not directly linked to retreaded tyres but to the waste they eventually turn into, and that the level of such risks depends on how waste tyres are managed and disposed of. Thus, the Panel failed to acknowledge the indirect, uncertain, and relative contribution of the Import Ban to its stated objective and, in turn, failed to limit the weight afforded to this element in the weighing and balancing process.

25. The European Communities contends that the Panel based its weighing and balancing exercise on its flawed analysis of reasonably available alternatives. The Panel also failed to take proper account of the trade restrictiveness of the Import Ban in the weighing and balancing exercise. The Panel focused on non-generation measures, and overlooked the considerable advantages of sound waste tyre collection and disposal schemes, including the fact that the implementation of the CONAMA scheme is less trade restrictive than the Import Ban. The Panel conducted an individual analysis of possible alternatives, did not really carry out a global assessment, and discarded measures that have already been implemented without verifying the extent of implementation. In sum, asserts the European Communities, the Panel did not conduct a proper weighing and balancing of the relevant elements and alternatives, but, rather, a superficial analysis that repeated all of the errors it had already made in its assessment of the necessity of the Import Ban.

26. For all of the above reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that the Import Ban was "necessary" to protect human, animal, or plant life or health, within the meaning of Article XX(b) of the GATT 1994. Should the Appellate Body accept this request, the European Communities further requests the Appellate Body to find that the Import Ban is not "necessary" within the meaning of Article XX(b) of the GATT 1994.

2. The Chapeau of Article XX of the GATT 1994

(a) The MERCOSUR Exemption

27. The European Communities claims that the Panel erred in finding that the exemption from the Import Ban on imports of retreaded tyres from MERCOSUR countries (the "MERCOSUR exemption") did not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade and was not, therefore, contrary to the chapeau of Article XX of the GATT 1994. These findings were based on a "confused" analysis "marred by serious errors of law".[54] In particular, the European Communities emphasizes that the fact that Brazil introduced the MERCOSUR exemption in order to comply with its obligations under MERCOSUR does not preclude a finding of "arbitrary" discrimination. The European Communities argues further that the volume of imports

[54]European Communities' appellant's submission, para. 304.

from MERCOSUR countries is irrelevant to the analysis of whether that exemption constitutes arbitrary or unjustifiable discrimination. The European Communities requests the Appellate Body to reverse this finding and to find, instead, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX.

28. For the European Communities, the "arbitrary" discrimination and the "unjustifiable" discrimination mentioned in the chapeau of Article XX are closely related. Both require discrimination to be explained through convincing, reasonable, and rational arguments. What is arbitrary and unjustifiable discrimination must, in the view of the European Communities, be established in relation to the objective of the measure at issue and the conditions prevailing in the countries concerned. At the same time, the notions of "arbitrary" and "unjustifiable" are not identical: "the term 'arbitrary' has its 'centre of gravity' in the lack of consistency and predictability in the application of the measure, while the term 'unjustifiable' refers more to the lack of motivation and capacity to convince."[55]

29. The European Communities submits that, in its analysis, the Panel wrongly defined "arbitrary" discrimination as being limited to "capricious", "unpredictable", or "random" discrimination.[56] This definition failed to take into account the object and purpose of Article XX, as well as the context provided by the close link between "arbitrary discrimination" and "unjustifiable discrimination". The European Communities adds that this definition would deprive arbitrary discrimination of its useful value, because "few actions of governments are ever entirely 'random' or 'capricious'."[57] The chapeau of Article XX expresses "requirements of good faith, and requires a delicate balancing of the interests of the Member invoking an exception ... and the rights of other Members".[58] The European Communities contends that the Panel's approach, however, was not consistent with the required balancing of interests, because it would allow discrimination "on the basis of purely extraneous factors which have nothing to do with the objectives of the measure"[59], as long as the discrimination is not random or capricious.

30. According to the European Communities, whether a measure involves arbitrary discrimination can only be determined by taking into account the objective of the measure in respect of which Article XX is invoked. A measure will not be arbitrary if it "appears as reasonable, predictable and foreseeable"[60] in the light of that objective.

31. It follows, according to the European Communities, that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary discrimination because it had been introduced in response to a ruling of a MERCOSUR arbitral tribunal. The MERCOSUR exemption does not further, and has the potential of undermining, the stated objective of the measure (the protection of life and health from risks arising from mosquito-borne diseases and tyre fires), and for this reason must be regarded as unreasonable, contradictory, and thus arbitrary. For the European Communities, allowing a Member's obligations under other international agreements to render discrimination consistent with the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The fact that the chapeau of Article XX prohibits discrimination "between countries where

[55]European Communities' appellant's submission, para. 310 (referring to European Communities' first written submission to the Panel, para. 152).

[56]Panel Report, paras. 7.272, 7.280, and 7.281.

[57]European Communities' appellant's submission, para. 316.

[58]*Ibid.*, para. 319 (referring to Appellate Body Report, *US – Shrimp*, paras. 158 and 159, where the Appellate Body also found that the "rigidity" and "inflexibility" of certain certification requirements introduced by the United States constituted "arbitrary discrimination").

[59]*Ibid.*, para. 319.

[60]*Ibid.*, para. 321.

the same conditions prevail" provides further support for the European Communities' interpretation, because whether the same conditions prevail in different countries is an objective question, not a question of legal obligations *vis-à-vis* another country. It is thus "inconceivable that the mere compliance with an international agreement would suffice to render discrimination between countries where the same conditions prevail compatible with the chapeau of Article XX".[61]

32. As regards the Panel's attempt to buttress its reasoning by referring to Article XXIV of the GATT 1994 and the "'nature' of Mercosur as an agreement"[62] within the meaning of that provision, the European Communities submits that agreements justified under Article XXIV would not entitle Members to discriminate in the application of Article XX measures, because Article XXIV:8(a)(i) and (b) explicitly excludes measures that are justified under Article XX from the requirement to eliminate restrictive regulations of commerce with respect to substantially all the trade within a customs union or free trade area. The European Communities further criticizes the Panel for not verifying whether MERCOSUR is a customs union that complies with the requirements of Article XXIV of the GATT 1994.

33. The European Communities points to two additional flaws in the Panel's reasoning: its statement that it took into account "the nature of the ruling on the basis of which Brazil has acted"[63]; and the Panel's reliance on Brazil's statement that the MERCOSUR exemption was "the only course of action available to it"[64] to implement the ruling. The nature of the ruling on the basis of which Brazil has acted is irrelevant for the determination of whether the MERCOSUR exemption constitutes arbitrary discrimination. Moreover, before the MERCOSUR tribunal, Brazil chose not to defend the Import Ban by invoking an exception clause related to the protection of human life and health, and thus the fact that it invoked such grounds in this dispute must be regarded as arbitrary. The European Communities further submits that the MERCOSUR tribunal did not oblige Brazil to discriminate between its MERCOSUR partners and other WTO Members, because Brazil could have implemented the arbitral ruling by lifting the Import Ban with respect to all third countries.

34. The European Communities argues further that the Panel erred in finding that unjustifiable discrimination could arise only if imports under the MERCOSUR exemption were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined. By assessing the existence of unjustifiable discrimination on the basis of import volumes, the Panel applied a test that has no basis in the text of Article XX and finds no support in WTO case law. The European Communities adds that, if adopted by the DSB, this finding would diminish its rights under the covered agreements, contrary to Article 3.2 of the DSU.

35. The European Communities submits that import volumes under the MERCOSUR exemption are irrelevant for determining whether this exemption constitutes arbitrary or unjustifiable discrimination. The specific volume of imports from MERCOSUR countries in a given year is not related to the manner in which the Import Ban is applied, but rather dependent upon economic factors relating to supply and demand. Moreover, this volume can fluctuate significantly from year to year, and may be more likely to do so if the Panel's finding stands, given that it creates an incentive to shift retreaded tyre production to MERCOSUR countries, especially to those that do not restrict the importation of used tyres. Thus, reasons the European Communities, in addition to being incorrect, the Panel's findings increase the likelihood of future litigation on whether increases in imports from MERCOSUR countries have rendered the exemption inconsistent with the chapeau. This is not

[61]European Communities' appellant's submission, para. 325.

[62]*Ibid.*, para. 329.

[63]*Ibid.*, para. 330 (referring to Panel Report, para. 7.283).

[64]*Ibid.*, para. 332 (referring to Panel Report, para. 7.280).

consistent with Article 3.3 of the DSU, which provides that the prompt settlement of disputes "is essential for the effective functioning of the WTO".[65]

36. According to the European Communities, the Panel's approach is also inconsistent with the Appellate Body Report in *US – Gambling*, where "the Appellate Body did not attach importance to the 'volume' of services traded under [that] exemption, and to how that volume compared with the volume of online gambling services offered by Antigua and Barbuda or, in fact, all other WTO Members cumulatively."[66] The Panel's approach also goes against Appellate Body reports confirming the right of Members to challenge measures, *as such*, and the need to protect the security and predictability of the multilateral trading system that underpins that right.[67] Yet, under the Panel's approach, the question of which volumes of imports would be regarded as "significant" for purposes of the chapeau of Article XX would ultimately depend on market factors, and could be assessed only *ex post* based on data relating to trade flows.

37. The European Communities also contests the Panel's conclusions that the MERCOSUR exemption did not constitute "a disguised restriction on international trade" within the meaning of the chapeau of Article XX. Like its finding on unjustifiable discrimination, the Panel's finding was based on the rationale that MERCOSUR imports have not been significant in volume. Thus, submits the European Communities, the Panel's finding on a disguised restriction on international trade is equally erroneous. The European Communities fails to understand how the Panel could characterize the imports under the MERCOSUR exemption, increasing tenfold since 2002 from 200 to 2,000 tons of tyres per year by 2004, as "insignificant".[68]

38. For these reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that the MERCOSUR exemption did not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, within the meaning of the chapeau of Article XX, and to find, instead, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the requirements of that provision.

(b) Imports of Used Tyres

39. With respect to the Panel's analysis of imports of used tyres under the chapeau of Article XX, the European Communities supports the Panel's conclusion that such imports constituted unjustifiable discrimination between countries where the same conditions prevail, but challenges several other findings made by the Panel in this part of its analysis. Specifically, the European Communities contends that the Panel erred, first, in finding that the imports of used tyres through court injunctions did not result in arbitrary discrimination and, secondly, in finding that such imports constituted unjustifiable discrimination and a disguised restriction on international trade only to the extent that they occurred in such amounts as to significantly undermine the objective of the Import Ban.

40. For the European Communities, the Panel adopted an overly restrictive approach to the notion of "arbitrary discrimination", in considering that action is not arbitrary as long as there is some cause or reason to explain it. What is arbitrary must be decided in the light of the stated objective of the measure. The European Communities reasons that, because, from the perspective of the protection of human life or health, there is no difference between, on the one hand, a retreaded tyre produced in the

[65]European Communities' appellant's submission, para. 343.

[66]*Ibid.*, para. 344 (referring to Appellate Body Report, *US – Gambling*, para. 369).

[67]*Ibid.*, para. 345 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

[68]European Communities' appellant's submission, para. 348.

European Communities and, on the other hand, a retreaded tyre produced in Brazil from a casing imported from the European Communities, the importation of used tyres through court injunctions must be regarded as constituting arbitrary discrimination. The European Communities adds that the Panel's attempt to distinguish between, on the one hand, the actions of Brazilian courts in granting injunctions allowing imports of used tyres and, on the other hand, the compliance of administrative authorities with those injunctions, is ill-founded. A WTO Member must assume responsibility for the acts of all the branches of its government. The contradiction between the actions of the branches of the Brazilian government that have allowed the importation of used tyres, and those that ban the importation of retreaded tyres, must be regarded as arbitrary behaviour on the part of Brazil.

41. The European Communities also submits that the Panel erred in finding that the imports of used tyres under court injunctions resulted in unjustifiable discrimination only to the extent that they significantly undermined the objective of the Import Ban. In analyzing whether imports of used tyres under court injunctions were inconsistent with the chapeau of Article XX, the Panel applied the same quantitative approach that it had incorrectly applied when assessing the MERCOSUR exemption under that provision. The European Communities refers to the arguments it advanced in relation to the MERCOSUR exemption to explain why the volumes of imports are irrelevant for purposes of determining the consistency of a measure with the chapeau of Article XX.

42. The European Communities observes further that the court injunctions effectively exempt Brazilian retreaders from the import ban on used tyres, because they do not contain any temporal or quantitative limitations. Thus, the Panel's quantitative approach engenders uncertainty for the implementation of the Panel Report and is not in accordance with the prompt settlement of the dispute as required by Article 3.3 of the DSU. The Panel characterized imports of 10.5 million used tyres into Brazil in 2005 as "significant", but failed to identify the threshold below which imports of used tyres would no longer be "significant". The European Communities adds that, for the same reasons adduced in relation to unjustifiable discrimination, the Panel erred in finding that the imports of used tyres through court injunctions resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports occurred in such quantities that they significantly undermined the objective of the Import Ban.

43. For all these reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that imports of used tyres under court injunctions did not constitute arbitrary discrimination under the chapeau of Article XX, and constituted unjustifiable discrimination or a disguised restriction on international trade under the terms of this provision only to the extent that those imports significantly undermined the objective of the Import Ban. The European Communities requests the Appellate Body to find, instead, that imports of used tyres under court injunctions result in the Import Ban being applied inconsistently with all of the requirements of the chapeau of Article XX of the GATT 1994.

3. Conditional Appeal

44. Should the Appellate Body not find, as requested by the European Communities, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX, then the European Communities conditionally appeals the Panel's decision to exercise judicial economy with respect to its separate claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994. In such circumstances, the European Communities requests the Appellate Body to reverse the Panel's decision to exercise judicial economy with respect to these claims and to complete the legal analysis and find that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and not justified under Articles XX(d) and XXIV of the GATT 1994.

(a) The Panel's Exercise of Judicial Economy

45. The European Communities submits that, in declining to rule on the European Communities' claims under Articles I.1 and XIII:1 of the GATT 1994, the Panel exercised "false judicial economy" and did not provide a positive resolution to the dispute as required by Articles 3.3, 3.4, and 3.7 of the DSU.[69] In the light of the Panel's finding that the Import Ban was inconsistent with the chapeau of Article XX only to the extent that imports of used tyres were occurring in amounts that significantly undermined the objective of the Import Ban, Brazil was under no obligation to remove the MERCOSUR exemption *per se*. Therefore, the Panel should have addressed the European Communities' claims that the MERCOSUR exemption *per se* is incompatible with Articles I:1 and XIII:1.

(b) Completing the Legal Analysis

46. The European Communities submits that there are sufficient factual findings of the Panel and uncontested facts on record for the Appellate Body to complete the legal analysis and find that the MERCOSUR exemption is incompatible with Articles I:1 and XIII:1, and is not justified under Articles XX(d) and XXIV of the GATT 1994. The European Communities recalls that Brazil did not contest that the MERCOSUR exemption constitutes a violation of Articles I:1 and XIII:1. Therefore, the only question to be addressed by the Appellate Body is whether this measure can be justified under Articles XX(d) and XXIV.

(c) The MERCOSUR Exemption and Article XXIV of the GATT 1994

47. The European Communities argues that the MERCOSUR exemption is not justified under Article XXIV of the GATT 1994, because it does not satisfy the two conditions identified by the Appellate Body in its Report in *Turkey – Textiles*.[70] First, Brazil failed to demonstrate that MERCOSUR complies with the conditions of Article XXIV:8(a) and 5(a) of the GATT 1994. As explained extensively in the European Communities' submissions to the Panel, Brazil failed to demonstrate that MERCOSUR has achieved a liberalization of "substantially all"[71] the trade within MERCOSUR, as required by Article XXIV:8(a)(i). The European Communities contends that trade in the automotive and sugar sectors has not been entirely liberalized within MERCOSUR, and highlights that "the automotive sector alone accounts for approximately 29%"[72] of trade within MERCOSUR. In addition, according to the European Communities, exceptions to MERCOSUR's common external tariff "currently concern up to 10% of the tariff lines"[73] applicable to external trade, and individual MERCOSUR countries "maintain export duties and 'other regulations of commerce' on trade with third countries that are not common to all Mercosur countries."[74]

48. The European Communities adds that Brazil failed to demonstrate that MERCOSUR complies with the requirement in Article XXIV:5(a) of the GATT 1994 that duties and other restrictive regulations of commerce are not to be on the whole more restrictive than the general

[69]European Communities' appellant's submission, para. 375.

[70]European Communities' appellant's submission, para. 381 (referring to Appellate Body Report, *Turkey – Textiles*, para. 58).

[71]*Ibid.*, para. 383.

[72]*Ibid.*

[73]*Ibid.*, para. 384 (referring to Committee on Trade and Development, "Examination of the Southern Common Market (MERCOSUR) Agreement", WT/COMTD/1/Add.17, 9 June 2006 (Exhibit EC-121 submitted by the European Communities to the Panel), p. 2).

[74]*Ibid.*

incidence of these measures prior to the creation of MERCOSUR, in particular, as regards non-tariff measures. Indeed, emphasizes the European Communities, the measure at issue in this dispute illustrates that MERCOSUR countries continue to adopt such non-tariff measures.

49. Secondly, the European Communities maintains that Brazil has not shown that the MERCOSUR exemption was necessary for the formation of MERCOSUR. Nothing in the reasoning of the Appellate Body Report in *Turkey – Textiles* suggests that this condition would not apply to cases such as this one where a restriction is first imposed on all goods, and then subsequently removed only for goods originating in the customs union. Moreover, the European Communities considers that "Article XXIV would be turned into an almost limitless exception, which would allow parties to a customs union to take any measure derogating from WTO obligations"[75] if WTO Members were not required to demonstrate that the measure was necessary for the formation of the customs union in question.

50. The European Communities submits that the MERCOSUR exemption was not necessary for the formation of MERCOSUR. Article XXIV:8(a)(i) explicitly exempts measures consistent with Article XX from the requirement to eliminate barriers to trade with respect to substantially all the trade between the constituent members of a customs union. For this reason, it follows that Article XX cannot be invoked in order to justify the selective elimination of such trade barriers only with respect to trade within the customs union or free trade area. Nor can the MERCOSUR exemption be characterized as necessary for the formation of MERCOSUR because it was adopted several years after the conclusion of MERCOSUR.

(d) The MERCOSUR Exemption and Article XX(d) of the GATT 1994

51. The European Communities submits that the MERCOSUR exemption is also not justified under Article XX(d) of the GATT 1994. The Appellate Body found, in *Mexico – Taxes on Soft Drinks*, that the term "laws and regulations" in Article XX(d) covered "rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member".[76] However, Brazil has not demonstrated that the obligation to comply with rulings of the MERCOSUR arbitral tribunals has been incorporated into the Brazilian legal system. The European Communities suggests further that the term "securing compliance" in Article XX(d) does not mean simply "complying". Instead, "securing compliance" refers to enforcement measures where compliance is achieved by persons other than the entity "securing" the compliance. Thus, Article XX(d) does not cover Brazil's adoption of the MERCOSUR exemption. Furthermore, the MERCOSUR exemption is not "necessary" within the meaning of Article XX(d) because Brazil could have complied with the ruling of the MERCOSUR arbitral tribunal by lifting the Import Ban with respect to all third countries, rather than only its MERCOSUR partners. Finally, the European Communities submits that the MERCOSUR exemption does not fulfil the requirements of the chapeau of Article XX, because it constitutes unjustifiable and arbitrary discrimination between countries where the same conditions prevail, in particular, given that, by virtue of it, Brazil allows the imports of retreaded tyres from MERCOSUR countries even when those tyres are made from used tyres originating in the European Communities.

[75]European Communities' appellant's submission, para. 392.

[76]*Ibid.*, para. 402 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79).

B. *Arguments of Brazil – Appellee*

1. The Necessity Analysis

52. Brazil maintains that the Panel properly found that the Import Ban was "necessary" to protect human, animal, or plant life or health within the meaning of Article XX(b) of the GATT 1994, and therefore requests the Appellate Body to uphold this finding.

(a) The Contribution Analysis

53. First, Brazil argues that the Panel correctly assessed the contribution made by the Import Ban to the achievement of its objective. The paragraphs set out in Article XX focus on the measure, as such, while the chapeau focuses also on the application of the measure. Therefore, actual contribution is not relevant to the analysis under paragraph (b) of Article XX, and the Panel applied the correct legal standard in using phrases such as "can contribute" and "capable of contributing".[77] Such a standard is also particularly appropriate given that some measures—for example, environmental measures—may not have immediate effect. The Panel's approach was in line with "virtually all" other cases that have examined a measure's contribution under paragraphs (b) and (d) of Article XX of the GATT 1994 or under Article XIV of the *General Agreement on Trade in Services* (the "GATS").[78] This is the case whether the risk sought to be avoided is direct or indirect. Brazil adds that the need to undertake the weighing and balancing exercise also illustrates that the European Communities cannot be correct. If a panel were required to assess the extent of a measure's actual contribution, it would have to do the same for alternative measures in order to compare them. Yet, this is impossible, because an alternative measure is one that has not yet been realized. That the Panel was not, as the European Communities claims, required to quantify the Import Ban's contribution to reducing waste tyre volumes is confirmed in the Appellate Body Report in *EC – Asbestos*, where the Appellate Body held that "a risk may be evaluated either in quantitative or *qualitative* terms".[79] Brazil also expresses its understanding that, according to existing case law, if the measure can make a contribution to its objective, and no reasonably available alternatives exist, then the measure is "necessary".

54. In addition, Brazil argues that the Panel acted consistently with its duty under Article 11 of the DSU in finding that the Import Ban contributed to the achievement of its objective. The Panel relied on numerous studies and reports, which provided it with more than a sufficient basis to find that tyres used in Brazil are retreadable and are being retreaded. The Panel referred to the ABR Report[80] and INMETRO Technical Note 001/2006[81] merely as examples of such reports and studies. In addition, the Panel's reliance on INMETRO Technical Note 001/2006, rather than on an earlier INMETRO note, was justified, because it is well established that a panel may rely on evidence that post-dates the panel's establishment, and because Brazil had explained why it was not appropriate for the Panel to rely on the earlier INMETRO note. The mere fact that the Panel did not describe its conclusions on each piece of evidence—or respond to each of the European Communities' objections—does not mean that it did not consider the evidence. The European Communities may

[77]Brazil's appellee's submission, para. 74 (referring to Panel Report, paras. 7.118 and 7.142).

[78]*Ibid.*, para. 77 (referring to Panel Report, *US – Gambling*, para. 6.494; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.217; Panel Report, *Korea – Various Measures on Beef*, para. 658; and GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.31).

[79]*Ibid.*, para. 81 (quoting Appellate Body Report, *EC – Asbestos*, para. 167). (emphasis added by Brazil)

[80]*Supra*, footnote 41.

[81]*Supra*, footnote 42.

disagree with the weight the Panel assigned to the various factual elements before it, but there is no indication that the Panel exceeded its discretion as the trier of fact.

55. As regards numerous other arguments raised by the European Communities, Brazil identifies evidence that provides support for the Panel's findings that retreaded tyres have a shorter lifespan than new tyres and that new tyres are retreadable and are being retreaded in Brazil, and asserts that the Panel did not, as the European Communities claims, base its findings on speculation about future events. Brazil also emphasizes that imports of used tyres under court injunctions and imports of retreaded tyres under the MERCOSUR exemption are extraneous to the Import Ban and do not properly form part of the "necessity" analysis.

(b) Alternatives to the Import Ban

56. Brazil contends that the Panel correctly determined that none of the measures suggested by the European Communities constituted a reasonably available alternative to the Import Ban. As a preliminary matter, Brazil contends that the European Communities' appeal on this issue is premised on a mistaken understanding of Brazil's chosen level of protection. Brazil is *not* seeking to reach a fixed level of health and safety, or only to protect against mosquito-borne diseases and tyre fire emissions (accumulation risks). Rather, it seeks to reduce accumulation, transportation, and disposal risks associated with the generation of waste tyres in Brazil *to the maximum extent possible*. Because the Panel's finding of fact correctly identified the level of protection sought by Brazil, and the European Communities, in its appeal, does not challenge this finding under Article 11 of the DSU, the European Communities' claims of error regarding reasonably available alternatives fall outside the scope of appellate review.

57. Taking account of the proper definition of its chosen level of protection (including against disposal risks), Brazil asserts that the Panel properly recognized that stockpiling, landfilling, co-incineration, and material recycling all present risks to human health and the environment. The Panel also correctly dismissed a better enforcement of the import ban on used tyres as an alternative to the Import Ban, because such a measure would not allow Brazil to reduce the number of additional waste tyres generated by imported short-lifespan retreaded tyres. Brazil also rejects the European Communities' assertion that the Panel applied an incorrect definition of "alternative", because, for Brazil, an alternative must allow a Member to achieve its chosen level of protection, and that level requires a reduction to the maximum extent possible of risks arising from waste tyre accumulation, transportation, and disposal risks. Because the Panel correctly defined Brazil's level of protection, it was also correct to consider that other complementary measures to reduce the overall number of waste tyres were not "alternatives" to the Import Ban on retreaded tyres. Brazil adds that, contrary to the European Communities' claims on appeal, the Panel did not require a single alternative measure to achieve fully the desired objective, did not refuse to consider the proposed alternatives collectively, and did not focus on whether options were actually being employed instead of whether they were reasonably available.

58. Furthermore, Brazil argues that the Panel's findings on the availability of alternative measures rested on an objective assessment of the facts, as required by Article 11 of the DSU. According to Brazil, the Panel based its finding that disposal of waste tyres presents serious health and environmental risks on an extensive factual record. The evidence on record fully supports the Panel's finding that landfilling of *both* whole and shredded waste tyres presents human health and environmental risks. Brazil also argues that the Panel's reference to the fact that the European Communities prohibits landfilling was relevant, because the health and environmental objectives listed in the European Communities' Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste [82] mirror Brazil's objective. Furthermore, the Brazilian legislation that allowed landfilling, and

[82]Exhibit BRA-42 submitted by Brazil to the Panel.

which the European Communities claims the Panel should have taken into account, was a temporary measure adopted in a single Brazilian state to combat a significant increase in dengue cases. That legislation does not demonstrate that landfilling is safe, but only that, in those circumstances, the short-term need to combat dengue was more pressing.

59. In relation to stockpiling, Brazil submits that the evidence on record, including a study by the California Environmental Protection Agency[83], supports the Panel's finding that stockpiling presents human health and environmental risks. Furthermore, the European Communities itself acknowledges that "'controlled stockpiling is *not a final disposal operation*' but merely 'temporary storage.'"[84] As regards co-incineration, the evidence on record fully supports the Panel's finding that incineration of waste tyres presents risks to human health, that toxic emissions from the incineration of tyres cannot be eliminated, and that these emissions are higher than those generated by the burning of conventional fuels. In the light of these acknowledged risks, it would not have made sense, as the European Communities now argues, for the Panel to have required Brazil to provide evidence on co-incineration in Brazil rather than in other countries, or to use increased co-incineration as an alternative. The Panel acted within its discretion in determining the weight attributed to several reports that the European Communities considers outdated and, in any event, the evidence relied upon by the Panel is not as "outdated", nor is the evidence cited by the European Communities as "recent", as the European Communities claims on appeal. The Appellate Body, therefore, should reject the European Communities' attempts to have it second-guess the Panel's appreciation of the evidence.

60. In relation to material recycling, Brazil submits that the Panel did not consider only civil engineering in reaching its findings on alternative measures. The Panel also considered evidence related to rubber asphalt, use of rubber granulates, and devulcanization. Nor did the Panel base its finding that material recycling applications could not dispose of existing volumes of waste tyres on evidence of devulcanization alone. Instead, contends Brazil, the Panel cited documents suggesting that material recycling applications *collectively* lacked adequate disposal capacity.

(c) The Weighing and Balancing Process

61. Brazil asserts that the Panel properly weighed and balanced the relevant factors and proposed alternatives in determining that the Import Ban was "necessary" within the meaning of Article XX(b) of the GATT 1994, and that the European Communities' appeal on this point amounts to mere disagreement with the Panel's exercise of its discretion in determining which evidence to rely upon in support of its findings. The Panel expressly recognized that the Import Ban is highly trade restrictive, but rejected the European Communities' argument that this fact alone precluded a finding that the ban was "necessary". Instead, the Panel properly recognized that there may be circumstances in which a highly restrictive measure is nonetheless necessary and, in the process of weighing and balancing, identified the specific circumstances of this case that led it to such a conclusion. With respect to the question of contribution, Brazil recalls its position that Article XX(b) does not require a party to quantify the measure's contribution to the objective pursued. In any event, the Import Ban's contribution is substantial "because it reduced imports of retreaded tyres from 18,455 tons in 1999 to 1,727 tons in 2005 (over 90 percent)."[85] Brazil also argues that, because imports of retreaded tyres, by definition, increase the amount of waste tyres in Brazil, the relationship between the Import Ban and Brazil's goal of reducing waste tyre risks to the maximum extent possible is both direct and certain.

[83]California Environmental Protection Agency (US), Integrated Waste Management Board, "Increasing the Recycled Content in New Tyres" (May 2004) (Exhibit BRA-59 submitted by Brazil to the Panel).

[84]Brazil's appellee's submission, para. 154 (quoting European Communities' appellant's submission, para. 255). (emphasis added by Brazil)

[85]Brazil's appellee's submission, para. 177 (referring to Panel Report, para. 4.54; and Brazil's response to Question 40 posed by the Panel, Panel Report, p. 270).

2. The Chapeau of Article XX of the GATT 1994

(a) The MERCOSUR Exemption

62. Brazil argues that the Panel correctly held that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constituted "arbitrary or unjustifiable" discrimination or "a disguised restriction on international trade" within the meaning of the chapeau of Article XX of the GATT 1994. Accordingly, Brazil requests the Appellate Body to reject the European Communities' claims of error and to uphold the Panel's findings in this respect.

63. Brazil asserts that the Panel properly interpreted the meaning of the word "arbitrary" in the chapeau of Article XX, in accordance with the customary rules of interpretation of public international law. The Panel took into account the ordinary meaning of the word, along with both the context and the object and purpose of the chapeau of Article XX, as well as previous panel and Appellate Body reports. On this basis, the Panel interpreted the word "arbitrary" "as lacking a reasonable basis and requiring the need to convincingly explain the rationale of the measure".[86]

64. Brazil disputes the European Communities' assertion that what constitutes arbitrary discrimination must be determined in relation to the objective of the measure. The specific contents of the measure at issue, including its policy objective, must be examined under the exceptions listed in the paragraphs of Article XX. The chapeau of Article XX, in turn, requires panels to examine whether the measure at issue is applied reasonably, in a manner that does not result in an abusive exercise of a Member's right to pursue its policy objective. Brazil emphasizes that the European Communities' interpretation would impermissibly narrow the scope of the chapeau of Article XX and limit the flexibility that Members have to protect legitimate values under that provision. Brazil adds that, in any event, in this case the Panel did consider imports under the MERCOSUR exemption in relation to the objective of the measure at issue when it determined that, at the time of its examination, volumes of retreaded tyres imported under the MERCOSUR exemption did not significantly undermine the objective of the Import Ban. Furthermore, reasons Brazil, it would *not* have been reasonable or rational, in the light of the objective of the Import Ban, for Brazil to have implemented the MERCOSUR ruling by abolishing the ban altogether, as the European Communities suggests.

65. Brazil considers that the Panel correctly found that the discrimination resulting from the MERCOSUR exemption was not arbitrary. In Brazil's view, even under the European Communities' definition of "arbitrary", the following considerations identified by the Panel demonstrate that the MERCOSUR exemption did not amount to arbitrary discrimination: (i) Brazil introduced the exemption only after a dispute settlement tribunal established under MERCOSUR ruled that the ban violated Brazil's obligations under MERCOSUR; (ii) the MERCOSUR ruling was adopted in the context of an agreement intended to liberalize trade that is expressly recognized in Article XXIV of the GATT 1994; (iii) agreements of the type recognized by Article XXIV inherently provide for discrimination; (iv) Brazil had an obligation under international law to implement the ruling by the MERCOSUR tribunal; (v) Brazil applied the MERCOSUR ruling in the most narrow way possible, that is, by exempting imports of a particular kind of retreaded tyres (remoulded) from the application of the ban; and (vi) it was not reasonable for Brazil to implement the MERCOSUR ruling with respect to imports from all sources, because doing so would have forced Brazil to abandon its policy objective and its chosen level of protection. The Panel appropriately determined that these circumstances provided a rational basis for enacting the MERCOSUR exemption. Brazil rejects as a "blatant misrepresentation"[87] the European Communities' argument that the Panel's finding necessarily implies that mere compliance with any international agreement would exclude the existence of

[86]*Ibid.*, para. 191 (referring to Panel Report, paras. 7.260, 7.273, and 7.283).

[87]Brazil's appellee's submission, para. 209.

arbitrary discrimination, particularly given that the Panel expressly stated that its finding was limited to the "specific circumstances of the case".[88] Furthermore, the European Communities' systemic concerns in this respect are contrary to the well-established precept under general international law that "bad faith on the part of States is not to be presumed"[89], and it is "absurd"[90] to suggest that a WTO Member would conclude an agreement under Article XXIV for purposes of circumventing the requirements of the chapeau of Article XX.

66. Brazil also submits that the Panel correctly concluded that the legal standard under the chapeau of Article XX is different from the legal standard under Article XXIV. As Brazil argued before the Panel, a measure that does not meet the requirements of Article XXIV can nevertheless meet the requirements of the chapeau of Article XX.

67. Brazil considers that the Panel correctly found that the operation of the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute unjustifiable discrimination. Brazil has difficulty understanding the European Communities' objections to the Panel's analysis since the European Communities itself argues that what constitutes arbitrary or unjustifiable discrimination must be established in relation to the objective of the measure at issue, and the Panel did precisely that. The Panel determined how Brazil's policy objective of reducing unnecessary generation of tyre waste to the maximum extent possible was being affected by imports of retreaded tyres under the MERCOSUR exemption. The level of imports and their effect on the objective of the Import Ban were relevant, in particular, because the chapeau of Article XX focuses on the application of the measure at issue. Brazil also explains that the level of imports could not rise to a level that would undermine the objective of the Import Ban in the future, because Resolution No. 38 of the Câmara de Comércio Exterior (Chamber of Foreign Trade) of 22 August 2007[91] established annual limits on the number of retreaded tyres that can be imported into Brazil from MERCOSUR countries. According to Brazil, these import volumes "correspond roughly" to the import volumes that the Panel found "were not significant".[92]

68. Brazil considers that the European Communities' reference to the right of Members to challenge measures, as such, is misplaced. The chapeau of Article XX requires an examination of the manner in which a measure is being applied, and this will "rarely" be based on "immutable, static situations".[93] The European Communities' challenge to the Panel's finding that 2,000 tons of retreaded tyres is "insignificant" is similarly without merit. According to Brazil, it is worth noting that the level of 2,000 tons is only one seventh of the 14,000 tons previously imported from the European Communities and, in any event, the Panel's finding that 2,000 tons is not a significant amount is a factual finding that cannot be revisited on appeal.

69. In addition, Brazil submits that the Panel's finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constitutes "a disguised restriction on international trade" under the chapeau of Article XX is legally sound, and refers to its arguments before the Panel in support of this position.

[88]*Ibid.*, para. 210 (quoting Panel Report, para. 7.283).

[89]*Ibid.*, para. 213. (footnote omitted)

[90]*Ibid.*, para. 214.

[91]Exhibit BRA-175 submitted by Brazil to the Appellate Body.

[92]Brazil's appellee's submission, para. 225 (referring to Panel Report, para. 7.288).

[93]*Ibid.*, para. 229.

(b) Imports of Used Tyres

70. Brazil submits that the Panel committed no error in the analytical approach it adopted in determining whether imports of used tyres under court injunctions resulted in the Import Ban being applied in a manner that constituted "arbitrary discrimination", "unjustifiable discrimination", or "a disguised restriction on international trade" within the meaning of the chapeau of Article XX of the GATT 1994. Brazil requests the Appellate Body to reject the European Communities' claims of error and to uphold the Panel's findings that the imports of used tyres did not constitute "arbitrary discrimination" and constituted "unjustifiable discrimination" or "a disguised restriction on international trade" within the meaning of that provision only to the extent that import volumes of used tyres "significantly undermined" the objective of the Import Ban.

71. Brazil argues that the Panel correctly found that the imports of used tyres under court injunctions did not result in the Import Ban being applied in a manner that constituted "arbitrary discrimination". The Panel was satisfied, on the basis of the evidence before it, that there was a rational basis for the importation of used tyres. Furthermore, as it did in the context of the MERCOSUR exemption, the Panel did analyze whether the imports of used tyres significantly undermined the objective of the Import Ban—that is, it took the very approach advocated by the European Communities. The Panel did *not*, as the European Communities now claims, draw a distinction between the actions of certain Brazilian courts granting injunctions and the compliance by Brazilian administrative authorities with those court injunctions. Brazil also rejects the European Communities' allegation that there is a contradiction between the actions of different branches of the Brazilian government. Rather, insists Brazil, the Import Ban, the court injunctions, and the enforcement of the injunctions by the customs authorities were the result of the operation of the Rule of Law. "There is nothing unpredictable, irrational, abnormal, unreasonable, or even illegal in the conduct of Brazil's legislative, executive, or judiciary branches."[94]

72. With respect to the Panel's analysis of "unjustifiable discrimination", Brazil submits that it was appropriate for the Panel to consider the level of imports of used tyres. For the same reasons that Brazil articulated with respect to the MERCOSUR exemption, the effect that the volume of imports of used tyres had on Brazil's ability to achieve its policy objective was relevant to the Panel's analysis of unjustifiable discrimination. Brazil points out the inconsistencies in the European Communities' arguments, which, on the one hand, criticize the Panel for taking into account the effects of import volumes on Brazil's ability to achieve its policy objective, and, on the other hand, insist that arbitrary and unjustifiable discrimination can be established only when analyzed in relation to the objective of the measure at issue. Brazil disputes the European Communities' assertion that the Panel's analysis of the volume of imports involves uncertainty for implementation of its report. According to Brazil, monitoring of a WTO Member's compliance is an integral part of the dispute settlement mechanism, and there are various examples of cases where panels made findings that were based on facts and circumstances that were potentially subject to change.[95]

73. Finally, Brazil argues that the Panel correctly considered the volume of imports of used tyres as part of its determination that the Import Ban was being applied in a manner that constituted "a disguised restriction on international trade", and refers to the arguments it made before the Panel in support of this position.

[94]Brazil's appellee's submission, para. 245.

[95]See Brazil's appellee's submission, para. 253 (referring to Panel Report, *US – Section 301 Trade Act*, paras. 7.131-7.136, 7.170, 7.179, and 7.185; and Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 6.1).

3. The European Communities' Conditional Appeal

(a) The Panel's Exercise of Judicial Economy

74. Brazil considers that the Panel was justified in deciding to exercise judicial economy with respect to the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 and not justified under Articles XX(d) and XXIV of the GATT 1994. In the light of the Panel's finding that the Import Ban was inconsistent with Article XI:1 of the GATT 1994, a separate finding in relation to an exemption to the Import Ban was not necessary to secure a positive resolution of the dispute. The MERCOSUR exemption could not exist in the absence of the Import Ban, which had previously been found to be inconsistent with the GATT 1994. The allegedly limited basis for the Panel's finding of inconsistency under Article XI:1 is not relevant, because Article 3.7 of the DSU "does not distinguish between different *degrees* of solutions".[96] Brazil also distinguishes the facts of this case from those in *EC – Export Subsidies on Sugar*, on the basis that "the remedies under the GATT and the DSU for a violation of Article XI (found by the Panel) are no different from the remedies for a violation of Article XIII or I."[97] Furthermore, the very condition on which the European Communities appeals the Panel's exercise of judicial economy contradicts its contention that separate rulings under Article I:1 and Article XIII:1 were necessary. According to Brazil, by conditioning its appeal on a finding by the Appellate Body that the MERCOSUR exemption does not result in the Import Ban being applied inconsistently with Article XX, the European Communities is implicitly recognizing that a finding that the Import Ban is not justified under Article XX renders unnecessary findings on its separate claims under Articles I:1 and XIII:1.

(b) Completing the Legal Analysis

75. In the event the Appellate Body were to reverse the Panel's decision to exercise judicial economy, Brazil submits that the Appellate Body does not have a sufficient basis on which to complete the analysis of the European Communities' claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and with respect to Brazil's related defences under Articles XXIV and XX(d) of the GATT 1994. There are neither undisputed facts nor factual findings by the Panel concerning the consistency of MERCOSUR with Article XXIV:5(a) and 8(a) of the GATT 1994 or the justification of the MERCOSUR exemption under Article XX(d). Brazil specifically contests, as it did before the Panel, assertions made by the European Communities regarding intra-MERCOSUR liberalization of the automotive and sugar sectors, as well as with respect to alleged exceptions to the common external tariff. In addition, the European Communities' claims under Articles XIII:1 and I:1, and Brazil's related defence under Article XXIV, are not suitable for completion of the analysis, because they are not closely related to the provisions examined by the Panel, and because they involve novel legal issues that have not been explored in depth by the parties. Brazil cites as examples of such unexplored issues the questions of what constitutes "substantially all the trade" under Article XXIV:8(a)(i) and what constitutes "substantially the same duties and other regulations of commerce" under Article XXIV:8(a)(ii).

(c) The MERCOSUR Exemption and Article XXIV of the GATT 1994

76. In the event the Appellate Body considers it can complete the analysis with respect to the separate claims made by the European Communities in relation to the MERCOSUR exemption, Brazil submits that this measure is justified under Article XXIV of the GATT 1994.

[96]*Ibid.*, para. 268. (original emphasis)

[97]*Ibid.*, para. 269.

77. Brazil argues that it submitted sufficient evidence before the Panel to make a *prima facie* case that MERCOSUR meets the requirements of Article XXIV:5(a) and 8(a). In particular, Brazil submitted the results of calculations made by the Secretariat for MERCOSUR and the WTO Secretariat showing that the duties and other regulations of commerce applied at the time of MERCOSUR's formation (1995), and in 2006, were not "on the whole" higher or more restrictive than those applied prior to its formation. Brazil further suggests there is evidence on record demonstrating that "substantially all the trade" between constituent members of MERCOSUR has been liberalized, and that MERCOSUR countries maintain substantially the same duties and other regulations of commerce on trade *vis-à-vis* third countries, thus complying with the requirements of Article XXIV:8(a). Brazil notes in this regard that, before the Panel, it incorporated by reference all of the documents submitted by MERCOSUR members to the Committee on Regional Trade Agreements (the "CRTA").

78. Brazil contends that the European Communities has failed to rebut Brazil's *prima facie* demonstration that MERCOSUR is consistent with the requirements of Article XXIV:5 and 8. The fact that the CRTA and the Committee on Trade and Development did not reach the conclusion that MERCOSUR is in compliance with Article XXIV does not suggest that MERCOSUR is inconsistent with Article XXIV, in particular, because Members' measures are presumed WTO-consistent until sufficient evidence is presented to prove the contrary, and because the CRTA has only once concluded that a regional trade agreement was compatible with the GATT 1994.

79. In addition, Brazil maintains that the European Communities failed to substantiate its claims that MERCOSUR was inconsistent with Article XXIV. Although the European Communities asserts that the automotive and sugar sectors within MERCOSUR have not been fully liberalized, this is contradicted by the evidence it submitted to the Panel. According to Brazil, evidence before the Panel demonstrated that "the automotive sector has been the subject of continuing and progressive liberalization [and that] bilateral agreements between Mercosur members have already led, in practice, to duty-free trade in almost 100 percent of the commerce in the auto sector."[98] Brazil suggests further that the sugar sector alone cannot prevent compliance with the requirement under Article XXIV:8(a)(i) that "substantially all the trade" between the constituent territories be liberalized, because it "accounts for less than 0.001 percent of the total [trade]".[99] As regards the European Communities' assertion that there are exceptions to MERCOSUR's common external tariff, Brazil submits that the evidence on record demonstrates that MERCOSUR "applies a common external tariff to products in over 90 percent of the tariff lines and has a specific timetable in place to cover the remaining categories of products by 2008."[100] Brazil also rejects the European Communities' assertion that MERCOSUR does not meet the requirement under Article XXIV:5(a) that non-tariff barriers on trade with third countries not be "*on the whole* ... more restrictive"[101], noting that the only example provided by the European Communities is the Import Ban itself. According to Brazil, a single measure cannot constitute sufficient evidence to show that MERCOSUR does not meet the requirements of Article XXIV:5(a).

80. Moreover, Brazil contends that the Appellate Body's decision in *Turkey – Textiles* cannot be read as requiring Brazil to demonstrate that the MERCOSUR exemption was introduced upon the formation of a customs union, and that its formation would have been prevented if it were not allowed

[98]Brazil's appellee's submission, para. 295 (referring to Panel Report, para. 4.391; and WT/COMTD/1/Add.17, *supra*, footnote 73, p. 3).

[99]*Ibid.* (referring to Committee on Trade and Development, "Examination of the Southern Common Market (MERCOSUR) Agreement", WT/COMTD/1/Add.16, 16 May 2006 (Exhibit BRA-170 submitted by Brazil to the Panel), para. 14; and WT/COMTD/1/Add.17, *supra*, footnote 73, p. 3).

[100]*Ibid.*, para. 296 (referring to Brazil's response to Question 132 posed by the Panel, Panel Report, pp. 360-361, in turn citing WT/COMTD/1/Add.17, *supra*, footnote 73, p. 2).

[101]*Ibid.*, para. 297. (emphasis added by Brazil)

to introduce such a measure. The analytical approach adopted by the Appellate Body in *Turkey – Textiles* should not be applied in the present dispute, because the MERCOSUR exemption does not impose new restrictions against third countries but, rather, eliminates restrictive regulations between the parties to the customs union.[102] Furthermore, Brazil contends that a Member should not be allowed to demonstrate the necessity of its measure *only* as of the time a customs union is formed, because such customs unions and the integration of their members evolve and deepen over time.

81. Brazil also rejects the European Communities' argument that the fact that the text of Article XXIV:8(a)(i) exempts Article XX measures from the requirement to eliminate duties and other restrictive regulations of commerce demonstrates that the MERCOSUR exemption was not necessary for the formation of MERCOSUR. Such an interpretation would require the members of the customs union to exempt Article XX measures from internal liberalization, "lest they are later challenged by third countries for discrimination and not permitted to invoke Article XXIV to justify those measures."[103] Moreover, the Appellate Body has explained that "the terms of [Article XXIV:8(a)(i)] offer 'some flexibility' to the constituent members of a customs union when liberalizing their internal trade".[104] This flexibility in Article XXIV permits Brazil to eliminate the Import Ban in respect of MERCOSUR countries while maintaining it in respect of non-MERCOSUR countries. Brazil also emphasizes that the MERCOSUR exemption was not introduced pursuant to its obligations under Article XXIV:8(a)(i), but was rather the result of its unsuccessful attempt to defend the Import Ban before a MERCOSUR arbitral tribunal.

(d) The MERCOSUR Exemption and Article XX(d) of the GATT 1994

82. Should the Appellate Body decide to complete the analysis of the European Communities' claims under Articles I:1 and XIII:1 of the GATT 1994, Brazil submits that it should find the MERCOSUR exemption to be justified under Article XX(d) of the GATT 1994.

83. Brazil submits that the Panel correctly interpreted and applied the term "to secure compliance" in Article XX(d), in contrast to the European Communities' interpretation that a state "secures compliance" within the meaning of Article XX(d) only when it enforces rules or regulations as regards other actors, and not when it secures its own compliance with the laws or regulations of its domestic legal system. Moreover, the Appellate Body's interpretation of Article XX(d) in *Mexico – Taxes on Soft Drinks* made no such distinction. Rather, the Appellate Body's interpretation of the text of Article XX(d) makes clear that domestic laws or regulations that ensure compliance by a state with its obligations are within the scope of that provision. Brazil also contends that it has incorporated the obligation to comply with rulings of MERCOSUR tribunals into its domestic law, and that evidence to that effect exists in the record.

84. Lastly, Brazil contends that the MERCOSUR exemption is "necessary" within the meaning of Article XX(d). Brazil argues that it could not have complied with the ruling of the MERCOSUR tribunal by simply exempting all third countries from the Import Ban, as the European Communities suggests it should have done, because this would have forced Brazil to abandon its policy objective of reducing unnecessary generation of tyre waste to the maximum extent possible.

[102]For Brazil, *US – Line Pipe* is a more apposite case in the factual context of this dispute. (See Brazil appellee's submission, para. 301 (referring to Panel Report, *US – Line Pipe*, paras. 7.147 and 7.148))

[103]*Ibid.*, para. 307.

[104]*Ibid.*, para. 308 (quoting Appellate Body Report, *Turkey – Textiles*, para. 48).

C. *Arguments of the Third Participants*

85. Pursuant to Rule 24(2) and (4) of the *Working Procedures*, China, Cuba, Guatemala, Mexico, Paraguay, and Thailand chose not to file a third participant's submission but attended the oral hearing. Cuba, in its statement at the oral hearing, expressed its agreement with the Panel's findings that the Import Ban was necessary to reduce the exposure of human, animal, or plant life or health to risks arising from waste tyres. Cuba also emphasized the importance of the principle of sustainable development and environment preservation policies, and recalled that waste tyre management presents a challenge in particular for developing countries, given the significant environmental and economic costs it involves.

1. Argentina

86. Argentina agrees with the Panel's finding that the Import Ban contributed to the protection of human life and health within the meaning of Article XX(b) of the GATT 1994. Argentina submits that the Panel's necessity analysis was consistent with the case law of the Appellate Body, and that "the Panel's reasoning relie[d] on facts brought to its attention by the parties."[105] The Panel correctly rejected the European Communities' contention that the Import Ban did not contribute to reducing the number of waste tyres, based on its conclusion that "the direct effect of [the Import Ban] is to compel consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres."[106] If the direct effect of the Import Ban were to impede additional imports of retreaded tyres with a shorter lifespan than new tyres, then it would fulfil Brazil's objective of avoiding generation and accumulation of waste tyres. Argentina underscores further that the Panel was not required to quantify the contribution of the Import Ban to the realization of the objective pursued.[107]

87. Argentina submits that the Panel was correct in concluding that the objective of protecting human health and life against life-threatening diseases "is both vital and important in the highest degree".[108] The Panel correctly found that the alternative measures identified by the European Communities aimed at reducing the number of waste tyres and at improving the management of waste tyres in Brazil, but not at preventing the generation of waste tyres to the maximum extent possible. Argentina also agrees with the Panel's finding that "the promotion of domestic retreading and enhanced retreadability of locally used tyres in Brazil would not lead to the reduction in the number of waste tyres additionally generated by 'imported short-lifespan retreaded tyres'."[109] For Argentina, the measures identified by the European Communities did not constitute alternatives that could be applied as a substitute for the Import Ban in preventing the generation of waste tyres to the maximum extent possible. Lastly, Argentina concludes that the Panel did not err in finding that there were no reasonably available alternatives to the Import Ban that would ensure the same level of protection to human life and health sought by Brazil.

2. Australia

88. Australia submits that the Panel erred in finding that the Import Ban was "necessary" within the meaning of Article XX(b) of the GATT 1994. Article XX(b) should be interpreted so as to maintain the careful balance between the rights and obligations of WTO Members to secure their trade interests and the rights of Members to impose measures necessary to protect human, animal, or

[105]Argentina's third participant's submission, para. 14.

[106]Argentina's third participant's submission, para. 16 (quoting Panel Report, para. 7.134).

[107]*Ibid.*, para. 18 (referring to Appellate Body Report, *EC – Asbestos*, para. 167).

[108]*Ibid.*, para. 26 (referring to Panel Report, para. 7.111).

[109]*Ibid.*, para. 24 (quoting Panel Report, para. 7.168).

plant life or health. In Australia's view, the Panel incorrectly balanced these factors in making its findings on necessity.

89. Australia notes that the Panel, in identifying the measure at issue, should have considered the MERCOSUR exemption in relation to a breach of Article XI:1 of the GATT 1994. Australia encourages the Appellate Body to treat the Import Ban and the MERCOSUR exemption "as an 'integrated whole'"[110] under Article XX(b).

90. Moreover, although the Appellate Body stated that a "necessary" measure is significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution", the Panel applied a definition of "necessary" that is closer to "making a contribution" than to "indispensable".[111] The Panel correctly considered the relative importance of the interests or values pursued by the Import Ban, but did not correctly examine the contribution of the measure to the realization of the ends pursued by it. The Panel also failed to consider adequately the restrictive impact of the Import Ban when conducting the weighing and balancing process. If the measure is properly identified as including both the Import Ban and exemptions to that ban, it is then more appropriate to determine first whether such a measure, in its totality, is necessary in the context of Article XX(b), taking into account the potential restrictive impact on international commerce, among other factors.

91. In relation to the Panel's assessment of alternative measures, Australia submits that the Panel did not properly weigh and balance possible alternatives, because it incorrectly identified the ends pursued by the measure, incorrectly limited its consideration of alternatives to those available "in reality"[112], and failed to consider potential alternatives cumulatively rather than only on an individual basis. Australia also argues that the Panel incorrectly excluded a better enforcement of the import ban on used tyres as an alternative measure to the Import Ban. For Australia, there is no basis in Appellate Body case law for excluding from the necessity analysis alternatives that relate to the manner in which the relevant measure is implemented in practice. The Panel also applied an incorrect definition of "alternatives" when limiting its analysis to those measures seeking to avoid the accumulation of waste tyres generated from imported retreaded tyres. Finally, Australia disagrees with the Panel's reasoning that "complementary" measures were not "alternative" measures, because they could not be directly substituted for the Import Ban. Although the Panel recognized that a combination of measures may be appropriate where different alternatives are complementary in addressing the risk, in practice, the Panel evaluated each individual alternative measure in isolation.

92. Australia argues further that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX of the GATT 1994. In defining "arbitrary" as "motivated by capricious or unpredictable reasons", the Panel placed too much emphasis on dictionary definitions and reduced the term to "inutility".[113] Consistent with the Appellate Body's statement in *US – Shrimp* that "the precise meaning of the terms in the chapeau [of Article XX] may shift 'as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ'"[114], the Panel should have considered the specific factual situation that was before it. Australia adds that, although it accepts that compliance with an international agreement "could be considered as a factor by a panel in deciding

[110]Australia's third participant's submission, para. 5 (referring to Appellate Body Report, *EC – Asbestos*, para. 64).

[111]*Ibid.*, para. 6 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).

[112]*Ibid.*, para. 20.

[113]Australia's third participant's submission, para. 38 (referring to Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at 21; and Appellate Body Report, *Canada – Dairy*, para. 133).

[114]*Ibid.*, para. 39 (referring to Appellate Body Report, *US – Shrimp*, para. 159).

whether discrimination was 'arbitrary'"[115], this approach requires panels to "make a judgement on the status and validity of action under the agreement".[116]

93. With respect to the Panel's finding that unjustifiable discrimination occurs only to the extent that the objective of the Import Ban has been significantly undermined by a significant amount of imports, Australia submits that the Panel may have created a new test for the consideration of unjustifiable discrimination under the chapeau of Article XX. Australia recognizes that a measure with no real impact in practice may not constitute arbitrary or unjustifiable discrimination, but maintains that the import into Brazil of 2,000 tons of retreaded tyres per year would not appear to be insignificant or without practical impact. If the Appellate Body upholds the Panel's approach, the European Communities potentially would be forced to commence a new dispute under the DSU, either under Article 21.5 or under a newly constituted panel, in the event that imports of retreaded tyres from MERCOSUR countries increase to a level that would undermine the achievement of the objective of the Import Ban. Such re-litigation of essentially the same dispute would not ensure the prompt settlement of the dispute, as provided for in Article 3.3 of the DSU.

94. Finally, Australia considers that, for the same reasons as those presented in relation to the MERCOSUR exemption, the Panel erred in finding that the Brazilian court injunctions that permitted the importation of used tyres were not arbitrary.

3. Japan

95. Japan argues that what constitutes "arbitrary or unjustifiable discrimination" under the chapeau of Article XX of the GATT 1994 relates to the manner in which a challenged measure is applied and should not be defined in relation to the objective of that measure. The objective of a measure is relevant only to the determination of whether it falls under one of the paragraphs of Article XX, and not as an element to justify the measure's compatibility with the chapeau of that provision. The ordinary meaning of the term "arbitrary" indicates that an arbitrary discrimination test should focus primarily on *subjective* elements (such as motivations) in assessing the manner in which the measure is applied. As for the term "unjustifiable", the Panel correctly concluded that it suggests the "need to be able to 'defend' or convincingly explain the rationale for any discrimination in the application of the measure."[117] According to Japan, Members can reasonably provide such convincing explanation of the rationale based on *objective* elements, since they are considered to be easier to validate.

96. In addition, Japan agrees with the Panel that the importation of used tyres under court injunctions did not constitute arbitrary discrimination under the chapeau of Article XX, because the Panel focused on *subjective* elements in evaluating the manner of application of the Import Ban. For Japan, the administrative authority is obliged to follow a court order (where the authority has challenged it before the courts without success), and has no discretion not to obey it. Therefore, whether acts of all branches of a government are "arbitrary" usually needs to be examined in relation to the pertinent decision-making processes. In this case, the Panel correctly found that the actions of the Brazilian courts and those of Brazilian administrative authorities were not arbitrary. Japan adds that it does not necessarily follow that the government as a whole acted in an arbitrary manner just because acts of its difference branches contradict each other.

97. Japan next submits that the Panel was incorrect in assessing whether "unjustifiable discrimination" arose from the MERCOSUR exemption and from imports of used tyres under court injunctions on the basis of import volumes. Although import volumes may be a relevant factor in

[115] *Ibid.*, para. 42.

[116] *Ibid.*

[117] Japan's third participant's submission, para. 11 (quoting Panel Report, para. 7.260).

determining whether the application of a measure constitutes unjustifiable discrimination, import volumes are subject to strong fluctuation due to economic factors, and are therefore an inadequate benchmark for purposes of determining the consistency of a measure with the chapeau of Article XX. According to Japan, import volumes constitute a "vague threshold"[118] that would lead to disagreements between the parties as to the consistency of the measure in the implementation stage. Japan suggests that Brazil's disposal capacity is a more reasonable threshold, because it is directly related to the reduction in the amount of waste tyre accumulation in Brazil. Japan adds that Brazil's disposal capacity is more easily quantifiable and less prone to fluctuation due to supply and demand than to import volumes.

98. Finally, Japan submits that the Panel erroneously exercised judicial economy with respect to the European Communities' claims that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 of the GATT 1994. The Panel should have examined these claims, because the European Communities had set out, in its panel request, claims that the MERCOSUR exemption as a specific measure was inconsistent with these GATT provisions. Japan considers that a panel's discretion in exercising judicial economy must not adversely affect the appropriateness of the recommendations and rulings of the DSB, which are key to the full and satisfactory settlement of a dispute.[119] In this case, the Panel's exercise of judicial economy prevented the satisfactory settlement of the matter, because the Panel's findings required Brazil to rectify the Import Ban only in relation to imports of used tyres under court injunctions, but did not necessarily require Brazil to address the measure's inconsistency in relation to the MERCOSUR exemption.

4. Korea

99. Korea submits that the Panel erred in concluding that the Import Ban was capable of contributing to the achievement of its objective. Korea agrees with the Panel that "there is no requirement that there be a precise measurement of the health risk involved".[120] However, Korea distinguishes the facts in *EC – Asbestos* from the facts in this dispute, because the measure at issue in *EC – Asbestos* "was a ban on the use of the product and the qualitative linkage was of the product to cancer"[121], while in the present dispute there is no inherent danger in the product itself. In particular, when unlimited domestic production and importation from MERCOSUR countries are permitted, the statement that "numerical precision" is not required can be abused as "an excuse for any lack of effort in assessing degrees of risk".[122] In Korea's view, Brazil failed to demonstrate what amount of waste tyre reduction is optimal for achieving Brazil's objective and its chosen level of protection and how the limitations introduced by the Import Ban relate to any such level.

100. For Korea, the Panel's finding that the Import Ban was "capable of contributing to the overall reduction of the amount of waste tyres"[123] amounts to a violation of Article 11 of the DSU. It is unclear what the Panel understood as "capable of contributing", and the Panel should have quantified the extent of the actual contribution of the Import Ban to the achievement of its objective, particularly in the light of its subsequent finding that a quantity of 2,000 tons of retreaded tyres imported under the MERCOSUR exemption did not "significantly" undermine the objective of the measure.

[118] *Ibid.*, para. 25.

[119] Japan's third participant's submission, paras. 31-32 (referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133; and Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 330-335).

[120] Korea's third participant's submission, para. 8 (referring to Panel Report, paras. 7.118 and 7.119).

[121] *Ibid.*, para. 9.

[122] *Ibid.*

[123] Korea's third participant's submission, para. 10.

101. Korea agrees with the Panel that Members can choose the level of protection they consider appropriate. However, the measure in question does not relate directly to the reduction of mosquito-borne diseases and tyre fire emissions. Rather, it is "derivative" and relates to the reduction in the number of waste tyres, which may have a "knock-on effect"[124] on the reduction of mosquito-borne diseases and tyre fire emissions. However, in Korea's view, the Panel failed to assess properly the relationship of the Import Ban to its stated goal of safeguarding human health through the reduction of waste tyres. For Korea, without a better assessment of whether or not the Import Ban actually results in a reduction of the accumulation of waste tyres, one cannot establish a measurable link (or, indeed, any link) to the stated health goal. Therefore, Korea reasons, "some sort of metric, even if not a precise one"[125], would have been necessary for the Panel to determine the contribution of the Import Ban to the achievement of its objective. Korea considers that the European Communities provided a number of alternatives to the Import Ban, any of which individually or in combination would provide less trade-restrictive measures in achieving the stated goal.

102. Korea argues further that the Panel erred in finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner inconsistent with the chapeau of Article XX of the GATT 1994. First, Korea agrees with the Panel that the ordinary meaning of the word "arbitrary" includes the "elements of capricious, unpredictable and inconsistent".[126] However, the Panel assessed the MERCOSUR exemption only in the light of the meaning of the terms "capricious" and "unpredictable". According to Korea, the term "inconsistent" informs the whole meaning of "arbitrary".[127] This is significant, because the MERCOSUR exemption is not capricious, or unpredictable. However, the Import Ban and the MERCOSUR exemption certainly were "inconsistent" in the light of the underlying justification, that is, the protection of humans from mosquito-borne diseases and tyre fire emissions. For Korea, there is no logical way of distinguishing between retreaded tyres from a MERCOSUR country and retreaded tyres from another WTO Member in relation to the protection of human life and health objective pursued by Brazil.

103. Secondly, Korea submits that the Panel erred in finding that 2,000 tons of retreaded tyres imported from MERCOSUR countries did not significantly undermine the objective of the Import Ban. Korea asserts that the initial burden was on Brazil to establish adequately the factual link between the health goal and the measure in question, and to do so "with some certainty and demonstrability".[128] Thus, in the absence of such a benchmark provided by Brazil, the Import Ban is by definition "arbitrary", because it "may be applied or not applied in inconsistent manners without any factual or logical basis."[129] Korea argues that the Panel misinterpreted the nature of the exception provided under Article XXIV of the GATT 1994 and how it interacts with the exception under Article XX.

104. Finally, Korea argues that there was no legal basis for the Panel to find that the open-ended MERCOSUR exemption was consistent with Brazil's defence under Article XX based on the novel standard of significantly undermining the objective that the Panel had construed.[130] This reasoning implied that MERCOSUR imports could increase to some unknown level that might then significantly undermine the protection of human life and health objective stated by Brazil. Korea contends that the Panel's approach virtually invited future disputes. This is not consistent with Article 3.3 of the DSU, which provides that prompt settlement of disputes is a key element of the dispute settlement system.

[124] *Ibid.*, para. 11.

[125] *Ibid.*, para. 12.

[126] *Ibid.*, para. 19.

[127] *Ibid.*, para. 20.

[128] Korea's third participant's submission, para. 29.

[129] *Ibid.*

[130] *Ibid.*, para. 33.

According to Korea, the Panel erred by attempting to make an "as applied" ruling based on transient facts, when the structure of the measure and the open-ended MERCOSUR exemption required an "as such" finding.

5. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu

105. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that the Panel erred in its interpretation of the chapeau of Article XX of the GATT 1994, and in finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constituted either "arbitrary discrimination" or "a disguised restriction on international trade" within the meaning of the chapeau.

106. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that the Panel's finding that the MERCOSUR exemption did not constitute "arbitrary discrimination between countries where the same conditions prevail" was in error, because the MERCOSUR exemption "was done unpredictably".[131] In support of this argument, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu recalls that Brazil maintained a general ban on the importation of used tyres even after the formation of MERCOSUR, when Brazil should have eliminated most of the trade barriers with other MERCOSUR countries, and that Brazil even enacted new restrictions on imports when it enacted the Import Ban. Moreover, Brazil did not invoke the protection of human life and health in its defence before the MERCOSUR arbitral tribunal, and that tribunal did not specify how Brazil should implement its ruling. Brazil itself decided to adopt the MERCOSUR exemption. For these reasons, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu contends that "it is quite clear that no 'predictability' could be found in Brazil's trade policy, which would justify the effect of discrimination on retreaded tyres."[132] This lack of predictability results in the discrimination introduced by the MERCOSUR exemption being "arbitrary" within the meaning of the chapeau of Article XX.

107. In addition, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu argues that the MERCOSUR exemption should be considered arbitrary in the light of the objective of the Import Ban. It is uncontested that retreaded tyres exported from MERCOSUR countries into Brazil had the same potential to damage human life or health as retreaded tyres exported from non-MERCOSUR countries. For this reason, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that, "if the protection of human life or health necessitates Brazil adopting an import ban on retreaded tyres, a loophole in the ban would undermine Brazil's asserted objective."[133] The MERCOSUR exemption is just such a loophole, and the discrimination that it engenders is, therefore, arbitrary.

108. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu argues further that the Panel erred in finding that the discrimination engendered by the MERCOSUR exemption was permissible pursuant to Article XXIV of the GATT 1994. Even assuming that MERCOSUR is consistent with Article XXIV, Article XXIV:8(a) specifically excludes measures adopted consistently with Article XX from the obligation to liberalize "substantially all the trade" within a customs union. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu also highlights that the objectives of Articles XX and XXIV "are diametrically opposed".[134]

[131] Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 7.

[132] *Ibid.*, para. 13.

[133] *Ibid.*, para. 15.

[134] Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 21.

109. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu also argues that the Panel erred in finding that the MERCOSUR exemption did not constitute "a disguised restriction on international trade" under the chapeau of Article XX, "because the amount of imported retreaded tyres did not increase 'significantly' following [its] introduction".[135] The chapeau of Article XX does not require evidence of a disruption in trade flows for a complainant to make a case that a disguised restriction exists. The "logic"[136] of the Appellate Body's rulings in *US – Shrimp* and in *US – Gambling* was "to discourage a [WTO] Member from adopting a measure having an adverse effect on international trade."[137] Therefore, a disguised restriction on international trade should be found to exist when there is a *possibility* that it does exist. The Panel's test of "significance", in contrast, clearly lacked a legal basis.

110. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu adds that, as a result of the MERCOSUR exemption, "the trade flow of retreaded tyres to Brazil has been changed in a manner benefiting other MERCOSUR countries"[138], because these countries are now "able to import used tyres from non-MERCOSUR countries in the first place, retread them locally, and finally re-export retreaded tyres to Brazil."[139] The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu concludes that international trade in retreaded tyres will be distorted, and that a disguised restriction results from such trade distortion.

111. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu further suggests that the Panel's findings in this dispute might cause confusion for WTO Members when assessing whether a specific measure is WTO-consistent, create a tendency for WTO Members to initiate a multiplicity of WTO disputes, and undermine the security and predictability needed to conduct future trade. These problems stem from the Panel's failure to provide clear criteria for determining what volume of imports or increase in import volumes would be considered "significant". Moreover, since import volumes are generally determined by supply and demand, the Panel's significance test, if adopted, would make it difficult for WTO Members, who do not have the power to control trade flows into their domestic markets, to adopt WTO-consistent measures or to eliminate WTO-inconsistent measures.

6. United States

112. The United States agrees with the European Communities that the manner in which the Panel considered the MERCOSUR exemption in its Article XX analysis was erroneous in a number of respects. First, the Panel erred in disregarding the MERCOSUR exemption when determining whether the Import Ban was "necessary" within the meaning of Article XX(b) of the GATT 1994. The MERCOSUR exemption is contained in Portaria SECEX 14/2004[140], and this was the measure found by the Panel to be inconsistent with Article XI:1 of the GATT 1994. For this reason, the Panel was obliged to determine whether Brazil had established that the same measure—Portaria SECEX 14/2004—was justified under Article XX, including by considering the aspect of the MERCOSUR exemption in its necessity analysis. The United States highlights that a single sentence of Portaria SECEX 14/2004 contains both the Import Ban and the MERCOSUR exemption. According to the United States, the Panel should have considered, in determining the contribution of the measure to the

[135] *Ibid.*, para. 23 (referring to Panel Report, para. 7.354).

[136] *Ibid.*, para. 26.

[137] *Ibid.* (referring to Appellate Body Report, *US – Shrimp*, paras. 166-184; and Appellate Body Report, *US – Gambling*, para. 369).

[138] *Ibid.*, para. 27.

[139] *Ibid.* (referring to Panel Report, para. 7.352).

[140] See *supra*, footnote 3.

ends pursued by it, the fact that retreaded tyres continue to be imported due to the MERCOSUR exemption, and its failure to do so constituted a breach of Article 11 of the DSU.

113. However, the United States disagrees with the European Communities' apparent position that the contribution of the measure to the ends pursued must be evaluated quantitatively, or that demonstrating a contribution requires "verifiable" evidence of whether the measure "actually" contributed to the ends pursued.[141] Article XX(b) does not contain a requirement to quantify "necessity", and both quantitative and qualitative evidence may be relevant to the necessity analysis, including the analysis of the contribution of the measure to the ends pursued.

114. The United States also argues that the Panel erred in finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade", contrary to the chapeau of Article XX. First, the Panel erred in basing its finding that the MERCOSUR exemption did not constitute arbitrary discrimination on the fact that the exemption was adopted to comply with a ruling issued by a MERCOSUR tribunal. The ruling did not prescribe any specific implementation action and, more fundamentally, the United States objects to the Panel's reference to Article XXIV in the context of the MERCOSUR ruling. The United States explains that "Article XXIV does not 'expressly recognize' *any and all* frameworks for [WTO] Members to discriminate in favor of partners in customs unions or free trade areas, but rather recognizes particular agreements that meet the conditions specified therein."[142] The Panel could not have properly concluded that MERCOSUR is a type of agreement expressly recognized in Article XXIV, because it made no findings as to whether MERCOSUR meets the terms of Article XXIV.

115. Secondly, the United States maintains that the Panel erred in relying on the number of retreaded tyres imported into Brazil from MERCOSUR countries as a basis for its finding that the MERCOSUR exemption did not constitute "unjustifiable discrimination" or "a disguised restriction on international trade" under the chapeau of Article XX. The Panel found that the volume of imports from MERCOSUR countries appears not to have been "significant", but failed to offer any meaningful analysis of what volume would be "significant". The United States points out that import volumes may change, and that simple reliance on a figure "appears a dubious basis for the Panel's conclusion that the permitted imports will not 'undermine' the objective of the measure."[143] According to the United States, the chapeau of Article XX requires panels to evaluate whether unjustifiable discrimination or a disguised restriction on international trade exists, and not simply whether the discrimination that exists undermines the objective of the measure.

116. Finally, should the Appellate Body reach the European Communities' conditional appeal and decide to rule on the European Communities' separate claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994, the United States submits that Brazil may not rely on Article XXIV of the GATT 1994 as a defence. MERCOSUR has not been notified under Article XXIV as a customs union, as required by Article XXIV:7 of the GATT 1994. According to the United States, failure to notify a customs union under Article XXIV:7 does not merely render a customs union inconsistent with that paragraph; rather, pursuant to paragraph 1 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* (the "*Understanding on Article XXIV of the GATT 1994*"), such a customs union is not consistent with Article XXIV as a whole. Members that opt not to subject their customs union to the procedures set out in Article XXIV and the *Understanding on Article XXIV of the GATT 1994* or its interpretation are not entitled to invoke that provision as a defence. Moreover, the United States notes that

[141] United States' third participant's submission, para. 6 (referring to European Communities' appellant's submission, paras. 172-174).

[142] United States' third participant's submission, para. 9. (original emphasis)

[143] *Ibid.*, para. 11.

MERCOSUR countries notified MERCOSUR pursuant to paragraph 4(a) of the *GATT 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (the "Enabling Clause")[144] rather than under Article XXIV:7(a) of the GATT 1994. The United States argues that regional arrangements as defined under Articles 1, 2, and 3 of the Enabling Clause have different characteristics and are subject to different obligations than customs unions and free trade areas covered by Article XXIV.

III. Issues Raised in This Appeal

117. The following issues are raised in this appeal:

(a) with respect to the Panel's analysis of "necessity" within the meaning of Article XX(b) of the GATT 1994:

(i) whether the Panel erred in finding that the Import Ban is "necessary" to protect human or animal life or health[145]; and

(ii) whether the Panel breached its duty under Article 11 of the DSU to make an objective assessment of the facts;

(b) with respect to the Panel's interpretation and application of the chapeau of Article XX of the GATT 1994:

(i) whether the Panel erred in finding that the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau[146]; and

(ii) whether the Panel erred in its analysis of whether imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau; and

(c) if the Appellate Body does *not* find that the MERCOSUR exemption results in the Import Ban being applied in a manner that is inconsistent with the chapeau of Article XX of the GATT 1994, then:

(i) whether the Panel erred in exercising judicial economy in relation to the European Communities' separate claim that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994; and, if so

(ii) whether the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 and is not justified under Article XXIV or Article XX(d) of the GATT 1994.

[144]L/4903, 28 November 1979, BISD 26S/203.

[145]Panel Report, para. 7.215.

[146]*Ibid.*, paras. 7.289 and 7.354.

IV. Background and the Measure at Issue

A. *Factual Background*

118. Tyres are an integral component in passenger cars, lorries, and airplanes and, as such, their use is widespread in modern society. New passenger cars are typically sold with new tyres. When tyres need to be replaced, consumers in some countries[147] may have a choice between new tyres or "retreaded" tyres. This dispute concerns the latter category of tyres.[148] Retreaded tyres are used tyres that have been reconditioned for further use by stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread, and sometimes with new material also covering parts or all of the sidewalls.[149] Retreaded tyres can be produced through different methods, one of which is called "remoulding".[150]

119. At the end of their useful life[151], tyres become waste, the accumulation of which is associated with risks to human, animal, and plant life and health.[152] Specific risks to human life and health include:

> (i) the transmission of dengue, yellow fever and malaria through mosquitoes which use tyres as breeding grounds; and (ii) the exposure of human beings to toxic emissions caused by tyre fires which may cause loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, but also cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems. [153]

Risks to animal and plant life and health include: "(i) the exposure of animals and plants to toxic emissions caused by tyre fires; and (ii) the transmission of a mosquito-borne disease (dengue) to animals."[154]

120. Governments take actions to minimize the adverse effects of waste tyres. Policies to address "waste" include preventive measures aiming at reducing the generation of additional waste tyres [155], as

[147]We note that Brazil is not the only WTO Member that has adopted a ban on imports of retreaded tyres. According to Brazil, countries that have restricted imports of used and retreaded tyres include Argentina, Bangladesh, Bahrain, Nigeria, Pakistan, Thailand, and Venezuela. (Brazil's first submission to the Panel, para. 67) At the oral hearing, Brazil identified the following as countries that ban imports of retreaded tyres: Argentina, Morocco, Nigeria, Pakistan, Thailand, Tunisia, and Venezuela.

[148]Retreaded tyres are classified in the *International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels, 14 June 1983, under subheadings 4012.11 (motor cars), 4012.12 (buses and lorries), 4012.13 (aircraft), and 4012.19 (other types). (Panel Report, para. 2.4)

[149]Panel Report, para. 2.1.

[150]"Remoulding" consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. The other two methods of retreading are "top-capping", which consists of replacing only the tread, and "re-capping", which entails replacing the tread and part of the sidewall. (*Ibid.*, para. 2.2)

[151]The Panel assumed that, on average, a tyre—whether new or retreaded—can be used on a passenger car for five years before it becomes a used tyre. (*Ibid.*, para. 7.128)

[152]*Ibid.*, para. 7.109.

[153]Panel Report, para. 7.109. See also *ibid.*, paras. 7.53-7.83.

[154]*Ibid.*, para. 7.112.

well as remedial measures aimed at managing and disposing of tyres that can no longer be used or retreaded, such as landfilling, stockpiling, the incineration of waste tyres, and material recycling.

121. The Panel observed that the parties to this dispute have not suggested that retreaded tyres used on vehicles pose any particular risks compared to new tyres, provided that they comply with appropriate safety standards. Various international standards exist in relation to retreaded tyres, including, for example, the norm stipulating that passenger car tyres may be retreaded only once.[156] One important difference between new and retreaded tyres is that the latter have a shorter lifespan and therefore reach the stage of being waste earlier.[157]

B. *The Measure at Issue*

122. Article 40 of Portaria No. 14 of the Secretaria de Comércio Exterior ("SECEX") (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade), dated 17 November 2004 ("Portaria SECEX 14/2004")[158] reads as follows:

> Article 40 – An import license will not be granted for retreaded tyres and used tyres, whether as a consumer product or feedstock, classified under NCM code 4012, except for remoulded tyres, classified under NCM codes 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, originating and proceeding from the Mercosur Member States under the Economic Complementation Agreement No. 18.[159]

Article 40 of Portaria SECEX 14/2004 contains three main elements: (i) an import ban on *retreaded* tyres (the "Import Ban")[160]; (ii) an import ban on *used* tyres; and (iii) an exemption from the Import Ban of imports of certain retreaded tyres from other countries of the Mercado Común del Sur ("MERCOSUR") (Southern Common Market), which has been referred to in this dispute as the "MERCOSUR exemption".[161] The MERCOSUR exemption did not form part of previous regulations prohibiting the importation of retreaded tyres, notably Portaria SECEX No. 8 of 25 September 2000

[155]See the Panel's finding, in paragraph 7.100 of its Report, that "policies to address 'waste' by non-generation of additional waste are a generally recognized means of addressing waste management issues", as well as footnote 1170 thereto, detailing the evidence on which the Panel relied in reaching this conclusion.

[156]*Ibid.*, para. 2.3.

[157]*Ibid.*, paras. 7.129 and 7.130.

[158]Exhibits BRA-84 and EC-29 submitted by Brazil and the European Communities, respectively, to the Panel. We note that, in November 2006, Article 40 of Portaria SECEX 14/2004 was replaced by Article 41 of Portaria SECEX No. 35 dated 24 November 2006, the text of which is identical to that of Article 40 of Portaria SECEX 14/2004. (European Communities' appellant's submission, para. 145 and footnote 18 thereto)

[159]See Panel Report, para. 2.7.

[160]Throughout this Report, reference to the "Import Ban" shall be understood as referring only to the import ban on retreaded tyres. It therefore does not include the MERCOSUR exemption, despite the fact that this exemption is contained in the same legal instrument as the Import Ban, that is, Article 40 of Portaria SECEX 14/2004.

[161]The MERCOSUR exemption applies exclusively to remoulded tyres, a subcategory of retreaded tyres, which result from the process of replacing the tread and the sidewall, including all or part of the lower area of the tyre. (See Panel Report, para. 2.74 and footnote 1440 to para. 7.265)

("Portaria SECEX 8/2000")[162], but was introduced as a result of a ruling issued by a MERCOSUR arbitral tribunal.[163]

123. This dispute concerns the Import Ban and the MERCOSUR exemption in Article 40 of Portaria SECEX 14/2004, but not the import ban on used tyres.[164] In its request for the establishment of a panel[165], the European Communities identified the Import Ban and the MERCOSUR exemption as distinct measures, and made separate claims against each of these measures. The European Communities claimed that the Import Ban was inconsistent with Article XI:1 of the GATT 1994, and could not be justified under Article XX of the GATT 1994.[166] The European Communities also made distinct claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, and could not be justified under either Article XXIV:5 of the GATT 1994 or the Enabling Clause.[167] In comments made during the interim review, Brazil stated that it had treated the Import Ban and the MERCOSUR exemption as two separate measures contained in the same legal instrument.[168]

124. Following the approach of the parties, the Panel analyzed the claim made against the Import Ban separately from the claims made against the MERCOSUR exemption. The Panel found the Import Ban to be inconsistent with Article XI:1 of the GATT 1994.[169] It then turned to Brazil's related defence under Article XX(b) of the GATT 1994, stating that its analysis of Brazil's justification of the violation should focus also on the Import Ban, because this was the "specific measure" that had been found to be inconsistent with Article XI:1.[170] Thus, according to the Panel, its analysis of the necessity of *that* specific measure should not have taken account of "elements extraneous to the measure itself" or of situations in which the Import Ban "does *not* apply (i.e. the exemption of MERCOSUR imports)".[171] The Panel recognized, nonetheless, that "the MERCOSUR

[162]Exhibits BRA-71 and EC-26 submitted by Brazil and the European Communities, respectively, to the Panel. See also Panel Report, para. 2.8.

[163]Following the adoption of Portaria SECEX 8/2000, Uruguay requested, on 27 August 2001, the initiation of arbitral proceedings within MERCOSUR. Uruguay alleged that Portaria SECEX 8/2000 constituted a new restriction of commerce between MERCOSUR countries, which was incompatible with Brazil's obligations under MERCOSUR. In its ruling of 9 January 2002, the arbitral tribunal found that the Brazilian measure was incompatible with MERCOSUR Decision CMC No. 22 of 29 June 2000, which obliges MERCOSUR countries not to introduce new *inter se* restrictions of commerce. (See Panel Report, para. 2.13; see also Exhibits BRA-103 and EC-40 submitted by Brazil and the European Communities, respectively, to the Panel) Following the arbitral award, Brazil enacted Portaria SECEX No. 2 of 8 March 2002, which eliminated the import ban for remoulded tyres originating in other MERCOSUR countries. (See Panel Report, para. 2.14; see also Exhibit BRA-78 submitted by Brazil to the Panel; see also Exhibit EC-41 submitted by the European Communities to the Panel) This exemption was incorporated into Article 40 of Portaria SECEX 14/2004.

[164]The European Communities confirmed, in response to questioning at the oral hearing, that it has not challenged the ban on the import of *used* tyres contained in Article 40 of Portaria SECEX 14/2004.

[165]WT/DS332/4, 18 November 2005. See also European Communities' first written submission to the Panel, para. 47.

[166]See, for instance, European Communities' first written submission to the Panel, paras. 89-168.

[167]*Supra*, footnote 144. See also European Communities' first written submission to the Panel, paras. 193-222.

[168]Panel Report, para. 6.17.

[169]The Panel found that the prohibition of the issuance of import licences for retreaded tyres has the effect of prohibiting the importation of retreaded tyres, and is thus inconsistent with Article XI:1 of the GATT 1994. (*Ibid.*, paras. 7.14, 7.15, and 7.34) In making the finding that Portaria SECEX 14/2004 is inconsistent with Article XI:1, the Panel focused on the import prohibition; its reasoning reflects the notion that an exemption from an import ban by its nature does not constitute a prohibition or restriction.

[170]*Ibid.*, para. 7.106.

[171]*Ibid.*, para. 7.107. (footnote omitted)

exemption is foreseen in the very legal instrument containing the import ban".[172] It then included the MERCOSUR exemption in its analysis of the chapeau of Article XX, because the chapeau involves consideration of the manner in which the specific measure to be justified (in this case, the Import Ban) is applied.

125. On appeal, the European Communities indicated, in response to questioning at the oral hearing, that the Import Ban and the MERCOSUR exemption are two aspects of a single measure—that is, Article 40 of Portaria SECEX 14/2004—and that this provision is the measure at issue. Notwithstanding this position, the European Communities does not appeal the Panel's analytical approach. More specifically, the European Communities does not contend that the Panel erred in identifying and separately treating as two distinct matters before it: a claim relating to the Import Ban; and a claim concerning the discrimination introduced by the MERCOSUR exemption.

126. We observe, nonetheless, that the Panel might have opted for a more holistic approach to the measure at issue by examining the two elements of Article 40 of Portaria SECEX 14/2004 that relate to retreaded tyres *together*. The Panel could, under such an approach, have analyzed whether the Import Ban in combination with the MERCOSUR exemption violated Article XI:1, and whether that *combined* measure, or the resulting partial import ban, could be considered "necessary" within the meaning of Article XX(b).[173]

127. Yet, the Panel's approach reflects the manner in which the European Communities formulated its claims to the Panel, and the fact that the MERCOSUR exemption was not part of the original ban on the importation of retreaded tyres adopted by Brazil (Portaria SECEX 8/2000), but was only introduced following a ruling in 2002 by a MERCOSUR arbitral tribunal. These considerations prompt us to examine the issues appealed on the basis of the conceptual approach adopted by the Panel in defining the scope of the measure at issue, which, as indicated above, has not specifically been appealed by the European Communities.

C. *Related Measures*

128. In addition to the Import Ban, Brazil has adopted a variety of other measures which were also challenged or discussed before the Panel. Although none of these measures are directly at issue in this appeal, we consider it useful to identify them briefly.

129. Presidential Decree 3.179, as amended[174], provides sanctions applicable to conduct and activities harmful to the environment, and other provisions, and its Article 47-A subjects the importation, as well as the marketing, transportation, storage, keeping or warehousing, of imported used and retreaded tyres to a fine of R$400/unit.

130. Resolution No. 258 of 26 August 1999 of the Conselho Nacional do Meio Ambiente ("CONAMA") (National Council for the Environment of the Ministry of the Environment) ("CONAMA Resolution 258/1999")[175], as amended by CONAMA Resolution No. 301 of 21 March 2002[176], created a collection and disposal scheme that makes it mandatory for domestic manufacturers

[172] *Ibid.*, para. 7.237; see also para. 6.19.

[173] Indeed, two of the third participants in this appeal—Australia and the United States—suggest that the Panel should have adopted such an approach. (Australia's third participant's submission, paras. 4 and 5; United States' third participant's submission, para. 5)

[174] See *supra*, footnote 5.

[175] Exhibits BRA-4 and EC-47 submitted by Brazil and by the European Communities, respectively, to the Panel.

[176] Exhibit BRA-68 submitted by Brazil to the Panel.

of new tyres and tyre importers to provide for the safe disposal of waste tyres in specified proportions.[177] CONAMA Resolution 258/1999, as amended in 2002, aims to ensure the environmentally appropriate final disposal of unusable tyres. Also, by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil[178], CONAMA Resolution 258/1999, as amended in 2002, seeks to encourage Brazilian retreaders to retread more domestically used tyres.

131. Brazilian states have also enacted measures aiming at reducing risks arising from the accumulation of waste tyres. Law 12.114 of the State of Rio Grande do Sul prohibits the commercialization of imported used tyres within its territory, which includes imported retreaded tyres, as well as retreaded tyres made in Brazil from imported casings.[179] A 2005 amendment to that law allows the importation and marketing of imported retreaded tyres provided that the importer proves that it has destroyed ten used tyres in Brazil for every retreaded tyre imported. In the case of imports of used tyre casings, however, the destruction of only one used tyre per imported tyre is required.[180] The State of Paraná has adopted Paraná Rodando Limpo, a voluntary programme to collect, *inter alia*, all existing unusable tyres currently discarded throughout the territory of Paraná.[181]

132. Finally, we note that, notwithstanding the import ban on used tyres contained in Article 40 of Portaria SECEX 14/2004, a number of Brazilian retreaders have sought, and obtained, injunctions allowing them to import used tyre casings in order to manufacture retreaded tyres from those used tyres.[182] Although the Brazilian government has, within the Brazilian domestic legal system, opposed these injunctions, it has had mixed results in its efforts to prevent the grant, or obtaining the reversal, of court injunctions for the importation of used tyres.[183]

V. The Panel's Analysis of the Necessity of the Import Ban

A. *The Panel's Necessity Analysis under Article XX(b) of the GATT 1994*

133. The first legal issue raised by the European Communities' appeal relates to the Panel's finding that the Import Ban is "necessary" within the meaning of Article XX(b) of the GATT 1994.[184] The European Communities challenges three specific aspects of the Panel's analysis under Article XX(b). First, the European Communities contends that the Panel applied an "erroneous legal standard"[185] in assessing the contribution of the Import Ban to the realization of the ends pursued by it, and that it did not properly weigh this contribution in its analysis of the necessity of the Import Ban. Secondly, the European Communities submits that the Panel did not define correctly the alternatives to the Import Ban and erred in excluding possible alternatives proposed by the European Communities.[186] Thirdly, the European Communities argues that, in its analysis under Article XX(b), the Panel did not carry out

[177] See para. 154 and footnote 253 thereto of this Report.

[178] Panel Report, para. 7.137.

[179] *Ibid.*, para. 2.11.

[180] *Ibid.*, para. 2.12.

[181] *Ibid.*, paras. 7.66, 7.174, 7.175, and 7.178.

[182] *Ibid.*, paras. 7.241 and 7.92-7.305.

[183] *Ibid.*, para. 7.304.

[184] Panel Report, para. 7.215.

[185] European Communities' appellant's submission, para. 166.

[186] *Ibid.*, para. 209.

a proper, if any, weighing and balancing of the relevant factors.[187] We will examine these contentions of the European Communities in turn.

1. The Panel's Analysis of the Contribution of the Import Ban to the Achievement of Its Objective

134. In the analysis of the contribution of the Import Ban to the achievement of its objective, the Panel first recalled its previous findings that, through the Import Ban, Brazil pursued the objective of reducing exposure to the risks to human, animal, and plant life and health arising from the accumulation of waste tyres, and that such policy fell within the range of policies covered by paragraph (b) of Article XX of the GATT 1994.[188] The Panel also found that Brazil's chosen level of protection is the "reduction of the risks of waste tyre accumulation to the maximum extent possible".[189] In analyzing whether the Import Ban "contributes to the realization of the policy pursued, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres"[190], the Panel examined two questions. First, the Panel sought to assess whether the Import Ban can contribute to the reduction in the number of waste tyres generated in Brazil. Secondly, the Panel sought to evaluate whether a reduction in the number of waste tyres can contribute to the reduction of the risks to human, animal, and plant life and health arising from waste tyres.[191]

135. Regarding the first question, the Panel noted Brazil's explanation that the Import Ban would contribute to the achievement of the objective of reducing the number of waste tyres if imported retreaded tyres would be replaced either with domestically retreaded tyres made from tyres used in Brazil, or with new tyres capable of future retreading. The Panel began by examining the replacement of imported retreaded tyres with new tyres on Brazil's market.[192] The Panel determined that "all types of retreaded tyres (i.e. for passenger car, bus, truck and aircraft) have by definition a shorter lifespan than new tyres."[193] Accordingly, the Panel reasoned that "an import ban on retreaded tyres may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan."[194] The Panel verified next whether there is a link between the replacement of imported retreaded tyres with domestically retreaded tyres and a reduction in the number of waste tyres in Brazil.[195] If retreaded tyres are manufactured in Brazil from tyres used in Brazil, the retreading of these used tyres contributes to the reduction of the accumulation of waste tyres in Brazil by "giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life."[196] The Panel added that "an import ban on retreaded tyres can encourage domestic retreaders to retread more domestic used tyres than they might have done otherwise"[197], because it "compel[s] consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres."[198] The Panel then assessed whether domestic

[187] *Ibid.*, para. 285.

[188] Panel Report, para. 7.115.

[189] *Ibid.*, para. 7.108. (footnote omitted)

[190] *Ibid.*, para. 7.115.

[191] Panel Report, para. 7.122.

[192] *Ibid.*, paras. 7.126-7.130.

[193] *Ibid.*, para. 7.130.

[194] *Ibid.*

[195] *Ibid.*, para. 7.132.

[196] *Ibid.*, para. 7.133.

[197] *Ibid.*, para. 7.134. (footnote omitted)

[198] *Ibid.*

used tyres can be retreaded in Brazil. On the basis of the evidence provided by the parties, the Panel found that "at least some domestic used tyres are being retreaded in Brazil"[199], that Brazil "has the production capacity to retread domestic used tyres"[200], and that new tyres sold in Brazil have the potential to be retreaded.[201] The Panel also observed that "Article 40 of Portaria SECEX 14/2004 bans the importation of both used and retreaded tyres to Brazil" and that "the import ban on used tyres supports the effectiveness of the import ban on retreaded tyres regarding the reduction of waste tyres."[202] The Panel concluded that the Import Ban "is capable of contributing to the reduction of the overall amount of waste tyres generated in Brazil."[203]

136. The Panel then turned to the question of whether the reduction in the number of waste tyres would contribute to a reduction of the risks to human, animal, and plant life and health arising from waste tyres. For the Panel, "the very essence of the problem is the actual accumulation of waste in and of itself."[204] The Panel added that "[t]o the extent that this accumulation has been demonstrated to be associated with the occurrence of the risks at issue, including the providing of fertile breeding grounds for the vectors of these diseases, a reduction in this accumulation, even if it does not eliminate it, can reasonably be expected to constitute a step towards the reduction of the occurrence of the diseases and the tyre fires."[205] The Panel concluded that:

> ... the prohibition on the importation of retreaded tyres is capable of making a contribution to the objective pursued by Brazil, in that it can lead to a reduction in the overall number of waste tyres generated in Brazil, which in turn can reduce the potential for exposure to the specific risks to human, animal, plant life and health that Brazil seeks to address.[206]

137. According to the European Communities, the Panel, in its assessment of the contribution of the Import Ban to the realization of the ends pursued by it, referred only to the potential contribution this measure might make.[207] The European Communities argues that the Panel applied an "erroneous legal standard"[208] in so doing, and that the Panel should have sought "to establish the actual contribution of the measure to its stated goals, and the importance of this contribution".[209] For the European Communities, the Panel was required to determine the extent to which the Import Ban makes a contribution to the achievement of its stated objective because, otherwise, it is not possible to weigh and balance properly this contribution against other relevant factors.[210] Accordingly, the European Communities contends, the Panel erred by not quantifying the reduction of waste tyres resulting from the Import Ban.[211] For the European Communities, "[t]he very indirect nature of the

[199] *Ibid.*, para. 7.136.

[200] *Ibid.*, para. 7.142.

[201] *Ibid.*, para. 7.137.

[202] Panel Report, para. 7.139.

[203] *Ibid.*, para. 7.142.

[204] *Ibid.*, para. 7.146.

[205] *Ibid.*

[206] *Ibid.*, para. 7.148.

[207] European Communities' appellant's submission, para. 168.

[208] *Ibid.*, para. 166.

[209] *Ibid.*, para. 167.

[210] *Ibid.*, para. 171.

[211] *Ibid.*, para. 174.

alleged risks attributed to imported retreaded tyres should have called for a particularly diligent examination of the contribution made by the ban to the reduction of the number of the waste tyres arising in Brazil."[212]

138. Brazil counters that the Panel correctly assessed the contribution of the Import Ban to the achievement of its objective. Brazil argues that actual contribution is properly assessed under the chapeau of Article XX of the GATT 1994, which focuses on the application of the measure. Brazil asserts further that the Appellate Body expressly recognized, in *EC – Asbestos*, that "a risk may be evaluated either in quantitative or *qualitative* terms"[213] and, therefore, the Panel was under no obligation to quantify the Import Ban's contribution to the reduction in waste tyre volumes.

139. We begin by recalling that the analysis of a measure under Article XX of the GATT 1994 is two-tiered.[214] First, a panel must examine whether the measure falls under at least one of the ten exceptions listed under Article XX.[215] Secondly, the question of whether the measure at issue satisfies the requirements of the chapeau of Article XX must be considered.

140. We note at the outset that the participants do not dispute that it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve[216], as well as the level of protection that it wants to obtain, through the measure or the policy it chooses to adopt.[217]

141. Article XX(b) of the GATT 1994 refers to measures "necessary to protect human, animal or plant life or health". The term "necessary" is mentioned not only in Article XX(b) of the GATT 1994, but also in Articles XX(a) and XX(d) of the GATT 1994, as well as in Article XIV(a), (b), and (c) of the GATS. In *Korea – Various Measures on Beef*, the Appellate Body underscored that "the word 'necessary' is not limited to that which is 'indispensable'".[218] The Appellate Body added:

> Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".[219] (footnote omitted)

[212]European Communities' appellant's submission, para. 177.

[213]Brazil's appellee's submission, para. 81 (quoting Appellate Body Report, *EC – Asbestos*, para. 167). (emphasis added by Brazil)

[214]Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20. See also Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 64.

[215]In other words, the policy objective of the measure at issue must fall under the range of policies covered by the paragraphs of Article XX of the GATT 1994. (See, for instance, Appellate Body Report, *US – Shrimp*, para. 149)

[216]Appellate Body Report, *US – Gasoline*, p. 30, DSR 1996:I, 3, at 28.

[217]Appellate Body Report, *EC – Asbestos*, para. 168.

[218]Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

[219]Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

142. In *Korea – Various Measures on Beef*, the Appellate Body explained that determining whether a measure is "necessary" within the meaning of Article XX(d):

> ... involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[220]

143. In *US – Gambling*, the Appellate Body addressed the "necessity" test in the context of Article XIV of the GATS. The Appellate Body stated that the weighing and balancing process inherent in the necessity analysis "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure"[221], and also involves an assessment of other factors, which will usually include "the contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce".[222]

144. It is against this background that we must determine whether the Panel erred in assessing the contribution of the Import Ban to the realization of the objective pursued by it, and in the manner in which it weighed this contribution in its analysis of the necessity of the Import Ban. We begin by identifying the objective pursued by the Import Ban. The Panel found that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"[223], and noted that "few interests are more 'vital' and 'important' than protecting human beings from health risks, and that protecting the environment is no less important."[224] The Panel also observed that "Brazil's chosen level of protection is the reduction of the risks of waste tyre accumulation to the maximum extent possible."[225] Regarding the trade restrictiveness of the measure, the Panel noted that it is "as trade-restrictive as can be, as far as retreaded tyres from non-MERCOSUR countries are concerned, since it aims to halt completely their entry into Brazil."[226]

145. We turn to the methodology used by the Panel in analyzing the contribution of the Import Ban to the achievement of its objective. Such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyze the contribution of the measure at issue to the

[220]*Ibid.*, para. 164.

[221]Appellate Body Report, *US – Gambling*, para. 306. (footnote omitted)

[222]*Ibid.* In *Korea – Various Measures on Beef*, the Appellate Body observed that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects." (Appellate Body Report, *Korea – Various Measures on Beef*, para. 163)

[223]Panel Report, para. 7.102.

[224]Panel Report, para. 7.108 (referring to Brazil's first written submission, para. 101).

[225]*Ibid.* (footnote omitted)

[226]*Ibid.*, para. 7.114.

realization of the ends pursued by it in accordance with the requirements of Article XX of the GATT 1994 and Article 11 of the DSU.

146. We note that the Panel chose to conduct a qualitative analysis of the contribution of the Import Ban to the achievement of its objective.[227] In previous cases, the Appellate Body has not established a requirement that such a contribution be quantified.[228] To the contrary, in *EC – Asbestos*, the Appellate Body emphasized that there is "no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health".[229] In other words, "[a] risk may be evaluated either in quantitative or qualitative terms."[230] Although the reference by the Appellate Body to the quantification of a risk is not the same as the quantification of the contribution of a measure to the realization of the objective pursued by it (which could be, as it is in this case, the reduction of a risk), it appears to us that the same line of reasoning applies to the analysis of the contribution, which can be done either in quantitative or in qualitative terms.

147. Accordingly, we do not accept the European Communities' contention that the Panel was under an obligation to quantify the contribution of the Import Ban to the reduction in the number of waste tyres and to determine the number of waste tyres that would be reduced as a result of the Import Ban.[231] In our view, the Panel's choice of a qualitative analysis was within the bounds of the latitude it enjoys in choosing a methodology for the analysis of the contribution.

148. The Panel analyzed the contribution of the Import Ban to the achievement of its objective in a coherent sequence. It examined first the impact of the replacement of imported retreaded tyres with *new tyres* on the reduction of waste. Secondly, the Panel sought to determine whether imported retreaded tyres would be replaced with *domestically retreaded tyres*, which led it to examine whether domestic used tyres can be and are being retreaded in Brazil. Thirdly, it considered whether the reduction in the number of waste tyres would contribute to a reduction of the risks to human, animal, and plant life and health.

149. The Panel's analysis was not only directed at an assessment of the current situation and the *immediate* effects of the Import Ban on the reduction of the exposure to the targeted risks. The Panel's approach also focused on evaluating the extent to which the Import Ban is likely to result in a reduction of the exposure to these risks.[232] In the course of its reasoning, the Panel made and tested some key hypotheses, including: that imported retreaded tyres are being replaced with new tyres[233] and domestically retreaded tyres[234]; that some proportion of domestic used tyres are retreadable and are being retreaded[235]; that Brazil introduced a number of measures to facilitate the access of

[227] *Ibid.*, para. 7.118.

[228] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 163 and 164; Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *US – Gambling*, para. 306; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

[229] Appellate Body Report, *EC – Asbestos*, para. 167. (original emphasis; footnote omitted)

[230] *Ibid.*

[231] European Communities, appellant's submission, para. 174.

[232] In the Panel's view, "it cannot be reasonably expected that the specific measure under consideration would entirely eliminate the risk ... or even that its impact on the actual reduction of the incidence of the diseases at issue would manifest itself very rapidly after the enactment of the measure." (Panel Report, para. 7.145)

[233] *Ibid.*, para. 7.130.

[234] *Ibid.*, paras. 7.133-7.135.

[235] *Ibid.*, para. 7.136.

domestic retreaders to good-quality used tyres[236]; that more automotive inspections in Brazil lead to an increase in the number of retreadable used tyres[237]; and that Brazil has the production capacity to retread such tyres.[238] The Panel sought to verify these hypotheses on the basis of the evidence adduced by the parties and found them to be logically sound and supported by sufficient evidence. In the next Section, we will examine the European Communities' claim that the Panel failed to make an objective assessment of the facts with respect to the verification of some of these hypotheses. Assuming, for the time being, that the Panel assessed the facts in accordance with Article 11 of the DSU, it appears to us that the Panel's analysis supports its conclusion that the Import Ban is capable of making a contribution and can result in a reduction of exposure to the targeted risks.[239] We have now to determine whether this was sufficient to conclude that the Import Ban is "necessary" within the meaning of Article XX(b) of the GATT 1994.

150. As the Panel recognized, an import ban is "by design as trade-restrictive as can be".[240] We agree with the Panel that there may be circumstances where such a measure can nevertheless be necessary, within the meaning of Article XX(b). We also recall that, in *Korea – Various Measures on Beef*, the Appellate Body indicated that "the word 'necessary' is not limited to that which is 'indispensable'".[241] Having said that, when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective. Thus, we disagree with Brazil's suggestion that, because it aims to reduce risk exposure to the maximum extent possible, an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary.[242]

151. This does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX(b). We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time—can only be evaluated with the benefit of time.[243] In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or

[236] Panel Report, para. 7.137.

[237] *Ibid.*, para. 7.138.

[238] *Ibid.*, para. 7.141.

[239] *Ibid.*, para. 7.148.

[240] *Ibid.*, para. 7.211.

[241] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

[242] Brazil's appellee's submission, paras. 80 and 83. According to Brazil, given its chosen level of protection to reduce the risk of waste tyre accumulation to the maximum extent possible, "[i]f the Panel finds that there are no reasonable alternatives to the measure, the measure is necessary—no matter how small its contribution—because the WTO does not second-guess the Member's chosen level of protection." (*Ibid.*, para. 80)

[243] In this respect, we note that, in *US – Gasoline*, the Appellate Body stated, in the context of Article XX(g) of the GATT 1994, that, "in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable." (Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at 20)

environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.

152. We have now to assess whether the qualitative analysis provided by the Panel establishes that the Import Ban is apt to produce a material contribution to the achievement of the objective of reducing exposure to the risks arising from the accumulation of waste tyres.

153. We observe, first, that the Panel analyzed the contribution of the Import Ban as initially designed, without taking into account the imports of remoulded tyres under the MERCOSUR exemption. As we indicated above, this is not the only possible approach. Nevertheless, we proceed with our examination of the Panel's reasoning on that basis for the reasons we explained earlier. In the light of the evidence adduced by the parties, the Panel was of the view that the Import Ban would lead to imported retreaded tyres being replaced with retreaded tyres made from local casings[244], or with new tyres that are retreadable.[245] As concerns new tyres, the Panel observed, and we agree, that retreaded tyres "have by definition a shorter lifespan than new tyres"[246] and that, accordingly, the Import Ban "may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan."[247] As concerns tyres retreaded in Brazil from local casings, the Panel was satisfied that Brazil had the production capacity to retread domestic used tyres[248] and that "at least some domestic used tyres are being retreaded in Brazil."[249] The Panel also agreed that Brazil has taken a series of measures to facilitate the access of domestic retreaders to good-quality used tyres[250], and that new tyres sold in Brazil are high-quality tyres that comply with international standards and have the potential to be retreaded.[251] The Panel's conclusion with which we agree was that, "if the domestic retreading industry retreads more domestic used tyres, the overall number of waste tyres will be reduced by giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life."[252] For these reasons, the Panel found that a reduction of waste tyres would result from the Import Ban and that, therefore, the Import Ban would contribute to reducing exposure to the risks associated with the accumulation of waste tyres. As the Panel's analysis was qualitative, the Panel did not seek to estimate, in quantitative terms, the reduction of waste tyres that would result from the Import Ban, or the time horizon of such a reduction. Such estimates would have been very useful and, undoubtedly, would have strengthened the foundation of the Panel's findings. Having said that, it does not appear to us erroneous to conclude, on the basis of the hypotheses made, tested, and accepted by the Panel, that fewer waste tyres will be generated with the Import Ban than otherwise.

[244]Panel Report, paras. 7.126-7.130.

[245]*Ibid.*, paras. 7.131-7.142.

[246]*Ibid.*, para. 7.130.

[247]Panel Report, para. 7.130.

[248]*Ibid.*, para. 7.141. The Panel noted that, in 2005, 33.4 million new tyres (all types included) were sold in Brazil (either domestically produced or imported) and 18.6 million retreaded tyres were produced domestically.

[249]*Ibid.*, para. 7.136.

[250]*Ibid.*, para. 7.137.

[251]*Ibid.*

[252]*Ibid.*, para. 7.133.

154. Moreover, we wish to underscore that the Import Ban must be viewed in the broader context of the comprehensive strategy designed and implemented by Brazil to deal with waste tyres. This comprehensive strategy includes not only the Import Ban but also the import ban on used tyres, as well as the collection and disposal scheme adopted by CONAMA Resolution 258/1999, as amended in 2002, which makes it mandatory for domestic manufacturers and importers of new tyres to provide for the safe disposal of waste tyres in specified proportions.[253] For its part, CONAMA Resolution 258/1999, as amended in 2002, aims to reduce the exposure to risks arising from the accumulation of waste tyres by forcing manufacturers and importers of new tyres to collect and dispose of waste tyres at a ratio of five waste tyres for every four new tyres. This measure also encourages Brazilian retreaders to retread more domestic used tyres by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil.[254] Thus, the CONAMA scheme provides additional support for and is consistent with the design of Brazil's strategy for reducing the number of waste tyres. The two mutually enforcing pillars of Brazil's overall strategy—the Import Ban and the import ban on used tyres—imply that the demand for retreaded tyres in Brazil must be met by the domestic retreaders, and that these retreaders, in principle, can use only domestic used tyres for raw material.[255] Over time, this comprehensive regulatory scheme is apt to induce sustainable changes in the practices and behaviour of the domestic retreaders, as well as other actors, and result in an increase in the number of retreadable tyres in Brazil and a higher rate of retreading of domestic casings in Brazil. Thus, the Import Ban appears to us as one of the key elements of the comprehensive strategy designed by Brazil to deal with waste tyres, along with the import ban on used tyres and the collection and disposal scheme established by CONAMA Resolution 258/1999, as amended in 2002.

[253]Article 3 of CONAMA Resolution 258/1999, as amended in 2002, provides:

> The time periods and quantities for collection and environmentally appropriate final disposal of unusable tyres resulting from use on automotive vehicles and bicycles covered by this Regulation are as follows:
>
> I – as of 1 January 2002: for every four new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;
>
> II – as of 1 January 2003: for every two new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;
>
> III – as of 1 January 2004:
>
> a) for every one new tyre produced in Brazil or imported new tyre, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;
>
> b) for every four imported reconditioned tyres, of any type, importers must ensure final disposal of five unusable tyres;
>
> IV – as of 1 January 2005:
>
> a) for every four new tyres produced in Brazil or imported tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of five unusable tyres;
>
> b) for every three imported reconditioned tyres, of any type, importers must ensure final disposal of four unusable tyres.

[254]Panel Report, para. 7.137.

[255]Leaving aside, as explained above, the imports under the MERCOSUR exemption and under court injunctions.

155. As we explained above, we agree with the Panel's reasoning suggesting that fewer waste tyres will be generated with the Import Ban in place. In addition, Brazil has developed and implemented a comprehensive strategy to deal with waste tyres. As a *key element* of this strategy, the Import Ban is likely to bring a material contribution to the achievement of its objective of reducing the exposure to risks arising from the accumulation of waste tyres. On the basis of these considerations, we are of the view that the Panel did not err in finding that the Import Ban contributes to the achievement of its objective.

2. The Panel's Analysis of Possible Alternatives to the Import Ban

156. In order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken.[256] As the Appellate Body indicated in *US – Gambling*, while the responding Member must show that a measure is necessary, it does not have to "show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives."[257] We recall that, in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".[258] If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative. The responding Member may also seek to demonstrate that the proposed alternative is not, in fact, "reasonably available".[259] As the Appellate Body indicated in *US – Gambling,* "[a]n alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[260] If the responding Member demonstrates that the measure proposed by the complaining Member is not a genuine alternative or is not "reasonably available", taking into account the interests or values being pursued and the responding Member's desired level of protection, it follows that the measure at issue is necessary.[261]

157. Before the Panel, the European Communities put forward two types of possible alternative measures or practices: (i) measures to reduce the number of waste tyres accumulating in Brazil; and (ii) measures or practices to improve the management of waste tyres in Brazil.[262] The Panel examined the alternative measures proposed by the European Communities in some detail, and in each case found that the proposed measure did not constitute a reasonably available alternative to the Import Ban. Among the reasons that the Panel gave for its rejections were that the proposed alternatives

[256] Appellate Body Report, *US – Gambling,* para. 311.

[257] *Ibid.*, para. 309. (original emphasis)

[258] *Ibid.*, para. 308.

[259] *Ibid.*, para. 311.

[260] Appellate Body Report, *US – Gambling,* para. 308.

[261] *Ibid.*, para. 311.

[262] Panel Report, para. 7.159.

were already in place, would not allow Brazil to achieve its chosen level of protection, or would carry their own risks and hazards.

158. Regarding the measures to reduce the accumulation of waste tyres, the Panel first discussed measures to encourage domestic retreading or improve the retreadability of domestic used tyres. The Panel observed that these measures had already been implemented or were in the process of being implemented[263] so that the impact of these measures and the Import Ban "could be cumulative rather than substitutable".[264] Therefore, the Panel disagreed with the European Communities that "the institution of domestic measures to encourage timely domestic retreading and to improve the retreadability of domestic used tyres would achieve the same outcome as the import ban".[265]

159. The Panel went on to discuss the European Communities' contention that Brazil should prevent imports of used tyres into Brazil through court injunctions. The Panel noted that imports of used tyres were already prohibited by law in Brazil, "so that if the 'alternative measure' proposed by the European Communities is the prohibition of used tyres, it could be said that Brazil actually already imposes that measure."[266] Accordingly, the Panel concluded that the possible alternative measures identified by the European Communities to avoid the *generation* of waste tyres could not "apply *as a substitute*" for the Import Ban but are, rather, complementary measures that Brazil already applies, at least in part.[267]

160. Turning to alternatives aiming to improve management of waste tyres, the Panel examined, first, collection and disposal schemes and, secondly, disposal methods.

161. The European Communities referred mainly to two collection and disposal schemes.[268] In the analysis of these schemes, the Panel recalled that "Brazil's chosen level of protection is the reduction of the risks associated with waste tyre accumulation to the maximum extent possible".[269] According to the Panel, "insofar as the level of protection pursued by Brazil involves the 'non-generation' of waste tyres in the first place", collection and disposal schemes, such as that adopted by CONAMA Resolution 258/1999 or the Paraná Rodando Limpo[270] programme, "would not seem able to achieve the same level of protection as the import ban".[271] The Panel also noted Brazil's concern that these collection and disposal schemes do not address or eliminate disposal risks.[272] The Panel concluded that these schemes cannot be considered as alternatives to the Import Ban at the level of protection sought by Brazil, because they were already implemented in Brazil and do not address the risks associated with the disposal of waste tyres.[273]

[263] *Ibid.*, para. 7.169.

[264] *Ibid.*

[265] *Ibid.*

[266] *Ibid.*, para. 7.171.

[267] Panel Report, para. 7.172. (original emphasis)

[268] The scheme adopted by CONAMA Resolution 258/1999, as amended in 2002, which makes it mandatory for domestic producers and importers of new tyres to provide for the safe disposal of waste tyres (or unusable tyres) in specified proportions; and a voluntary multi-sector programme called Paraná Rodando Limpo, which has been put in place in the State of Paraná. (See *supra*, footnote 253; see also *supra*, paras. 130 and 131)

[269] Panel Report, para. 7.177.

[270] See Exhibit EC-49 submitted by the European Communities to the Panel.

[271] Panel Report, para. 7.177.

[272] *Ibid.*

[273] *Ibid.*, para. 7.178.

162. The Panel then examined the following disposal methods identified by the European Communities: (i) landfilling; (ii) stockpiling; (iii) incineration of waste tyres in cement kilns and similar facilities; and (iv) material recycling.

163. Concerning *landfilling*, the Panel found that the landfilling of waste tyres may pose the very risks Brazil seeks to reduce through the Import Ban, and for this reason cannot constitute a reasonably available alternative.[274] For the Panel, landfilling of waste tyres poses problems, including the "instability of sites that will affect future land reclamation, long-term leaching of toxic substances, and the risk of tyre fires and mosquito-borne diseases."[275] The Panel also observed that the evidence it examined showing the existence of such risks did not make a clear distinction between landfilling of shredded tyres (also referred to as "controlled landfilling") and landfilling of whole tyres ("uncontrolled landfilling"). Thus, for the Panel, it was not possible to conclude that landfilling of shredded tyres does not pose risks similar to those linked to other types of waste tyre landfills.[276]

164. Regarding *stockpiling*[277], the Panel observed that this method does not "dispose of" waste tyres[278], and added that "the evidence shows that even the so-called 'controlled stockpiling' that is to say stockpiles designed to prevent the risk of fires and pests may still pose considerable risks to human health and the environment."[279] The Panel concluded that stockpiling did not constitute an alternative to the Import Ban.[280]

165. With respect to the *incineration* of waste tyres, the Panel found that sufficient evidence demonstrated that health risks exist in relation to the incineration of waste tyres, even if such risks could be significantly reduced through strict emission standards.[281] For the Panel, the evidence suggested that "the question still remains whether toxic chemicals emitted by incineration of waste tyres, regardless of the level of emission, may potentially pose health risks to humans."[282] The Panel added that, although emission levels can vary largely depending on the emission control technology, "the most up-to-date technology that can control toxic emissions to minimum levels is not necessarily readily available, mostly for financial reasons."[283]

166. Finally, the Panel examined *material recycling* applications. Regarding civil engineering applications using waste tyres, the Panel found that demand for these applications was fairly limited partly due to their high costs, that they are capable of disposing of only a small number of waste tyres, and that the evidence casts doubt on the safety of some of these engineering applications.[284] With respect to rubber asphalt, the Panel found that the information showed that "the use of rubber asphalt results in higher costs."[285] Consequently, "the demand for this technology is limited and its waste disposal capacity is reduced."[286] The Panel also noted that the use of rubber granulates in the

[274] *Ibid.*, para. 7.186.

[275] *Ibid.*, para. 7.183. (footnote omitted)

[276] Panel Report, para. 7.184.

[277] Stockpiling consists of storing waste tyres in designated installations. (See European Communities' second written submission to the Panel, para. 104)

[278] Panel Report, para. 7.188.

[279] *Ibid.* (footnote omitted)

[280] *Ibid.*, para. 7.189.

[281] *Ibid.*, para. 7.194.

[282] *Ibid.*, para. 7.192. (footnote omitted)

[283] *Ibid.*, para. 7.193. (footnotes omitted)

[284] *Ibid.*, paras. 7.201 and 7.202.

[285] *Ibid.*, para. 7.205.

[286] Panel Report, para. 7.205. (footnote omitted)

production of certain products may dispose of only a limited amount of waste tyres.[287] Finally, as regards devulcanization and other forms of chemical or thermal transformation, the Panel observed that, "under current market conditions, the economic viability of these options has yet to be demonstrated."[288] In the light of these considerations, the Panel concluded that "it is not clear that material recycling applications are entirely safe"[289], and that even if they were completely harmless, "they would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive costs and thus cannot constitute a reasonably available alternative".[290]

167. On appeal, the European Communities contends that the Panel erred in its analysis of the measures or practices that were presented as possible alternatives to the Import Ban. In particular, the European Communities submits that the Panel used in its analysis an incorrect concept of "alternative". In addition, the European Communities argues that the Panel should have considered as alternatives to the Import Ban a better enforcement of the ban on imports of used tyres and of existing collection and disposal schemes.

168. Brazil asserts that the Panel was correct in finding that none of the alternative measures suggested by the European Communities constituted "reasonably available" alternatives to the Import Ban. For Brazil, the Panel correctly took account of Brazil's chosen level of protection—that is, the reduction of risks associated with the generation of waste tyres in Brazil to the maximum extent possible—in concluding that none of the alternatives suggested by the European Communities avoided the generation of additional waste tyres in the first place.

169. The Panel examined each of the measures or practices put forward by the European Communities in order to determine whether they were reasonably available alternatives in the light of the objective of the Import Ban and Brazil's chosen level of protection.[291]

170. We note that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"[292] and that "Brazil's chosen level of protection is the reduction of [these] risks ... to the maximum extent possible"[293], and that a measure or practice will not be viewed as an alternative unless it "preserve[s] for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".[294]

171. We recall that tyres—new or retreaded—are essential for modern transportation. However, at the end of their useful life, they turn into waste that carries risks for public health and the environment.[295] Governments, legitimately, take actions to minimize the adverse effects of waste tyres. They may adopt preventive measures aiming to reduce the accumulation of waste tyres, a category into which the Import Ban falls. Governments may also contemplate remedial measures for the management and disposal of waste tyres, such as landfilling, stockpiling, incineration of waste tyres, and material recycling. Many of these measures or practices carry, however, their own risks or

[287] *Ibid.*, para. 7.206. (emphasis and footnote omitted)

[288] *Ibid.*, para. 7.207. (footnote omitted)

[289] *Ibid.*, para. 7.208.

[290] *Ibid.* (footnote omitted)

[291] *Ibid.*, para. 7.152.

[292] Panel Report, para. 7.102.

[293] *Ibid.*, para. 7.108. (footnote omitted)

[294] Appellate Body Report, *US – Gambling,* para. 308. (footnote omitted)

[295] See *supra*, para. 119.

require the commitment of substantial resources, or advanced technologies or know-how. Thus, the capacity of a country to implement remedial measures that would be particularly costly, or would require advanced technologies, may be relevant to the assessment of whether such measures or practices are reasonably available alternatives to a preventive measure, such as the Import Ban, which does not involve "prohibitive costs or substantial technical difficulties".[296]

172. Among the possible alternatives, the European Communities referred to measures to encourage domestic retreading or improve the retreadability of used tyres, as well as a better enforcement of the import ban on used tyres and of existing collection and disposal schemes. In fact, like the Import Ban, these measures already figure as elements of a comprehensive strategy designed by Brazil to deal with waste tyres.[297] Substituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect. We are therefore of the view that the Panel did not err in rejecting as alternatives to the Import Ban components of Brazil's policy regarding waste tyres that are complementary to the Import Ban.

173. We move now to the other measures or practices proposed by the European Communities as alternatives to the Import Ban.[298] The European Communities contends that the Panel committed an error of law by applying a "narrow definition of alternative"[299], according to which an alternative to the Import Ban is "a measure that must avoid the waste tyres arising specifically from imported retreaded tyres"[300], or one "equal to a waste non-generation measure".[301] For the European Communities, this narrow definition differs from "the objective allegedly pursued by the challenged measure"[302], and resulted in the rejection of several disposal and waste management measures presented by the European Communities that should have been accepted as alternatives to the Import Ban.

174. In evaluating whether the measures or practices proposed by the European Communities were "alternatives", the Panel sought to determine whether they would achieve Brazil's policy objective and chosen level of protection[303], that is to say, reducing the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"[304] to the maximum extent possible.[305] In this respect, we believe, like the Panel, that non-generation measures are more apt to

[296]Appellate Body Report, *US – Gambling*, para. 308.

[297]The Panel noted that Brazil has already implemented or is in the process of implementing measures to encourage domestic retreading or improve the retreadability of tyres. (Panel Report, para. 7.169) The Panel observed that "imports of used tyres *are* already prohibited". (*Ibid.*, para. 7.171 (original emphasis)) The Panel agreed with Brazil that "collection and disposal schemes such as Resolution CONAMA 258/1999 as amended [in 2002] and Paraná Rodando Limpo have already been implemented in Brazil". (*Ibid.*, para. 7.178)

[298]These measures or practices are the following disposal methods: landfilling; stockpiling; incineration of waste tyres; and material recycling.

[299]European Communities' appellant's submission, para. 227.

[300]*Ibid.*, para. 219. (underlining omitted)

[301]*Ibid.*, para. 222.

[302]*Ibid.*, para. 221.

[303]Panel Report, para. 7.157.

[304]*Ibid.*, para. 7.102.

[305]*Ibid.*, para. 7.108. (footnote omitted) See also *ibid.*, para. 7.152:

> We must therefore now consider whether any alternative measure, less inconsistent with GATT 1994, that is, less trade-restrictive than a complete import ban, would have been reasonably available to Brazil to achieve the same objective, taking into account Brazil's chosen level of protection. (footnote omitted)

achieve this objective because they prevent the accumulation of waste tyres, while waste management measures dispose of waste tyres only once they have accumulated. Furthermore, we note that, in comparing a proposed alternative to the Import Ban, the Panel took into account specific risks attached to the proposed alternative, such as the risk of leaching of toxic substances that might be associated to landfilling[306], or the risk of toxic emissions that might arise from the incineration of waste tyres.[307] In our view, the Panel did not err in so doing. Indeed, we do not see how a panel could undertake a meaningful comparison of the measure at issue with a possible alternative while disregarding the risks arising out of the implementation of the possible alternative.[308] In this case, the Panel examined as proposed alternatives landfilling, stockpiling, and waste tyre incineration, and considered that, even if these disposal methods were performed under controlled conditions, they nevertheless pose risks to human health similar or additional to those Brazil seeks to reduce through the Import Ban.[309] Because these practices carry their own risks, and these risks do not arise from non-generation measures such as the Import Ban, we believe, like the Panel, that these practices are not reasonably available alternatives.

175. With respect to material recycling, we share the Panel's view that this practice is not as effective as the Import Ban in reducing the exposure to the risks arising from the accumulation of waste tyres. Material recycling applications are costly, and hence capable of disposing of only a limited number of waste tyres.[310] We also note that some of them might require advanced technologies and know-how that are not readily available on a large scale. Accordingly, we are of the view that the Panel did not err in concluding that material recycling is not a reasonably available alternative to the Import Ban.

3. The Weighing and Balancing of Relevant Factors by the Panel

176. The European Communities argues that, in its analysis of the necessity of the Import Ban, the Panel stated that it had weighed and balanced the relevant factors, but it "has not actually done it".[311] According to the European Communities, although the Appellate Body has not defined the term "weighing and balancing", "this language refers clearly to a process where, in the first place, the importance of each element is assessed individually and, then, its role and relative importance is taken into consideration together with the other elements for the purposes of deciding whether the challenged measure is necessary to attain the objective pursued."[312] The European Communities reasons that, "since the Panel failed to establish ... the extent of the actual contribution the [Import Ban] makes to the reduction of the number of waste tyres arising in Brazil, ... it was incapable of 'weighing and balancing' this contribution against any of the other relevant factors."[313] In addition, the European Communities contends that "the Panel base[d] ... its 'weighing and balancing' exercise on the wrong analysis it ... made of the alternatives".[314] In sum, the European Communities argues that

[306]*Ibid.*, para. 7.183.

[307]*Ibid.*, para. 7.194.

[308]This was recognized by the Appellate Body in *EC – Asbestos*, where it stated that the risks attached to a proposed measure should be included in the exercise of comparison aiming to determine whether it is a reasonably available alternative to the measure at issue. (Appellate Body Report, *EC – Asbestos*, para. 174)

[309]Panel Report, para. 7.195; see also para. 7.186 (landfilling); para. 7.189 (stockpiling); and para. 7.194 (waste tyre incineration).

[310]*Ibid.*, paras. 7.201 and 7.205-7.208.

[311]European Communities' appellant's submission, para. 285.

[312]*Ibid.*, para. 284.

[313]*Ibid.*, para. 288.

[314]European Communities' appellant's submission, para. 290. (underlining omitted)

the Panel conducted a "superficial analysis"[315] that is not a real weighing and balancing of the different factors and alternatives, because it did not balance "its arguments about the measure and the alternatives with the absolute trade-restrictiveness of the import ban and with a real evaluation of the contribution of the import ban to the objective pursued."[316]

177. Brazil counters that the Panel correctly weighed and balanced the relevant factors and proposed alternatives in its necessity analysis. Brazil argues that the Panel expressly recognized that the Import Ban is highly trade restrictive, but properly weighed and balanced this factor against the other relevant factors. In relation to contribution, Brazil considers that Article XX(b) of the GATT 1994 does not require quantification, and that, in any event, the Import Ban's contribution to the reduction of imports of retreaded tyres is "substantial".[317] Brazil adds that, because imports of retreaded tyres by definition increase the amount of waste tyres in Brazil, the contribution of the Import Ban to the reduction of risks arising from waste tyres to the maximum extent possible is "both direct and certain".[318]

178. We begin our analysis by recalling that, in order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake.[319] It is through this process that a panel determines whether a measure is necessary.[320]

179. In this case, the Panel identified the objective of the Import Ban as being the reduction of the exposure to risks arising from the accumulation of waste tyres. It assessed the importance of the interests underlying this objective. It found that risks of dengue fever and malaria arise from the accumulation of waste tyres and that the objective of protecting human life and health against such diseases "is both vital and important in the highest degree".[321] The Panel noted that the objective of the Import Ban also relates to the protection of the environment, a value that it considered—correctly, in our view—important.[322] Then, the Panel analyzed the trade restrictiveness of the Import Ban and its contribution to the achievement of its objective. It appears from the Panel's reasoning that it considered that, in the light of the importance of the interests protected by the objective of the Import Ban, the contribution of the Import Ban to the achievement of its objective outweighs its trade restrictiveness. This finding of the Panel does not appear erroneous to us.[323]

180. The Panel then proceeded to examine the alternatives to the Import Ban proposed by the European Communities. The Panel explained that some of them could not be viewed as alternatives to the Import Ban because they were complementary to it and were already included in Brazil's

[315] *Ibid.*, para. 295.

[316] *Ibid.*, para. 294.

[317] Brazil's appellee's submission, para. 177.

[318] *Ibid.*, para. 178.

[319] Appellate Body Report, *US – Gambling*, para. 307.

[320] *Ibid.*

[321] Panel Report, para. 7.210. (footnote omitted)

[322] *Ibid.*, para. 7.112.

[323] *Supra*, paras. 150-155.

comprehensive policy.[324] Next, the Panel compared the other alternatives proposed by the European Communities—landfilling, stockpiling, incineration, and material recycling—with the Import Ban, taking into consideration the specific risks associated with these proposed alternatives. The Panel concluded from this comparative assessment that none of the proposed options was a reasonably available alternative to the Import Ban.

181. The European Communities argues that the Panel failed to make a proper collective assessment of all the proposed alternatives, a contention that does not stand for the following reasons. First, the Panel did refer to its collective examination of these alternatives in concluding that "none of these, either individually *or collectively*, would be such that the risks arising from waste tyres in Brazil would be safely eliminated, as is intended by the current import ban."[325] Secondly, as noted by the Panel and discussed above, some of the proposed alternatives are not real substitutes for the Import Ban since they complement each other as part of Brazil's comprehensive policy.[326] Finally, having found that other proposed alternatives were not reasonably available or carried their own risks, these alternatives would not have weighed differently in a collective assessment of alternatives.

182. In sum, the Panel's conclusion that the Import Ban is necessary was the result of a process involving, first, the examination of the contribution of the Import Ban to the achievement of its objective against its trade restrictiveness in the light of the interests at stake, and, secondly, the comparison of the possible alternatives, including associated risks, with the Import Ban. The analytical process followed by the Panel is consistent with the approach previously defined by the Appellate Body.[327] The weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement. We therefore do not share the European Communities' view that the Panel did not "actually" weigh and balance the relevant factors[328], or that the Panel made a methodological error in comparing the alternative options proposed by the European Communities with the Import Ban.

183. In the light of all these considerations, we are of the view that the Panel did not err in the manner it conducted its analysis under Article XX(b) of the GATT 1994 as to whether the Import Ban was "necessary to protect human, animal or plant life or health".

B. *The Panel's Necessity Analysis and Article 11 of the DSU*

184. The European Communities claims that the Panel breached its duties under Article 11 of the DSU in its analysis of the "necessity" of the Import Ban under Article XX(b) of the GATT 1994. In particular, the European Communities submits that the Panel failed to make an objective assessment of the facts in its assessment of the contribution of the Import Ban to the achievement of its objective, and in its examination of the proposed alternatives.

[324] For example, measures to encourage domestic retreading and improve the retreadability of domestic used tyres, a better implementation of the import ban on used tyres, and a better implementation of existing collection and disposal schemes. See also Panel Report, paras. 7.169, 7.171, and 7.178.

[325] *Ibid.*, para. 7.214. (emphasis added)

[326] Panel Report, para. 7.213.

[327] Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *US – Gambling*, para. 306; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

[328] European Communities' appellant's submission, para. 285.

1. Article 11 of the DSU and the Panel's Analysis of the Contribution of the Import Ban to the Achievement of Its Objective

185. We recall that Article 11 requires a panel to conduct "an objective assessment of the matter before it, including an objective assessment of the facts of the case". This assessment implies, among other things, that a panel must consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence.[329]

186. Within these parameters, it is generally "within the discretion of the panel to decide which evidence it chooses to utilize in making findings"[330], and panels are "not required to accord to factual evidence of the parties the same meaning and weight as do the parties".[331] A panel is entitled "to determine that certain elements of evidence should be accorded more weight than other elements—that is the essence of the task of appreciating the evidence"[332]—and the Appellate Body "will not interfere lightly with the panel's exercise of its discretion".[333] Thus, a participant challenging a panel's findings of fact under Article 11 of the DSU is required to demonstrate that the panel has exceeded the bounds of its discretion as the trier of facts.

187. Against this background, we turn to the contentions of the European Communities. First, the European Communities argues that there was an insufficient factual foundation for the Panel's conclusion that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres" that were not capable of being retreaded[334], and that the Panel ignored "substantial evidence" produced by the European Communities demonstrating the existence of "low-quality non-retreadable tyres"[335] in the Brazilian market.

188. Brazil submits that the Panel's conclusion is supported by the evidence on record and adds that high rates of retreadability in the country demonstrate that new tyres sold in Brazil "generally have [the] potential for future retreading".[336]

189. We observe that, in support of its position that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres" that are not suitable for retreading, the Panel referred to standards applied to new tyres sold in Brazil that are "strict technical and performance standards that are based on international standards".[337] The European Communities argues that potential retreadability is not an element of these standards and that, therefore, the Panel's position on the retreadability of new

[329]Appellate Body Report, *EC – Hormones*, paras. 132 and 133. See also Appellate Body Report, *Japan – Apples*, para. 221; Appellate Body Report, *EC – Asbestos*, para. 161; Appellate Body Report, *Australia – Salmon*, para. 266; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; Appellate Body Report, *EC – Sardines,* para. 299; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 125; Appellate Body Report, *Japan – Agricultural Products II*, paras. 141 and 142; Appellate Body Report, *Korea – Dairy*, para. 138; Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 161 and 162; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; Appellate Body Report, *US – Gambling*, para. 363; Appellate Body Report, *EC – Selected Customs Matters*, para. 258; and Appellate Body Report, *US – Carbon Steel*, para. 142.

[330]Appellate Body Report, *US – Carbon Steel*, para. 142 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

[331]Appellate Body Report, *Australia – Salmon*, para. 267.

[332]Appellate Body Report, *EC – Asbestos*, para. 161.

[333]Appellate Body Report, *US – Wheat Gluten*, para. 151. (footnote omitted)

[334]Panel Report, para. 7.137; European Communities' appellant's submission, paras. 183 and 184.

[335]European Communities' appellant's submission, para. 183. (footnote omitted)

[336]Brazil's appellee's submission, para. 116.

[337]Panel Report, para. 7.137.

tyres sold in Brazil had no factual basis.[338] We are not persuaded by this argument. The Panel's position was not that these standards include retreadability but, rather, that they result in a level of quality for new tyres that increases the potential for them to be retreaded.[339] Thus, the Panel's finding did not lack a factual basis since there was a relationship between the standards to which the Panel referred and its conclusion that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres"[340] that are not retreadable.

190. Nor did the Panel disregard the evidence presented by the European Communities in reaching its conclusion on retreadability. To the contrary, the Panel expressly referred to various studies submitted by the European Communities in Exhibits EC-15 and EC-67 through EC-71, which related to the existence of "cheap low-quality new tyres in Brazil".[341] The Panel simply attached more weight to other pieces of evidence that were before it [342], as Article 11 of the DSU entitles it to do.[343]

191. The European Communities asserts further that the Panel relied on "arbitrarily chosen pieces of evidence" and failed to consider contradictory evidence[344] in basing its finding that "at least some domestic used tyres are being retreaded in Brazil"[345] exclusively on a statement contained in a report by the Associação Brasileira do Segmento de Reforma de Pneus (the "ABR") (Brazilian Association of the Retreading Industry) (the "ABR Report").[346] According to the European Communities, the Panel neglected to consider evidence contained in a second report by the ABR[347] that contradicted this statement.[348] We do not find merit in this argument. The Panel relied on various studies and reports other than the ABR Report.[349] Moreover, the Panel took into account the evidence in the second report by the ABR[350] as the express reference it made to that report confirms.[351]

[338]European Communities' appellant's submission, para. 184.

[339]Panel Report, para. 7.137.

[340]*Ibid.*

[341]*Ibid.*, footnote 1252 to para. 7.137 (referring to European Communities' oral statement at the first Panel meeting, para. 28; and European Communities' response to Question 11 posed by the Panel, Panel Report, pp. 254 and 255, in turn referring to Exhibits EC-15 and EC-67 through EC-71 submitted by the European Communities to the Panel).

[342]*Ibid.*, para. 7.137.

[343]Appellate Body Report, *EC – Asbestos,* para. 161.

[344]European Communities' appellant's submission, para. 185.

[345]Panel Report, para. 7.136.

[346]*Supra*, footnote 41.

[347]*Supra*, footnote 43.

[348]European Communities' appellant's submission, paras. 186 and 187.

[349]For example, the Panel relied on, *inter alia*, retreadability figures for the Brazilian company Mazola Comércio (Panel Report, para. 7.135 and footnote 1236 thereto (referring to Exhibit BRA-93 submitted by Brazil to the Panel)); studies by the consultancy LAFIS and the Institute of Technological Research of the State of São Paulo (*ibid.*, footnote 1237 (referring to Exhibits EC-92 and BRA-159 submitted by the European Communities and Brazil, respectively, to the Panel)); a video by BS Colway (*ibid.*, footnote 1239 (referring to Exhibit EC-72 submitted by the European Communities to the Panel)); and retreadability figures in Brazil (*ibid.*, footnote 1241 (referring to Brazil's oral statement at the second Panel meeting, paras. 57-61; Brazil's comments on Question 107 posed by the Panel to the European Communities, Panel Report, pp. 317-323; Brazil's response to Question 117 posed by the Panel, Panel Report, pp. 332-334; and Exhibit BRA-162 submitted by Brazil to the Panel)) and in other countries (*ibid.*, footnote 1242 (referring to Brazil's first written submission to the Panel, para. 79, where Brazil provided some examples of retreadability figures for the United Kingdom, the United States, Australia, and France)). See also Brazil's response to Question 17 posed by the Panel, *ibid.*, p. 257.

[350]Exhibit BRA-157, *supra*, footnote 43.

192. The European Communities next charges the Panel with failing to discount the evidentiary value of Technical Note 001/2006 of the Instituto Nacional de Metrologia, Normalização e Qualidade Industrial ("INMETRO") (National Institute for Metrology, Standardization and Industrial Quality)[352], on the grounds that it was issued during the course of the Panel proceedings, and with neglecting to consider contradictory evidence contained in an earlier INMETRO Technical Note 83/2000.[353]

193. It is well settled that a panel may consider a piece of evidence that post-dates its establishment.[354] Thus, INMETRO Technical Note 001/2006 was clearly an admissible piece of evidence. The European Communities, however, seems to suggest that the fact that INMETRO Technical Note 001/2006 post-dates the establishment of the Panel undermines its "evidentiary value", because Brazil was well aware of the significance of INMETRO Technical Note 001/2006 at that time. In our view, this amounts to an argument that the Panel should have attached more weight to one piece of evidence than to another, and does not suffice to demonstrate that the Panel exceeded the bounds of its discretion by attaching more weight to INMETRO Technical Note 001/2006—a more recent document—than to INMETRO Technical Note 83/2000. Furthermore, the Panel did not neglect INMETRO Technical Note 83/2000. As the European Communities acknowledges[355], the Panel expressly referred to this particular piece of evidence in its analysis.[356]

194. The European Communities further maintains that the Panel ignored evidence contained in a study by the consultancy LAFIS[357] indicating that the rate of retreading of passenger car tyres in Brazil is below 9.99 per cent.[358] The Panel, however, specifically considered the LAFIS study in its analysis as to whether domestic used tyres are retreadable and are being retreaded in Brazil.[359] It also discussed the arguments presented by Brazil and the European Communities in relation to this figure.

195. The European Communities charges the Panel with "bolster[ing] its conclusions"[360] on the retreadability of domestic casings with speculation on future measures that Brazil may take and, in particular, in stating that "mandatory inspections are taking place in Brazil and that more frequent inspections are to be expected once Bill 5979/2001 is approved".[361] However, the Panel's finding that "mandatory inspections are taking place"[362] was based on inspection requirements imposed by Brazil's National Code of Traffic and applicable technical standards, which were in force at the time the Panel

[351]See Panel Report, footnote 1238 to para. 7.135 (referring to Exhibit BRA-157, *supra*, footnote 43).

[352]Exhibit BRA-163 submitted by Brazil to the Panel.

[353]European Communities' appellant's submission, paras. 188 and 189 (referring to INMETRO Technical Note 83/2000 (Exhibit EC-45 submitted by the European Communities to the Panel)).

[354]This was confirmed by the Appellate Body in its Report, *EC – Selected Customs Matters*, at para. 188.

[355]European Communities' appellant's submission, para. 189 and footnote 56 thereto.

[356]Panel Report, footnote 1240 to para. 7.135.

[357]European Communities' appellant's submission, para. 190 (referring to LAFIS report, *supra*, footnote 45, p. 11).

[358]*Ibid.*, para. 190.

[359]Panel Report, para. 7.135 and footnote 1237 thereto.

[360]European Communities' appellant's submission, para. 195.

[361]Panel Report, para. 7.138.

[362]*Ibid.*

conducted its review[363], and is not vitiated by the Panel's additional reference to possible consequences of the approval of Bill 5979/2001.

196. In addition, the European Communities contends that, in analyzing the contribution of the Import Ban to the realization of the ends pursued by it, the Panel erred in failing to accord any evidentiary weight to the fact that Brazilian retreaders have sought court injunctions that permit the importation of used tyres for further retreading.[364] The European Communities claims that the Panel engaged in a "wilful exclusion"[365] of evidence relating to the importation of used tyres through court injunctions, even though this evidence was relevant because it demonstrates that Brazilian retreaded tyres are produced with imported casings, and casts doubt on Brazil's position that domestic casings suitable for retreading are readily available in Brazil.[366]

197. We are not persuaded that the Panel ignored evidence relating to the importation of used tyres through court injunctions in its analysis of the contribution of the Import Ban to the realization of the ends pursued by it. The Panel acknowledged these injunctions and the arguments put forth by the European Communities in its analysis of the conflicting arguments and evidence regarding the level of retreadability of tyres in Brazil.[367] In the end, the Panel ascribed more weight to evidence adduced by Brazil suggesting that "at least some domestic used tyres are being retreaded in Brazil"[368] and that "domestic used tyres are suitable for retreading".[369] It appears to us that, in proceeding in that manner, the Panel did not exceed the bounds of its discretion as the trier of facts.

198. In the light of the above considerations, we *find* that the Panel did not fail to conduct an objective assessment of the facts of the case, as required by Article 11 of the DSU, when evaluating the contribution of the Import Ban to the achievement of its objective.

2. Article 11 of the DSU and the Panel's Examination of Possible Alternatives to the Import Ban

199. The European Communities contends that, in its analysis of possible alternatives to the Import Ban, the Panel did not make an objective assessment of the facts as required by Article 11 of the DSU. The European Communities' claim of error under Article 11 is directed at the Panel's appreciation of the evidence concerning a number of disposal methods for waste tyres suggested by the European Communities as alternatives to the Import Ban, namely, landfilling, controlled stockpiling, co-incineration, and material recycling.

200. According to the European Communities, the Panel's factual findings in relation to each of these alternatives were not based on an objective assessment, because the Panel ignored important facts and arguments submitted by the European Communities and referred to the evidence before it "in a selective and distorted manner".[370] The European Communities also charges the Panel with

[363]See *ibid.*, para. 7.138 (referring to Law No. 9.503 of 23 September 1997 (National Code of Traffic) (Exhibit BRA-102 submitted by Brazil to the Panel); and Brazil's response to Question 8 posed by the European Communities).

[364]European Communities' appellant's submission, para. 191.

[365]*Ibid.*, para. 192.

[366]European Communities' appellant's submission, paras. 192 and 193.

[367]Panel Report, para. 7.140.

[368]*Ibid.*, para. 7.136.

[369]*Ibid.*, para. 7.142.

[370]European Communities' appellant's submission, para. 247.

failing to consider one specific alternative to the Import Ban suggested by the European Communities, namely, the National Dengue Control Programme.[371]

201. Regarding the landfilling of waste tyres, the Panel reviewed the extensive evidentiary record on the risks posed by landfills of waste tyres.[372] In the course of its analysis of this evidence, the Panel noted the distinction made by the European Communities between "uncontrolled" and "controlled" landfills[373], but observed that "the evidence on the health and environmental risks posed by landfills of waste tyres does not make a clear distinction between 'uncontrolled' and the so-called 'controlled' landfills"[374], and that its assessment of that evidence indicated that "it [was] not possible to conclude that controlled landfills do not pose risks similar to those linked to other types of waste tyre landfills."[375] Therefore, contrary to the European Communities' assertion that the Panel erred in basing its findings exclusively on evidence relating to uncontrolled landfilling, the Panel's conclusion that landfilling "may pose the very risks Brazil seeks to avoid through the import ban"[376] was based on evidence that demonstrates that risks arise indistinctively from controlled and uncontrolled landfills.

202. The European Communities also suggests that the Panel erred under Article 11 in its rejection of landfilling as an alternative to the Import Ban because it did not take into account legislation allowing some landfilling of shredded tyres in Brazil. It is true that the Panel did not refer specifically to this legislation in its analysis. We note, however, that Brazil had argued that the legislation in question was exceptional, temporary, and in no way contradicted the existence or risks generally associated with landfilling.[377] A panel enjoys discretion in assessing whether a given piece of evidence is relevant for its reasoning[378], and is not required to discuss, in its report, each and every piece of evidence.[379]

203. We turn to the European Communities' argument that the Panel did not objectively assess the facts in observing that "stockpiling as such does not 'dispose of' waste tyres" and that controlled stockpiling "may still pose considerable risks to human health and the environment".[380] The Panel did not, as the European Communities contends, erroneously treat stockpiling as a "final disposal operation".[381] To the contrary, the Panel recognized that stockpiling is used only for temporary storage.[382] Moreover, the Panel's finding that stockpiling, even as an intermediate operation, carries risks of its own rested on various pieces of evidence, including a California Environmental Protection

[371] *Supra*, footnote 53.

[372] Panel Report, para. 7.183 and footnotes 1318 and 1319 thereto (referring to Exhibits BRA-1, BRA-8, BRA-38, BRA-41, BRA-45, and BRA-58 submitted by Brazil to the Panel).

[373] *Ibid.*, para. 7.184.

[374] *Ibid.*

[375] *Ibid.* In particular, we observe that the evidence relating to the risk of tyre fires and to the long-term leaching of toxic chemicals referred to in paragraph 7.183 and footnote 1318 thereto of the Panel Report does not appear to distinguish between landfilling of whole tyres and landfilling of shredded tyres.

[376] *Ibid.*, para. 7.186.

[377] Brazil's appellee's submission, para. 152.

[378] See Appellate Body Report, *EC – Hormones*, para. 132.

[379] See Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 240; see also Appellate Body Report, *EC – Hormones*, para. 138.

[380] Panel Report, para. 7.188. (footnote omitted)

[381] European Communities' appellant's submission, para. 255.

[382] Panel Report, footnote 1330 to para. 7.188. The Panel referred to the *Basel Convention Technical Guidelines on the Identification and Management of Used Tyres* (1999) (Exhibit BRA-40 submitted by Brazil to the Panel), p. 12, which states, *inter alia*, that "[s]tockpiling with proper control can be used only for temporary storage before an end-of-life tyre is forwarded to a recovery operation."

Agency study that concludes, in relation to controlled stockpiling, that "[a]ll tire and rubber storage facilities should be considered high-risk storage facilities."[383]

204. Regarding co-incineration, the Panel found that "Brazil has provided sufficient evidence to demonstrate that health risks exist in relation to the incineration of waste tyres, even if such risks can be significantly reduced through strict emission standards."[384] In reaching this conclusion, the Panel relied on evidence consisting of technical studies and reports of regulatory agencies relating to activities in countries other than Brazil.[385] The Panel acted within its margin of discretion as the trier of facts in considering that evidence relating to co-incineration activities in countries other than Brazil was relevant to the question of whether co-incineration poses health risks if used in Brazil, and in relying on that evidence.

205. With respect to material recycling applications such as civil engineering, rubber asphalt, rubber products, and devulcanization, the Panel found that it is not clear that they "are entirely safe"[386], and that even if they were, material recycling applications "would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive costs".[387] The European Communities contends that both of these findings lacked a proper factual foundation.

206. The Panel stated that "*it is not clear* whether some of these engineering applications are sufficiently safe."[388] It also expressed the view that "the evidence is *inconclusive* on whether rubber asphalt exposures are more hazardous than conventional asphalt exposures."[389] Furthermore, the Panel did "not find evidence showing that devulcanization or other forms of chemical or thermal transformation such as pyrolisis pose substantial health or environmental risks."[390] It is on the basis of these findings that the Panel concluded that "*it is not clear* that material recycling applications are entirely safe."[391] The Panel relied on numerous pieces of evidence to make these findings[392], and the European Communities has not demonstrated that this evidence cannot support the Panel's finding. Moreover, in finding that material recycling was not a reasonably available alternative to the Import Ban, the Panel relied mainly on the limited disposal capacity of these applications; safety considerations were not central to its reasoning.

[383] Panel Report, para. 7.189 and footnote 1331 thereto (referring to California Environmental Protection Agency (US), Integrated Waste Management Board, "Tire Pile Fires: Prevention, Response, Remediation" (2002) (Exhibit BRA-29 submitted by Brazil to the Panel)).

[384] *Ibid.*, para. 7.194.

[385] *Ibid.*, para. 7.192 and footnotes 1339-1342 thereto. In particular, the Panel referred to a report which concluded that "emissions of toxic organics ... [as a result of co-incineration of waste tyres] cannot be effectively controlled." (*Ibid.*, footnote 1339 (quoting Okopol Institut für Ökologie und Politik GmbH, "Expertise on the Environmental Risk Associated with the Co-Incineration of Wastes in the Cement Kiln 'Four E' of CBR Usine de Lixhe, Belgium" (circa 1998) (Exhibit BRA-46 submitted by Brazil to the Panel)) The Panel also pointed to evidence that demonstrated that "there is no scientific basis for [concluding] that burning waste tires in cement kilns is safe" (*ibid.* (quoting letter from Seymour I. Schwartz to the California Integrated Waste Management Board, dated 21 January 1998 (Exhibit BRA-49 submitted by Brazil to the Panel)), and that "[u]se [of waste tyres] in wet cement kilns is not an optimal environmental solution" (*ibid.* (quoting European Environment Agency, "Waste from road vehicles" (2001) (Exhibit BRA-108 submitted by Brazil to the Panel)).

[386] *Ibid.*, para. 7.208.

[387] *Ibid.*

[388] Panel Report, para. 7.202. (emphasis added)

[389] *Ibid.*, para. 7.205. (footnote omitted; emphasis added)

[390] *Ibid.*, para. 7.207.

[391] *Ibid.*, para. 7.208. (emphasis added)

[392] *Ibid.*, para. 7.202 and footnote 1359 thereto.

207. Indeed, the Panel determined that evidence adduced in relation to civil engineering[393], rubber asphalt[394], rubber products[395], and devulcanization[396] suggested that each of these applications involve high costs that would significantly limit their ability "to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection".[397] The European Communities argues that the Panel erred in rejecting material recycling applications on the basis of their costs[398], suggesting that the Panel erroneously equated *high* costs with *prohibitive* costs, when only the latter would justify a finding that a given alternative is not "reasonably available". This argument is based on an artificial distinction between high and prohibitive costs. Further, in our view, this is not an issue relating to the Panel's appreciation of the evidence, but rather to its legal characterization of the facts. In any event, what disqualifies these alternatives, according to the Panel, is not their high costs as such, but the effect of these high costs in limiting the disposal capacity of these methods.

208. Finally, the European Communities claims that the Panel failed to analyze as a possible alternative measure the National Dengue Control Programme, and that this failure constitutes a violation of Article 11 of the DSU.[399] We observe that the European Communities referred to the National Dengue Control Programme in its second written submission to the Panel in support of its contention that "authorities in Brazil seem to encourage material recycling as an alternative."[400] We note further that the alternative measure identified there was material recycling, and that the National Dengue Control Programme was discussed under the subheading "Material recycling" in the European Communities' written submission merely as one example of material recycling.[401] Thus, the National Dengue Control Programme was not submitted by the European Communities as a distinct alternative measure but, rather, was presented as an illustration of material recycling, which the Panel discussed extensively.

209. Accordingly, we *find* that the Panel did not fail to conduct an objective assessment of the facts, as required by Article 11 of the DSU, in finding that the disposal methods for waste tyres suggested by the European Communities were not reasonably available alternatives to the Import Ban.

[393] *Ibid.*, para. 7.201 and footnote 1358 thereto (referring to 2006 report by the European Tyre and Rubber Manufacturers' Association (Exhibit EC-84 submitted by the European Communities to the Panel); California Environmental Protection Agency (US), Integrated Waste Management Board, "Five-Year Plan for the Waste Tire Recycling Management Program" (2003) (Exhibit BRA-36 submitted by Brazil to the Panel); and K. Cannon, "Environment; Where Mosquitoes And Tires Breed", *The New York Times*, 8 July 2001 (Exhibit BRA-130 submitted by Brazil to the Panel)).

[394] *Ibid.*, para. 7.205 and footnote 1367 thereto (referring to OECD Report, *supra*, footnote 52).

[395] *Ibid.*, para. 7.206 and footnote 1368 thereto (referring to J. Serumgard, "Internalization of Scrap Tire Management Costs: A Review of the North American Experience", in Proceedings of the Second Joint Workshop of the Secretariat of the United Nations Conference on Trade and Development (UNCTAD) and the International Rubber Study Group on Rubber and the Environment (1998) (Exhibit BRA-125 submitted by Brazil to the Panel); and Human Resources and Social Development Canada, Rubber Industry (circa 1999) (Exhibit BRA-131 submitted by Brazil to the Panel)).

[396] *Ibid.*, para. 7.207 and footnote 1371 thereto (referring to Exhibits EC-15 and EC-18 submitted by the European Communities to the Panel; and Exhibit BRA-125 submitted by Brazil to the Panel).

[397] *Ibid.*, para. 7.208.

[398] European Communities' appellant's submission, para. 278.

[399] European Communities' appellant's submission, para. 280.

[400] European Communities' second written submission to the Panel, para. 137.

[401] See *Ibid.*, para. 138 under subheading II.A.4 (c) iv) "Material recycling", p. 41.

C. *General Conclusion on the Necessity Analysis under Article XX(b) of the GATT 1994*

210. At this stage, it may be useful to recapitulate our views on the issue of whether the Import Ban is necessary within the meaning of Article XX(b) of the GATT 1994. This issue illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns arising from the handling of waste generated by a product at the end of its useful life. In this respect, the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. As a key component of a comprehensive policy aiming to reduce the risks arising from the accumulation of waste tyres, the Import Ban produces such a material contribution to the realization of its objective. Like the Panel, we consider that this contribution is sufficient to conclude that the Import Ban is necessary, in the absence of reasonably available alternatives.

211. The European Communities proposed a series of alternatives to the Import Ban. Whereas the Import Ban is a preventive non-generation measure, most of the proposed alternatives are waste management and disposal measures that are remedial in character. We consider that measures to encourage domestic retreading or to improve the retreadability of tyres, a better enforcement of the import ban on used tyres, and a better implementation of existing collection and disposal schemes, are complementary to the Import Ban; indeed, they constitute mutually supportive elements of a comprehensive policy to deal with waste tyres. Therefore, these measures cannot be considered real alternatives to the Import Ban. As regards landfilling, stockpiling, co-incineration of waste tyres, and material recycling, these remedial methods carry their own risks or, because of the costs involved, are capable of disposing of only a limited number of waste tyres. The Panel did not err in concluding that the proposed measures or practices are not reasonably available alternatives.

212. Accordingly, having already found that the Panel did not breach its duty under Article 11 of the DSU, and in the light of the above considerations, we *uphold* the Panel's finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered "necessary to protect human, animal or plant life or health."

VI. The Panel's Interpretation and Application of the Chapeau of Article XX of the GATT 1994

A. *The MERCOSUR Exemption and the Chapeau of Article XX of the GATT 1994*

213. After finding that the Import Ban was provisionally justified under Article XX(b) of the GATT 1994[402], the Panel examined whether the application of the Import Ban by Brazil satisfied the requirements of the chapeau of Article XX.

[402] Panel Report, para. 7.215.

214. The chapeau of Article XX of the GATT 1994 reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures [of the type specified in the subsequent paragraphs of Article XX].

215. The focus of the chapeau, by its express terms, is on the application of a measure already found to be inconsistent with an obligation of the GATT 1994 but falling within one of the paragraphs of Article XX.[403] The chapeau's requirements are two-fold. First, a measure provisionally justified under one of the paragraphs of Article XX must not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail. Secondly, this measure must not be applied in a manner that would constitute "a disguised restriction on international trade". Through these requirements, the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members.[404]

216. Having determined that the exemption from the Import Ban of remoulded tyres originating in MERCOSUR countries resulted in discrimination in the application of the Import Ban, the Panel examined whether this discrimination was arbitrary or unjustifiable. The Panel concluded that, as of the time of its examination, the operation of the MERCOSUR exemption had not resulted in the Import Ban being applied in a manner that would constitute "arbitrary or unjustifiable discrimination", within the meaning of the chapeau of Article XX.[405] The Panel also found that the MERCOSUR exemption had not been shown "to date" to result in the Import Ban being applied in a manner that would constitute "a disguised restriction on international trade", within the meaning of the chapeau of Article XX.[406] The European Communities appeals these findings of the Panel.

1. The MERCOSUR Exemption and Arbitrary or Unjustifiable Discrimination

217. Regarding the issue of whether the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail, the Panel noted, first, that the health impact of remoulded tyres imported from MERCOSUR countries and their European counterparts can be expected to be comparable.[407] The Panel also observed that it was only after a MERCOSUR tribunal found Brazil's ban on the importation of remoulded tyres to constitute a new restriction on trade prohibited under MERCOSUR that Brazil exempted remoulded tyres originating in MERCOSUR countries from the application of the Import Ban.[408] For the Panel, the MERCOSUR exemption "does not seem to be motivated by capricious or unpredictable reasons [as it] was adopted further to a ruling

[403]Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20; Appellate Body Report, *US – Gambling*, para. 339.

[404]Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20-21; Appellate Body Report, *US – Gambling*, para. 339.

[405]Panel Report, para. 7.289.

[406]*Ibid.*, paras. 7.354 and 7.355.

[407]Panel Report, para. 7.270.

[408]*Ibid.*, para. 7.271.

within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR."[409] The Panel added that the discrimination arising from the MERCOSUR exemption was not "*a priori* unreasonable", because this discrimination arose in the context of an agreement of a type expressly recognized under Article XXIV of the GATT 1994 that "inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries."[410]

218. The European Communities argued before the Panel that Brazil was at least partially responsible for the ruling that resulted in the MERCOSUR exemption because it did not defend itself in the MERCOSUR proceedings on grounds related to human health and safety.[411] The Panel was not persuaded by this submission. Indeed, the Panel considered it would not be appropriate for it "to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil's litigation strategy in those proceedings."[412]

219. For the Panel, the MERCOSUR ruling provided a reasonable basis to enact the MERCOSUR exemption, with the implication that the resulting discrimination is not arbitrary.[413] The Panel indicated, however, that it was not suggesting that "the invocation of any international agreement would be sufficient under any circumstances, in order to justify the existence of discrimination in the application of a measure under the chapeau of Article XX."[414] The Panel acknowledged that "casings from non-MERCOSUR countries, as well as casings originally used in MERCOSUR, may be retreaded in a MERCOSUR country and exported to Brazil as originating in MERCOSUR."[415] The Panel underscored that, "[i]f such imports were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined, the application of the import ban in conjunction with the MERCOSUR exemption would constitute a means of unjustifiable discrimination."[416] However, as of the time of the Panel's examination, "volumes of imports of retreaded tyres under the exemption appear not to have been significant."[417] The Panel concluded that the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute arbitrary or unjustifiable discrimination.[418]

220. The European Communities claims that the Panel erred in its interpretation and application of the term "arbitrary or unjustifiable discrimination" in the chapeau of Article XX of the GATT 1994, and in finding that the MERCOSUR exemption does not constitute such discrimination. According to

[409]*Ibid.*, para. 7.272.

[410]*Ibid.*, para. 7.273.

[411]Article 50(d) of the Treaty of Montevideo provides for an exception similar to Article XX(b) of the GATT 1994. (See *infra*, footnote 443)

[412]Panel Report, para. 7.276 and footnote 1451 thereto.

[413]*Ibid.*, para. 7.281.

[414]Panel Report, para. 7.283. The Panel also considered that it was not contrary to the terms of Article XXIV:8(a) of the GATT 1994—which specifically excludes measures taken under Article XX from the requirement to liberalize "substantially all the trade" within a customs union—to take into account, as it did, "the fact that the MERCOSUR exemption was adopted as a result of Brazil's obligations under MERCOSUR." (*Ibid.*, para. 7.284)

[415]*Ibid.*, para. 7.286.

[416]*Ibid.*, para. 7.287.

[417]*Ibid.*, para. 7.288. The Panel noted that imports of retreaded tyres under the MERCOSUR exemption had increased tenfold since 2002, from 200 to 2,000 tons per year by 2004. For the Panel, "[t]hat figure remains much lower than the 14,000 tons per year imported from the European Communities alone prior to the imposition of the import ban." (*Ibid.* (referring to European Communities' first written submission to the Panel, para. 80))

[418]*Ibid.*, para. 7.289.

the European Communities, whether a measure involves arbitrary or unjustifiable discrimination can only be determined by taking into account the objective of the measure at issue, in this case, the protection of life and health from risks arising from mosquito-borne diseases and tyre fires. A measure will not be arbitrary if it "appears as reasonable, predictable and foreseeable"[419] in the light of this objective. It follows, according to the European Communities, that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary discrimination because it was introduced in response to a ruling of a MERCOSUR arbitral tribunal. The MERCOSUR exemption does not further but may undermine the stated objective of the measure. For this reason, it must be regarded as "unreasonable, contradictory, and thus arbitrary".[420] For the European Communities, allowing a Member's obligations under other international agreements to render discrimination consistent with the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The European Communities adds that, in any event, the MERCOSUR tribunal did not oblige Brazil to discriminate between its MERCOSUR partners and other WTO Members, and that Brazil could have implemented the ruling by lifting the Import Ban for all third countries.[421]

221. With respect to the Panel's finding that unjustifiable discrimination could arise if imports under the MERCOSUR exemption were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined [422], the European Communities argues that the Panel applied a test that has no basis in the text of Article XX and no support in the case law of the Appellate Body or of previous panels. The European Communities also notes that "the level of imports in a given year may be subject to strong fluctuations, and for this reason ... is entirely inadequate for the purposes of assessing the compatibility of a measure with Article XX".[423]

222. Brazil, for its part, supports the Panel's finding that the MERCOSUR exemption does not result in the Import Ban being applied in a manner that constitutes "arbitrary discrimination", contrary to the chapeau of Article XX. In addition, Brazil disputes the European Communities' argument that what constitutes "arbitrary discrimination" must be determined only in relation to the objective of the Import Ban. According to Brazil, the specific contents of the measure, including its policy objectives, must be examined under the exceptions listed in the paragraphs of Article XX. The chapeau of Article XX requires panels to examine whether the measure at issue is applied reasonably, in a manner that does not result in an abusive exercise of a Member's right to pursue its policy objectives. Brazil adds, for the sake of argument, that the Panel in any event considered the objective of the Import Ban when it determined that, at the time of its examination, volumes of imports of retreaded tyres under the MERCOSUR exemption did not significantly undermine the objective of the Import Ban. Furthermore, according to Brazil, the Panel was correct in finding that the ruling of the MERCOSUR tribunal provided a rational basis for the adoption of the MERCOSUR exemption.

223. For Brazil, the operation of the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute "unjustifiable discrimination". The Panel determined how Brazil's policy objective of reducing to the maximum extent possible unnecessary generation of tyre waste was being affected by imports of retreaded tyres under the MERCOSUR exemption. The level of imports and their effect on the objective of the Import Ban were relevant, in particular, because the chapeau of Article XX focuses on the application of the measure at issue.

[419]European Communities' appellant's submission, para. 321.

[420]*Ibid.*, para. 323.

[421]European Communities' appellant's submission, para. 332.

[422]Panel Report, para. 7.287.

[423]European Communities' appellant's submission, para. 340.

224. We begin our analysis by recalling that the function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX.[424] In *US – Shrimp*, the Appellate Body stated that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith."[425] The Appellate Body added that "[o]ne application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'"[426] Accordingly, the task of interpreting and applying the chapeau is "the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement."[427] The location of this line of equilibrium may move "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[428]

225. Analyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination. Thus, we observe that, in *US – Gasoline*, the Appellate Body assessed the two explanations provided by the United States for the discrimination resulting from the application of the baseline establishment rules at issue.[429] As it found them unsatisfactory, the Appellate Body concluded that the application of the baseline establishment rules resulted in arbitrary or unjustifiable discrimination.[430] In *US – Shrimp*, the Appellate Body relied on a number of factors in finding that the measure at issue resulted in arbitrary or unjustifiable discrimination. The assessment of these factors by the Appellate Body was part

[424]Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 21.

[425]Appellate Body Report, *US – Shrimp*, para. 158.

[426]*Ibid.* (quoting B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), chap. 4, at 125).

[427]*Ibid.*, para. 159.

[428]*Ibid.*

[429]The *US – Gasoline* case involved a programme aiming to ensure that pollution from gasoline combustion did not exceed 1990 levels. Baselines for the year 1990 were set as a means for determining compliance with the programme requirements. These baselines could be either individual or statutory, depending on the nature of the entity concerned. Whereas individual baselines were available to domestic refiners, they were not to foreign refiners.

The first explanation provided by the United States for such discrimination was the impracticability of verification and enforcement of individual baselines for foreign refiners. (Appellate Body Report, *US – Gasoline*, pp. 25-26, DSR 1996:I, 3, at 23-24) Secondly, the United States explained that imposing the statutory baseline requirement on domestic refiners as well was not an option, because it was not feasible to require domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. (*Ibid.*, p. 28, DSR 1996:I, 3, at 26-27)

[430]*Ibid.*, p. 29, DSR 1996:I, 3, at 27.

of an analysis that was directed at the cause, or the rationale, of the discrimination.[431] *US – Shrimp (Article 21.5 – Malaysia)* concerned measures taken by the United States to implement recommendations and rulings of the DSB in *US – Shrimp*. The Appellate Body's analysis of these measures under the chapeau of Article XX focused on whether discrimination that might result from the application of those measures had a legitimate cause or rationale in the light of the objectives listed in the paragraphs of Article XX.[432]

226. The Appellate Body Reports in *US – Gasoline*, *US – Shrimp*, and *US – Shrimp (Article 21.5 – Malaysia)* show that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence. In this case, Brazil explained that it introduced the MERCOSUR exemption to comply with a ruling issued by a MERCOSUR arbitral tribunal. This ruling arose in the context of a challenge initiated by Uruguay against Brazil's import ban on remoulded tyres, on the grounds that it constituted a new restriction on trade prohibited under MERCOSUR. The MERCOSUR arbitral tribunal found Brazil's restrictions on the importation of remoulded tyres to be a violation of its obligations under MERCOSUR. These facts are undisputed.

227. We have to assess whether this explanation provided by Brazil is acceptable as a justification for discrimination between MERCOSUR countries and non-MERCOSUR countries in relation to retreaded tyres. In doing so, we are mindful of the function of the chapeau of Article XX, which is to prevent abuse of the exceptions specified in the paragraphs of that provision.[433] In our view, there is such an abuse, and, therefore, there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure. We note, for example, that one of the bases on which the Appellate Body relied in *US – Shrimp* for concluding that the operation of the measure at issue resulted in unjustifiable discrimination was that one particular aspect of the application of the measure (the measure implied that, in certain circumstances, shrimp caught abroad using methods identical to those employed in the United States would be

[431]These factors were: (i) the discrimination that resulted from a "rigid and unbending requirement" (Appellate Body Report, *US – Shrimp*, para. 177; see also para. 163) that countries exporting shrimp into the United States adopt a regulatory programme that is essentially the same as the United States' programme; (ii) the discrimination that resulted from the failure to take into account different conditions that may occur in the territories of other WTO Members, in particular, specific policies and measures other than those applied by the United States that might have been adopted by an exporting country for the protection and conservation of sea turtles (*ibid.*, paras. 163 and 164); (iii) the discrimination that resulted from the application of the measure was "difficult to reconcile with the declared policy objective of protecting and conserving sea turtles" (*ibid.*, para. 165), because, in some circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market; and (iv) the discrimination that resulted from the fact that, while the United States negotiated seriously with some WTO Members exporting shrimp into the United States for the purpose of concluding international agreements for the protection and conservation of sea turtles, it did not do so with other WTO Members (*ibid.*, paras. 166 and 172).

[432]Thus, the Appellate Body endorsed the panel's conclusion that conditioning market access on the adoption of a regulatory programme for the protection and conservation of sea turtles comparable in effectiveness—as opposed to the adoption of "essentially the same" regulatory programme—"allows for sufficient flexibility in the application of the measure so as to avoid 'arbitrary or unjustifiable discrimination'". (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 144) The Appellate Body also considered that the measures adopted by the United States permitted a degree of flexibility that would enable the United States to consider the particular conditions prevailing in Malaysia, notably because it provides that, in making certification determinations, the United States authorities "shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles". (*Ibid.*, para. 147)

[433]Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 21.

excluded from the United States market[434]) was "difficult to reconcile with the declared objective of protecting and conserving sea turtles".[435] Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.

228. In this case, the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal. The tribunal found against Brazil because the restriction on imports of remoulded tyres was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

229. The Panel considered that the MERCOSUR exemption resulted in discrimination between MERCOSUR countries and other WTO Members, but that this discrimination would be "unjustifiable" only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined".[436] The Panel's interpretation implies that the determination of whether discrimination is unjustifiable depends on the quantitative impact of this discrimination on the achievement of the objective of the measure at issue. As we indicated above, analyzing whether discrimination is "unjustifiable" will usually involve an analysis that relates primarily to the cause or the rationale of the discrimination. By contrast, the Panel's interpretation of the term "unjustifiable" does not depend on the cause or rationale of the discrimination but, rather, is focused exclusively on the assessment of the *effects* of the discrimination. The Panel's approach has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of "arbitrary or unjustifiable discrimination" in previous cases.[437]

230. Having said that, we recognize that in certain cases the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable. The effects of discrimination might be relevant, depending on the circumstances of the case, because, as we indicated above[438], the chapeau of Article XX deals with the manner of application of the measure at issue. Taking into account as a relevant factor, among others, the effects of the discrimination for determining whether the rationale of the discrimination is acceptable is, however, fundamentally different from the Panel's approach, which focused exclusively on the relationship between the effects of the discrimination and its justifiable or unjustifiable character.

[434]Appellate Body Report, *US – Shrimp*, para. 165.

[435]*Ibid.*

[436]Panel Report, para. 7.287.

[437]See *supra*, paras. 225 and 226. We also observe that the Panel's approach was based on a logic that is different in nature from that followed by the Appellate Body when it addressed the national treatment principle under Article III:4 of the GATT 1994 in *Japan – Alcoholic Beverages II*. In that case, the Appellate Body stated that Article III aims to ensure "equality of competitive conditions for imported products in relation to domestic products". (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, 97, at 109) The Appellate Body added that "it is irrelevant that 'the trade effects' of the [measure at issue], as reflected in the volumes of imports, are insignificant or even non-existent". (*Ibid.*, at 110) For the Appellate Body, "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products." (*Ibid.* (footnote omitted))

[438]*Supra*, para. 215.

231. We also note that the Panel found that the discrimination resulting from the MERCOSUR exemption is not arbitrary. The Panel explained that this discrimination cannot be said to be "capricious" or "random"[439] because it was adopted further to a ruling within the framework of MERCOSUR.[440]

232. Like the Panel, we believe that Brazil's decision to act in order to comply with the MERCOSUR ruling cannot be viewed as "capricious" or "random". Acts implementing a decision of a judicial or quasi-judicial body—such as the MERCOSUR arbitral tribunal—can hardly be characterized as a decision that is "capricious" or "random". However, discrimination can result from a rational decision or behaviour, and still be "arbitrary or unjustifiable", because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.[441]

233. Accordingly, we *find* that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination. Furthermore, we *reverse* the Panel's finding, in paragraph 7.287 of the Panel Report, that, under the chapeau of Article XX of the GATT 1994, discrimination would be unjustifiable only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined". We therefore *reverse* the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination. We also *reverse* the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that, to the extent that the MERCOSUR exemption is not the result of "capricious" or "random" action, the Import Ban is not applied in a manner that would constitute arbitrary discrimination.

234. This being said, we observe, like the Panel[442], that, before the arbitral tribunal established under MERCOSUR, Brazil could have sought to justify the challenged Import Ban on the grounds of human, animal, and plant health under Article 50(d) of the Treaty of Montevideo.[443] Brazil, however, decided not to do so. It is not appropriate for us to second-guess Brazil's decision not to invoke Article 50(d), which serves a function similar to that of Article XX(b) of the GATT 1994. However, Article 50(d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings[444], show, in our view, that the discrimination

[439]Panel Report, para. 7.281.

[440]*Ibid.*, para. 7.272.

[441]See *supra*, paras. 227 and 228.

[442]Panel Report, paras. 7.275 and 7.276.

[443]Treaty of Montevideo, Instrument Establishing the Latin American Integration Association (ALADI), done at Montevideo, August 1980 (Exhibit EC-39 submitted by the European Communities to the Panel). Article 50(d) reads as follows:

> No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding:
>
> ...
>
> d. Protection of human, animal and plant life and health;

[444]See Panel Report, para. 7.275.

associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.[445]

2. The MERCOSUR Exemption and Disguised Restriction on International Trade

235. The European Communities also challenges the Panel's conclusion that the MERCOSUR exemption had not been shown to date to result in the Import Ban being applied in a manner that would constitute "a disguised restriction on international trade".[446]

236. When examining whether the Import Ban was applied in a manner that constitutes a disguised restriction on international trade, the Panel was not persuaded by the European Communities' contention that Brazil adopted the prohibition on the importation of retreaded tyres as "a disguise to conceal the pursuit of trade-restrictive objectives".[447] The Panel recalled that Brazil bans both used and retreaded tyre imports; for the Panel, such an approach "is consistent with Brazil's declared objective of reducing to the greatest extent possible the unnecessary accumulation of short-lifespan tyres"[448], and "in principle deprives Brazilian retreaders of the opportunity to source casings from abroad".[449]

237. The Panel went on to examine more specifically the European Communities' argument that "the MERCOSUR exemption results in the application of the measure in a manner that constitutes a disguised restriction on international trade, as it alters trade flows in a manner that benefits, in addition to Brazilian retreaders, retreaders from other MERCOSUR countries."[450] The Panel recalled that, under this exemption, "it is quite possible for retreaders from MERCOSUR countries benefiting from the exemption to source casings from abroad (for example from the European Communities), retread them locally, and then export the retreaded tyres to Brazil under the MERCOSUR exemption."[451] The Panel referred to the reasoning that it had developed with respect to arbitrary or unjustifiable discrimination and considered that, if imports from MERCOSUR countries were to occur in significant amounts, the Import Ban would be applied in a manner that constitutes a disguised restriction on international trade.[452] The Panel was however of the view that, as of the time of its examination, "the volume of imports of remoulded tyres that has actually taken place under the MERCOSUR exemption has not been significant."[453]

238. On appeal, the European Communities does not challenge the Panel's conclusion that the Import Ban was adopted with the intention of protecting public health and the environment. Its appeal is, instead, limited to the specific findings made by the Panel in relation to the MERCOSUR

[445]In addition, we note that Article XXIV:8(a) of the GATT 1994 exempts, where necessary, measures permitted under Article XX from the obligation to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all the trade" within a customs union. Therefore, if we assume, for the sake of argument, that MERCOSUR is consistent with Article XXIV and that the Import Ban meets the requirements of Article XX, this measure, where necessary, could be exempted by virtue of Article XXIV:8(a) from the obligation to eliminate other restrictive regulations of commerce within a customs union.

[446]Panel Report, para. 7.355.

[447]*Ibid.*, para. 7.330 (quoting Panel Report, *EC – Asbestos,* para. 8.236).

[448]*Ibid.*, para. 7.343.

[449]*Ibid.*

[450]*Ibid.*, para. 7.350.

[451]*Ibid.*, para. 7.352. (footnote omitted)

[452]*Ibid.*, para. 7.353.

[453]*Ibid.*, para. 7.354. (footnote omitted) See also *supra*, footnote 417.

exemption[454] and the imports of used tyres through court injunctions.[455] For the European Communities, the Panel addressed this question with a reasoning almost identical to that it had developed in respect of the existence of arbitrary or unjustifiable discrimination.[456] Therefore, the European Communities reasons, if the Panel's approach concerning arbitrary or unjustifiable discrimination is not endorsed by the Appellate Body, the Panel's finding that the MERCOSUR exemption has not been shown to date to result in a disguised restriction on international trade should also be reversed.[457] In response to questioning at the oral hearing, the European Communities confirmed that its claim in this regard is based on the same arguments it put forward in relation to arbitrary or unjustifiable discrimination.

239. We agree with the European Communities' observation that the reasoning developed by the Panel to reach the challenged conclusion was the same as that made in respect of arbitrary or unjustifiable discrimination. Indeed, the Panel conditioned a finding of a disguised restriction on international trade on the existence of significant imports of retreaded tyres that would undermine the achievement of the objective of the Import Ban. We explained above why we believe that the Panel erred in finding that the MERCOSUR exemption would result in arbitrary or unjustifiable discrimination only if the imports of retreaded tyres from MERCOSUR countries were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined.[458] As the Panel's conclusion that the MERCOSUR exemption has not resulted in a disguised restriction on international trade was based on an interpretation that we have reversed, this finding cannot stand. Therefore, we also *reverse* the Panel's findings, in paragraphs 7.354 and 7.355 of the Panel Report, that "the MERCOSUR exemption ... has not been shown to date to result in the [Import Ban] being applied in a manner that would constitute ... a disguised restriction on international trade."

B. *Imports of Used Tyres through Court Injunctions and the Chapeau of Article XX of the GATT 1994*

1. Imports of Used Tyres through Court Injunctions and Arbitrary or Unjustifiable Discrimination

240. The European Communities submits that the Panel erred in its analysis of the imports of used tyres through court injunctions under the chapeau of Article XX of the GATT 1994. We begin our analysis with the requirement in the chapeau of Article XX that the measure at issue not be applied in a manner that would result in "arbitrary or unjustifiable discrimination".

241. The Panel determined that the imports of used tyres through court injunctions resulted in discrimination in favour of domestic retreaders. This is because these imports enabled retreaded tyres to be produced in Brazil from imported casings, while retreaded tyres produced abroad using the same casings could not be imported.[459] Having done so, the Panel went on to examine whether this discrimination is arbitrary or unjustifiable.

[454]Panel Report, paras. 7.350-7.355.

[455]*Ibid.*, paras. 7.347-7.349 and 7.355. We examine this aspect of the European Communities' appeal in Section VI.B.2 of this Report.

[456]European Communities' appellant's submission, para. 366.

[457]*Ibid.*, paras. 367 and 368.

[458]*Supra*, Section VI.A.1.

[459]Panel Report, para. 7.243.

242. The Panel noted that the importation of used tyres into Brazil is prohibited, and that "used tyres have been imported into Brazil in recent years only as a result of injunctions granted by Brazilian courts in specific cases."[460] The Panel found that the discrimination resulting from the imports of used tyres through court injunctions was not the consequence of a "capricious" or "random" action, and that, to this extent, the Import Ban was not applied in a manner that would constitute arbitrary discrimination.[461]

243. The Panel recalled, however, that the contribution of the Import Ban to the achievement of its objective "is premised on imports of used tyres being prohibited".[462] For the Panel, the granting of injunctions allowing used tyres to be imported "runs directly counter to this premise, as it effectively allows the very used tyres that are prevented from entering into Brazil *after* retreading to be imported *before* retreading."[463] The Panel examined the volumes of imports of used tyres that have taken place under the court injunctions. For the Panel, the amounts of imports of used tyres that have actually taken place under the court injunctions were significant.[464] Accordingly, the Panel found that, "since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination."[465]

244. For the European Communities, the Panel erred in finding that the imports of used tyres through court injunctions do not result in arbitrary discrimination, given that "[w]hat is arbitrary must be decided in the light of the stated objectives of the measure".[466] Because, from the point of view of the protection of human life or health, there is no difference between, on the one hand, a retreaded tyre produced in the European Communities and, on the other hand, a retreaded tyre produced in Brazil from a casing imported from the European Communities, prohibiting imported retreaded tyres while allowing the importation of used tyres through court injunctions must be regarded as constituting arbitrary discrimination.[467] Furthermore, the European Communities maintains that, as regards the issue of whether court injunctions constitute unjustifiable discrimination, the Panel adopted the same erroneous quantitative approach as it did when discussing the MERCOSUR exemption.[468] The European Communities adds that the Panel's approach engenders uncertainty for

[460]*Ibid.*, para. 7.292. (footnote omitted) The Panel also observed that Brazil has challenged these injunctions "with a certain degree of success". (*Ibid.*) For the Panel, the imports of used tyres were "the result of successful court challenges", and found their basis "in the customs authorities' need to give effect to judicial orders". (*Ibid.*) The Panel added that nothing in the evidence suggested that the decisions of the Brazilian courts granting those injunctions were capricious or unpredictable, nor does "the decision of the Brazilian administrative authorities to comply with the preliminary injunctions ... seem irrational or unpredictable". (*Ibid.*, para. 7.293)

[461]*Ibid.*, para. 7.294.

[462]*Ibid.*, para. 7.295.

[463]*Ibid.* (original emphasis)

[464]Panel Report, paras. 7.297 and 7.303. In particular, the Panel noted that, in 2005, Brazil imported approximately 10.5 million used tyres, compared to 1.4 million in 2000, the year in which the ban on imports of used and retreaded tyres was first enacted (Portaria SECEX 8/2000). The Panel also observed that the total number of retreaded tyres imported annually to Brazil, from all sources, was 2-3 million prior to the Import Ban. Thus, according to the Panel, in 2005, the imports of used tyres were approximately three times the amount of retreaded and used tyres combined that were imported annually prior to the Import Ban. (*Ibid.*, paras. 7.301 and 7.302)

[465]*Ibid.*, para. 7.306.

[466]European Communities' appellant's submission, para. 357.

[467]*Ibid.*

[468]*Ibid.*, para. 360.

the implementation of the Panel Report, because the Panel did not identify "the threshold below which the imports of used tyres would no longer be significant".[469]

245. Brazil submits that the Panel did not err in the analytical approach it adopted to determine whether imports of used tyres under court injunctions resulted in the Import Ban being applied in a manner that constituted "arbitrary or unjustifiable discrimination" under the chapeau of Article XX. For Brazil, it was appropriate for the Panel to consider the level of imports of used tyres in its determination. Brazil thus dismisses the European Communities' argument that the Panel's approach engenders uncertainty for the implementation of the Panel Report, and stresses that the monitoring of a WTO Member's compliance is an integral part of the dispute settlement system.

246. As we explained above, the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause or rationale given for the discrimination.[470] For Brazil, the fact that Brazilian retreaders are able to use imported casings is the result of the decisions of the Brazilian administrative authorities to comply with court injunctions.[471] We observe that this explanation bears no relationship to the objective of the Import Ban—reducing exposure to the risks arising from the accumulation of waste tyres to the maximum extent possible. The imports of used tyres through court injunctions even go against the objective pursued by the Import Ban. As we indicated above, there is arbitrary or unjustifiable discrimination, within the meaning of the chapeau of Article XX, when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the paragraphs of Article XX, or goes against this objective. Accordingly, we *find* that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

247. The Panel approached the question of whether the imports of used tyres through court injunctions result in unjustifiable discrimination in the same manner as it did with the MERCOSUR exemption. We explained above why we are of the view that this quantitative approach—according to which discrimination would be characterized as unjustifiable only if imports under the MERCOSUR exemption take place in such amounts that the achievement of the objective of the measure at issue would be "significantly undermined"[472]—is flawed.[473] Accordingly, we *reverse* the Panel's findings, in paragraphs 7.296 and 7.306 of the Panel Report, that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban. Furthermore, for the same reasons as those explained in paragraph 232, we *reverse* the Panel's finding, in paragraph 7.294 of the Panel Report, that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination to the extent that such imports are not the result of "capricious" or "random" action.

2. Imports of Used Tyres and Disguised Restriction on International Trade

248. The Panel found that, "since imports of used tyres take place in significant amounts under court injunctions to the benefit of the domestic retreading industry, the [Import Ban] is being applied

[469] *Ibid.*, para. 363.

[470] *Supra*, Section VI.A.1.

[471] See Panel Report, paras. 7.292 and 7.293; see also Brazil's appellee's submission, para. 245.

[472] Panel Report, para. 7.287 (as regards the MERCOSUR exemption); see also para. 7.296 (with respect to the imports of used tyres through court injunctions).

[473] *Supra*, Section VI.A.1.

in a manner that constitutes a disguised restriction on international trade."[474] The Panel reasoned that the restriction on international trade inherent in the Import Ban has operated to the benefit of domestic retreaders, because "[t]he granting of court injunctions for the importation of used tyres has ... in effect meant that ... domestic retreaders have been able to continue to benefit from the importation of used tyres as material for their own activity in significant amounts, while their competitors from non-MERCOSUR countries have been kept out of the Brazilian market."[475]

249. The European Communities submits that the Panel erred in finding that the imports of used tyres through court injunctions would have resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports are taking place in such quantities that they significantly undermine the objective of the Import Ban.[476] The European Communities refers to the arguments it made regarding the existence of arbitrary or unjustifiable discrimination, and reiterates its view that the Panel's reliance on import volumes for the purpose of determining compatibility with the chapeau of Article XX of the GATT 1994 is erroneous.[477]

250. Brazil argues that the Panel correctly considered the volume of imports of used tyres as part of its determination that the Import Ban was being applied in a manner that constituted a disguised restriction on international trade, and refers to the arguments that it made before the Panel in support of this position.

251. The reasoning elaborated by the Panel to reach the challenged finding was the same as that it developed in respect of "arbitrary or unjustifiable discrimination". Indeed, the Panel conditioned a finding of a disguised restriction on international trade on the existence of imports of used tyres in amounts that would significantly undermine the achievement of the objective of the Import Ban. We explained above why we consider this reasoning of the Panel erroneous. As the challenged finding results from the same reasoning that we have found to be erroneous and have rejected, this finding of the Panel cannot stand. Accordingly, we *reverse* the Panel's finding, in paragraph 7.349 of the Panel Report, that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports are taking place in such quantities that they significantly undermine the objective of the Import Ban.

252. We found that the MERCOSUR exemption and the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau of Article XX of the GATT 1994. In the light of these findings, we *uphold*, albeit for different reasons, the Panel's findings, in paragraphs 7.357 and 8.1(a)(i) and (ii) of the Panel Report, that the Import Ban, found by the Panel to be inconsistent with Article XI:1 of the GATT 1994, is not justified under Article XX of the GATT 1994.

VII. The European Communities' Claims that the MERCOSUR Exemption Is Inconsistent with Article I:1 and Article XIII:1 of the GATT 1994

253. Before the Panel, the European Communities made separate claims regarding the MERCOSUR exemption, namely, that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1 of the GATT 1994. Brazil did not contest that the MERCOSUR exemption was

[474] Panel Report, para. 7.349.

[475] *Ibid.*, para. 7.348. (footnote omitted)

[476] *Ibid.*, para. 7.349.

[477] European Communities' appellant's submission, para. 367.

prima facie inconsistent with Articles I:1 and XIII:1, but claimed that it was justified under Articles XX(d) and XXIV of the GATT 1994.

254. After noting that the MERCOSUR exemption and the Import Ban have the same legal basis, namely, Article 40 of Portaria SECEX 14/2004[478], the Panel emphasized that, under Article 11 of the DSU, "it was required to address only those issues that are necessary for the resolution of the matter between the parties."[479] The Panel recalled its earlier findings that the Import Ban was inconsistent with Article XI:1 and not justified under Article XX(b). It then decided to exercise judicial economy in respect of the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1, and not justified under Articles XX(d) or Article XXIV of the GATT 1994. According to the Panel, the MERCOSUR exemption derives from and exists only in relation to the Import Ban. The Panel reasoned that, as it had already found that the Import Ban was inconsistent with the requirements of the GATT 1994, it was unnecessary to examine the European Communities' separate claims regarding the MERCOSUR exemption.[480]

255. On appeal, the European Communities requests that we reverse the Panel's decision to exercise judicial economy in relation to its separate claims regarding the MERCOSUR exemption. The European Communities also requests us to complete the legal analysis and find that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and not justified under Article XX(d) or Article XXIV of the GATT 1994. This request, however, is conditioned upon our upholding the Panel's finding that the MERCOSUR exemption does not result in the Import Ban being applied inconsistently with the requirements of the chapeau of Article XX.

256. As we have found that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX, the condition on which the European Communities' request is predicated has not been fulfilled. It is therefore not necessary for us to rule on the European Communities' conditional appeal. Accordingly, we do not examine the European Communities' conditional appeal and make no finding in relation to its separate claims that the MERCOSUR exemption is inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, and not justified under Article XX(d) or Article XXIV of the GATT 1994.

257. Having said that, we observe that it might have been appropriate for the Panel to address the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1. We have previously indicated that the principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute"[481], and it seems that the Panel assumed this to be the case in the present dispute. However, the Panel found that the MERCOSUR exemption resulted in the Import Ban being applied *consistently* with the requirements of the chapeau of Article XX. In view of this finding, we must acknowledge that we have difficulty seeing how the Panel could have been justified in not addressing the separate claims of inconsistency under Article I:1 and Article XIII:1 directed at the MERCOSUR exemption. We emphasize that panels must be mindful, when applying the principle of judicial economy, that the aim of the dispute settlement mechanism under Article 3.7 of the DSU is to secure a positive solution to the dispute. Therefore, a panel's discretion to decline to rule on different claims of inconsistency adduced in relation to the same measure is limited by its duty to make findings that

[478]See Panel Report, para. 7.453.

[479]*Ibid.*, para. 7.454 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 18, DSR 1996:I, 323, at 339).

[480]*Ibid.*, para. 7.455.

[481]Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

will allow the DSB to make sufficiently precise recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"[482]

VIII. Findings and Conclusions

258. For the reasons set out in this Report, the Appellate Body:

(a) with respect to the analysis of the necessity of the Import Ban under Article XX(b) of the GATT 1994:

(i) upholds the Panel's finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered "necessary" within the meaning of Article XX(b) and is thus provisionally justified under that provision; and

(ii) finds that the Panel did not breach its duty under Article 11 of the DSU to make an objective assessment of the facts;

(b) with respect to the analysis under the chapeau of Article XX of the GATT 1994:

(i) reverses the Panel's findings, in paragraphs 7.287, 7.354, and 7.355 of the Panel Report, that the MERCOSUR exemption would result in the Import Ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that it results in volumes of imports of retreaded tyres that would significantly undermine the achievement of the objective of the Import Ban;

(ii) reverses the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in arbitrary discrimination; also reverses the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination; and finds, instead, that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX;

(iii) reverses the Panel's findings, in paragraphs 7.296, 7.306, 7.349, and 7.355 of the Panel Report, that the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban;

(iv) reverses the Panel's finding, in paragraph 7.294 of the Panel Report, that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination; and finds, instead, that the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX; and

[482]Appellate Body Report, *Australia – Salmon*, para. 223.

(c) with respect to Article XX of the GATT 1994, upholds, albeit for different reasons, the Panel's findings, in paragraphs 7.357 and 8.1(a)(i) and (ii) of the Panel Report, that the Import Ban is not justified under Article XX of the GATT 1994; and

(d) with respect to the European Communities' claims that the MERCOSUR exemption is inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, finds that the condition on which the European Communities' appeal is predicated is not satisfied, and therefore does not consider it.

259. The Appellate Body recommends that the DSB request Brazil to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS332/9
3 September 2007
(07-3724)

Original: English

BRAZIL – MEASURES AFFECTING IMPORTS OF RETREADED TYRES

Notification of an Appeal by the European Communities
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 3 September 2007, from the Delegation of the European Commission, is being circulated to Members.

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1. Pursuant to Article 16.4 and Article 17 of the DSU and to Rule 20.1 of the Working Procedures for Appellate Review, the European Communities submits its Notice of Appeal on certain issues of law covered in the Report of the Panel on *Brazil – Measures Affecting Imports of Retreaded Tyres*[1] and certain legal interpretations developed by the Panel.

2. The European Communities seeks review by the Appellate Body of the following aspects of the Report of the Panel:

(a) The Panel's finding that the import ban on retreaded tyres was necessary within the meaning of Article XX(b) of the GATT. The Panel's finding and corresponding reasoning are contained in paragraphs 7.103 to 7.216 of the Panel Report. The EC appeals this finding notably because:

- in assessing the contribution of the measure to the protection of human, animal and plant life and health, the Panel merely assesses whether the ban is capable of making a potential contribution to its stated objectives. This reasoning is inconsistent with Article XX(b) of the GATT. Moreover, in reaching its conclusion regarding the potential contribution of the ban, the Panel also fails to make an objective assessment of the matter before it, including of the facts of the case, as required by Article 11 of the DSU, and effectively shifts the burden of proof to the EC;

[1] WT/DS332/R, circulated on 12 June 2007.

- in assessing the reasonably available alternative measures, the Panel wrongly excludes some of the alternatives proposed by the European Communities, on the basis that those alternatives are related to the manner in which the import ban is implemented *in practice*, that they are not necessarily readily available, that they do not avoid the waste tyres arising specifically from imported retreaded tyres, that they already exist in Brazil, or that they are individually capable of disposing only of a small number of waste tyres. Moreover, the Panel has ignored important facts and arguments presented by the European Communities, has referred to the evidence submitted by the parties in a selective and distorted manner, and has effectively shifted the burden of proof to the EC. These findings are inconsistent with Article XX(b) of the GATT and with the Panel's duty to make an objective assessment of the matter before it, including of the facts of the case, as required by Article 11 of the DSU;

- contrary to Article XX (b) of the GATT, the Panel has erred by not carrying out a process of weighing and balancing the relevant factors and elements (objective pursued, trade-restrictiveness of the measure, contribution and alternatives);

(b) the Panel's finding that the exemption, from the import ban and other challenged measures, of imports of retreaded tyres from other Mercosur countries does not constitute arbitrary or unjustifiable discrimination (paragraphs 7.270 to 7.289 of the Panel Report). This finding is inconsistent with the chapeau of Article XX of the GATT;

(c) the Panel's finding that the imports of used tyres do not constitute arbitrary discrimination and that they constitute unjustified discrimination only to the extent that they significantly undermine the objectives of the ban (paragraphs 7.292 to 7.294, 7.296 and 7.306 of the Panel Report). This finding is inconsistent with the chapeau of Article XX of the GATT;

(d) the Panel's finding that the Mercosur exemption does not constitute a disguised restriction on international trade, and that imports of used tyres would constitute a disguised restriction only to the extent that they significantly undermine the objectives of the ban (paragraphs 7.347 to 7.355 of the Panel Report). This finding is inconsistent with the chapeau of Article XX of the GATT;

(e) the Panel's decision to exercise judicial economy with respect to the European Communities' claims under Articles XIII:1 and I:1 of the GATT (paragraphs 7.453 to 7.456 and 8.2 of the Panel Report). Since the Panel found that the Mercosur exemption is not incompatible with the chapeau of Article XX GATT, a separate finding on the compatibility of this exemption with Articles XIII:1 and I:1 GATT would have been necessary to secure a positive resolution of the dispute, as required by Articles 3.3, 3.4, 3.7 and 11 of the DSU. The European Communities therefore asks the Appellate Body to find that the Mercosur exemption is incompatible with Articles XIII:1 and I:1 of the GATT, and is not justified either by Article XXIV or by Article XX(d) of the GATT.

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Report of the Appellate Body, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, adopted 16 January 1998

WORLD TRADE ORGANIZATION

WT/DS26/AB/R
WT/DS48/AB/R
16 January 1998

(98-0099)

Appellate Body

EC MEASURES CONCERNING MEAT AND MEAT PRODUCTS (HORMONES)

AB-1997-4

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

EC Measures Concerning Meat and Meat Products (Hormones)

European Communities, *Appellant/Appellee*

United States, *Appellant/Appellee*
Canada, *Appellant/Appellee*

Australia, New Zealand and Norway, *Third Participants*

AB-1997-4

Present:

Feliciano, Presiding Member
Ehlermann, Member
Matsushita, Member

I. Introduction: Statement of the Appeal

1. The European Communities, the United States and Canada appeal from certain issues of law and legal interpretations in the Panel Reports, *EC Measures Concerning Meat and Meat Products (Hormones)*.[1] These two Panel Reports, circulated to Members of the World Trade Organization ("WTO") on 18 August 1997, were rendered by two Panels composed of the same three persons.[2] These Panel Reports are similar, but they are not identical in every respect. The Panel in the complaint brought by the United States was established by the Dispute Settlement Body (the "DSB") on 20 May 1996. On 16 October 1996, the DSB established the Panel in the complaint brought by Canada. The European Communities and Canada agreed, on 4 November 1996, that the composition of the latter Panel would be identical to the composition of the Panel established at the request of the United States.

2. The Panel dealt with a complaint against the European Communities relating to an EC prohibition of imports of meat and meat products derived from cattle to which either the natural hormones: oestradiol-17β, progesterone or testosterone, or the synthetic hormones: trenbolone acetate, zeranol or melengestrol acetate ("MGA"), had been administered for growth promotion purposes. This import prohibition was set forth in a series of Directives of the Council of Ministers that were enacted before 1 January 1995. Those Directives were:

1. Council Directive 81/602/EEC of 31 July 1981 ("Directive 81/602")[3];
2. Council Directive 88/146/EEC of 7 March 1988 ("Directive 88/146")[4]; and
3. Council Directive 88/299/EEC of 17 May 1988 ("Directive 88/299").[5]

[1]Complaint by the United States, WT/DS26/R/USA, (the "US Panel Report") and Complaint by Canada, WT/DS48/R/CAN, (the "Canada Panel Report").

[2]As the composition of both Panels was identical, we will refer to the Panels as "the Panel".

[3]Official Journal, No. L 222, 7 August 1981, p. 32.

[4]Official Journal, No. L 70, 16 March 1988, p. 16.

[5]Official Journal, No. L 128, 21 May 1988, p. 36.

3. Directive 81/602 prohibited the administration to farm animals of substances having a hormonal action and of substances having a thyrostatic action. It also prohibited the placing on the European market of both domestically produced and imported meat and meat products derived from farm animals to which such substances had been administered. Two exceptions to this prohibition were provided for. One exception covered substances with an oestrogenic, androgenic or gestagenic action when used for therapeutic or zootechnical purposes and administered by a veterinarian or under a veterinarian's responsibility. The other exception related to three natural hormones (oestradiol - 17β, progesterone and testosterone) and two synthetic hormones (trenbolone acetate and zeranol) used for growth promotion purposes if allowed under the regulations of the Member States of the European Economic Community ("EEC"), until a detailed examination of the effects of these substances could be carried out and until the EEC could take a decision on the use of these substances for growth promotion. The sixth hormone involved in this appeal, MGA, was not included in the second exception; it was covered by the general prohibition concerning substances having a hormonal or thyrostatic action.

4. Seven years later[6], Directive 88/146 was promulgated prohibiting the administration to farm animals of the synthetic hormones: trenbolone acetate and zeranol, for any purposes, as well as the administration of the natural hormones: oestradiol - 17β, progesterone and testosterone, for growth promotion or fattening purposes. This Directive permitted Member States of the EEC to authorize, under specified conditions, the use of the three natural hormones for therapeutic and zootechnical purposes. Directive 88/146 explicitly prohibited both the intra-EEC trade and the importation from third countries of meat and meat products obtained from animals to which substances having oestrogenic, androgenic, gestagenic or thyrostatic action had been administered. Trade in meat and meat products derived from animals treated with such substances for therapeutic or zootechnical purposes was allowed only under certain conditions. Those conditions were set out in Directive 88/299.

5. Effective as of 1 July 1997, Directives 81/602, 88/146 and 88/299 were repealed and replaced with Council Directive 96/22/EC of 29 April 1996 ("Directive 96/22").[7] This Directive maintains the prohibition of the administration to farm animals of substances having a hormonal or thyrostatic action. As under the previously applicable Directives, it is prohibited to place on the market, or to import from third countries, meat and meat products from animals to which such substances, including the six hormones at issue in this dispute, were administered. This Directive also continues to allow Member States to authorize the administration, for therapeutic and zootechnical purposes, of certain substances having a hormonal or thyrostatic action. Under certain conditions, Directive 96/22 allows the placing on the market, and the importation from third countries, of meat and meat products from animals to which these substances have been administered for therapeutic and zootechnical purposes.

6. The Panel circulated its Reports to the Members of the WTO on 18 August 1997. The US Panel Report and the Canada Panel Report reached the same conclusions in paragraph 9.1:

(i) The European Communities, by maintaining sanitary measures which are not based on a risk assessment, has acted inconsistently with the

[6]It should be noted that on 31 December 1985 the Council of Ministers adopted Directive 85/649/EEC prohibiting the use in livestock farming of certain substances having a hormonal action, Official Journal, No. L 382, 31 December 1985, p. 228. This Directive prohibited the use of all the hormones (except MGA, the use of which had been previously prohibited) for growth promotion purposes and established more detailed provisions concerning authorized therapeutic uses. This Directive was challenged in the Court of Justice of the European Communities, which annulled it on procedural grounds in its Judgment of 23 February 1988, [1988] E.C.R. 855. Shortly afterwards, the European Commission submitted to the Council a proposal for a substantively identical Directive, which the Council adopted on 7 March 1988 as Directive 88/146/EEC.

[7]Official Journal, No. L 125, 23 May 1996, p. 3.

requirements contained in Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

(ii) The European Communities, by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considers to be appropriate in different situations which result in discrimination or a disguised restriction on international trade, has acted inconsistently with the requirement contained in Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

(iii) The European Communities, by maintaining sanitary measures which are not based on existing international standards without justification under Article 3.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures, has acted inconsistently with the requirements of Article 3.1 of that Agreement.

In both Reports, the Panel recommended in paragraph 9.2:

... that the Dispute Settlement Body requests the European Communities to bring its measures in dispute into conformity with its obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures.

7. On 24 September 1997, the European Communities notified the DSB of its decision to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed two notices of appeal[8] with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). Pursuant to Rule 21 of the *Working Procedures*, the European Communities filed an appellant's submission on 6 October 1997. On 9 October 1997, the United States and Canada filed appellants' submissions pursuant to Rule 23(1) of the *Working Procedures*. On 20 October 1997, the United States and Canada each filed an appellee's submission pursuant to Rule 22 of the *Working Procedures* and the European Communities filed its own appellee's submission pursuant to Rule 23(3) of the *Working Procedures*. On the same day, Australia, New Zealand and Norway filed separate third participants' submissions in accordance with Rule 24 of the *Working Procedures*.

8. The oral hearing was held on 4 and 5 November 1997. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing this appeal. The participants and third participants also gave oral concluding statements.

II. Arguments of the Participants and Third Participants

A. *Claims of Error by the European Communities - Appellant*

1. Burden of Proof

9. The European Communities argues that the Panel erred in its allocation of the burden of proof in this dispute in three respects. In the view of the European Communities, the Panel erred on the issue of

[8]WT/DS26/9, 25 September 1997, and WT/DS48/7, 25 September 1997.

burden of proof under the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*") in general; in allocating the burden of proof under Article 3.3 of the *SPS Agreement*; and in allocating the burden of proof under Article 5.1 of the *SPS Agreement*.

10. In respect of the issue of burden of proof under the *SPS Agreement* in general, the European Communities argues that the Panel erred in finding that the burden of proof under the *SPS Agreement* rests on the Member imposing a measure.[9] According to the European Communities, none of the general considerations invoked by the Panel supports the view that special rules on the burden of proof should be applied in proceedings concerning the *SPS Agreement*.

11. As to the allocation of the burden of proof under Article 3.3 of the *SPS Agreement*, the European Communities disagrees with the Panel's finding that Article 3.3 constitutes an exception to the general obligation, contained in Article 3.1, to base measures on international standards, and that the burden of proof under Article 3.3 is therefore on the responding party.[10] The European Communities argues that the *SPS Agreement* expressly recognizes that a Member has the right to choose an appropriate level of sanitary and phytosanitary protection, and that Article 3.3 lays down specific conditions governing the exercise of that right in those cases where an international standard exists. According to the European Communities, Article 3.1 does not provide a "general obligation" to be read in isolation, but presents one of three options available to a Member when an international standard exists.

12. With regard to the burden of proof under Article 5.1 of the *SPS Agreement*, the European Communities opposes the Panel's finding that Canada and the United States had met their burden of presenting a *prima facie* case of inconsistency with Article 5.1, in respect of importation of meat treated with the MGA hormone.[11] The European Communities notes that Canada and the United States stated that they had conducted risk assessments and had authorized MGA for growth promotion, but refused to provide scientific evidence and information, claiming their studies were proprietary and confidential in nature. The European Communities believes that the Panel has fundamentally erred in law by condoning the refusals by Canada and the United States to submit all studies available.

2. Standard of Review

13. The European Communities claims that the Panel erred in law[12] by not according deference to the following aspects of the EC measures: first, the decision of the European Communities to set and apply a level of sanitary protection higher than that recommended by the Codex Alimentarius (the "Codex") for the risks arising from the use for growth promotion of the hormones in dispute; second, the EC's scientific assessment and management of the risk from the hormones at issue, and third, the EC's adherence to the precautionary principle and its aversion to accepting any increased carcinogenic risk.

14. It is submitted by the European Communities that WTO panels should adopt a deferential "reasonableness" standard when reviewing a Member's decision to adopt a particular science policy or a Member's determination that a particular inference from the available data is scientifically plausible. To the European Communities, the Panel in this case imposed its own assessment of the scientific evidence.

[9]US Panel Report, paras. 8.52-8.54; Canada Panel Report, paras. 8.55-8.57.

[10]US Panel Report, para. 8.86; Canada Panel Report, para. 8.89.

[11]US Panel Report, para. 8.253; Canada Panel Report, para. 8.256.

[12]US Panel Report, paras. 8.124, 8.127, 8.133, 8.134, 8.145, 8.146, 8.194, 8.199, 8.213 and 8.255; Canada Panel Report, paras. 8.127, 8.130, 8.136, 8.137, 8.148, 8.149, 8.197, 8.202, 8.216 and 8.258.

15. The European Communities asserts that GATT 1947 panel reports rejected a *de novo* standard of review in relation to fact-finding[13], and that this approach has been maintained by panels established under the DSU.[14] It is contended that the "reasonable deference standard of review" has been given expression in the *Marrakesh Agreement Establishing the World Trade Organization*[15] (the "*WTO Agreement*") in Article 17.6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"). The European Communities considers that the principle of reasonable deference is applicable in all highly complex factual situations, including the assessment of the risks to human health arising from toxins and contaminants, and that therefore, the Panel applied an inappropriate standard of review in the present case.

3. The Precautionary Principle

16. The European Communities submits that the Panel erred in law in considering that the precautionary principle was only relevant for "provisional measures" under Article 5.7 of the *SPS Agreement*.[16] The precautionary principle is already, in the view of the European Communities, a general customary rule of international law or at least a general principle of law, the essence of which is that it applies not only in the management of a risk, but also in the assessment thereof. It is claimed that the Panel therefore erred in stating that the application of the precautionary principle "would not override the explicit wording in Articles 5.1 and 5.2 [of the *SPS Agreement*]", and in suggesting that that principle might be in conflict with those Articles. The European Communities asserts that Articles 5.1 and 5.2 and Annex A.4 of the *SPS Agreement* do not prescribe a particular type of risk assessment, but rather simply identify factors that need to be taken into account. Thus, these provisions do not prevent Members from being cautious when setting health standards in the face of conflicting scientific information and uncertainty.

4. Objective Assessment of the Facts

17. The European Communities argues that the Panel failed to make an objective assessment of the facts and therefore did not comply with its obligations under Article 11 of the DSU. The Panel, it is alleged, disregarded or distorted the evidence with regard to both the MGA and the other five hormones at issue supplied by the Panel's experts, as well as the scientific evidence presented by the European Communities. In support of this contention, the European Communities submits that the Panel has manifestly distorted the views of both Dr. Lucier[17] and Dr. André.[18] According to the European

[13]The European Communities refers to: Panel Report, *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted 27 April 1994, ADP/87; Panel Report, *United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted 28 April 1994, SCM/153; Panel Report, *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, adopted 27 April 1993, BISD 40S/205; Panel Report, *United States - Measures Affecting Imports of Softwood Lumber from Canada*, adopted 27-28 October 1993, BISD 40S/358, Panel Report, *United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden*, ADP/117, 24 February 1994, unadopted; Panel Report, *EC - Anti-Dumping Duties on Audio Tapes in Cassettes originating in Japan*, ADP/136, 28 April 1995, unadopted; and Panel Report, *United States - Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products originating in France, Germany and the United Kingdom*, SCM/185, 15 November 1994, unadopted.

[14]The European Communities refers to: Panel Report, *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* ("*United States - Underwear*"), adopted 25 February 1997, WT/DS24/R; Panel Report, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses* ("*United States - Shirts and Blouses*"), adopted 23 May 1997, WT/DS33/R.

[15]Done at Marrakesh, Morocco, 15 April 1994.

[16]US Panel Report, paras. 8.157 and 8.158; Canada Panel Report, paras. 8.160 and 8.161.

[17]See, in particular, US Panel Report, footnote 331; Canada Panel Report, footnote 437.

[18]See, in particular, US Panel Report, footnote 348; Canada Panel Report, footnote 455.

Communities, contrary to what the Panel found, the evidence provided to the Panel by the majority of its own scientific experts indicated that there was a real risk of adverse effects arising from the use of the hormones at issue. It is also claimed that the Panel manifestly distorted the scientific evidence by considering that the 1995 European Communities Scientific Conference on Growth Promotion in Meat Production (the "1995 EC Conference") amounted to a risk assessment in the sense of Articles 5.1 and 5.2. The distinction made by the Panel between general studies on the health risks associated with hormones and specific studies addressing the health risks of residues in food of hormones used for growth promotion purposes was, in the view of the European Communities, devised by the Panel for the sole purpose of enabling it to conclude that the Monographs of the International Agency for Research on Cancer ("IARC")[19] are not relevant as a risk assessment in this case. This, the European Communities asserts, amounts to a distortion of relevant scientific evidence. The European Communities also alleges that the Panel violated Article 11 of the DSU by discarding several articles and opinions of individual scientists invoked by the European Communities.

18. With regard to the problems relating to the control of the correct use of the hormones, the European Communities contends that it submitted convincing specific evidence to the Panel, but that the Panel either failed to take this evidence into account or failed to summarize it properly in the Panel Report. Finally, the Panel allegedly ignored the arguments made by the European Communities as to why the situations compared by the Panel under Article 5.5 were not comparable. In rejecting the six reasons advanced by the European Communities as to why the distinction in the levels of sanitary protection between carbadox and olaquindox, on the one hand, and the hormones at issue in this dispute, on the other, is not arbitrary or unjustifiable, the European Communities argues that the Panel failed to take into account the evidence before it.

5. Temporal Application of the *SPS Agreement*

19. The European Communities states that the Panel's conclusion that the *SPS Agreement* applies to measures that were enacted before the entry into force of the *SPS Agreement* but that did not cease to exist after that date, is too sweeping.[20] According to the European Communities, the *SPS Agreement* shows a different intention in some of its provisions, at least if these provisions are interpreted in the way proposed by the Panel. Articles 5.1 to 5.5 require that certain preparatory actions and procedures be followed before a measure is adopted and obligations of this kind are exhausted once the measures under consideration are adopted. The European Communities, therefore, concludes that the *SPS Agreement* does not apply to the procedure for the elaboration of the EC measures at issue in this dispute.

6. Article 3.1

20. The European Communities submits that the Panel erred in interpreting the term "based on" in stating that Article 3.2 "equates" measures "based on" international standards with measures which "conform to" such standards.[21] The European Communities asserts that these terms differ in their meaning.

21. It is pointed out by the European Communities that Article 3 employs the term "based on" in paragraphs 1 and 3, whereas it uses the term "conform to" in paragraph 2. Also, Article 2 distinguishes between "based on" (paragraph 2) and "conform to" (paragraph 4). This differing language in consecutive paragraphs of different articles cannot be accidental.

[19]The 1987 Monographs of the IARC on the Evaluation of Carcinogenic Risks to Humans, Supplement 7 (the "1987 IARC Monographs").

[20]US Panel Report, paras. 8.25 and 8.26; Canada Panel Report, paras. 8.28 and 8.29.

[21]US Panel Report, para. 8.72; Canada Panel Report, para. 8.75.

22. To the European Communities, a measure may deviate – but not substantially – from the content of a recommendation of the Codex and still be considered as "based on" that recommendation for the purposes of Article 3.1. However, what constitutes a "substantial" deviation is not defined in the *SPS Agreement*. The submission of the European Communities is that Article 3 of the *SPS Agreement* accomplishes its object of furthering international harmonization by allowing Members to choose one of three alternative options. First, a Member may opt to conform its sanitary measures to the Codex recommendations, in accordance with Article 3.2. Second, a Member may wish merely to "base [its] sanitary ... measures on international ... recommendations", in accordance with Article 3.1, instead of conforming to such recommendations. Third, a Member may decide, in accordance with Article 3.3, to establish sanitary measures which provide a "higher level of sanitary protection" than would measures "based on" the Codex recommendations. As noted above[22], it is firm view of the European Communities that these three options are of equal standing and that Article 3.3 cannot be qualified as an exception to Article 3.1. The European Communities therefore objects to the Panel's interpretation of and conclusions concerning Article 3.1.

7. Article 3.3

23. The European Communities contends that the Panel's finding that whatever the difference might be between the two exceptions in Article 3.3, a sanitary measure can only be justified under this provision if it is consistent with the requirements contained in Article 5[23], in effect reduces the two alternative conditions in the first sentence of Article 3.3 to "mere surplusage". According to the European Communities, Article 3.3 defines the concept of the first condition ("scientific justification") in the footnote thereto without making a direct reference to Article 5, paragraphs 1 to 8, as it does with respect to the second condition ("as a consequence of choosing a higher level of protection"). The absence in the footnote to Article 3.3 of language referring to Articles 5.1-5.8 is in itself sufficient indication of the intention of the drafters to qualify the application of Article 5 in the case of the first condition. Thus, the European Communities asserts, the plain meaning and structure of Article 3.3 imply that the risk assessment requirements of Article 5 apply only if the second of these two alternative conditions is met.

8. Article 5.1

24. The European Communities contests the Panel's finding that Article 5.1 requires a Member imposing an SPS measure to submit evidence that it "took into account" a risk assessment when it enacted or maintained a measure[24], since neither the ordinary meaning of the words "based on", in context, nor the object and purpose of Article 5, suggest a "minimum procedural requirement" under Article 5.1.

25. The European Communities contends that to require concrete evidence in the preamble of the EC Directives or some other evidence that the European Communities actually considered the scientific studies in enacting or maintaining the measures at issue is unreasonable and arbitrary, and runs counter to the object and purpose of Article 5 and the *SPS Agreement*. There is no legal authority for the Panel's interpretation that risk assessment cannot be on-going and therefore no reason for restricting risk assessment to "old evidence". The European Communities asserts that there is a legitimate SPS goal of providing an opportunity for potentially affected Members to produce scientific evidence relevant to particular measures, and of ensuring consideration of that evidence by the Member adopting the SPS measure. Therefore, the European Communities submits that all parties and third parties should have the right to present "new" relevant evidence to the Panel.

[22]Para. 11 of this Report.

[23]US Panel Report, para. 8.83; Canada Panel Report, para. 8.86.

[24]US Panel Report, para. 8.113; Canada Panel Report, para. 8.116.

26. With regard to the Panel's findings on the consistency of the import prohibition with the substantive requirements of Article 5.1, the European Communities claims that the Panel erred in its interpretation of Article 5.1 in six separate respects. First, the Panel was incorrect in distinguishing between studies that specifically address the hormones for growth promotion purposes, such as the 1982 Report of the EC Scientific Veterinary Committee[25] (the "Lamming Report") and the JECFA Reports[26], and studies which relate to hormones in general, such as the 1987 IARC Monographs and articles and opinions of individual scientists referred to by the European Communities.[27] The Panel's assumption that such a distinction makes a qualitative difference in terms of risk assessment is wrong, and the distinction is arbitrary. The European Communities argues that Articles 5.1 and 5.2 neither prescribe risk assessment techniques nor specify the requirements of a risk assessment.

27. Second, the Panel's view of Article 5.1 as imposing a substantive obligation on Members to conform their SPS measures to the conclusions reflected in the JECFA Reports or the reports of other scientific committees is manifestly incorrect. The "scientific basis" of SPS measures cannot be confined to the formalized conclusions of committees called upon to review or analyze the risks a substance may pose. Those conclusions are just one of the elements to be taken into account. The "available scientific evidence", referred to in Article 5.2, includes both generally held or majority scientific views as well as minority, or dissenting, scientific opinion (often first expressed by individual scientists). The European Communities also controverts the Panel's finding that the reports of the European Parliament are "non-scientific"[28], and contends that this finding is manifestly wrong, certainly as regards the so-called Pimenta Report.[29]

28. Third, the Panel's interpretation that "based on" within the meaning of Article 5.1 means "in conformity with" is mistaken.[30] The European Communities states that reports of scientific committees frequently say practically nothing or very little on some of the factors indicated in Articles 5.1 and 5.2. To the European Communities, Article 5.1 is designed to compel Members to have some plausible scientific rationale as the "basis" for their sanitary measures, but not to conform their measures absolutely to the technical and scientific conclusions of the reports.

29. Fourth, the European Communities contends that the "most fundamental error of interpretation" of the Panel relates to the concept of risk and risk assessment.[31] "Risk" does not mean "harm" or "adverse effect". "Risk", for the purposes of the *SPS Agreement*, is the "potential" for the harm or adverse effects arising and, therefore, the mere possibility of risk arising suffices for the purposes of Articles 5.1 and 5.2. A risk evaluated to be one in a million is sufficient justification. If there is a potential for adverse effects (no matter how small), then there is, according to the European Communities, a risk. The concept of risk in the *SPS Agreement* is a qualitative, not a quantitative concept. Any identified increase in cancer (whether

[25]1982 Report of the EC Scientific Veterinary Committee, Scientific Committee for Animal Nutrition and the Scientific Committee for Food on the basis of the Report of the Scientific Group on Anabolic Agents in Animal Production.

[26]Evaluation of certain veterinary drug residues in food: Thirty-second Report of the Joint FAO/WHO Expert Committee on Food Additives, Technical Report Series 763 (World Health Organization, 1988); and the evaluation of certain veterinary drug residues in food: Thirty-fourth Report of the Joint FAO/WHO Expert Committee on Food Additives, Technical Report Series 788 (World Health Organization, 1989).

[27]US Panel Report, paras. 8.127 and 8.130; Canada Panel Report, paras. 8.130 and 8.133.

[28]US Panel Report, para. 8.109; Canada Panel Report, para. 8.112.

[29]European Parliament, Session Documents, Report drawn up on behalf of the Committee of Inquiry into the Problem of Quality in the Meat Sector, Rapporteur: Mr. Carlos Pimenta, Document A2-11/891/PARTS A-B, March 1989 ("Pimenta Report").

[30]US Panel Report, para. 8.117; Canada Panel Report, para. 8.120.

[31]As reflected in para. 8.124 of the US Panel Report and para. 8.127 of the Canada Panel Report.

quantitative or qualitative) must be sufficient to constitute a risk against which WTO Members are entitled to protect their population.

30. Fifth, the European Communities disputes the Panel's finding that the problem of control is irrelevant to risk assessment[32], as contrary to common sense and to the express language of Article 5.2 and Annex C of the *SPS Agreement* clarifies. The European Communities also points out that the condition "in accordance with good veterinary practice" is part of the content of the Codex recommendation, and that effective control is necessary to ensure that the hormones at issue are administered in accordance with good practice. Evaluation of any potential risk arising from lack of observance of good practice is an inherent part of the risk assessment exercise. Moreover, it was for the European Communities, and not for the Panel, to determine whether the control measures of an exporting Member are adequate to achieve the EC's appropriate level of sanitary protection. The Panel has disregarded the EC's arguments relating to the practical and technical difficulties that are specific to control of the hormones at issue. The European Communities also protests as an error in law the Panel's conclusion that banning the use of a substance does not necessarily offer better protection of human health than other means of merely regulating its use.

31. Finally, the European Communities submits that the Panel was manifestly wrong in finding that a risk assessment must be carried out for each individual substance.[33] Nowhere in the *SPS Agreement*, and in particular in Articles 5.1 and 5.2, is there language requiring a risk assessment "for each individual substance". In the view of the European Communities, there is nothing to prevent classes or categories of substances from being assessed together if this is scientifically justified.

9. Article 5.5

32. The European Communities argues that the Panel erred in its interpretation of Article 5.5. With respect to the first element, namely, the existence of different levels of protection in different situations, the Panel erroneously interpreted Article 5.5 in holding that situations involving the same health risk or substance are comparable situations for the purposes of Article 5.5.[34] The European Communities submits that it is inappropriate to compare the level of protection relating to hormones used for growth promotion purposes with the level of protection relating to naturally-occurring hormones. Science and the regulatory practices of Members do not treat man-made risks, such as the risks created by hormones used for growth promotion, and naturally-occurring risks, such as those arising from the presence of hormones in meat, milk, cabbage or broccoli, in the same way. The *SPS Agreement* applies only to man-made risks because the naturally-occurring hormones in meat and other foodstuffs are not "contaminants and toxins" within the meaning of the *SPS Agreement*. Furthermore, the European Communities submits that, contrary to what the Panel found[35], there is no difference, let alone a significant difference, in the EC level of protection against naturally-occurring hormones and its level of protection against added hormones. The EC measures provide for the same level of protection against naturally-occurring hormones and added hormones, namely, the risk determined by nature.

33. In respect of the second element of Article 5.5, namely, the arbitrary or unjustifiable nature of distinctions in levels of protection, the European Communities contends that the Panel has erroneously assumed that the only factors relevant to determining what is an arbitrary or unjustifiable distinction are "scientific" factors. Other factors, such as public perception of what is dangerous and of what level of risk is acceptable, and the benefit, if any, to be gained from shouldering a risk, must also be relevant. Moreover,

[32]US Panel Report, para. 8.146; Canada Panel Report, para. 8.149.

[33]US Panel Report, para. 8.257; Canada Panel Report, para. 8.260.

[34]US Panel Report, para. 8.176; Canada Panel Report, para. 8.179.

[35]US Panel Report, paras. 8.191 and 8.212; Canada Panel Report, paras. 8.194 and 8.215.

the European Communities argues that, contrary to what the Panel found[36], the distinction between the level of protection adopted in respect of the hormones at issue when used for growth promotion and the level of protection adopted with respect to carbadox and olaquindox is not arbitrary or unjustifiable.

34. As to the third element of Article 5.5, namely discrimination or a disguised restriction on international trade resulting from the distinction in the levels of protection, the European Communities objects to the Panel's finding that it was sufficient to demonstrate "the significance of the difference in levels of protection combined with the arbitrariness thereof".[37] Article 5.5 makes a resultant "discrimination or a disguised restriction on international trade" an additional element beyond arbitrary and unjustifiable distinctions in the levels of protection a Member considers appropriate. The European Communities does not consider the approach developed by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*[38] ("*Japan - Alcoholic Beverages*") and invoked by the Panel in this case as appropriate for the very different problem in determining discrimination (between countries) and a disguised restriction of trade in a regulatory regime designed to protect human health.

35. Furthermore, it is argued by the European Communities that Article 5.5 must be interpreted together with Article 2.3 of the *SPS Agreement*. Accordingly, "discrimination" in Article 5.5 means "discrimination between States where identical or similar conditions prevail". The Panel ignored Article 2.3 and assumed that discrimination can be between substances, risks and levels of protection. This assumption cannot be correct since otherwise the term "discrimination" would add nothing to "arbitrary and unjustifiable distinctions", in the view of the European Communities.

36. The European Communities stresses that there is no import ban for beef as such and that the restriction applies only to non-conforming products. This is the inevitable consequence of any SPS measure, and cannot be enough to establish a "disguised restriction on international trade". The European Communities continued to import the same amount of meat after the ban as before, and the prohibition of hormones for growth promotion has no effect on the surpluses of beef. The suggestion of the Panel that the reduction of beef surpluses in the European Communities might have been a secondary motive, is, in any event, not sufficient to establish the discrimination or disguised restriction on international trade contemplated in Article 5.5. Finally, the European Communities submits that the fact that 70% of the bovine meat produced in the United States and Canada is from cattle to which hormones have been administered for growth promotion is no indication of a disguised restriction on trade.

10. Procedural Issues

37. The European Communities asserts that a number of procedural decisions taken by the Panel were unfair and require review by the Appellate Body. The European Communities objects to the Panel's view that it need consider the EC's procedural objections only where the European Communities could make a "precise claim" of prejudice.[39] The Panel should have asked itself whether its procedural decisions were consistent with the DSU, not whether the European Communities could make a precise claim of prejudice. It is asserted by the European Communities that the Panel committed a legal procedural error in refusing to accept the scientific assessments of the European Communities, declining to set up an expert review group, and proceeding to decide itself a scientific matter on which the Panel had no expertise. The Panel's decision to receive a range of opinions from individual experts[40] deprived the European

[36]US Panel Report, para. 8.238; Canada Panel Report, para. 8.241.

[37]US Panel Report, para. 8.184; Canada Panel Report, para. 8.187.

[38]Adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

[39]US Panel Report, paras. 8.14-8.15; Canada Panel Report, paras. 8.18-8.19.

[40]US Panel Report, para. 8.7; Canada Panel Report, para. 8.7.

Communities of the procedural guarantees provided for expert review groups in the DSU. By following this procedure, the Panel put itself in a position to choose freely between different scientific opinions. The European Communities contends that the selection of scientific experts by the Panel violated Articles 11, 13.2 and Appendix 4 of the DSU as well as Article 13.2 of the *SPS Agreement*. The European Communities objects to the selection of two experts on the grounds that one of them was a national of a party or third party and had links with the pharmaceutical industry, while the other was a member of the Codex/JECFA group that had produced the report on the use of hormones in animal growth promotion and was the "rapporteur" of this study. Further, according to the European Communities, these two experts lacked expertise in the field.

38. The European Communities also alleges that the Panel erred in refusing to request that Canada and the United States provide the studies on which their authorities had based their decisions to authorize the use of MGA for growth promotion. In the view of the European Communities, the Panel had a duty to carry out an objective assessment of the facts, and declining to request the complainants to produce the evidence on which they based their own domestic decisions is not compatible with this duty. Moreover, Article 18.2 of the DSU provides safeguards for the protection of confidential information. Thus, the allegedly confidential nature of the information on MGA should have been no obstacle to its production and use in the proceeding. The European Communities also asserts that the Panel based the main part of its reasoning concerning Article 5.5 of the *SPS Agreement* on a claim that the complainants had *not* made, i.e. that there was a difference of treatment between artificially-added, or exogenous, natural and synthetic hormones when used for growth promotion purposes and the naturally-present endogenous hormones in untreated meat and other foods (such as milk, cabbage, broccoli or eggs). In the view of the European Communities, not only is this "claim" wrong in law and in fact, but the Panel also violated the DSU in relying on it especially since the United States expressly protested against the Panel's use of such a "claim". The European Communities asserts that panels are not entitled to make findings going beyond what has been requested by the parties.

39. The European Communities submits further that the Panel took a number of decisions granting "extended third party rights" to Canada and the United States – and not to other third parties – that are not justified by Article 9.3, and are contrary to Articles 7.1, 7.2, 18.2 and 10.3 of the DSU as well as the terms of reference of the Panel. These decisions were: first, to give access to all of the information submitted in the United States' proceeding to Canada; second, to give access to all the information submitted in the Canadian proceeding to the United States; third, to hold a joint meeting with the scientific experts; and fourth, to invite the United States to observe and make a statement at the second substantive meeting in the proceeding initiated by Canada.

B. *Arguments by the United States - Appellee*

1. Burden of Proof

40. With regard to the allocation of the burden of proof under Article 3.3 of the *SPS Agreement*, the United States refers to the Appellate Body Report in *United States - Shirts and Blouses*[41] and argues that, like Articles XX and XI:2(c)(i) of the GATT 1994, Article 3.3 of the *SPS Agreement* is not a positive rule establishing an obligation in itself. It is in the nature of an affirmative defence, and the Panel was therefore correct in finding that the burden of proof under Article 3.3 rests on the defending party. As to the burden of proof under Article 5.1 of the *SPS Agreement*, the United States contends that the European Communities, in complaining that Canada and the United States did not provide their confidential information concerning MGA, misses the point that the Panel had to determine whether the European Communities had based its import ban on a risk assessment.

[41]Adopted 23 May 1997, WT/DS33/AB/R, pp. 14 and 16.

2. Standard of Review

41. The United States submits that the deferential "reasonableness" standard of review advocated by the European Communities is without support in the text of either the DSU or the *SPS Agreement*. The United States observes that, under Article 5.1, the Panel was called upon to determine if the EC ban was "based on" an assessment, as appropriate to the circumstances, of the risks to human health. Such a determination does not require a panel to conduct its own risk assessment or substitute its own judgement regarding risks, but only to determine if the measure is "based on" a risk assessment. Under Article 2.2, the question for a panel is not whether it would have come to a different conclusion "based on" the evidence, but rather whether the scientific evidence submitted by the Member maintaining the measure is "sufficient" as a basis for that measure. The United States believes that in this sense, the European Communities is correct in asserting that a panel is not to conduct a *de novo* review of the scientific basis of the measure.

42. The United States argues, however, that nothing in the *SPS Agreement* or the *WTO Agreement* requires a Panel to defer to the Member maintaining the SPS measure. In examining measures under the *Agreement on Textiles and Clothing* (the "ATC"), which, like the *SPS Agreement*, does not provide for a particular standard of review, two previous panels found that it would not be appropriate either to apply a *de novo* standard of review or to grant undue deference to the administrative findings of national authorities.[42] The United States cautions that the GATT panel reports cited by the European Communities, involving anti-dumping and countervailing duty disputes, do not support the existence of a deferential standard of review in the *SPS Agreement*. Those GATT panel reports involved situations where national authorities had taken anti-dumping or countervailing duty measures pursuant to detailed national legislation and procedures mandated by the *Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the "*Tokyo Round Anti-Dumping Code*"). According to the United States, the *Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* shows that Members have yet to decide if the standard of review set out in Article 17.6 of the *Anti-Dumping Agreement* is capable of general application. The United States asserts that the European Communities is mistaken in arguing that this standard of review applies to the *SPS Agreement*.

3. The Precautionary Principle

43. In the view of the United States, the claim of the European Communities that there is a generally-accepted principle of international law which may be referred to as the "precautionary principle" is erroneous as a matter of international law. The United States does not consider that the "precautionary principle" represents a principle of customary international law; rather, it may be characterized as an "approach" – the content of which may vary from context to context. The *SPS Agreement* does recognize a precautionary approach; indeed, Article 5.7 permits the provisional adoption of SPS measures even where the relevant scientific evidence is insufficient. Thus, the United States believes that there is no need to invoke a "precautionary principle" in order to be risk-averse since the *SPS Agreement*, by its terms, recognizes the discretion of Members to determine their own level of sanitary protection. The European Communities does not explain how "the precautionary principle" affects the requirements in the *SPS Agreement* that a measure be "based on" scientific principles and a risk assessment, and not maintained without sufficient scientific evidence. The EC's invocation of a "precautionary principle" cannot create a risk assessment where there is none, nor can a "principle" create "sufficient scientific evidence" where there is none.

[42]The United States refers to: Panel Report, *United States - Underwear*, adopted 25 February 1997, WT/DS24/R; and Panel Report, *United States - Shirts and Blouses*, adopted 23 May 1997, WT/DS33/R.

4. Objective Assessment of the Facts

44. According to the United States, the European Communities improperly requests the Appellate Body to review the Panel's factual findings to determine whether they were either "inadequate" or "not objective", and thus inconsistent with Article 11 of the DSU. The United States submits that, according to Article 17.6 of the DSU, factual findings are clearly beyond review by the Appellate Body. Furthermore, the United States contends that the European Communities has not shown either improper influence or conflict of interest that might warrant consideration of the objectivity of the Panel.

5. Temporal Application of the *SPS Agreement*

45. The United States argues that the European Communities, in claiming that Articles 5.1 to 5.5 do not apply to SPS measures adopted before the *SPS Agreement* entered into force, has misread the *SPS Agreement*. There is no support for this claim in the text, context or negotiating history of the *SPS Agreement*. If the position of the European Communities were accepted, this would, in the view of the United States, leave a gaping exception to the disciplines of the *SPS Agreement*.

6.Article 3.1

46. According to the United States, since the EC measures are not "based on" the Codex standards, even under the broad test of "based on" proposed by the European Communities, there is no need for the Appellate Body to address the alleged difference between measures "based on" international standards and measures that "conform to" international standards. The United States recognizes that Article 3 of the *SPS Agreement* uses the two different terms in Articles 3.1 and 3.2, but suggests that whether any theoretical difference between those two terms would have any meaning in practice is a question for another case.

7.Article 3.3

47. The United States believes that the European Communities is incorrect in claiming that its ban need not be "based on" a risk assessment under Article 5.1 in order to qualify under Article 3.3 as a measure for which there is a "scientific justification" for departing from an international standard. A risk assessment provides the necessary "examination and evaluation of available scientific information" required in the footnote to Article 3.3. The European Communities provides no explanation why the "relevant provisions" of the *SPS Agreement*, referred to in that footnote, do not include Article 5.1. The context of the footnote to Article 3.3 includes the definition of "risk assessment" in Annex A of the *SPS Agreement*. According to the United States, the fact that Articles 5.1 and 5.2 relate to conducting a risk assessment make it clear that these Articles are "relevant provisions" of the *SPS Agreement* for purposes of the footnote, and that any doubt regarding the applicability of Article 5.1 is removed by the last sentence of Article 3.3.

8. Article 5.1

48. The United States maintains that the Panel's finding that there is a "procedural requirement" inherent in Article 5.1 is simply a common sense reading of Article 5.1. It would be difficult to see how a measure is "based on" a risk assessment if the Member did not even know of the existence of the risk assessment or never considered the risk assessment in enacting or maintaining the measure. Furthermore, the Panel Report should not be read as imposing a rigid requirement to be satisfied only by referring to the risk assessment in the preamble to the measure. Such a reference, the United States contends, is simply one means of demonstrating that a risk assessment was taken into account.

49. The Panel was correct, according to the United States, in finding that in order that a measure may be "based on" a risk assessment, the scientific principles underlying the measure must reflect the scientific

conclusions reached by the scientists conducting the risk assessment. The United States submits that the European Communities did not, at any time during the panel proceedings, produce a risk assessment identifying any risk. In the case of the hormone MGA, it is even more obvious that the EC ban is not "based on" a risk assessment.

50. With regard to the problems of control of correct use of the hormones, the United States submits that the Panel correctly characterized the argument of the European Communities as being a general statement that there is no guarantee of 100 percent compliance with any system of laws. Such a generalized concern is not an adequate basis for the EC ban. Furthermore, there is no evidence that the control of the hormones at issue is more difficult than the control of other veterinary drugs (the use of which is allowed), or that control is more difficult under a regime where hormones are allowed for growth promotion under specific conditions than under a current regime where they are banned. During the oral hearing, the United States observed that the scientific studies indicated that the hormones are safe when used in accordance with good practice. According to the United States, these studies do not address the question of whether the hormones at issue are unsafe when not used in accordance with good practice.

51. As to whether a separate risk assessment is necessary for each particular substance, the United States submits that under Article 5.1, the European Communities must base its ban with respect to MGA on an "evaluation, as appropriate to the circumstances, of the potential for adverse effects on human health arising from the presence of residues of MGA in meat ...". The European Communities provided no such evaluation of MGA. The scientific studies that the European Communities referred to deal with a general class of compounds, and do not deal specifically with MGA.

9. Article 5.5

52. The United States supports the finding that the situation involving carbadox and the situation involving the six hormones at issue are different situations which can nonetheless be compared for the purposes of Article 5.5. To the United States, the Panel was correct in finding that the EC distinction in the levels of protection involving carbadox and the level of protection involving the hormones at issue was arbitrary and resulted in a disguised restriction on international trade. In coming to that conclusion, the Panel found that the hormones at issue, banned in the European Communities, were used for growth promotion purpose in the bovine meat sector where the European Communities wanted to limit supplies and was arguably less concerned with international competitiveness while carbadox, allowed in the European Communities, is used for growth promotion purposes in the pork meat sector where the European Communities has no domestic surpluses and where international competitiveness is a high priority. The United States claims that this issue relates to factual findings that are not reviewable by the Appellate Body.

10.Procedural Issues

53. The United States asks the Appellate Body to dismiss each of the procedural claims raised by the European Communities. The appeal by the European Communities on these issues, the United States claims, raises a threshold question as to whether, and if so, under what circumstances, the procedures employed by the Panel during the proceeding could be considered to be issues of law covered in the Panel Report or legal interpretations developed by the Panel within the meaning of Article 17.6 of the DSU. The United States asserts that the European Communities has not pointed to any textual basis for its arguments, nor to any past practice under the GATT 1947 or the *WTO Agreement*. The United States submits that, to sustain a claim that a panel's handling of procedural issues was inconsistent with the DSU, a party to a dispute must have raised objections in a timely manner during the panel proceeding, if feasible. In the view of the United States, any other response to procedural objections will weaken the authority of panels and destabilize the dispute settlement system. It would also be fundamentally unfair to permit a party to wait and see what the outcome of a panel proceeding is and make its procedural objections only when it is too

late for the panel to address them. The United States urges that the objections raised by the European Communities should be rejected to the extent that they were not first made to the Panel.

54. With respect to the EC's objection concerning the Panel's selection of experts, the United States observes that during the panel proceeding, the European Communities did not object to the participation of two experts who are not only nationals of the Member States of the European Union, but are also employed by institutions of such Member States. As to the EC's objection to the alleged links of one of the experts to the pharmaceutical industry, the United States asserts that the European Communities did not question these links at the time this expert's name was raised by the Panel, even though the European Communities expressed similar concerns at that time with regard to two other scientists proposed by the Panel.

55. Turning to the issue of whether a procedural objection should be based on a "precise claim" of prejudice, the United States believes that while a Panel clearly has the duty of following the relevant rules of the DSU and the covered agreements, a party seeking the reversal or a modification of a procedural ruling should assume the responsibility of providing concrete reasons and legal arguments justifying its objection. Otherwise, every procedural ruling of a Panel could be subject to objections posed for unspecified reasons.

56. The United States asserts that the Panel's decision to consult individual experts, instead of convening an expert review group, was consistent with the DSU and the *SPS Agreement*. The European Communities itself concedes that Article 13 of the DSU and Article 11.2 of the *SPS Agreement* are permissive, and not mandatory, provisions. The United States contends that the Panel was not required to convene an expert review group, either under the terms of Article 13 of the DSU or Article 11.2 of the *SPS Agreement*. If the Panel had convened an expert review group, the rules and procedures of Appendix 4 of the DSU would have been applicable. Since the Panel did not convene such a group, the Panel's decision not to follow the rules and procedures of Appendix 4 was completely consistent with the DSU and was within the discretion accorded to panels in their procedural decisions.

57. The United States contends that the Panel's harmonization of the two panel proceedings did not impair the rights of defence of the European Communities. The use of the same panelists for both proceedings accorded a procedural advantage to the European Communities. According to the United States, rather than having two meetings with each of the two separate Panels, the European Communities was able to have four sessions with the same Panel. The European Communities willingly agreed to have the same panelists in both proceedings.

58. With respect to the issue of extended third party rights, the United States submits that the European Communities failed to make to the Panel the detailed objections it made for the first time in its appellant's submission. There is no reason why, if one panel may grant such rights in one dispute, another panel may not also grant such rights in another dispute.[43] The United States believes that there were strong reasons to provide it with extended third party rights in the Canadian panel proceeding. The United States asserts that the European Communities is mistaken in asserting that the Panel's grant of extended third party rights gave the complainants access to documents. Both the United States and the European Communities made public their submissions and statements to the Panel in the United States' panel proceeding, and therefore Canada already had access to all these documents.

C. *Arguments by Canada - Appellee*

1. Burden of Proof

[43]The United States refers to Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, WT/DS27/R/USA ("*European Communities - Bananas*").

59. On the matter of allocation of the burden of proof under the *SPS Agreement* in general, Canada contends that the Panel adopted the reasoning provided by the Appellate Body in *United States - Shirts and Blouses*.[44] As to the allocation of the burden of proof under Article 3.3 of the *SPS Agreement*, Canada insists that the Panel's findings are correct, although it would be more accurate to hold that "... the burden of proof under Article 3.1 shifts to the defending party to show either that the measure in dispute is consistent with the obligation in Article 3.1, or to invoke the exception under 3.1 and show that it meets the conditions of that exception".[45] Should the Appellate Body reverse or modify the Panel's findings on the burden of proof, Canada submits that in any event, Canada has established a *prima facie* case of violation. With regard to the burden of proof under Article 5.1 of the *SPS Agreement*, Canada believes that it had provided sufficient evidence concerning the import ban on meat treated with MGA to establish a *prima facie* case.

2. The Precautionary Principle

60. The Panel did not take a position on whether the "precautionary principle" constituted part of the body of international law. Rather, in Canada's view, the Panel acknowledged that the "precautionary principle" was reflected in Article 5.7 of the *SPS Agreement*, and correctly held that the "precautionary principle" could not override Articles 5.1 and 5.2, or any other provision of the *SPS Agreement*. Canada also regards the issue of whether the "precautionary principle" is "built into" other provisions of the *SPS Agreement* as irrelevant in this appeal. Moreover, the European Communities has not explained what is meant by the "precautionary principle" having been "built into" other provisions of the *SPS Agreement*, and how this could in any way affect the conclusions of the Panel. The "precautionary principle" should be characterized as the "precautionary approach" because it has not yet become part of public international law. Canada considers the precautionary approach or concept as an *emerging* principle of international law, which may in the future crystallize into one of the "general principles of law recognized by civilized nations", within the meaning of Article 38(1)(c) of the *Statute of the International Court of Justice*.

3. Objective Assessment of the Facts

61. Canada submits that many of the claims made by the European Communities in its appellant's submission purport to be claims relating to errors of law but are in reality claims alleging errors of fact. The Appellate Body made it clear in its Report in *European Communities - Bananas*[46], that factual findings are, pursuant to Article 17.6 of the DSU, beyond review by the Appellate Body.

4. Temporal Application of the *SPS Agreement*

62. Canada argues that the distinction drawn by the European Communities between provisions of the *SPS Agreement* that include the terms "maintain" or "apply", and others that do not, is not sustainable. This dichotomy presented by the European Communities would mean that measures in existence on 1 January 1995 are indefinitely exempt from the disciplines of Articles 5.1 and 5.5, but it is hardly credible that the Members intended to exempt them. Other covered agreements contain specific provisions dealing with temporal issues, therefore, non-application of provisions of the *SPS Agreement*, such as Articles 5.1 and 5.5, would have been dealt with expressly in the text of the *SPS Agreement*. In any event, the EC measures at issue in this dispute include EC Directives 96/22/EC and 96/23/EC, which were adopted after the *WTO Agreement* entered into force.

[44]Adopted 23 May 1997, WT/DS33/AB/R.

[45]Canada's appellee's submission, para. 59.

[46]Adopted 25 September 1997, WT/DS27/AB/R.

5.Article 3.1

63. Canada maintains that the EC's argument that Article 3.1 does not constitute a "general obligation", but is one of three options available to Members when Codex recommendations exist, is incorrect. Article 3.1 sets out a positive obligation for Members to base their SPS measures on international standards, guidelines or recommendations. The words of Article 3.1 do not describe three "options". If the drafters of the agreement had intended such a meaning, they would have said so. Canada supports the Panel's conclusion that the terms "conform to" and "based on" are "co-extensive". Even if the Appellate Body accepts the view that "conforms to" is narrower in scope than "based on", Article 3.1 does not present a second "option", as argued by the European Communities. A measure that "conforms to" an international standard would also be "based on" that standard.

6. Article 3.3

64. The key element of the footnote to Article 3.3 is that it requires an examination and evaluation of available scientific information. Since the *SPS Agreement* defines a risk assessment as: "the *evaluation* of the potential for adverse effects on human ... health ...", the "examination and evaluation of scientific information" in the footnote to Article 3.3 refers to a risk assessment. A Member cannot, in Canada's view, determine that the relevant international standards are not sufficient to achieve its appropriate level of sanitary protection unless the Member does an evaluation of that risk (i.e. a risk assessment), taking into account available scientific evidence.

7. Article 5.1

65. Canada considers that the Panel's interpretation of Article 5.1 accords with the ordinary meaning of the words in their context. If a measure is "founded on" a risk assessment then there must be some evidence that the measure was built upon that foundation. Such a requirement would not amount to "freezing the scientific record", since the Panel made clear that it was looking for evidence that a risk assessment was taken into account when the EC measures were established *or at any later point in time*. In Canada's view, the Panel's reading of Article 5.1 is sound, and accords with the basic obligations set out in Article 2.2 that a measure must not be maintained without sufficient scientific evidence. If the scientific conclusions reflected in the EC measures do not conform with any of those reached in the risk assessments, then the scientific foundation for the measure clearly does not come from those risk assessments.

66. Canada submits that in defining what is a risk assessment, the European Communities focuses on the word "potential" to the exclusion of "evaluation". In doing so, the European Communities has stopped the process at identifying an adverse effect without carrying out the evaluation of the risk, i.e. performing a risk assessment.

67. At the oral hearing, when asked about the need for a separate risk assessment of each individual substance, Canada opined that one can use characteristics of chemical families as a starting point for exploring whether something might pose a hazard, but it is then necessary to go on and do a full evaluation of that chemical in order to determine whether it in fact poses a hazard.

8. Article 5.5

68. According to Canada, the scope of "different situations" referred to in Article 5.5 is at least as broad as the Panel found. The limited scope suggested by the European Communities conflicts with the ordinary meaning of "different situations". Canada also submits that in the light of the object and purpose of the *SPS Agreement* and the context of Article 5.5, there is no reason to limit the scope of comparison between levels of protection for human health. In Canada's view, the Panel correctly found that the European

Communities had not justified the distinctions in its purported levels of protection. The Panel did not "confine" the range of factors to be taken into consideration; the Panel considered all the arguments the European Communities had provided, but found them wanting. Canada contests the argument of the European Communities that the significance of the difference in levels of protection is no guide to the significance of trade effects. No measure could be more trade restrictive than an import ban.

9.Procedural Issues

69. Canada submits that all of the procedural rulings made by the Panel were fair to all the parties, did not result in any prejudice or injustice, and were within the Panel's jurisdiction and discretion. In particular, Canada believes that the Panel acted within its jurisdiction in making comparisons and findings with respect to the levels of protection for endogenous natural hormones, even if those precise arguments on Article 5.5 of the *SPS Agreement* were not made by Canada or the United States. Article 11 of the DSU does not limit the mandate of the Panel by compelling it to use only the arguments made by the parties. A panel is not prevented from making an objective finding that does not correspond to either party's argument.

70. Concerning the Panel's decision to consult experts in their individual capacities, rather than as an expert review group, Canada submits that the process chosen by the Panel ensured that all the views of the experts advising the Panel were brought to the Panel's attention. Far from prejudicing the European Communities, this process gave the European Communities an opportunity to elicit evidence to support its arguments from any of the Panel's experts. While Article 11.2 of the *SPS Agreement* provides that in disputes involving scientific or technical issues, a Panel should seek advice from experts chosen by the Panel in consultation with the parties to the dispute, this provision does not require the Panel to accept all expert advice without scrutiny. Canada submits that, to the contrary, the Panel had no authority to delegate its fact-finding duty to the experts in such a manner.

71. It is also submitted by Canada that the objection of the European Communities to the nationality of the experts selected to assist the Panel is without merit. Canada is unaware that the European Communities raised any such objection during the Panel's selection of experts. In Canada's view, by suggesting an expert who was a national of one of its Member States, the European Communities waived its right to object to the other scientists on the basis of their nationality. The Panel's decisions on "extended third party rights" were proper exercises of the Panel's discretion, and are not inconsistent with the DSU. The European Communities made references to materials that it had placed before the US Panel, but did not provide those materials in the Canada Panel proceeding. Thus, according to Canada, rather than prejudice the EC case, the Panel allowed all the submissions by the European Communities before the US Panel to be considered by the Canada Panel. Canada maintains that the decision of the Panel to convene a joint meeting of the experts was also within the discretion of the Panel. The European Communities has failed to demonstrate that it suffered any substantive prejudice as a result of this decision. In Canada's view, pursuant to Article 11 of the *SPS Agreement,* the Panel was entitled to seek advice from experts chosen by the Panel in consultation with the parties, but was under no obligation to convene a meeting with the experts, either severally or jointly.

D. *Claims of Error by the United States - Appellant*

1.Article 2.2

72. In its capacity as appellant, the United States submits that the Panel erred because, having made all of the findings necessary to find that the EC measure was inconsistent with Article 2.2, it did not take the final step and declare the import ban to be inconsistent with Article 2.2.[47] Article 2.2 requires the European

[47]US Panel Report, para. 8.271.

Communities to have sufficient scientific evidence to support its measure. Since the Panel methodically listed and reviewed all of the scientific evidence presented by the European Communities, and in respect of each piece of evidence made a factual finding that the evidence did not support the EC measure, the United States submits that the Panel should have come to the legal conclusion that the EC import prohibition is maintained without sufficient scientific evidence. In the view of the United States, there was no need for the Panel to determine exactly how much scientific evidence is "sufficient" for purposes of Article 2.2. The Panel found that the European Communities had presented no evidence to support its ban; "no evidence" cannot be considered to meet the threshold of "sufficient evidence".

73. In justifying why it made no finding under Article 2.2, the Panel stated that Articles 3 and 5 provide for more specific obligations than the "basic rights and obligations" set out in Article 2. According to the United States, Articles 3 and 5 of the *SPS Agreement* do not necessarily provide for more specific rights and obligations than all of the "basic rights and obligations" set out in Article 2. Neither Article 3 nor Article 5 says how much evidence is necessary to support an SPS measure. Article 2.2 establishes that quantum of evidence in requiring that measures not be maintained "without sufficient scientific evidence". The United States submits, therefore, that nothing in the text of Articles 2, 3 or 5 indicate that all of the obligations in Article 2 are subsumed under the provisions of Articles 3 and 5.

2. Article 5.6

74. It is urged by the United States that the Panel erred[48] in failing to make a finding under Article 5.6 of the *SPS Agreement*, and that the Panel's findings on Article 5.5 are sufficient to establish that the EC ban is inconsistent with Article 5.6 of the *SPS Agreement*. The United States notes that the European Communities prohibits the use of the natural hormones to promote growth, while having no limits on the residues of these exact same substances either naturally-present or used for therapeutic or zootechnical purposes. Since the European Communities accepts the residues of these naturally-occurring hormones in meat as safe, then the EC ban is, in the view of the United States, more trade restrictive than required.

75. The United States also notes that the European Communities prohibits the use of the three synthetic hormones at issue, while permitting the use of similar hormones (the three natural hormones) for therapeutic and zootechnical purposes as well as the use of carbadox, another synthetic compound, for growth promotion purposes. In the view of the United States, the European Communities has, in each instance, chosen the most trade restrictive approach (a ban on trade) with respect to the six hormones for growth promotion purposes. The United States argues that the European Communities could permit residues of these hormones used for growth promotion purposes at the same levels that it permits for other purposes and still achieve its level of protection. The fact that the European Communities permits these levels for these other purposes demonstrates that similarly treating residues from growth promotion would be reasonably available to the European Communities and would be technically and economically feasible. Permitting these levels for growth promotion purposes would also be significantly less trade restrictive than the current EC ban.

76. The Panel found that "no scientific evidence is available which concludes that an identifiable risk arises from the use of any of the hormones at issue for growth promotion purposes in accordance with good practice."[49] In the view of the United States, this finding is sufficient in itself to establish that the EC ban is inconsistent with Article 5.6. If there is no identifiable risk from the use of these hormones for growth promotion in accordance with good practice, then the EC ban cannot be necessary to achieve a level of protection from an identified risk. The ban is then, by definition, more trade restrictive than required to achieve the appropriate level of sanitary protection by the European Communities.

[48]US Panel Report, para. 8.247.

[49]US Panel Report, para. 8.134.

E. *Claims of Error by Canada - Appellant*

1. Article 5.6

77. Canada states that its appeal is designed to safeguard its right to rely on its arguments presented to the Panel with respect to Article 5.6, in the event that the Appellate Body decides to modify or reverse the Panel's findings with respect to Articles 3.1, 5.1 or 5.5 of the *SPS Agreement*. Canada asserts that the EC measures are inconsistent with Article 5.6 of the *SPS Agreement*. Canada submits that according to the wording of paragraph 5 of Annex A, Article 5.5 and the object and purpose of the *SPS Agreement*, if there is no scientific evidence of an identifiable risk, there is no basis on which to adopt a measure to achieve a level of sanitary protection under the *SPS Agreement*, except as provided in Article 5.7.

78. In Canada's view, if a Member could adopt a level of protection and implement a sanitary measure even if it did not provide scientific evidence of an identifiable risk, no effect could be given to the obligation contained in Article 5 to base measures on an assessment of risks. This approach would undermine the wording and object and purpose of the *SPS Agreement*. Canada notes that the Panel found that the European Communities had not provided any scientific evidence of an identifiable risk related to the hormones at issue when used for growth promotion purposes in accordance with good practice.[50] If there is no scientific evidence of an identifiable risk, and therefore no basis on which to adopt a measure to achieve a level of sanitary protection under the *SPS Agreement*, except for Article 5.7, then by definition, no SPS measure could be adopted that would not be more trade restrictive than required. In Canada's conclusion, applying the Panel's findings with respect to the six hormones at issue to the requirements of Article 5.6, the EC measures are more trade restrictive than required, and inconsistent with Article 5.6.

F. *Arguments by the European Communities - Appellee*

1. Article 2.2

79. The European Communities questions whether the statement of the Panel regarding Article 2.2 amounts to an issue of law covered in the Panel Report or a legal interpretation developed by the Panel in the sense of Article 17.6 of the DSU. Although the Panel declined to rule on Article 2.2 because of a legal interpretation reached by the Panel regarding the relationship between Articles 2 and 5 of the *SPS Agreement*, the refusal by the Panel to rule on Article 2.2 places this statement outside the scope of appellate review. The Panel did not address the substantive requirements of Article 2.2, and has not made the necessary findings on whether the scientific evidence submitted by the European Communities is sufficient. The European Communities agrees with the United States that nothing in the text of Articles 2, 3 and 5 of the *SPS Agreement* indicates that all of the obligations set out in Article 2 are subsumed under the provisions of Articles 3 and 5. From the factual, procedural and substantive points of view, the questions that need to be considered under Article 2.2 are different from those examined by the Panel under Articles 3.1, 5.1, 5.2 and 5.5 of the *SPS Agreement*. It appears to the European Communities that there is no "sufficient basis" in the Panel Report for the Appellate Body to rule on the claims of the United States in respect of Article 2.2. Moreover, the United States bases its claims on certain paragraphs of the Panel Report that are founded on a manifest misunderstanding or clear distortion of the facts, or inadequate reasoning by the Panel, as explained by the European Communities in its own appeal.

80. The European Communities submits that, should the Appellate Body examine the applicability of Article 2.2 of the *SPS Agreement*, it should also examine the applicability of Article 5.7, which is expressly

[50]Canada Panel Report, paras. 8.165 and 8.264.

referred to in Article 2.2. The European Communities believes that its measures are consistent with Article 2.2 of the *SPS Agreement*.

81. The European Communities observes that in its appeal, the United States does not discuss what constitutes "sufficient" scientific evidence. Since the concepts of "risk" and "risk assessment" in the *SPS Agreement* are not quantitative, but qualitative concepts, the word "sufficient" also cannot be taken to refer to the quantitative, but rather to the qualitative, aspects of the scientific evidence used by the regulatory authorities of a Member. The use of the words "scientific principles" in the same Article reinforces the view that Article 2.2 and the *SPS Agreement* in general do not require sanitary measures to be "based on" the "best" scientific evidence or the "weight" of available scientific evidence. The European Communities submits, therefore, that the real question is not whether the sanitary measure is "based on" the "best" science or the "preponderance" of science or whether there is conflicting science. Rather, the question is only whether the government maintaining a measure has a scientific basis for that measure.

2. Article 5.6

82. The European Communities also questions whether the statements of the Panel regarding Article 5.6 amount to an issue of law covered in the Panel Report or a legal interpretation developed by the Panel, for purposes of Article 17.6 of the DSU. Although the Panel's refusal to rule on Article 5.6 rests on a certain view of the Panel regarding the relationship between Articles 2 and 5 of the *SPS Agreement*, such a refusal places the matter outside the scope of appellate review. The European Communities submits that the Panel did not apply the substantive requirements of Article 5.6, and did not make the necessary factual findings that: first, the EC measures are more trade restrictive than required to achieve the EC's level of protection; secondly, there is another measure reasonably available taking into account technical and economic feasibility; and thirdly, this other measure both achieves the EC's level of sanitary protection and is significantly less trade restrictive. Finally, the European Communities argues that Canada and the United States base their claims on certain paragraphs of the Panel Report that are founded on a manifest misunderstanding or clear distortion of the facts or inadequate reasoning by the Panel, as the European Communities has explained in its appeal.

83. The European Communities is convinced that the EC measures are consistent with Article 5.6 of the *SPS Agreement*. According to the European Communities, the objective is to ensure that consumers are not exposed to any residues of hormones used for growth promotion purposes. The European Communities acknowledges that some hormones are present naturally and cannot be avoided. It also acknowledges that some hormones are administered to cattle for therapeutic and zootechnical purposes, purposes which are unavoidable and beneficial. However, the European Communities has decided that the exposure of its population to hormones above this level should be avoided, and that in particular, there should be a zero level of tolerance for hormones used for growth promotion purposes.

84. The European Communities has considered some possible alternatives to the prohibition of imports of bovine meat containing residues of hormones administered for growth promotion: first, the application of Maximum Residue Limits ("MRLs") to such meat; second, the application of some kind of control to all imports of meat to determine whether hormones had been administered for growth promotion purposes; and third, reliance on the exporters labelling their meat to indicate whether hormones had been administered for growth promotion purposes. According to the European Communities, however, none of the above alternative measures would achieve the specified level of protection.

G. *Arguments by the Third Participants*

1. Australia

85. Australia considers that the Panel erred in law in its general interpretations concerning the burden of proof under the *SPS Agreement*[51], and supports the arguments put forward by the European Communities. However, it is also contended by Australia that paragraphs 8.54 and 8.58 of the Canada Panel Report and paragraphs 8.51 and 8.55 of the US Panel Report present correct interpretations of the burden of proof and that the Panel has, in general, followed these correct interpretations in its legal reasoning and findings.

86. The conclusion reached by the Panel with regard to the temporal application of the *SPS Agreement* is also supported by Australia. However, Australia also recognizes the concerns raised by the European Communities and agrees that there is nothing in the *SPS Agreement* that could be interpreted to mean that measures already in place at the time the *SPS Agreement* came into force are necessarily inconsistent simply because the "preparatory and procedural obligations" provided in Article 5 may not have been met. On the other hand, Australia admits that nothing in the *SPS Agreement* suggests that such measures can escape application of key provisions, such as Articles 5.1 and 5.2.

87. The Panel's interpretation that the *SPS Agreement* "equates" the terms "conform to" and "based on" ignores, in Australia's view, the ordinary meaning of these terms in their context and fails to give effect to all the terms of the *SPS Agreement*. The Panel has ignored the significant fact that the *SPS Agreement* uses the expression "conform to" in both Article 3.2 and Article 2.4, i.e. in the two situations where rebuttable presumptions are established that certain measures are consistent with the *SPS Agreement* and/or the GATT 1994. Australia believes that the issue of whether a particular measure is "based on" an international standard, or "conforms to" such a standard, is something which can only be determined on a case-by-case basis.

88. The Panel failed to give effect to all the terms of the *SPS Agreement* by its treatment of the two options provided in Article 3.3. According to Australia, the Panel has ignored the differences in the wording of the two options, and their explicit identification as alternatives by the use of the word "or" in Article 3.3. This interpretation has resulted in the Panel concluding that both alternatives mean that a measure can only be justified under Article 3.3 if it meets the requirements of Article 5. In Australia's view, while a Member's determination under the first of these options must be "based on" an examination and evaluation of available scientific information "in conformity with" the relevant provisions of the *SPS Agreement*, there remains an important distinction between the two options which the Panel failed to recognize.

89. Australia also considers as erroneous the Panel's interpretation of "risk", specifically its use of the term "identifiable risk", which has no basis in the text of the *SPS Agreement*. What the Panel is required to examine under Articles 5.1 and 5.2 is whether the EC measure is "based on" a risk assessment, and not whether there was an "identifiable risk".

90. In discussing whether there is a need for a separate risk assessment for each individual substance, Australia draws particular attention to the wording of Article 5.1 providing for a risk assessment "as appropriate to the circumstances". This wording expressly recognizes that what constitutes an appropriate risk assessment may differ from case to case. In the view of Australia, the determination of whether a risk assessment is required for a particular individual substance should therefore be made on a case-by-case basis. The Panel recognized that in order to find an SPS measure inconsistent with Article 5.5 all elements of this provision need to be present[52] but the Panel, nevertheless, gave undue weight, in the view of Australia, to the significance of the distinction in the levels of protection. The Panel's reference to the

[51]US Panel Report, paras. 8.52-8.54; Canada Panel Report, paras. 8.55-8.57.

[52]US Panel Report, para. 8.174; Canada Panel Report, para. 8.177.

Appellate Body Report in *Japan - Alcoholic Beverages*[53] concerning the requirements of Article III:2 of the GATT 1994 was misleading and inappropriate.

91. Although Australia supports the view of the United States that the EC measures are inconsistent with Article 2.2 of the *SPS Agreement*, Australia does not believe there was any need for the Panel to make such a finding.

2. New Zealand

92. New Zealand refers to its third party submission to the Panel relating to Articles 2.2 and 5.6. New Zealand submits that since the Panel found that there was no scientific evidence that indicated that an identifiable risk arises from the use of any of the hormones at issue when used for growth promotion purposes in accordance with good practice, the Appellate Body should consider the applicability of Articles 2.2 and 5.6 of the *SPS Agreement* to the import ban.

3. Norway

93. Norway stresses that the *SPS Agreement* does not contain obligations to harmonize different levels of protection. The right of every Member to set its own level of protection is, according to Norway, an inherent right that has always been accepted by the GATT and now by the *WTO Agreement*. In the view of Norway, Members have a variety of options when deciding on their appropriate level of protection. They may decide to adopt a more lenient approach or a more stringent approach. Member A may decide to have a (close to) zero tolerance for deaths related to the usage of certain substances, while Member B accepts one death per million per year. This is entirely for Member A and Member B to decide. When, thereafter, each Member chooses the measure necessary to achieve its level of protection, that measure must comply with the basic obligations of Articles 2, 3 and 5 of the *SPS Agreement*. As long as the existence of a risk is established, the WTO is only concerned with the justification of the measure the Member chooses to apply to achieve the level of protection it has deemed appropriate. According to Norway, there is no requirement on that Member to come to the same conclusions concerning the evaluation of the available scientific evidence that other Members or international organizations may have reached.

94. On the issue of burden of proof, Norway argues that the Panel erred when it described Article 3.1 as the general rule, thus imposing an obligation on Members to harmonize their SPS measures. Article 3.1 clearly states that harmonization is merely an objective or option, by using the words "... on as wide a basis as possible". The "exceptions" to this objective are not limited to situations covered by Article 3.3. There are others, as can be seen from the words "... except as otherwise provided for in this Agreement, and in particular in paragraph 3". Norway submits that instead of designating one paragraph of Article 3 as a general rule and others as exceptions, the Panel should have read Article 3 within the context of Articles 2.2 and 2.3. In the view of Norway, where the SPS measure is identical for domestic and imported products, the general rule – as with all obligations – is that the complainant must present a *prima facie* case of violation. The requirement in Article 2.2 that measures be "necessary" does not alter the above. SPS measures are not exceptional measures, and the burden of proving that a measure is not necessary rests in the first instance with the complainant.

95. In respect of Article 5.5, Norway submits that it is the level of protection that is at issue, rather than the measure, which must "conform to" other parts of the *SPS Agreement*. It is for the complainant to prove that a decision on different levels of protection violates Article 5.5.

[53]Adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

III. Issues Raised in this Appeal

96. This appeal raises the following legal issues:

(a) Whether the Panel correctly allocated the burden of proof in this case;

(b) Whether the Panel applied the appropriate standard of review under the *SPS Agreement*;

(c) Whether, or to what extent, the precautionary principle is relevant in the interpretation of the *SPS Agreement*;

(d) Whether the provisions of the *SPS Agreement* apply to measures enacted before the date of entry into force of the *WTO Agreement*;

(e) Whether the Panel made an objective assessment of the facts pursuant to Article 11 of the DSU;

(f) Whether the Panel acted within the scope of its authority in its selection and use of experts, in granting additional third party rights to the United States and Canada and in making findings based on arguments not made by the parties;

(g) Whether the Panel correctly interpreted Articles 3.1 and 3.3 of the *SPS Agreement*;

(h) Whether the EC measures are "based on" a risk assessment within the meaning of Article 5.1 of the *SPS Agreement*;

(i) Whether the Panel correctly interpreted and applied Article 5.5 of the *SPS Agreement*; and

(j) Whether the Panel appropriately exercised "judicial economy" in not making findings on the consistency of the EC measures with Article 2.2 and Article 5.6 of the *SPS Agreement*.

IV. Allocating the Burden of Proof in Proceedings Under the *SPS Agreement*

97. The first general issue that we must address relates to the allocation of the burden of proof in proceedings under the *SPS Agreement*. The Panel appropriately describes this issue as one "of particular importance"[54], in view of the nature of disputes under that Agreement. Such disputes may raise multiple and complex issues of fact.

98. The Panel begins its analysis by setting out the general allocation of the burden of proof between the contending parties in any proceedings under the *SPS Agreement*. 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. This seems straightforward enough and is in conformity with our ruling in *United States - Shirts and Blouses*[55], which the Panel invokes and which embodies a rule applicable in any adversarial proceedings.

[54]US Panel Report, para. 8.48; Canada Panel Report, para. 8.51.

[55]Adopted 23 May 1997, WT/DS33/AB/R, p. 14.

99. The Panel, however, proceeds to make a general, unqualified, interpretative ruling that the *SPS Agreement* allocates the "evidentiary burden" to the Member imposing an SPS measure. To support this general statement, which renders the Panel's reference to our own ruling in *United States - Shirts and Blouses* little more than lip-service, the Panel first points to:

> ... the wording of many of the provisions contained in [the SPS] Agreement and in particular the first three words thereof: "*Members shall ensure* that ..." (e.g. Articles 2.2, 2.3, 5.1 and 5.6 of the SPS Agreement).[56]

100. The Panel next quotes Article 5.8 of the *SPS Agreement*, while parenthetically noting that this Article "relates more to transparency than to any requirement of legal justification".[57] Article 5.8 provides:

> When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.

101. Lastly, the Panel seeks support for its general interpretative ruling in Article 3.2 of the *SPS Agreement*, which establishes a presumption of consistency with relevant provisions of that Agreement and of the GATT 1994 for measures that conform to international standards, guidelines and recommendations. From this presumption, the Panel extracts a reverse inference that if a measure does *not* conform to international standards, the Member imposing such a measure must bear the burden of proof in any complaint of inconsistency with a provision of the *SPS Agreement*.[58]

102. We find the general interpretative ruling of the Panel to be bereft of basis in the *SPS Agreement* and must, accordingly, reverse that ruling. It does not appear to us that there is any necessary (i.e. logical) or other connection between the undertaking of Members to ensure, for example, that SPS measures are "applied only to the extent necessary to protect human, animal or plant life or health ..."[59], and the allocation of burden of proof in a dispute settlement proceeding. Article 5.8 of the *SPS Agreement* does not purport to address burden of proof problems; it does not deal with a dispute settlement situation. To the contrary, a Member seeking to exercise its right to receive information under Article 5.8 would, most likely, be in a pre-dispute situation, and the information or explanation it receives may well make it possible for that Member to proceed to dispute settlement proceedings and to carry the burden of proving on a *prima facie* basis that the measure involved is not consistent with the *SPS Agreement*. The Panel's last reason involves, quite simply, a *non-sequitur*. The converse or *a contrario* presumption created by the Panel does not arise. The presumption of consistency with relevant provisions of the *SPS Agreement* that arises under Article 3.2 in respect of measures that conform to international standards may well be an *incentive* for Members so to conform their SPS measures with such standards. It is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*.

[56]US Panel Report, para. 8.52; Canada Panel Report, para. 8.55.

[57]US Panel Report, para. 8.53; Canada Panel Report, para. 8.56.

[58]US Panel Report, para. 8.54; Canada Panel Report, para. 8.57.

[59]*SPS Agreement*, Article 2.2.

103. In initiating its discussion on the requirements of Articles 3.1 and 3.3 of the *SPS Agreement*, the Panel turns once more to allocating the burden of proof between the complaining parties and the defending party. The Panel states:

> One purpose of the SPS Agreement, as explicitly recognized in the preamble, is to promote the use of international standards, guidelines and recommendations. To that end, Article 3.1 imposes an obligation on all Members to base their sanitary measures on international standards except as otherwise provided for in the SPS Agreement, and in particular in Article 3.3 thereof. In this sense, Article 3.3 provides an *exception* to the general obligation contained in Article 3.1. Article 3.2, in turn, specifies that the complaining party has the burden of overcoming a presumption of consistency with the SPS Agreement in the case of a measure based on international standards. It thereby suggests by implication that when a measure is not so based, the burden is on the respondent to show that the measure is justified under the exceptions provided for in Article 3.3.
>
> We find, therefore, that once the complaining party provides a *prima facie* case (i) that there is an international standard with respect to the measure in dispute, and (ii) that the measure in dispute is *not* based on this standard, the burden of proof under Article 3.3 shifts to the defending party.[60] (underlining added)

104. The Panel relies on two interpretative points in reaching its above finding. First, the Panel posits the existence of a "general rule - exception" relationship between Article 3.1 (the general obligation) and Article 3.3 (an exception)[61] and applies to the *SPS Agreement* what it calls "established practice under GATT 1947 and GATT 1994" to the effect that the burden of justifying a measure under Article XX of the GATT 1994 rests on the defending party.[62] It appears to us that the Panel has misconceived the relationship between Articles 3.1, 3.2 and 3.3, a relationship discussed below[63], which is qualitatively different from the relationship between, for instance, Articles I or III and Article XX of the GATT 1994. Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement, that is, where a Member has projected for itself a higher level of sanitary protection than would be achieved by a measure based on an international standard. Article 3.3 recognizes the autonomous right of a Member to establish such higher level of protection, provided that that Member complies with certain requirements in promulgating SPS measures to achieve that level. The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an "exception". In much the same way, 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. It is also well to remember that a *prima facie* case is one which, in the absence of effective refutation by the

[60]US Panel Report, paras. 8.86 and 8.87; Canada Panel Report, paras. 8.89 and 8.90.

[61]US Panel Report, para. 8.86; Canada Panel Report, para. 8.89.

[62]US Panel Report, footnote 288; Canada Panel Report, footnote 393.

[63]Paras. 169-172 of this Report.

defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.[64]

105. Secondly, the Panel relies upon the reverse presumption or implication it discovered in Article 3.2 of the *SPS Agreement*. As already noted, we have been unable to find any basis for that implication or presumption.[65]

106. We believe, therefore, and so hold that the Panel erred in law both in its two interpretative points and its finding set out in paragraphs 8.86 and 8.87 of the US Panel Report and paragraphs 8.89 and 8.90 of the Canada Panel Report (quoted above).[66]

107. The legal interpretations developed and the findings set out above by the Panel appear to have been applied, *inter alia*, in the following paragraphs that have also been appealed by the European Communities:

> We recall the conclusions we reached above on burden of proof, in particular that the European Communities has, with respect to its measures which deviate from international standards, the burden of proving the existence of a risk assessment (and, derived therefrom, an identifiable risk) on which the EC measures in dispute are based. It is not, in this dispute, for the United States to prove that there is *no* risk.[67]
>
> ...
>
> We finally recall our findings reached above on the specific burden of proof under Article 3.3. In particular, we found that the burden of proving that the requirements imposed by Article 3.3 (*inter alia*, consistency with Article 5) are met, in order to justify a sanitary measure which deviates from an international standard, rests with the Member imposing that measure. Since the EC measures examined in this section (relating to all hormones in dispute other than MGA) are not based on existing international standards and need to be justified under the exceptions provided for in Article 3.3, the European Communities bears the burden of proving that the determination and application of its level of protection is consistent with Articles 5.4 to 5.6.[68]

108. To the extent that the Panel[69] purports to absolve the United States and Canada from the necessity of establishing a *prima facie* case showing the absence of the risk assessment required by Article 5.1, and the failure of the European Communities to comply with the requirements of Article 3.3, and to impose upon the European Communities the burden of proving the existence of such risk assessment and the consistency of its measures with Articles 5.4, 5.5 and 5.6 *without regard to whether or not the complaining parties had already established their prima facie case*, we consider and so hold that the Panel once more erred in law.

[64]Appellate Body Report, *United States - Shirts and Blouses*, adopted 23 May 1997, WT/DS33/AB/R, p. 14.

[65]Para. 102 of this Report.

[66]See para. 103 of this Report.

[67]US Panel Report, para. 8.151; Canada Panel Report, para. 8.154.

[68]US Panel Report, para. 8.165; Canada Panel Report, para. 8.168.

[69]US Panel Report, paras. 8.151 and 8.165; Canada Panel Report, paras. 8.154 and 8.168.

109. In accordance with our ruling in *United States - Shirts and Blouses*[70], the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each Article of the *SPS Agreement* addressed by the Panel, i.e., Articles 3.1, 3.3, 5.1 and 5.5. Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party's claim.[71]

V. The Standard of Review Applicable in Proceedings Under the *SPS Agreement*

110. The European Communities appeals from certain findings of the Panel[72] upon the ground that the Panel failed to apply an appropriate standard of review in assessing certain acts of, and scientific evidentiary material submitted by, the European Communities.[73] The European Communities claimed, more specifically, that:

> ... the panel erred in law in not according deference to the following elements of the EC measures:
>
> -the EC's decision to set and apply a level of sanitary protection higher than that recommended by Codex Alimentarius for the risks arising from the use of these hormones for growth promotion;
>
> -the EC's scientific assessment and management of the risk from the hormones at issue; and
>
> -the EC's adherence to the precautionary principle and its aversion to accepting any increased carcinogenic risk.
>
> The panel also erred in law because it:
>
> -assigned a high probative value to the scientific views presented by some of the five scientific experts chosen by it (and to the views of the technical expert appointed by Codex Alimentarius);
>
> -disregarded in effect or distorted the scientific evidence presented by the EC and its scientific advisors, and systematically considered the scientific views of the panel-appointed experts or even a minority of those experts, of higher probative value than the scientific evidence presented by the EC scientists;

[70]Adopted 23 May 1997, WT/DS33/AB/R, pp. 14-16.

[71]Our finding that the Panel erred in allocating the burden of proof generally to the Member imposing the measure, however, does not deal with the quite separate issue of whether the United States and Canada actually made a *prima facie* case of violation of each of the following Articles of the *SPS Agreement:* 3.1, 3.3, 5.1 and 5.5. See in this respect, footnote 180 of this Report.

[72]US Panel Report, paras. 8.124, 8.127, 8.133, 8.134, 8.145, 8.146, 8.194, 8.199, 8.213 and 8.255; Canada Panel Report, paras. 8.127, 8.130, 8.136, 8.137, 8.148, 8.149, 8.197, 8.202, 8.216 and 8.258.

[73]EC's appellant's submission, para. 140.

-based its legal interpretations and findings on a number of critical issues on the majority of scientific views presented by its own appointed experts, instead of limiting itself to examining whether the scientific evidence presented by the EC was based on "*scientific principles*" (as required by Article 2:2 [of the *SPS Agreement*]).[74]

111. In the view of the European Communities, the principal alternative approaches to the problem of formulating the "proper standard of review" so far as panels are concerned are two-fold. The first is designated as "*de novo* review". This standard of review would allow a panel complete freedom to come to a different view than the competent authority of the Member whose act or determination is being reviewed. A panel would have to "verify whether the determination by the national authority was _correct' both factually and procedurally".[75] The second is described as "deference". Under a "deference" standard, a panel, in the submission of the European Communities, should not seek to redo the investigation conducted by the national authority but instead examine whether the "procedure" required by the relevant WTO rules had been followed.[76]

112. Clearly referring only to an appropriate standard of review of *factual* determinations by the domestic authorities of a Member, the European Communities submits that the principle of deference has been embodied in Article 17.6(i) of the *Anti-Dumping Agreement*, which reads as follows:

17.6 In examining the matter referred to in paragraph 5:

(i)in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

113. The European Communities further urges that the above-quoted standard, which it describes as a "deferential _reasonableness' standard"[77] is applicable in "all highly complex factual situations, including the assessment of the risks to human health arising from toxins and contaminants"[78], and should have been applied by the Panel in the present case.

114. The first point that must be made in this connection, is that the *SPS Agreement* itself is silent on the matter of an appropriate standard of review for panels deciding upon SPS measures of a Member. Nor are there provisions in the DSU or any of the covered agreements (other than the *Anti-Dumping Agreement*) prescribing a particular standard of review. Only Article 17.6(i) of the *Anti-Dumping Agreement* has language on the standard of review to be employed by panels engaged in the "assessment of the facts of the matter". We find no indication in the *SPS Agreement* of an intent on the part of the

[74]EC's appellant's submission, para. 139.

[75]EC's appellant's submission, para. 122.

[76]EC's appellant's submission, para. 123.

[77]EC's appellant's submission, para. 128.

[78]EC's appellant's submission, para. 127.

Members to adopt or incorporate into that Agreement the standard set out in Article 17.6(i) of the *Anti-Dumping Agreement*. Textually, Article 17.6(i) is specific to the *Anti-Dumping Agreement*.[79]

115. The standard of review appropriately applicable in proceedings under the *SPS Agreement*, of course, must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.[80] To adopt a standard of review not clearly rooted in the text of the *SPS Agreement* itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that.

116. We do not mean, however, to suggest that there is at present no standard of review applicable to the determination and assessment of the facts in proceedings under the *SPS Agreement* or under other covered agreements. In our view, Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements. Article 11 reads thus:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution". (underlining added)

117. So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor "total deference", but rather the "objective assessment of the facts". Many panels have in the past refused to undertake *de*

[79]On the other hand, as suggested by the United States, we must note the *Decision on the Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, which states:

Ministers,

Decide as follows:

The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application. (underlining added)

This Ministerial Decision evidences that the Ministers were aware that Article 17.6 of the *Anti-Dumping Agreement* was applicable only in respect of that Agreement.

[80]See, for example, S.P. Croley and J.H. Jackson, "WTO Dispute Panel Deference to National Government Decisions, The Misplaced Analogy to the U.S.Chevron Standard-of-Review Doctrine", in E.-U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer, 1997) 185, p. 189; P.A. Akakwam, "The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations" (1996), 5:2 *Minnesota Journal of Global Trade* 277, pp. 295-296.

novo review[81], wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review. On the other hand, "total deference to the findings of the national authorities", it has been well said, "could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU".[82]

118. In so far as legal questions are concerned - that is, consistency or inconsistency of a Member's measure with the provisions of the applicable agreement - a standard not found in the text of the *SPS Agreement* itself cannot absolve a panel (or the Appellate Body) from the duty to apply the customary rules of interpretation of public international law.[83] It may be noted that the European Communities refrained from suggesting that Article 17.6 of the *Anti-Dumping Agreement* in its entirety was applicable to the present case. Nevertheless, it is appropriate to stress that here again Article 11 of the DSU is directly on point, requiring a panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...".

119. We consider, therefore, that the issue of failure to apply an appropriate standard of review, raised by the European Communities, resolves itself into the issue of whether or not the Panel, in making the above and other findings referred to and appealed by the European Communities, had made an "objective assessment of the matter before it, including *an objective assessment of the facts* ...". This particular issue is addressed (in substantial detail) below.[84] Here, however, we uphold the findings of the Panel appealed by the European Communities upon the ground of failure to apply either a "deferential reasonableness standard" or the standard of review set out in Article 17.6(i) of the *Anti-Dumping Agreement*.

VI. The Relevance of the Precautionary Principle in the Interpretation of the *SPS Agreement*

120. We are asked by the European Communities to reverse the finding of the Panel relating to the precautionary principle. The Panel's finding and its supporting statements are set out in the Panel Reports in the following terms:

> The European Communities also invokes the precautionary principle in support of its claim that its measures in dispute are based on a risk assessment. To the extent that this principle could be considered as part of customary international law *and* be used to interpret Articles 5.1 and 5.2 on the assessment of risks as a customary rule of interpretation of public international law (as that phrase is used in Article 3.2 of the DSU), we consider that this principle would not override the explicit wording of Articles 5.1 and 5.2 outlined above, in particular since the precautionary principle has been incorporated and given a specific meaning in Article 5.7 of the SPS Agreement. We note, however, that the European Communities has explicitly stated in this case that it is not invoking Article 5.7.

[81]Panel Report, *United States - Underwear*, adopted 25 February 1997, WT/DS24/R; Panel Report, *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, adopted 27 April 1993, BISD 40S/205; Panel Report, *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway,* adopted 27 April 1994, ADP/87; and Panel Report, *United States - Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada*, adopted 3 June 1987, BISD 34S/194.

[82]Panel Report, *United States - Underwear*, adopted 25 February 1997, WT/DS24/R, para. 7.10

[83]DSU, Article 3.2.

[84]Paras. 131-144 of this Report.

> We thus find that the precautionary principle cannot override our findings made above, namely that the EC import ban of meat and meat products from animals treated with any of the five hormones at issue for growth promotion purposes, in so far as it also applies to meat and meat products from animals treated with any of these hormones *in accordance with good practice*, is, from a substantive point of view, not *based on* a risk assessment.[85] (underlining added)

121. The basic submission of the European Communities is that the precautionary principle is, or has become, "a general customary rule of international law" or at least "a general principle of law".[86] Referring more specifically to Articles 5.1 and 5.2 of the *SPS Agreement*, applying the precautionary principle means, in the view of the European Communities, that it is not necessary for *all* scientists around the world to agree on the "possibility and magnitude" of the risk, nor for *all* or most of the WTO Members to perceive and evaluate the risk in the same way.[87] It is also stressed that Articles 5.1 and 5.2 do not prescribe a particular type of risk assessment and do not prevent Members from being cautious in their risk assessment exercise.[88] The European Communities goes on to state that its measures here at stake were precautionary in nature and satisfied the requirements of Articles 2.2 and 2.3, as well as of Articles 5.1, 5.2, 5.4, 5.5 and 5.6 of the *SPS Agreement*.[89]

122. The United States does not consider that the "precautionary principle" represents customary international law and suggests it is more an "approach" than a "principle".[90] Canada, too, takes the view that the precautionary principle has not yet been incorporated into the corpus of public international law; however, it concedes that the "precautionary approach" or "concept" is "an *emerging* principle of law" which may in the future crystallize into one of the "general principles of law recognized by civilized nations" within the meaning of Article 38(1)(c) of the *Statute of the International Court of Justice*.[91]

123. The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear.[92] We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.[93]

[85]US Panel Report, paras. 8.157 and 8.158; Canada Panel Report, paras. 8.160 and 8.161.

[86]EC's appellant's submission, para. 91.

[87]EC's appellant's submission, para. 88.

[88]EC's appellant's submission, para. 94.

[89]EC's appellant's submission, para. 98.

[90]United States' appellee's submission, para. 92.

[91]Canada's appellee's submission, para. 34.

[92]Authors like P. Sands, J. Cameron and J. Abouchar, while recognizing that the principle is still evolving, submit nevertheless that there is currently sufficient state practice to support the view that the precautionary principle is a principle of customary international law. See, for example, P. Sands, *Principles of International Environmental Law*, Vol. I (Manchester University Press 1995) p. 212; J. Cameron, "The Status of the Precautionary Principle in International Law", in J. Cameron and T. O'Riordan (eds.), *Interpreting the Precautionary Principle* (Cameron May, 1994) 262, p. 283; J.Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in D. Freestone and E. Hey (eds.), *The Precautionary Principle*

124. It appears to us important, nevertheless, to note some aspects of the relationship of the precautionary principle to the *SPS Agreement*. First, the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement. Secondly, the precautionary principle indeed finds reflection in Article 5.7 of the *SPS Agreement*. We agree, at the same time, with the European Communities, that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle. It is reflected also in the sixth paragraph of the preamble and in Article 3.3. These explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations. Thirdly, 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. Lastly, however, the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the *SPS Agreement*.

125. We accordingly agree with the finding of the Panel that the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the *SPS Agreement*.

in International Law (Kluwer, 1996) 29, p. 52. Other authors argue that the precautionary principle has not yet reached the status of a principle of international law, or at least, consider such status doubtful, among other reasons, due to the fact that the principle is still subject to a great variety of interpretations. See, for example, P. Birnie and A. Boyle, *International Law and the Environment* (Clarendon Press, 1992), p. 98; L. Gündling, "The Status in International Law of the Precautionary Principle" (1990), 5:1,2,3 *International Journal of Estuarine and Coastal Law* 25, p. 30; A. deMestral (et. al), *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Emond Montgomery, 1993), p. 765; D. Bodansky, in *Proceedings of the 85th Annual Meeting of the American Society of International Law* (ASIL, 1991), p. 415.

[93]In *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia),* the International Court of Justice recognized that in the field of environmental protection "... new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight ...". However, we note that the Court did not identify the precautionary principle as one of those recently developed norms. It also declined to declare that such principle could override the obligations of the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabcíkovo/Nagymaros System of Locks. See, *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia),* I.C.J. Judgement, 25 September 1997, paras. 140, 111-114. Not yet reported in the I.C.J. Reports but available on internet at http://www.icj-cij.org/idecis.htm.

VII. Application of the *SPS Agreement* to Measures Enacted Before 1 January 1995

126. Although Directives 81/602, 88/148 and 88/299 were enacted before the entry into force of the *WTO Agreement* on 1 January 1995, the Panel held[94] that, in line with Article 28 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")[95], the *SPS Agreement* should apply to the EC measures at issue because they continued to exist after 1 January 1995 and the *SPS Agreement* does not show any intention to limit its application to measures enacted after the entry into force of the *WTO Agreement*. The Panel stated that, to the contrary, several provisions of the *SPS Agreement*, and in particular Articles 2.2, 3.3, 5.6, 5.8 and 14 thereof, confirm the *SPS Agreement* does indeed apply to SPS measures which were enacted before 1 January 1995 but were maintained thereafter.[96]

127. The European Communities submits that this conclusion of the Panel is "too sweeping"[97] and that the *SPS Agreement* shows an intention to limit the temporal application of the Agreement, and in particular Articles 5.1 to 5.5 thereof, to measures enacted after the entry into force of the Agreement.

128. We addressed the issue of temporal application in our Report in *Brazil - Measures Affecting Desiccated Coconut* and concluded on the basis of Article 28 of the *Vienna Convention* that:

> Absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force.[98]

We agree with the Panel that the *SPS Agreement* would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the *SPS Agreement* reveals a contrary intention. We also agree with the Panel that the *SPS Agreement* does not reveal such an intention. The *SPS Agreement* does not contain any provision limiting the temporal application of the *SPS Agreement*, or of any provision thereof, to SPS measures adopted after 1 January 1995.[99] In the absence of such a provision, it cannot be assumed that central provisions of the *SPS Agreement*, such as Articles 5.1 and 5.5, do not apply to measures which were enacted before 1995 but which continue to be in force thereafter. If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly. Articles 5.1 and 5.5 do not distinguish between SPS measures adopted before 1 January 1995 and measures adopted since; the relevant implication is that they are intended to be applicable to both. Furthermore, other provisions of the *SPS Agreement*, such as Articles 2.2, 2.3, 3.3 and 5.6, expressly contemplate applicability to SPS measures that already existed on 1 January 1995. Finally, we observe, more generally, that Article XVI.4 of the *WTO Agreement* stipulates that:

[94]US Panel Report, para. 8.25; Canada Panel Report, para. 8.28.

[95]Done at Vienna, 23 May 1969, 1155 UNTS 331; (1969), 8 International Legal Materials, 679.

[96]US Panel Report, para. 8.26; Canada Panel Report, para. 8.29.

[97]EC's appellant's submission, para. 264.

[98]Adopted 20 March 1997, WT/DS22/AB/R, p. 15.

[99]Note that Article 14 of the *SPS Agreement* allows the *least-developed country Members* and other *developing country Members* to delay implementation of the provisions of that Agreement for a period of *five and two years*, respectively, following the date of entry into force of the *WTO Agreement*. Developing country Members may only delay application of the provisions of that Agreement where such application is prevented by lack of technical expertise, technical infrastructure or resources. This right to *defer* application of the provisions of the *SPS Agreement* concerns, however, both SPS measures existing before the entry into force of the *WTO Agreement* and SPS measures enacted since.

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").[100]

129. We are aware that the applicability, as from 1 January 1995, of the requirement that an SPS measure be based on a risk assessment to the many SPS measures already in existence on that date, may impose burdens on Members. It is pertinent here to note that Article 5.1 stipulates that SPS measures must be based on a risk assessment, *as appropriate to the circumstances*, and this makes clear that the Members have a certain degree of flexibility in meeting the requirements of Article 5.1.

130. We therefore affirm the finding of the Panel with regard to the temporal application of the *SPS Agreement*. We also note that the measure at issue in this appeal is, since 1 July 1997, no longer embodied in the pre-1995 Directives referred to above, but rather in Directive 96/22, which was elaborated and enacted *after* the entry into force of the *WTO Agreement*. None of the parties contests that the currently applicable measure is subject to the disciplines of Articles 5.1 and 5.5 of the *SPS Agreement*.

VIII. The Requirement of Objective Assessment of the Facts by a Panel Under Article 11 of the DSU

131. The European Communities claims that the Panel has disregarded or distorted the evidence submitted by the European Communities to the Panel, as well as the opinions and statements made by the scientific experts advising the Panel. It is claimed, in other words, that the Panel has failed to make an objective assessment of the facts as required by Article 11 of the DSU, and the European Communities asks us to reverse the findings so arrived at by the Panel.

132. Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel. Findings of fact, as distinguished from legal interpretations or legal conclusions, by a panel are, in principle, not subject to review by the Appellate Body. The determination of whether or not a certain event did occur in time and space is typically a question of fact; for example, the question of whether or not Codex has adopted an international standard, guideline or recommendation on MGA is a factual question. Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question. Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.

[100]With the exception of the measures taken by a Member under specific mandatory legislation referred to in paragraph 3(a) of the language incorporating the GATT 1994 into the *WTO Agreement*.

133. The question which then arises is this: when may a panel be regarded as having failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts before it? Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. In the present appeal, the European Communities repeatedly claims that the Panel disregarded or distorted or misrepresented the evidence submitted by the European Communities and even the opinions expressed by the Panel's own expert advisors. The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel.[101] A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.

134. It is, accordingly, incumbent upon us to examine the claims of the European Communities that the Panel here disregarded or distorted at least some of the evidence submitted to it.

A. *Evidence with Regard to MGA*

135. According to the European Communities, the Panel's finding that the experts advising the Panel have stated on several occasions that they are not aware of any publicly available scientific studies that evaluate the safety of MGA[102] is manifestly not true.[103] The Panel cited only two of its experts (Dr. Ritter and Dr. McLean) and the statements of these two scientists do not entirely support the Panel's conclusion. Furthermore, the Panel did not mention that Dr. André and Dr. Lucier, two other experts advising the Panel, had respectively said that MGA is a "real risk" and that MGA is an "extraordinarily potent progestant", that is "about 30 times more potent than progesterone and orally active".[104] We note that Dr. Ritter clearly stated with regard to MGA that he had "no information other than of a proprietary nature which [he] did not use"[105] and that Dr. McLean stated he had made no comment in his submission about MGA "because there hasn't been a large amount of data package available".[106] These two statements tend to support the Panel's conclusion. It is true that the Panel does not refer to the statements by Dr. Lucier and Dr. André. However, these statements do not contradict the Panel's conclusion that there is no publicly available study on the safety of MGA. Furthermore, while the Panel could have made a reference to and an evaluation of the statements by Dr. André and Dr. Lucier concerning MGA, it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings. We do not think that the Panel's silence on the statements of Dr. André and Dr. Lucier constitutes a distortion or disregard of evidence.

[101]It might be asked whether the European Communities did not merely intend to use "disregard" and "distortion" as unusually forceful synonyms for "misapprehend" or "misappreciation". It is not, however, clear that the European Communities did so intend, considering among other things the marked frequency with which "disregard" and "distortion" were used.

[102]US Panel Report, para. 8.255; Canada Panel Report, para. 8.258.

[103]EC's appellant's submission, para. 168.

[104]EC's appellant's submission, para. 170, quoting Annex to the US and Canada Panel Reports, para. 852.

[105]Annex to the US and Canada Panel Reports, para. 352.

[106]Annex to the US and Canada Panel Reports, para. 354 .

136. The European Communities argues that the Panel failed to request the submission of data on MGA and contends that this failure constituted a violation of Article 11 of the DSU. However, we see nothing in Article 11 to suggest that there is an obligation on the Panel to gather data relating to MGA and that it was therefore required to request the submission of this data.

137. Furthermore, the European Communities states that the Panel arbitrarily disregarded all the information concerning MGA that the European Communities had supplied to the Panel. The information here referred to are studies and reports of the IARC on hormones, including progestins, a category of substances to which MGA is said to belong. However, we note that the Panel did not simply ignore the IARC studies and reports but rather had indicated it did not consider them to be relevant because it found that a risk assessment needs to be carried out for each individual substance.[107]

B. *Evidence with Regard to the Five Other Hormones*

138. With regard to the five other hormones in dispute, the European Communities contends that the Panel manifestly distorted the scientific evidence presented by the European Communities and eliminated dissenting scientific views of its own experts in an attempt to make the desired result fit the scientific record.[108] First, the European Communities submits[109] that the Panel incorrectly quotes some of the statements of Dr. Lucier and totally ignores other more relevant statements he made.[110] We note that the Panel did indeed quote Dr. Lucier incorrectly. The Panel wrongly interpreted Dr. Lucier's statement in paragraph 819 of the Annex as meaning that the 0 to 1 in a million risk is caused by the *total amount of oestrogens in treated meat*. It is clear that Dr. Lucier stated that this risk is caused by the small fraction of oestrogens that is *added for growth promotion purposes*. However, this mistake on the part of the Panel in interpreting Dr. Lucier's statement does not constitute a *deliberate* disregard of evidence or *gross* negligence amounting to bad faith. The Panel also failed to refer to certain other statements made by Dr. Lucier. It seems to us that these statements either merely clarify the statement discussed above or are of a general nature. The Panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly. The same thing may be said with regard to the claim by the European Communities that the Panel failed to quote certain statements by Dr. Ritter and Dr. McLean.[111]

139. Second, it is claimed that the Panel manifestly distorted the views of Dr. André when it said that he did not contest the statements made by the other Panel experts on the safety of the hormones in dispute.[112] To the contrary, according to the European Communities, the views expressed by Dr. André support the scientific opinions presented by the EC scientists.[113] Whether or not the views of Dr. André support the statements made by the other Panel experts or the opinions expressed by the EC scientists may be an issue of fact; it does require some technical expertise to deal with it. However, even if the Panel has interpreted

[107]US Panel Report, para. 8.257; Canada Panel Report, para. 8.260. The Panel pointed out that with respect to the five other hormones in dispute, JECFA, Codex and the European Communities itself have conducted or invoked risk assessments for each individual substance. Furthermore, the Panel referred to the paper presented at the 1995 EC Scientific Conference by J. Bridges and O. Bridges on "Hazards of Growth Promoting Agents and Strategies of Risk Assessment" (Conference Proceedings, p. 250). US Panel Report, para. 8.260; Canada Panel Report, para. 8.263.

[108]EC's appellant's submission, para. 350.

[109]EC's appellant's submission, para. 347.

[110]See, in particular, footnote 331 of the US Panel Report and footnote 437 of the Canada Panel Report.

[111]See the statements of Dr. Ritter in paras. 322, 743 and 782, and the statement of Dr. McLean in para. 824, of the Annex to the US and Canada Panel Reports.

[112]See footnote 348 of the US Panel Report and footnote 455 of the Canada Panel Report.

[113]See, in particular, paras. 6.99 to 6.101 of the US Panel Report and paras. 6.98 to 6.100 of the Canada Panel Report.

the views of Dr. André incorrectly, we see no reason, and no reason was advanced, to consider this mistake as a *deliberate disregard* or *distortion* of evidence.

140. Third, it is claimed that the Panel manifestly distorted the scientific evidence by considering that the 1995 EC Scientific Conference amounted to a risk assessment in the sense of Articles 5.1-5.2. However, we note that the Panel does not state that the 1995 EC Conference amounted to a risk assessment. The Panel includes this Conference in the listing of scientific evidence concerning the hormones at issue referred to by the European Communities.[114] With regard to the reports mentioned in this list, the Panel states that several of these reports appear to meet the minimum requirements of a risk assessment, referring to the Lamming Report and the 1988 and 1989 JECFA Reports.[115] The Panel does not, however, refer to the 1995 EC Conference. The Panel discusses the scientific conclusions to be drawn from the 1995 EC Scientific Conference but this does not amount to designating the Conference as a risk assessment.[116]

141. Fourth, the European Communities contends that the distinction made by the Panel between studies that generally relate to the hormones in dispute and studies that specifically address residues in food of these hormones when used for growth promotion purposes is a distinction devised by the Panel for the sole purpose of rejecting the relevance of the 1987 IARC Monographs in this case and amounts to a distortion of relevant scientific evidence.[117] We note, however, that the Panel did consider the 1987 IARC Monographs but held that they could not be regarded as part of a risk assessment for the hormones at issue because the Monographs do not address the carcinogenic potential of these hormones when used specifically for growth promotion purposes or with respect to residue levels comparable to those present after such use[118], or the potential for adverse effects arising from the presence *in food* of residues of the hormones in dispute or from residue levels comparable to those present in food. The Panel's distinction between general and specific studies and its treatment of the 1987 IARC Monographs does not, therefore, appear arbitrary. Furthermore, we note that the Panel concluded, in the alternative, that the Monographs have been taken into account in, and do not contradict, the other studies referred to by the European Communities, in particular the 1988 and 1989 JECFA Reports.[119] We believe that the Panel's treatment of the 1987 IARC Monographs does not amount to a distortion of evidence.

142. Fifth, the European Communities submits that the Panel made no attempt whatsoever to discuss "the scientific views and evidence presented by the other EC scientists" and therefore violated Article 11 of the DSU.[120] It is our understanding that the European Communities refers here to the articles and opinions of individual scientists that are included in the Panel's list of scientific evidence referred to by the European Communities.[121] We note that, contrary to what the European Communities claims, the Panel does discuss these articles and opinions of individual scientists. The Panel Report included a summary discussion of these articles and opinions.[122] However, as the Panel explains, the scientific evidence included in these

[114]US Panel Report. para. 8.108; Canada Panel Report, para 8.111. The 1995 EC Conference Proceedings were submitted by the European Communities itself as annexes to its first submission to the Panel in both the US and Canada proceedings.

[115]US Panel Report, para. 8.111; Canada Panel Report, para. 8.114.

[116]US Panel Report, para. 8.123; Canada Panel Report, para. 8.126.

[117]EC's appellant's submission, para. 368.

[118]US Panel Report, para. 8.127; Canada Panel Report, para. 8.130.

[119]US Panel Report, para. 8.129; Canada Panel Report, para. 8.132.

[120]EC's appellant's submission, para. 380.

[121]US Panel Report, para. 8.108; Canada Panel Report, para. 8.111.

[122]US Panel Report, para. 8.130; Canada Panel Report, para. 8.133. The Panel itself refers to some of the articles and opinions in paras. 4.131-4.136 and 4.180 of the US Panel Report, and paras. 4.154-4.166 of the Canada Panel Report.

articles and opinions relates to the carcinogenic or genotoxic potential of entire categories of hormones or the hormones at issue in general; not when used specifically for growth promotion purposes or with respect to residue levels comparable to those present in meat after such use. In our opinion, the Panel's treatment of the articles and opinions of individual scientists, like its treatment of the 1987 IARC Monographs, does not amount to a distortion of evidence.

C. *Evidence with Regard to the Issue of Control*

143. With regard to the issue of control, the European Communities contends that the Panel failed to take into account the evidence submitted by the European Communities[123] and ignored statements made by some of its own experts.[124] We observe that the Panel did indeed not explicitly refer to all the evidence regarding the issue of control before it. The Panel had found that the risks related to the general problems of control should not be taken into account in risk assessment[125] and accordingly did not refer extensively to the evidence regarding the issue of control. Furthermore, we note that the Panel, subsequently and in the alternative, concluded that even if the issue of control, and the evidence relating to that issue, could be taken into account, the European Communities had not supplied *convincing* evidence. The Panel, it appears, excluded that evidence on the *legal ground* of non-relevancy; as will be seen later, the Panel erred in law in holding the evidence non-relevant. Nevertheless, it did examine the evidence.[126]

144. The European Communities also claims that the Panel incorrectly quoted the statements of its experts.[127] Referring to a number of specific statements[128], the Panel stated that the experts advising the Panel made clear that the potential for abuse under a regime where the hormones in dispute are allowed under specified conditions and under the current regime where they are banned, would be comparable. The European Communities submits that in the statements referred to by the Panel, the experts either explicitly stated they were speculating or added strong reservations to their opinions. After reading these statements carefully, we come to the conclusion that the Panel did not in fact represent the opinions of its experts accurately. However, this mistake does not amount to the egregious disregarding or distorting of evidence before the Panel.

D. *Evidence on Article 5.5*

145. The European Communities claims that in finding that the difference in its levels of protection in respect of five of the hormones at issue and in respect of carbadox and olaquindox is arbitrary or

[123]The European Communities contends that it submitted convincing specific evidence to the Panel that control would be more difficult under a regime where the hormones in dispute were allowed (under specific conditions of use) than under the current EC regime where the hormones in dispute are banned. It also contends that it submitted clear evidence to the Panel, specifying the risks for human health that the inadequate control of these hormones can pose and that in the United States and Canada there were instances in which the MRL's were not respected. Finally the European Communities submitted evidence relating the practical and technical difficulties that are specific to control of hormones. EC's appellant's submission, paras. 403-433.

[124]EC's appellant's submission, para. 416. The European Communities submits that, for example, Dr. André's reference to misuse in France (see para. 168 of the Annex to the US and Canada Panel Reports) and Dr. McLean's statement on the difficulty of controlling treatment of animals (see para. 474 of the Annex to the US and Canada Panel Reports) were not taken into account by the Panel.

[125]US Panel Report, para. 8.146; Canada Panel Report, para. 8.149.

[126]US Panel Report, para. 8.146; Canada Panel Report, para. 8.149.

[127]EC's appellant's submission, para. 419.

[128]US Panel Report, footnote 362; Canada Panel Report, footnote 469.

unjustifiable[129], the Panel did not take into account the evidence before it.[130] We note that the Panel considered in detail each of the arguments and related evidence referred to by the European Communities on this particular point.[131] Although the Panel did not agree with the arguments advanced by the European Communities, we do not believe that in doing so, the Panel arbitrarily ignored or manifestly distorted the evidence before it. We deal with these arguments below in some detail.[132]

IX. Certain Procedures Adopted by the Panel

A. *The Selection and Use of Experts*

[129]US Panel Report, para. 8.238; Canada Panel Report, para. 8.241.

[130]The European Communities argues that it had advanced six reasons why this distinction is not arbitrary or unjustifiable but the Panel rejected all these reasons, and in doing so, it failed to take into account the evidence before it. The reasons advanced by the European Communities were the following: first, that carbadox and olaquindox are not hormones and have a different mode of action; second, that carbadox and olaquindox act as growth promoters by combating the development of bacteria; third, that carbadox and olaquindox are only available in prepared feedstuffs in predetermined dosages; fourth, that there are no alternatives to carbadox and olaquindox; fifth, that carbadox cannot be abused; and sixth, that carbadox is used in very small quantities and is hardly absorbed. EC's appellant's submission, paras. 529-548.

[131]US Panel Report, paras. 8.231-8.238; Canada Panel Report, paras. 8.234-8.240.

[132]See paras. 227-235 of this Report.

146. The European Communities considers that in its selection and use of experts, the Panel has violated Article 11.2 of the *SPS Agreement* and Articles 11, 13.2 and Appendix 4 of the DSU.[133] We note that the Panel decided to request the opinion of experts on certain scientific and other technical matters raised by the parties to the dispute, and rather than establishing an experts review group, the Panel considered it more useful to leave open the possibility of receiving a range of opinions from the experts in their individual capacity. The Panel stresses, among other things, that:

> We considered, however, that neither Article 11.2 of the SPS Agreement nor Article 13.2 of the DSU limits our right to seek information from *individual* experts as provided for in Article 11.2, first sentence, of the SPS Agreement and Articles 13.1 and 13.2, first sentence, of the DSU.[134]

147. We agree with the Panel. Both Article 11.2 of the *SPS Agreement* and Article 13 of the DSU enable panels to seek information and advice as they deem appropriate in a particular case. Article 11.2 of the *SPS Agreement* states:

> In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group. (underlining added)

Article 13 of the DSU provides, in relevant part:

> 1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate ...
>
> 2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to the dispute, a panel *may* request an advisory report in writing from an experts review group ... (underlining added)

We find that in disputes involving scientific or technical issues, neither Article 11.2 of the *SPS Agreement,* nor Article 13 of the DSU prevents panels from consulting with individual experts. Rather, both the *SPS Agreement* and the DSU leave to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate.

[133]EC's appellant's submission, para. 587.

[134]US Panel Report, para. 8.7; Canada Panel Report, para. 8.7.

148. Both Article 11.2 of the *SPS Agreement* and Article 13.2 of the DSU require panels to consult with the parties to the dispute during the selection of the experts. However, it is not claimed by any of the participants in this appeal that the Panel did not consult with them when appointing the experts. Moreover, it is uncontested that the experts have been selected in accordance with procedures on which all the participants have previously agreed.[135] It is similarly uncontested that, among the experts consulted by the Panel, there are nationals from each of the parties to the dispute. The rules and procedures set forth in Appendix 4 of the DSU apply in situations in which expert review groups have been established. However, this is not the situation in this particular case. Consequently, once the panel has decided to request the opinion of individual scientific experts, there is no legal obstacle to the panel drawing up, in consultation with the parties to the dispute, *ad hoc* rules for those particular proceedings.

149. We conclude, therefore, that in its selection and use of experts, the Panel has not acted inconsistently with Articles 11, 13.2 and Appendix 4 of the DSU and Article 11.2 of the *SPS Agreement*.

B. *Additional Third Party Rights to the United States and Canada*

150. The European Communities contends that, notwithstanding its protest that these decisions affected its rights of defence, the Panel took a number of decisions granting additional third party rights to Canada and the United States which are not justified by Article 9.3 of the DSU, are inconsistent with Articles 7.1, 7.2, 18.2 and 10.3 thereof, and were not granted to the other third parties.[136] We recall that the European Communities refers to the following decisions of the Panel: first, to hold a joint meeting with scientific experts; second, to give access to all of the information submitted in the United States' proceeding to Canada; third, to give access to all of the information submitted in the Canadian proceeding to the United States; and fourth, to invite the United States to observe and make a statement at the second substantive meeting in the proceeding initiated by Canada.

151. Article 9.3 of the DSU reads as follows:

> If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

After examining the procedural course of the two disputes, we consider that four aspects should be underlined. First, both proceedings dealt with the same matter. Second, all the parties to both disputes agreed that the same panelists would serve on both proceedings. Third, although the proceeding initiated by Canada started several months after the proceeding started by the United States, the Panel managed to finish the Panel Reports at the same time. Fourth, given the fact that the same panelists were conducting two proceedings dealing with the same matter, neither Canada nor the United States were ordinary third parties in each other's complaint.

152. With respect to the decision of the Panel to hold a joint meeting with scientific experts, the Panel explains as follows:

> Prior to our meeting with scientific experts, we decided to hold that meeting jointly for both this Panel, requested by Canada, and the parallel panel requested by the United States. This decision stemmed from the similarities of the two cases (the same EC measures are at issue and both cases are dealt

[135]US Panel Report, paras. 6.1-6.10; Canada Panel Report, paras. 6.1-6.9.

[136]EC's appellant's submission, paras. 605 and 612.

> with by the same panel members), our decision to use the same scientific experts in both cases and the fact that we had already decided to invite Canada and the United States to participate in the meeting with scientific experts in each of the two cases. In addition, we considered that, from a practical perspective, there was a need to avoid repetition of arguments and/or questions at our meetings with the scientific experts. The European Communities objected to this decision arguing that one joint meeting with experts, instead of two separate meetings, was likely to affect its procedural rights of defence. Where it made precise claims of prejudice to its rights of defence, we took corrective action.[137]

We consider the explanation of the Panel quite reasonable, and its decision to hold a joint meeting with the scientific experts consistent with the letter and spirit of Article 9.3 of the DSU. Clearly, it would be an uneconomical use of time and resources to force the Panel to hold two successive but separate meetings gathering the same group of experts twice, expressing their views twice regarding the same scientific and technical matters related to the same contested EC measures. We do not believe that the Panel has erred by addressing the EC procedural objections only where the European Communities could make a precise claim of prejudice. It is evident to us that a procedural objection raised by a party to a dispute should be sufficiently specific to enable the panel to address it.[138]

153. The decision of the Panel to use and provide all information to the parties in both disputes was taken in view of its previous decision to hold a joint meeting with the experts.[139] The European Communities asserts that it cannot see how providing information in one of the proceedings to a party in the other helps to harmonize timetables.[140] We can see a relation between timetable harmonization within the meaning of Article 9.3 of the DSU and economy of effort. In disputes where the evaluation of scientific data and opinions plays a significant role, the panel that is established later can benefit from the information gathered in the context of the proceedings of the panel established earlier. Having access to a common pool of information enables the panel and the parties to save time by avoiding duplication of the compilation and analysis of information already presented in the other proceeding.[141] Article 3.3 of the DSU recognizes the importance of avoiding unnecessary delays in the dispute settlement process and states that the prompt settlement of a dispute is essential to the effective functioning of the WTO. In this particular case, the Panel tried to avoid unnecessary delays, making an effort to comply with the letter and spirit of Article 9.3 of the DSU. Indeed, as noted earlier, despite the fact that the Canadian proceeding was initiated several months later than that of the United States, the Panel managed to finish both Panel Reports at the same time.

154. Regarding the participation of the United States in the second substantive meeting of the Panel requested by Canada, the Panel states:

[137]Canada Panel Report, para. 8.18. See also US Panel Report, para. 8.14.

[138]Furthermore, the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling.

[139]US Panel Report, para. 8.15; Canada Panel Report, para. 8.19.

[140]EC's appellant's submission, para. 610.

[141]Moreover, in the proceeding initiated by Canada, the European Communities made references to materials that it had previously submitted in the proceeding initiated by the United States. Canada's appellee's submission, para. 216.

> This decision was, *inter alia*, based on the fact that our second meeting was held the day after our joint meeting with the scientific experts and that the parties to this dispute would, therefore, most likely comment on, and draw conclusions from, the evidence submitted by these experts to be considered in both cases. Since in the panel requested by the United States the second meeting was held before the joint meeting with scientific experts, we considered it appropriate, in order to safeguard the rights of the United States in the proceeding it requested, to grant the United States the opportunity to observe our second meeting in this case and to make a brief statement at the end of that meeting.[142]

The explanation of the Panel appears reasonable to us. If the Panel had not given the United States an opportunity to participate in the second substantive meeting of the proceedings initiated by Canada, the United States would not have had the same degree of opportunity to comment on the views expressed by the scientific experts that the European Communities and Canada enjoyed. Although Article 12.1 and Appendix 3 of the DSU do not specifically require the Panel to grant this opportunity to the United States, we believe that this decision falls within the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law. In this regard, we note that in *European Communities - Bananas*[143], the panel considered that particular circumstances justified the grant to third parties of rights somewhat broader than those explicitly envisaged in Article 10 and Appendix 3 of the DSU. We conclude that, in the case before us, circumstances justified the Panel's decision to allow the United States to participate in the second substantive meeting of the proceedings initiated by Canada.

C. *The Difference Between Legal Claims and Arguments*

155. Arguing that panels are not entitled to make findings beyond what has been requested by the parties, the European Communities asserts that the Panel has erred by basing the main part of its reasoning on Article 5.5 of the *SPS Agreement* on a claim that the complainants had not made.[144] According to the European Communities, the complainants did not complain of a supposed difference of treatment between artificially added or exogenous natural and synthetic hormones when used for growth promotion purposes compared with the naturally present endogenous hormones in untreated meat and other foods (such as milk, cabbage, broccoli or eggs). The European Communities states that nowhere in the sections of the Panel Reports summarising the arguments on Article 5.5 is there any mention of such an argument.

156. Considering that in the request for the establishment of a panel in the proceeding initiated by the United States[145], as well as in the proceeding started by Canada[146], both complainants have included a claim that the EC ban is inconsistent with Article 5 of the *SPS Agreement,* we believe that the objection of the European Communities overlooks the distinction between legal claims made by the complainant and arguments used by that complainant to sustain its legal claims. In *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* we said:

> We stated ... in *Brazil - Desiccated Coconut* that all claims must be included in the request for establishment of a panel in order to come within the panel's

[142]Canada Panel Report, para. 8.20.

[143]Adopted 25 September 1997, WT/DS27/AB/R.

[144]EC's appellant's submission, paras. 495 and 594.

[145]WT/DS26/6, 25 April 1996.

[146]WT/DS48/5, 17 September 1996.

> terms of reference, based on the practice of panels under the GATT 1947 and the Tokyo Round Codes. That past practice required that a claim had to be included in the documents referred to, or contained in, in the terms of reference in order to form part of the "matter" referred to a panel for consideration. Following both this past practice and the provisions of the DSU, in *European Communities - Bananas*, we observed that there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties as a case proceeds.[147] (footnotes omitted)

Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration. A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute. Given that in this particular case both complainants claimed that the EC measures were inconsistent with Article 5.5 of the *SPS Agreement*, we conclude that the Panel did not make any legal finding beyond those requested by the parties.

X. The Interpretation of Articles 3.1 and 3.3 of the *SPS Agreement*

157. The European Communities appeals from the conclusion of the Panel that the European Communities, by maintaining SPS measures which are not based on existing international standards without justification under Article 3.3 of the *SPS Agreement*, has acted inconsistently with the requirements contained in Article 3.1 of that Agreement.

[147] Adopted 16 January 1998, WT/DS50/AB/R, para. 88.

158. It will be seen below that the Panel is actually saying that the European Communities acted inconsistently with the requirements of both Articles 3.1 and 3.3 of the *SPS Agreement*, a position that flows from the Panel's view of a supposed "general rule - exception" relationship between Articles 3.1 and 3.3, a view we have indicated we do not share.[148]

159. The above conclusion of the Panel has three components: first, international standards, guidelines and recommendations exist in respect of meat and meat products derived from cattle to which five of the hormones involved have been administered for growth promotion purposes; secondly, the EC measures involved here are not based on the relevant international standards, guidelines and recommendations developed by Codex, because such measures are not in conformity with those standards, guidelines and recommendations; and thirdly, the EC measures are "not justified under", that is, do not comply with the requirements of Article 3.3. *En route* to its above-mentioned conclusion, the Panel developed three legal interpretations, which have all been appealed by the European Communities and which need to be addressed: the first relates to the meaning of "based on" as used in Article 3.1; the second is concerned with the relationship between Articles 3.1, 3.2 and 3.3 of the *SPS Agreement*; and the third relates to the requirements of Article 3.3 of the *SPS Agreement*. As may be expected, the Panel's three interpretations are intertwined.

A. *The Meaning of "Based On" as Used in Article 3.1 of the SPS Agreement*

160. Article 3.1 provides:

> To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

161. Addressing the meaning of "based on", the Panel constructs the following interpretations:

> The SPS Agreement does not explicitly define the words *based on* as used in Article 3.1. However, Article 3.2, which introduces a presumption of consistency with both the SPS Agreement and GATT for sanitary measures which *conform to* international standards, equates measures *based on* international standards with measures which *conform to* such standards. Article 3.3, in turn, explicitly relates the definition of sanitary measures *based on* international standards to the level of sanitary protection achieved by these measures. Article 3.3 stipulates the conditions to be met for a Member to enact or maintain certain sanitary measures which are *not* based on international standards. It applies more specifically to measures "which result in a *higher level* of sanitary ... protection than would be achieved by measures based on the relevant international standards" or measures "which result in a *level* of sanitary ... protection *different* from that which would be achieved by measures based on international standards". One of the determining factors in deciding whether a measure is *based on* an international standard is, therefore, the level of protection that measure achieves. According to Article 3.3

[148] See paras. 104 and 106 of this Report.

> all measures which *are* based on a given international standard should in principle achieve the *same* level of sanitary protection. Therefore, if an international standard reflects a specific level of sanitary protection and a sanitary measure implies a *different* level, that measure cannot be considered to be *based on* the international standard.

We find, therefore, that for a sanitary measure to be *based on* an international standard in accordance with Article 3.1, that *measure* needs to reflect the same level of sanitary protection as the *standard*. In this dispute a comparison thus needs to be made between the level of protection reflected in the EC measures in dispute and that reflected in the Codex standards for each of the five hormones at issue.[149] (underlining added)

162. We read the Panel's interpretation that Article 3.2 "equates" measures "based on" international standards with measures which "conform to" such standards, as signifying that "based on" and "conform to" are identical in meaning. The Panel is thus saying that, henceforth, SPS measures of Members *must* "conform to" Codex standards, guidelines and recommendations.

163. We are unable to accept this interpretation of the Panel. In the first place, the ordinary meaning of "based on" is quite different from the plain or natural import of "conform to". A thing is commonly said to be "based on" another thing when the former "stands" or is "founded" or "built" upon or "is supported by" the latter.[150] In contrast, much more is required before one thing may be regarded as "conform[ing] to" another: the former must "comply with", "yield or show compliance" with the latter. The reference of "conform to" is to "correspondence in form or manner", to "compliance with" or "acquiescence", to "follow[ing] in form or nature".[151] A measure that "conforms to" and incorporates a Codex standard is, of course, "based on" that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure.

164. In the second place, "based on" and "conform to" are used in different articles, as well as in differing paragraphs of the same article. Thus, Article 2.2 uses "based on", while Article 2.4 employs "conform to". Article 3.1 requires the Members to "base" their SPS measures on international standards; however, Article 3.2 speaks of measures which "conform to" international standards. Article 3.3 once again refers to measures "based on" international standards. The implication arises that the choice and use of different words in different places in the ***SPS Agreement*** are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement.[152] Canada has suggested the use of different terms was "accidental" in this case, but has offered no convincing argument to support its suggestion. We do not believe this suggestion has overturned the inference of deliberate choice.

165. In the third place, the object and purpose of Article 3 run counter to the Panel's interpretation. That purpose, Article 3.1 states, is "[t]o harmonize [SPS] measures on as wide a basis as possible ...". The preamble of the ***SPS Agreement*** also records that the Members "[d]esir[e] to *further the use of harmonized [SPS] measures between Members* on the basis of international standards, guidelines and recommendations developed by the relevant international organizations ...". (emphasis added) Article 12.1

[149]US Panel Report, paras. 8.72 and 8.73; Canada Panel Report, paras. 8.75 and 8.76.

[150]L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I, p. 187.

[151]L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I, p. 477.

[152]Appellate Body Report, *United States - Underwear*, adopted 25 February 1997, WT/DS24/AB/R, p. 17.

created a Committee on Sanitary and Phytosanitary Measures and gave it the task, *inter alia*, of "furtherance of its objectives, in particular with respect to harmonization" and (in Article 12.2) to "encourage the use of international standards, guidelines and recommendations by all Members". It is clear to us that harmonization of SPS measures of Members on the basis of international standards is projected in the Agreement, as a *goal*, yet to be realized *in the future*. To read Article 3.1 as requiring Members to harmonize their SPS measures *by conforming those measures with international standards*, guidelines and recommendations, *in the here and now*, is, in effect, to vest such international standards, guidelines and recommendations (which are by the terms of the Codex *recommendatory* in form and nature[153]) with *obligatory* force and effect. The Panel's interpretation of Article 3.1 would, in other words, transform those standards, guidelines and recommendations into binding *norms*. But, as already noted, the ***SPS Agreement*** itself sets out no indication of any intent on the part of the Members to do so. We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations.[154] To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the ***SPS Agreement*** would be necessary.

166. Accordingly, we disagree with the Panel's interpretation that "based on" means the same thing as "conform to".

167. After having erroneously "equated" measures "based on" an international standard with measures that "conform to" that standard[155], the Panel proceeds to Article 3.3. According to the Panel, Article 3.3 "explicitly relates" the "definition of sanitary measures *based on* international standards to the level of sanitary protection achieved by those measures". The Panel then interprets Article 3.3 as saying that "all measures which are based on a given international standard should *in principle* achieve the *same* level of sanitary protection", and argues *a contrario* that "if a sanitary measure implies a *different* level (from that reflected in an international standard), that measure cannot be considered to be *based on* the international standard". The Panel concludes that, under Article 3.1, "for a sanitary measure to be *based on* an international standard ..., that *measure* needs to reflect the same level of sanitary protection as the *standard*".[156]

[153]US Panel Report, para. 8.59; Canada Panel Report, para. 8.62.

[154]The interpretative principle of *in dubio mitius*, widely recognized in international law as a "supplementary means of interpretation", has been expressed in the following terms:

> "The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."

R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman, 1992), p. 1278. The relevant case law includes: *Nuclear Tests Case (Australia v. France)*, (1974), I.C.J. Reports, p. 267 (International Court of Justice); *Access of Polish War Vessels to the Port of Danzig* (1931) PCIJ Rep., Series A/B, No.43, p. 142 (Permanent Court of International Justice); *USA-France Air Transport Services Arbitration* (1963), 38 International Law Reports 243 (Arbitral Tribunal); *De Pascale Claim* (1961), 40 International Law Reports 250 (Italian - United States Conciliation Commission). See also: I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 631; C. Rousseau, *Droit International Public*, Vol. I (1990), p. 273; D. Carreau, *Droit International*, 4th ed. (Editions A. Pedone, 1994), p. 142; M. Díez de Velasco, *Instituciones de Derecho Internacional Pblico*, 9th ed., Vol. I (Editorial Tecnos, 1991), pp. 163-164; and B. Conforti, *Diritto Internazionale*, 3rd ed. (Editoriale Scientifica, 1987), pp. 99-100.

[155]US Panel Report, para. 8.72; Canada Panel Report, para. 8.75.

[156]US Panel Report, para. 8.73; Canada Panel Report, para. 8.76.

168. It appears to us that the Panel reads much more into Article 3.3 than can be reasonably supported by the actual text of Article 3.3. Moreover, the Panel's entire analysis rests on its flawed premise that "based on", as used in Articles 3.1 and 3.3, means the same thing as "conform to" as used in Article 3.2. As already noted, we are compelled to reject this premise as an error in law. The correctness of the rest of the Panel's intricate interpretation and examination of the consequences of the Panel's litmus test, however, have to be left for another day and another case.

B. *Relationship Between Articles 3.1, 3.2 and 3.3 of the SPS Agreement*

169. We turn to the relationship between Articles 3.1, 3.2 and 3.3 of the *SPS Agreement*. As observed earlier, the Panel assimilated Articles 3.1 and 3.2 to one another, designating the product as the "general rule", and contraposed that product to Article 3.3 which denoted the "exception". This view appears to us an erroneous representation of the differing situations that may arise under Article 3, that is, where a relevant international standard, guideline or recommendation exists.

170. Under Article 3.2 of the *SPS Agreement*, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the *SPS Agreement* and of the GATT 1994.

171. Under Article 3.1 of the *SPS Agreement*, a Member may choose to establish an SPS measure that is based on the existing relevant international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2; but, as earlier observed, the Member is not penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant article of the *SPS Agreement* or of the GATT 1994.

172. Under Article 3.3 of the *SPS Agreement*, a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not "based on" the international standard. The Member's appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right. This is made clear in the sixth preambular paragraph of the *SPS Agreement*:

Members,

> ...
>
> *Desiring* to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health; (underlining added)

As noted earlier, this right of a Member to establish its own level of sanitary protection under Article 3.3 of the *SPS Agreement* is an autonomous right and *not* an "exception" from a "general obligation" under Article 3.1.

C. *The Requirements of Article 3.3 of the SPS Agreement*

173. The right of a Member to define its appropriate level of protection is not, however, an absolute or unqualified right. Article 3.3 also makes this clear:

> Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.[2] Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.
>
> ———————
>
> [2]For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

174. The European Communities argues that there are two situations covered by Article 3.3 and that its SPS measures are within the first of these situations.[157] It is claimed that the European Communities has maintained SPS measures "which result in a higher level of ... protection than would be achieved by measures based on the relevant" Codex standard, guideline or recommendation, for which measures "there is a scientific justification".[158] It is also, accordingly, argued that the requirement of a risk assessment under Article 5.1 does not apply to the European Communities. At the same time, it is emphasized that the EC measures have satisfied the requirements of Article 2.2.[159]

175. Article 3.3 is evidently not a model of clarity in drafting and communication. The use of the disjunctive "or" does indicate that two situations are intended to be covered. These are the introduction or maintenance of SPS measures which result in a higher level of protection:

> (a)"if there is a scientific justification"; or
> (b)"as a consequence of the level of ... protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5".

[157]EC's appellant's submission, paras. 240-244.

[158]*SPS Agreement*, Article 3.3.

[159]EC's appellee's submission, para. 88.

It is true that situation (a) does not speak of Articles 5.1 through 5.8. Nevertheless, two points need to be noted. First, the last sentence of Article 3.3 requires that "all measures which result in a [higher] level of ... protection", that is to say, measures falling within situation (a) as well as those falling within situation (b), be "not inconsistent with any other provision of [the SPS] Agreement". "Any other provision of this Agreement" textually includes Article 5. Secondly, the footnote to Article 3.3, while attached to the end of the first sentence, defines "scientific justification" as an "examination and evaluation of available scientific information in conformity with relevant provisions of this Agreement ...". This examination and evaluation would appear to partake of the nature of the risk assessment required in Article 5.1 and defined in paragraph 4 of Annex A of the *SPS Agreement*.

176. On balance, we agree with the Panel's finding that although the European Communities has established for itself a level of protection higher, or more exacting, than the level of protection implied in the relevant Codex standards, guidelines or recommendations, the European Communities was bound to comply with the requirements established in Article 5.1. We are not unaware that this finding tends to suggest that the distinction made in Article 3.3 between two situations may have very limited effects and may, to that extent, be more apparent than real. Its involved and layered language actually leaves us with no choice.

177. Consideration of the object and purpose of Article 3 and of the *SPS Agreement* as a whole reinforces our belief that compliance with Article 5.1 was intended as a countervailing factor in respect of the right of Members to set their appropriate level of protection. In generalized terms, the object and purpose of Article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people. The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both "necessary to protect" human life or health and "based on scientific principles", and without requiring them to change their appropriate level of protection. 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 sometimes competing, interests of promoting international trade and of protecting the life and health of human beings. We conclude that the Panel's finding that the European Communities is required by Article 3.3 to comply with the requirements of Article 5.1 is correct and, accordingly, dismiss the appeal of the European Communities from that ruling of the Panel.

XI. The Reading of Articles 5.1 and 5.2 of the *SPS Agreement*: Basing SPS Measures on a Risk Assessment

178. We turn to the appeal of European Communities from the Panel's conclusion that, by maintaining SPS measures which are not based on a risk assessment, the European Communities acted inconsistently with the requirements contained in Article 5.1 of the *SPS Agreement*.

179. Article 5.1 of the *SPS Agreement* provides:

> Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations. (underlining added)

A. *The Interpretation of "Risk Assessment"*

180. At the outset, two preliminary considerations need to be brought out. The first is that the 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*[160], which reads as follows:

> 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. (underlining added)

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.

181. The second preliminary consideration relates to the Panel's effort to distinguish between "risk assessment" and "risk management". The Panel observed that an assessment of risk is, at least with respect to risks to human life and health, a "scientific" examination of data and factual studies; it is not, in the view of the Panel, a "policy" exercise involving social value judgments made by political bodies.[161] The Panel describes the latter as "non-scientific" and as pertaining to "risk management" rather than to "risk assessment".[162] We must stress, in this connection, that Article 5 and Annex A of the *SPS Agreement* speak of "risk assessment" only and that the term "risk management" is not to be found either in Article 5 or in any other provision of the *SPS Agreement*. Thus, the Panel's distinction, which it apparently employs to achieve or support what appears to be a restrictive notion of risk assessment, has no textual basis. The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used.

1. Risk Assessment and the Notion of "Risk"

182. Paragraph 4 of Annex A of the *SPS Agreement* sets out the treaty definition of risk assessment: This definition, to the extent pertinent to the present appeal, speaks of:

> ... the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs. (underlining added)

183. Interpreting the above definition, the Panel elaborates risk assessment as a two-step process that "should (i) *identify* the *adverse effects* on human health (if any) arising from the presence of the hormones at issue when used as growth promoters *in meat* ..., and (ii) if any such adverse effects exist, *evaluate* the *potential* or probability of occurrence of such effects".[163]

184. The European Communities appeals from the above interpretation as involving an erroneous notion of risk and risk assessment. Although the utility of a two-step analysis may be debated, it does not

[160] US Panel Report, para. 8.93; Canada Panel Report, para. 8.96.

[161] US Panel Report, para. 8.94; Canada Panel Report, para. 8.97.

[162] US Panel Report, para. 8.95; Canada Panel Report, para. 8.98.

[163] US Panel Report, para. 8.98; Canada Panel Report, para. 8.101.

appear to us to be substantially wrong. What needs to be pointed out at this stage is that the Panel's use of "probability" as an alternative term for "potential" creates a significant concern. The ordinary meaning of "potential" relates to "possibility" and is different from the ordinary meaning of "probability".[164] "Probability" implies a higher degree or a threshold of potentiality or possibility. It thus appears that here the Panel introduces a quantitative dimension to the notion of risk.

185. In its discussion on a statement made by Dr. Lucier at the joint meeting with the experts in February 1997[165], the Panel states the risk referred to by this expert is an estimate which "... only represents a statistical range of 0 to 1 in a million, not a scientifically identified risk".[166] The European Communities protests vigorously that, by doing so, the Panel is in effect requiring a Member carrying out a risk assessment to quantify the potential for adverse effects on human health.[167]

186. It is not clear in what sense the Panel uses the term "scientifically identified risk". The Panel also frequently uses the term "identifiable risk"[168], and does not define this term either. The Panel might arguably have used the terms "scientifically identified risk" and "identifiable risk" simply to refer to an ascertainable risk: if a risk is not ascertainable, how does a Member ever know or demonstrate that it exists? In one part of its Reports, the Panel opposes a requirement of an "identifiable risk" to the uncertainty that theoretically always remains since science can *never* provide *absolute* certainty that a given substance will not *ever* have adverse health effects.[169] We agree with the Panel that this theoretical uncertainty is not the kind of risk which, under Article 5.1, is to be assessed. In another part of its Reports, however, the Panel appeared to be using the term "scientifically identified risk" to prescribe implicitly that a certain *magnitude* or threshold level of risk be demonstrated in a risk assessment if an SPS measure based thereon is to be regarded as consistent with Article 5.1.[170] To the extent that the Panel purported to require a risk assessment to establish a minimum magnitude of risk, we must note that imposition of such a quantitative requirement finds no basis in the *SPS Agreement*. A panel is authorized only to determine whether a given SPS measure is "based on" a risk assessment. As will be elaborated below, this means that a panel has to determine whether an SPS measure is sufficiently supported or reasonably warranted by the risk assessment.

2. Factors to be Considered in Carrying Out a Risk Assessment

187. Article 5.2 of the *SPS Agreement* provides an indication of the factors that should be taken into account in the assessment of risk. Article 5.2 states that:

> In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

[164]The dictionary meaning of "potential" is "that which is possible as opposed to actual; a possibility"; L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles,* Vol. 2, p. 2310 (Clarendon Press, 1993). In contrast, "probability" refers to "degrees of likelihood; the appearance of truth, or likelihood of being realized", and "a thing judged likely to be true, to exist, or to happen"; *Id.*, p. 2362.

[165]Para. 819 of the Annex to the US and Canada Panel Reports.

[166]US Panel Report, footnote 331; Canada Panel Report, footnote 437.

[167]EC's appellant's submission, paras. 392-397.

[168]US Panel Report, paras. 8.124, 8.134, 8.136, 8.151, 8.153, 8.161, 8.162; Canada Panel Report, paras. 8.127, 8.137, 8.139, 8.154, 8.156, 8.164, 8.165.

[169]US Panel Report, paras. 8.152-8.153; Canada Panel Report, paras. 8.155-8.156

[170]US Panel Report, footnote 331; Canada Panel Report, footnote 437.

The listing in Article 5.2 begins with "available scientific evidence"; this, however, is only the beginning. We note in this connection that the Panel states that, for purposes of the EC measures in dispute, a risk assessment required by Article 5.1 is "a *scientific* process aimed at establishing the *scientific* basis for the sanitary measure a Member intends to take".[171] To the extent that the Panel intended to refer to a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions, the Panel's statement is unexceptionable.[172] However, to the extent that the Panel purports to exclude from the scope of a risk assessment in the sense of Article 5.1, all matters not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences, we believe that the Panel is in error. Some of the kinds of factors listed in Article 5.2 such as "relevant processes and production methods" and "relevant inspection, sampling and testing methods" are not necessarily or wholly susceptible of investigation according to laboratory methods of, for example, biochemistry or pharmacology. Furthermore, there is nothing to indicate that the listing of factors that may be taken into account in a risk assessment of Article 5.2 was intended to be a closed list. It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.

B. *The Interpretation of "Based On"*

1. A "Minimum Procedural Requirement" in Article 5.1?

188. Although it expressly recognizes that Article 5.1 does *not* contain any specific procedural requirements for a Member to base its sanitary measures on a risk assessment, the Panel nevertheless proceeds to declare that "there is a minimum procedural requirement contained in Article 5.1". That requirement is that "the Member imposing a sanitary measure needs to submit evidence that at least it actually *took into account* a risk assessment when it enacted or maintained its sanitary measure in order for that measure to be considered as *based on* a risk assessment".[173] The Panel goes on to state that the European Communities did not provide any evidence that the studies it referred to or the scientific conclusions reached therein "*have actually been taken into account by the competent EC institutions* either when it *enacted* those measures (in 1981 and 1988) or *at any later point in time*".[174] (emphasis added) Thereupon, the Panel holds that such studies could not be considered as part of a risk assessment on which the European Communities based its measures in dispute. Concluding that the European Communities had not met its burden of proving that it had satisfied the "minimum procedural requirement" it had found in Article 5.1, the Panel holds the EC measures as inconsistent with the requirements of Article 5.1.

[171]US Panel Report, para. 8.107; Canada Panel Report, para. 8.110.

[172]"The ordinary meaning of _scientific', as provided by dictionary definitions, includes _of, relating to, or used in science', _broadly, having or appearing to have an exact, objective, factual, systematic or methodological basis', _of, relating to, or exhibiting the methods or principles of science' and _of, pertaining to, using, or based on the methodology of science'. Dictionary definitions of _science' include _the observation, identification, description, experimental investigation, and theoretical explanation of natural phenomena', _any methodological activity, discipline, or study', and _knowledge attained through study or practice'". (footnotes omitted) *United States' Statement of Administrative Action, Uruguay Round Agreements Act*, 203d Congress, 2d Session, House Document 103-316, Vol. 1, 27 September 1994, p. 90.

[173]US Panel Report, para. 8.113; Canada Panel Report, para. 8.116.

[174]US Panel Report, para. 8.114; Canada Panel Report, para. 8.117.

189. We are bound to note that, as the Panel itself acknowledges, no textual basis exists in Article 5 of the *SPS Agreement* for such a "minimum procedural requirement". The term "based on", when applied as a "minimum procedural requirement" by the Panel, may be seen to refer to a human action, such as particular human individuals "taking into account" a document described as a risk assessment. Thus, "take into account" is apparently used by the Panel to refer to some subjectivity which, at some time, may be present in particular individuals but that, in the end, may be totally rejected by those individuals. We believe that "based on" is appropriately taken to refer to a certain *objective relationship* between two elements, that is to say, to an *objective situation* that persists and is observable between an SPS measure and a risk assessment. Such a reference is certainly embraced in the ordinary meaning of the words "based on" and, when considered in context and in the light of the object and purpose of Article 5.1 of the *SPS Agreement*, may be seen to be more appropriate than "taking into account". We do not share the Panel's interpretative construction and believe it is unnecessary and an error of law as well.

190. Article 5.1 does not insist that a Member that adopts a sanitary measure shall have carried out its own risk assessment. It only requires that the SPS measures be "based on an assessment, as appropriate for the circumstances ...". The SPS measure might well find its objective justification in a risk assessment carried out by another Member, or an international organization. The "minimum procedural requirement" constructed by the Panel, could well lead to the elimination or disregard of available scientific evidence that rationally supports the SPS measure being examined. This risk of exclusion of available scientific evidence may be particularly significant for the bulk of SPS measures which were put in place before the effective date of the *WTO Agreement* and that have been simply maintained thereafter.

191. In the course of demanding evidence that EC authorities actually "took into account" certain scientific studies, the Panel refers to the preambles of the EC Directives here involved. The Panel notes that such preambles did not mention any of the scientific studies referred to by the European Communities in the panel proceedings. Preambles of legislative or quasi-legislative acts and administrative regulations commonly fulfil requirements of the internal legal orders of WTO Members. Such preambles are certainly not required by the *SPS Agreement*; they are not normally used to demonstrate that a Member has complied with its obligations under international agreements. The absence of any mention of scientific studies in the preliminary sections of the EC Directives does not, therefore, prove anything so far as the present case is concerned.

2. Substantive Requirement of Article 5.1 - Rational Relationship Between an SPS Measure and a Risk Assessment

192. Having posited a "minimum procedural requirement" of Article 5.1, the Panel turns to the "substantive requirements" of Article 5.1 to determine whether the EC measures at issue are "based on" a risk assessment. In the Panel's view, those "substantive requirements" involve two kinds of operations: first, identifying the scientific conclusions reached in the risk assessment and the scientific conclusions implicit in the SPS measures; and secondly, examining those scientific conclusions to determine whether or not one set of conclusions matches, i.e. conforms with, the second set of conclusions.[175] Applying the "substantive requirements" it finds in Article 5.1, the Panel holds that the scientific conclusions implicit in the EC measures do not conform with any of the scientific conclusions reached in the scientific studies the European Communities had submitted as evidence.[176]

193. We consider that, in principle, the Panel's approach of examining the scientific conclusions implicit in the SPS measure under consideration and the scientific conclusion yielded by a risk assessment

[175]US Panel Report, para. 8.117; Canada Panel Report, para. 8.120.

[176]US Panel Report, para. 8.137; Canada Panel Report, para. 8.140.

is a useful approach. The relationship between those two sets of conclusions is certainly relevant; they cannot, however, be assigned relevance to the exclusion of everything else. We believe that Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2 of the *SPS Agreement*, requires that the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measure at stake. The requirement that an SPS measure be "based on" a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment.

194. We do not believe that a risk assessment has to come to a monolithic conclusion that coincides with the scientific conclusion or view implicit in the SPS measure. The risk assessment could set out both the prevailing view representing the "mainstream" of scientific opinion, as well as the opinions of scientists taking a divergent view. Article 5.1 does not require that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community. In some cases, the very existence of divergent views presented by qualified scientists who have investigated the particular issue at hand may indicate a state of scientific uncertainty. Sometimes the divergence may indicate a roughly equal balance of scientific opinion, which may itself be a form of scientific uncertainty. In most cases, responsible and representative governments tend to base their legislative and administrative measures on "mainstream" scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources. By itself, this does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment, especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety. Determination of the presence or absence of that relationship can only be done on a case-to-case basis, after account is taken of all considerations rationally bearing upon the issue of potential adverse health effects.

195. We turn now to the application by the Panel of the substantive requirements of Article 5.1 to the EC measures at stake in the present case. The Panel lists the following scientific material to which the European Communities referred in respect of the hormones here involved (except MGA):

-the 1982 Report of the EC Scientific Veterinary Committee, Scientific Committee for Animal Nutrition and the Scientific Committee for Food on the basis of the Report of the Scientific Group on Anabolic Agents in Animal Production ("Lamming Report");

-the 1983 Symposium on Anabolics in Animal Production of the *Office international des epizooties* ("OIE") ("1983 OIE Symposium");

-the 1987 Monographs of the International Agency for Research on Cancer ("IARC") on the Evaluation of Carcinogenic Risks to Humans, Supplement 7 ("1987 IARC Monographs");

-the 1988 and 1989 JECFA Reports;

-the 1995 European Communities Scientific Conference on Growth Promotion in Meat Production ("1995 EC Scientific Conference");

-articles and opinions by individual scientists relevant to the use of hormones (three articles in the journal Science, one article in the International Journal of Health Service, one report in The Veterinary Record and separate scientific opinions of Dr. H. Adlercreutz, Dr. E. Cavalieri, Dr. S.S. Epstein, Dr. J.G. Liehr, Dr. M. Metzler, Dr.

> Perez-Comas and Dr. A. Pinter, all of whom were part of the EC delegation at [the] joint meeting with experts).[177]

196. Several of the above scientific reports appeared to the Panel to meet the minimum requirements of a risk assessment, in particular, the Lamming Report and the 1988 and 1989 JECFA Reports. The Panel assumes accordingly that the European Communities had demonstrated the existence of a risk assessment carried out in accordance with Article 5 of the *SPS Agreement*.[178] At the same time, the Panel finds that the conclusion of these scientific reports is that the use of the hormones at issue (except MGA) for growth promotion purposes is "safe". The Panel states:

> ... none of the scientific evidence referred to by the European Communities which specifically addresses the safety of some or all of the hormones in dispute when used for growth promotion, indicates that an identifiable risk arises for human health from such use of these hormones if good practice is followed. All of the scientific studies outlined above came to the conclusion that the use of the hormones at issue (all but MGA, for which no evidence was submitted) for growth promotion purposes is safe; most of these studies adding that this conclusion assumes that good practice is followed.[179]

197. Prescinding from the difficulty raised by the Panel's use of the term "identifiable risk", we agree that the scientific reports listed above do not rationally support the EC import prohibition.[180]

[177]US Panel Report, para. 8.108; Canada Panel Report, para. 8.111.

[178]US Panel Report, para. 8.111; Canada Panel Report, para. 8.114.

[179]US Panel Report, para. 8.124; Canada Panel Report, para. 8.127.

[180]In paras. 97-109 of this Report, we conclude that the Panel mistakenly required that the European Communities take on the burden of proof that its measures related to the hormones involved here, except MGA, are based on a risk assessment. We determine that the United States and Canada have to make a *prima facie* case that these measures are *not* based on a risk assessment. However, after careful consideration of the panel record, we are satisfied that the United States and Canada, although not required to do so by the Panel, did, in fact, make this *prima facie* case that the SPS measures related to the hormones involved here, except MGA, are not based on a risk assessment.

198. With regard to the scientific opinion expressed by Dr. Lucier at the joint meeting with the experts, and as set out in paragraph 819 of the Annex to the US and Canada Panel Reports[181], we should note that this opinion by Dr. Lucier does not purport to be the result of scientific studies carried out by him or under his supervision focusing specifically on residues of hormones in meat from cattle fattened with such hormones.[182] Accordingly, it appears that the single divergent opinion expressed by Dr. Lucier is not reasonably sufficient to overturn the contrary conclusions reached in the scientific studies referred to by the European Communities that related specifically to residues of the hormones in meat from cattle to which hormones had been administered for growth promotion.

199. The European Communities laid particular emphasis on the 1987 IARC Monographs and the articles and opinions of individual scientists referred to above.[183] The Panel notes, however, that the scientific evidence set out in these Monographs and these articles and opinions relates to the carcinogenic potential of entire *categories* of hormones, or of the hormones at issue *in general*. The Monographs and the articles and opinions are, in other words, in the nature of general studies of or statements on the carcinogenic potential of the named hormones. The Monographs and the articles and opinions of individual scientists have not evaluated the carcinogenic potential of those hormones when used specifically *for growth promotion purposes*. Moreover, they do not evaluate the specific potential for carcinogenic effects arising from the presence *in "food"*, more specifically, "meat or meat products" of residues of the hormones in dispute. The Panel also notes that, according to the scientific experts advising the Panel, the data and studies set out in these 1987 Monographs have been taken into account in the 1988 and 1989 JECFA Reports and that the conclusions reached by the 1987 IARC Monographs are complementary to, rather than contradictory of, the conclusions of the JECFA Reports.[184] The Panel concludes that these Monographs and these articles and opinions are insufficient to support the EC measures at issue in this case.

200. We believe that the above findings of the Panel are justified. The 1987 IARC Monographs and the articles and opinions of individual scientists submitted by the European Communities constitute general studies which do indeed show the existence of a general risk of cancer; but they do not focus on and do not address the particular kind of risk here at stake - the carcinogenic or genotoxic potential of the residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes – as is required by paragraph 4 of Annex A of the *SPS Agreement*. Those general studies, are in other words, relevant but do not appear to be sufficiently specific to the case at hand.

[181]This paragraph reads in relevant part:

> For every million women alive in the United States, Canada, Europe today, about a 110,000 of those women will get breast cancer. This is obviously a tremendous public health issue. Of those 110,000 women get breast cancer, maybe several thousand of them are related to the total intake of exogenous oestrogens from every source, including eggs, meat, phyto-oestrogens, fungal oestrogens, the whole body burden of exogenous oestrogens. And by my estimates one of those 110,000 would come from eating meat containing oestrogens as a growth promoter, if used as prescribed.

[182]Assuming that Dr. Lucier's estimate is realistic, it is noteworthy that there could be up to 371 persons who, under the conditions identified by Dr. Lucier, would get cancer in the Member States of the European Union. The total population of the Member States of the European Union in 1995 was 371 million.

[183]Para. 195 of this Report.

[184]US Panel Report, para. 8.129; Canada Panel Report, para. 8.132.

201. With regard to risk assessment concerning MGA, the European Communities referred to the 1987 IARC Monographs. These Monographs deal with, *inter alia*, the category of progestins of which the hormone progesterone is a member. The European Communities argues that because MGA is an anabolic agent which mimics the action of progesterone, the scientific studies and experiments relied on by the 1987 IARC Monographs were highly relevant.[185] However, the Monographs and the articles and opinions of the individual scientists did not include any study that demonstrated how closely related MGA is chemically and pharmacologically to other progestins and what effects MGA residues would actually have on human beings when such residues are ingested along with meat from cattle to which MGA has been administered for growth promotion purposes. It must be recalled in this connection that none of the other scientific material submitted by the European Communities referred to MGA, and that no international standard, guideline or recommendation has been developed by Codex relating specifically to MGA. The United States and Canada declined to submit any assessment of MGA upon the ground that the material they were aware of was proprietary and confidential in nature. In other words, there was an almost complete absence of evidence on MGA in the panel proceedings. We therefore uphold the Panel's finding that there was no risk assessment with regard to MGA.

202. The evidence referred to above by the European Communities related to the biochemical risk arising from the ingestion by human beings of residues of the five hormones here involved in treated meat, where such hormones had been administered to the cattle in accordance with good veterinary practice.[186] The European Communities also referred to distinguishable but closely related risks - risks arising from failure to observe the requirements of good veterinary practice, in combination with multiple problems relating to detection and control of such abusive failure, in the administration of hormones to cattle for growth promotion.

203. The Panel considers this type of risk and examines the arguments made by the European Communities but finds no assessment of such kind of risk. Ultimately, the Panel rejects those arguments principally on *a priori* grounds. First, to the Panel, the provisions of Article 5.2 relating to "relevant inspection, sampling and testing methods":

> ... do not seem to cover the general problem of control (such as the problem of ensuring the observance of good practice) which can exist for any substance. The risks related to the general problem of control do not seem to be specific to the substance at issue but to the economic or social incidence related to a substance or its particular use (such as economic incentives for abuse). These non-scientific factors should, therefore not be taken into account in a risk assessment but in *risk management*.[187] (underlining added)

[185]EC's appellant's submission, para. 179 *ff*.

[186]Although the term used in the Codex Standards for the three natural hormones is *good animal husbandry practice* (Section I, MRLs, *Codex Alimentarius*, Vol. 3, pp. 7, 12 and 14), the Glossary of Terms and Definitions of the *Codex Alimentarius* does not contain this term. Instead, it defines the concept:

> "**Good Practice in the Use of Veterinary Drugs (GPVD):** Is the official recommended or authorized usage including withdrawal periods, approved by national authorities, of veterinary drugs under practical conditions".

We will therefore use the term *good veterinary practice* as a shorthand expression of the concept defined in the *Codex Alimentarius*.

[187]US Panel Report, para. 8.146; Canada Panel Report, para. 8.149.

Moreover, the Panel finds that, assuming these factors could be taken into account in a risk assessment, the European Communities has not provided convincing evidence that the control or prevention of abuse of the hormones here involved is more difficult than the control of other veterinary drugs, the use of which is allowed in the European Communities. Further, the European Communities has not provided evidence that control would be more difficult under a regime where the use of the hormones in dispute is allowed under specific conditions than under the current EC regime of total prohibition both domestically and in respect of imported meat. The Panel concludes by saying that banning the use of a substance does not necessarily offer better protection of human health than other means of regulating its use.[188]

204. The European Communities appeals from these findings of the Panel principally on two grounds: firstly, that the Panel has misinterpreted Article 5.2 of the *SPS Agreement*; secondly, that the Panel has disregarded and distorted the evidence submitted by the European Communities.[189]

205. In respect of the first ground, we agree with the European Communities that the Panel has indeed misconceived the scope of application of Article 5.2. It should be recalled that Article 5.2 states that in the assessment of risks, Members shall take into account, in addition to "available scientific evidence", "relevant processes and production methods; [and] relevant inspection, sampling and testing methods". We note also that Article 8 requires Members to "observe the provisions of Annex C in the operation of control, inspection and approval procedures ...". The footnote in Annex C states that "control, inspection and approval procedures include, *inter alia*, procedures for sampling, testing and certification". We consider that this language is amply sufficient to authorize the taking into account of risks arising from failure to comply with the requirements of good veterinary practice in the administration of hormones for growth promotion purposes, as well as risks arising from difficulties of control, inspection and enforcement of the requirements of good veterinary practice.

206. Most, if not all, of the scientific studies referred to by the European Communities, in respect of the five hormones involved here, concluded that their use for growth promotion purposes is "safe"[190], if the hormones are administered in accordance with the requirements of good veterinary practice. Where the condition of observance of good veterinary practice (which is much the same condition attached to the standards, guidelines and recommendations of Codex with respect to the use of the five hormones for growth promotion) is *not* followed, the logical inference is that the use of such hormones for growth promotion purposes may or may not be "safe".[191] The *SPS Agreement* requires assessment of the potential for adverse effects on human health arising from the presence of contaminants and toxins in food. We consider that the object and purpose of the *SPS Agreement* justify the examination and evaluation of all such risks for human health whatever their precise and immediate origin may be. We do not mean to suggest that risks arising from potential abuse in the administration of controlled substances and from control problems need to be, or should be, evaluated by risk assessors in each and every case. When and if risks of these types do in fact arise, risk assessors may examine and evaluate them. Clearly, the necessity or propriety of examination and evaluation of such risks would have to be addressed on a case-by-case basis. What, in our view, is a fundamental legal error is to exclude, on an *a priori* basis, any such risks from the scope of application of Articles 5.1 and 5.2. We disagree with the Panel's suggestion that exclusion of risks resulting from the combination of potential abuse and difficulties of control is justified by distinguishing between "risk assessment" and "risk management". As earlier noted, the concept of "risk

[188]US Panel Report, para. 8.146; Canada Panel Report, para. 8.149.

[189]EC's appellant's submission, para. 399 and 401.

[190]US Panel Report, para. 8.124; Canada Panel Report, para. 8.127.

[191]This point was clearly brought out during the oral hearing and both the United States and Canada expressed agreement with this inference. See footnote 186 of this Report concerning the usage of the terms "good veterinary practice" and "good animal husbandry practice".

management" is not mentioned in any provision of the *SPS Agreement* and, as such, cannot be used to sustain a more restrictive interpretation of "risk assessment" than is justified by the actual terms of Article 5.2, Article 8 and Annex C of the *SPS Agreement*.

207. The question that arises, therefore, is whether the European Communities did, in fact, submit a risk assessment demonstrating and evaluating the existence and level of risk arising in the present case from abusive use of hormones and the difficulties of control of the administration of hormones for growth promotion purposes, within the United States and Canada as exporting countries, and at the frontiers of the European Communities as an importing country. Here, we must agree with the finding of the Panel that the European Communities in fact restricted itself to pointing out the condition of administration of hormones "in accordance with good practice" "without further providing an assessment of the potential adverse effects related to non compliance with such practice".[192] The record of the panel proceedings shows that the risk arising from abusive use of hormones for growth promotion combined with control problems for the hormones at issue, may have been examined on two occasions in a scientific manner. The first occasion may have occurred at the proceedings before the Committee of Inquiry into the Problem of Quality in the Meat Sector established by the European Parliament, the results of which constituted the basis of the Pimenta Report of 1989. However, none of the original studies and evidence put before the Committee of Inquiry was submitted to the Panel. The second occasion could have been the 1995 EC Scientific Conference on Growth Promotion in Meat Production. One of the three workshops of this Conference examined specifically the problems of "detection and control". However, only one of the studies presented to the workshop discussed systematically some of the problems arising from the combination of potential abuse and problems of control of hormones and other substances.[193] The study presented a theoretical framework for the systematic analysis of such problems, but did not itself investigate and evaluate the actual problems that have arisen at the borders of the European Communities or within the United States, Canada and other countries exporting meat and meat products to the European Communities. At best, this study may represent the beginning of an assessment of such risks.

208. In the absence of any other relevant documentation, we find that the European Communities did not actually proceed to an assessment, within the meaning of Articles 5.1 and 5.2, of the risks arising from the failure of observance of good veterinary practice combined with problems of control of the use of hormones for growth promotion purposes. The absence of such a risk assessment, when considered in conjunction with the conclusion actually reached by most, if not all, of the scientific studies relating to the other aspects of risk noted earlier, leads us to the conclusion that no risk assessment that reasonably supports or warrants the import prohibition embodied in the EC Directives was furnished to the Panel. We affirm, therefore, the ultimate conclusion of the Panel that the EC import prohibition is not based on a risk assessment within the meaning of Articles 5.1 and 5.2 of the *SPS Agreement* and is, therefore, inconsistent with the requirements of Article 5.1.

209. Since we have concluded above[194] that an SPS measure, to be consistent with Article 3.3, has to comply with, *inter alia*, the requirements contained in Article 5.1, it follows that the EC measures at issue, by failing to comply with Article 5.1, are also inconsistent with Article 3.3 of the *SPS Agreement*.

XII. The Reading of Article 5.5 of the *SPS Agreement*: Consistency of Levels of Protection and Resulting Discrimination or Disguised Restriction on International Trade

[192] US Panel Report, para. 8.143; Canada Panel Report, para. 8.146.

[193] B. Jülicher, "Sampling Strategies", in *Proceedings of the Scientific Conference on Growth Promotion in Meat Production*, Brussels, 29 November to 1 December 1995, pp. 521-540.

[194] See para. 177 of this Report.

210. The European Communities also appeals from the conclusion of the Panel[195] that, by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considers appropriate in different situations which result in discrimination or a disguised restriction on international trade, the European Communities acted inconsistently with the requirements set out in Article 5.5 of the *SPS Agreement*.[196]

A. *General Considerations: the Elements of Article 5.5*

211. Article 5.5 of the *SPS Agreement* needs to be quoted in full:

> With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

212. Article 5.5 must be read in context. An important part of that context is Article 2.3 of the *SPS Agreement*, which provides as follows:

> 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.

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.

213. The objective of Article 5.5 is formulated as the "achieving [of] consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection". Clearly, the desired consistency is defined as a goal to be achieved in the future. To assist in the realization of that objective, the Committee on Sanitary and Phytosanitary Measures is to develop *guidelines for the practical implementation of Article 5.5*, bearing in mind, among other things, that ordinarily, people do not voluntarily expose themselves to health risks. Thus, we agree with the Panel's view that the statement of that goal does not establish a *legal obligation* of consistency of appropriate levels of protection. We think, too, that the goal set is not absolute or perfect consistency, since governments establish their appropriate levels of protection frequently on an *ad hoc* basis and over time, as different risks present themselves at different times. It is only arbitrary or unjustifiable inconsistencies that are to be avoided.

[195] EC's appellant's submission, para. 448.

[196] US Panel Report, paras. 8.206, 8.218, 8.244, 8.266 and 8.269; Canada Panel Report, paras. 8.209, 8.221, 8.247, 8.269 and 8.272.

214. Close inspection of Article 5.5 indicates that a complaint of violation of this Article must show the presence of three distinct elements. The first element is that the Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations. The second element to be shown is that those *levels of protection* exhibit arbitrary or unjustifiable differences ("distinctions" in the language of Article 5.5) in their treatment of different situations. The last element requires that the arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade. We understand the last element to be referring to the *measure* embodying or implementing a particular level of protection as resulting, in its application, in discrimination or a disguised restriction on international trade.

215. We consider the above three elements of Article 5.5 to be cumulative in nature; all of them must be demonstrated to be present if violation of Article 5.5 is to be found. In particular, both the second and third elements must be found. The second element alone would not suffice. The third element must also be demonstrably present: the implementing measure must be shown to be applied in such a manner as to result in discrimination or a disguised restriction on international trade. The presence of the second element – the arbitrary or unjustifiable character of differences in *levels of protection* considered by a Member as appropriate in differing situations – may in practical effect operate as a "warning" signal that the implementing *measure* in its application *might* be a discriminatory measure or *might* be a restriction on international trade disguised as an SPS measure for the protection of human life or health. Nevertheless, the measure itself needs to be examined and appraised and, in the context of the differing levels of protection, shown to result in discrimination or a disguised restriction on international trade.

B. *Different Levels of Protection in Different Situations*

216. We examine the first element set out in Article 5.5, namely, that a Member has established different levels of protection which it regards as appropriate for itself in differing situations. The Panel, interpreting the term "different situations", states in effect that situations involving the same substance or the same adverse health effect may be compared to one another.[197] The European Communities protests this interpretation as erroneous: while it agrees that there must be some common element (e.g. the substance or drug, or the health risk), it argues that such common element is not necessarily sufficient to ensure a rational comparison.[198]

217. There appears no need to examine this matter at any length. Clearly, comparison of *several* levels of sanitary protection deemed appropriate by a Member is necessary if a panel's inquiry under Article 5.5 is to proceed at all. The situations exhibiting differing levels of protection cannot, of course, be compared unless they are comparable, that is, unless they present some common element or elements sufficient to render them comparable. If the situations proposed to be examined are *totally* different from one another, they would not be rationally comparable and the differences in levels of protection cannot be examined for arbitrariness.

218. In examining the EC measures here involved[199] and at least one other SPS measure of the European Communities[200], the Panel finds that several different levels of protection were projected by the European Communities:

[197]US Panel Report, para. 8.176; Canada Panel Report, para. 8.179.

[198]EC's appellant's submission, para. 455.

[199]See paras. 2-5 of this Report.

[200]Directive du Conseil 70/524/CEE of 23 November 1970, Official Journal No. L 270, 14 December 1970, p. 1, the Annexes of which are replaced by Commission Directive 91/248/EEC of 12 April 1991, Official Journal No. L 124, 18 May 1991, p. 1.

(i) the level of protection in respect of natural hormones when used for growth promotion[201];
(ii) the level of protection in respect of natural hormones occurring endogenously in meat and other foods[202];
(iii) the level of protection in respect of natural hormones when used for therapeutic or zootechnical purposes[203];
(iv) the level of protection in respect of synthetic hormones (zeranol and trenbolone) when used for growth promotion[204]; and
(v) the level of protection in respect of carbadox and olaquindox.[205]

C. *Arbitrary or Unjustifiable Differences in Levels of Protection*

219. The Panel then proceeds to compare level of protection (i) with, firstly, level of protection (ii) and, secondly, with level of protection (iii). Thereafter, the Panel compares levels of protection (i) and (iv) with level of protection (v). The Panel holds that the differences between levels of protection (i) and (iv) on the one hand, and level of protection (ii) on the other, are arbitrary and unjustifiable.[206] It further held that the differences in levels of protection (i) and (iv) on the one hand, and level (v) on the other, are also arbitrary and unjustifiable.[207] In contrast, the Panel does not undertake to compare level of protection (iii) with level of protection (i).[208] We examine below *seriatim* what the Panel has done and the results it has obtained.

220. The Panel first compares the levels of protection established by the European Communities in respect of natural and synthetic hormones when used for growth promotion purposes (levels of protection (i) and (iv)) with the level of protection set by the European Communities in respect of natural hormones occurring endogenously in meat and other natural foods (level of protection (ii)). The Panel finds the difference between these levels of protection "arbitrary" and "unjustifiable" basically because, in its view, the European Communities had not provided any reason other than the difference between added hormones and hormones naturally occurring in meat and other foods that have formed part of the human diet for centuries, and had not submitted any evidence that the risk related to natural hormones used as growth promoters is higher than the risk related to endogenous hormones.[209] The Panel adds that the residue level of natural hormones in some natural products (such as eggs and broccoli) is higher than the residue level of hormones administered for growth promotion in treated meat.[210] Furthermore, the Panel states the practical difficulties of detecting the presence of residues of natural hormones in treated meat would also be present in respect of natural hormones occurring endogenously in meat and other foods.[211] The Panel

[201]US Panel Report, para. 8.191; Canada Panel Report, para. 8.194; and, with regard to MGA, US Panel Report, para. 8.265; Canada Panel Report, para. 8.268.

[202]US Panel Report, para. 8.191; Canada Panel Report, para. 8.194; and, with regard to MGA, US Panel Report, para. 8.265; Canada Panel Report, para. 8.268.

[203]US Panel Report, para. 8.191; Canada Panel Report, para. 8.194.

[204]US Panel Report, para. 8.212; Canada Panel Report, para. 8.215.

[205]US Panel Report, para. 8.226 (with respect to carbadox only); Canada Panel Report, para. 8.229; and, with regard to MGA, US Panel Report, para. 8.268; Canada Panel Report, para. 8.271.

[206]US Panel Report, paras. 8.197 and 8.214; Canada Panel Report, paras. 8.200 and 8.217; and, with regard to MGA, US Panel Report, para. 8.265; Canada Panel Report, para. 8.268.

[207]US Panel Report, para. 8.238; Canada Panel Report, para. 8.241; and, with regard to MGA, US Panel Report, para. 8.268; Canada Panel Report, para. 8.271.

[208]US Panel Report, para. 8.200; Canada Panel Report, para. 8.203.

[209]US Panel Report, para. 8.193; Canada Panel Report, para. 8.196.

[210]US Panel Report, para. 8.194; Canada Panel Report, para. 8.197.

[211]US Panel Report, para. 8.195; Canada Panel Report, para. 8.198.

stresses the very marked gap between a "no-residue" level of protection against natural hormones used for growth promotion and the "unlimited-residue" level of protection with regard to hormones occurring naturally in meat and other foods.[212] Much the same reasons are deployed by the Panel in comparing the levels of protection in respect of synthetic hormones used for growth promotion and in respect of natural hormones endogenously occurring in meat and other foods.[213]

221. We do not share the Panel's conclusions that the above differences in levels of protection in respect of added hormones in treated meat and in respect of naturally-occurring hormones in food, are merely arbitrary and unjustifiable. To the contrary, we consider there is a fundamental distinction between added hormones (natural or synthetic) and naturally-occurring hormones in meat and other foods. In respect of the latter, the European Communities simply takes no regulatory action[214]; to require it to prohibit totally the production and consumption of such foods or to limit the residues of naturally-occurring hormones in food, entails such a comprehensive and massive governmental intervention in nature and in the ordinary lives of people as to reduce the comparison itself to an absurdity. The other considerations cited by the Panel, whether taken separately or grouped together, do not justify the Panel's finding of arbitrariness in the difference in the level of protection between added hormones for growth promotion and naturally-occurring hormones in meat and other foods.

222. Because the Panel finds that the difference in the level of protection in respect of the three natural hormones, when used for growth promotion purposes, and the level of protection in respect of natural hormones present endogenously in meat and other foods is unjustifiable, the Panel regards it as unnecessary to decide whether the difference in the levels of protection set by the European Communities in respect of natural hormones used as growth promoters and in respect of the same hormones when used for therapeutic or zootechnical purposes, is justified.[215] Because, however, we have reached a conclusion different from that of the Panel, we consider it appropriate to complete the Panel's analysis in order that we may be in a position to review the Panel's conclusion concerning consistency with Article 5.5 as a whole. The matter of therapeutic and zootechnical uses of hormones was fully argued before the Panel.[216] Although the failure of the Panel to proceed with this comparison was not expressly appealed by the United States, the United States relies markedly upon the fact that the European Communities treats therapeutic and zootechnical uses of natural hormones differently from growth promotion use of the same hormones.[217]

223. The European Communities has argued that there are two important differences between the administration of hormones for growth promotion purposes and their administration for therapeutic and zootechnical purposes. The first difference concerns the frequency and scale of the treatment.[218] Therapeutic use is occasional as opposed to regular and continuous use that characterizes growth promotion.[219] Therapeutic use is selective as it concerns only individual sick or diseased animals; growth

[212]US Panel Report, para. 8.196; Canada Panel Report, para. 8.199.

[213]US Panel Report, paras. 8.213, 8.264 and 8.265; Canada Panel Report, paras. 8.216, 8.267 and 8.268.

[214]It may be questioned whether the European Communities has established at all an appropriate level of protection in respect of naturally-occurring hormones in meat and other foods (i.e. which are part of peoples' daily diet). We have accepted *arguendo* the assumption of the Panel that the European Communities did, for the purposes of this analysis.

[215]US Panel Report, para. 8.200; Canada Panel Report, para. 8.203.

[216]See, for example, US Panel Report, paras. 4.63, 4.64, 4.68, 4.69, 4.71, 4.223, 4.224, 4.225, 4.226 and 4.227, and Canada Panel Report, paras. 4.141, 4.147, 4.217, 4.238 and 4.242.

[217]United States' appellant's submission, paras. 26, 27 and 29.

[218]EC's appellee's submission, paras. 82-84.

[219]US Panel Report, para. 4.71; Canada Panel Report, para. 4.242.

promotion involves the administration of hormones to all herds and all the members of a herd of cattle. Thus, therapeutic use takes place on a small scale and normally involves cattle intended for breeding and not for slaughter; in contrast, the use of these hormones for growth promotion occurs on a much larger scale and is much more difficult and costly to control.[220] Zootechnical use may relate to entire herds but would occur only once a year[221]; it is thus clearly distinguishable from the use of hormones continuously and over long periods of time (apparently most of the lifespan of the animals involved). This difference has been stressed in particular by Dr. André, one of the experts advising the Panel.[222]

224. The second difference concerns the mode of administration of hormones. In order to prevent abuse[223], the European Communities has regulated in substantial detail the conditions under which the administration of natural hormones may be authorized by the Member States of the European Union for therapeutic and zootechnical purposes. The hormones must, in the first place, be administered by a veterinarian or under the responsibility of a veterinarian.[224] In addition, Directive 96/22/EC specifies detailed conditions, such as, for example: strict withdrawal periods; administration by injection or, in case of varying disfunctions, by vaginal spirals, but not by implants; clear identification of the individual animal so treated; and recording of the details of treatment by the responsible veterinarian (e.g. type of treatment, type of veterinary drug used or authorized, date of treatment, identity of the animals treated).[225]

225. The conclusion we come to, after consideration of the foregoing factors, is that, on balance, the difference in the levels of protection concerning hormones used for growth promotion purposes, on the one hand, and concerning hormones used for therapeutic and zootechnical purposes, on the other, is not, in itself, "arbitrary or unjustifiable".

226. We turn to the Panel's comparison between the levels of protection set by the European Communities in respect of natural and synthetic hormones for growth promotion and with respect to carbadox and olaquindox.[226] Carbadox and olaquindox are anti-microbial agents or compounds which are mixed with the feed given to piglets (maximum age of four months). According to a report of JECFA[227], submitted to the Panel by the United States, carbadox is a feed additive that is a known genotoxic carcinogen, that is, carbadox *induces* and does not merely promote cancer.[228] The experts advising the Panel confirmed that carbadox was genotoxic in character.

[220]US Panel Report, para. 8.198; Canada Panel Report, para. 8.201.

[221]US Panel Report, para. 8.199; Canada Panel Report, para. 8.202.

[222]US Panel Report, paras. 6.183, 6.184 and 6.189; Canada Panel Report, paras. 6.182, 6.183 and 6.188.

[223]See the ninth paragraph of the Preamble of Directive 96/22/EC, dated 29 April 1996, which states:

> Whereas the prohibition on the use of hormonal substances for fattening purposes should continue to apply; whereas the use of certain substances for therapeutic or zootechnical purposes may be authorized but must be strictly controlled in order to prevent any misuse; (underlining added)

[224]US Panel Report, para. 4.69; Canada Panel Report, para. 4.192.

[225]US Panel Report, para. 4.69; Canada Panel Report, para. 4.238.

[226]EC Directive 70/524/CEE of 23 November 1970 governs the use of additives to animal feed. This Directive allows Member States to permit the use of certain additives listed in Annex I of the Directive, under the conditions there specified. On 12 April 1991, EC Directive 91/248/EEC replaced Annexes I and II of the 1970 Directive with new Annexes. The new Annex I includes the following under the subheading "growth promoters": carbadox and olaquindox.

[227]Evaluation of Certain Veterinary Drug Residues in Food: Thirty-sixth Report of the Joint FAO/WHO Expert Committee on Food Additives ("JECFA"), Technical Report Series 799 (World Health Organization, 1990), pp. 45-50.

[228]US Panel Report, para. 4.220.

227. In the panel proceedings, the European Communities sought to justify the difference in the levels of protection in respect of the natural and synthetic hormones (except MGA) and in respect of carbadox and olaquindox.[229] The Panel responds to these arguments and the European Communities has reiterated its original arguments in its appellant's submission.[230] We canvass the arguments of the European Communities and the Panel's responses, which are set out below in very summary form.

228. The first argument of the European Communities is that carbadox and olaquindox are not hormones, but rather anti-microbial agents. The Panel responds that the European Communities has not explained why this difference would itself justify a different regulatory treatment in the light of the carcinogenic potential of both kinds of substances.[231]

229. The second argument of the European Communities is that carbadox and olaquindox only indirectly act as growth promoters by suppressing the development of bacteria and aiding the intestinal flora of piglets, thereby also exerting preventive therapeutic effects; hormones, it is said, have no preventive therapeutic action when used as growth promoters. However, the Panel considers that both the hormones in dispute and carbadox and olaquindox may have therapeutic effects.[232]

230. The European Communities' third argument is that carbadox and olaquindox are only commercially available in prepared feedstuffs (not as injections or implants) in predetermined dosages and, therefore, are less open to abuse. The Panel observes that, according to experts advising it, products containing any of the five hormones at issue for implantation or injection are also packaged in predetermined dosages. The experts add that carbadox as an additive in feedstuffs poses additional risks since it may harm the persons handling the feedstuff.[233]

231. The fourth argument of the European Communities is that there are no alternatives to carbadox or olaquindox available that have the same therapeutic action. The Panel notes that, according to one of the experts, there are readily available alternatives such as oxytetracycline. According to Canada, oxytetracycline has been the subject of a risk assessment by JECFA and Codex has adopted the Acceptable Daily Intakes (ADI) and MRLs recommended by JECFA.[234]

232. The European Communities' fifth argument is that carbadox cannot be abused since it has growth promotion effects only in piglets up to four months old and a fixed withdrawal period of at least 28 days is set in the relevant Directive. In turn, the Panel notes that, according to its expert advisors, there is no assurance that the piglets treated with carbadox would not be slaughtered and that residues of carbadox would not thereby enter the food chain of human beings. The Panel adds that the use of the hormones at issue as growth promoters could similarly be subjected to strict conditions.[235]

233. The sixth argument the European Communities made is that carbadox is used in very small quantities and is hardly absorbed in the piglet's gut with the result that it leaves practically no residues at all in pork meat destined for human consumption. The Panel replies that, according to the experts advising it,

[229]US Panel Report, para. 8.229 (with respect to carbadox only); Canada Panel Report, para. 8.232.

[230]EC's appellant's submission, paras. 528-548.

[231]US Panel Report, para. 8.231 (with respect to carbadox only); Canada Panel Report, para. 8.234.

[232]US Panel Report, para. 8.232 (with respect to carbadox only); Canada Panel Report, para. 8.235.

[233]US Panel Report, para. 8.233 (with respect to carbadox only); Canada Panel Report, para. 8.236.

[234]US Panel Report, para. 8.234 (with respect to carbadox only); Canada Panel Report, para. 8.237.

[235]US Panel Report, para. 8.235; Canada Panel Report, para. 8.238.

once a substance has been administered to an animal, there will always be some residue of this substance or a metabolite left, albeit a very small amount, in the meat of that animal.[236] In this connection, Canada volunteered the comment that, according to a 1991 study commissioned by the European Communities and provided to the Panel, metabolites of carbadox and olaquindox are "nearly completely absorbed in the gut" and that "in using carbadox, a mutagenic or carcinogenic risk for the consumer seems negligible if the withdrawal time is closely respected".[237]

234. The European Communities made a seventh argument which was not repeated in its appeal: the complaining parties limit their claim to one or two substances out of 10,000 to 15,000 veterinary medicinal substances the use of which the European Communities authorizes, which indicates "a remarkable degree of consistency in its levels of sanitary protection".[238] The Panel notes that the European Communities has advised it that the EC Council, by a Decision of 26 February 1996, has already taken action *motu proprio* to review carbadox and olaquindox. To the Panel, the arguments of the European Communities suggest that it acknowledges that the difference in the levels of protection in respect of added hormones and in respect of carbadox and olaquindox may not be justified and should be reviewed.[239]

235. Having reviewed the above arguments and counter-arguments, we must agree with the Panel that the difference in the EC levels of protection in respect of the hormones in dispute when used for growth promotion, on the one hand, and carbadox and olaquindox, on the other, is unjustifiable in the sense of Article 5.5.

D. *Resulting in Discrimination or a Disguised Restriction on International Trade*

236. In interpreting this last element or requirement of Article 5.5, the Panel recalls the conclusion of the Appellate Body in *United States - Standards for Reformulated and Conventional Gasoline*[240] ("*United States - Gasoline*") to the effect that the terms "arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction on international trade" found in Article XX of the GATT 1994, may be read side-by-side and impart meaning to one another.[241] The Panel also recalls our statement in *Japan - Alcoholic Beverages*[242], and in particular the requirement in Article III:2, second sentence, of the GATT 1994 that dissimilar taxation needs to be "applied ... so as to afford protection to domestic production". It quotes the passage stating, in part, that "[the dissimilar taxation] may be so much more that it will be clear from that very differential that the dissimilar taxation was applied _so as to afford protection'. In some cases, that may be enough to show a violation".[243] The Panel then renders its interpretation of the last requirement of Article 5.5 of the *SPS Agreement* as follows:

> We consider the reasoning in both Appellate Body Reports to be equally relevant to the relationship between the three elements contained in Article 5.5. All three elements impart meaning to one another. Nevertheless, in order to give effect to all three elements contained in Article 5.5 and giving full

[236]US Panel Report, para. 8.236; Canada Panel Report, para. 8.239.

[237]CEAS Consultants (Wye) Ltd. (et.al.), *The Impact on Animal Husbandry in the European Community of the Use of Growth Promoters,* Final Report, Vol. I (1991), cited in Canada's appellee's submission, paras. 180-181.

[238]US Panel Report, para. 8.237; Canada Panel Report, para. 8.240.

[239]US Panel Report, para. 8.237 (with respect to carbadox only); Canada Panel Report, para. 8.240.

[240]Adopted 20 May 1996, WT/DS2/AB/R.

[241]US Panel Report, paras. 8.182 and 8.240; Canada Panel Report, paras. 8.185 and 8.243.

[242]Adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

[243]US Panel Report, para. 8.183; Canada Panel Report, para. 8.186.

> meaning to the text and context of this provision, we consider that all three elements need to be distinguished and addressed separately. However, we also agree that in some cases where a Member enacts, for comparable situations, sanitary measures which reflect different levels of protection, the significance of the difference in levels of protection combined with the arbitrariness thereof may be sufficient to conclude that this difference in levels of protection "result[s] in discrimination or a disguised restriction on international trade" in the sense of Article 5.5 (in line with the argument that the magnitude of the very differential of a dissimilar taxation may be enough to conclude that a dissimilar taxation is applied so as to afford protection, as provided for in the second sentence of Article III:2 of GATT.[244] (underlining added)

237. The European Communities urges that the Panel committed several errors of legal interpretation. Firstly, the Panel disregards the alternative character of the three elements of the *chapeau* of Article XX of the GATT 1994, and the fact that the three elements of Article 5.5 of the *SPS Agreement* are additional and cumulative in nature.[245] Secondly, Article III:2, second sentence, of the GATT 1994 is concerned with the impact of a tax on the competitive relations concerning directly competitive or substitutable products. On the other hand, discrimination and disguised restriction in the sense of Article 5.5 of the *SPS Agreement* are entirely different concepts.[246] Thirdly, and as a consequence of its interpretation of Article 5.5, a "discrimination or a disguised restriction on international trade" is not really, for the Panel, a third or additional requirement at all under Article 5.5.[247]

238. We agree with the Panel's view that "all three elements [of Article 5.5] need to be distinguished and addressed separately".[248] We also recall our interpretation that Article 5.5 and, in particular, the terms "discrimination or a disguised restriction on international trade", have to be read in the context of the basic obligations contained in Article 2.3, which requires that "sanitary ... *measures* shall not be *applied in a manner which would constitute a disguised restriction on international trade*". (emphasis added)[249]

239. However, we disagree with the Panel on two points. First, in view of the structural differences between the standards of the *chapeau* of Article XX of the GATT 1994 and the elements of Article 5.5 of the *SPS Agreement*, the reasoning in our Report in *United States - Gasoline*, quoted by Panel, cannot be casually imported into a case involving Article 5.5 of the *SPS Agreement*. Secondly, in our view, it is similarly unjustified to assume applicability of the reasoning of the Appellate Body in *Japan - Alcoholic Beverages*[250] about the inference that may be drawn from the sheer size of a tax differential for the application of Article III:2, second sentence, of the GATT 1994, to the quite different question of whether arbitrary or unjustifiable differences in levels of protection against risks for human life or health, "result in discrimination or a disguised restriction on international trade".[251]

[244]US Panel Report, para 8.184; Canada Panel Report, para. 8.187.

[245]EC's appellant's submission, paras. 471-477.

[246]EC's appellant's submission, para. 486.

[247]EC's appellant's submission, para. 491.

[248]US Panel Report, para. 8.184; Canada Panel Report, para. 8.187.

[249]See para. 212 of this Report.

[250]Adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

[251]The differential involved in *Japan - Alcoholic Beverages* was a tax differential, which is very different from a differential in levels of protection. Unlike a differential in levels of protection, a tax differential is always expressed in quantitative terms and a significant tax differential in favour of domestic products will inevitably affect the competitiveness of imported products and thus afford protection to domestic products. There is a clear and linear relationship between a tax differential and the protection afforded to domestic products. There is, however, no such relationship between a differential in levels of human health protection and discrimination or disguised restriction on trade.

240. In our view, the degree of difference, or the extent of the discrepancy, in the levels of protection, is only one kind of factor which, along with others, may cumulatively lead to the conclusion that discrimination or a disguised restriction on international trade in fact results from the application of a measure or measures embodying one or more of those different levels of protection. Thus, we do not think that the difference between a "no residues" level and "unlimited residues" level is, together with a finding of an arbitrary or unjustifiable difference, sufficient to demonstrate that the third, and most important, requirement of Article 5.5 has been met. 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*. Evidently, the answer to the question whether arbitrary or unjustifiable differences or distinctions in levels of protection established by a Member do in fact result in discrimination or a disguised restriction on international trade must be sought in the circumstances of each individual case.

241. In the present appeal, it is necessary to address this question only with regard to the difference in the levels of protection established in respect of the hormones in dispute and in respect of carbadox and olaquindox.

242. According to the Panel, the "significance" of the "arbitrary or unjustifiable" distinction in the level of protection concerning the hormones in dispute as compared with the level of protection in respect of carbadox and olaquindox results in discrimination or a disguised restriction on international trade. It bases this finding on: (i) the great difference in the levels of protection, namely, the difference between a "no residue" level for the five hormones at issue when used as growth promoters, as opposed to an "unlimited residue" level for carbadox and olaquindox; (ii) the absence of any plausible justification put forward by the European Communities for this significant difference; and (iii) the nature of the EC measure, i.e., the prohibition of imports, which necessarily restricts international trade.[252]

243. The Panel adduces, in support of its finding, three additional factors: (iv) the objectives (apart from the protection of human health) that it believes the European Communities had in mind in enacting or maintaining the EC ban, as reflected in the preambles of the measures in dispute, the reports of the European Parliament and the opinions rendered by the EC Social and Economic Committee. These include the harmonizing of the regulatory schemes of the different Member States of the European Union and the removal of competitive distortions in and barriers to intra-community trade in beef, and the bringing about of an increase in the consumption of beef, thereby reducing the internal beef surpluses, and providing more favourable treatment to domestic producers[253]; (v) before the import ban came into force (in 1987), the percentage of animals treated for growth promotion with the hormones in dispute was significantly lower in the European Communities than in Canada and the United States. The apparent implication, for the Panel, is that the EC measures constitute *de facto* discrimination against imported beef produced with growth promotion hormones[254]; and (vi) that the hormones at issue are used for growth promotion in the bovine sector "where the European Communities seemingly wants to limit supplies and is arguably less concerned with international competitiveness", whereas carbadox and olaquindox are used for

[252]US Panel Report, para. 8.241; Canada Panel Report, para. 8.244.

[253]US Panel Report, para 8.242; Canada Panel Report, para. 8.245.

[254]US Panel Report, para 8.242; Canada Panel Report, para. 8.245.

growth promotion in the pork meat sectors "where the European Communities has no domestic surpluses and where international competitiveness is a higher priority".[255]

244. In its appeal, the European Communities stresses that the prohibition of the use of hormones for growth promotion purposes applies equally to beef produced within the European Communities and to imports of such beef.[256] It is also emphasized that the predominant motivation for both the prohibition of the domestic use of growth promotion hormones and the prohibition of importation of treated meat, is the protection of the health and safety of its population. No suggestion has been made that the import prohibition of treated meat was the result of lobbying by EC domestic producers of beef. It is also pointed out that legislation (in representative governments) normally reflects multiple objectives. The fact that there was a higher percentage of beef treated with growth promotion hormones in Canada and in the United States, as compared with the European Communities, was simply a reflection of the fact that Canada and the United States had allowed this practice for a long time while the European Communities had not. The long history of the EC Directives should be recalled in this connection. The import prohibition could not have been designed simply to protect beef producers in the European Communities *vis-à-vis* beef producers in the United States and Canada, for beef producers in the European Communities were precisely forbidden to use the same hormones for the same purpose. We note, in this connection, that the prohibition of domestic use also necessarily excludes any exports of treated meat by domestic producers.

245. We do not attribute the same importance as the Panel to the supposed multiple objectives of the European Communities in enacting the EC Directives that set forth the EC measures at issue. The documentation that preceded or accompanied the enactment of the prohibition of the use of hormones for growth promotion and that formed part of the record of the Panel makes clear the depth and extent of the anxieties experienced within the European Communities concerning the results of the general scientific studies (showing the carcinogenicity of hormones), the dangers of abuse (highlighted by scandals relating to black-marketing and smuggling of prohibited veterinary drugs in the European Communities) of hormones and other substances used for growth promotion and the intense concern of consumers within the European Communities over the quality and drug-free character of the meat available in its internal market.[257] A major problem addressed in the legislative process of the European Communities related to the differences in the internal regulations of various Member States of the European Union (four or five of which permitted, while the rest prohibited, the use for growth promotion of certain hormones), the resulting distortions in competitive conditions in and the existence of barriers to intra-community trade. The necessity for harmonizing the internal regulations of its Member States was a consequence of the European Communities' mandate to establish a common (internal) market in beef.[258] Reduction of any

[255]US Panel Report, para. 8.243 (with respect to carbadox only); Canada Panel Report, para. 8.246.

[256]EC's appellant's submission, para. 552.

[257]See, for example: Opinion of the Economic and Social Committee of 13 December 1984 on the proposal for a Council Directive amending Directive 81/602/EEC concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action, Official Journal, No. C 44, 15 February 1985, p. 14; Resolution of the European Parliament of 11 October 1985 on the proposal for a Council Directive amending Directive 81/602/EEC concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action, Official Journal No. C 288, 11 November 1985, p. 158; Resolution of the European Parliament of 16 September 1988 on the use of hormones in meat production, Official Journal, No. C 262, 10 October 1988, p. 167; and Resolution of the European Parliament of 14 April 1989 on the USA's refusal to comply with Community legislation on slaughterhouses and hormones, and the consequences of this refusal, Official Journal, No. C 120, 16 May 1989, p. 356. The latter Resolution was based on, *inter alia*, the Pimenta Report, Parts A and B.

[258]Article 7a of the Treaty Establishing the European Community stipulates:

> The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 ...
>
> The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

[259]US Panel Report, para 8.271; Canada Panel Report, para. 8.274.

[260]US Panel Report, para 8.247; Canada Panel Report, para. 8.250.

[261]United States' appellant's submission, para. 4.

[262]United States' appellant's submission, para. 18.

[263]United States' appellant's submission, para. 20.

[264]Canada's appellant's submission, paras. 19-22.

beef surplus through an increase in the consumption of beef within the European Communities, is not only in the interests of EC farmers, but also of non-hormone using farmers in exporting countries. We are unable to share the inference that the Panel apparently draws that the import ban on treated meat and the Community-wide prohibition of the use of the hormones here in dispute for growth promotion purposes in the beef sector were not really designed to protect its population from the risk of cancer, but rather to keep out US and Canadian hormone-treated beef and thereby to protect the domestic beef producers in the European Communities.

246. Our conclusion, therefore, is that the Panel's finding that the "arbitrary or unjustifiable" difference in the EC levels of protection in respect of the hormones at issue on the one hand and in respect of carbadox and olaquindox on the other hand, "result in discrimination or a disguised restriction on international trade", is not supported either by the architecture and structure of the EC Directives here at stake or of the subsequent Directive on carbadox and olaquindox, or by the evidence submitted by the United States and Canada to the Panel. The Panel's finding is itself unjustified and erroneous as a matter of law. Accordingly, we reverse the conclusion of the Panel that the European Communities has acted inconsistently with the requirements set out in Article 5.5 of the *SPS Agreement*.

XIII. Appeals by the United States and Canada: Articles 2.2 and Article 5.6 of the *SPS Agreement*

247. The Panel refrained from making findings under Articles 2.2 and 5.6 of the *SPS Agreement*. In respect of Article 2.2, the Panel, having found that the EC measures are inconsistent with Articles 3.1, 5.1 and 5.5, did not believe there was any necessity for making a finding on the consistency of the same EC measures with Article 2.2. The Panel, in so concluding, also considered that Articles 3 and 5 provide for more specific rights and obligations than the "basic rights and obligations" set out in Article 2.[259]

248. In respect of Article 5.6, the Panel held that since it had already found the EC level of protection reflected in the EC measure in dispute was adopted in violation of Article 5.5, there was no need to examine whether that same measure is also more trade restrictive than necessary to achieve that level in the sense of Article 5.6.[260]

249. The United States, *qua* appellant, believes the Panel has made all the findings necessary for the purpose and should have declared the EC import prohibition inconsistent with Article 2.2.[261] It is also submitted by the United States that the text of Articles 2, 3 and 5 does not indicate that all of the obligations in Article 2.2 are subsumed under Articles 3 and 5.[262] In respect of Article 5.6, it is similarly urged by the United States that the Panel's findings on Article 5.5 are sufficient to establish that the EC import prohibition is also inconsistent with Article 5.6.[263] Similar submissions are made by Canada as appellant.[264]

250. We agree with the Panel's application of the notion of judicial economy. We have affirmed the Panel's conclusion that the EC measures are inconsistent with Article 5.1 in view of the failure of the

European Communities to provide a risk assessment that reasonably supports such measures. Under the circumstances, the necessity or propriety of proceeding to determine whether Article 2.2 of the *SPS Agreement* has also been violated is not at all clear to us. Had we reversed the Panel's conclusion in respect of the inconsistency of the EC measures with Article 5.1, it would have been logically necessary to inquire whether Article 2.2 might nevertheless have been violated. 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. We recall the reading that we have given above to Articles 2 and 5 – that Article 2.2 informs Article 5.1, and that similarly Article 2.3 informs Article 5.5 – but believe that further analysis of their relationship should await another case.

251. We have, at the same time, reversed the Panel's conclusion under Article 5.5 of the *SPS Agreement* that the levels of protection set by the European Communities in respect of the use of hormones for growth promotion result in discrimination or a disguised restriction on international trade. However, it cannot be assumed that all the findings of fact necessary to proceed to a determination of consistency or inconsistency of the EC measures with the requirements of Article 5.6 have been made by the Panel, which Article also provides that "technical and economic feasibility" should be taken into account. There appears all the more reason for refraining from an examination of the legality of the measures under Article 5.6 and for adhering to the prudential dictates of the principle of judicial economy.

252. We consider, therefore, and so hold, that the Panel did not err in refraining from making findings on Articles 2.2 and 5.6 of the *SPS Agreement*.

XIV. Findings and Conclusions

253. For the reasons set out in the preceding sections of this Report, the Appellate Body:

(a) reverses the Panel's general interpretative ruling that the *SPS Agreement* allocates the evidentiary burden to the Member imposing an SPS measure, and also reverses the Panel's conclusion that when a Member's measure is not based on an international standard in accordance with Article 3.1, the burden is on that Member to show that its SPS measure is consistent with Article 3.3 of the *SPS Agreement*;

(b) concludes that the Panel applied the appropriate standard of review under the *SPS Agreement*;

(c) upholds the Panel's conclusions that the precautionary principle would not override the explicit wording of Articles 5.1 and 5.2, and that the precautionary principle has been incorporated in, *inter alia*, Article 5.7 of the *SPS Agreement*;

(d) upholds the Panel's conclusion that the *SPS Agreement*, and in particular Articles 5.1 and 5.5 thereof, applies to measures that were enacted before the entry into force of the *WTO Agreement*, but that remain in force thereafter;

(e) concludes that the Panel, although it sometimes misinterpreted some of the evidence before it, complied with its obligation under Article 11 of the DSU to make an objective assessment of the facts of the case;

(f) concludes that the procedures followed by the Panel in both proceedings – in the selection and use of experts, in granting additional third party rights to the United States and Canada and in making findings based on arguments not made by the parties – are consistent with the DSU and the *SPS Agreement*;

(g) reverses the Panel's conclusion that the term "based on" as used in Articles 3.1 and 3.3 has the same meaning as the term "conform to" as used in Article 3.2 of the *SPS Agreement*;

(h) modifies the Panel's interpretation of the relationship between Articles 3.1, 3.2 and 3.3 of the *SPS Agreement*, and reverses the Panel's conclusion that the European Communities by maintaining, without justification under Article 3.3, SPS measures which are not based on existing international standards, acted inconsistently with Article 3.1 of the *SPS Agreement*;

(i) upholds the Panel's finding that a measure, to be consistent with the requirements of Article 3.3, must comply with, *inter alia*, the requirements contained in Article 5 of the *SPS Agreement*;

(j) modifies the Panel's interpretation of the concept of "risk assessment" by holding that neither Articles 5.1 and 5.2 nor Annex A.4 of the *SPS Agreement* require a risk assessment to establish a minimum quantifiable magnitude of risk, nor do these provisions exclude *a priori*, from the scope of a risk assessment, factors which are not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences;

(k) reverses the Panel's finding that the term "based on" as used in Article 5.1 of the *SPS Agreement* entails a "minimum procedural requirement" that a Member imposing an SPS measure must submit evidence that it actually took into account a risk assessment when it enacted or maintained the measure;

(l) upholds the Panel's finding that the EC measures at issue are inconsistent with the requirements of Article 5.1 of the *SPS Agreement*, but modifies the Panel's interpretation by holding that Article 5.1, read in conjunction with Article 2.2, requires that the results of the risk assessment must sufficiently warrant the SPS measure at stake;

(m) reverses the Panel's findings and conclusions on Article 5.5 of the *SPS Agreement*; and

(n) concludes that the Panel exercised appropriate judicial economy in not making findings on Articles 2.2 and 5.6 of the *SPS Agreement*.

254. The foregoing legal findings and conclusions uphold, modify and reverse the findings and conclusions of the Panel in Parts VIII and IX of the Panel Reports, but leave intact the findings and conclusions of the Panel that were not the subject of this appeal.

255. The Appellate Body *recommends* that the Dispute Settlement Body request the European Communities to bring the SPS measures found in this Report and in the Panel Reports, as modified by this Report, to be inconsistent with the *SPS Agreement* into conformity with the obligations of the European Communities under that Agreement.

Report of the Appellate Body,
United States – Continued Suspension of Obligations in the EC-Hormones Dispute,
WT/DS320/AB/R, adopted 16 October 2008

WORLD TRADE ORGANIZATION

WT/DS320/AB/R
16 October 2008
(08-4928)

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UNITED STATES – CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC – HORMONES DISPUTE

AB-2008-5

Report of the Appellate Body

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Canada – Continued Suspension	Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R, circulated to WTO Members 31 March 2008
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
Chile – Price Band System (Article 21.5 – Argentina)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
EC – Approval and Marketing of Biotech Products	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1, and Add.1 to Add.9, adopted 21 November 2006, DSR 2006:III, 847
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
EC – Commercial Vessels	Panel Report, *European Communities – Measures Affecting Trade in Commercial Vessels*, WT/DS301/R, adopted 20 June 2005, DSR 2005:XV, 7713
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Hormones	Award of the Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU*, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833

Short Title	Full Case Title and Citation
EC – Hormones (Canada)	Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada*, WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235
EC – Hormones (Canada) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS48/ARB, 12 July 1999, DSR 1999:III, 1135
EC – Hormones (US)	Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States*, WT/DS26/R/USA, adopted 13 February 1998, as modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, 699
EC – Hormones (US) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999, DSR 1999:III, 1105
EC – Sardines	Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report, WT/DS231/AB/R, DSR 2002:VIII, 3451
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Japan – Apples	Appellate Body Report, *Japan Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
Japan – Apples	Panel Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/R, adopted 10 December 2003, upheld by Appellate Body Report, WT/DS245/AB/R, DSR 2003:IX, 4481
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Certain EC Products	Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R and Add.1, adopted 10 January 2001, as modified by Appellate Body Report, WT/DS165/AB/R, DSR 2001:II, 413
US – Continued Suspension	Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R, circulated to WTO Members 31 March 2008
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1675
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663, and Corr.1
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375
US – Offset Act (Byrd Amendment)	Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report, WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, 489
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1

Short Title	Full Case Title and Citation
US – Underwear	Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997, as modified by Appellate Body Report, WT/DS24/AB/R, DSR 1997:I, 31
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323

Abbreviation	Description
1999 Opinion	"Opinion of the SCVPH – Assessment of Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products" (30 April 1999) (Exhibits US-4 and CDA-2 submitted by the United States and Canada, respectively, to the Panel)
2000 Opinion	"Review of Specific Documents relating to the SCVPH Opinion of 30 April 99 on the Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products" (adopted on 3 May 2000) (Exhibits US-17 and CDA-4 submitted by the United States and Canada, respectively, to the Panel)
2002 Opinion	"Opinion of the SCVPH on Review of Previous SCVPH Opinions of 30 April 1999 and 3 May 2000 on the Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products" (adopted on 10 April 2002) (Exhibits US-1 and CDA-17 submitted by the United States and Canada, respectively, to the Panel)
ADI	Acceptable daily intake
Codex	Codex Alimentarius Commission
CVMP	Committee on Veterinary Medicinal Products of the European Union (a subcommittee of the European Medicines Agency (EMEA))
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
FAO	Food and Agriculture Organization of the United Nations
FDA	Food and Drug Administration of the United States
GATT 1994	*General Agreement on Tariffs and Trade 1994*
IARC	International Agency for Research on Cancer
JECFA	Joint FAO/WHO Expert Committee on Food Additives
MGA	Melengestrol acetate
MRLs	Maximum residue limits
Panel Report, *Canada – Continued Suspension*	Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R
Panel Report, *US – Continued Suspension*	Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R
Rules of Conduct	*Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DSB/RC/1, adopted 3 December 1996
SCVPH	Scientific Committee on Veterinary Measures relating to Public Health of the European Commission
SPS Agreement	*Agreement on the Application of Sanitary and Phytosanitary Measures*
TBT Agreement	*Agreement on Technical Barriers to Trade*
Vienna Convention	*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WHO	World Health Organization of the United Nations

Abbreviation	Description
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Continued Suspension of Obligations in the EC – Hormones Dispute

AB-2008-5

European Communities, *Appellant/Appellee*
United States, *Other Appellant/Appellee*
Canada, *Other Appellant/Appellee*

Australia, *Third Participant*
Brazil, *Third Participant*
China, *Third Participant*
India, *Third Participant*
Mexico, *Third Participant*
New Zealand, *Third Participant*
Norway, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*

Present:

Unterhalter, Presiding Member
Abi-Saab, Member
Bautista, Member

I. Introduction

1. The European Communities, the United States, and Canada each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*[1] (the "Panel Report, *US – Continued Suspension*"), and the Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*[2] (the "Panel Report, *Canada – Continued Suspension*").[3] The Panels were established to consider complaints by the European Communities concerning the suspension of concessions or other obligations by the United States and by Canada against the European Communities because of the latter's alleged failure to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") stemming from the *EC – Hormones* dispute.[4] The European Communities asserts that the United States and Canada must cease the suspension of concessions because the European

[1]WT/DS320/R, 21 March 2008.
[2]WT/DS321/R, 21 March 2008.
[3]In this Report, we refer to the United States first and then to Canada, in keeping with the chronology of the WT/DS numbers assigned to these disputes.
[4]The recommendations and rulings of the DSB resulted from the adoption on 13 February 1998, by the DSB, of the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R; the Panel Report, WT/DS26/R/USA; and the Panel Report, WT/DS48/R/CAN.

Communities adopted Directive 2003/74/EC[5] and notified it to the DSB as a measure taken to comply with the DSB's recommendations and rulings in *EC – Hormones*.[6]

2. Before the panels in *EC – Hormones*[7], the United States and Canada claimed that the ban imposed by the European Communities on meat from cattle treated with six hormones—oestradiol-17β, progesterone, testosterone, trenbolone acetate, zeranol, and melengestrol acetate ("MGA")—was inconsistent with the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), in particular, Articles 2, 3, and 5 thereof, the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*"), and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

3. The panel in *EC – Hormones* held that:

- by maintaining sanitary measures that are not based on a risk assessment, the European Communities had acted inconsistently with Article 5.1 of the *SPS Agreement*;

- by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considered appropriate in different situations which result in discrimination or a disguised restriction on international trade, the European Communities had acted inconsistently with Article 5.5 of the *SPS Agreement*; and

- by maintaining sanitary measures that are not based on existing international standards without justification under Article 3.3 of the *SPS Agreement*, the European Communities had acted inconsistently with Article 3.1 of that Agreement.[8]

4. The European Communities appealed the panel's findings under Articles 3.1, 3.3, 5.1, and 5.5 of the *SPS Agreement*. In addition, the European Communities claimed that the panels had erred in the selection and use of scientific experts, in allocating the burden of proof, and in applying the standard of review. The United States and Canada appealed the panel's decision not to make findings relating to Articles 2.2 and 5.6 of the *SPS Agreement*.

[5]Directive 2003/74/EC of the European Parliament and of the Council of 22 September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists, *Official Journal of the European Union*, L Series, No. 262 (14 October 2003) 17 (Exhibits EC-1 and US-3 submitted by the European Communities and the United States, respectively, to the Panel).

[6]Panel Report, *US – Continued Suspension*, para. 1.1; Panel Report, *Canada – Continued Suspension*, para. 1.1.

[7]As the same individuals served on both panels, in this Report we will henceforth refer to the panels in the singular.

[8]Panel Report, *EC – Hormones (US)*, para. 9.1; Panel Report, *EC – Hormones (Canada)*, para. 9.1.

5. The Appellate Body upheld, albeit on the basis of modified reasoning, the panel's findings that the European Communities' import ban on meat and meat products treated with the six hormones at issue was inconsistent with Article 5.1 of the *SPS Agreement*, and, as a consequence, was also inconsistent with Article 3.3 of that Agreement. The Appellate Body found that the scientific studies submitted by the European Communities in that dispute were not "sufficiently specific to the case at hand"[9], because they were "general studies which do indeed show the existence of a general risk of cancer; but they do not focus on and do not address the particular kind of risk here at stake".[10] For this reason, the Appellate Body concluded that "no risk assessment that reasonably support[ed] or warrant[ed] the import prohibition embodied in the [European Communities'] Directives was furnished to the Panel"[11], and accordingly found that the European Communities' import ban, imposed under Directive 96/22/EC, was not "based on" a risk assessment within the meaning of Article 5.1. Moreover, the Appellate Body disagreed with the panel's interpretation of the relationship between Articles 3.1 and 3.3 of the *SPS Agreement*. The panel interpreted Article 3.3 to be an exception to the "general obligation" of Article 3.1, and found that the European Communities had not acted consistently with Article 3.1 and had not provided appropriate scientific justification for a higher level of SPS protection under Article 3.3. The Appellate Body concluded, however, that the right of Members to establish a higher level of sanitary protection under Article 3.3 is an autonomous right and not an exception to a "general obligation" under Article 3.1. Accordingly, the Appellate Body reversed the panel's conclusion that the import prohibition was inconsistent with Article 3.1. Nevertheless, as the Appellate Body found that the European Communities' import prohibition was inconsistent with Article 5.1, it also concluded that the import prohibition was inconsistent with Article 3.3. The Appellate Body, however, modified the panel's interpretation of "risk assessment" by holding that there was no requirement "to establish a minimum quantifiable magnitude of risk", and that the factors "not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences" were not excluded from the scope of a risk assessment.[12] The Appellate Body also reversed the panel's findings that the European Communities had acted inconsistently with Article 5.5 of the *SPS Agreement*, which requires that a WTO Member avoid arbitrary or unjustifiable distinctions in the levels of sanitary protection that result in discrimination or a disguised restriction on international trade. Furthermore, the Appellate Body agreed with the panel that the precautionary principle would not override Articles 5.1 and 5.2 and that it had been incorporated in, *inter alia*, Article 5.7 of the *SPS Agreement*. With regard to the selection and use of experts by the panel, the Appellate Body concluded that the panel had acted consistently with the

[9]Appellate Body Report, *EC – Hormones*, para. 200.

[10]*Ibid.*

[11]*Ibid.*, para. 208.

[12]*Ibid.*, para. 253(j).

requirements of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and the *SPS Agreement*. The Appellate Body rejected the European Communities' claim that the panel had erred in the standard applied to the review of the evidence and thus found that the panel had complied with its obligation under Article 11 of the DSU. Finally, the Appellate Body concluded that the panel's exercise of judicial economy was proper in not making findings under Articles 2.2 and 5.6 of the *SPS Agreement*.

6. On 13 February 1998, the DSB adopted the panel and Appellate Body Reports in *EC – Hormones* and recommended that the European Communities bring its measures into conformity with the *SPS Agreement*. Following the adoption of the panel and Appellate Body reports by the DSB, the European Communities requested that the reasonable period of time for implementation be determined through arbitration in accordance with Article 21.3(c) of the DSU. The Arbitrator determined a reasonable period of time of 15 months, expiring on 13 May 1999.[13]

7. On 12 May 1999, the European Communities addressed a communication to the Chairman of the DSB, which stated:

> [T]he Community has undertaken a complementary risk assessment in light of the relevant clarifications on risk assessment provided by the Appellate Body.
>
> In light of such results of that risk assessment as are now available to it, the Community is not in a position to lift its existing import ban on 13 May.
>
> The Community now intends to study in more depth these results in order to evaluate on this basis and in the light of any new relevant information what steps may be necessary in light of our WTO rights and obligations.[14]

8. As a result, the United States and Canada requested the DSB to authorize suspension of concessions and other obligations pursuant to Article 22.2 of the DSU. The European Communities objected to the levels of suspension of concessions proposed by the United States and Canada, and requested that such levels be determined through arbitration pursuant to Article 22.6 of the DSU.[15] The Arbitrators concluded that the levels of nullification and impairment in relation to United States and Canadian meat exports were US$116.8 million and Can$11.3 million, respectively.[16] On 26 July 1999, the United States and Canada obtained authorization from the DSB to suspend concessions and other obligations in relation to the European Communities.

[13]Award of the Arbitrator, *EC – Hormones*, para. 48.
[14]WT/DS26/18, WT/DS48/16.
[15]WT/DS26/20; WT/DS48/18.
[16]Decision by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 83; Decision by the Arbitrators, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 72.

9. On 29 July 1999, the United States applied 100 per cent import duties on a range of imports from certain member States of the European Communities.[17] On 1 August 1999, Canada applied 100 per cent *ad valorem* duties on a similar range of imports from the European Communities.[18]

10. After the adoption of the panel and Appellate Body Reports in the *EC – Hormones* dispute, the European Commission initiated 17 scientific studies to assess any risks to human health posed by the six hormones at issue.[19] On 30 April 1999, the Scientific Committee on Veterinary Measures relating to Public Health (the "SCVPH") of the European Communities issued the Assessment of Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products[20] (the "1999 Opinion"). Subsequent to the adoption of the 1999 Opinion, additional scientific information was made available to the European Commission in the form of scientific studies conducted by: (i) the United Kingdom's Veterinary Products Committee sub-group on the 1999 Opinion (October 1999); (ii) the Committee for Veterinary Medicinal Products ("CVMP") of the European Union (a subcommittee of the European Medicines Agency (EMEA)) (December 1999); and (iii) the Joint FAO/WHO Expert Committee on Food Additives ("JECFA") (February 2000). At the request of the European Commission, the SCVPH examined this scientific information and, on 3 May 2000, issued a review of its 1999 Opinion in which it declined to alter the conclusions contained therein[21] (the "2000 Opinion"). On 10 April 2002, a second review of the 1999 Opinion was issued by the SCVPH[22] (the "2002 Opinion") on the basis of more recent scientific data collected since the previous review. The scientific data reviewed by the SCVPH included the final results of all 17 studies that had been commissioned by the European Commission.

11. In the light of the conclusions of the 1999, 2000, and 2002 Opinions, the European Communities adopted Directive 2003/74/EC on 22 September 2003[23], which amends Directive 96/22/EC in relation to the prohibition of the use of hormones in stockfarming. Directive 2003/74/EC maintains the permanent prohibition of the placing on the market of meat and meat products from animals treated with oestradiol-17β for growth-promotion purposes originally contained in Directive 96/22/EC.[24] In relation to the five other hormones—testosterone, progesterone, trenbolone acetate, zeranol, and MGA—Directive 2003/74/EC continues to apply the prohibition

[17]Office of the United States Trade Representative, Implementation of WTO Recommendations Concerning *EC – Measures Concerning Meat and Meat Products (Hormones)*, *United States Federal Register*, Vol. 64, No. 143 (27 July 1999) 40638.
[18]European Union Surtax Order, *Canada Gazette Part II*, Vol. 133, No. 17 (18 August 1999).
[19]These scientific studies are contained in Exhibits EC-7 (US) through EC-42 (US) and Exhibits EC-4 (CDA) through EC-39 (CDA) submitted by the European Communities to the Panel.
[20]"Opinion of the SCVPH – Assessment of Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products" (30 April 1999) (Exhibits US-4 and CDA-2 submitted by the United States and Canada, respectively, to the Panel). The main conclusions of the 1999 Opinion are set out in Panel Report, *US – Continued Suspension*, para. 7.391, and Panel Report, *Canada – Continued Suspension*, para. 7.388.
[21]"Review of Specific Documents relating to the SCVPH Opinion of 30 April 99 on the Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products" (adopted on 3 May 2000) (Exhibits US-17 and CDA-4 submitted by the United States and Canada, respectively, to the Panel). The main conclusions of the 2000 Opinion are set out in Panel Report, *US – Continued Suspension*, para. 7.392, and Panel Report, *Canada – Continued Suspension*, para. 7.389.
[22]"Opinion of the SCVPH on Review of Previous SCVPH Opinions of 30 April 1999 and 3 May 2000 on the Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products" (adopted on 10 April 2002) (Exhibits US-1 and CDA-17 submitted by the United States and Canada, respectively, to the Panel). The 2002 Opinion confirmed the validity of the 1999 and 2000 Opinions and concluded that no amendments to those Opinions were justified. The main conclusions of the 2002 Opinion are set out in Panel Report, *US – Continued Suspension*, para. 7.393, and Panel Report, *Canada – Continued Suspension*, para. 7.390.
[23]*Supra*, footnote 5.
[24]Directive 2003/74/EC, *supra*, footnote 5, Recital 10 and Article 1 (amending Articles 2 and 3 of Directive 96/22/EC).

contained in Directive 96/22/EC, but on a provisional basis.[25] Directive 2003/74/EC specifies that, even though the scientific information available showed the existence of risks associated with these substances, "the current state of knowledge does not make it possible to give a quantitative estimate of the risk to consumers".[26] Accordingly, the prohibition of these five hormones should apply "while the Community seeks more complete scientific information from any source, which could shed light and clarify the gaps in the present state of knowledge of these substances".[27]

12. On 27 October 2003, the European Communities notified the DSB of the adoption, publication, and entry into force of Directive 2003/74/EC, as well as the 1999, 2000, and 2002 Opinions, which it considered to be risk assessments that sufficiently justified the permanent and provisional import prohibitions under the *SPS Agreement*.[28] The European Communities therefore claimed that it had fully implemented the DSB's recommendations and rulings in the original *EC – Hormones* disputes, and consequently considered that the suspensions of concessions by the United States and Canada were no longer justified. The United States and Canada refused to lift the measures taken pursuant to the DSB's authorization to suspend concessions or other obligations. The European Communities requested consultations with the United States and Canada on 8 November 2004.[29] The Panel was established, at the request of the European Communities, on 17 February 2005.[30]

13. Before the Panel, the European Communities put forward two "series of main claims", and a conditional "alternative" claim. In its first "series of main claims", the European Communities argued that, by maintaining their suspension of concessions and other obligations, the United States and Canada were seeking redress of a perceived violation of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") without having recourse to the rules and procedures of the DSU, in violation of Article 23.2(a) of the DSU read in conjunction with Articles 21.5 and 23.1.[31] The European Communities argued that the United States and Canada should have initiated a compliance proceeding under Article 21.5 of the DSU following notification of the implementing measure to the DSB if they considered that this measure was not consistent with the covered agreements. Their failure to do so violated the specific prohibition to make unilateral determinations set out in Article 23.2(a) of the DSU. The European Communities therefore argued that the continued suspension of concessions or other obligations by the United States and Canada constituted a violation of Article 23.2(a) read in conjunction with Articles 21.5 and 23.1 of the DSU.

14. In its second "series of main claims", the European Communities argued that the United States and Canada, by failing to have recourse to, and abide by, the rules and procedures of the DSU, violated Article 23.1 read in conjunction with Articles 22.8 and 3.7 of the DSU. In particular, the European Communities argued that Article 22.8 of the DSU prohibits the continued application of the suspension of concessions when the measure found to be inconsistent is removed. In addition to the two series of main claims, the European Communities asserted that the continued suspension of concessions or other obligations by the United States and Canada violates Articles I and II of the

[25] *Ibid.*

[26] Directive 2003/74/EC, *supra*, footnote 5, Recital 7.

[27] *Ibid.*, Recital 10.

[28] WT/DS26/22, WT/DS48/20.

[29] Panel Report, *US – Continued Suspension*, para. 1.1; Panel Report, *Canada – Continued Suspension*, para. 1.1.

[30] Panel Report, *US – Continued Suspension*, para. 1.3; Panel Report, *Canada – Continued Suspension*, para. 1.3. Two separate Panels were established to examine the complaints against the United States and Canada, respectively; however, the Panels were composed of the same panelists. As the composition of both Panels was identical, in this Report we refer to the Panels collectively as the "Panel".

[31] Panel Report, *US – Continued Suspension*, para. 7.153; Panel Report, *Canada – Continued Suspension*, para. 7.140.

GATT 1994.[32] Finally, the European Communities made an "alternative" claim[33], conditional on "the Panel find[ing] no violation of Article 23 of the DSU, ... that [the United States'/Canada's] measure[s] violate[] Article 22.8 of the DSU and Articles I and II of the GATT 1994."[34]

15. The United States and Canada rejected the European Communities' claims, arguing that their measures suspending concessions or other obligations are consistent with Article 22.8 of the DSU. According to the United States and Canada, the suspension of concessions was authorized by the DSB and this authorization remains in effect.[35] They further argued that the European Communities has failed to comply with the DSB's recommendations and rulings stemming from *EC – Hormones*, because Directive 2003/74/EC is inconsistent with the *SPS Agreement*, in particular, Articles 3.3, 5.1, and 5.7.[36] The United States also alleged that the European Communities' implementing measure is inconsistent with Article 5.2 of the *SPS Agreement*.[37]

16. The Panel Reports were circulated to Members of the World Trade Organization (the "WTO") on 31 March 2008. The Panel began its analysis with the European Communities' first series of main claims and found that the United States and Canada "violated Article 23.1 and 23.2(a) of the DSU by seeking redress of a violation of the *WTO Agreement* through a determination that the [European Communities'] implementing measure did not comply with the DSB recommendations and rulings in the *EC – Hormones* case without having recourse to dispute settlement in accordance with the rules and procedures of the DSU."[38] Turning to the European Communities' second series of main claims, the Panel explained that the European Communities' "second series of main claims" and its "conditional" claim under Article 22.8 of the DSU were both "based on the [European Communities'] view that it has complied with the recommendations and rulings of the DSB in the *EC – Hormones* case by adopting Directive 2003/74/EC and properly notifying it to the DSB".[39] "The difference", according to the Panel, "is that, under the conditional claim, the European Communities alleges actual compliance, and not that it should be presumed to have complied in good faith."[40] The Panel then observed that it "could not agree with the European Communities and base [its] findings of violation of Article 23.1 read in conjunction with Article 22.8 and 3.7 of the DSU on an irrebuttable presumption of good faith compliance".[41] Consequently, the Panel said that it would have to determine whether it had jurisdiction to examine the consistency of the European Communities' implementing measure with the *SPS Agreement*. It concluded that it was "entitled to determine whether the European Communities has removed the measure found to be inconsistent with a covered agreement in order to establish whether Article 22.8 has been breached" by the United States and Canada.[42] In particular, the Panel determined that it would review the compatibility of the European

[32] Panel Report, *US – Continued Suspension*, para. 3.1; Panel Report, *Canada – Continued Suspension*, para. 3.1.

[33] Panel Report, *US – Continued Suspension*, para. 7.155; Panel Report, *Canada – Continued Suspension*, para. 7.142.

[34] Panel Report, *US – Continued Suspension*, para. 3.2; Panel Report, *Canada – Continued Suspension*, para. 3.2.

[35] Panel Report, *US – Continued Suspension*, para. 4.78; Panel Report, *Canada – Continued Suspension*, para. 4.78.

[36] Panel Report, *US – Continued Suspension*, para. 7.180; Panel Report, *Canada – Continued Suspension*, paras. 7.398, 7.552, and 7.826.

[37] Panel Report, *US – Continued Suspension*, para. 7.406.

[38] Panel Report, *US – Continued Suspension*, para. 7.251; Panel Report, *Canada – Continued Suspension*, para. 7.244.

[39] Panel Report, *US – Continued Suspension*, para. 7.156; Panel Report, *Canada – Continued Suspension*, para. 7.143. (emphasis omitted)

[40] Panel Report, *US – Continued Suspension*, para. 7.156; Panel Report, *Canada – Continued Suspension*, para. 7.143.

[41] Panel Report, *US – Continued Suspension*, para. 7.359; Panel Report, *Canada – Continued Suspension*, para. 7.357.

[42] Panel Report, *US – Continued Suspension*, para. 7.372; Panel Report, *Canada – Continued Suspension*, para. 7.369.

Communities' implementing measure with Articles 5.1, 5.7, and 3.3 of the *SPS Agreement*.[43] In the case against the United States, the Panel said it would additionally examine the compatibility with Article 5.2 of the *SPS Agreement*.[44]

17. The Panel proceeded to examine the compatibility of the European Communities' implementing measure and made the following findings. As regards Article 5.2 in the case against the United States, the Panel found that "the European Communities took into account risk assessment techniques of the relevant international organizations and took into account the factors listed in Article 5.2 of the *SPS Agreement*."[45]

18. In relation to Article 5.1 of the *SPS Agreement*, the Panel found:

> [T]he Opinions do not constitute a risk assessment because the Opinions do not satisfy the definition of a risk assessment contained in Annex A(4) second sentence and because the scientific evidence referred to in the Opinions does not support the conclusions therein. Because the Opinions are not a risk assessment as appropriate to the circumstances, the measure cannot be based on a risk assessment within the meaning of Article 5.1.[46] (footnote omitted)
>
> In light of the above, the Panel concludes that the [European Communities'] implementing measure on oestradiol-17β is not compatible with Article 5.1 of the *SPS Agreement*.[47]

19. In respect of Article 5.7 of the *SPS Agreement*, the Panel found:

> [I]t has not been demonstrated that relevant scientific evidence was insufficient, within the meaning of Article 5.7 of the *SPS Agreement*, in relation to any of the five hormones with respect to which the European Communities applies a provisional ban.[48]
>
> We therefore conclude that the [European Communities'] compliance measure does not meet the requirements of Article 5.7 of the *SPS Agreement* as far as the provisional ban on progesterone, testosterone, zeranol, trenbolone acetate and melengestrol acetate is concerned.[49]

20. The Panel refrained from making findings on Article 3.3 of the *SPS Agreement*, explaining that, "[i]n light of our mandate and of our objectives in engaging in a review of the conformity of the [European Communities'] implementing measure with the *SPS Agreement*, we see no reason to reach

[43]Panel Report, *US – Continued Suspension*, para. 7.411; Panel Report, *Canada – Continued Suspension*, para. 7.402.
[44]Panel Report, *US – Continued Suspension*, para. 7.410.
[45]*Ibid.*, para. 7.573.
[46]Panel Report, *US – Continued Suspension*, para. 7.578; Panel Report, *Canada – Continued Suspension*, para. 7.548.
[47]Panel Report, *US – Continued Suspension*, para. 7.579; Panel Report, *Canada – Continued Suspension*, para. 7.549.
[48]Panel Report, *US – Continued Suspension*, para. 7.835; Panel Report, *Canada – Continued Suspension*, para. 7.821.
[49]Panel Report, *US – Continued Suspension*, para. 7.836; Panel Report, *Canada – Continued Suspension*, para. 7.822.

a conclusion on Article 3.3 of the *SPS Agreement*, to the extent that this conclusion depends on a violation of Article 5."[50]

21. Having concluded its analysis under the *SPS Agreement*, the Panel made the following findings in respect of the European Communities' second series of main claims:

> [W]e conclude that it has not been established that the European Communities has removed the measure found to be inconsistent with a covered agreement.[51]
>
> For these reasons and those developed above, we find that the European Communities did not demonstrate a breach of Article 22.8 of the DSU by [the United States and Canada].[52]
>
> The Panel recalls its understanding that violations of Articles 23.1 and 3.7 were only claimed in relation to the violation of Article 22.8 of the DSU. To the extent that Article 22.8 has not been breached, the European Communities has not established a violation of Articles 23.1 and 3.7 of the DSU. The Panel concludes that there is no violation of Articles 23.1 and 3.7 of the DSU by [the United States and Canada] as a result of a breach of Article 22.8.[53]

22. The Panel also rejected the European Communities' claims under Articles I:1 and II of the GATT 1994.[54] Finally, the Panel addressed the European Communities' alternative claim of violation of Article 22.8 of the DSU:

> We recall that the European Communities also raised a *conditional* claim of violation of Article 22.8 of the DSU *per se*. The European Communities specified in its first written submission that this claim was "made in the alternative and only on the condition that the Panel does not establish any violation under Articles 23.1, 23.2(a), 3.7, 22.8 and 21.5 of the DSU".
>
> We note that we have established a violation of Article 23.1 and 23.2(a). We also recall that we have already addressed the alleged violation of Article 22.8 of the DSU as part of our review of the [European Communities'] claim of violation of Article 23.1 read together with Article 22.8 and Article 3.7 of the DSU. Under those circumstances, it is not necessary for the Panel to address the conditional claim of violation [of] 22.8 of the DSU *per se* in the alternative.[55] (original emphasis; footnote omitted)

[50]Panel Report, *US – Continued Suspension*, para. 7.845; Panel Report, *Canada – Continued Suspension*, para. 7.830.
[51]Panel Report, *US – Continued Suspension*, para. 7.847; Panel Report, *Canada – Continued Suspension*, para. 7.832.
[52]Panel Report, *US – Continued Suspension*, para. 7.850; Panel Report, *Canada – Continued Suspension*, para. 7.835.
[53]Panel Report, *US – Continued Suspension*, para. 7.851; Panel Report, *Canada – Continued Suspension*, para. 7.836.
[54]Panel Report, *US – Continued Suspension*, para. 7.853; Panel Report, *Canada – Continued Suspension*, para. 7.838.
[55]Panel Report, *US – Continued Suspension*, paras. 7.854 and 7.855; Panel Report, *Canada – Continued Suspension*, paras. 7.839 and 7.840.

23. On the basis of the above, the Panel concluded that the United States and Canada had made the following "procedural violations":

> (a) by seeking, through the measure at issue—that is the suspension of concessions or other obligations subsequent to the notification of the [European Communities'] implementing measure (Directive 2003/74/EC)—the redress of a violation of obligations under a covered agreement without having recourse to, and abiding by, the rules and procedures of the DSU, [the United States and Canada have] breached Article 23.1 of the DSU;
>
> (b) by making a determination within the meaning of Article 23.2(a) of the DSU to the effect that a violation had occurred without having recourse to dispute settlement in accordance with the rules and procedures of the DSU, [the United States and Canada have] breached Article 23.2(a) of the DSU.[56]

24. As regards the European Communities' claims concerning Article 23.1 of the DSU, read together with Articles 22.8 and 3.7, the Panel concluded:

> (a) to the extent that the measure found to be inconsistent with the *SPS Agreement* in the *EC – Hormones* dispute [(WT/DS26, WT/DS48)] has not been removed by the European Communities, [the United States and Canada have] not breached Article 22.8 of the DSU;
>
> (b) to the extent that Article 22.8 has not been breached, the European Communities has not established a violation of Articles 23.1 and 3.7 of the DSU *as a result of a breach of Article 22.8*.[57] (original emphasis)

25. In the light of its conclusions, the Panel recommended that the DSB request the United States and Canada to bring their measures into conformity with their obligations under the DSU.[58] The Panel made the following additional remarks and suggestion pursuant to Article 19.1 of the DSU regarding the implementation of its findings and conclusions:

[56]Panel Report, *US – Continued Suspension*, para. 7.856; Panel Report, *Canada – Continued Suspension*, para. 7.841.

[57]Panel Report, *US – Continued Suspension*, para. 7.857; Panel Report, *Canada – Continued Suspension*, para. 7.842.

[58]Panel Report, *US – Continued Suspension*, para. 8.2; Panel Report, *Canada – Continued Suspension*, para. 8.2.

> Whereas it is for the Members to decide on the appropriate steps needed to bring measures found in breach of their WTO obligations into conformity, the Panel deems it important to recall its conclusion in [paragraph 7.251 in *US – Continued Suspension* and paragraph 7.244 in *Canada – Continued Suspension*] as the parties have apparently diverging opinions as to how this report should be implemented by the respondent. As already mentioned, while the Panel performed functions similar to that of an Article 21.5 panel, this was done only in order to determine whether Article 22.8 of the DSU had been breached. This Panel was not called upon, nor does it have jurisdiction, to determine the compatibility of Directive 2003/74/EC with the covered agreements. In that context, the Panel suggests that, in order to implement its findings under Article 23 and in order to ensure the prompt settlement of this dispute, [the United States and Canada] should have recourse to the rules and procedures of the DSU without delay.[59]

26. On 29 May 2008, the European Communities notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal certain issues of law covered in the Panel Reports in *US – Continued Suspension* and *Canada – Continued Suspension* and certain legal interpretations developed by the Panel and filed a single Notice of Appeal[60], pursuant to Rule 20 of the *Working Procedures for Appellate Review*[61] (the "*Working Procedures*").

27. In a letter dated 30 May 2008, the Division noted that, in the interests of "fairness and orderly procedure", as referred to in Rule 16(1) of the *Working Procedures*, and in agreement with the participants, the appellate proceedings in respect of the European Communities' appeal from the Panel Reports in *US – Continued Suspension* and *Canada – Continued Suspension* would be consolidated due to the substantial overlap in the content of the disputes. A single Division would hear and decide the appeals, and a single oral hearing would be held by the Division.[62] The participants were further informed that Appellate Body Member, Mr. Georges Abi-Saab, had been selected, on the basis of rotation, to serve on the Division hearing these appeals, and that, in accordance with Rule 15 of the *Working Procedures*, the Appellate Body had notified the Chairman of the DSB of its decision to authorize Mr. Abi-Saab to complete the disposition of the appeals even though his second term as Appellate Body Member was due to expire before the completion of the appellate proceedings.

28. On 5 June 2008, the European Communities filed an appellant's submission.[63] On 10 June 2008, the United States and Canada each notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal certain issues of law covered in the respective Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal[64], pursuant to Rule 23(1) and (2) of the *Working Procedures*. On 13 June 2008, the United States and Canada each filed an other appellant's submission.[65] On 26 June 2008, Canada, the European Communities, and

[59]Panel Report, *US – Continued Suspension*, para. 8.3; Panel Report, *Canada – Continued Suspension*, para. 8.3.

[60]WT/DS320/12, WT/DS321/12 (attached as Annex I to this Report).

[61]WT/AB/WP/5, 4 January 2005.

[62]At the oral hearing, the United States and Canada confirmed their preference for two separate Appellate Body reports. We have issued separate reports (WT/DS320/AB/R and WT/DS321/AB/R), which are identical except for the Findings and Conclusions section.

[63]Pursuant to Rule 21 of the *Working Procedures*.

[64]WT/DS320/13 (attached as Annex II to this Report); WT/DS321/13 (attached as Annex III to this Report).

[65]Pursuant to Rule 23(3) of the *Working Procedures*.

the United States each filed an appellee's submission[66], and Australia, Brazil, New Zealand, and Norway each filed a third participant's submission.[67] On the same day, China, India, Mexico, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu each notified the Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant.[68]

29. After consultation with the Appellate Body Secretariat, Canada, the European Communities, and the United States each agreed that it would not be possible for the Appellate Body to circulate its Reports in these appeals within the 90-day time-limit referred to in Article 17.5 of the DSU.[69] Canada, the European Communities, and the United States agreed that additional time was needed because of the preliminary procedural issue arising in these proceedings, the size of the Panel record, the number and complexity of the issues appealed, and the fact that there was another appellate proceeding running simultaneously. Accordingly, Canada, the European Communities, and the United States each confirmed that it would deem the Appellate Body Reports in these proceedings, issued no later than 16 October 2008, to be Appellate Body reports circulated pursuant to Article 17.5 of the DSU.

30. On 27 June 2008, the European Communities sent a letter to the Appellate Body Secretariat noting that the United States and Canada had filed their appellee's submissions after the 5:00 p.m. time-limit set out by the Division in the Working Schedule drawn up for these appeals. The European Communities referred to Rule 18(1) of the *Working Procedures* and requested that the Division "inform the parties of the treatment that should be accorded to these documents".[70] The United States and Canada responded in separate letters and requested the Division to reject the European Communities' request.[71] At the oral hearing, the Division gave a ruling on the European Communities' request regarding the late filing of the appellee's submission by the United States and Canada. The Division emphasized the importance of all participants adhering strictly to the time-limits set out in the Working Schedule, given the time constraints imposed upon both the participants and the Appellate Body Members in these proceedings. It also noted that the failure to strictly observe such time-limits can have an impact upon the fairness and the orderly conduct of the proceedings. However, having thoroughly examined the matter, and in the light of the particular time-limits concerned and potential prejudice that might be involved, the Division decided nevertheless to consider the appellees' submissions filed by the United States and Canada.

[66]Pursuant to Rules 22 and 23(4) of the *Working Procedures*. After consultation with the participants, the Division hearing this appeal allocated additional time for filing the appellees' submissions and the third participants' submissions and notifications, pursuant to Rules 16, 22, 23, 24, and 26 of the *Working Procedures*.

[67]Pursuant to Rule 24(1) of the *Working Procedures*.

[68]Pursuant to Rule 24(2) of the *Working Procedures*.

[69]Letter from the European Commission to the Director of the Appellate Body Secretariat dated 11 July 2008; Letter from Canada to the Director of the Appellate Body Secretariat dated 15 July 2008; Letter from the United States to the Director of the Appellate Body Secretariat dated 17 July 2008.

[70]Letter from the European Commission to the Director of the Appellate Body Secretariat dated 27 June 2008.

[71]Letter from Canada to the Director of the Appellate Body Secretariat dated 30 June 2008; Letter from the United States to the Director of the Appellate Body Secretariat dated 1 July 2008. Canada noted that the European Communities' appellee's submission sent via email was also slightly delayed. The United States noted that the European Communities announced in an email message that it had delivered printed copies of its appellee's submission to the Appellate Body Secretariat and to the other participants and third participants before 5 p.m.; however, the United States received the electronic copy of the European Communities' appellee's submission after 5 p.m., whereas the Working Schedule states that "[t]welve printed copies, as well as an electronic copy, of each written submission should be filed by 5 p.m., Geneva, Switzerland time, on the due date indicated in this Working Schedule". (original underlining) In the event the Appellate Body were to rule on the European Communities' request regarding the United States' appellee's submission, the United States requested the Appellate Body also to inform the European Communities of the treatment to be accorded to its submission in the light of Rule 18 of the *Working Procedures*.

31. Canada, the European Communities, and the United States requested, on 3 June 2008, that the Division authorize public observation of the oral hearing. They argued that public observation of the oral hearing was not precluded by the DSU, the *Working Procedures*, or the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*[72] (the "*Rules of Conduct*"). The participants proposed various logistical arrangements that would allow public observation, while respecting the confidentiality of any third participants that did not wish to disclose their oral statements or responses to questions.[73] On 4 June 2008, the Division invited the third participants to comment in writing on the participants' request to open the hearing to public observation. In particular, the Division asked for the third participants' views on the permissibility of opening the hearing for public observation under the DSU and the *Working Procedures*, and, if they so wished, on the specific logistical arrangements proposed in the requests. Comments were received, on 12 June 2008, from Australia, Brazil, China, India, Mexico, New Zealand, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu. Australia, New Zealand, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu supported the participants' request to open the hearing to public observation. Brazil, China, India, and Mexico requested the Appellate Body to deny the participants' request. According to these third participants, the oral hearing forms part of the proceedings of the Appellate Body and, therefore, is subject to the requirement of Article 17.10 of the DSU that "[t]he proceedings of the Appellate Body shall be confidential". On 16 June 2008, the Division invited Canada, the European Communities, and the United States to comment on the submissions made by the third participants. Third participants who wished to submit comments on the submissions made by the other third participants were also invited to do so. Additional comments from Canada, the European Communities, and the United States were received on 23 June 2008. On 7 July 2008, the Division held an oral hearing with the participants and third participants, exclusively dedicated to exploring the issues raised by the request of the participants to authorize public observation. The participants and third participants made oral statements and responded to questions from the Division. At the end of the oral hearing, the participants and third participants were invited to submit, by close of business, 8 July 2008, additional comments relating specifically to the technical modalities proposed by the participants for public observation. Comments were received from Brazil, China, India, and Mexico, as well as Canada, the European Communities, and the United States.

32. On 10 July 2008, the Division issued a Procedural Ruling in which it authorized the public observation of the oral hearing and adopted additional procedures for that purpose in accordance with Rule 16(1) of the *Working Procedures*. The Procedural Ruling is attached as Annex 4 of this Report. Public observation took place via simultaneous closed-circuit television broadcast to a separate room. Notice of the opening of the hearing to public observation and registration instructions were provided on the WTO website. A total of 80 individuals registered to observe the oral hearing.

33. The oral hearing took place on 28-29 July 2008. Pursuant to the additional procedures adopted by the Division, Canada, the European Communities, and the United States were authorized to disclose their oral statements and responses to questions. Australia, New Zealand, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu were also authorized to disclose their statements and responses to questions. The oral statements and responses to questions of the other third participants were not subject to observation by the public.

[72]The *Rules of Conduct*, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are incorporated into the *Working Procedures* (WT/AB/WP/5), as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

[73]The participants expressed a preference for simultaneous closed-circuit broadcast to a separate room.

II. Arguments of the Participants and the Third Participants

A. *Claims of the European Communities – Appellant*

1. Procedural Issue – Public Observation of the Oral Hearing

34. The European Communities requested the Appellate Body to allow public observation of the oral hearing in these proceedings. The European Communities recognizes that Article 17.10 of the DSU provides that "[t]he proceedings of the Appellate Body shall be confidential". Nevertheless, for the European Communities, "it is by no means obvious that the term 'proceedings' covers the oral hearing of the Appellate Body."[74] The European Communities submits that "an interpretation of the ordinary meaning of that term in its context and in light of the DSU's object and purpose will demonstrate that '[t]he proceedings of the Appellate Body' rather refers to the Appellate Body's internal work, and does not include its oral hearing, and that Article 17.10 in any event does not prohibit an open oral hearing."[75]

35. The European Communities acknowledges that Article 14.1 of the DSU refers to the "deliberations" of the panel as being confidential. However, the European Communities argues that the choice of the different words "deliberations" and "proceedings" may be explained by the fact that the idea of creating an Appellate Body emerged relatively late in the negotiations on the DSU, and the fact that the DSU regulates the appellate review in much more rudimentary terms than the panel procedure. Therefore, the European Communities finds no basis for understanding the choice of the different words "deliberations" and "proceedings" as reflecting an intention to draw a difference for the question at issue, and to rule out public observation of Appellate Body oral hearings. The European Communities also refers to the French and Spanish versions of Article 17.10 that use the terms "*travaux*" and "*actuaciones*", respectively. The European Communities states that these are "very broad terms that could cover every work which the Appellate Body performs", but that such a literal reading "would give rise to absurd results".[76] Thus, these terms have to be given a "more plausible meaning"[77] and are best understood as capturing the internal work of the Appellate Body.

36. According to the European Communities, interpreting "proceedings" more broadly than "the internal work of the Appellate Body" leads to problematic results. First, the oral hearing would be confidential with "the absurd result ... that the parties themselves could not attend the hearing in their own dispute".[78] Secondly, it would preclude the Appellate Body from referring to the arguments of the participants in the Appellate Body report. Thirdly, the Notices of Appeal could not be circulated to WTO Members and made public.

37. The European Communities asserts that, if the Appellate Body was "empowered"[79] by Article 17.9 of the DSU to draw up its *Working Procedures* and thereby to create the "oral hearing", even though an oral hearing is not foreseen in the DSU, it is also entitled to hold an oral hearing that is open for public observation. The European Communities submits that allowing public observation of the oral hearing "gives effect to the choice which the DSU offers to the parties"[80] under Article 18.2 of the DSU, which provides that "[n]othing in [the DSU] shall preclude a party to a dispute from disclosing statements of its own positions". Moreover, the European Communities states that, in accordance with Article 3.7 of the DSU, the objective of the WTO dispute settlement mechanism is

[74]European Communities' request for an open hearing, para. 9.
[75]*Ibid.*
[76]European Communities' request for an open hearing, para. 15.
[77]*Ibid.*
[78]*Ibid.*, para. 19.
[79]*Ibid.*, para. 25.
[80]*Ibid.*, para. 26. (emphasis omitted)

"to secure a positive solution to a dispute". It follows that if the parties to a dispute jointly consider that an open hearing is an important part of their desired way to find a positive solution of their dispute, then it is in line with the object and purpose of the DSU to accommodate that request.

38. The European Communities maintains that confidentiality under the DSU is correctly understood as protecting the interests of WTO Members where they consider that they need that protection, and not as an obligation imposed, even where WTO Members do not desire confidentiality. The European Communities adds that "[t]he other function of confidentiality is to protect the integrity of the (quasi-)judicial process, but in contrast to secret deliberations, this function does not require closed hearings."[81] On the contrary, the European Communities argues that open hearings are even better and more natural for the judicial process, as the tradition of open oral hearings in national and international judiciaries around the world demonstrates.

39. Finally, the European Communities submits that the Appellate Body should follow the example of the Panel in these proceedings and of other panels which have allowed public observation of their meetings with the parties. The European Communities additionally refers to various international courts and tribunals that allow the public to observe their hearings.

40. The European Communities rejects the arguments made by the third participants that oppose the request to open the hearing on the basis of their interpretation of the scope of the term "proceedings". The European Communities states that none of these third participants "has commented on the many inconsistencies that would arise out of such a reading ..., not least the fact that the confidentiality requirement obviously does not apply to certain other aspects of the 'proceedings' in a broad sense (such as the notice of appeal, the disclosure of statements in the report etc. ...)."[82] The European Communities also rejects the relevance of the interpretation of the term "proceedings" in *Canada – Aircraft*, because that case involved a different issue, namely, whether additional procedures were necessary for the protection of business confidential information. As regards Article 18.2 of the DSU, the European Communities considers that this provision "trumps any confidentiality requirements that may exist elsewhere in the agreement"[83], rather than vice-versa, as suggested by some third participants. Moreover, the European Communities disagrees with the argument that the Appellate Body's decision in this case will prejudge the outcome of the DSU review negotiations.

41. For these reasons, the European Communities requests the Appellate Body to allow public observation of the hearing in these proceedings. The European Communities states that its preferred format is to allow public observation of the Appellate Body's oral hearing "by way of real-time closed-circuit audio and video broadcast to a separate room".[84]

2. Articles 23.2(a) and 21.5 of the DSU

42. Although it agrees with the Panel's finding that the United States and Canada have acted inconsistently with Articles 23.2(a) and 23.1 of the DSU, the European Communities asserts that the Panel erred by failing to find that Article 23.2(a), read together with Articles 21.5 and 23.1, required the United States and Canada to initiate Article 21.5 proceedings if they considered that Directive 2003/74/EC did not comply with the DSB's recommendations and rulings in *EC – Hormones*.

43. According to the European Communities, when a WTO Member considers that the implementing measure taken by another WTO Member is not consistent with the covered agreements,

[81]*Ibid.*, para. 31.
[82]European Communities' comments on third participants' comments, para. 4.
[83]*Ibid.*, para. 10.
[84]European Communities' request for an open hearing, para. 45.

and proceeds to enforce what it considers to be its rights under the DSU, that Member is obliged first to have recourse to a compliance procedure under Article 21.5 of the DSU. The European Communities asserts that "a WTO Member is not entitled, in these circumstances, to seek the redress of an alleged violation through the suspension of obligations without first having recourse to a compliance procedure."[85]

44. In the view of the European Communities, the Panel confused the question of whether recourse to Article 21.5 is obligatory and the question of what procedures are available under Article 21.5. The European Communities disagrees with the Panel's interpretation of the phrase "except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding" in Article 23.2(a) as "encompassing any of the means of dispute settlement provided in the DSU, including consultation, conciliation, good offices and mediation".[86] According to the European Communities, "[i]t is not in dispute"[87] that the United States and Canada disagree with the European Communities as to the consistency of Directive 2003/74/EC with the *SPS Agreement*. Consequently, the present dispute "clearly" falls within the scope of Article 21.5 because it concerns a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings"[88] of the DSB in *EC – Hormones*. The European Communities emphasizes that consultation, conciliation, good offices, and mediation under the DSU have no effect unless the results are accepted by the parties. In this dispute, the European Communities argues, "it is manifest that no procedure requiring the agreement between the parties was available"[89], because the European Communities exhausted all available options, including arbitration under Article 25 of the DSU, in its attempt to come to an agreement with the responding parties. The European Communities submits that the phrase "shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel" in Article 21.5 implies an obligation to have recourse to compliance panel proceedings and that, in the absence of an amicable solution, there must be a final and binding ruling by an adjudicative body. The European Communities concludes from this that "Article 21.5 of the DSU is the applicable provision because the WTO members clearly privileged that provision in case of disagreement between the parties on implementation".[90] Thus, the European Communities maintains that the Panel erred in failing to draw the necessary conclusion that an Article 21.5 panel proceeding was the only applicable procedure available under the DSU and that such a panel procedure was "the only way for the United States and Canada to proceed".[91]

45. The European Communities argues furthermore that the Panel erred in finding that compliance panel proceedings may be initiated by the European Communities as the original responding party in *EC – Hormones*. On the contrary, the European Communities submits, it is inherent in the wording, context, and object and purpose of the provision that the original complaining parties, that is, the United States and Canada, are required to have recourse to Article 21.5.[92] The European Communities maintains that references in Articles 3.12, 4.4, 4.7, and 6 of the DSU to "complaining party" and "complainant" confirm that the WTO dispute settlement system is based on the notion of "adversarial proceedings" and "is not applicable to requests for an abstract confirmation of the *consistency* of a measure"[93] by the defending party. Thus, where a complaining party alleges that an implementing measure is not consistent with the covered agreements, the "implementing Member cannot have recourse to Article 21.5 of the DSU in order to confirm the WTO-consistency of

[85]European Communities' appellant's submission, para. 57.
[86]*Ibid.*, para. 48 (referring to Panel Report, *US – Continued Suspension*, para. 7.247; and Panel Report, *Canada – Continued Suspension*, para. 7.240).
[87]European Communities' appellant's submission, para. 59.
[88]*Ibid.*, para. 49.
[89]*Ibid.*, para. 54.
[90]*Ibid.*, para. 61.
[91]European Communities' appellant's submission, para. 55.
[92]See *ibid.*, para. 75.
[93]*Ibid.*, para. 78. (original emphasis)

its compliance measure."[94] The European Communities asserts that this understanding is confirmed by the very notion of the DSU as a "dispute" settlement system and by the basic logic reflected in Article 3.3 of the DSU and Article XXIII:2 of the GATT 1994, which assumes a situation where a WTO Member considers that its rights are being impaired by another Member's measure and therefore challenges that measure, and "does not address the situation where a Member is complaining against its own measure".[95]

46. The European Communities additionally contends that "[i]t would be manifestly impossible for the European Communities to fulfil the very basic requirements of Article 6" as regards the content of the request for the establishment of a panel, because "it would not be in a position to identify the provisions of the *SPS Agreement* that are violated."[96] Moreover, the European Communities maintains that compliance panel proceedings initiated by the European Communities would not lead to recommendations addressed to the retaliatory measures taken by the United States and Canada, because these measures are not the measure taken to comply with respect to which a disagreement exists within the meaning of Article 21.5. The European Communities also points out that an original complainant may refuse to participate in compliance panel proceedings initiated by the original respondent, as in fact occurred in *EC – Bananas III (Article 21.5 – EC)*. The European Communities considers that the "subsequent practice"[97] that has developed in the WTO dispute settlement system confirms its understanding that Article 21.5 is only available to complaining parties in the original dispute. The European Communities points out that, since the establishment of the WTO, 30 out of 31 proceedings pursuant to Article 21.5 were initiated by the original complaining party, and the panel report in the one remaining proceeding, initiated by the original responding party, was never adopted. This demonstrates that such a procedure is not an option for the original responding party.

47. On this basis, the European Communities requests the Appellate Body to reverse the Panel's findings that the scope of the phrase "recourse to these dispute settlement procedures" in Article 23.2(a) is not limited to Article 21.5 panel proceedings initiated, in this case, by the United States and Canada as the original complaining parties, and that the European Communities, as the original respondent, may initiate Article 21.5 proceedings.

3. Article 22.8 of the DSU

48. The European Communities alleges that the Panel erred in finding that the European Communities' second series of main claims were premised on: (i) a violation by the United States and Canada of their obligations under Article 22.8 of the DSU; and (ii) the actual conformity with the *SPS Agreement* of the implementing measure taken by the European Communities.[98] In its second series of main claims before the Panel, the European Communities argued that the United States and Canada have acted inconsistently with Article 23.1 of the DSU, read together with Articles 22.8 and 3.7, by maintaining the suspension of concessions despite the removal of the "measure found to be inconsistent" within the meaning of Article 22.8—that is, Directive 96/22/EC.[99]

49. The European Communities explains that it never argued that the claim under Article 23.1 of the DSU was dependent on a violation of Article 22.8 by the United States and Canada and never argued that this claim would be premised on the conformity of the implementing measure with the

[94]*Ibid.*, para. 78.
[95]*Ibid.*, para. 85.
[96]*Ibid.*, para. 88.
[97]European Communities' appellant's submission, para. 91.
[98]*Ibid.*, paras. 99 and 100 (referring to Panel Report, *US – Continued Suspension*, para. 7.272; and Panel Report, *Canada – Continued Suspension*, para. 7.288).
[99]Panel Report, *US – Continued Suspension*, para. 7.252; Panel Report, *Canada – Continued Suspension*, para. 7.245.

SPS Agreement. Rather, the violation the European Communities claimed was the unilateral determination made by the United States and Canada according to which "the measure taken to comply" with the recommendations and rulings of the DSB, that is, Directive 2003/74/EC, is not, in their view, consistent with the *SPS Agreement*. The European Communities adds that such a determination is a violation of Article 23.1 of the DSU read in the light of Article 22.8 of the DSU, not a claim of violation of Article 22.8 in itself, and is not premised on the conformity of the implementing measure with the *SPS Agreement*. The European Communities additionally notes that only in the alternative, and only on the condition that the Panel did not establish any violation under Articles 23.1, 23.2(a), 3.7, 22.8 and 21.5 of the DSU, did the European Communities make an alternative claim under Article 22.8 of the DSU.[100]

50. The European Communities asserts that the Panel "fail[ed] to provide any serious legal argumentation"[101] as to why, under Article 22.8, what is to be achieved is not the removal of the measure, but actual compliance with the DSB's recommendations and rulings. The European Communities takes issue with the Panel's finding that the replacement of Directive 96/22/EC by Directive 2003/74/EC did not constitute the removal of the inconsistent measure within the meaning of Article 22.8, because Directive 2003/74/EC, like its predecessor, imposes an import ban on meat treated with hormones. According to the European Communities, this finding contradicts the Panel's earlier finding that "it is not the ban on meat treated with growth promotion hormones as such that was found illegal in the *EC – Hormones* case, but the justification for this ban which was found insufficient."[102] Moreover, the European Communities underscores the Panel's finding that Directive 2003/74/EC "shows all the signs of an implementing measure having gone through all the formal process required for its adoption and showing, on its face, all the signs of a measure adopted in good faith."[103] The European Communities contends that, because the Panel concluded that Directive 96/22/EC—the measure found to be inconsistent with a covered agreement—has been removed, it follows from the wording of Article 22.8 that the application of the suspension of concessions was no longer authorized after the adoption and the subsequent notification of Directive 2003/74/EC to the DSB. The European Communities also emphasizes that Articles 3.7 and 22.8 both recognize that the suspension of concessions or other obligations is a temporary measure of last resort.[104]

51. The European Communities emphasizes that Article 22.8 refers to whether the "measure found to be inconsistent with a covered agreement" has been removed. The European Communities asserts that, in this particular case, the measure found to be inconsistent within the meaning of Article 22.8 was the measure that was subject to the original dispute in *EC – Hormones* and that was identified by the Appellate Body as the measure found to be inconsistent with the *SPS Agreement* in 1998. That measure was Directive 96/22/EC. Thus, once the European Communities adopted Directive 2003/74/EC, which was based on a new risk assessment that explicitly aimed at addressing the shortcomings found in *EC – Hormones* with respect to Directive 96/22/EC, the suspension of concessions or other obligations could no longer be applied. Once the original measure was removed, the suspension of concessions would continue without its main objective—implementation of the DSB's recommendations and rulings—because the implementing measure had already been taken. The objective to induce compliance could only "revive after it has been properly established before a

[100]European Communities' appellant's submission, para. 97.
[101]*Ibid*., para. 105.
[102]*Ibid*., para. 106 (quoting Panel Report, *US – Continued Suspension*, para. 7.207; and Panel Report, *Canada – Continued Suspension*, para. 7.199). (emphasis omitted)
[103]*Ibid*., para. 108 (quoting Panel Report, *US – Continued Suspension*, para. 7.238; and Panel Report, *Canada – Continued Suspension*, para. 7.231). (emphasis omitted)
[104]*Ibid*., paras. 115 and 116. The European Communities also refers to its own conduct in *US – FSC*, where it suspended the application of retaliatory measures and initiated an Article 21.5 proceeding because it considered the United States' implementing measure to be inconsistent with the relevant covered agreements. (*Ibid*., para. 156)

compliance procedure under Article 21.5 of the DSU that the implementing measure has been insufficient to remedy a WTO violation."[105]

52. The European Communities contends that "Articles 21 and 22 of the DSU [were] ... drafted around a basic dichotomy between 'the measure found to be inconsistent' and the 'measures taken to comply'."[106] Therefore, "whether the measure taken [by the European Communities] to comply is compliant with the recommendations and rulings of the DSB"[107] is a matter to be determined by a panel acting under Article 21.5 of the DSU. Unlike Article 21.5, Article 22.8 refers to whether the measure has been removed and does not refer to whether the measure taken to comply is consistent with the DSB's recommendations and rulings. The European Communities adds that interpreting Article 22.8 as referring to "actual compliance", as the Panel did, would allow the original complaining Member to make a unilateral determination of the substantive merits of the measure taken to comply without recourse to Article 21.5 of the DSU.

53. The European Communities considers that the Panel "fundamentally erred" in the manner in which it identified the "measure found to be inconsistent with a covered agreement" in order to determine whether it "has been removed"[108] within the meaning of Article 22.8 of the DSU. The European Communities states that, even though the Panel initially considered that Directive 96/22/EC, that is, the SPS measure subject to the original proceedings in *EC – Hormones*, was removed, the Panel later held the view that considering Directive 96/22/EC as the measure found to be inconsistent with a covered agreement within the meaning of Article 22.8 is "unsatisfactory, as Directive 96/22/EC was replaced by Directive 2003/74/EC which also imposes an import ban".[109]

54. For these reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that the European Communities' claims under Articles 23.1, 22.8, and 3.7 of the DSU were premised on a violation of Article 22.8 and on the actual compliance of Directive 2003/74/EC with the *SPS Agreement*. It also requests the Appellate Body to complete the analysis and find that the United States and Canada have breached Article 23.1 of the DSU by continuing the suspension of concessions despite the adoption and subsequent notification to the DSB of Directive 2003/74/EC.

4. The Panel's Terms of Reference

55. The European Communities maintains that its alternative claim of a "direct"[110] violation of Article 22.8, on the basis of its actual compliance with the *SPS Agreement*, was "strictly"[111] predicated on the condition that the Panel found no violations pursuant to the European Communities' two series of main claims. The European Communities asserts that the Panel should not have ignored the "hierarchy"[112] and "conditional order of the legal claims" because it "form[ed] part of [its] mandate".[113] The European Communities reiterates that its second series of main claims, alleging that the United States and Canada have violated Article 23.1, read together with Articles 22.8 and 3.7, did

[105]European Communities' appellant's submission, para. 141.
[106]*Ibid*., paras. 136 and 137 (referring to the Appellate Body's statement in paragraph 36 of its Report in *Canada – Aircraft (Article 21.5 – Brazil)* that "a measure which has been 'taken to comply ...' ... will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures" (original emphasis; footnote omitted)).
[107]*Ibid*., para. 142.
[108]*Ibid*., para. 145.
[109]European Communities' appellant's submission, para. 146 (quoting Panel Report, *US – Continued Suspension*, paras. 7.283 and 7.284; and Panel Report, *Canada – Continued Suspension*, paras 7.299 and 7.300).
[110]*Ibid*., para. 160 (quoting Panel Report, *US – Continued Suspension*, para. 7.164; and Panel Report, *Canada – Continued Suspension*, para. 7.151).
[111]*Ibid*., para. 165.
[112]*Ibid*., para. 162.
[113]*Ibid*., para. 167.

not depend on the presumed or actual compliance of Directive 2003/74/EC with the DSB's recommendations and rulings, but were premised on the fact that the measure found to be inconsistent with a covered agreement, within the meaning of Article 22.8, had been removed. Therefore, whether Directive 2003/74/EC complies with the *SPS Agreement* was only relevant for the European Communities' conditional "alternative" claim, which the Panel should have examined only if the condition that the Panel found no violation under the European Communities' two series of main claims had been met. On this basis, the European Communities argues that the Panel ignored the clear indication by the European Communities as to the hierarchy and conditional order of its claims and exceeded its mandate by reviewing the compatibility of Directive 2003/74/EC with the *SPS Agreement*, even though the Panel had already found that the United States and Canada had breached Articles 23.1 and 23.2(a) of the DSU.

56. The European Communities alleges that, as shown by the panel report in *EC – Sardines*, when a panel has clear indications by the complaining party as to the order of its legal claims, it is "bound by the sequencing order of the legal claims"[114] if such an order does not affect the proper interpretation of the relevant provisions of the covered agreements. In this dispute, the order of claims raised by the European Communities did not affect the proper interpretation of the relevant provisions of the DSU and the *SPS Agreement*, and the Panel erred in failing to follow this order.

57. The European Communities emphasizes that its "main point in these proceedings was to establish that the proper place to review compliance was before an Article 21.5 panel at the request of the United States or Canada on the basis of explicit claims setting out their objections to the new measures."[115] It adds that, had the Panel followed the order and conditions of the claims made by the European Communities, it would not have acted as a compliance panel in blatant disregard of its terms of reference and the very specific requirements under Article 21.5 of the DSU as informed, *inter alia*, by Article 6 of the DSU. The European Communities notes, in this regard, what it considers to be contradictory statements by the Panel with respect to whether or not the Panel was "substitut[ing]" itself for, or "perform[ing]"[116] the role of, an Article 21.5 panel.

58. Therefore, the European Communities asserts that the Panel "acted ... in blatant disregard of [its] terms of reference and the ... requirements under Article 21.5 of the DSU"[117] and erroneously assumed the function of an Article 21.5 panel, in contravention with Articles 7 and 21.5 of the DSU.

5. The Panel's Suggestion for Implementation

59. The European Communities requests the Appellate Body to "modify"[118] the Panel's suggestion that the United States and Canada "should have recourse to the rules and procedures of the DSU without delay".[119] According to the European Communities, as a result of the Panel's findings that the United States and Canada have breached Articles 23.2(a) and 23.1 of the DSU, there is "no doubt"[120] that the continued suspension of concessions is inconsistent with the DSU, even if a compliance proceeding were initiated without delay. Consequently, the European Communities considers that "the United States and Canada should remove their suspension of WTO obligations and

[114]European Communities' appellant's submission, para. 168 (referring to Panel Report, *EC – Sardines*, paras. 7.14-7.19).
[115]*Ibid.*, para. 170.
[116]*Ibid.*, paras. 172 and 173 (referring to Panel Report, *US – Continued Suspension*, paras. 7.276 and 8.3; and Panel Report, *Canada – Continued Suspension*, paras. 7.292 and 8.3). (emphasis omitted)
[117]*Ibid.*, para. 171.
[118]*Ibid.*, para. 456.
[119]*Ibid.*, para. 478 (quoting Panel Report, *US – Continued Suspension*, para. 8.3; and Panel Report, *Canada – Continued Suspension*, para. 8.3).
[120]*Ibid.*, para. 468.

have recourse to the rules and procedures of the DSU without delay if they continue to take issue with the European Communities' implementation of the recommendations"[121] stemming from *EC – Hormones*.

60. The European Communities adds that the phrase "through recourse to dispute settlement" in Article 23.2(a) requires an outcome of the recourse in the form of binding decisions or an agreement between the parties. Thus, the European Communities argues, the inconsistency resulting from the continued suspension of concessions will not disappear if the United States and Canada merely request consultations or initiate mediation procedures. Instead, the United States and Canada must "complete"[122] Article 21.5 proceedings against the European Communities. The European Communities further submits that it "would be deprived of the protection of Article 23 of the DSU, if [it] can secure the withdrawal of the sanctions only by winning in the compliance dispute brought by the United States and Canada, as suggested by the Panel."[123] In the European Communities' view, Article 23 would be "turned on its head"[124] if a WTO Member were allowed to make first a unilateral determination—by keeping the suspension of concessions in place—that an implementing measure of another Member is WTO-inconsistent, and only later obtain multilateral findings in proceedings initiated by the implementing Member that provide a valid basis for the determination.

61. The European Communities states that the circumstances of this dispute require "clarity" and a suggestion by the Appellate Body would be "very useful"[125], explaining that the Panel's suggestion is "too vague to be of much assistance".[126] Thus, the European Communities requests the Appellate Body to "improve"[127] the Panel's suggestion so as to make it clear that the United States and Canada must cease applying the suspension of concessions, and must seek resolution of any remaining disagreement concerning the consistency with the *SPS Agreement* of Directive 2003/74/EC by having recourse to Article 21.5 panel proceedings or any other proceeding to which the parties may agree.

6. The Panel's Selection of Experts

62. The European Communities takes issue with the Panel's selection of two experts—Dr. Jacques Boisseau and Dr. Alan Boobis—who contributed to the reports by JECFA regarding the use of the hormones at issue in this dispute. The European Communities claims that "any 'reliance' the Panel[] [has] placed on what these two experts from JECFA said is a violation of the relevant rules on conflict of interest, of its rights of due process and of the requirement for the Panel[] to perform an 'objective assessment' of the matter before [it]"[128], as required under Article 11 of the DSU.

63. Recalling the Appellate Body's finding in *Thailand – H-Beams* that the "requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings"[129], the European Communities posits that due process "informs the entire Dispute Settlement Understanding".[130] In the view of the European Communities, "the consultation of experts by the Panel[] for the purposes of scientific and technical advice including their selection must respect general principles of law, and in particular the principle of due process."[131] The European

[121]European Communities' appellant's submission, para. 454.
[122]*Ibid.*, para. 461.
[123]*Ibid.*, para. 475.
[124]*Ibid.*, para. 476. (emphasis omitted)
[125]*Ibid.*, para. 477.
[126]*Ibid.*, para. 479.
[127]*Ibid.*, para. 480.
[128]European Communities' appellant's submission, para. 202.
[129]*Ibid.*, para. 184 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 88).
[130]*Ibid.*, para. 184.
[131]*Ibid.*, para. 188.

Communities adds that "[i]t is inherent in the principle of due process that the parties to a dispute are given a fair hearing including that the experts a court, tribunal or panel hears or consults are *independent and impartial*."[132]

64. The European Communities contends that "the relevant legal test"[133] for evaluating whether an expert is independent and impartial is found in Section VI.2 of the *Rules of Conduct*, which requires that experts "disclose any information that could reasonably be expected to be known to them at the time [they are requested to serve as experts] which ... is likely to affect or give rise to justifiable doubts as to their independence or impartiality." The European Communities asserts that this standard is "quite simple and low" and "does not require certainty or high probability".[134] The European Communities asserts that "the Panel[] never actually addressed the relevant legal question"[135] of whether this standard served to disqualify these experts.

65. The European Communities alleges that the Panel disregarded its "most important objection"[136] that Drs. Boisseau and Boobis, who participated in the drafting of JECFA reports, could not be independent and impartial because they were asked to evaluate the risk assessments that were "very critical of the JECFA reports".[137] The European Communities observes that as "co-authors" of the JECFA reports, these experts "cannot be considered to be independent and impartial in these circumstances, because this would amount to asking them to review and criticise reports that are their own doing".[138]

66. In addition, the European Communities claims that the Panel's decision to select these experts was "based on a very narrow definition of a perceived conflict of interest because it required an actual or almost certain conflict, not a perceived, likelihood or a justifiable doubts test".[139] According to the European Communities, a perceived conflict of interest arises in this dispute due to the fact that Dr. Boisseau took "a position in favour of the safety of these hormones" and Dr. Boobis "has been receiving funding from the pharmaceutical industry in his research and counselling".[140]

67. The European Communities alleges several further errors committed by the Panel. It faults the Panel for "relying overwhelmingly"[141] on the opinions of Drs. Boisseau and Boobis on practically all scientific aspects of the matters; for failing to ensure that Drs. Boisseau and Boobis complied with the self-disclosure requirement before their selection; and for failing to "actually examine[] whether all of the experts had a potential conflict of interest and whether [Drs. Boisseau and Boobis] fulfilled the conditions to be truly independent and impartial".[142] Finally, the European Communities argues that, "even if one were to take the view that the Panel[] could accept the non-independent experts provided that they would constantly bear in mind the potential conflicts [of interest and the lack of independence] when weighing the expert opinions, it is clear that the Panel[] refused to do so, considering the issue of the experts finally resolved when dismissing the European Communities'

[132] *Ibid.* (original emphasis)
[133] *Ibid.*, para. 195.
[134] *Ibid.*
[135] *Ibid.*, para. 196.
[136] *Ibid.*, para. 203.
[137] *Ibid.*, para. 196.
[138] European Communities' appellant's submission, para. 205. The European Communities seeks to draw analogy from a judgment by the European Court of Human Rights, which found that a person was denied a fair trial because the expert appointed by the relevant tribunal had drafted the report triggering the trial against that person. (*Ibid.*, para. 206 (referring to European Court of Human Rights, Judgment of 6 May 1985, *Case of Bönisch* v. *Austria*, Application no. 8658/79 (Exhibit EC-131 submitted by the European Communities to the Appellate Body)))
[139] European Communities' appellant's submission, para. 203.
[140] *Ibid.*
[141] *Ibid.*, para. 212.
[142] *Ibid.*, para. 192.

objections."[143] Indeed, these experts "dominate[d] the entire scientific examination by the Panel[] both from the point of view of how often they [were] referred to and whether the Panel[] ever question[ed] their opinions and whether their opinions go beyond science and stray into the area of the risk regulator."[144]

68. On this basis, the European Communities submits that the Panel failed to respect the principle of due process; failed to ensure compliance with the requirements on self-disclosure under the *Rules of Conduct*; erred in accepting as experts persons whose independence and impartiality was not assured; and acted inconsistently with its obligations under Article 11 of the DSU. The European Communities therefore requests the Appellate Body to "reverse all the findings of the Panel[] which depend on the advice they received from" Drs. Boisseau and Boobis.[145]

7. Article 5.1 of the *SPS Agreement*

69. The European Communities argues that the Panel erred in finding that the permanent ban on meat and meat products from cattle treated with oestradiol-17β applied pursuant to Directive 2003/74/EC was not based on a risk assessment within the meaning of Article 5.1 and Annex A, paragraph 4, of the *SPS Agreement*. The European Communities requests the Appellate Body to reverse this finding for the following reasons.

70. The European Communities submits that the Panel erred in its interpretation and application of Article 5.1 and Annex A, paragraph 4, of the *SPS Agreement* as informed by Article 5.2 of that Agreement. The European Communities asserts that the Panel "[a]dopted an extremely narrow and consequently erroneous"[146] interpretation of "risk assessment" when it excluded from the scope of its analysis under Article 5.1 arguments and evidence concerning the misuse and abuse and difficulties of control in the administration of hormones to cattle for growth-promotion purposes. The European Communities refers to the Panel's statement that Article 5.2 of the *SPS Agreement* "instructs Members on how to conduct a risk assessment"[147], and argues that the Panel erroneously rendered Article 5.2 "entirely *procedural*".[148] In the European Communities' view, Article 5.2 "does not prescribe a given method or procedure to be followed in conducting a risk assessment", but provides "*substantive factors*"[149] to be taken into account in a risk assessment and offers guidance on the substantive content of a "risk assessment" within the meaning of Article 5.1. Consequently, the Panel made a "fundamental legal error" by "considerably narrowing down the scope"[150] of a risk assessment within the meaning of Article 5.1. In doing so, the Panel wrongly excluded "risk management" aspects from the coverage of Article 5.1, and thereby adopted the same restrictive interpretation of "risk assessment" in Article 5.1 that was overturned by the Appellate Body in *EC – Hormones*.[151]

71. The European Communities relies on the Appellate Body's finding in *EC – Hormones* that risk assessors "may examine and evaluate ... risks arising from potential abuse in the administration of controlled substances and from control problems".[152] The European Communities maintains that the SCVPH Opinions explicitly addressed evidence concerning the abusive use and difficulties of control in the administration of hormones for growth-promotion purposes, and yet the Panel "simply

[143] *Ibid.*, para. 211. (footnote omitted)
[144] *Ibid.*, para. 208.
[145] European Communities' appellant's submission, para. 212.
[146] *Ibid.*, para. 308.
[147] *Ibid.*, para. 316 (quoting Panel Report, *US – Continued Suspension*, para. 7.440). (emphasis omitted)
[148] *Ibid.*, para. 320. (original emphasis)
[149] *Ibid.*, para. 316. (original emphasis)
[150] *Ibid.*, para. 320.
[151] *Ibid.*, para. 322 (referring to Appellate Body Report, *EC – Hormones*, para. 187).
[152] European Communities' appellant's submission, para. 324 (referring to Appellate Body Report, *EC – Hormones*, paras. 206 and 207).

ignore[d] the evidence".[153] The Panel failed to take account of the fact that the abusive use and difficulties of control were important factors in the risk assessment underlying the SCVPH Opinions, adding considerably to the risk identified. Instead, the Panel instructed the scientific experts to examine only that part of the evidence concerning the residues in meat from these hormones administrated "in accordance with good veterinary practice".[154] The European Communities adds that the fact that Codex Alimentarius Commission ("Codex") standards do not usually address the possibility of misuse and abuse throws the Panel's approach into question, because the notion of risk assessment under Article 5.1 of the *SPS Agreement* is clearly wider than that under Codex.

72. The European Communities also asserts that the Panel erred in finding that the European Communities has acted inconsistently with Article 5.1 by failing to evaluate specifically the risks arising from residues of oestradiol-17β in meat from cattle treated with this substance for growth-promoting purposes. The European Communities highlights the conclusion in the risk assessment underlying Directive 2003/74/EC that new evidence concerning the genotoxicity[155] of oestradiol suggests that oestradiol-17β "acts as a complete carcinogen by exerting tumour initiating and promoting effects".[156] This conclusion demonstrates that the risk assessment focused on and addressed specifically the particular kind of risks at stake—the carcinogenic and genotoxic potential of the residues of oestradiol-17β found in meat treated with this hormone.

73. The European Communities maintains further that the Panel erred in requiring the quantification of the risks to human health arising from the consumption of meat containing residues of oestradiol-17β. The European Communities asserts that, by referring to "potential occurrence"[157] of adverse effects when posing questions to the experts, the Panel "imposed a quantitative method of risk assessment on the European Communities borrowed from Codex Alimentarius and JECFA".[158] However, the Panel's rejection of a "purely qualitative analysis of risk"[159] and the imposition of such a quantitative requirement find no basis in the *SPS Agreement* and contradict the Appellate Body's finding in *EC – Hormones* that a risk assessment under the *SPS Agreement* does not require the establishment of a minimum magnitude of risk. In addition, the experts acknowledged that quantification of risk is not necessary for substances that have genotoxic potential, such as oestradiol-17β. For this reason, the European Communities suggests that a qualitative analysis of risk must be *a fortiori* sufficient to meet the requirements of Article 5.1 and Annex A, paragraph 4, of the *SPS Agreement*.

74. The European Communities argues that the Panel erred in allocating the burden of proof under Article 5.1 of the *SPS Agreement*. The fact that the European Communities is the complaining party in this dispute "does not change the basic standard on the burden of proof under the *SPS Agreement*".[160] Accordingly, it was incumbent upon the United States and Canada to rebut the *prima facie* case of consistency made by the European Communities in relation to Directive 2003/74/EC.

[153] *Ibid.*, para. 329.

[154] *Ibid.*, para. 274 (referring to Question 13 posed by the Panel to the scientific experts, Panel Reports, Annex D, p. D-22; Panel Report, *US – Continued Suspension*, paras. 6.102, 6.164, and 6.165; and Panel Report, *Canada – Continued Suspension*, paras. 6.94, 6.154, and 6.155).

[155] Genotoxicity is the ability to cause damage to genetic material (DNA). Such damage may be mutagenic and/or carcinogenic. (See Panel Report, *US – Continued Suspension*, footnote 370 to para. 7.77; and Panel Report, *Canada – Continued Suspension*, footnote 362 to para. 7.75 (referring to replies of Dr. Boobis and Dr. Guttenplan to Question 2 posed by the Panel to the scientific experts, Panel Reports, Annex D, paras. 41 and 58, respectively) See also transcript of the Panel's joint meeting with the scientific experts on 27-28 September 2006, Panel Reports, Annex G, paras. 85-90)

[156] European Communities' appellant's submission, para. 337 (referring to 1999 Opinion, p. 73).

[157] *Ibid.*, para. 346.

[158] European Communities' appellant's submission, para. 308. See also *ibid.*, para. 296.

[159] *Ibid.*, para. 353 (referring to Panel Report, *US – Continued Suspension*, para. 7.530; and Panel Report, *Canada – Continued Suspension*, para. 7.502).

[160] *Ibid.*, para. 287.

The European Communities submits that, because of the particularity of the case, this obligation to rebut the *prima facie* case made by the European Communities amounts to the same standard as making a *prima facie* case in a dispute where the United States and Canada proceed with a normal panel procedure against an SPS measure taken by the European Communities. The Panel nevertheless found that the United States and Canada had "sufficiently refuted the [European Communities'] allegation of compliance in [their] first written submission[s] through positive evidence of breach of the *SPS Agreement*"[161] without articulating the rationale for this conclusion. Therefore, the Panel erred in law in shifting the burden of proof to the European Communities without first examining, provision by provision under the *SPS Agreement*, whether the arguments of the United States and Canada had sufficient merit to shift the burden of proof back to the European Communities.

75. The European Communities further argues that the Panel failed to conduct an objective assessment of the facts of the case, as required by Article 11 of the DSU. While the European Communities agrees with the Appellate Body's interpretation of the standard of review applicable under the *SPS Agreement*, it also notes that, when reviewing governmental measures in highly complex or technical matters, domestic courts and international tribunals usually follow a "reasonableness" approach to the fact-finding of competent authorities. The European Communities recalls that, according to the Appellate Body's interpretation of Article 5.1, Members are entitled to rely on "divergent opinion[s] coming from qualified and respected sources"[162] in their risk assessments when adopting SPS measures. For this reason, a panel reviewing a Member's SPS measure under Article 5.1 should seek to determine whether there is any reasonable scientific basis for such measures and respect the "important and autonomous right"[163] of Members to set their level of SPS protection. A panel should not substitute its scientific judgement for that of the Member taking the measure and should not "second guess"[164] Members, particularly in situations where available science is providing alternative and competing explanations. Thus, in this dispute, the Panel should have asked whether there were divergent opinions in the scientific community, and, if the European Communities based itself on a divergent opinion, if those opinions are qualified and respected.

76. Instead of determining "whether there was any reputable support within the relevant scientific community for the determination made by the European Communities in the light of its chosen level of protection"[165], the Panel stated that it was in a situation "similar"[166] to that of a risk assessor and sought to determine what the correct scientific conclusions were relating to the hormones at issue. In doing so, the Panel "drifted into a *de novo* review"[167] of the European Communities' risk assessment and decided "to become the jury on the correct science ... by picking and choosing between the conflicting and contradictory opinions of the experts in an arbitrary manner".[168] The Panel imposed its choices on the European Communities between the different "scientifically plausible alternatives", either by basing itself on the views expressed by a majority of the experts, or by selecting the "most specific" or "best supported" views.[169] As a result, the Panel failed to take into account diverging views reflecting a "genuine and legitimate scientific controversy"[170] among the experts over the safety of residues of hormones in meat. The Panel also ignored that some of the experts reported the same

[161] *Ibid.*, para. 288 (quoting Panel Report, *US – Continued Suspension*, para. 7.385; and Panel Report, *Canada – Continued Suspension*, para. 7.382).

[162] European Communities' appellant's submission, para. 226 (quoting Appellate Body Report, *EC – Hormones*, para. 194). (emphasis omitted)

[163] *Ibid.*, para. 222 (referring to Appellate Body Report, *EC – Hormones*, para. 172). (emphasis omitted)

[164] *Ibid.*, para. 222.

[165] *Ibid.*, para. 240.

[166] *Ibid.*, para. 237 (quoting Panel Report, *US – Continued Suspension*, para. 7.418; and Panel Report, *Canada – Continued Suspension*, para. 7.409).

[167] *Ibid.*, para. 237.

[168] *Ibid.*, para. 239. (emphasis omitted)

[169] *Ibid.*, para. 240.

[170] *Ibid.*, para. 248.

concerns as expressed in the SCVPH Opinions, "praised"[171] the analysis in those Opinions, or highlighted that the Opinions followed a different, but equally plausible, scientific approach.

77. The European Communities alleges the following specific errors in connection with its claim that the Panel failed to make an objective assessment of the facts. First, the European Communities alleges that the Panel acted inconsistently with Article 11 of the DSU when it failed to take into account evidence related to the assessment of risks to human health arising from exposure to residues of hormones from multiple endogenous and exogenous sources. The European Communities maintains that the Panel Reports explain this issue "very briefly"[172], even though it was raised several times in the European Communities' written submissions and comments, and was discussed extensively during the meeting of the Panel with the experts. The European Communities observes that "there is no mention at all [of the risks of multiple exposures] in the Panel['s] findings."[173]

78. Secondly, the European Communities maintains that the Panel "failed to consider or distorted"[174] scientific evidence demonstrating that no safe threshold levels exist for the consumption by humans of oestradiol-17β due to its actual or potential genotoxicity. The European Communities emphasizes that a majority of the experts advising the Panel agreed that there was sufficient scientific evidence in support of the European Communities' conclusion that oestradiol-17β is actually or potentially genotoxic. However, the Panel "side-stepped" such crucial evidence and "mischaracteri[zed]" the evidence when finding that the European Communities had "not provided analysis of the potential for these [genotoxic] effects to arise from the consumption of meat and meat products which contain residues of oestradiol-17β".[175] The European Communities observes that to have conclusive evidence on whether or not a threshold can be applied "might require scientific testing on humans", which would be "totally unethical" and require a Member "to do the impossible".[176] The European Communities considers the conclusion that no threshold levels may be established in relation to oestradiol-17β to be "just as valid"[177] scientifically as the opposing position held by the United States, Canada, and JECFA. Therefore, the Panel acted inconsistently with Article 11 of the DSU by ignoring "the totality of the evidence"[178] and by failing to recognize the significance of the "'genuine' and 'legitimate' scientific controversy"[179] relating to the question of whether risks to human health arising from the consumption of residues of oestradiol-17β could be addressed through the establishment of threshold levels.

79. The European Communities argues furthermore that the Panel reached the "manifestly unfounded"[180] finding that the European Communities had not evaluated the specific risks to humans arising from the consumption of meat containing residues of oestradiol-17β as a result of the cattle being treated with this hormone for growth-promotion purposes. In reaching this finding, the Panel incorrectly imposed a "specificity" or "direct causality"[181] requirement pursuant to which the European Communities had to demonstrate *actual* adverse effects, rather than the *possibility* of

[171] *Ibid.*, para. 247.
[172] European Communities' appellant's submission, para. 249 (referring to Panel Report, *US – Continued Suspension*, paras. 7.502 and 7.503; and Panel Report, *Canada – Continued Suspension*, paras. 7.474 and 7.475).
[173] *Ibid.*, para. 249.
[174] *Ibid.*, para. 250.
[175] *Ibid.*, para. 251 (quoting Panel Report, *US – Continued Suspension*, para. 7.537; and Panel Report, *Canada – Continued Suspension*, para. 7.509).
[176] *Ibid.*, para. 258.
[177] *Ibid.*
[178] *Ibid.*
[179] *Ibid.*
[180] European Communities' appellant's submission, para. 270.
[181] *Ibid.*, para. 262.

adverse effects, contrary to the Appellate Body's findings in *EC – Hormones* and *Japan – Apples*.[182] In the European Communities' view, the Appellate Body's findings in these disputes did not prevent a Member from meeting the standard in Article 5.1 by demonstrating that the identified adverse effects may "*possibl[y] arise* from the residues in meat" and that "there is no need to demonstrate real causality" as the Panel in this dispute required.[183] Moreover, the European Communities notes that no country has conducted the kind of specificity test required by the Panel, and the European Communities cannot be found in violation of the *SPS Agreement* for failing to meet such a test. In addition, the Panel ignored the fact that three of the experts advising the Panel confirmed that the potential for adverse effects had been demonstrated by the European Communities. On this basis, the European Communities submits that the Panel ignored and "grossly misinterpreted" part of the relevant evidence in reaching this finding and failed to explain how its conclusions "have a reasonable relationship to the totality of the evidence".[184] As a result, the Panel exceeded the bounds of its discretion as the trier of facts in its assessment of the evidence, in violation of Article 11 of the DSU.

80. The European Communities submits that the Panel failed to interpret and apply correctly Article 5.1 of the *SPS Agreement* and failed to conduct an objective assessment of the matter as required by Article 11 of the DSU. Therefore, the European Communities requests the Appellate Body to reverse the Panel's findings under Article 5.1 of the *SPS Agreement*.

8. Article 5.7 of the *SPS Agreement*

81. The European Communities argues that the Panel erred in finding that the relevant scientific evidence on the five hormones was not "insufficient" within the meaning of Article 5.7 of the *SPS Agreement* and that, consequently, the provisional ban on the importation and marketing of meat from cattle treated with these five hormones does not meet the requirements of Article 5.7. The European Communities requests the Appellate Body to reverse this finding for the following reasons.

82. First, the European Communities argues that the Panel erred in its interpretation of Article 5.7 because it expressly rejected the relevance of the level of protection set by a Member for evaluating whether the scientific evidence is "insufficient" within the meaning of Article 5.7. The European Communities takes issue with the Panel's "sweeping statement"[185] that the "presumption of consistency of measures conforming to international standards", provided in Article 3.2 of the *SPS Agreement*, "implies that these standards ..., particularly those referred to in this case, are based on risk assessments that meet the requirements of the *SPS Agreement*."[186] According to the European Communities, the presumption of consistency that applies to measures conforming to international standards under Article 3.2 does not necessarily lead to the conclusion that the scientific evidence underlying the international standards is sufficient to conduct a risk assessment within the meaning of Article 5.1. This is because the international standard may not be based on a risk assessment at all, may be based on a risk assessment that is not informed by all factors listed in Articles 5.1 and 5.2, or the relevant evidence behind the international standard may be insufficient, or outdated, or no longer the mainstream scientific opinion.

[182] *Ibid.*, para. 261 (referring to Panel Report, *US – Continued Suspension*, paras. 7.511 and 7.512; and Panel Report, *Canada – Continued Suspension*, paras. 7.483 and 7.484, in turn referring to Appellate Body Report, *EC – Hormones*, para. 200; and Appellate Body Report, *Japan – Apples*, para. 202 and footnote 372 thereto).
[183] *Ibid.*, para. 261. (original emphasis)
[184] *Ibid.*, para. 270.
[185] European Communities' appellant's submission, para. 388.
[186] *Ibid.*, para. 387 (quoting Panel Report, *US – Continued Suspension*, para. 7.644; and Panel Report, *Canada – Continued Suspension*, para. 7.622).

83. The European Communities asserts that an international standard already "implies or encapsulates"[187] a certain level of protection. However, Article 3.3 of the *SPS Agreement* allows Members to adopt SPS measures that result in a higher level of protection than the one underlying an international standard. Consequently, the intended level of protection must be relevant for determining whether the scientific evidence is "insufficient" within the meaning of Article 5.7, and a Member that sets a higher level of protection may find the relevant scientific evidence underlying an international standard to be insufficient. The European Communities thus maintains that the Panel's approach entirely disconnected the sufficiency of the scientific evidence from the level of protection set by the European Communities, and this approach is contrary to the explicit wording of Article 3.3 and the views expressed by the experts it had selected. Referring to the distinction drawn by the Appellate Body in *Japan – Apples* between "scientific uncertainty" and "insufficiency of scientific evidence"[188], the European Communities notes that this distinction does not exclude that the insufficiency of the scientific evidence may be due to scientific uncertainty created by the existence of divergent minority opinions.

84. Secondly, the European Communities argues that the Panel erred in imposing on the European Communities the initial burden of demonstrating that Directive 2003/74/EC meets the requirements of Article 5.7 in relation to the provisional ban on the five hormones at issue. By imposing the burden of proof on the European Communities, the Panel "seem[ed]"[189] to have erroneously considered Article 5.7 as an exception to the rules laid down in Article 5.1, even though Article 5.7 confers to WTO Members a "qualified right"[190] to take provisional measures under certain conditions. The European Communities maintains that Article 5.7 has "its own legal regime that is distinct from Article 5.1".[191] This is because Article 2.2 of the *SPS Agreement* explicitly exempts measures taken under Article 5.7 from its scope of application, and Article 5.1, which is a specific application of the obligations in Article 2.2, cannot be applicable under the circumstances where Article 2.2 is not applicable. The European Communities recalls the Appellate Body's finding in *Japan – Apples* that a link exists between Articles 5.7 and 5.1 in that "relevant scientific evidence" will be "insufficient" within the meaning of Article 5.7 if the body of available scientific evidence does not allow the performance of an adequate assessment of risks as required under Article 5.1.[192] On this basis, the European Communities argues that "there is a continuum of 'relevant scientific evidence' that is divided between the respective scopes of application of Articles 5.1 and 5.7."[193] Therefore, a Member that is "sufficiently diligent ... must be able"[194] to take an SPS measure under either Article 5.1 or Article 5.7, and the sufficiency of the scientific evidence "is determinative on whether or not the measure concerned falls under Article 5.1 or 5.7".[195] Thus, the European Communities argues that, because it has a right to impose provisional measures when it considers that relevant scientific evidence is insufficient, the United States and Canada should bear the burden of demonstrating that this condition for applying provisional measures under Article 5.7 has not been fulfilled. Instead, the Panel erroneously shifted this burden to the European Communities when it limited its review exclusively to the "insufficiencies"[196] identified by the European Communities in its submissions. By requiring the European Communities to identify the issue for which relevant

[187] *Ibid.*, para. 397.
[188] *Ibid.*, paras. 377 and 378 (referring to Appellate Body Report, *Japan – Apples*, para. 184).
[189] European Communities' appellant's submission, para. 362.
[190] *Ibid.*, para. 368.
[191] *Ibid.*, para. 367.
[192] *Ibid.*, para. 371 (quoting Appellate Body Report, *Japan – Apples*, para. 179).
[193] *Ibid.*, para. 374.
[194] European Communities' statement at the oral hearing.
[195] European Communities' appellant's submission, para. 374.
[196] *Ibid.*, para. 380 (quoting Panel Report, *US – Continued Suspension*, para. 7.653; and Panel Report, *Canada – Continued Suspension*, para. 7.630).

scientific evidence is insufficient, the Panel allocated to the European Communities the burden "to prove the negative".[197]

85. Thirdly, the European Communities argues that the Panel erred in finding that, where international standards for a substance exist, a "critical mass" of new scientific evidence that calls into question the fundamental precepts of previous knowledge is required to render the relevant scientific evidence "insufficient" within the meaning of Article 5.7. The European Communities asserts that the "critical mass" standard developed by the Panel "imposed a high quantitative and qualitative threshold"[198] with respect to the new scientific evidence that is required to render prior scientific evidence insufficient. The European Communities submits that the quality of the scientific evidence is more important that the quantity. For this reason, even a single study made by qualified and respectable scientists, even when in the minority, could be considered *a priori* sufficient to question the sufficiency of the previous scientific evidence if its merits are particularly relevant for the circumstances of the risk assessment. According to the European Communities, the Panel's mistake stemmed from the erroneous premise of its analysis that the existence of an international standard presupposes that the scientific evidence has been sufficient to conduct a risk assessment. This error led the Panel to assume wrongly that a "critical mass" of new evidence is required to question the sufficiency of the scientific evidence and consequently to disregard "serious concerns"[199] expressed by the experts in relation to the "fundamental scientific controversy"[200] concerning the risks to human health posed by the five hormones. The European Communities observes that the relevant question is not only whether relevant scientific evidence can "become" insufficient, but also whether it "is" insufficient in the first place.[201] Furthermore, the European Communities argues that the Panel's application of the "critical mass" standard excludes *a priori* the possibility of a WTO Member basing its risk assessment on a "respectable minority view".[202] This effectively "preclude[d] [the] application"[203] of the precautionary principle in the interpretation of Articles 5.1 and 5.7, contrary to the Appellate Body's finding that "the precautionary principle indeed finds reflection in Article 5.7 of the *SPS Agreement*."[204] The European Communities explains that the Panel's "critical mass" standard implies that the scientific evidence passes immediately from a state of insufficiency to a state of complete knowledge, because there will be no "transitional period"[205] in which Article 5.7 could apply.

86. The European Communities alleges that, in applying the "critical mass" standard to the evidence before it, the Panel "systematically downplay[ed]"[206] and ignored "highly relevant scientific evidence"[207] which "support[ed] the position of the European Communities ... that in fact the scientific evidence was indeed insufficient"[208] to perform a risk assessment. The European Communities challenges the Panel's analysis of the evidence on the following issues with respect to all five hormones: (i) effects of hormones on certain population groups; (ii) dose response; (iii) long latency periods for cancer and confounding factors; and (iv) adverse effects on human growth and

[197] *Ibid.*, para. 291.
[198] European Communities' appellant's submission, para. 412.
[199] *Ibid.*, para. 421.
[200] *Ibid.*, para. 426.
[201] *Ibid.*, para. 419.
[202] *Ibid.*, para. 409.
[203] *Ibid.*, para. 427.
[204] Appellate Body Report, *EC – Hormones*, para. 124.
[205] European Communities' statement at the oral hearing.
[206] European Communities' appellant's submission, para. 427.
[207] European Communities' appellant's submission, para. 447.
[208] *Ibid.*, para. 427.

reproduction.[209] In addition, the European Communities raises specific concerns relating to the Panel's application of the "critical mass" standard when it evaluated the sufficiency of the information individually for each of the five hormones.

87. As regards the Panel's finding that the scientific evidence on the effects of the five hormones on certain population groups was not "insufficient" within the meaning of Article 5.7, the European Communities argues that the Panel ignored Dr. Sippell's testimony that the development of more sensitive detection methods has identified lower endogenous hormonal levels in pre-pubertal children than previously thought, calling into question the range of physiological levels of sex hormones believed to exist in humans. According to the European Communities, the Panel downplayed the significance of this development by referring to Dr. Boobis' statement that such new detection methods were "not yet validated".[210] In the area of dose response, the European Communities submits that the Panel Reports contain "no serious analysis"[211] of this issue, and that the only basis articulated by the Panel in support of its conclusion was its prior finding that the ultra-sensitive detection methods had not yet been validated. The European Communities also suggests that the Panel ignored Dr. Cogliano's testimony confirming that the relevant scientific evidence was insufficient to conduct a risk assessment for all of the five hormones, because "you cannot estimate that dose-response curve with any kind of certainty."[212]

88. In respect of the long latency period of cancer and the existence of confounding factors, the European Communities argues that the Panel's "critical mass" standard "essentially require[d] the European Communities to do the impossible"[213], because long latency periods for cancer and the existence of confounding factors do not permit the establishment of a causal link between the prevalence of cancer and the consumption of residues of the five hormones in meat. In order to establish such causal link, it would be necessary to conduct tests on humans by isolating them from the rest of the population "for years if not decades", which constitutes "an unrealistic requirement".[214]

89. As for the evidence of adverse effects of the five hormones on human growth and reproduction, the European Communities argues that the Panel "systematically downplay[ed]"[215] the opinions of Drs. Sippell and Guttenplan in reaching its finding that the relevant scientific evidence was not "insufficient" within the meaning of Article 5.7. For the European Communities, "[t]he fact that the new evidence relates *inter alia* to children, the most vulnerable and sensitive part of the population, is a major concern for the European Communities" and this concern is "reinforced by the opinions expressed by Dr. Sippell and Dr. Guttenplan".[216] The European Communities additionally maintains that the Panel "arbitrarily"[217] gave a different status to the statements of different experts advising the Panel. For example, whereas Dr. Guttenplan's expression of concerns regarding potential developmental effects of hormones on children was characterized by the Panel as an expression of "doubts"[218], the opinion of Dr. Boobis that new evidence obtained by the European Communities did

[209]In its appellant's submission, the European Communities also refers to the Panel's analysis concerning bioavailability. (European Communities' appellant's submission, paras. 179 and 432) However, at the oral hearing, the European Communities stated that this issue was not implicated in its appeal of the Panel's findings under Article 5.7.

[210]European Communities' appellant's submission, para. 430 (quoting Panel Report, *US – Continued Suspension*, para. 7.670; and Panel Report, *Canada – Continued Suspension*, para. 7.647).

[211]*Ibid*., para. 431.

[212]*Ibid*., para. 444 (quoting transcript of the Panel's joint meeting with the scientific experts on 27-28 September 2006, Panel Reports, Annex G, para. 871).

[213]*Ibid*., para. 433.

[214]European Communities' appellant's submission, para. 434.

[215]*Ibid*., para. 435.

[216]*Ibid*., para. 436.

[217]*Ibid.*

[218]*Ibid.* (quoting Panel Report, *US – Continued Suspension*, para. 7.719; and Panel Report, *Canada – Continued Suspension*, para. 7.696).

not indicate additional concern regarding risks of the five hormones was "manifestly given the status of scientific evidence".[219]

90. Turning to the Panel's assessment of each of the five hormones individually, the European Communities argues that the Panel ignored evidence demonstrating that progesterone and testosterone are carcinogenic to humans. Such evidence consisted of International Agency for Research on Cancer ("IARC") studies that concluded that progesterone is "possibly carcinogenic to humans"[220] and that testosterone is a "probable carcinogenic to humans".[221] The European Communities further submits that the Panel confused Articles 5.1 and 5.7 when it concluded that the IARC studies addressed the carcinogenicity of progesterone and testosterone in general, but did not specifically address the carcinogenic potential to humans of consuming residues of these hormones in meat. According to the European Communities, it is precisely because scientific evidence is lacking on this specific question that the European Communities decided to impose provisional restrictions on the basis of available pertinent information.

91. With respect to the Panel's finding that the relevant scientific evidence on trenbolone acetate was not "insufficient" within the meaning of Article 5.7, the European Communities argues that the Panel drew its conclusions exclusively on the basis of Dr. Boobis' opinion. The European Communities draws attention to Dr. Guttenplan's opinion that the scientific evidence showed that trenbolone acetate was "significantly estrogenic" and that it did not appear that "accurate ADIs [(acceptable daily intakes)] can be established at this point" for this substance.[222] The Panel "attempt[ed] to downplay"[223] this opinion of Dr. Guttenplan by referring to his statement that, although accurate acceptable daily intakes ("ADIs") cannot be established, a risk assessment can still be carried out. In the European Communities' view, the Panel failed to ascertain whether Dr. Guttenplan merely meant that the four steps of the JECFA risk assessment can be formally conducted or whether a risk assessment within the meaning of Article 5.1 of the *SPS Agreement* can be conducted, and that it was the latter that was relevant to the Panel's analysis.

92. As regards the Panel's finding that the relevant scientific evidence was not "insufficient" in relation to the carcinogenicity of zeranol, the European Communities argues that the Panel failed to take into account Dr. Guttenplan's testimony that "additional tests of zeranol should be carried out".[224] The European Communities argues further that the Panel downplayed Dr. Sippell's concerns regarding the effects of zeranol in human breast cancer cells by relying, instead, on Dr. Boobis' opinion.

93. Moreover, the European Communities argues that the Panel concluded "in a sweeping manner"[225] that the evidence on MGA was "sufficient" to conduct a risk assessment, because a process towards adopting an international standard for this hormone is underway in Codex. The European Communities also charges the Panel with downplaying the new studies the European Communities has conducted since 1999, even though the Panel recognized that the evaluation carried out by JECFA was based on studies that date back to the 1960s and 1970s. Furthermore, the European Communities criticizes the Panel for disregarding the opinion of Dr. De Brabander in relation to trenbolone acetate, zeranol, and MGA, which called into question residue levels estimated

[219]*Ibid*., para. 436.

[220]*Ibid*., para. 437 (referring to Panel Report, *US – Continued Suspension*, para. 7.737; and Panel Report, *Canada – Continued Suspension*, para. 7.714, in turn referring to IARC written replies to Question 25 posed by the Panel, Panel Reports, Annex E-3, p. 129). (emphasis omitted)

[221]*Ibid*., para. 438.

[222]European Communities' appellant's submission, para. 439 (quoting Panel Report, *US – Continued Suspension*, para. 7.779; and Panel Report, *Canada – Continued Suspension*, para. 7.761).

[223]*Ibid*., para. 440.

[224]*Ibid*., para. 441 (quoting Panel Report, *US – Continued Suspension*, para. 7.797; and Panel Report, *Canada – Continued Suspension*, para. 7.781).

[225]*Ibid*., para. 442.

by JECFA and raised concerns regarding the potential effects of these hormones and their metabolites on the environment.

94. Finally, the European Communities asserts that the Panel failed to make an objective assessment of the facts in reaching its findings under Article 5.7 of the *SPS Agreement*, in violation of Article 11 of the DSU. The European Communities underscores Dr. Cogliano's statement that "the data are not sufficient" to conduct a "low-dose prediction of risk at levels you might find in hormone-treated meat"[226], and observes that this statement was not reflected in the Panel Reports. The European Communities argues that the Panel decided to accept only those expert opinions that it considered "acceptable", and in so doing the Panel "arbitrarily chose between different scientific opinions" instead of establishing whether the European Communities had "followed a scientifically plausible alternative" when adopting Directive 2003/74/EC and the Panel thus "failed to recognise the legal significance of a genuine scientific controversy".[227] Consequently, the Panel found that the SCVPH Opinions "came to the wrong scientific conclusions"[228], and thus conducted a *de novo* review of the facts, contrary to the requirements in Article 11 of the DSU to make an objective assessment of the facts, as reflected in the European Communities' risk assessment.

95. The European Communities submits that the Panel failed to interpret and apply correctly Article 5.7 of the *SPS Agreement* and failed to conduct an objective assessment of the matter as required by Article 11 of the DSU. Therefore, the European Communities requests the Appellate Body to reverse the Panel's findings under Article 5.7 of the *SPS Agreement*.

B. *Arguments of the United States – Appellee*

1. Procedural Issue – Public Observation of the Oral Hearing

96. The United States requests that the Appellate Body allow public observation of the oral hearing in these proceedings. The United States refers to the experience with open hearings at the panel stage and states that this development has been of great benefit to the WTO and the multilateral trading system. The United States explains that "[t]he ability of the public at large—e.g., representatives of civil society, such as NGOs, journalists, academics, and individual citizens—to observe dispute settlement hearings has helped foster greater confidence in the WTO dispute settlement system and the manner in which it operates."[229] The United States also considers that the practice of having open panel meetings with the parties has served to strengthen the "legitimacy and credibility"[230] of the system and that this increased confidence in the dispute settlement process can translate into a greater acceptance of the outcome of the dispute settlement proceeding, with potential benefits in respect of implementation. In addition, the United States points out that the practice of opening panel meetings with the parties has also been of great benefit to the governments of many WTO Members because "a significant number of delegates from WTO Members that were not parties to the dispute have taken advantage of the opportunity to attend an open panel meeting in order to follow a dispute more closely than they otherwise could."[231] The United States further notes that "opening meetings allows the WTO to compare more favourably to other international fora"[232] and refers to the practice of many international tribunals. The United States observes that this dispute

[226]European Communities' appellant's submission, para. 279 (quoting transcript of the Panel's joint meeting with the scientific experts on 27-28 September 2006, Panel Reports, Annex G, para. 871).
[227]*Ibid.*, para. 281.
[228]*Ibid.*, para. 282.
[229]United States' request for an open hearing, para. 5.
[230]*Ibid.*
[231]United States' request for an open hearing, para. 6.
[232]*Ibid.*, para. 7.

involves questions of human health and scientific judgements and therefore "provides a particularly strong example of public interest in WTO dispute settlement".[233]

97. In the United States' view, there is nothing in the DSU, the *Working Procedures* or the *Rules of Conduct* that addresses the issue of open hearings "directly".[234] The United States does not consider that Article 17.10 precludes open appellate hearings. The United States argues that because there is no mention of an Appellate Body oral hearing in the DSU, "Article 17.10 cannot be directed at the question of whether such a hearing should be open or closed."[235] The United States observes, in this regard, that third parties that were not third participants in both appeals in *US – Shrimp (Thailand)* and *US – Customs Bond Directive* were allowed to attend the consolidated oral hearing that was held for those appeals. The United States adds that "[s]omething similar appears to have occurred"[236] in the *US – 1916 Act* appellate proceedings. The United States submits, furthermore, that "there is nothing in the DSU that authorizes a third party to observe any Appellate Body hearing" and that, "[i]f Article 17.10 required that the hearing be confidential, then the Appellate Body could not have permitted third parties to observe the hearing."[237]

98. According to the United States, Article 17.10 has not been interpreted as "literally requiring the confidentiality of Appellate Body hearings" because Appellate Body reports "routinely describe events at a hearing or even include quotations from the statements or answers to questions".[238] Moreover, the United States notes that an Appellate Body report routinely discloses the arguments of the participants and third participants in their written submissions, and Notices of Appeal and of Other Appeal are always circulated as public WT/DS documents.

99. The United States also emphasizes that Article 17.10 must be read and applied in conjunction with Article 18.2 of the DSU. For the United States, the phrase "[n]othing in this Understanding" in Article 18.2 must be read to mean "that not even Article 17.10 could interfere with a party's right to disclose its own positions to the public, including statements made in the course of an Appellate Body hearing".[239] The United States adds that if the statements and answers to questions can be made public by the participants, there is no reason why the parties cannot agree to have such statements and answers made public at the time they are uttered.

100. The United States alleges that it is not aware of anything in the negotiating history of the DSU that would suggest that parties could not agree to open an Appellate Body hearing to public observation. Nor does the United States consider that the *Working Procedures* require an oral hearing that is closed to the public. Furthermore, it does not see anything in the *Rules of Conduct* that would be an impediment to opening the hearing, because where parties agree to make their statements in the presence of the public, "there is no confidential information to be protected and no confidentiality of the proceedings to be maintained."[240] The United States clarifies that by authorizing the request of the participants, the Appellate Body "would not be prejudging"[241] the DSU review negotiations.

[233]*Ibid.*, para. 13.
[234]*Ibid.*, para. 15.
[235]*Ibid.*, para. 17.
[236]*Ibid.*, para. 19.
[237]*Ibid.*, para. 20.
[238]*Ibid.*, para. 21.
[239]United States' request for an open hearing, para. 24. (emphasis omitted)
[240]*Ibid.*, para. 26.
[241]*Ibid.*, para. 28.

101. In response to the comments of the third participants, the United States refers to the Recommendations by the Preparatory Committee for the WTO.[242] The United States asserts that the Recommendations indicate that the Preparatory Committee viewed Article 17.10 as focused on the deliberations of the Appellate Body and any confidential information submitted by the participants to an appeal. The United States also argues that the third participants that oppose the request to open the hearing fail to reconcile their understanding of the term "proceedings" with the fact that statements made at the oral hearing and responses to questions are routinely quoted and described in Appellate Body reports. Moreover, the United States points out that Article 18.2 refers to "statements of its own positions", which include responses to questions posed at the oral hearing, and does not impose a limitation on when the disclosure may occur. Finally, the United States rejects the argument that the Appellate Body may not consider the request to open the hearing because transparency is being discussed in the DSU review negotiations.

102. The United States therefore requests that the Appellate Body allow public observation of the oral hearing and discusses several modalities that could be used to accommodate any third participants wishing to maintain the confidentiality of their submissions. The United States, however, indicates a preference for allowing public observation by means of closed-circuit simultaneous broadcast.

2. Articles 23.2(a) and 21.5 of the DSU

103. The United States submits that the Panel properly found that the phrase "recourse to dispute settlement" within the meaning of Article 23.2(a) of the DSU is not limited to an Article 21.5 panel proceeding and that Article 23.2(a) did not require the United States to initiate a compliance panel proceeding for purposes of examining the compatibility of Directive 2003/74/EC with the *SPS Agreement*.

104. The United States considers that the Panel's interpretation of the phrase "recourse to dispute settlement in accordance with [the DSU]" in Article 23.2(a) as encompassing all procedures under the DSU, rather than relating exclusively to an Article 21.5 panel proceeding, was "sensible and well supported"[243] by the text of the DSU. The United States observes that Article 21.5 refers to "these dispute settlement procedures" without specifying any particular subset of the procedures provided in the DSU, and thus does not exclude any aspect of the DSU procedures.[244] Moreover, in the United States' view, a complaining party always retains the option to initiate an ordinary panel proceeding to avoid the limitations on the scope of measures and claims that may be brought in an Article 21.5 proceeding. Therefore, the United States argues, Article 21.5 provides no contextual support for the European Communities' assertion that the phrase "rules and procedures of [the DSU]" in Article 23.2(a) refers exclusively to a panel operating under the jurisdictional limitations and accelerated timeframes provided for in Article 21.5. The United States contends that, unless the European Communities is suggesting that it would refuse to participate in any proceeding other than a compliance panel proceeding initiated by the United States to examine the consistency of Directive 2003/74/EC with the *SPS Agreement*, there is no reason to assume that an Article 21.5 proceeding is the only means by which the United States and the European Communities could reach a resolution of this dispute.

105. The United States disagrees with the European Communities' interpretation of the term "shall be decided" in Article 21.5 as indicating that "final" resolution results only from a panel proceeding. If that were the case, this dispute would have been finally resolved in 1998 with the adoption of the

[242]United States' comments on third participants' comments, paras. 5 and 6 (referring to Establishment of the Appellate Body: Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995 (WT/DSB/1), para. 9).

[243]United States' appellee's submission, para. 126.

[244]See *ibid.*, para. 127.

DSB's recommendations and rulings in *EC – Hormones*. The United States argues that the term "shall be decided" should not be read in such a restrictive way, because the goal of the DSU is to secure a positive resolution, and a mutually acceptable solution is preferable for achieving this goal. The United States also disagrees with the European Communities' contention that the term "shall be decided" in Article 21.5 requires a decision by an adjudicative body. Rather, the use of the passive tense leaves open the question by whom a disagreement under Article 21.5 should be decided, and may include the parties, a regular panel, an arbitrator, or a mediator or other facilitator.

106. The United States submits that the European Communities' "frustrated experience as an original responding party"[245] initiating an Article 21.5 proceeding in *EC – Bananas III (Article 21.5 – EC)* does not lead to the conclusion that such an approach is disallowed by the DSU. The United States argues that the European Communities "cannot have it both ways": insisting, in *EC – Bananas III (Article 21.5 – EC)*, upon the right to initiate an Article 21.5 proceeding when it "thought that avenue would be to its advantage", and now arguing that an original respondent is foreclosed from initiating an Article 21.5 proceeding.[246] Moreover, the United States rejects the European Communities' claim that the fact that the panel report in *EC – Bananas III (Article 21.5 – EC)* was not adopted signifies certain "subsequent practice"[247], noting that it was the European Communities itself that did not seek adoption of that report.[248]

107. For these reasons, the United States requests the Appellate Body to reject the European Communities' claim that Article 23.2(a) of the DSU required the United States to initiate an Article 21.5 panel proceeding for purposes of examining the WTO-consistency of Directive 2003/74/EC. The United States nevertheless observes that the Appellate Body need not address the European Communities' claims in this regard if it reverses the Panel's findings that the United States has acted inconsistently with Articles 23.1 and 23.2(a) of the DSU, as requested by the United States in its other appeal.[249]

3. Article 22.8 of the DSU

108. The United States maintains that the Panel correctly interpreted Article 22.8 of the DSU in finding that it requires not just the *pro forma* removal of the measure found to be inconsistent, but the achievement of actual compliance with the DSB's recommendations and rulings, before the application of the suspension of concessions must be terminated.

109. The United States alleges that, in replacing Directive 96/22/EC with Directive 2003/74/EC, the European Communities simply switched the legal instruments underlying the import ban and, in so doing, failed to remove the inconsistent measure within the meaning of Article 22.8. The United States contends that the phrase "until such time as the measure found to be inconsistent with a covered agreement has been removed" in Article 22.8 requires the elimination of the WTO-inconsistency, that is, actual compliance. The United States notes that the ordinary meaning of "removed" is "lifted, taken away".[250] The United States explains that it is difficult to see how a WTO-inconsistent measure can be said to be taken away if an equivalent measure is put in its place. The United States further argues that the context provided by other provisions of the DSU—namely, Articles 21.1, 21.5, 22.1, and 22.2—confirm that it is actual compliance that is required by Article 22.8. These provisions

[245]United States' appellee's submission, para. 134.

[246]*Ibid.*

[247]*Ibid.*, para. 115 (quoting Article 31(3)(b) of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").

[248]*Ibid.*, para. 135.

[249]*Ibid.*, para. 125 (referring to United States' other appellant's submission, sections II and III). See also *infra*, paras. 188-194.

[250]United States' appellee's submission, para. 102 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, p. 2543).

indicate that the drafters of the DSU "contemplated that suspension of concessions and 'full implementation' were alternatives to one another".[251] The United States adds that interpreting Article 22.8 as requiring actual compliance is also supported by the purpose of the suspension of concessions, which is to induce compliance.

110. The United States rejects the European Communities' contention that Articles 21 and 22 of the DSU establish a "basic dichotomy" between "the measure found to be inconsistent" and the "measures taken to comply", arguing that the European Communities draws an "artificial distinction" between the "removal of a measure" and "existence or consistency" of a measure taken to comply.[252] The United States draws attention to Article 3.7 of the DSU as reflecting the object and purpose of the DSU. Article 3.7 provides that "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned", which the United States understands as referring "not to ... a mere repeal of a measure that is replaced by another, but ... instead to an actual elimination of the measure that brings about compliance".[253] According to the United States, the removal of an inconsistent measure, accompanied by the taking of a measure that undermines such removal, results in the absence of a measure taken to comply.

111. Moreover, the United States disagrees with the European Communities' contention that Article 22.8 requires the suspension of concessions to be terminated "in the presence of an implementation [measure]" that has not yet been found to be WTO-inconsistent through Article 21.5 proceedings.[254] The United States submits that this contention is not supported by Article 22.8, which does not state that the suspension of concessions shall only be applied "until the measure found to be inconsistent is *claimed* to have been removed".[255] The United States also rejects the European Communities' argument that the Panel, in finding that Directive 96/22/EC was replaced by Directive 2003/74/EC, failed to consider that Directive 96/22/EC ceased to exist upon the adoption of Directive 2003/74/EC, and that the latter contains changes to the justification for the import restrictions imposed by the former. According to the United States, the Panel's approach was consistent with the Appellate Body's treatment in *EC – Hormones* of Directive 96/22/EC as a substitute for the previous Directives that had "ceased to exist" when they were replaced by Directive 96/22/EC, despite changes made by that Directive to the import restrictions imposed by the previous Directives.[256]

112. Furthermore, the United States alleges that the European Communities' logic, according to which an original complainant must terminate its suspension of concessions and initiate an Article 21.5 proceeding when an original respondent claims compliance, will lead to "a strange and absurd result".[257] If the Article 21.5 panel concludes that compliance has not been achieved, there is neither a renewed reasonable period of time nor another opportunity to request authorization for the suspension of concessions.

113. On this basis, the United States requests the Appellate Body to reject the European Communities' appeal of the Panel's findings that Article 22.8 of the DSU requires the achievement of

[251] *Ibid.*, para. 103. (emphasis omitted)
[252] *Ibid.*, para. 104 (quoting European Communities' appellant's submission, paras. 136-142).
[253] *Ibid.*, para. 106. (emphasis omitted)
[254] United States' appellee's submission, para. 114 (referring to European Communities' appellant's submission, para. 98). As regards the European Communities' argument that it had suspended retaliatory action during the Article 21.5 proceedings in *US – FSC*, the United States contends that the European Communities continues to suspend concessions in *US – Offset Act (Byrd Amendment)* without initiating an Article 21.5 proceeding, even though the United States has notified the DSB of the repeal of the Continued Dumping and Subsidy Offset Act of 2000. (*Ibid.*)
[255] *Ibid.*, para. 115. (original emphasis)
[256] *Ibid.*, para. 111.
[257] *Ibid.*, para. 117.

actual compliance with the DSB's recommendations and rulings before the application of the suspension of concessions must be terminated.

4. The Panel's Terms of Reference

114. The United States disagrees with the European Communities' claim that the Panel exceeded its terms of reference by assuming the powers of an Article 21.5 panel.

115. The United States observes that, pursuant to Article 7.1 of the DSU, a panel's standard terms of reference cover the matter referred to in the request for the establishment of a panel. The United States notes that, in its panel request, the European Communities specifically asked the Panel to consider its complaint with a view to finding that the United States had acted inconsistently with Article 22.8 of the DSU. Article 22.8 thus fell within the Panel's terms of reference, and the Panel was free to develop its own legal reasoning when addressing the claims raised by the European Communities under Article 22.8.

116. For the United States, the Panel's finding that the European Communities' claims under Article 22.8 were premised on the actual compliance of Directive 2003/74/EC with the *SPS Agreement* was based on a correct interpretation of Article 22.8 and was supported by the text, context, and object and purpose of the DSU. Furthermore, the United States rejects the European Communities' reference to the panel report in *EC – Sardines* as "inapposite", noting that, unlike in this dispute, following the order of analysis requested by the complainant in that dispute did not lead to an error of law.[258]

117. Accordingly, the United States requests the Appellate Body to reject the European Communities' assertion that the Panel exceeded its terms of reference under Articles 7 and 21.5 of the DSU by examining the compatibility of Directive 2003/74/EC with the *SPS Agreement*. The United States maintains that the Panel in fact limited its terms of reference improperly on the basis of the manner in which the European Communities presented its claims.[259]

5. The Panel's Suggestion for Implementation

118. The United States asserts that the Appellate Body should decline the European Communities' request to improve the Panel's suggestion for implementation. The United States disagrees with the European Communities' contention that "the Panel's suggestions require that the United States remove the suspension of concessions, and initiate and conclude an Article 21.5 compliance panel proceeding."[260] The United States underscores that, on the contrary, the Panel declined to suggest that the United States discontinue its suspension of concessions despite its finding that the United States has committed procedural violations under Articles 23.2(a) and 23.1 of the DSU. The United States considers that a suggestion on implementation is "inappropriate"[261], because it is for a WTO Member to decide on the steps needed to bring itself into conformity. In addition, the United States argues that the Appellate Body should reject the European Communities' request to improve the Panel's suggestion, because improvement of panels' suggestions is not within the Appellate Body's mandate,

[258] United States' appellee's submission, para. 122 (referring to European Communities' appellant's submission, para. 68, in turn referring to Panel Report, *EC – Sardines*, paras. 7.17 and 7.18).
[259] See also *infra*, para. 196.
[260] United States' appellee's submission, para. 136. (footnote omitted)
[261] *Ibid.*, para. 139.

which is circumscribed by Articles 17.6 and 17.13 of the DSU. The United States observes that, in any event, the Appellate Body would not need to address this issue if it were to reverse the Panel's findings of procedural violations under Articles 23.1 and 23.2(a), as requested by the United States in its other appeal.

6. The Panel's Selection of Experts

119. The United States argues that the European Communities is "[r]ecycling yet another of its failed challenges from its appeal in *EC – Hormones*"[262] by objecting to the expert selection process in its appeal. The United States explains that, in *EC – Hormones*, the Appellate Body found no fault with the panel because it had consulted with the parties regarding the selection of experts. The United States describes the steps taken by the Panel in this case to consult with the parties on expert selection, and concludes that the Panel's conduct in the selection of experts was transparent and consultative, providing the parties with notice and opportunities to respond, express their concerns, and be heard before the Panel made its decisions. Moreover, the United States asserts that the Panel "obtain[ed] self-disclosure information from all of the experts, including from Dr. Boisseau".[263]

120. Noting the assertion by the European Communities that the relevant legal test was "likelihood or justifiable doubts" as to an expert's independence or impartiality, the United States argues that "[t]he fact of the matter is that the Panel and the parties were provided with full disclosure of the experts' professional affiliations and financial interests" and "[t]he record demonstrates that the Panel took the [European Communities'] concerns into account in concluding that the two experts in question were not disqualified from serving."[264]

121. The United States alleges that the European Communities provides no support for the claims regarding due process rights, arguing that the European Communities cited nothing more "than the most general statement" by the Appellate Body in *Thailand – H-Beams* and a judgment by the European Court of Human Rights that the European Communities "recycled from its challenge to the panel's expert selection process in *EC – Hormones*".[265] In the United States' view, neither of those citations supports the European Communities' claim. Finally, to the extent the European Communities alleges a breach of Article 11 of the DSU, the United States argues that the Panel acted within the proper bounds of its discretion as fact-finder.

122. Consequently, the United States requests the Appellate Body to reject the European Communities' claim that the Panel acted inconsistently with the principle of due process, the requirements in the *Rules of Conduct*, and its duties under Article 11 of the DSU, in selecting Drs. Boisseau and Boobis, and to reject the request to reverse the Panel's findings that relied on the advice of these two experts.

7. Article 5.1 of the *SPS Agreement*

123. The United States argues that the Panel was correct in finding that the European Communities' permanent ban on meat and meat products from cattle treated with oestradiol-17β for growth-promoting purposes was not based on a risk assessment within the meaning of Article 5.1 of the *SPS Agreement.* The United States requests the Appellate Body to dismiss the European Communities' appeal for the following reasons.

[262]United States' appellee's submission, para. 83.
[263]*Ibid*., para. 86. (footnote omitted)
[264]*Ibid*., paras. 87 and 88.
[265]*Ibid*., para. 89.

124. The United States rejects the European Communities' argument that the Panel erred by excluding, on an *a priori* basis, the European Communities' evidence regarding misuse and abuse in the administration of oestradiol-17β. The United States considers that the "core"[266] of the European Communities' argument is that, because misuse and abuse in the administration of oestradiol-17β might occur one day, the European Communities is justified in banning oestradiol-17β entirely. Contrary to the European Communities' argument, the Panel "fully appreciated"[267] the significance of the European Communities' assertion that misuse and abuse in the administration of oestradiol-17β can add to the risks identified in relation to this substance. However, the Panel correctly considered that additional risks arising from misuse and abuse would only be relevant for its analysis if the European Communities had succeeded in demonstrating that a specific risk arose from the consumption by humans of residues of oestradiol-17β in meat. Hence, the United States asserts that, consistent with the Appellate Body's findings in *EC – Hormones*, the Panel did not *a priori* exclude misuse and abuse from the scope of application of Articles 5.1 and 5.2 of the *SPS Agreement*. Rather, the Panel acknowledged the fact that the European Communities had taken those factors into account, recognized that such factors were not relevant to the initial inquiry regarding whether a specific risk had been identified, and provided a detailed account of its reasoning.

125. The United States maintains further that the Panel correctly held that the European Communities had not evaluated specifically the risks arising from the consumption of meat and meat products containing residues of oestradiol-17β as a result of cattle being treated with hormones for growth-promotion purposes. The Panel's examination of whether the European Communities had demonstrated the potential for adverse effects arising specifically from the presence of hormone residues in meat was based on a "careful tracing"[268] of the Appellate Body's interpretation of a "risk assessment" under Article 5.1, as defined by Annex A, paragraph 4, to the *SPS Agreement*. The United States rejects the European Communities' assertion that the Panel's articulation of the "specificity" test would require the demonstration of actual effects in humans. Rather, it is possible to perform tests on laboratory animals and extrapolate the results to human beings, and the European Communities recognizes that other countries have found ways to evaluate the possibility of adverse effects arising from the consumption by humans of hormone residues in meat by performing tests on laboratory animals. The United States also contends that "one expert's statement, divorced from the rest of the evidentiary record" is not sufficient to demonstrate that the European Communities has evaluated the specific risk arising from residues of oestradiol-17β in meat.[269] Instead, the evidentiary record supported the Panel's conclusion that the European Communities had identified only "general risks"[270] and had failed to address the specific risk as required by the *SPS Agreement*, that is, the "possibility that these adverse effects come into being, originate, or result from the consumption of meat or meat products which contain veterinary residues of oestradiol-17β as a result of the cattle being treated with the hormone for growth promotion purposes."[271] The Panel's finding that the European Communities had failed to show the specificity required of a risk assessment resulted from an analytical process that was appropriately grounded in the precepts of scientific inquiry and prior Appellate Body reports.

126. In addition, the United States refutes the European Communities' argument that the Panel required the quantification of risks by focusing its inquiry on whether the European Communities had

[266]United States' appellee's submission, para. 53.
[267]*Ibid*., para. 54 (referring to European Communities' appellant's submission, paras. 319 and 331).
[268]United States' appellee's submission, para. 57.
[269]*Ibid*., para. 60 (referring to European Communities' appellant's submission, para. 342, in turn referring to reply of Dr. Guttenplan to Question 13 posed by the Panel to the scientific experts, Panel Report, *US – Continued Suspension*, para. 7.523, and Panel Report, *Canada – Continued Suspension*, para. 7.495).
[270]*Ibid*., para. 61.
[271]*Ibid*., para. 65 (quoting European Communities' appellant's submission, para. 344, in turn quoting Panel Report, *US – Continued Suspension*, para. 7.537 (emphasis added by the European Communities omitted)).

demonstrated the "potential occurrence of these adverse effects".[272] According to the United States, the Panel did not preclude that a qualitative risk assessment could be sufficient for purposes of Article 5.1. Instead, the Panel's reference to "potential occurrence" of risks focused on whether the European Communities' risk assessment was "sufficiently specific to the case at hand".[273] The United States asserts that the Panel's finding that the European Communities' risk assessment did not have the required specificity is a finding of fact, which the European Communities cannot succeed in disturbing on the basis of its allegation that the Panel imposed some kind of "'quantification' requirement".[274]

127. The United States argues furthermore that the Panel did not err in allocating the burden of proof under Article 5.1 of the *SPS Agreement*. The Panel properly noted that "one of the particularities of this case"[275] was that the European Communities' claim under Article 22.8 of the DSU was premised on the assertion by the European Communities that it had brought itself into conformity with the *SPS Agreement* through Directive 2003/74/EC. For this reason, and taking into account the European Communities' concern that it should not be required to "prove a negative", the Panel was justified in allocating to the European Communities the burden of establishing a *prima facie* case of conformity with the *SPS Agreement*, including Article 5.1 of that Agreement. Once the Panel found that the European Communities had established such a *prima facie* case, the burden of proof shifted to the United States. The Panel then rightly found that the United States had rebutted the European Communities' *prima facie* case of consistency through positive evidence of breach of the *SPS Agreement*. The United States agrees with the Panel's finding that, consistent with the "particularities"[276] of the European Communities' claim under Article 22.8, "the burden shifted back and forth between the parties and eventually 'neutralized' each other since each party also submitted evidence in support of its allegations."[277] The United States further agrees with the Panel's approach that it would "weigh all the evidence before it"[278] in considering whether an allegation had been proven. In so doing, the Panel did not state or consider that it had placed the burden of proof on the European Communities.

128. The United States argues that the Panel did not fail to conduct an objective assessment of the matter, as required by Article 11 of the DSU, in reaching its finding that the European Communities' permanent ban on oestradiol-17β was not based on a risk assessment within the meaning of Article 5.1. According to the United States, the more deferential "reasonableness"[279] standard that the European Communities posits should apply to "measures adopted by governments or specialised agencies in highly complex or technical matters"[280] finds no support in the text of the *SPS Agreement*. This Agreement "does not prescribe a particular standard of review or include specific provisions addressing the review by a panel of a determination or examination conducted by a national authority".[281] Moreover, the United States recalls that the Appellate Body rejected the European Communities' attempt to introduce a "deferential 'reasonableness' standard" in *EC – Hormones*, finding that "[t]o adopt a standard of review not clearly rooted in the text of the *SPS Agreement* itself, may well amount to changing that finely drawn balance" between the jurisdictional

[272] *Ibid.*, para. 62 (quoting Panel Report, *US – Continued Suspension*, para. 7.521).
[273] *Ibid.*, para. 64 (quoting Appellate Body Report, *EC – Hormones*, para. 200).
[274] United States' appellee's submission, para. 66.
[275] *Ibid.*, para. 93 (quoting Panel Report, *US – Continued Suspension*, para. 7.384).
[276] *Ibid.*, para. 94.
[277] *Ibid.* (referring to Panel Report, *US – Continued Suspension*, para. 7.386).
[278] *Ibid.* (quoting Panel Report, *US – Continued Suspension*, para. 7.386). (emphasis omitted)
[279] *Ibid.*, para. 36 (referring to European Communities' appellant's submission, para. 223).
[280] *Ibid.*, para. 37 (quoting European Communities' appellant's submission, para. 223).
[281] United States' appellee's submission, para. 34 (referring to Appellate Body Report, *EC – Hormones*, paras. 114-116).

competences conceded by WTO Members and the jurisdictional competences retained by Members for themselves.[282]

129. The United States additionally rejects the European Communities' argument that panels must apply the "generally applicable standard of review"[283] differently, depending upon the specific provision of the *SPS Agreement* that is being applied to the facts. The United States recalls the standard of review proposed by the European Communities for a claim arising under Article 5.1 of the *SPS Agreement*, according to which a panel must defer to a Member's risk assessment "if the evidence before the panel provides for at least one scientifically plausible set of conclusions under which an adverse effect might occur."[284] In the United States' view, the European Communities' formulation has no support in the covered agreements and "conflates the concept of 'standard of review' and the application of law to facts".[285] On this basis, the United States submits that the standards of review proposed by the European Communities "are products of [its own] wishful thinking and find no support in the DSU, the *SPS Agreement*, or the findings of the Appellate Body".[286]

130. The United States observes that the Appellate Body has consistently held that the standard of review to be applied by panels to their fact-finding in SPS disputes is "neither *de novo* review, as such, nor 'total deference', but rather the 'objective assessment of the facts'".[287] The United States emphasizes that a panel will be regarded as having failed to make an objective assessment where it "deliberately disregards", "refuses to consider", or "wilfully distorts or misrepresents" evidence submitted to it.[288] This requires "more than just an error of judgement in the appreciation of evidence, but rather an 'egregious error that calls into question the good faith of a panel'".[289] Moreover, panels "enjoy a 'margin of discretion' as triers of fact" and are "not required to accord to factual evidence of the parties the same meaning and weight as do the parties", and may properly "determine that certain elements of evidence should be accorded more weight than other elements".[290]

131. The United States rejects the European Communities' contention that the Panel exceeded the bounds of its discretion under Article 11 of the DSU in its appreciation of the evidence. The Panel's statement that "its situation [was] similar"[291] to that of a risk assessor does not support the European Communities' allegation that the Panel impermissibly conducted a *de novo* review. Rather, the Panel considered itself to be in a situation "similar" to that of a risk assessor insofar as it would benefit from hearing a full spectrum of scientific experts to obtain a complete picture of both mainstream and divergent scientific views.[292] The United States also dismisses the European Communities' allegation that the Panel exceeded the bounds of its discretion in choosing to rely on the views expressed by the "majority of experts", or on the "most specific" or "best supported" view.[293] The United States asserts that the Panel's exercise of judgement in evaluating the evidence was "part and parcel of the Panel's duty to make an objective assessment of the facts".[294] Moreover, the Panel could not have realistically referred to all statements made by the experts advising it and should have had a substantial margin of

[282] *Ibid.*, para. 37 (quoting Appellate Body Report, *EC – Hormones*, para. 115).
[283] *Ibid.*, para. 38.
[284] *Ibid.*, para. 38 (quoting European Communities' appellant's submission, para. 229).
[285] *Ibid.*, para. 39.
[286] *Ibid.*, para. 39.
[287] *Ibid.*, para. 40 (quoting Appellate Body Report, *EC – Hormones*, para. 117).
[288] *Ibid.*, para. 41 (quoting Appellate Body Report, *EC – Hormones*, para. 133).
[289] *Ibid.*, para. 41 (quoting Appellate Body Report, *EC – Hormones*, para. 133).
[290] United States' appellee's submission, para. 42 (quoting Appellate Body Report, *Japan – Apples*, para. 221, in turn quoting Appellate Body Report, *EC – Asbestos*, para. 161, and Appellate Body Report, *Australia – Salmon*, para. 267).
[291] *Ibid.*, para. 44 (quoting Panel Report, *US – Continued Suspension*, para. 7.418).
[292] *Ibid.*, para. 44.
[293] Panel Report, *US – Continued Suspension*, para. 7.420; Panel Report, *Canada – Continued Suspension*, para. 7.411.
[294] United States' appellee's submission, para. 47.

discretion as to which statements to refer to explicitly. The United States submits that the Panel's findings in relation to: (i) exposure to hormones from multiple sources; (ii) the genotoxicity of oestradiol-17β; (iii) the specificity of the risk assessment; and (iv) the role of misuse and abuse of hormones as factors in a risk assessment were all within the bounds of its discretion as the trier of facts and should therefore be upheld by the Appellate Body.

132. The United States additionally contends that the European Communities' challenges raised under Article 11 of the DSU to the Panel's fact-finding appear to be claims that the Panel breached Article 12.7 of the DSU by failing to set out the findings of fact, the applicability of relevant provisions, and the basic rationale underlying its findings. However, no such claim of error under Article 12.7 has been made by the European Communities on appeal. For this reason, to the extent that the European Communities' challenges raised under Article 11 should properly have been raised under Article 12.7 instead, those claims should be disregarded as not properly subject to review by the Appellate Body.

133. The United States concludes that the Panel did not err in finding that Directive 2003/74/EC is inconsistent with Article 5.1 of the *SPS Agreement*, and requests the Appellate Body to reject the European Communities' appeal concerning the Panel's findings.

8. Article 5.7 of the *SPS Agreement*

134. The United States argues that the Panel correctly found that the relevant scientific evidence on the five hormones subject to the provisional ban was not "insufficient" within the meaning of Article 5.7 of the *SPS Agreement.* The United States requests the Appellate Body to dismiss this ground of the European Communities' appeal for the following reasons.

135. The United States argues that the Panel correctly interpreted Article 5.7, taking account of the context provided by Articles 3.2 and 3.3 of the *SPS Agreement*. The United States recalls that, pursuant to Article 3.2, a measure conforming to an international standard shall be deemed to be consistent with the relevant provisions of the *SPS Agreement*. Thus, the Panel was justified in finding that the existence of international standards demonstrated that there had been sufficient scientific evidence to conduct a risk assessment within the meaning of Article 5.1. Indeed, it would not make sense that the *SPS Agreement* would require a measure conforming to an international standard to be deemed consistent with Article 5.1 if the international standard was not based on a proper risk assessment. In any event, the United States charges the European Communities with failing to take into account that, "*in this case*, the international standards for the hormones in question are unquestionably supported by proper risk assessments."[295]

136. The United States contends furthermore that the European Communities' desired level of SPS protection was irrelevant for the Panel's determination of whether the scientific evidence was "insufficient" within the meaning of Article 5.7. First, the United States submits that the European Communities had failed to show that its appropriate level of protection is different from the level of protection that the Codex standards are designed to achieve. Secondly, the United States notes that a risk assessment is a scientific process aimed at identifying whether a risk exists, and risk assessors "need not have any particular level of protection in mind in conducting the risk assessment".[296] Therefore, the question of whether the relevant scientific evidence is "insufficient" within the meaning of Article 5.7 is a matter entirely separate "from the 'appropriate level of [SPS] protection'"[297] that a Member chooses to set. In addition, the United States considers remarkable the European Communities' statement that "[s]cience is essentially about measuring past fact and hypothesizing

[295]United States' appellee's submission, para. 70. (original emphasis)
[296]*Ibid*., para. 72.
[297]*Ibid*., para. 73.

about the future, including postulating about future risk."[298] The United States argues that this statement reveals the European Communities' "fundamental misunderstanding of science", because the scientific method is about "rigorously testing a hypothesis using experimentation rather than 'measuring past fact' or 'hypothesizing about the future'".[299]

137. The United States maintains that the Panel did not err in finding that a "critical mass of new evidence" is required to render previously sufficient scientific evidence "insufficient" within the meaning of Article 5.7. The United States observes that the Panel did not impose a quantitative requirement by referring to the "critical mass" of new evidence. Instead, the Panel used this term to indicate "a situation where evidence becomes so quantitatively and qualitatively sufficient to call into question the fundamental precepts of previous knowledge and evidence", such that new scientific information is "at the origin of a change in the understanding of a scientific issue".[300] The United States points out that the five hormones subject to the provisional ban had been studied intensively for decades and the international standards for four of them had existed for over 20 years. The United States additionally recalls that, in *EC – Hormones*, the European Communities argued that the scientific evidence concerning the same five hormones had been "sufficient to justify its legislation and [it] [had] not need[ed] to rely on the exception provided for in Article 5.7 concerning cases where relevant scientific evidence was insufficient."[301] Under these circumstances, it was "appropriate" for the Panel to focus on the question of "whether relevant scientific evidence had *become* insufficient".[302] The United States adds that there was "plentiful" evidence in the record demonstrating that the relevant scientific evidence "[was] and remains sufficient" to conduct a risk assessment for the five hormones.[303]

138. The United States asserts that the Panel correctly allocated the burden of proof in its analysis under Article 5.7. As it argues in respect of Article 5.1[304], the United States submits that the Panel properly noted that "one of the particularities of this case"[305] was that the European Communities' claim under Article 22.8 of the DSU was premised on an assertion by the European Communities that it had brought itself into conformity with the *SPS Agreement* through the adoption of Directive 2003/74/EC. For this reason, and taking into account the European Communities' concern that it should not be required to "prove a negative", the Panel was justified in allocating on the European Communities the burden of establishing a *prima facie* case of conformity with the *SPS Agreement*, including with Article 5.7 of that Agreement. The United States agrees with the Panel that "the burden shifted back and forth between the parties and eventually 'neutralized' each other since each party also submitted evidence in support of its allegations."[306] The United States further agrees with the Panel's approach that it would "weigh all the evidence before it"[307] in considering whether an allegation had been proved. Furthermore, the United States observes that "the Panel did not state or consider that it had placed the burden of proof on the [European Communities]."[308] Thus,

[298]United States' appellee's submission, para. 74 (quoting European Communities' appellant's submission, para. 398).
[299]*Ibid*., para. 74.
[300]*Ibid*., para. 78 (quoting Panel Report, *US – Continued Suspension*, para. 6.141). (emphasis omitted)
[301]*Ibid*., para. 80 (quoting Panel Report, *EC – Hormones (US)*, para. 4.239).
[302]*Ibid.* (original emphasis)
[303]*Ibid*., para. 81.
[304]See *supra*, para. 127.
[305]United States' appellee's submission, para. 93 (quoting Panel Report, *US – Continued Suspension*, para. 7.384; and Panel Report, *Canada – Continued Suspension*, para. 7.381).
[306]United States' appellee's submission, para. 94 (referring to Panel Report, *US – Continued Suspension*, para. 7.386).
[307]*Ibid.* (quoting Panel Report, *US – Continued Suspension*, para. 7.386; and Panel Report, *Canada – Continued Suspension*, para. 7.383). (emphasis omitted)
[308]*Ibid.*, para. 96.

the United States dismisses as "speculation"[309] the European Communities' assertion that the Panel treated Article 5.7 as an exception to Article 5.1.

139. Finally, the United States argues that the Panel did not fail to conduct an objective assessment of the facts as required by Article 11 of the DSU in reaching its findings under Article 5.7 of the *SPS Agreement*. As noted earlier[310], the United States argues that the "reasonableness approach"[311] that the European Communities posits should apply to "measures adopted by governments or specialised agencies in highly complex or technical matters"[312] has no support in the text of the *SPS Agreement*. Moreover, the United States submits that the Panel did not conduct a *de novo* review and, instead, acted within the bounds of its discretion by attributing to the different pieces of evidence a different weight and significance than that attributed by the European Communities.[313] As regards certain statements by the experts concerning the "sufficiency" of the relevant scientific evidence on which the European Communities relies, the United States asserts that these statements "were all made at the conclusion of the Panel's meeting with the experts when the experts were given the opportunity to make general, concluding remarks on the previous two days".[314] According to the United States, the experts were not instructed to limit their remarks to certain hormones and, in fact, the statements of the experts quoted by the European Communities either explicitly addressed oestradiol-17β or did not specify to which of the hormones the experts' statements made reference.[315] The United States reiterates that "there was plentiful evidence in the record demonstrating that the relevant scientific evidence"[316] remains sufficient to conduct a risk assessment for these five hormones, including statements by the experts acknowledging that the data were sufficient to conduct risk assessments for the five hormones subject to the provisional ban. Thus, the United States concludes that the Panel's consideration of whether there was a "'critical mass of new evidence' was proper and well-supported".[317] Finally, the United States maintains that, to the extent the European Communities' challenges raised under Article 11 of the DSU "should properly have been raised under [Article 12.7 of the DSU] instead, those claims should be disregarded as not properly subject to review by the Appellate Body."[318]

140. The United States concludes that the Panel did not err in finding that Directive 2003/74/EC is inconsistent with Article 5.7 of the *SPS Agreement*, and requests the Appellate Body to reject the European Communities' appeal concerning the Panel's findings.

C. *Arguments of Canada – Appellee*

1. Procedural Issue – Public Observation of the Oral Hearing

141. Canada requests that the Appellate Body open the hearing in these proceedings to public observation. Canada observes that, if "[r]ead out of context", the first sentence of Article 17.10 "may

[309] *Ibid.*
[310] See *supra*, para. 128.
[311] United States' appellee's submission, para. 37 (referring to European Communities' appellant's submission, para. 223).
[312] *Ibid.* (quoting European Communities' appellant's submission, para. 223).
[313] See *supra*, paras. 130 and 131.
[314] United States' appellee's submission, para. 81.
[315] *Ibid.* (referring to statements by Drs. Sippell, Guttenplan, Cogliano, and Boisseau, quoted in European Communities' appellant's submission, paras. 422, 423, 424, and 425, respectively).
[316] United States' appellee's submission, para. 81 (referring to comments by the United States on the replies of the scientific experts, Codex, JECFA, and IARC to questions posed by the Panel, Panel Reports, Annex F, paras. 47 and 48).
[317] *Ibid.*, para. 82.
[318] *Ibid.*, para. 49.

appear to require closed oral hearings before the Appellate Body".[319] However, Canada argues that when the key terms of the sentence—"proceedings" and "confidential"—are properly interpreted in accordance with the customary rules of treaty interpretation, in the context of the entire DSU and, in particular, Article 17 itself, it can be seen that the sentence does not, and was not intended to, operate as a bar to open hearings.

142. In Canada's submission, the term "proceedings" in Article 17.10 "encompasses the entire appellate process".[320] As regards the term "confidential", Canada states that an examination of the context of Article 17.10 and the practice of WTO dispute settlement demonstrates that this provision does not require that the entire appellate process must remain strictly secret and out of the public's knowledge. Canada adds that if Article 17.10 required absolute confidentiality, then all of the steps within an appeal would have to remain out of the public knowledge, including the initial Notice of Appeal and the final Appellate Body report. However, both of these documents are made public upon circulation. Moreover, Appellate Body reports, which are made public, include summaries of the participants' written submissions and refer to the participants' arguments made during the oral hearing. Canada thus concludes that many aspects of the Appellate Body's proceedings during the "substantive portion"[321] of the appellate process are actually revealed to the public and are not subject to confidentiality under Article 17.10.

143. Canada also draws attention to Article 18.2 of the DSU, which "permits parties to reveal their positions to the public".[322] Canada asserts that, "[a]s was recognized by the Panel, all three parties, by making a unanimous request for a public oral hearing in these two parallel appeals, are relying on their right, stated in ... Article 18.2, to make their oral arguments public."[323] Canada adds that Article 18.2 does not prescribe a specific means of making a party's arguments public and, consequently, it does not matter whether such right is exercised after the oral hearing or contemporaneously with the oral hearing.

144. Canada submits that the *Rules of Conduct* "do not present an obstacle"[324] to the Appellate Body holding open hearings. Furthermore, Canada considers that, under Rule 16(1) of the *Working Procedures*, "[t]he Appellate Body has discretion ... to respond favourably to the unanimous request by all three parties to the appeal in this case and to open the oral hearing to the public."[325]

145. Canada additionally asserts that open hearings are an important contribution to the legitimacy and the perception of legitimacy of the WTO dispute settlement system. Canada cautions that "[t]he legitimacy of the WTO dispute settlement system would suffer if the oral hearing at the appellate level were to be closed while at the panel stage the hearings were open."[326]

146. In response to the comments of the third participants, Canada asserts that the third participants that oppose the request to open the hearing seek to divorce the term "proceedings" from its context and ignore the meaning of "confidential" altogether.[327] Canada further notes that, given the entitlement of parties under Article 18.2 to disclose their written submissions, oral statements, and answers to questions, "it would be absurd to find that where those parties agree that they wish to present their positions at an appellate hearing in open session, they may not do so."[328] Canada also objects to the argument that the Appellate Body's decision on this issue would prejudge the outcome

[319] Canada's request for an open hearing, para. 4.
[320] *Ibid.*, para. 5.
[321] Canada's request for an open hearing, para. 7.
[322] *Ibid.*, para. 9.
[323] *Ibid.*, para. 14.
[324] *Ibid.*, para. 15.
[325] *Ibid.*, para. 19.
[326] *Ibid.*, para. 24.
[327] Canada's comments on third participants' comments, para. 8.
[328] *Ibid.*, para. 10.

of the DSU review negotiations. This argument, according to Canada, misconstrues the nature and scope of the participants' request, because they are not asking the Appellate Body to decide that all appellate hearings must be open to the public. Canada observes, moreover, that the argument is premised on the incorrect notion that "whenever a matter in dispute settlement is or might be the subject of negotiations among the membership, panels and the Appellate Body should decline to consider the matter lest it 'prejudge' the outcome of the negotiations."[329]

147. Accordingly, Canada requests that the Appellate Body allow public observation of the hearing in these proceedings. Canada states that, in order to accommodate any third participants wishing to retain the confidentiality of their oral submissions, a "practical solution" would be to have "a video link between the room in which the oral hearing takes place and a second room in which the public can watch the oral hearing"[330] and to interrupt the broadcast if a third participant so wishes.

2. Articles 23.2(a) and 21.5 of the DSU

148. Canada submits that the Panel correctly found that "recourse to dispute settlement" within the meaning of Article 23.2(a) of the DSU is not limited to Article 21.5 panel proceedings and that Articles 21.5, 23.1, and 23.2(a) did not require Canada to initiate a compliance panel proceeding for purposes of examining the compatibility of Directive 2003/74/EC with the *SPS Agreement*.

149. According to Canada, the European Communities' characterization of this dispute as a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply", within the meaning of Article 21.5, "ignores ... that the essence of this dispute is not specifically about a 'disagreement' over the [European Communities'] alleged compliance measure".[331] Rather, Canada argues that Article 22.8 is the provision of the DSU that specifically applies to the post-retaliation stage and that it is for the European Communities, as the party seeking termination of the suspension of concessions, to demonstrate that it has removed its WTO-inconsistent measure within the meaning of Article 22.8. Canada maintains that the European Communities' unilateral assertion of compliance by virtue of Directive 2003/74/EC does not compel Canada to initiate an Article 21.5 proceeding, and does not require Canada to lift the suspension of concessions. Canada submits that to allow a unilateral declaration of compliance to displace the multilateral authorization to suspend concessions "would contravene the very rule against unilateralism that the [European Communities] accuses Canada of breaching".[332]

150. Canada further submits that the European Communities has the option of initiating an Article 21.5 proceeding itself. This is confirmed by the fact that the panel in *EC – Bananas III (Article 21.5 – EC)* did not decline jurisdiction, even though the proceeding was initiated by the European Communities, the respondent in the original proceedings. Canada recalls that the panel report in *EC – Bananas III (Article 21.5 – EC)* was not adopted because the European Communities, the only party that participated in that proceeding, did not request its adoption. Consequently, the European Communities' assertion that "subsequent practice" confirms that Article 21.5 panel proceedings may not be initiated by the original respondent "is without any foundation".[333] Canada disagrees with the European Communities' argument that the panel's inability to compel other parties to participate in *EC – Bananas (Article 21.5 – EC)* shows why an original respondent may not initiate

[329]Canada's comments on third participants' comments, para. 15.
[330]Canada's request for an open hearing, para. 29.
[331]Canada's appellee's submission, paras. 7 (referring to European Communities' appellant's submission, para. 49) and 8.
[332]*Ibid.*, para. 9.
[333]Canada's appellee's submission, para. 11 (referring to the European Communities' appellant's submission, para. 91).

Article 21.5 proceedings, because "no panel can ever compel a party to a dispute to appear"[334] in any panel proceeding.

151. Canada asserts that the Panel correctly found that, while recourse to an Article 21.5 panel was one of the procedural mechanisms available to the European Communities to demonstrate that it had "removed" its WTO-inconsistent measure and obtain the termination of Canada's suspension of concessions, the European Communities had several other procedural avenues available to it. These include good offices and consultations, arbitration under Article 25 of the DSU, and recourse to a panel *de novo*. The availability of a new panel proceeding is demonstrated by the fact that the European Communities initiated the present dispute and put the issue of whether Directive 2003/74/EC had brought it into compliance "squarely before the Panel"[335] through its conditional claims. Thus, contrary to the European Communities' assertion that an Article 21.5 panel proceeding is the only procedure providing finality to the dispute, the fact that the European Communities put the issue of actual compliance "squarely" before the Panel in this case demonstrates its own belief that the Panel was in a position to adjudicate "the central matter at issue" in this dispute.[336]

152. On this basis, Canada requests the Appellate Body to reject the European Communities' appeal regarding the Panel's finding that Articles 21.5 and 23.2(a) did not require Canada to initiate an Article 21.5 panel proceeding for purposes of examining the WTO-consistency of Directive 2003/74/EC.

3. Article 22.8 of the DSU

153. Canada argues that, contrary to the European Communities' claims, the Panel correctly interpreted Article 22.8 of the DSU by concluding that the phrase "until such time as the measure found to be inconsistent with a covered agreement has been removed" means that the illegality itself must be removed, and not only the originally impugned measure.

154. According to Canada, the European Communities "advocates an overly narrow and formalistic interpretation that fails to situate Article 22.8 in its proper context"[337] when arguing that the "mere existence"[338] of an implementing measure and its subsequent notification would be enough to satisfy the requirement under Article 22.8 that the WTO-inconsistent measure is removed. In contrast, the Panel properly took into account the context of Article 22.8 when finding that the removal of the inconsistent measure, under the first scenario in Article 22.8, required actual compliance with the DSB's recommendations and rulings before the suspension of concessions could be terminated. Canada maintains that the second and third scenarios requiring termination of the suspension of concessions under Article 22.8 "contemplate situations where the issue of the nullification or impairment caused by ... non-compliance with [the covered agreements] has been satisfactorily addressed".[339] Furthermore, Canada asserts that the Panel correctly found that the ongoing surveillance by the DSB of the implementation of the recommendations and rulings, as provided in the second sentence of Article 22.8, was intended to ensure that Members fully implement the DSB's recommendations and rulings. Canada also submits that surveillance by the DSB would be rendered meaningless if its role were to be reduced to one of a passive observer that would "simply take note of the 'existence' of an alleged implementing measure, without ensuring that its recommendations and rulings have indeed been implemented".[340] Canada adds that the Panel's

[334]*Ibid.*, para. 12.
[335]*Ibid.*, para. 15.
[336]*Ibid.*, para. 15.
[337]Canada's appellee's submission, para. 21.
[338]*Ibid.*, para. 18 (quoting European Communities' appellant's submission, para. 101).
[339]*Ibid.*, para. 25.
[340]*Ibid.*, para. 26.

interpretation was also consistent with the principle of "prompt" compliance with the DSB's recommendations and rulings expressed in Articles 21.1 and 3.2 of the DSU.

155. Canada further submits that the Panel's interpretation of Article 22.8 was consistent with the object and purpose of the DSU to provide security and predictability to the multilateral trading system as set forth in Article 3.2. This is because, in Canada's view, "Article 22.8 is the linchpin for ensuring that the suspension of concessions achieves the objective of inducing full compliance"[341], and Article 22.8 should not be interpreted so narrowly as to weaken the effectiveness of the suspension of concessions. Canada contends that the interpretation of Article 22.8 advocated by the European Communities would require the immediate termination of Canada's suspension of concessions upon the mere unverified assertion and unilateral declaration of compliance with the DSB's recommendations and rulings and would require "the initiation by Canada of new litigation" in order not to "displace Canada's multilaterally authorized suspension of concessions".[342] If it is eventually established that the alleged implementing measure does not comply with the DSB's recommendations and rulings, the Member seeking compliance "will continue to suffer, without any relief, the nullification or impairment caused by the failure of the non-compliant Member to bring itself into compliance".[343] Thus, Canada argues, the interpretation of Article 22.8 advocated by the European Communities should be rejected in order to avoid "a cycle of 'recurrent litigation'".[344]

156. Canada therefore requests the Appellate Body to reject the European Communities' appeal of the Panel's finding that Article 22.8 of the DSU requires actual compliance with the DSB's recommendations and rulings before the suspension of concessions must be terminated.

4. The Panel's Terms of Reference

157. Canada contends that the European Communities' claim that the Panel exceeded its terms of reference when it assumed a role similar to that of a compliance panel confuses the issue of the Panel's jurisdiction with the issue of the sequence of the European Communities' claims. Canada notes that, under its alternative and conditional claim, the European Communities implicitly acknowledged that the Panel had jurisdiction to examine the compatibility of Directive 2003/74/EC with the *SPS Agreement*. Thus, the real contention underlying the European Communities' claim that the Panel exceeded its terms of reference is not that the Panel improperly examined the consistency of Directive 2003/73/EC with the *SPS Agreement*, but, rather, that the Panel did so in addressing the European Communities' second series of main claims.

158. Canada maintains that the Panel correctly found that it had no choice but to review the consistency of Directive 2003/74/EC with the *SPS Agreement*, because the presumption of good faith compliance, which the European Communities relied upon in making its second series of main claims, was rebuttable by Canada. Canada recalls the Panel's observation that its examination of Directive 2003/74/EC under the *SPS Agreement* was "not the result of ... disregarding the order in which"[345] the European Communities presented its claims, but was done for the purpose of addressing the European Communities' second series of main claims under Articles 23.1, 22.8, and 3.7 of the DSU. Hence, the Panel's approach was not a result of it disregarding the sequence of the European Communities' claims, but the result of a reasoned analysis of the second series of main claims.

159. Canada further argues that, although the European Communities' panel request did not refer to provisions of the *SPS Agreement*, the Panel correctly found that the compatibility of Directive 2003/74/EC with the *SPS Agreement* was *ipso facto* an issue before the Panel. Thus, the

[341] *Ibid.*, para. 33.
[342] Canada's appellee's submission, para. 34.
[343] *Ibid.*, para. 35.
[344] *Ibid.* (quoting Panel Report, *Canada – Continued Suspension*, para. 7.230).
[345] *Ibid.*, para. 40 (quoting Panel Report, *Canada – Continued Suspension*, para. 7.357).

Panel did not breach Article 7 of the DSU, because this provision requires panels to address the relevant provisions of the covered agreement cited by the parties. Canada recalls that the European Communities' second series of main claims was premised on a violation of Article 22.8 by Canada, which in turn depended on a finding that the measure found to be inconsistent with the *SPS Agreement* in *EC – Hormones* had been removed. Consequently, Article 22.8 required the Panel to consider the consistency of Directive 2003/74/EC with the *SPS Agreement* as a condition precedent to a finding of violation by Canada of Article 22.8. In addition, Canada maintains that the Panel's approach was consistent with the Appellate Body's finding in *Argentina – Footwear (EC)* that a panel cannot make an "objective assessment of the matter" if it only refers in its reasoning to the "specific provisions cited by the parties in their claims".[346] Canada observes, moreover, that the Panel considered that the issue of the substantive compliance of the European Communities' implementing measure was raised "early in the proceedings" and therefore "no party to the dispute could claim that it did not have the opportunity to address the legal arguments of the other."[347]

160. On this basis, Canada requests the Appellate Body to reject the European Communities' claim that the Panel exceeded its terms of reference under Articles 7 and 21.5 of the DSU when examining the compatibility of Directive 2003/74/EC with the *SPS Agreement*.

5. The Panel's Suggestion for Implementation

161. In its appellee's submission, Canada did not address the European Communities' request that the Appellate Body modify the Panel's suggestion for implementation. However, in its other appellant's submission, Canada requests the Appellate Body to reverse the Panel's suggestion for implementation, because the suggestion was contradictory to the Panel's findings under Article 22.8.[348]

6. The Panel's Selection of Experts

162. Canada rejects the European Communities' argument that Section VI of the *Rules of Conduct* sets forth the relevant legal standard.[349] Rather, Canada submits that the only standard governing conflict of interest questions is found in Section II (Governing Principle) of the *Rules of Conduct*. That provision requires that all persons covered under the *Rules of Conduct*, including experts, "shall be independent and impartial", and "shall avoid direct or indirect conflicts of interest". Moreover, Canada asserts that Drs. Boisseau and Boobis met the disclosure requirement under the Working Procedures for Consultations with Scientific and/or Technical Experts (the "Experts Working Procedures") developed by the Panel, and that, in particular, both complied with the requirements by disclosing their involvement in JECFA. In Canada's view, "it was up to the Panel to evaluate whether this had an impact [on] the independence and impartiality of these candidates in this case."[350]

163. Canada submits that the Panel correctly found that Drs. Boisseau and Boobis were independent and impartial. Canada recalls that the Panel "expressly addressed"[351] the allegation that these two experts were defending their prior work when it explained that the purpose of consulting them was to obtain advice about the substance of JECFA's risk assessment, and to help identify the extent to which concerns raised by the European Communities had been considered in JECFA's risk assessment. Canada also highlights the Panel's explanations that it was asking the experts about

[346] Canada's appellee's submission, para. 43 (quoting Appellate Body Report, *Argentina – Footwear (EC)*, para. 74).
[347] *Ibid.* (referring to Panel Report, *Canada – Continued Suspension*, para. 7.371).
[348] See also *infra*, para. 206.
[349] Canada's appellee's submission, para. 47 (referring to European Communities' appellant's submission, para. 195).
[350] *Ibid.*, para. 49.
[351] *Ibid.*, para. 54.

JECFA's consensual view, which may differ from the experts' personal views, and that both experts admitted to the Panel that the state of scientific knowledge can evolve.

164. Canada observes that the conflict of interest alleged by the European Communities is not covered by the Illustrative List of Information to be Disclosed set out in Annex 2 of the *Rules of Conduct*. Therefore, according to Canada, "an expert's previous participation in JECFA would not put the person in a conflict-of-interest situation when he or she provides advice to the Panel."[352] In Canada's view, participation by these experts both in JECFA and as advisers to the Panel occurred in a personal, independent, professional capacity and for no monetary gain. Moreover, Canada submits, it is inaccurate to portray participation by Drs. Boisseau and Boobis in JECFA committees as "giving them an (almost proprietary) interest in the outcome of the JECFA process that they would have felt compelled to defend when advising the Panel".[353] Canada maintains that the JECFA process "is a diffuse one, in which a number of scientists participate but the precise outcome is uncertain beforehand".[354] The experts, Canada submits, were contributors to a process "aimed at reaching a consensus out of what may initially be a variety of scientific views", which is "very different" from scientific conclusions arrived at through the efforts of, and published by, an individual scientist.[355]

165. Canada considers that the practical consequence of the Panel excluding Drs. Boisseau and Boobis as experts would have been that "the pool of eligible experts would have been shrunk significantly, such that it would have become very difficult for the Panel to appoint experts in all the areas of expertise that it had identified."[356] Pointing to an example in which a particular scientist had examined issues relating to genetically modified organisms for both the European Food Safety Authority and JECFA, Canada avers that this is consistent with its view that independent scientific experts serving in their personal capacity may advise different international bodies (or national bodies) on the same subject matter without compromising their independence and impartiality.

166. Canada therefore requests the Appellate Body to reject the European Communities' claim that the Panel acted inconsistently with the principle of due process, the requirements of the *Rules of Conduct*, and Article 11 of the DSU in selecting Drs. Boisseau and Boobis, and to reject the request to reverse the Panel's findings that relied on the advice of these two experts.

7. Article 5.1 of the *SPS Agreement*

167. Canada argues that the Panel was correct in finding that the European Communities' permanent ban on meat and meat products from cattle treated with oestradiol-17β for growth-promoting purposes was not based on a risk assessment within the meaning of Article 5.1 of the *SPS Agreement*. Canada requests the Appellate Body to dismiss the European Communities' appeal.

168. Canada argues that the Panel correctly interpreted Article 5.1 of the *SPS Agreement*, as informed by Article 5.2 of the *SPS Agreement*, and did not ignore in its analysis the European Communities' arguments regarding misuse and abuse in the administration of hormones. Canada maintains that the European Communities did not provide evidence demonstrating that it had evaluated misuse and abuse in the administration of oestradiol-17β as a specific risk in relation to the consumption of meat from cattle treated with this hormone for growth-promotion purposes. Therefore, "it is even unreasonable to presume misuse/abuse of hormones"[357] for purposes of the Panel's examination of Article 5.1 in this dispute. In addition, Canada asserts that the Panel was correct in finding that the issue of misuse and abuse was relevant "only to the extent that it [could]

[352] *Ibid.*, para. 55.
[353] *Ibid.*, para. 56.
[354] Canada's appellee's submission, para. 56.
[355] *Ibid.*
[356] *Ibid.*, para. 57.
[357] *Ibid.*, para. 87.

lead to an increased concentration of hormone residues in meat and meat products than would otherwise occur if good veterinary practices are applied."[358] The Panel found in this regard that the European Communities had not evaluated the potential for adverse effects arising from the consumption of meat containing residues of oestradiol-17β as a result of cattle being treated with this hormone for growth-promotion purposes. Thus, because the European Communities had not specifically assessed the risk arising from consumption of meat containing hormone residues, the Panel rightly found that whether the concentrations of residues of oestradiol-17β in meat could be higher as a result of misuse and abuse did not need to be addressed. Canada rejects the European Communities' argument that the Panel placed undue emphasis on the Codex standards, which assume good veterinary practices. Canada submits that the Panel did not perceive its task as evaluating the SCVPH Opinions against the assessments by JECFA; rather, once it had found that the European Communities had taken Codex into account, thereby complying with the terms of Article 5.1 of the *SPS Agreement*, the Panel was correct in using Codex's approach to risk assessment as a general reference.

169. Canada contends moreover that the Panel did not exclude *a priori* from its analysis evidence on possible misuse and abuse in the administration of hormones, which was the legal error identified by the Appellate Body in *EC – Hormones*. Rather, the Panel "properly confined its inquiry to the assessment that was material to the context of this case".[359] Canada submits that the Panel properly rejected the European Communities' attempt to interpret the Appellate Body's finding in *EC – Hormones*—that risk assessments may include matters not susceptible of quantitative analysis—as allowing "risk management" considerations to be taken into account in a "risk assessment" within the meaning of Article 5.1.[360] According to Canada, the European Communities' arguments relating to "risk management" seek "to distract from the main weakness of its case: that it did not assess the specific risk".[361]

170. Canada asserts that the Panel correctly held that the European Communities' risk assessment was not sufficiently specific to the particular risk at issue, that is, the adverse effects to human health arising from consumption of meat from cattle treated with oestradiol-17β for growth-promotion purposes. Canada draws attention to the Appellate Body's findings in *EC – Hormones* that the scientific evidence considered in a risk assessment must be "sufficiently specific"[362] to the substance at issue in order for it to "sufficiently warrant" or "reasonably support" the SPS measure.[363] Canada maintains that the European Communities was not absolved from conducting a quantitative assessment of such risk simply because the SCVPH Opinions indicate that oestradiol-17β is genotoxic. This is because the evidence referred to in the SCVPH Opinions relates to the genotoxicity of oestradiol-17β *in vitro*[364], which does not indicate that it is genotoxic *in vivo*.[365] Canada rejects the European Communities' allegation that the Panel ignored Dr. Guttenplan's statement that the scientific evidence was specific in relation to the relevant risk. This statement must be interpreted as

[358] Canada's appellee's submission, para. 88 (referring to Panel Report, *Canada – Continued Suspension*, para. 6.154).
[359] *Ibid.*
[360] *Ibid.*, para. 93 (referring to Panel Report, *Canada – Continued Suspension*, paras. 7.491 and 7.492).
[361] *Ibid.*, para. 93.
[362] *Ibid.*, para. 97 (quoting Appellate Body Report, *EC – Hormones*, para. 200).
[363] Canada's appellee's submission, para. 98 (quoting Appellate Body Report, *EC – Hormones*, para. 193). (underlining omitted)
[364] *In vitro* means outside of the body, usually in a cell-based system in a test tube or culture dish.. (Panel Report, *US – Continued Suspension*, footnote 509 to para. 7.393(d); and Panel Report, *Canada – Continued Suspension*, footnote 500 to para. 7.390(d) (referring to transcript of the Panel meeting with the scientific experts, Panel Reports, Annex G, para. 96))
[365] *In vivo* means in the whole organism, the intact organism (Panel Report, *US – Continued Suspension*, footnote 585 to para. 7.472 (referring to transcript of the Panel meeting with the scientific experts, Panel Reports, Annex G, para. 96))

referring only to the "hazard identification"[366] phase of a risk assessment, and Dr. Guttenplan subsequently stated that "the evidence evaluating the occurrence of adverse effects is weak."[367] Canada also notes that two other experts indicated very clearly that the European Communities "did not have scientific evidence to support the assertion of the specific risk".[368] Therefore, the Panel had a "solid basis"[369] for finding that the risk assessments were not sufficiently specific to the relevant risk arising from hormone residues in meat.

171. Canada also contests the European Communities' assertion that the Panel erred in requiring a quantification of risks. Canada observes that, although the Appellate Body recognized in *EC – Hormones* that a risk assessment could be performed either quantitatively or qualitatively, it also held that a risk assessment is a process "characterized by systematic, disciplined and objective enquiry and analysis".[370] Therefore, a qualitative risk assessment must be "done in a scientifically rigorous fashion"[371], and the European Communities could not make a qualitative assessment on the basis of unproven assumptions where the available quantitative data go against those assumptions. The European Communities' risk assessment did not meet this standard, because it did not contain either quantitative or qualitative evidence of the genotoxic potential of oestradiol-17β *in vivo*. In addition, the European Communities failed to substantiate its assertion that no threshold could be identified for oestradiol-17β, because it did not provide evidence suggesting that this hormone is a "direct-acting genotoxicant".[372]

172. Canada submits furthermore that the Panel's examination of whether the European Communities had evaluated the "potential occurrence of adverse effects"[373] does not express a preference for a quantitative analysis of risk and is consistent with the *SPS Agreement*. This is because the only possible way to examine the "potential" for adverse effects, within the meaning of Annex A, paragraph 4, to the *SPS Agreement*, is to "ask whether those adverse effects could ever occur".[374] Canada also points out that the Panel recognized that "potential" is a lesser threshold than "likelihood".[375] Canada adds that the Panel's approach is consistent with the Appellate Body's finding in *EC – Hormones*, because the Appellate Body did not fault the panel in that dispute for finding that a risk assessment under Annex A, paragraph 4, requires an evaluation of "the potential ... of occurrence of such effects".[376] Canada additionally recalls the Appellate Body's reasoning that Article 5.1 is "intended as a countervailing factor in respect of the right of Members to set their appropriate level of protection"[377] pursuant to Article 3.3 of the *SPS Agreement*. By contrast, the European Communities seems to be arguing for an "unqualified right to define its own level of protection"[378] by asserting that the Panel erred in favouring quantitative methods over qualitative ones when examining the risk assessment performed by the European Communities.

173. Canada asserts that the Panel made an objective assessment of the matter in reaching its finding that the European Communities' permanent ban on oestradiol-17β was not based on a risk

[366]Canada's appellee's submission, para. 99.
[367]*Ibid.* (quoting Panel Report, *Canada – Continued Suspension*, para. 7.495).
[368]*Ibid.* (referring to replies to questions posed by the Panel to the scientific experts, Panel Reports, Annex D, paras. 129-144).
[369]*Ibid.*, para. 99.
[370]*Ibid.*, para. 101 (quoting Appellate Body Report, *EC – Hormones*, para. 187).
[371]*Ibid.*, para. 102.
[372]Canada's appellee's submission, para. 106.
[373]*Ibid.*, para. 107 (referring to European Communities' appellant's submission, para. 340, in turn quoting Panel Report, *US – Continued Suspension*, para. 7.521, and Panel Report, *Canada – Continued Suspension*, para. 7.493). (emphasis omitted)
[374]*Ibid.*, para. 107. (original underlining)
[375]*Ibid.*, para. 108 (referring to Panel Report, *Canada – Continued Suspension*, para. 7.481).
[376]*Ibid.* (referring to Appellate Body Report, *EC – Hormones*, para. 183). (emphasis omitted)
[377]*Ibid.*, para. 109 (referring to Appellate Body Report, *EC – Hormones*, para. 177).
[378]*Ibid.*, para. 109.

assessment within the meaning of Article 5.1. As the trier of facts, the Panel was entitled to accord more weight to the views of those experts it found to be credible and persuasive. Canada emphasizes that, under the Appellate Body's interpretation, an objective assessment under Article 11 of the DSU implies, among other things, that a "panel must consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."[379] Within these parameters, "panels enjoy discretion as the trier of facts, including in disputes involving the evaluation of scientific evidence"[380] and, in the exercise of this discretion, are entitled "to determine that certain elements of evidence should be accorded more weight than other elements".[381] Thus, "[r]equiring panels, in their assessment of the evidence before them, to give precedence to the importing Member's evaluation of scientific evidence and risk is not compatible with this well-established principle."[382] Canada underscores that, given the discretion afforded to panels to appreciate the value of the evidence before them, the Appellate Body has made clear that "not every error in the appreciation of the evidence ... may be characterized as a failure to make an objective assessment of the facts."[383]

174. Canada maintains that the European Communities has failed to demonstrate that the Panel exceeded the bounds of its discretion as the trier of facts in reaching its factual findings regarding the consistency with the *SPS Agreement* of the permanent ban on meat from cattle treated with oestradiol-17β imposed pursuant to Directive 2003/74/EC. Canada does not view the Panel's statement that it was in a situation "similar"[384] to that of a risk assessor as an indication that the Panel "drifted into a *de novo* review"[385] of the European Communities' risk assessment. Rather, the Panel made use of the advice given by the experts as context to assess the alleged compliance of the European Communities' measure with the recommendations and rulings of the DSB in *EC – Hormones*. In this regard, the Panel specifically acknowledged that it was poorly suited to engage in a *de novo* review of the European Communities' risk assessment.[386] According to Canada, as the trier of facts, the Panel was entitled to give greater weight to the advice of certain experts, and was under no obligation to treat all advice received from the experts "on an equal footing".[387] Thus, rather than "picking and choosing"[388] between the opinions of the experts, the Panel weighed the advice received from the different experts and carried out an objective assessment of the matter before it, in conformity with Article 11 of the DSU.

175. Turning to the specific allegations of error made by the European Communities under Article 11 of the DSU, Canada characterizes as "simply false"[389] the European Communities' allegation that the Panel did not take into account evidence related to exposure to hormones from multiple sources. The Panel "specifically acknowledge[d] that it had considered the issue [of multiple

[379]*Ibid.*, para. 61 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185).
[380]*Ibid.*, para. 62 (referring to Appellate Body Report, *Japan – Apples*, paras. 166 and 221).
[381]Canada's appellee's submission, para. 62 (quoting Appellate Body Report, *EC – Asbestos*, para. 161).
[382]*Ibid.* (quoting Appellate Body Report, *Japan – Apples*, para. 166). (emphasis omitted)
[383]*Ibid.*, para. 64 (quoting Appellate Body Report, *EC – Hormones*, para. 133). (emphasis omitted) Canada also refers to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 186; and Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 240. (Canada's appellee's submission, paras. 63 and 67)
[384]*Ibid.*, para. 71 (quoting Panel Report, *Canada – Continued Suspension*, para. 7.409).
[385]*Ibid.*, para. 72 (quoting European Communities' appellant's submission, para. 237).
[386]*Ibid.*, para. 72 (referring to Panel Report, *Canada – Continued Suspension*, paras. 7.107, 7.405, 7.406, 7.571, and 7.630).
[387]*Ibid.*, para. 73.
[388]*Ibid.*, para. 74 (quoting European Communities' appellant's submission, para. 239).
[389]*Ibid.*, para. 77.

exposure]"[390] in its analysis of the European Communities' risk assessment under Article 5.1, and for this reason did not fail to conduct an objective assessment as required by Article 11.

176. Furthermore, Canada rejects the European Communities' contention that the Panel imposed an incorrect "specificity" or "direct causality" requirement.[391] Rather than requiring the "demonstration of actual effects"[392], the Panel correctly required the European Communities "to evaluate the possibility that the identified adverse effect came into being, originated, or resulted from the presence of residues of oestradiol-17β in meat or meat products as a result of the cattle being treated with the hormone for growth promoting purposes."[393] According to Canada, this neither amounts to a requirement that the European Communities demonstrate "actual effects"[394], nor is it a violation of Article 11 by the Panel.

177. Finally, Canada maintains that the Panel "extensively dealt" with the evidence[395] related to the genotoxicity of oestradiol-17β in its report and concluded that the scientific evidence referred to in the SCVPH Opinions did not "support the European Communities' conclusion that for oestradiol-17β genotoxicity had already been demonstrated explicitly", nor did it "support the conclusion that the presence of residues of oestradiol-17β in meat and meat products as a result of the cattle being treated with the hormone for growth promotion purposes leads to increased cancer risk".[396] Therefore, Canada asserts that the Panel carefully considered all the evidence before it on the genotoxicity of oestradiol-17β, and did not fail to conduct an objective assessment of the matter as required by Article 11 of the DSU.

178. Canada concludes that the Panel correctly interpreted and applied Article 5.1 of the *SPS Agreement* and did not fail to make an objective assessment of the matter under Article 11 of the DSU. Canada therefore requests the Appellate Body to dismiss the appeal of the European Communities regarding the Panel's findings under Article 5.1 of the *SPS Agreement*.

8. Article 5.7 of the *SPS Agreement*

179. Canada argues that the Panel properly found that the relevant scientific evidence on the five hormones subject to the provisional ban was not "insufficient" within the meaning of Article 5.7 of the *SPS Agreement*. Canada requests the Appellate Body to dismiss this ground of the European Communities' appeal.

180. Canada submits that the Panel correctly considered the relevance of international standards in determining that the scientific evidence on risks posed by the five hormones was not "insufficient" within the meaning of Article 5.7. Canada observes that the Panel did not find that the existence of international standards created an irrebuttable presumption of the sufficiency of scientific evidence and amounted to a "legal bar"[397] to the adoption of provisional measures under Article 5.7. Rather, the Panel was "expressing a presumption, not a conclusion"[398], when it found that the existence of international standards "implies" that sufficient evidence existed to complete a risk assessment. This is borne out by the Panel's recognition that previously sufficient evidence could subsequently become

[390] Canada's appellee's submission, para. 77 (referring to Panel Report, *Canada – Continued Suspension*, para. 7.501).
[391] *Ibid.*, para. 79 (referring to European Communities' appellant's submission, paras. 259-270).
[392] *Ibid.* (referring to European Communities' appellant's submission, para. 261).
[393] *Ibid.*, para. 80 (quoting Panel Report, *Canada – Continued Suspension*, para. 7.485). (underlining omitted)
[394] *Ibid.* (quoting European Communities' appellant's submission, para. 261).
[395] *Ibid.*, para. 81.
[396] *Ibid.* (quoting Panel Report, *Canada – Continued Suspension*, para. 7.540). (underlining omitted)
[397] Canada's appellee's submission, para. 117.
[398] *Ibid.*, para. 118. (underlining omitted)

"insufficient" within the meaning of Article 5.7 when it is "unsettled"[399] by new studies. Therefore, contrary to the European Communities' contention, the Panel explicitly recognized that, despite the existence of international standards, there could be situations where relevant scientific evidence becomes insufficient to conduct an adequate risk assessment. On that basis, the Panel went on to assess whether the "insufficiencies" identified by the European Communities were enough to render insufficient the previously sufficient evidence upon which the JECFA assessments were based.

181. In addition, Canada suggests that the Panel correctly excluded from the scope of its analysis under Article 5.7 the level of protection chosen by the European Communities. The Panel was correct in finding that the ability of the European Communities to conduct a risk assessment on four of the provisionally banned hormones could not "hinge on"[400] its decision to apply a higher level of protection than that reflected in the international standards. The European Communities' argument that the "sufficiency" of scientific evidence under Article 5.7 depends on the acceptable level of risk adopted by a Member[401] undermines the "basic logic" of the *SPS Agreement*, according to which Article 5.7 operates as a "temporary 'safety valve'"[402] in situations where there is insufficient scientific evidence to allow a Member to conduct a risk assessment that fulfils the requirements of Articles 2.2 and 5.1. The European Communities' approach would allow Members "to effectively exclude from the available pool of relevant scientific evidence, any evidence that does not support their chosen level of protection"[403] for purposes of evaluating whether there is sufficient scientific evidence to conduct a risk assessment. Canada argues that a Member's desired level of protection is not relevant for determining whether the scientific evidence is "insufficient" within the meaning of Article 5.7, because the "autonomous right"[404] of WTO Members to introduce measures that result in a higher level of protection than the one achieved by measures based on international standards under Article 3.3 is subject to the requirement that such measures be based on a risk assessment.

182. Canada maintains that the Panel did not err in allocating to the European Communities the burden of proving the insufficiency of the scientific evidence under Article 5.7. Canada considers that the Panel correctly characterized Article 5.7 as a "qualified exemption"[405] from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence. Article 5.7 is not an option that can be freely chosen by a Member. Rather, it operates as a "temporary 'safety valve'"[406] in situations where some evidence exists but are not enough to complete a full risk assessment. The Panel shifted the burden of proof under Article 5.7 to the European Communities only once it was satisfied that Canada had sufficiently refuted the European Communities' allegation of compliance through positive evidence of a breach of Article 5.7. Canada posits further that this allocation of the burden of proof is consistent with the Appellate Body's ruling in *US – Wool Shirts and Blouses*, because it was for the European Communities, as the party alleging a breach of Article 22.8 of the DSU, to demonstrate that its implementing measure complied with Article 5.7 of the *SPS Agreement*.[407]

183. Furthermore, Canada argues that the Panel did not err in finding that, in situations where international risk assessments have been conducted for the substances at issue, a "critical mass" of

[399] *Ibid.*, para. 119 (referring to Panel Report, *Canada – Continued Suspension*, para. 7.598).
[400] *Ibid.*, para. 122.
[401] *Ibid.*, para. 121 (referring to European Communities' appellant's submission, para. 397; and Panel Report, *Canada – Continued Suspension*, paras. 7.618 and 7.619).
[402] *Ibid.*, para. 122.
[403] *Ibid.*, para. 123.
[404] Canada's appellee's submission, para. 124 (quoting Appellate Body Report, *EC – Hormones*, para. 172).
[405] *Ibid.*, para. 114 (quoting Appellate Body Report, *Japan – Agricultural Products II*, para. 80. (emphasis omitted))
[406] *Ibid.*, para. 122.
[407] *Ibid.*, para. 115 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335).

new evidence would be required to render the relevant scientific evidence "insufficient" for the purposes of Article 5.7. Canada dismisses the European Communities' argument that the "critical mass" standard excludes *a priori* the possibility that a WTO Member base its risk assessment on respectable minority views. Canada recalls the Appellate Body's finding that a measure conforming to the requirements of Article 5.1 may be based on minority opinions.[408] In these situations, Canada argues, there is "inherently"[409] sufficient evidence to perform a risk assessment that provides a basis for the SPS measure. Article 5.7, in contrast, only applies to situations where there is "insufficient" scientific evidence to conduct a risk assessment "at all", regardless of whether a measure is based on "minority" or "mainstream" scientific opinions.[410] Therefore, contrary to the European Communities' contention, "the concept of critical mass as applied by the Panel cannot be assimilated with the findings of the Appellate Body on the validity of basing an SPS measure on minority views."[411] Canada adds that the notion of "critical mass" used by the Panel does not specify how much evidence would be needed to make insufficient scientific evidence that was previously sufficient, nor does it exclude the possibility that one "new study or series of studies could call into question the scientific assumptions underpinning the current understanding of a scientific issue."[412] Thus, Canada submits, the Panel's "critical mass" standard "correctly sets a high threshold"[413] reflecting the presumption in this dispute that the available scientific evidence had been sufficient to adopt the relevant international standards.

184. Finally, Canada argues that the Panel did not fail to conduct an objective assessment of the facts under Article 11 of the DSU in reaching its findings under Article 5.7 of the *SPS Agreement*. Canada asserts that the European Communities' allegation that the Panel acted inconsistently with Article 11 appears to have "lost sight of the process that the Panel was engaged in"[414], which was to arrive at an objective determination of the facts in accordance with Article 11 of the DSU. Canada refers to its earlier arguments that, as the trier of facts, the Panel had the discretion to determine what weight to attach to the statements made by the experts in the course of the proceedings, and to assess the experts' expertise and credibility.[415] Canada rejects the European Communities' allegations that the Panel "systematically downplay[ed]"[416] the expert opinions indicating that the scientific evidence was insufficient to carry out a risk assessment. According to Canada, such allegations fail to take into account the fact that, in addition to reviewing the written answers by the experts to the Panel's questions, the Panel was able to "observe these experts" during the meetings with them and was able to "arrive at an assessment of their respective expertise and their credibility in particular areas".[417] Thus, it was on this basis that the Panel was entitled to rely more on the views expressed by some experts than those of others. Therefore, the Panel's reliance on the views of these experts was fully consistent with its function as the trier of facts, and thus was consistent with Article 11 of the DSU.

185. Canada concludes that the Panel correctly interpreted and applied Article 5.7 of the *SPS Agreement* and did not fail to make an objective assessment of the matter under Article 11 of the DSU. Canada therefore requests the Appellate Body to dismiss the appeal of the European Communities regarding the Panel's findings under Article 5.7 of the *SPS Agreement*.

[408] *Ibid.*, para. 127 (referring to Appellate Body Report, *EC – Hormones*, para. 194; and Appellate Body Report, *EC – Asbestos*, para. 178).
[409] *Ibid.*, para. 127.
[410] Canada's appellee's submission, para. 127.
[411] *Ibid.*, para. 128.
[412] *Ibid.*
[413] *Ibid.*
[414] *Ibid.*, para. 129.
[415] See also *supra*, paras. 173 and 174.
[416] Canada's appellee's submission, para. 130 (quoting European Communities' appellant's submission, para. 427, and referring to para. 429).
[417] *Ibid.*, para. 130.

D. *Claims of the United States – Other Appellant*

186. The United States claims that the Panel erred in finding that the United States has acted inconsistently with Articles 23.1 and 23.2(a) of the DSU by "seeking the redress" of a violation in relation to Directive 2003/74/EC and by making a determination of violation without recourse to the rules and procedures of the DSU. The United States requests the Appellate Body to reverse these findings of the Panel.

1. Alleged Discrepancies in the Panel's Description of the Measure at Issue

187. The United States submits that conceptual difficulties and apparent discrepancies exist in the Panel's description of the measure at issue and in the Panel's identification of the relevant timeframes associated with the suspension of concessions. The Panel described the measure at issue as the "suspension of concessions ... continued without recourse to the procedures under the DSU", or the "continued application by the United States ... of its decision to apply ... import duties in excess of bound rates ... without recourse to the procedures under the DSU."[418] These descriptions are not only different, but confuse the legal claims made by the European Communities with what should be a factual description of the measure. The relevant timeframe of the measure was identified as from the "adoption of Directive 2003/74/EC", or "after the notification to the DSB of Directive 2003/74/EC".[419] Such discrepancies, in the United States' view, reflect a conceptual difficulty with the Panel's approach and show that the Panel appeared to be struggling to explain how it could find that the suspension of concessions authorized by the DSB is inconsistent with the United States' obligations under the WTO. According to the United States, "the Panel appear[ed] to be trying to characterize the measure not as the duties themselves, but as something else, something that changed in the measure once the [European Communities] notified its (inaccurate) claim of compliance"[420]; nonetheless, there was no new measure as a result of the European Communities' claim of compliance and no modification or other alteration in the duties.

2. The Panel's Findings under Article 23.1 of the DSU

188. The United States argues that the Panel "simply err[ed]" when it found that the application of the suspension of concessions was "without recourse to the procedures under the DSU".[421] The United States observes that, before it was authorized by the DSB to suspend concessions, it had extensive and lengthy recourse to multiple procedures under the DSU and "had fully complied with all relevant rules and procedures of the DSU ... in bringing the *EC – Hormones* dispute, determining the applicable [reasonable period of time] for compliance, determining the appropriate level of suspension of concessions, and obtaining the authorization of the DSB to suspend concessions".[422] The United States emphasizes that the DSB's authorization to suspend concessions, which it was granted on 26 July 1999, "has never been revoked and the [United States'] application of duties pursuant to that authorization has continued, unchanged", to this day.[423]

189. The United States asserts that, by finding that the United States was seeking the redress of a violation in relation to Directive 2003/74/EC, the Panel "re-characteriz[ed]"[424], without any legal

[418] United States' other appellant's submission, para. 21 (quoting Panel Report, *US – Continued Suspension*, paras. 2.7 and 7.151).
[419] *Ibid.*, para. 26 (quoting Panel Report, *US – Continued Suspension*, paras. 2.7 and 7.151). (emphasis omitted)
[420] *Ibid.*, para. 27.
[421] United States' other appellant's submission, para. 29.
[422] *Ibid.*, para. 17.
[423] *Ibid.*, para. 18.
[424] *Ibid.*, para. 31.

basis, the United States' suspension of concessions as now being directed against Directive 2003/74/EC. The United States further submits that the European Communities' notification of Directive 2003/74/EC to the DSB was a mere unilateral declaration of compliance, and that such a declaration does not fulfil any of the three conditions under Article 22.8 that must be satisfied before the DSB's authorization would cease to operate. The United States explains, moreover, that the Panel seemed to have improperly inferred that there was "some deadline by which a Member must respond to such a unilateral declaration"[425], when no such deadline was provided for in the DSU. Therefore, the United States argues that the Panel erroneously permitted the unilateral declaration of compliance to transform the legal justification for the suspension of concessions maintained by the United States. Given that the Panel found that the inconsistent measure has in fact not been removed, the multilateral DSB authorization remains in place and effective.

190. In the United States' view, the Panel's re-characterization of the legal justification for the suspension of concessions, as now directed against Directive 2003/74/EC, is "fatally flawed"[426] for several reasons. First, the Panel's finding is inconsistent with the ordinary meaning of the term "authorized", which is defined as "legally or formally sanctioned or appointed"[427], and with the fact that an "authorized" act is by definition consistent with the law. Therefore, the Panel's finding that the United States' suspension of concessions, which remains authorized, could constitute a violation of Article 23.1 was based on the paradoxical proposition that an act permitted by the law can simultaneously be prohibited by the law. Secondly, the Panel's analysis relied on a "false dichotomy"[428]: where a measure taken to comply is notified, a complaining party either terminates the suspension of concessions because it concludes that the measure is consistent with the covered agreements, or continues the suspension of concessions because it considers that the measure does not bring the implementing Member into compliance. In the United States' view, such a false dichotomy lacks a basis in the DSU because the DSU does not require a Member to form definitive conclusions regarding the validity of a unilateral declaration of compliance. The United States simply kept the duties in place and maintained the *status quo* on the basis that the European Communities' declaration of compliance has not been multilaterally confirmed.

191. In addition, the United States asserts that the Panel erred in the allocation of the burden of proof as it relieved the European Communities of the duty to make a *prima facie* case of inconsistency under Article 23.1 of the DSU. Furthermore, the United States recalls that, in rejecting the United States' argument that the European Communities has failed to show that the conditions under Article 22.8 for terminating the suspension of concessions have been met, the Panel reasoned that it is the obligation of the Member suspending concessions to ensure that the suspension is applied only until such time as foreseen in Article 22.8. The United States contends that Article 22.8 does not assign such responsibility to the Member suspending concessions and does not specify the procedures for determining whether the conditions in Article 22.8 are met. To the United States, "[w]hat is clear"[429] under Article 22.8 is that there is no basis to find that a multilateral authorization to suspend concessions is to be terminated by a unilateral declaration of compliance. A responding Member should not be able to escape the suspension of concessions and force the complaining party to engage in dispute settlement "simply by notifying a claim of compliance".[430]

192. The United States submits that the Panel's findings under Article 23.1 lead to "fundamentally problematic"[431] consequences, because, simply by claiming compliance, a Member could escape the

[425] *Ibid.*, para. 37.
[426] *Ibid.*, para. 40.
[427] *Ibid.*, para. 43 (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 151).
[428] United States' other appellant's submission, para. 45.
[429] *Ibid.*, para. 57.
[430] *Ibid.*, para. 62.
[431] *Ibid.*, para. 60.

application of the suspension of concessions and force the complaining party to initiate another dispute settlement proceeding, potentially creating an "endless loop"[432] of litigation. The United States additionally submits that the Panel "effectively read[s] into [Article 22.8 of the DSU] an obligation" on the Member suspending concessions "to take steps by some deadline to ascertain whether the conditions in Article 22.8 have been met".[433] Consequently, the Panel's approach "would add to the rights and obligations of Members in contravention of"[434] Article 19.2 of the DSU. The United States asserts that the DSU does not specify the rules applicable to the situation in the post-suspension stage where an original responding party has declared itself to be in compliance four years after the reasonable period of time for implementation has expired. Thus, panels and the Appellate Body "should not supplant the work and efforts of Members to provide clarifications or improvements to the DSU".[435] The United States observes that the DSU "does not leave parties in a post-suspension state of play bereft of tools to obtain redress and resolution"[436], and recourse to a normal panel proceeding remains an option to Members in the post-retaliation stage, as the European Communities chose to do in this dispute.

3. The Panel's Findings under Article 23.2(a) of the DSU

193. The United States also takes issue with the Panel's finding that the statements made by the United States at the DSB meetings constituted a unilateral "determination" to the effect that a violation occurred within the meaning of Article 23.2(a) of the DSU. This conclusion, according to the United States, was neither consistent with the ordinary meaning of the term "determination" in its context and in the light of the object and purpose of the DSU, nor supported by the negotiating history of the DSU. According to its ordinary meaning, a "determination" is a "final and definitive" decision that results from some kind of deliberative process and leads to a significant consequence.[437] The United States finds contextual support for this interpretation in the final clause of Article 23.2(a), which requires that determinations be consistent with the recommendations and rulings of the DSB, and thus confirms that a determination must be final and definitive. The United States argues that its statements made at the DSB meetings did not constitute a "determination", because these statements did not embody any definitiveness or finality and were, instead, punctuated with equivocation. Due to the complexity of making any good faith attempt to examine the European Communities' claim that Directive 2003/74/EC is consistent with the *SPS Agreement*, the United States needed time for review and could not be expected to have made a determination within a mere few weeks of the notification of Directive 2003/74/EC by the European Communities. Turning to the negotiating history of Article 23.2(a), the United States maintains that the "determination" that the negotiators intended to target under Article 23.2(a) was of the type and nature of the unilateral determinations made under Section 301 of the United States Trade Act of 1974[438], which were made at the conclusion of formal investigations and which resulted in certain legal consequences.[439] In addition, the United States contends that subjecting Members' DSB statements, which "are generally diplomatic or political in nature and prepared ... independently of any ... deliberative proceedings", to the discipline of Article 23.2(a) "will undoubtedly result in a 'chilling' effect on those statements".[440]

194. Furthermore, the United States alleges that a "determination" within the meaning of Article 23.2(a) cannot be inferred or implied, and the Panel erred in making such an inference from

[432] *Ibid.*, para. 65.
[433] United States' other appellant's submission, para. 66.
[434] *Ibid.*
[435] *Ibid.*, para. 69.
[436] *Ibid.*, para. 70.
[437] *Ibid.*, paras. 74-78.
[438] United States Trade Act of 1974, Public Law No. 93-618, 88 Stat. 1978 (1975), *United States Code*, Title 19, section 2101.
[439] United States' other appellant's submission, para. 88.
[440] *Ibid.*, paras. 93 and 95.

the United States' "inaction" regarding the suspension of concessions.[441] The United States adds that the Panel's inference "effectively reads into Article 23 a deadline by which a determination will be imputed to a Member"[442], even though Article 23 contains no such deadline and the Panel itself struggled to identify the proper timeframe after which the "continuation of suspension" would be considered to be inconsistent with Article 23. For the United States, "[t]he Panel's findings appear[ed] to require complaining parties and other Members to be silent in the face of a claim of compliance or risk having any reaction other than agreement be construed to be a 'determination'."[443] The United States additionally observes that, "even if the reaction is not sufficient to be a 'determination', it appears that a Member would risk such a reaction ripening into a 'determination' based simply on the passing of an unspecified deadline, which the Panel acknowledged does not exist."[444]

4. The Scope of the Panel's Mandate and the Panel's Suggestion

195. In the event the Appellate Body upholds the Panel's findings under Articles 23.2(a) and 23.1, the United States requests the Appellate Body to reverse the Panel's "erroneous suggestion"[445] that the United States must bring itself into conformity by having recourse to the rules and procedures of the DSU without delay. The United States contends that the Panel engaged in a detailed review of Directive 2003/74/EC and its consistency with both the DSB's recommendations and rulings and the *SPS Agreement*. Thus, recourse to the rules and procedures of the DSU has already been achieved, because "a fair and objective reading of the language in Articles 23.1 and 23.2(a) does not exclude instances"[446] in which a Member may "have recourse" by participating in a dispute settlement proceeding initiated by another WTO Member, as the United States did in this dispute. The United States observes that requiring re-litigation of the matters that have already been "reviewed and considered"[447] in these proceedings would not be an efficient use of the WTO dispute settlement system, and would be contrary to the objective of "prompt settlement" of disputes set out in Article 3.3 of the DSU.

196. The United States further submits that the Panel erred in finding that it had no jurisdiction to rule on the compatibility of Directive 2003/74/EC with the *SPS Agreement*. The United States argues that the Panel improperly limited the scope of its mandate on the basis that the European Communities had articulated its claim under Article 22.8 as a conditional claim. The United States asserts that "[a] panel's terms of reference, once determined at the outset of the dispute, cannot be narrowed or otherwise modified by a complaining party."[448] According to the United States, the relevant provision governing the terms of reference of a panel is Article 7 of the DSU, which "does not provide for a change to the terms of reference based on the complaining party's submissions".[449] Therefore, in the United States' view, this finding by the Panel should be reversed, and the Panel's findings regarding the WTO-inconsistency of Directive 2003/74/EC, made in the context of addressing the European Communities' second series of main claims, should be considered "direct" findings.[450]

[441] *Ibid.*, paras. 98-104.
[442] *Ibid.*, para. 105.
[443] *Ibid.*, para. 106.
[444] *Ibid.*, para. 106.
[445] *Ibid.*, para. 108.
[446] *Ibid.*, para. 111.
[447] United States' other appellant's submission, para. 113.
[448] *Ibid.*, para. 117.
[449] *Ibid.*
[450] *Ibid.*, para. 119.

5. Conclusion

197. In sum, the United States requests the Appellate Body to: (i) reverse the Panel's findings that the United States has acted inconsistently with Articles 23.1 and 23.2(a) of the DSU; (ii) reverse the Panel's suggestion that the United States should have recourse to the rules and procedures of the DSU without delay; and (iii) reverse the Panel's conclusion that it was not empowered to make a direct determination of the consistency of Directive 2003/74/EC with the *SPS Agreement*. The United States nevertheless clarifies that the Appellate Body need not reach the last two issues if it reverses the Panel's findings that the United States has acted inconsistently with Articles 23.1 and 23.2(a) of the DSU.

E. *Claims of Canada – Other Appellant*

198. Canada requests the Appellate Body to reverse the Panel's finding that Canada has acted inconsistently with Articles 23.1 and 23.2(a) of the DSU by maintaining the suspension of concessions after the notification of Directive 2003/74/EC by the European Communities. Canada submits that the Panel erred in addressing the European Communities' claims of violation under Articles 23.1 and 23.2(a) completely separately from the requirements of Article 22.8 of the DSU. Even if the Panel did not err in examining Article 23 in isolation from Article 22.8, Canada argues that the Panel erred in finding that Canada has breached Articles 23.1 and 23.2(a) by seeking the redress of a violation without recourse to the rules and procedures of the DSU.

1. The Panel's Examination of Articles 23.1 and 23.2(a) "In Isolation" from Article 22.8 of the DSU

199. Canada alleges that the "fundamental legal error"[451] of the Panel is its examination of the European Communities' claim under Articles 23.1 and 23.2(a) in isolation from its analysis under Article 22.8 of the DSU. According to Canada, the "[k]ey to this case is Article 22.8 of the DSU"[452], which, as *lex specialis* applicable to the post-retaliation phase of a dispute, sets out the three conditions that must be met in order to have the suspension of concessions terminated, one of the conditions being actual compliance with the DSB's recommendations and rulings. Canada maintains that the "continuous involvement of the DSB", pursuant to the second sentence of Article 22.8, "suggests that [the DSB] retains jurisdiction over the matter until its recommendations and rulings have been fully implemented".[453] Canada explains that "[t]his is consistent with the ongoing obligation on the Member being retaliated against to comply with its WTO obligations, including the requirement to comply promptly with the recommendations and rulings of the DSB."[454]

200. As regards Article 23, Canada submits that this provision begins by setting out general obligations that apply to what it refers to as the pre-dispute settlement stage of a dispute and then proceeds by setting out specific obligations (*lex specialis*) applicable through the compliance and retaliation stages of dispute settlement proceedings. Whereas the examples of prohibited unilateral conduct contained in Article 23.2 are not exhaustive, the structure of the Article indicates that, when a particular dispute has entered the compliance or retaliation stages, the relevant obligations are those in subparagraphs (b) and (c) of Article 23.2, and the general obligations contained in Articles 23.1 and 23.2(a) are no longer pertinent. Indeed, Canada observes, the only way for a complaining Member to have reached the compliance or retaliation stage is to have already satisfied those general obligations by having engaged in the WTO dispute settlement process and obtained a DSB ruling that the responding Member has violated its obligations. Canada additionally notes that the *travaux*

[451] Canada's other appellant's submission, para. 6.
[452] *Ibid.*, para. 35.
[453] *Ibid.*, para. 36.
[454] *Ibid.* (footnote omitted)

préparatoires provide a further indication that the DSU negotiators did not contemplate that Article 23 would apply to a post-retaliation situation. Canada thus argues that, in this case, since it has had recourse to the rules and procedures of the DSU in the *EC – Hormones* dispute and is suspending concessions pursuant to a DSB authorization, Canada has already satisfied the obligations contained in Articles 23.1 and 23.2(a). Therefore, as suggested by the text of Article 23.2(c), the Panel should have turned first to the provisions of Article 22, including the specific requirements of Article 22.8 that apply to the question of whether the suspension of concessions should be terminated. By failing to do so, the Panel's approach resulted in "contradictory findings"[455] that, on the one hand, Canada has breached Articles 23.1 and 23.2(a) of the DSU by continuing the suspension of concessions and, on the other hand, that Canada has the right to continue the suspension of concessions pursuant to Article 22.8 because the European Communities' inconsistent measure has not been removed.

201. Canada asserts, moreover, that the Panel failed to consider the object and purpose of the DSU. By considering Article 23 in isolation from other provisions of the DSU, the Panel arrived at findings that ultimately lessen the effectiveness of the WTO dispute settlement mechanism. The result is that "a non-compliant WTO Member could avoid the duly authorized suspension of concessions by another Member merely by adopting an alleged implementing measure, notifying such measure to the DSB and waiting to be challenged."[456] In Canada's view, such a result has the effect of undermining DSB-authorized retaliation, thereby weakening an important incentive for Members to bring their measures promptly into compliance. Canada contends that only a further multilateral determination of compliance by the DSB can set aside the DSB's prior authorization to suspend concessions. In Canada's view, the European Communities has the burden of initiating a panel proceeding—either an Article 21.5 proceeding or a *de novo* action against the suspension of concessions—to obtain such a multilateral determination.

202. Canada further maintains that, in examining the European Communities' claims under Articles 23.1 and 23.2(a) of the DSU in isolation from its examination of Article 22.8, the Panel erroneously followed the order of analysis proposed by the European Communities, even though such order of analysis is contrary to the principle of *lex specialis*, according to which the specific terms of a treaty must prevail over the general provisions.[457] The application of the *lex specialis* principle should have led the Panel to begin its analysis by determining whether the conditions for the termination of the suspension of concessions set out in Article 22.8 have been met. Canada criticizes the Panel for using "two different and inconsistent manners of identifying the [European Communities'] implementing measure at issue".[458] Canada explains that, while examining the second series of the European Communities' main claims, the Panel gave a broad interpretation to the term "measure" in Article 22.8 of the DSU and recognized that the phrase "until such time as the measure found to be inconsistent with a covered agreement has been removed" means that the "illegality itself" and not only the originally impugned measure had been removed. By contrast, in its approach to the first series of the European Communities' main claims, the Panel based its finding of a violation of Articles 23.1 and 23.2(a) of the DSU on the fact that the European Communities had notified a measure that had not yet been subject to dispute settlement.

[455]Canada's other appellant's submission, para. 43.
[456]*Ibid.*, para. 47.
[457]*Ibid.*, paras. 52-57. Canada refers to the Appellate Body's statement in *Canada – Wheat Exports and Grain Imports* that "panels are free to structure the order of their analysis as they see fit" but they "may find it useful to take account of the manner in which a claim is presented to them" by the complaining party; however, Canada contends that "panels must be careful not to simply follow the order of analysis as pleaded by a complainant", which may itself contain errors of law, especially if the relationship between two provisions mandates a certain sequence of analysis. (*Ibid.*, paras. 54 and 55 (quoting Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, paras. 109 and 126))
[458]Canada's other appellant's submission, para. 63.

203. Canada also criticizes the Panel for ignoring the procedural history of the case. According to Canada, Directive 2003/74/EC should be situated in the post-retaliation context and should not be considered as "a new measure *ab initio*".[459] Given that Canada had obtained DSB authorization to suspend concessions, the onus should be placed on the European Communities to demonstrate its compliance to a WTO panel. The Panel's findings that Canada has breached Articles 23.1 and 23.2(a) lead to a "manifestly absurd or unreasonable" interpretation that the mere adoption and notification of an alleged implementing measure by a WTO Member, which failed to bring itself into compliance within the reasonable period of time, could render the suspension of concessions authorized by the DSB inconsistent with the DSU. Canada asserts that the Panel's finding under Articles 23.1 and 23.2(a) renders ineffective the substantive requirements set out in Article 22.8 regarding the suspension of concessions, contrary to the principle of effectiveness that should govern treaty interpretation.

2. The Panel's Findings under Article 23.1 of the DSU

204. Canada contends that, even if the Panel was correct in considering Articles 23.1 and 23.2(a) in isolation, the Panel erred in finding that Canada was "seeking the redress" of a WTO violation by continuing the suspension of concessions in respect of a measure that had not yet been subject to recourse to the DSU. According to Canada, the Panel's finding ignored the fact that Canada had "sought and obtained"[460] DSB authorization to suspend concessions as a result of the inconsistencies found in *EC – Hormones*, and that Canada has taken no action to "seek the redress" of any alleged WTO-inconsistency of the European Communities' purported implementing measure. Canada further asserts that simply because Directive 2003/74/EC is a new measure does not imply that the legal basis for Canada's continued suspension of concessions has changed and that the suspension is now aimed at seeking the redress for any violations caused by Directive 2003/74/EC. Because Canada's suspension of concessions was authorized by the DSB, it is "by definition"[461] WTO-consistent. In Canada's view, "[t]he Panel erred in imputing alleged WTO inconsistencies of the [European Communities'] purported implementing measure as the reasons for Canada's continued suspension of concessions in this case."[462] Such an outcome would, in Canada's view, severely hinder the security and predictability of the WTO dispute settlement system, as Members would be unsure as to when, or for how long, they could properly rely on a DSB authorization to suspend concessions.

3. The Panel's Findings under Article 23.2(a) of the DSU

205. Furthermore, Canada alleges that the Panel erred in finding that Canada made a unilateral determination that a violation occurred in relation to Directive 2003/74/EC, contrary to Article 23.2(a), on the basis of Canada's statements at the DSB meetings and its continued application of the suspension of concessions. According to Canada, there is an insufficient amount of "firmness or immutability" with respect to the statements made by Canada at the DSB meetings for the Panel to conclude that Canada made "more or less a final decision" regarding the WTO-inconsistency of Directive 2003/74/EC.[463] Canada also argues that, because it had obtained DSB authorization to suspend concessions, it did not see the need to take a decision regarding the WTO-consistency of Directive 2003/74/EC, and that it was up to the European Communities to establish that it had

[459]*Ibid.*, para. 64.
[460]*Ibid.*, para. 80.
[461]Canada's other appellant's submission, para. 84.
[462]*Ibid.*, para. 80. Canada adds that the Panel's finding is flawed because it was not based on the notion of malfeasance (*ibid.*, para. 81 (referring to Panel Report, *EC – Commercial Vessels*, para. 7.188)) but, rather, was based on the notion of "non-feasance, whereby Canada's inaction, *i.e.*, failure to terminate its suspension of concessions following the notification of [Directive 2003/74/EC] would be construed as 'seeking redress' of a violation pursuant to Article 23.1 of the DSU." (*Ibid.*, para. 81)
[463]*Ibid.*, paras. 87-89 (quoting Panel Report, *US – Section 301 Trade Act*, footnote 657 to para. 7.50; and referring to statements made at the DSB meetings held on 7 November and 1 December 2003).

implemented the DSB's recommendations and rulings in *EC – Hormones*. Therefore, the Panel erroneously found that Canada's continuation of the suspension of concessions "corroborate[d]"[464] the fact that Canada made a determination of violation in relation to Directive 2003/74/EC, because it is the DSB's authorization, rather than Canada's expression of views on the WTO-consistency of this Directive, that formed the basis of Canada's continued suspension of concessions.

4. The Scope of the Panel's Mandate and the Panel's Suggestion

206. Finally, should the Appellate Body uphold the Panel's finding that Canada has breached Articles 23.1 and 23.2(a) of the DSU, Canada requests the Appellate Body to reverse the Panel's finding that it did not have jurisdiction to determine the compatibility of Directive 2003/74/EC with the *SPS Agreement*. Canada explains that the Panel specifically acknowledged that Article 22.8 of the DSU required it to consider, as a condition precedent to finding a breach of this provision by Canada, the consistency of Directive 2003/74/EC with the *SPS Agreement*. In addition, Canada considers that this finding contradicts the Panel's finding that was made in the context of its examination of the European Communities' second series of main claims. In that context, the Panel found that Canada has not breached Article 22.8, because the European Communities has not removed the inconsistency found in *EC – Hormones*.

207. Canada further requests the Appellate Body to reverse the Panel's suggestion that Canada should have recourse to the rules and procedures of the DSU without delay. Canada asserts that the Panel's suggestion ignores the fact that, earlier in its report, the Panel conducted an extensive review of the compatibility of the European Communities' implementing measure with the *SPS Agreement*. Nor does such recommendation contribute to a "prompt settlement" of the dispute as required by Article 3.3 of the DSU, because it would require a new panel proceeding to look at an issue that is already being dealt with in the context of the current proceedings. Finally, in Canada's view, this suggestion is contradictory to the Panel's findings under Article 22.8, and its statement that it was performing a function similar to that of an Article 21.5 panel. The suggestion is also inconsistent with Article 19.2 of the DSU, because it diminishes Canada's right to suspend concessions pursuant to the authorization given by the DSB.

5. Conclusion

208. In sum, Canada requests the Appellate Body to reverse the Panel's findings under Articles 23.1 and 23.2(a) of the DSU that Canada was "seeking the redress" of a violation and made a "determination" of violation with respect to Directive 2003/74/EC. Canada requests the Appellate Body to find, instead, that: (i) Articles 23.1 and 23.2(a) of the DSU do not apply to a situation where, following the adoption of an alleged implementing measure after the reasonable period of time has elapsed, a Member continues the suspension of concessions pursuant to the DSB's authorization; (ii) Canada has not acted inconsistently with Articles 23.1 and 23.2(a) because the European Communities failed to demonstrate that it brought itself into compliance, in accordance with Article 22.8 of the DSU; and (iii) the Panel erred in finding that it was bound by the manner in which the European Communities presented its two main claims. Should the Appellate Body uphold the Panel's findings under Articles 23.1 and 23.2(a) of the DSU, Canada requests the Appellate Body to reverse the Panel's finding that it did not have jurisdiction to determine the compatibility of Directive 2003/74/EC with the covered agreements, and to remove the suggestion that Canada should have recourse to the rules and procedures of the DSU without delay.[465]

[464] *Ibid*., para. 91 (quoting Panel Report, *Canada – Continued Suspension*, para. 7.224).
[465] Canada's other appellant's submission, paras. 99-101.

F. *Arguments of the European Communities – Appellee*

209. The European Communities submits that the Panel correctly found that the United States and Canada have breached Articles 23.1 and 23.2(a) of the DSU by maintaining the suspension of concessions after the notification of Directive 2003/74/EC, and requests the Appellate Body to dismiss Canada's and the United States' other appeals "in their entirety".[466]

210. The European Communities makes two preliminary arguments. First, the European Communities observes that the United States and Canada do not appear to dispute that Directive 2003/74/EC is a "measure taken to comply with the recommendations and rulings" of the DSB in the *EC – Hormones* dispute. Secondly, the European Communities asserts that the United States and Canada "entirely ignore"[467] the fact that the European Communities' first series of main claims included Article 21.5, but did not include Article 22.8 of the DSU. The European Communities adds that the error in the Panel's reasoning was to ignore Article 21.5, rather than Article 22.8, as the United States and Canada allege, although this error does not undermine the correctness of the Panel's conclusions of violation of Articles 23.2(a) and 23.1.

1. The "Harmonious" Interpretation of Articles 21, 22, and 23 of the DSU in the Post-Suspension Stage of a Dispute

211. The European Communities maintains that the "general and fundamental"[468] provisions of Article 23 of the DSU apply throughout the implementation stage of a dispute. The European Communities rejects the distinction made by Canada between "a new measure *ab initio*" and "a measure taken"[469] to implement the DSB's recommendations and rulings, as well as Canada's assertion that Articles 23.1 and 23.2(a) apply only to a new measure. The European Communities submits that such a distinction lacks a textual basis in the covered agreements. The European Communities recalls that Article XVI:4 of the *WTO Agreement* requires Members to ensure the conformity of their laws with their WTO obligations, and maintains that, in the light of this provision, the multilateral dispute settlement system "relies on good faith compliance and the presumption of conformity of measures taken by WTO Members"[470], which does not change in the post-retaliation stage of a dispute. Therefore, the European Communities argues, where a Member has taken a measure to implement the DSB's recommendations and rulings, the Member suspending the concessions bears the burden of proving the WTO-inconsistency of the implementing measure.[471] The general burden of proving that a measure is WTO-inconsistent cannot be reversed simply because the original complainant has taken retaliatory measures. The European Communities additionally contends that Canada, by stating that "Article 23.1 is concerned with measures in respect of which no WTO dispute settlement proceedings have taken place"[472], effectively reduces the scope of application of Article 23.1 and makes it "essentially meaningless in the implementation stage".[473]

212. The European Communities further submits that the interpretation of Articles 21 and 22, referenced in Article 23.2(b) and (c), should not change depending on the stage of the dispute settlement process, including when the dispute reaches the post-suspension stage. The European Communities asserts that the *lex specialis* applicable to its first series of main claims is Article 21.5, and not Article 22.8, as Canada argues. Article 22.8 "was part of and context for"[474] the European

[466] European Communities' appellee's submission, para. 148.
[467] *Ibid*., para. 29.
[468] *Ibid*., para. 36.
[469] *Ibid*., para. 39 (quoting Canada's other appellant's submission, para. 64).
[470] *Ibid*., para. 40.
[471] European Communities' appellee's submission, para. 40.
[472] *Ibid*., para. 43 (quoting Canada's other appellant's submission, para. 38).
[473] *Ibid*., para. 43.
[474] *Ibid*., para. 51.

Communities' second series of main claims. The European Communities emphasizes that Directive 2003/74/EC, as a measure taken to comply, must be presumed to be compliant with the covered agreements until shown otherwise through an Article 21.5 proceeding. The European Communities maintains that a Member suspending concessions must ensure that the suspension "complies at all times with the conditions laid down in Article 22.8".[475] On this basis, the European Communities argues that the adoption of a measure taken to comply triggers the following duties of the original complaining party: (i) to cease the suspension of concessions; (ii) to form a view on whether the measure found to be inconsistent has been removed; and (iii) to have recourse to Article 21.5 proceedings if it considers that the measure taken to comply is not consistent with the covered agreements. The European Communities considers that its understanding of Members' obligations in the post-suspension stage results from a "harmonious"[476] interpretation of Articles 21, 22, and 23 of the DSU that gives effect to each of these provisions. The European Communities emphasizes that the WTO dispute settlement system is based on adversarial procedures where a Member claims the inconsistency of a measure taken by another Member, and is not applicable to requests for an abstract confirmation of the consistency of a measure.

213. The European Communities maintains that the object and purpose of the DSU, according to Articles 3.7 and 3.3, is to secure a positive solution to, and prompt settlement of, a dispute. Thus, the United States' and Canada's suggestion that they can simply wait until the European Communities brings a dispute to prove the consistency of its implementing measure goes fundamentally against the object and purpose of the DSU. The European Communities emphasizes that, upon the adoption of a measure taken to comply, the Member suspending concessions is required to cease the application of the suspension while it fulfils its obligation to have recourse to dispute settlement procedures under Article 21.5. Such an interpretation is consistent with the function of the dispute settlement system, which is for adjudicating disputes and not for maintaining retaliatory measures where a measure to comply is taken in good faith. The European Communities disagrees with the United States' and Canada's argument that the European Communities' interpretation would fail to give effect to Article 22.8 of the DSU. It explains that, on the contrary, where a good faith measure has been taken to comply, as the European Communities did in this case by adopting Directive 2003/74/EC, there is no legitimate interest in continuing the suspension of concessions, because the suspension would have achieved its objective and the suspension "does nothing to induce compliance".[477] The European Communities additionally submits that allowing a Member to continue the suspension of concessions despite the adoption of a measure taken to comply effectively allows that Member to "extort"[478] more than what it is entitled to under the covered agreements. By maintaining the suspension of concessions, the United States and Canada "in truth"[479] wish to see the European Communities remove the import ban imposed on meat treated with hormones, even though removal of the ban is not required under the covered agreements as long as the ban is based on a risk assessment consistent with the *SPS Agreement*. Finally, the European Communities submits that its position is consistent with the approach taken in the Articles on Responsibility of States for Internationally Wrongful Acts[480] (the "Articles on State Responsibility"), which require that countermeasures be suspended if the internationally wrongful act has ceased and the dispute is pending before a tribunal that has the authority to make decisions binding upon the parties.[481]

[475] *Ibid.*, para. 62.
[476] *Ibid.*, para. 36.
[477] European Communities' appellee's submission, para. 81.
[478] *Ibid.*, para. 83.
[479] *Ibid.*, para. 84.
[480] Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001) (Exhibit EC-136 submitted by the European Communities to the Appellate Body), Article 52.3. The text of the Articles are annexed to United Nations General Assembly Resolution, A/RES/56/83, 29 January 2002 (Exhibit EC-135 submitted by the European Communities to the Appellate Body).
[481] See European Communities' appellee's submission, paras. 94-96.

214. The European Communities sums up its position on the proper interpretation of Articles 21, 22, and 23 as follows. The fact that the suspension of concessions was authorized, and subsequently also applied, does not change the proper interpretation and application of Articles 21 and 23. The original complaining Member remains under an obligation to have recourse to a compliance procedure under Article 21.5 if it disagrees with the existence or consistency of a measure taken to comply with a covered agreement. If it fails to do so, and simply waits and continues to apply the suspension of concessions, it necessarily is seeking redress and makes a unilateral determination that a violation has occurred in respect of the implementing measure within the meaning of Articles 23.2(a) and 23.1. In such a situation, the continued application of the suspension of concessions is simultaneously, *first*, evidence that the original complaining Member disagrees with the existence or consistency with a covered agreement of the measure taken to comply while refusing to have recourse to a compliance procedure under Article 21.5 (thus, making a "determination" that the new measure is WTO-inconsistent); and, *secondly*, a breach of Article 23.1, read together with Articles 22.8 and 3.7, because it seeks redress following its unilateral determination that the measure found to be inconsistent with the covered agreements has not been removed.

2. The Panel's Findings under Article 23.1 of the DSU

215. With respect to the Panel's finding that the United States is seeking the redress of a violation within the meaning of Article 23.1, the European Communities recalls the United States' contention that the Panel erroneously re-characterized the suspension of concessions as now directed against Directive 2003/74/EC. The European Communities asserts that this contention is without merit, because the United States could no longer maintain its suspension of concessions once the European Communities had removed Directive 96/22/EC. The Panel confirmed the removal of Directive 96/22/EC, and the United States has not appealed this finding. Additionally, the European Communities argues that "the United States ignores that there is a presumption of good faith compliance by WTO Members", and that the adoption of an implementing measure in good faith "triggers" an obligation to remove the suspension of concessions and requires the complaining Member to initiate Article 21.5 proceedings in case there is disagreement as to the WTO-consistency of the new measure.[482] The European Communities observes, moreover, that "even the United States acknowledged that it was maintaining its suspension of concessions against the new measure".[483] The European Communities further submits that, contrary to the United States' assertion, the Panel's finding does not lead to a paradoxical result that the authorized suspension of concessions can be both consistent and inconsistent with the covered agreements at the same time. Rather, the European Communities argues, the suspension of concessions was initially WTO-consistent, and subsequently became WTO-inconsistent in the light of the notification of Directive 2003/74/EC and the removal of the measure found to be WTO-inconsistent in *EC – Hormones*, namely, Directive 96/22/EC. Therefore, the continued application of sanctions in the presence of a compliance measure that the DSB has not found to be WTO-inconsistent implies that a Member is seeking to redress a violation.

216. Turning to the Panel's finding that Canada is seeking the redress of a violation within the meaning of Article 23.1, the European Communities disagrees with Canada's argument that the notification of Directive 2003/74/EC does not change the legal basis of Canada's suspension of concessions. The European Communities submits that, contrary to Canada's assertion, Article 22.8 of the DSU does not specify that it is for the respondent to show that it has removed the original measure. According to the European Communities, "[i]f anything, Article 22.8 of the DSU seems to indicate that such an assessment should be carried out by the complaining Member, since it is the one suspending concessions".[484] The European Communities adds that the use of the passive tense in the phrase "[t]he suspension of concessions ... shall only be applied" appears to indicate the obligation for

[482] European Communities' appellee's submission, para. 104. (emphasis omitted)
[483] *Ibid.*, para. 106 (referring to Panel Report, *US – Continued Suspension*, paras. 7.219-7.221 and footnote 438 thereto).
[484] European Communities' appellee's submission, para. 114.

the Member suspending concessions to terminate those measures when the original measure has been removed. The European Communities contends that, in any event, it has effectively shown that the inconsistent measure, namely, Directive 96/33/EC, was removed, and both the Panel and Canada recognized that Directive 2003/74/EC was a different measure.

3. The Panel's Findings under Article 23.2(a) of the DSU

217. As regards the Panel's finding that the United States made a determination within the meaning of Article 23.2(a), the European Communities considers that the United States' appeal is based on a "wrong reading of the Panel's findings", because the Panel did not make its finding based only on the statements made by the United States at the DSB meetings.[485] Instead, the Panel took into account the statements made by the United States at the DSB meetings and its decision to maintain its suspension of concessions as *evidence* that the United States had made a "determination" prohibited by Article 23.2(a) of the DSU.[486] The European Communities disagrees with the United States that the statements made at the DSB meetings lacked definitiveness. On the contrary, the United States expressed a "*definitive judgement*"[487] concerning the WTO-consistency of Directive 2003/74/EC. The European Communities dismisses the United States' argument that it could not have made a determination within weeks of the notification of Directive 2003/74/EC, contending, instead, that the term "determination" does not contain any temporal connotation. The European Communities also disagrees with the United States' view that the Panel inferred the existence of a "determination" from inaction. According to the European Communities, the United States "actively considered" that Directive 2003/74/EC was WTO-inconsistent and "actively continued" the suspension of concessions.[488] The European Communities further submits that, even if the negotiators of the DSU referred to Section 301 of the United States Trade Act of 1974, they did so as an example that was not intended to be an exhaustive illustration of the types of unilateral conduct prohibited by Article 23. The European Communities, moreover, rejects the United States' contention that statements made at DSB meetings are diplomatic in nature and have no legal effects, referring to the Appellate Body's observation in *US – Upland Cotton (Article 21.5 – Brazil)* that certain statements by the United States Government indicated that it was taking a measure for the purpose of complying.[489] Additionally, the European Communities notes that the United States' statements at the DSB meetings occurred in the particular context of seeking redress of a violation by continuing its application of sanctions against the European Communities. The European Communities also rejects the United States' argument that the Panel failed to establish when the United States had made a determination in breach of Article 23.2(a). In the European Communities' view, the Panel properly observed that the deadline by which a Member shall have recourse to the DSU in accordance with Article 23 "was not an issue before the Panel".[490]

218. The European Communities further argues that the Panel correctly found that Canada made a determination to the effect that a violation has occurred within the meaning of Article 23.2(a). The European Communities maintains that Canada's statements at DSB meetings that it was not removing the suspension of concessions, together with the fact that it has maintained the suspension of concessions, provide a sufficient amount of firmness or immutability indicating that Canada made a more or less final decision regarding the WTO-inconsistency of Directive 2003/74/EC. The European Communities explains that, because it had notified a new measure, which was different both legally and in substance, Canada needed to take a final decision regarding its conformity with the WTO agreements, which it did (as confirmed by its statements and the continuation of its suspension of

[485] *Ibid.*, para. 119.
[486] *Ibid.*, para. 122. (original emphasis)
[487] *Ibid.*, para. 126. (original emphasis)
[488] *Ibid.*, para. 133. (emphasis omitted)
[489] European Communities' appellee's submission, para. 131 (referring to Appellate Body Report, *US – Upland Cotton (21.5 – Brazil)*, para. 204).
[490] *Ibid.*, para. 134 (quoting Panel Report, *US – Continued Suspension*, para. 7.232).

concessions, as concluded by the Panel), and thus Canada made a "determination" in the sense of Article 23.2(a) without having recourse to the DSU.

4. The Scope of the Panel's Mandate and the Panel's Suggestion

219. Finally, the European Communities reiterates that, by ignoring the sequence of the legal claims made by the European Communities, the Panel exceeded its terms of reference in examining the consistency of Directive 2003/74/EC with the *SPS Agreement*, contrary to Articles 7 and 21.5 of the DSU.[491] Moreover, the European Communities repeats its request that the Appellate Body improve the Panel's suggestion—that the United States and Canada should have recourse to the rules and procedures of the DSU—by making it explicit that they must resort to Article 21.5 proceedings and cease the suspension of concessions without delay.

G. *Arguments of the Third Participants*

1. Australia

(a) Procedural Issue – Public Observation of the Oral Hearing

220. Australia supports the request of the participants to allow public observation of the oral hearing in these proceedings. Australia considers that enhancing the transparency of WTO dispute settlement proceedings can enhance the credibility of the dispute settlement system, and endorses the participants' arguments as to the value of open hearings. Australia submits that, although the first sentence of Article 17.10 "would seem to preclude a request that hearings of the Appellate Body be held in public", this provision must be read together with other provisions in the DSU, in particular, Article 17.10, second sentence, Article 17.14, and Article 18.2.[492] According to Australia, "[i]n order to allow meaning to be given to these other provisions, the apparent injunction in the first sentence of Article 17.10 cannot be absolute."[493] Australia observes that Article 17.10, second sentence, foresees that Appellate Body reports will contain sufficient information concerning the parties' statements and arguments to provide a basis for the Appellate Body's findings. It adds that the requirement in Article 17.14 that Appellate Body reports be circulated to WTO Members prior to adoption "would not be possible if the first sentence of Article 17.10 imposed an absolute requirement of confidentiality".[494] Australia also refers to Article 18.2 of the DSU and states that there is no difference between parties disclosing statements contemporaneously by publishing them on a website and disclosing them by making them in an open hearing. Finally, Australia observes that in the absence of an express prohibition in the DSU precluding an open hearing, the Appellate Body should authorize the participants' request, which "would be fully consonant with the object and purpose of the DSU".[495]

(b) Articles 21, 22, and 23 of the DSU

221. Australia submits that, although the DSU does not expressly provide procedures to be followed in the post-retaliation stage of a dispute, parties' actions should continue to be guided by the following two fundamental principles: (i) multilateral determination of non-compliance; and (ii) that the party asserting non-compliance bears the burden of establishing a *prima facie* case.

[491] See *supra*, paras. 55-58.
[492] Australia's comments on participants' request for an open hearing, p. 1.
[493] *Ibid.*, p. 2.
[494] *Ibid.*
[495] *Ibid.*

222. Australia asserts that Article 23.1 of the DSU establishes an overarching obligation for Members to have recourse to the rules and procedures of the DSU, including Article 21.5 of the DSU. Australia emphasizes that Article 21.5 is the governing provision in cases of disagreement regarding the WTO-consistency of a measure taken to comply with the DSB's recommendations and rulings, and it also applies to disagreements as to whether an inconsistent measure has been removed within the meaning of Article 22.8 of the DSU. Thus, Australia agrees with the European Communities that the disagreement regarding whether Directive 2003/74/EC removed the measure found to be inconsistent with the covered agreements in *EC – Hormones* should have been resolved through recourse to Article 21.5 panel proceedings. On this basis, Australia submits that the Panel erred in finding that the procedure under Article 21.5 of the DSU could be merely one of the mechanisms available.

223. Australia notes that the DSU is silent as to whether the suspension of concessions should cease when disputes arise regarding the removal of an inconsistent measure within the meaning of Article 22.8. According to Australia, it is open to a Member to continue the suspension of concessions pending the outcome of the Article 21.5 panel proceedings. Despite recognizing that Article 21.5 does not expressly address the issue of which party may initiate Article 21.5 proceedings, Australia argues that the Panel erred in relying on the unadopted panel report in *EC – Bananas III (Article 21.5 – EC)* for its finding that "proceedings under Article 21.5 are [not] open only to the original complainant."[496]

224. Australia notes that panels cannot rule on claims that have not been brought by the complaining party. Australia argues that none of the provisions of the *SPS Agreement* were within the Panel's terms of reference, and the Panel had no jurisdiction to consider the consistency of Directive 2003/74/EC with that Agreement. Australia contends that allowing claims under the *SPS Agreement* in this dispute would effectively reverse the burden of proof between the parties and "is inconsistent with the fundamental principle ... that the party asserting non-compliance with a covered agreement bears the burden of establishing a *prima facie* case".[497]

(c) The Panel's Selection of Experts

225. Australia agrees with the argument of the European Communities that panels must observe due process in both selecting and consulting with experts. Australia contends that fundamental fairness and due process "permeates all aspects of the WTO dispute settlement process, including a panel's use of experts".[498] Australia then maintains that the principle of due process equally informs Articles 11 and 13.2 of the DSU and Article 11.2 of the *SPS Agreement* and that, in selecting and consulting experts under these provisions, a panel is "duty bound to ensure that due process is respected".[499]

226. Citing the Appellate Body's finding in *US – 1916 Act* that the discretionary authority to grant enhanced participatory rights to third parties is "circumscribed, for example, by the requirements of due process"[500], Australia submits that a panel's discretion in the use of experts under Article 13.2 of the DSU and Article 11.2 of the *SPS Agreement* must be similarly circumscribed by the requirements of due process. Due process, Australia argues, requires that panels "seek, and take *full* account of, the views of the parties on the types of experts required and the suitability of individual experts".[501] They must also take full account of the views of the parties on the substance of the advice to be

[496] Australia's third participant's submission, paras. 11-13 (quoting Panel Report, *US – Continued Suspension*, para. 7.355; and Panel Report, *Canada – Continued Suspension*, para. 7.353).
[497] *Ibid.*, para. 25.
[498] *Ibid.*, para. 48.
[499] Australia's third participant's submission, para. 49.
[500] *Ibid.*, para. 50 (quoting Appellate Body Report, *US – 1916 Act*, para. 150).
[501] *Ibid.*, para. 51. (original emphasis)

sought from the experts and must not seek advice from any particular expert on matters outside their field of expertise. WTO Members have recognized in the *Rules of Conduct* that experts must be "independent and impartial" and "avoid direct and indirect conflicts of interest".[502]

(d) Articles 5.1 and 5.7 of the *SPS Agreement*

227. Australia asserts that the *SPS Agreement* balances the right to take measures to protect human, animal, or plant life or health against the trade liberalization goals of the WTO. It adds that "[t]his balance cannot be maintained if panels fail to apply appropriate standards of review."[503] Australia therefore agrees with the European Communities that the application of the appropriate standard of review by panels is fundamental to their assessment of the consistency of a Member's measure with its obligations under the *SPS Agreement*. The standard of review applicable in this case refers to the nature and appropriate intensity of scrutiny of a panel's evaluation of a Member's regulatory judgement or an assessment made by a competent body relied upon by that Member. The applicable standard of review addresses the threshold circumstance in which a panel may legitimately interfere in that judgement or factual assessment. As the Appellate Body has explained, the standard of objective assessment of the facts provided in Article 11 of the DSU "precludes [either] a *de novo* review or 'total deference' by a panel to the findings of a national authority".[504] Australia also agrees with the European Communities that the appropriate standard of review to be applied in a given dispute shall be informed "by both Article 11 of the DSU and the particular covered agreement(s) and obligations at issue".[505] Australia argues that this is supported by the Appellate Body's finding in *US – Softwood Lumber VI (Article 21.5 – Canada)* that the proper standard of review to be applied by a panel must "be understood in the light of the specific obligations of the relevant agreements that are at issue".[506]

228. Australia maintains that the standard of review to be applied by panels "may vary between different obligations under the *SPS Agreement*" and must reflect the "balance between regulatory autonomy and international supervision"[507] that is reflected in that Agreement. In Australia's view, the most significant limitation imposed by the text of the *SPS Agreement* on a panel's fact-finding jurisdiction is provided in Article 5.1. Article 5.1 imposes a "positive obligation on Members to obtain and rely upon a risk assessment that is appropriate to the circumstances".[508] This obligation requires that a "rigorous investigative and fact-finding process *compulsorily precedes*"[509] any review by a WTO panel of the relevant SPS measure. Therefore, a panel may not "usurp the role of a risk assessor"[510] by conducting the risk assessment itself, because doing so would "nullif[y]"[511] the competence retained by Members under Article 5.1 of the *SPS Agreement* and would amount to a *de novo* review inconsistent with Article 11 of the DSU. According to Australia, panels must accord "considerable deference (but not total deference)" to a Member's risk assessment where that Member has performed a "comprehensive and transparent" risk assessment.[512] This is consistent with the requirement in Article 5.1 that a risk assessment be "as appropriate to the circumstances". This requirement suggests that risk assessors may tailor their risk assessment to the specific circumstances

[502] *Ibid.*, para. 51.
[503] *Ibid.*, para. 28.
[504] *Ibid.*, para. 30 (referring to Appellate Body Report, *EC – Hormones*, para. 117).
[505] *Ibid.*, para. 31 (referring to European Communities' appellant's submission, para. 224).
[506] Australia's third participant's submission, para. 31 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 92).
[507] *Ibid.*, para. 34.
[508] *Ibid.*, para. 35.
[509] *Ibid.*, para. 36. (original emphasis)
[510] *Ibid.*, para. 36.
[511] *Ibid.*
[512] *Ibid.*

of a case, and that a panel may not attempt to choose between such a risk assessment and an alternative assessment that is not "similarly embedded"[513] in the specific circumstances.

229. Australia submits that, where the available scientific evidence may be susceptible to more than one interpretation by a "qualified and respected source"[514], a panel must accord deference to a Member's risk assessment, even where the panel's own preferred view appears to be supported by the "'preponderant' weight of the evidence".[515] Accordingly, a panel must not interfere with a Member's risk assessment solely because it might have drawn different conclusions on the basis of the available evidence, and must limit the scope of its review to determining whether "the risk assessor's decision [is] objective and credible".[516] For these reasons, Australia agrees with the European Communities that the Panel in this dispute misunderstood and misapplied the appropriate standard of review under Article 5.1 of the *SPS Agreement*. Although the Panel may have benefited from obtaining divergent scientific views for purposes of its background understanding, it could not deliberately place itself in a position whereby it could choose the scientific opinion it preferred. Yet, the Panel's various statements suggest that the Panel erroneously considered that its role was "to choose a position from among the different scientific views".[517] For example, the Panel stated that "its situation [was] similar"[518] to that of a risk assessor and that it "followed the majority of experts expressing concurrent views" or accepted the "most specific" or "best supported"[519] views among the experts. Australia maintains that the Panel should have focused on "whether the European Communities' risk assessment represented an objective and credible view"[520] from a qualified and respected source.

230. In addition, Australia contends that a particular risk assessment may support a range of possible measures, and that Members retain the discretion to select the most appropriate measure to address a particular risk "taking into account the relevant circumstances and its appropriate level of protection".[521] Australia submits that the "fundamental importance of the non-trade objectives of SPS measures" warrants "considerable deference"[522] by panels to the regulatory decision-making of Members, in particular, where the scientific evidence supports more than one credible interpretation.

231. Furthermore, Australia shares the European Communities' concerns regarding the relevance attributed by the Panel to the existence of international standards for four of the hormones subject to the provisional ban. Although international standards may be relevant in interpreting provisions of the *SPS Agreement*, they are not "dispositive"[523] of the meaning of these provisions and should not be "elevated"[524] to binding treaty obligations. For this reason, Australia agrees with the European Communities that the "existence of international standards is not determinative of whether there is sufficient evidence to conduct a risk assessment under the first requirement of Article 5.7."[525] Australia considers that the Panel's approach failed to adequately take into account Article 3.3 of the

[513] *Ibid.*, para. 37.
[514] *Ibid.*, para. 38 (quoting Appellate Body Report, *EC – Hormones*, para. 194).
[515] *Ibid.* (referring to Appellate Body Report, *EC – Asbestos*, para. 178).
[516] *Ibid.*, para. 39.
[517] Australia's third participant's submission, para. 42.
[518] *Ibid.*, para. 41 (quoting Panel Report, *US – Continued Suspension*, para. 7.418; and Panel Report, *Canada – Continued Suspension*, para. 7.409).
[519] *Ibid.*, para. 42 (quoting Panel Report, *US – Continued Suspension*, para. 7.420; and Panel Report, *Canada – Continued Suspension*, para. 7.411).
[520] *Ibid.*, para. 42.
[521] *Ibid.*, para. 44 (referring to Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1525).
[522] *Ibid.*, para. 45.
[523] *Ibid.*, para. 54 (referring to Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.241, 7.300, and 7.314).
[524] *Ibid.*, para. 54.
[525] *Ibid.*, para. 55 (referring to European Communities' appellant's submission, paras. 392 and 393).

SPS Agreement, which permits Members to take SPS measures that result in a higher level of protection than would be achieved by measures based on the relevant international standards.

2. Brazil

(a) Procedural Issue – Public Observation of the Oral Hearing

232. Brazil "strongly disagrees"[526] with the participants' request that the Appellate Body allow public observation of the oral hearing in these proceedings.

233. Brazil observes that the term "proceedings" is defined as "the business transacted by a court"[527], whereas "deliberations" is defined as "careful consideration, weighing up with a view to decision; ... consideration and discussion of a question by a legislative assembly, a committee, etc.; debate".[528] According to Brazil, the ordinary meaning leaves no doubt that the terms "proceedings" and "deliberations" are "not interchangeable", and that "proceedings" is a far broader concept than "deliberations" and encompasses the latter and a wide variety of steps taken by Members or conducted by the Appellate Body, including hearings.[529] Brazil further argues that the participants' interpretation of the term "proceedings" "runs counter to case-law", and notes that, in *Canada – Aircraft*, the Appellate Body interpreted the term "proceedings" as including "the conduct of the oral hearing".[530] Brazil observes, moreover, that Rule 28(1) of the *Working Procedures* "clearly sets out that the oral hearing is part of the appellate proceedings".[531]

234. Brazil asserts that in the light of the ordinary meaning of Article 17.10, the case-law, and the *Working Procedures*, there is no room for finding that "proceedings" are limited to "internal work" and exclude oral hearings, as alleged by the participants.[532] Therefore, Brazil considers that the first sentence of Article 17.10 "must be construed as requiring the confidentiality of any written submissions, legal memoranda, written responses to questions, oral statements, oral hearings, deliberations, exchange of views and all internal workings of the Appellate Body"[533] and, consequently, opening the oral hearings to the public in the appellate review stage is inconsistent with multilateral trading rules, despite the participants' efforts to prove the contrary.

235. Brazil does not see Article 18.2 as providing support for the participants' request to open the oral hearing to public observation. Brazil describes Article 18.2 as granting a right to parties to disclose their own statements to the public. According to Brazil, the participants fail to show how a right granted by Article 18.2 to Members can modify the obligation established in Article 17.10, an obligation that is applicable not only to WTO Members, but also to the Appellate Body. Brazil cautions that accepting the participants' request "would lead to the absurd conclusion that, by mutual consent, the parties to a dispute can override multilateral rules".[534] Brazil adds that, by this logic, "mutual consent" would be a "blanket authorization" to some Members to achieve goals not necessarily permitted by the multilaterally agreed rules; in fact, "mutual consent", when *contra legem*, would undermine the whole purpose of a multilateral framework.

[526] Brazil's comments on participants' request for an open hearing, para. 2.
[527] *Ibid.*, para. 7 (referring to *The New Shorter Oxford English Dictionary*, 1990, p. 1204).
[528] *Ibid.*, para. 8 (referring to *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), p. 624).
[529] *Ibid.*, para. 9.
[530] *Ibid.*, para. 10 (quoting Appellate Body Report, *Canada – Aircraft*, para. 143).
[531] *Ibid.*, para. 11.
[532] *Ibid.*, para. 12 (referring to European Communities' request for an open hearing, para. 15).
[533] *Ibid.*, para. 12.
[534] Brazil's comments on participants' request for an open hearing, para. 17.

236. Lastly, Brazil notes that transparency is an issue being discussed in the negotiations on the review of the DSU. Brazil submits that, in the light of the different positions of Members on this issue and its impact on the functioning of the dispute settlement mechanism, "the authority to make a decision on whether or not to open panels' and Appellate Body's proceedings to the public should lie with the WTO Membership as a whole, rather than being introduced through the 'back door', as the result of a series of 'stand-alone requests'".[535]

(b) Articles 21, 22, and 23 of the DSU

237. Brazil asserts that the Panel erred in analyzing the European Communities' claims under Articles 21.5, 23.1, and 23.2(a) of the DSU in "complete isolation" from the post-suspension context of this dispute and from the "systemic non-compliance" by the European Communities. Brazil also considers that the Panel erred in its acceptance, at least in part, of the European Communities' argument that this dispute is about a procedural violation. According to Brazil, the focus of the dispute should not be the retaliatory measures by the United States and Canada; rather, the focus should remain on whether the European Communities has complied with the DSB's recommendations and rulings in *EC – Hormones*. Brazil notes that Article 22.8 of the DSU sets out three conditions that must be met before termination of the suspension of concessions is required, with the first condition being the removal of the inconsistent measure. Brazil contends that, because none of the conditions set out in Article 22.8 have been fulfilled, the DSB's authorization to suspend concessions granted to the United States and Canada remains in place. In Brazil's view, "the multilateral authorization to suspend concessions can only be revoked by an equally *multilateral* ruling."[536]

238. Brazil disagrees with the Panel's finding that the United States and Canada were seeking redress of a violation within the meaning of Article 23.1 of the DSU by continuing the multilaterally authorized suspension of concessions after the adoption of Directive 2003/74/EC. According to Brazil, the European Communities' unilateral declaration that its implementing measure complies with the DSB's recommendations and rulings, or the alleged presumption of good faith compliance, cannot turn the suspension of concessions authorized by the DSB into an illegal measure. Brazil adds that the authorization to suspend concessions was in effect at the time of the European Communities' declaration, and that the United States and Canada "were simply exercising a right duly and previously authorized".[537] Brazil also takes issue with the Panel's interpretation of the term "determination" in Article 23.2(a) of the DSU. Noting that the "determinations" prohibited under Article 23.2(a) are unilateral assessments of the kind examined in the *US – Section 301 Trade Act* dispute[538], Brazil states that this provision is not intended to capture "[s]imple interventions and statements made at DSB or other WTO meetings".[539] Brazil adds that the suspension of concessions, authorized by the DSB and obtained through recourse to dispute settlement, cannot be considered to be a unilateral "determination".

239. Turning to the Panel's analysis under Article 22.8 of the DSU, Brazil agrees with the Panel that the removal of the measure found to be inconsistent must be understood as requiring substantive compliance. Consequently, Brazil argues, the Panel's analysis of Directive 2003/74/EC in the light of the *SPS Agreement* is of "paramount importance for providing an effective solution to the dispute".[540] Brazil considers, in this regard, that panels have authority to examine issues or legal provisions not included in the terms of reference to the extent necessary for providing a prompt solution to the dispute.

[535] *Ibid.*, para. 18 (referring to Canada's request for an open hearing, para. 20).
[536] Brazil's third participant's submission, para. 12. (original emphasis)
[537] Brazil's third participant's submission, para. 18.
[538] *Ibid.*, para. 21 (referring to Panel Report, *US – Section 301 Trade Act*, footnote 657 to para. 7.50).
[539] *Ibid.*, para. 21.
[540] *Ibid.*, para. 29.

240. Finally, Brazil asserts that, in the post-retaliation stage of a dispute, the original respondent bears the burden of proving that its implementing measure is WTO-consistent. According to Brazil, once an authorization is granted to a Member under Article 22.6 of the DSU to suspend concessions or other obligations, a turning point has been reached in the procedures established in the DSU. Thus, Brazil argues, where the original respondent has not complied with WTO rules for a long period of time despite the DSB's recommendations and rulings, the burden of making a *prima facie* case of compliance rests upon that party. Brazil submits that this "would not be a disproportionate burden" on the non-complying party because, in the "post-retaliation" stage, this Member "will have maintained an inconsistent measure for many years and the dispute settlement system should take this into consideration".[541] Brazil is also of the view that the original respondent can initiate Article 21.5 proceedings to establish compliance. Brazil argues that such an interpretation is consistent with the rationale that underpins Article 22.6 of the DSU, which places the burden on the original respondent to demonstrate that the level of the suspension of concessions proposed by the complaining Member is not justified under the DSU.

3. China

241. Pursuant to Rule 24(2) of the *Working Procedures*, China chose not to submit a third participant's submission.

242. China submits that the request made by the participants to open the oral hearing to public observation should be rejected by the Appellate Body. China disagrees with the participants' interpretation of the term "proceedings" in Article 17.10. China states that the drafters of the DSU intentionally used the different terms "deliberations" and "proceedings" in Articles 14.1 and 17.10, respectively. China does not understand the term "proceedings" in Article 17.10 as referring "only to the internal work of the Appellate Body".[542] China observes that the term "proceedings" is also used in Article 17.5 of the DSU, which provides that "the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report". Article 17.12 requires that the Appellate Body "address each of the issues raised in accordance with paragraph 6 during the appellate proceeding". These provisions do not provide contextual support for the interpretation of "proceedings" put forward by the participants. In China's view, the requirement in Article 17.10 that the proceedings of the Appellate Body be confidential must be interpreted to mean that only the participants and third participants may be present at the oral hearing, and all written submissions to the Appellate Body are treated as confidential.

243. China asserts, furthermore, that the purpose of the oral hearing is to provide all participants with adequate opportunity to present and argue their case before the Division with the aim of clarifying the legal issues in the appeal. Accordingly, China considers that the "main task [of] the Division, when dealing with the oral hearing issues, is to provide such opportunity to all participants and secure their right and obligation under the current DSU."[543] China emphasizes that any determination by the Appellate Body in this appeal "shall not prejudice" the position of Members in the ongoing negotiations on the review of the DSU.[544]

4. India

244. India stresses that the Appellate Body should reject the participants' request to allow public observation of the oral hearing in these proceedings. India submits that "the issue of external

[541] *Ibid.*, para. 34.
[542] China's comments on participants' request for an open hearing, p. 1.
[543] *Ibid.*, p. 2.
[544] *Ibid.*

transparency" is being discussed in the negotiations on the review of the DSU and that "[t]hese negotiations have not yet been completed, and there is no consensus on whether and which form of external transparency is acceptable to the entire WTO Membership."[545] India argues that until such consensus is achieved, panel and Appellate Body proceedings have to be held in closed sessions. India emphasizes that the confidentiality of the panel and Appellate Body proceedings provided under the DSU is a "substantive" matter[546], and any decision by the Appellate Body to open its proceedings to public observation necessarily involves consultations with, and decisions by, WTO Members, and not just the participants and third participants.

5. Mexico

245. Pursuant to Rule 24(2) of the *Working Procedures*, Mexico chose not to submit a third participant's submission.

246. Mexico disagrees with the request made by the participants to allow public observation of the oral hearing in these proceedings. Mexico observes that its position is supported by Article 17.10 of the DSU, which states that "[t]he proceedings of the Appellate Body shall be confidential."

6. New Zealand

(a) Procedural Issue – Public Observation of the Oral Hearing

247. New Zealand supports the request of the participants to allow public observation of the oral hearing in these proceedings. New Zealand observes that Rule 27 of the *Working Procedures*, which regulates the oral hearing, "makes no mention of confidentiality".[547] New Zealand additionally notes that the DSU does not mention hearings at the Appellate Body stage and therefore does not explicitly preclude opening such a hearing. New Zealand also agrees with the participants that Article 17.10, "read in accordance with the rules of treaty interpretation and in the context of other provisions in the DSU" does not preclude public observation of the oral hearing. Therefore, New Zealand considers that the joint request of the participants to open the hearing of the Appellate Body in these consolidated appeals is neither inconsistent with, nor precluded by, the DSU, the other covered agreements, or the *Working Procedures*.

(b) Articles 21, 22, and 23 of the DSU

248. New Zealand submits that the Panel erred in finding that the United States and Canada have acted inconsistently with Articles 23.1 and 23.2(a) of the DSU. In New Zealand's view, the Panel should have interpreted Articles 23.1 and 23.2(a) in the context of the other provisions of the DSU, in particular Article 22.8, which sets out three conditions that must be met in order to have the suspension of concessions terminated. New Zealand maintains that the first condition under Article 22.8, which is the relevant one in this dispute, refers to situations where the inconsistent measure has actually been removed, and not where the measure is merely claimed to have been removed. Thus, New Zealand submits, because the Panel found that the European Communities has not removed the inconsistent measure within the meaning of Article22.8, the United States and Canada have every right to continue the suspension of concessions. New Zealand contends that, by comparison, Article 23 is the "framework provision setting up the requirement to have recourse to dispute settlement"[548] and does not address the specific situation in this case, where the United States

[545]India's comments on participants' request for an open hearing, p. 1.
[546]*Ibid.*
[547]New Zealand's comments on participants' request for an open hearing, p. 1.
[548]New Zealand's third participant's submission, para. 3.21.

and Canada have already had recourse to dispute settlement. New Zealand adds that Article 23 does not impose an obligation on the United States and Canada to cease the suspension of concessions or to resort to Article 21.5 proceedings.

249. New Zealand maintains that, in reaching its finding of violation under Articles 23.1 and 23.2(a) of the DSU, the Panel failed to consider the object and purpose of the DSU, which is to provide security and predictability to the multilateral trading system. New Zealand observes that the Panel's finding leads to the result that the Member authorized to suspend concessions must terminate the suspension whenever the non-compliant Member notifies its adoption of an implementing measure to the DSB and then waits to be challenged. New Zealand adds that the Panel's approach "would almost inevitably give rise to the situation where an implementing Member could continually impose successive rounds of litigation at will, merely by asserting that it had complied"[549], thus undermining the predictability of the suspension of concessions and its importance in inducing prompt compliance. New Zealand also argues that the Panel's examination of Articles 23.1 and 23.2(a) in isolation from Article 22.8 "reduce[s]" the latter provision "to redundancy or inutility".[550]

250. New Zealand submits that the Panel's suggestion that the United States and Canada should have recourse to the rules and procedures of the DSU without delay "is simply not tenable".[551] Such a suggestion undermines the authorization to suspend concessions that the United States and Canada have obtained from the DSB. This is incompatible with the objective of "prompt settlement" of disputes envisaged in Article 3.3 of the DSU, because it would result in a "redundant" proceeding in which a new panel would look at "an issue that was already dealt with in the context of the current proceedings".[552]

(c) Terms of Reference

251. New Zealand contends that the Panel erred in stating that it did not have jurisdiction to rule on the compatibility of Directive 2003/74/EC with the covered agreements. New Zealand submits that the Panel should have explicitly determined the compatibility of Directive 2003/74/EC with the covered agreements because it had substantively reviewed the Directive and had concluded that the measure found to be inconsistent with the *SPS Agreement* in *EC – Hormones* had not been removed by the European Communities. In New Zealand's view, the Panel Report is sufficiently comprehensive for the Appellate Body to determine explicitly the compatibility of Directive 2003/74/EC with Articles 5.1 and 5.7 of the *SPS Agreement*.

(d) Articles 5.1 and 5.7 of the *SPS Agreement*

252. New Zealand "strongly"[553] disagrees with the European Communities' arguments in relation to Articles 5.1 and 5.7 of the *SPS Agreement* because they would "seriously undermine the principles and obligations"[554] of that Agreement. The *SPS Agreement* imposes a "very important" requirement that SPS measures be developed and implemented in a manner that is "transparent, consistent, scientifically-based, and the least trade-restrictive"[555], and this requirement is at the "forefront"[556] of this dispute. New Zealand recalls that Article 2.2 of the *SPS Agreement* imposes a general obligation that SPS measures be based on scientific principles and not maintained without sufficient

[549]*Ibid.*, para. 3.30.
[550]*Ibid.*, para. 3.36.
[551]*Ibid.*, para. 3.62.
[552]New Zealand's third participant's submission, para. 3.62 (quoting Canada's other appellant's submission, para. 96).
[553]*Ibid.*, para. 3.42.
[554]*Ibid.*, para. 3.43.
[555]*Ibid.*, para. 3.44.
[556]*Ibid.*, para. 3.45.

scientific evidence. This obligation is given specific application by Article 5.1, which requires that SPS measures be "based on" a risk assessment, which, according to the Appellate Body's interpretation, entails that there must be a "rational relationship between the measure and the risk assessment" whereby the results of the risk assessment sufficiently warrant the SPS measures at stake.[557] In New Zealand's view, the Panel correctly concluded that Directive 2003/74/EC was not based on a risk assessment within the meaning of Article 5.1. The Panel's findings were supported by an exhaustive overview of all relevant scientific evidence, drawing upon the expertise and knowledge of a group of eminent scientific and technical experts.

253. New Zealand states that the risk assessment at issue in this dispute is the second type of risk assessment provided for in paragraph 4 of Annex A to the *SPS Agreement*, which is "designed to protect from risks arising from additives, contaminants, toxins or disease-causing organisms in foodstuffs".[558] New Zealand recalls that, with regard to this type of risk assessment, the Appellate Body indicated in *EC – Hormones* that a Member is required to "identify the adverse effects on human or animal health (if any) arising from the presence of such additives, contaminants, toxins or disease-causing organisms in foodstuffs", and, "if any adverse effects exist, evaluate the potential (or possibility) of the occurrence of such effects."[559] The Appellate Body also found that "the 'risk' evaluated in a risk assessment must be ascertainable—'theoretical uncertainty is not the kind of risk which ... is to be assessed'."[560] New Zealand also refers to the panel's finding in *Japan – Apples* that a panel's review of a measure under Article 5.1 would also involve an evaluation of whether the risk assessment was "as appropriate to the circumstances", and whether it took into account "risk assessment techniques developed by the relevant international organizations."[561] New Zealand recalls further the Appellate Body's finding in *EC – Hormones* that the European Communities "did not actually proceed to an assessment, within the meaning of Articles 5.1 and 5.2, of the risks arising from the failure of observance of good veterinary practice combined with problems of control of the use of hormones for growth promotion purposes."[562] New Zealand concludes that, as in *EC – Hormones*, the European Communities "once again"[563] has failed to demonstrate that the risk assessment underlying Directive 2003/74/EC satisfies the requirements of the *SPS Agreement*.

254. New Zealand argues that, as the Member invoking Article 5.7, the European Communities bears the burden of demonstrating that the four requirements of Article 5.7 have been met, including the requirement that the measure be imposed in a situation where relevant scientific evidence is "insufficient".[564] New Zealand recalls the Appellate Body's finding that these four requirements are "cumulative"[565], and that, whenever one of them is not met, the measure at issue is inconsistent with Article 5.7. New Zealand asserts that European Communities has failed to demonstrate that it has satisfied any of the requirements under Article 5.7 with respect to Directive 2003/74/EC.

[557] *Ibid.*, para. 3.46 (referring to Appellate Body Report, *EC –Hormones*, para. 193).
[558] New Zealand's third participant's submission, para. 3.52.
[559] *Ibid.* (referring to Appellate Body Report, *EC – Hormones*, para. 183). (emphasis omitted)
[560] *Ibid.*, para. 3.53 (quoting Appellate Body Report, *EC – Hormones*, para. 186).
[561] *Ibid.*, para. 3.54 (quoting Panel Report, *Japan – Apples*, para. 8.236).
[562] *Ibid.*, para. 3.55 (quoting Appellate Body Report, *EC – Hormones*, para. 208).
[563] *Ibid.*, para. 3.56.
[564] *Ibid.*, para. 3.58 (referring to Panel Report, *Japan – Apples*, para. 8.212). In addition, the other requirements are: (i) the provisional SPS measure must be adopted on the "basis of available pertinent information"; (ii) the Member seeks to "obtain the additional information necessary for a more objective risk assessment"; and (iii) the Member reviews the measure "accordingly within a reasonable period of time".
[565] *Ibid.*, para. 3.59 (referring to Appellate Body Report, *Japan – Agricultural Products II*, para. 89).

7. Norway

(a) Procedural Issue – Public Observation of the Oral Hearing

255. Norway supports the participants' request that the Appellate Body allow public observation of the oral hearing in these proceedings. Norway asserts that the meaning of the term "proceedings" in isolation is not unequivocal, and resort must be had to context and object and purpose as set out in Article 31(1) of the *Vienna Convention on the Law of Treaties*[566] (the "*Vienna Convention*"). Turning to Articles 17.5 and 17.12 of the DSU as context, Norway recognizes that these provisions use the term "proceedings" "as 'short-hand' for all stages in an appeal", but it considers that this is "not dispositive in itself".[567] Norway also recognizes that Article 17.10 is drafted differently from Article 14.1, which uses the term "deliberations", but it does not consider that this implies that the term "proceedings" in the first sentence of Article 17.10 must be read to require confidentiality of the oral hearing before the Appellate Body. Norway asserts that it "cannot see that the object and purpose of Article 17.10 is different from [that of] Article 14.1 of the DSU, which is to protect the internal work of panels" and argues that "[t]he object and purpose thus indicates that the term 'proceedings' in Article 17.10 should be given a restrictive interpretation, focussing on the internal work of the Appellate Body, and not encompass[ing] the oral hearing."[568] Norway submits that a restrictive interpretation of "proceedings" is also supported by the Spanish and French versions of the DSU referring to the term "*actuaciones*" in Spanish and the term "*travaux*" in French, in accordance with Article 33 of the *Vienna Convention*. Norway finds further support for a restrictive interpretation of the term "proceedings" in the fact that Article 18.2 specifically authorizes parties to a dispute to disclose their submissions and statements to the public. In Norway's view, Article 18.2 cannot be interpreted to require "more confidentiality than the parties require".[569]

256. Norway thus considers that the DSU allows the Appellate Body to open the oral hearing to the public where all participants to the dispute so request and that the Appellate Body has discretion under Rule 16(1) of the *Working Procedures* to respond favourably to the request. Norway states that allowing public observation will bring the Appellate Body more into line with other international tribunals where "open hearings is the norm".[570] Norway further considers that allowing public observation "will be beneficial to the process and to the legitimacy of the Appellate Body's work".[571]

(b) Articles 21, 22, and 23 of the DSU

257. Norway maintains that Article 22.8 of the DSU requires that the suspension of concessions be temporary and conditional. Norway emphasizes that once compliance is achieved, be it through a simple revocation of the inconsistent measure or its replacement with another measure that ensures compliance, the right to suspend concessions "*automatically* lapses"[572] without a need for formal revocation of the authorization by the DSB. Norway submits that, where the parties disagree as to whether the measure taken to comply actually achieves compliance, as is the case in this dispute, the parties must resort to Article 21.5 panel proceedings. Once a panel (and the Appellate Body, if the panel report is appealed) determines that the implementing measure brings the Member concerned into compliance with the recommendations and rulings of the DSB, "the previous authorization [to

[566] Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.
[567] Norway's comments on participants' request for an open hearing, para. 15.
[568] *Ibid.*, para. 23.
[569] *Ibid.*, para. 37.
[570] *Ibid.*, para. 39.
[571] *Ibid.*
[572] Norway's third participant's submission, para. 6. (original emphasis)

suspend concessions] lapses *ipso facto* once the report is adopted, without there being a need for the DSB to revoke it formally as the temporal condition ... no longer exists".[573]

258. Norway further submits that a presumption of good faith compliance is applicable under the DSU, and the original complainant who considers that the measure taken to comply fails to achieve compliance has an obligation to initiate Article 21.5 proceedings. Noting that Articles 22.8 and 21.5 do not set forth any time-limits for initiating Article 21.5 proceedings, Norway claims that this does not mean that the original complainant may simply refuse to launch such proceedings. In Norway's view, beyond a certain point in time, Article 23.2(a) may be breached. To avoid unreasonable delays, Article 21.5 should be interpreted to allow both the original complainant and the original respondent to initiate Article 21.5 proceedings. Norway contends that Article 21.5 is written in the passive form without specifying which party may initiate the proceedings and, consequently, this provision allows both parties to launch Article 21.5 proceedings. The fact that the compliance panel report in *EC – Bananas III (Article 21.5 – EC)* remained unadopted, and that the panel refused to make any recommendations or rulings, does not in itself prove that an original respondent may not invoke Article 21.5, because that case involved particular circumstances that explain the outcome.

259. Norway explains that, in Article 21.5 proceedings launched by the original respondent, the panel may not "make a declaratory judgment based on the presentation of the original respondent, but must make an objective assessment of the matter before it."[574] However, where the original complainant refuses to participate, any claim that the new measure is inconsistent with other provisions of the covered agreements will not be heard. In such proceedings, the original respondent may be considered as a "complainant" for purposes of Article 6.1 and an "applicant" for purposes of Article 6.2 of the DSU. The requirements of Article 6.2 can be fulfilled by referring to the original panel and Appellate Body reports, together with the identification of the specific measure taken to comply and a description of how it ensures compliance. Norway adds that, in such proceedings, "[o]nly the violations specifically addressed"[575] in the panel and Appellate Body reports in the original dispute will be within the Article 21.5 panel's terms of reference. This is because the original respondent does not complain about specific violations by other Members, but asks for a "declaratory finding"[576] of compliance with the DSB's recommendations and rulings in the original dispute. By not launching Article 21.5 panel proceedings first, the original complainant loses certain rights to present new claims that it would have been able to include in the panel's terms of reference if it had initiated the Article 21.5 proceedings and submitted the request for the establishment of a panel. Consequently, Norway submits that allowing the original respondent to launch Article 21.5 proceedings would provide the original complainants with the incentive to launch Article 21.5 panel proceedings first.

8. Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

260. Pursuant to Rule 24(2) of the *Working Procedures*, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu chose not to submit a third participant's submission.

261. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu supports the request of the participants to allow public observation of the oral hearing in these proceedings "in the interests of greater transparency".[577]

[573] *Ibid.*, para. 7.
[574] *Ibid.*, para. 15.
[575] Norway's third participant's submission, para. 17.
[576] *Ibid.*, para. 18.
[577] Comments of Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on participants' request for an open hearing, p. 1.

III. Issues Raised in This Appeal

262. The following issues are raised on appeal by the European Communities:

(a) Whether the Panel erred in failing to find that the United States and Canada had to initiate proceedings pursuant to Article 21.5 of the DSU in order to comply with their obligations, under Articles 23.1 and 23.2(a), to have recourse to the rules and procedures of the DSU;

(b) Whether the Panel erred in finding that Article 22.8 of the DSU was not breached by the United States and Canada because the European Communities has failed to comply with the recommendations and rulings of the DSB in *EC – Hormones*, which underlie the authorization given to the United States and Canada to suspend concessions and other obligations;

(c) Whether the Panel exceeded its terms of reference by examining the compatibility of Directive 2003/74/EC[578] with Articles 5.1 and 5.7 of the *SPS Agreement*;

(d) Whether the Panel erred by failing to make the suggestion, pursuant to its authority under Article 19.1 of the DSU, that the United States and Canada cease the suspension of concessions and resort to Article 21.5 proceedings, or any other proceedings to which the parties may agree, to resolve any disagreements as to the consistency of Directive 2003/74/EC with the *SPS Agreement*;

(e) Whether the Panel failed to respect the principle of due process, and therefore failed to comply with its duties under Article 11 of the DSU, in selecting, and relying upon the advice of, two experts who were not "independent and impartial" as required by the *Rules of Conduct*;

(f) Whether the Panel erred in interpreting and applying Article 5.1 of the *SPS Agreement* in assessing the consistency of the import ban on meat from cattle treated with oestradiol-17β for growth-promotion purposes, applied pursuant to Directive 2003/74/EC, in particular by:

  (i) adopting a narrow interpretation of "risk assessment" and failing to take into account evidence on misuse and abuse in the administration of hormones;

  (ii) requiring the European Communities to evaluate specifically the risks arising from the presence of residues of oestradiol-17β in meat or meat products as a result of the cattle being treated with this hormone for growth-promotion purposes;

  (iii) imposing a quantitative method of risk assessment on the European Communities;

  (iv) incorrectly allocating the burden of proof; and

[578] Directive 2003/74/EC of the European Parliament and of the Council of 22 September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists, *Official Journal of the European Union*, L Series, No. 262 (14 October 2003) 17 (Exhibits EC-1 and US-3 submitted by the European Communities and the United States, respectively, to the Panel).

(v) failing to make an objective assessment of the matter before it, as required by Article 11 of the DSU, by articulating and applying an incorrect standard of review.

(g) Whether the Panel erred in interpreting and applying Article 5.7 of the *SPS Agreement* when assessing the consistency of the provisional import ban on meat from cattle treated with testosterone, progesterone, trenbolone acetate, zeranol, and melengestrol acetate ("MGA") for growth-promotion purposes, applied under Directive 2003/74/EC. More specifically, whether the Panel erred in finding that the relevant scientific evidence was insufficient because it:

(i) incorrectly found that the determination of whether the relevant scientific evidence is insufficient "must be disconnected" from the chosen level of protection;

(ii) articulated and applied an incorrect legal test pursuant to which, where international standards exist for a substance, a "critical mass of new scientific evidence" is required to render the relevant scientific evidence "insufficient";

(iii) incorrectly allocated the burden of proof; and

(iv) failed to make an objective assessment of the matter before it, as required by Article 11 of DSU.

263. The following issues are raised on appeal by the United States and Canada:

(a) Whether the Panel erred in finding that the United States and Canada were seeking the redress of a violation within the meaning of Article 23.1 of the DSU, by maintaining the suspension of concessions after the notification of Directive 2003/74/EC by the European Communities;

(b) Whether the Panel erred in finding that the United States and Canada made a unilateral determination that Directive 2003/74/EC is not consistent with the WTO agreements without recourse to the rules and procedures of the DSU, in breach of Article 23.2(a) of the DSU.

264. In the event that the Appellate Body were to uphold the Panel's finding that the United States and Canada acted inconsistently with Articles 23.2(a) and 23.1 of the DSU, the United States and Canada conditionally appeal the following issues:

(a) Whether the Panel erred in concluding that it was not called upon, and hence did not have jurisdiction, to determine the compatibility of Directive 2003/74/EC with Articles 5.1 and 5.7 of the *SPS Agreement*;

(b) Whether the Panel erred in suggesting, pursuant to Article 19.1 of the DSU, that the United States and Canada have recourse to the rules and procedures of the DSU without delay.

IV. The Application of the DSU in the Post-Suspension Stage of a Dispute

A. *Introduction*

265. We begin with the issues raised on appeal by Canada, the European Communities, and the United States relating to the interpretation and application of several provisions of the DSU in the post-suspension stage of a dispute. This stage refers to the period after a WTO Member has suspended concessions or other obligations to another Member[579], having received authorization to do so from the DSB. The authorization to suspend concessions stems from the other Member's failure to bring into compliance measures that have been found to be inconsistent with the covered agreements by a panel or the Appellate Body.

266. This appeal relates to the *EC – Hormones* dispute in which, following a complaint by the United States and Canada, the ban imposed by the European Communities on imports of meat from cattle treated with growth-promoting hormones, pursuant to Directive 96/22/EC, was found to be inconsistent with the *SPS Agreement*.[580] Because the European Communities failed to bring itself into compliance within the reasonable period of time, which expired on 13 May 1999[581], the United States and Canada requested the DSB to authorize suspension of concessions pursuant to Article 22.2 of the DSU.[582] The United States and Canada obtained authorization from the DSB to suspend concessions in relation to the European Communities on 26 July 1999, following an arbitration at the European Communities' request.[583] On 29 July 1999, the United States applied 100 per cent import duties on a range of imports from certain member States of the European Communities.[584] On 1 August 1999, Canada applied 100 per cent *ad valorem* duties on a similar range of imports from the European Communities.[585]

267. After the adoption of the panel and Appellate Body reports in the *EC – Hormones* dispute, the European Commission commissioned 17 scientific studies to assess the risks to human health posed by the six hormones at issue.[586] On the basis of these studies and additional scientific information made available to the European Commission, the Scientific Committee on Veterinary Measures relating to Public Health (the "SCVPH") issued three Opinions in 1999, 2000, and 2002 concerning risks to human health posed by the six hormones.[587] In the light of these Opinions, the European Communities adopted Directive 2003/74/EC on 22 September 2003[588], which amends Directive 96/22/EC. Directive 2003/74/EC maintains the permanent prohibition on the importation of meat and meat products from animals treated with oestradiol-17β for growth-promotion purposes originally contained in Directive 96/22/EC.[589] In relation to the five other hormones—testosterone, progesterone, trenbolone acetate, zeranol, and MGA—Directive 2003/74/EC imposes the prohibition on a provisional basis.[590] Directive 2003/74/EC specifies that, even though the scientific information available showed the existence of risks associated with these substances, "the current state of

[579] We will use the term "suspension of concessions" as an abbreviated reference to "the suspension of concessions or other obligations".
[580] Appellate Body Report, *EC – Hormones*, para. 253.
[581] Award of the Arbitrator, *EC – Hormones*, para. 48.
[582] WT/DS26/19; WT/DS48/17.
[583] Decision by the Arbitrators, *EC – Hormones (Article 22.6 – United States)*, para. 84; Decision by the Arbitrators, *EC – Hormones (Article 22.6 – Canada)*, para. 73. See also WT/DS26/20; WT/DS48/18.
[584] See *supra*, footnote 17.
[585] See *supra*, footnote 18.
[586] See *supra*, footnote 19.
[587] See *supra*, footnotes 20, 21, and 22.
[588] See *supra*, footnote 5.
[589] Directive 2003/74/EC, *supra*, footnote 5, Recital 10 and Article 1 (amending Articles 2 and 3 of Directive 96/22/EC).
[590] *Ibid.*

knowledge does not make it possible to give a quantitative estimate of the risk to consumers".[591] The prohibition of these five hormones applies "while the Community seeks more complete scientific information from any source, which could shed light and clarify the gaps in the present state of knowledge of these substances".[592]

268. On 27 October 2003, the European Communities notified the DSB of the adoption, publication, and entry into force of Directive 2003/74/EC, as well as the 1999, 2000, and 2002 Opinions, which it considered provided a sufficient justification for the permanent and provisional prohibitions on the importation of meat from cattle treated with the six hormones under the *SPS Agreement*.[593] The European Communities therefore claimed that it had fully implemented the DSB's recommendations and rulings in the original *EC – Hormones* dispute, and consequently considered that the suspension of concessions by the United States and Canada was no longer justified. The United States and Canada refused to lift the suspension of concessions imposed pursuant to the authorization obtained from the DSB, because they did not consider that Directive 2003/74/EC had brought the European Communities into compliance with the DSB's recommendations and rulings.[594] The European Communities initiated the present proceedings alleging that the United States and Canada acted inconsistently with their obligations under the DSU by continuing the suspension of concessions.[595]

269. A summary of the findings of the Panel is provided in section B and the claims and arguments raised on appeal are described in section C. In sections D and E we address the claims raised by the European Communities, including whether Article 22.8 of the DSU required the United States and Canada to cease the application of the suspension of concessions upon the European Communities' notification of Directive 2003/74/EC, and whether the United States and Canada were required to initiate Article 21.5 proceedings if they did not consider that Directive 2003/74/EC is consistent with the covered agreements. Section F addresses the claims raised by the United States and Canada in their other appeals concerning the Panel's findings that they breached Articles 23.2(a) and 23.1 of the DSU by seeking the redress of a violation without recourse to the rules and procedures of the DSU. Section G addresses the conditional claims raised by the United States and Canada in relation to the Panel's finding that it did not have jurisdiction to determine the compatibility of Directive 2003/74/EC with the covered agreements. Finally, section H addresses the issues raised by all three participants concerning the suggestion made by the Panel pursuant to Article 19.1 of the DSU.

B. *The Panel's Findings*

1. Scope of the European Communities' Claims

270. Before the Panel, the European Communities raised "two sets of main claims" against the continued suspension of concessions by the United States and Canada. It asserted that the continued suspension is inconsistent with: (i) Article 23.2(a), read together with Articles 21.5 and 23.1 of the DSU; and (ii) Article 23.1, read in conjunction with Articles 22.8 and 3.7 of the DSU. In addition, the European Communities raised claims under Articles I and II of the GATT 1994.[596] In the event

[591]Directive 2003/74/EC, *supra*, footnote 5, Recital 7.
[592]*Ibid*., Recital 10.
[593]WT/DS26/22; WT/DS48/20.
[594]WT/DSB/M/157; WT/DSB/M/159.
[595]In December 2004, the United States requested information from the European Communities pursuant to Article 5.8 of the *SPS Agreement* concerning the justification underlying Directive 2003/74/EC. (Panel Report, *US – Continued Suspension*, para. 7.227) The Panel was established on 14 January 2005 at the European Communities' request. (Panel Report, *US – Continued Suspension*, para. 1.2; Panel Report, *Canada – Continued Suspension*, para. 1.2)
[596]Panel Report, *US – Continued Suspension*, para. 3.1; Panel Report, *Canada – Continued Suspension*, para. 3.2.

that the Panel found no violation of Article 23 of the DSU, the European Communities claimed, in the alternative, that the continued suspension by the United States and Canada is inconsistent with Article 22.8 of the DSU.[597]

271. At the outset of its analysis, the Panel made some preliminary remarks concerning the scope of its mandate. The Panel recalled that the matter before it was the alleged failure of the United States and Canada to comply with their obligations under the DSU by maintaining the suspension of concessions authorized by the DSB in the *EC – Hormones* dispute, even though the European Communities had adopted Directive 2003/74/EC and notified this Directive to the DSB as the measure taken to comply.[598] The Panel noted that, in its first written submission, the European Communities divided its claims into "two main sets of claims" and one conditional claim. Under the first set of claims, the European Communities alleged that the United States and Canada, by maintaining the suspension of concessions, were seeking redress of a perceived violation by the European Communities of the covered agreements without recourse to the rules and procedures of the DSU, in breach of Article 23.2(a), read in conjunction with Articles 21.5 and 23.1 of the DSU.[599] Under the second set of claims, the European Communities submitted that, because it should be *presumed* to have complied in good faith with the DSB's recommendations and rulings by adopting and notifying Directive 2003/74/EC, the continued application of the suspension of concessions by the United States and Canada is also inconsistent with Article 23.1, read together with Articles 22.8 and 3.7 of the DSU.[600] Finally, in the event that the Panel was not to find "any violation under Articles 23.1, 23.2(a), 3.7, 22.8, and 21.5 of the DSU"[601], the European Communities raised a conditional claim alleging that the United States and Canada violated Article 22.8 of the DSU *per se* because, by adopting Directive 2003/74/EC, the European Communities had achieved *actual* (rather than *presumed*) compliance requiring termination of the suspension of concession in accordance with Article 22.8.[602]

272. The Panel considered that this approach, although not specified in the European Communities' request for the establishment of a panel, "is actually a clarification of the claims listed in its request for the establishment of a panel and not arguments".[603] Thus, the Panel considered that the approach outlined in the European Communities' first written submission constituted part of the Panel's terms of reference.[604] The Panel therefore decided that it would address the two main claims as elaborated by the European Communities in its first written submission, and would address the conditional claim only if the European Communities failed to establish its two main claims.[605]

[597]Panel Report, *US – Continued Suspension*, para. 3.2; Panel Report, *Canada – Continued Suspension*, para. 3.2.
[598]Panel Report, *US – Continued Suspension*, paras. 7.150 and 7.151; Panel Report, *Canada – Continued Suspension*, paras. 7.137 and 7.138.
[599]Panel Report, *US – Continued Suspension*, paras. 7.153 and 7.183; Panel Report, *Canada – Continued Suspension*, paras. 7.140 and 7.165.
[600]Panel Report, *US – Continued Suspension*, paras. 7.153 and 7.252; Panel Report, *Canada – Continued Suspension*, paras. 7.140 and 7.245.
[601]Panel Report, *US – Continued Suspension*, para. 7.155; Panel Report, *Canada – Continued Suspension*, para. 7.142.
[602]Panel Report, *US – Continued Suspension*, para. 7.156; Panel Report, *Canada – Continued Suspension*, para. 7.143.
[603]Panel Report, *US – Continued Suspension*, para. 7.163; Panel Report, *Canada – Continued Suspension*, para. 7.150.
[604]Panel Report, *US – Continued Suspension*, para. 7.164; Panel Report, *Canada – Continued Suspension*, para. 7.151.
[605]Panel Report, *US – Continued Suspension*, para. 7.164; Panel Report, *Canada – Continued Suspension*, para. 7.151.

2. The European Communities' Claim that the United States and Canada Breached Article 23.2(a) of the DSU Read Together with Articles 23.1 and 21.5

273. The Panel first examined the European Communities' claim under Article 23.2(a), read together with Articles 23.1 and 21.5 of the DSU. The Panel referred to the phrase "[i]n such cases", which connects paragraphs 1 and 2 of Article 23, and observed that this phrase indicated that it would have to determine whether the conditions of Article 23.1 were met before it could assess whether the United States and Canada breached Article 23.2(a) of the DSU. In the Panel's view, "Article 23.1 applies in this case only with respect to a determination against a measure which has not yet been subject to a recourse to the rules and procedures of the DSU."[606] According to the Panel, Directive 2003/74/EC is such a measure.[607] Noting that Directive 2003/74/EC, like the measure it replaced, imposed an import ban, the Panel recalled that it is not the import ban on meat treated with hormones, but rather the justification for this ban, that was found to be inconsistent with the *SPS Agreement* in *EC – Hormones*. Therefore, the Panel "d[id] not consider that the fact that the ban remains in place means that no new measure has been adopted".[608] The Panel further found that, although the United States and Canada were authorized to suspend concessions, such "'authorization by the DSB' does not mean [an] 'obligation to suspend concessions'."[609] Thus, in the Panel's view, "the fact that, after the European Communities' notification of Directive 2003/74/EC", the United States and Canada "continue[] to apply [their] suspension of concessions even though [they have] no obligation to do so is evidence" that the United States and Canada are "actively" seeking the redress of a violation within the meaning of Article 23.1.[610]

274. Having found that the conditions for the applicability of Article 23.1 were met, the Panel proceeded to examine whether the United States and Canada had "ma[d]e a determination to the effect that a violation has occurred" within the meaning of Article 23.2(a) in respect of Directive 2003/74/EC. The Panel observed that statements made at two DSB meetings concerning the notification of Directive 2003/74/EC indicated that the United States and Canada reached "a more or less final decision"[611] that the new Directive fails to implement the DSB's recommendations and rulings in *EC – Hormones* and is inconsistent with the *SPS Agreement*. Such statements, in the Panel's view, constitute a "determination" under Article 23.2(a) of the DSU.[612] The Panel added that, even if such statements were considered provisional, "the subsequent continuation of the suspension of concessions by [the United States and Canada] without alteration and without saying that [they were] still studying [Directive 2003/74/EC]" confirms that they made such a "determination".[613] The Panel further found that, because the DSB's authorization to suspend concessions does not apply to Directive 2003/74/EC[614] and does not amount to "a multilateral determination of inconsistency"

[606]Panel Report, *US – Continued Suspension*, para. 7.205; Panel Report, *Canada – Continued Suspension*, para. 7.197.
[607]Panel Report, *US – Continued Suspension*, para. 7.206; Panel Report, *Canada – Continued Suspension*, para. 7.198.
[608]Panel Report, *US – Continued Suspension*, para. 7.207; Panel Report, *Canada – Continued Suspension*, para. 7.199.
[609]Panel Report, *US – Continued Suspension*, para. 7.209; Panel Report, *Canada – Continued Suspension*, para. 7.201.
[610]Panel Report, *US – Continued Suspension*, para. 7.209; Panel Report, *Canada – Continued Suspension*, para. 7.201.
[611]Panel Report, *US – Continued Suspension*, para. 7.222; Panel Report, *Canada – Continued Suspension*, para. 7.215 (quoting Panel Report, *US – Section 301 Trade Act*, footnote 657 to para. 7.50).
[612]Panel Report, *US – Continued Suspension*, paras. 7.225 and 7.226; Panel Report, *Canada – Continued Suspension*, paras. 7.219, 7.222, and 7.223.
[613]Panel Report, *US – Continued Suspension*, para. 7.230; Panel Report, *Canada – Continued Suspension*, para. 7.224.
[614]Panel Report, *US – Continued Suspension*, para. 7.234; Panel Report, *Canada – Continued Suspension*, para. 7.228.

regarding that Directive[615], the United States and Canada failed to make a determination through recourse to the rules and procedures of the DSU, in violation of Article 23.2(a) of the DSU. Because the United States and Canada "ha[d] not made any determination through recourse to dispute settlement in accordance with the rules and procedures of the DSU," the Panel concluded *a fortiori* that the United States and Canada "ha[d] failed to make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under the DSU."[616] Therefore, the Panel found that the United States and Canada had breached Article 23.2(a) of the DSU.[617]

275. Next, the Panel turned to the European Communities' claim that the United States and Canada were required to initiate Article 21.5 proceedings if they considered that Directive 2003/74/EC was not consistent with the covered agreements. The Panel stated that recourse to the rules and procedures of the DSU, within the meaning of Article 23.2(a), "encompasses any of the means of dispute settlement provided in the DSU, including consultation, conciliation, good offices and mediation"[618] and is not limited to panel proceedings under Article 21.5 of the DSU. On this basis, the Panel "[did] not find it necessary to make a finding on whether [the United States and Canada] breached Article 21.5 by not having recourse to the procedure under that provision".[619]

276. On the basis of the above, the Panel concluded that the United States and Canada:

> violated Article 23.1 and 23.2(a) of the DSU by seeking redress of a violation of the WTO Agreement through a determination that the [European Communities'] implementing measure did not comply with the DSB recommendations and rulings in the *EC – Hormones* case without having recourse to dispute settlement in accordance with the rules and procedures of the DSU.[620]

3. The European Communities' Claim that the United States and Canada Breached Article 23.1 of the DSU Read Together with Articles 22.8 and 3.7

277. The Panel then turned to the European Communities' claim that the United States and Canada breached Article 23.1, read together with Articles 22.8 and 3.7 of the DSU, by continuing the suspension of concession even though the measure found to be inconsistent in *EC – Hormones* had been removed. The Panel observed that its earlier findings that the United States and Canada committed a "procedural error under the DSU [and] breached Articles 23.1 and 23.2(a)"[621] were "completely unrelated to whether the European Communities implemented the DSB recommendations and rulings"[622] in *EC – Hormones* in substance. In contrast, the Panel found that the European Communities' allegation of violations of Articles 22.8, 23.1, and 3.7 of the DSU was premised on the

[615]Panel Report, *US – Continued Suspension*, para. 7.242; Panel Report, *Canada – Continued Suspension*, para. 7.235.
[616]Panel Report, *US – Continued Suspension*, para. 7.244; Panel Report, *Canada – Continued Suspension*, para. 7.237. (emphasis omitted)
[617]Panel Report, *US – Continued Suspension*, para. 7.245; Panel Report, *Canada – Continued Suspension*, para. 7.238.
[618]Panel Report, *US – Continued Suspension*, para. 7.247; Panel Report, *Canada – Continued Suspension*, para. 7.240.
[619]Panel Report, *US – Continued Suspension*, para. 7.249; Panel Report, *Canada – Continued Suspension*, para. 7.242.
[620]Panel Report, *US – Continued Suspension*, para. 7.251; Panel Report, *Canada – Continued Suspension*, para. 7.244.
[621]Panel Report, *US – Continued Suspension*, para. 7.270; Panel Report, *Canada – Continued Suspension*, para. 7.286.
[622]Panel Report, *US – Continued Suspension*, para. 7.272; Panel Report, *Canada – Continued Suspension*, para. 7.288.

"*conformity* (presumed or actual) with the *SPS Agreement*"[623] of Directive 2003/74/EC. This is because, in the Panel's view, the phrase "until such time as the measure found to be inconsistent ... has been removed" in Article 22.8 implies that what is to be achieved is not the removal of the measure, but actual compliance with the DSB's recommendations and rulings.[624] Thus, Article 22.8 may be breached "only if the European Communities has complied with the recommendations and rulings of the DSB and [the United States and Canada] failed to immediately remove [their] suspension of concessions or other obligations."[625]

278. With respect to the European Communities' argument that it should benefit from "a presumption of good faith compliance"[626] regarding Directive 2003/74/EC, the Panel acknowledged that, under general international law, States enjoy a presumption of good faith in the performance of their treaty obligations.[627] Nevertheless, the Panel found that this presumption does not mean that the European Communities "actually complied with its treaty obligations"[628] and additionally observed that the United States and Canada may also invoke the presumption of good faith with regard to their respective measures.[629] Turning to the text of the DSU, the Panel found that "there is no express exclusion of the application of the principle of good faith in the DSU".[630] The Panel then rejected the United States' and Canada's argument that "the presumption of good faith compliance cannot supersede the multilateral authorization of the DSB ... to suspend concessions."[631] According to the Panel, "the removal of the measure found to be inconsistent with a covered agreement supersedes the DSB authorization to suspend concessions", because nothing in Article 22.8 of the DSU suggests that a Member suspending concessions can continue to do so as long as the authorization has not been repealed by the DSB.[632]

279. Next, the Panel examined the European Communities' argument that the presumption of good faith compliance is only rebuttable by recourse to Article 21.5 by the United States and Canada. In examining this argument, the Panel considered it important "to determine the extent to which the unavailability of any legal recourse for the European Communities in a post retaliation situation may justify that the presumption of good faith compliance be irrebuttable, except through recourse to the procedure provided in Article 21.5 of the DSU."[633] The Panel noted, first, that "nowhere does the DSU provide that a presumption of good faith compliance should be rebuttable only through recourse

[623]Panel Report, *US – Continued Suspension*, para. 7.272; Panel Report, *Canada – Continued Suspension*, para. 7.288.
[624]Panel Report, *US – Continued Suspension*, para. 7.284; Panel Report, *Canada – Continued Suspension*, para. 7.300.
[625]Panel Report, *US – Continued Suspension*, para. 7.285; Panel Report, *Canada – Continued Suspension*, para. 7.301.
[626]Panel Report, *US – Continued Suspension*, para. 7.310; Panel Report, *Canada – Continued Suspension*, para. 7.310.
[627]Panel Report, *US – Continued Suspension*, para. 7.318; Panel Report, *Canada – Continued Suspension*, para. 7.318.
[628]Panel Report, *US – Continued Suspension*, para. 7.322; Panel Report, *Canada – Continued Suspension*, para. 7.322.
[629]Panel Report, *US – Continued Suspension*, para. 7.323; Panel Report, *Canada – Continued Suspension*, para. 7.323.
[630]Panel Report, *US – Continued Suspension*, para. 7.336; Panel Report, *Canada – Continued Suspension*, para. 7.336.
[631]Panel Report, *US – Continued Suspension*, para. 7.342; Panel Report, *Canada – Continued Suspension*, para. 7.342.
[632]Panel Report, *US – Continued Suspension*, para. 7.343; Panel Report, *Canada – Continued Suspension*, para. 7.343.
[633]Panel Report, *US – Continued Suspension*, para. 7.348; Panel Report, *Canada – Continued Suspension*, para. 7.346.

to Article 21.5 of the DSU."[634] Secondly, the Panel observed that "it appears that, even under the current DSU, several means seem *a priori* to be available to the European Communities to obtain termination of the suspension of concessions or other obligations", including good offices and consultations, Article 21.5 proceedings, arbitration under Article 25 of the DSU, and recourse to regular panel procedures (as the European Communities had done in the present case).[635] For these reasons, the Panel rejected the European Communities' argument "that the presumption of good faith compliance which the European Communities enjoys should be rebuttable only through a recourse by the complainants in the original case to Article 21.5 of the DSU."[636] The Panel was not persuaded that Article 21.5 is the "only avenue" for addressing "a claim of compliance by a Member alleging to have complied with DSB recommendations and rulings", nor that Article 21.5 proceedings are "open only to the original complainant".[637]

280. The Panel concluded:

> while we agree with the existence of a presumption of good faith compliance, we do not agree with the European Communities that the presumption of good faith that it enjoys may only be rebutted in an Article 21.5 procedure. We find, on the contrary, that this presumption, because it applies to measures taken by all parties, must be rebuttable before this Panel. Just as the [European Communities'] allegations are intended to rebut the presumption of good faith conformity of the [United States and Canadian] retaliatory measures with Article 22.8 of the DSU, [the United States and Canada] should be allowed to rebut the presumption of [European Communities'] compliance by proving actual non-compliance.[638]

[634]Panel Report, *US – Continued Suspension*, para. 7.349; Panel Report, *Canada – Continued Suspension*, para. 7.347.
[635]Panel Report, *US – Continued Suspension*, para. 7.350; Panel Report, *Canada – Continued Suspension*, para. 7.348. The Panel noted that the broad language ("such dispute shall be decided through recourse to these dispute settlement procedures") used in Article 21.5 "could be deemed to encompass any procedure available under the DSU for the resolution of disputes". The Panel, however, opined that "other terms in Article 21.5 support the view that the Article 21.5 procedure is actually a panel procedure with a shorter deadline" and read the phrase "including whenever possible resort to the original panel" not as meaning that resort to a panel is generally preferred, but as requesting resort to the panelists that served on the original case, rather than to other individuals. (Panel Report, *US – Continued Suspension*, para. 7.351; Panel Report, *Canada – Continued Suspension*, para. 7.349)
[636]Panel Report, *US – Continued Suspension*, para. 7.356; Panel Report, *Canada – Continued Suspension*, para. 7.354.
[637]Panel Report, *US – Continued Suspension*, para. 7.355; Panel Report, *Canada – Continued Suspension*, para. 7.353.
[638]Panel Report, *US – Continued Suspension*, para. 7.357(f); Panel Report, *Canada – Continued Suspension*, para. 7.355(f). The Panel clarified:

> In reaching these conclusions, we do not consider that we add to or diminish the rights and obligations of WTO Members. We do not apply the presumption of good faith compliance independently from the obligations of the European Communities under the WTO Agreement. The European Communities has an obligation to comply with the WTO Agreement in general and with the recommendations and rulings of the DSB and the general principle of good faith implies that the European Communities do so in good faith. In doing so we apply the principle of good faith consistently with WTO law and general public international law.

(Panel Report, *US – Continued Suspension*, para. 7.358; Panel Report, *Canada – Continued Suspension*, para. 7.356) (footnotes omitted)

281. The Panel noted that, by invoking a presumption of good faith compliance, the European Communities was supporting its claim that the United States and Canada acted inconsistently with Article 23.1, read together with Articles 22.8 and 3.7, because they failed to terminate the suspension of concessions upon the removal of the measure found to be inconsistent with a covered agreement within the meaning of Article 22.8.[639] Thus, having determined that the presumption of good faith compliance is rebuttable in these proceedings, the Panel observed that, "for all practical purposes, this amounts to addressing the [European Communities'] 'alternative' claim of violation of Article 22.8 *per se*."[640] The Panel, however, explained that "this is not the result of us merely disregarding the order in which the European Communities wanted us to review this case".[641] Rather, the Panel considered that it was "still reviewing the [European Communities'] claim of violation of Article 23.1, read together with Articles 22.8 and 3.7" and "not reviewing a claim of violation of Article 22.8 in isolation."[642]

4. The Panel's Jurisdiction

282. The Panel recognized that its "terms of reference do not include any provision of the *SPS Agreement*"[643] and that, as a consequence, it was not within its mandate to review the alleged violations of the *SPS Agreement* or to make findings under that Agreement. Nonetheless, the Panel found that it "should address the compatibility of [Directive 2003/74/EC] with the provisions of the *SPS Agreement* referred to by the parties to the extent necessary to determine, with respect to the [European Communities'] claim relating to Article 22.8, whether the [European Communities'] measure found to be inconsistent in the *EC – Hormones* case has been removed."[644] Therefore, the Panel considered "that these are sufficient reasons for it to conclude that it has jurisdiction to consider the compatibility of the [European Communities'] implementing measure with the *SPS Agreement* as part of its review of the claim raised by the European Communities with respect to Article 22.8 of the DSU."[645] The Panel recognized that it was difficult for the European Communities to "identify all potential problems of incompatibility".[646] Instead, the Panel considered it "preferable, both from a legal and practical point of view, to consider *all* the allegations and arguments raised by each party, as long as the other party had the opportunity to comment on those allegations and arguments".[647] On this basis, the Panel found that it could review the compatibility of the Directive 2003/74/EC with Articles 5.1, 5.2[648], 5.7, and 3.3 of the *SPS Agreement*.[649]

[639]Panel Report, *US – Continued Suspension*, para. 7.332; Panel Report, *Canada – Continued Suspension*, para. 7.332.
[640]Panel Report, *US – Continued Suspension*, para. 7.359; Panel Report, *Canada – Continued Suspension*, para. 7.357.
[641]Panel Report, *US – Continued Suspension*, para. 7.359; Panel Report, *Canada – Continued Suspension*, para. 7.357.
[642]Panel Report, *US – Continued Suspension*, para. 7.359; Panel Report, *Canada – Continued Suspension*, para. 7.357.
[643]Panel Report, *US – Continued Suspension*, para. 7.360; Panel Report, *Canada – Continued Suspension*, para. 7.358.
[644]Panel Report, *US – Continued Suspension*, para. 7.375; Panel Report, *Canada – Continued Suspension*, para. 7.372. The Panel was "mindful of the procedural problems raised by this approach", but did not consider that, by proceeding in this manner, it was exceeding its jurisdiction to the extent that such a review is necessary in order to address the European Communities' claims under Article 22.8. (*Ibid.*)
[645]Panel Report, *US – Continued Suspension*, para. 7.379; Panel Report, *Canada – Continued Suspension*, para. 7.376.
[646]Panel Report, *US – Continued Suspension*, para. 7.403; Panel Report, *Canada – Continued Suspension*, para. 7.400.
[647]Panel Report, *US – Continued Suspension*, para. 7.404; Panel Report, *Canada – Continued Suspension*, para. 7.401. (original emphasis)
[648]The Panel reviewed Article 5.2 of the *SPS Agreement* in *US – Continued Suspension* only, because Canada did not make a claim under this provision.

5. Burden of Proof

283. Regarding the allocation of burden of proof, the Panel stated that it was for the European Communities to prove its claim that the United States and Canada had breached Article 22.8 of the DSU.[650] This claim was premised on the removal by the European Communities of the measure that had been found to be inconsistent in *EC – Hormones* and on its allegation that Directive 2003/74/EC was consistent with the *SPS Agreement*. The Panel shared the European Communities' concern that this could generate for the original respondent at the beginning of the proceedings a situation "equivalent to having to 'prove a negative', since the spectrum of provisions against which the legality of the [European Communities'] measure may have to be reviewed remain[ed] very broad" as long as the original complainants had not made their own allegations of inconsistency of the implementing measure.[651] The Panel noted that the European Communities enjoyed a rebuttable presumption of good faith compliance and thus, once it had established a *prima facie* case on the basis of that presumption, the burden shifted to the United States and Canada to rebut that presumption. The Panel, however, considered that the United States and Canada "sufficiently refuted the [European Communities'] allegation of compliance"[652] with the *SPS Agreement* and, subsequently, the European Communities responded to the allegations of violation. Therefore, the Panel believed that the European Communities "never actually had to 'prove a negative' in this case."[653] In the Panel's view, the "presumptions based on good faith enjoyed by each party ... eventually 'neutralized' each other" such that ultimately, each party had to prove its specific allegations in response to the evidence submitted by the other party and the Panel followed the practice of other panels to weigh all the evidence before it.[654]

284. On this basis, the Panel went on to examine the consistency of Directive 2003/74/EC with the *SPS Agreement*, and found that "it has not been established that the European Communities has removed the measure found to be inconsistent with a covered agreement."[655] Consequently, the Panel concluded that the European Communities failed to demonstrate a breach of Article 22.8 of the DSU

[649]Panel Report, *US – Continued Suspension*, para. 7.411; Panel Report, *Canada – Continued Suspension*, para. 7.402.
[650]Panel Report, *US – Continued Suspension*, para. 7.383; Panel Report, *Canada – Continued Suspension*, para. 7.380. The Panel explained:

> With respect to the violation of Article 22.8 as such, the Panel considered that it had, in principle, no reason to address burden of proof any differently than any other panel established under Article 6 of the DSU. Indeed, as stated by the [European Communities] itself, this case is about a measure taken by [the United States and Canada, respectively]. The fact that this dispute takes place in the context of the [European Communities'] alleged compliance with the recommendations and rulings of the DSB in the *EC – Hormones* dispute should have no impact on the question of the burden of proof regarding the actual claim before us. This means that the principles identified by the Appellate Body above apply, and that the European Communities must prove its claim that [the United States and Canada] breach[] Article 22.8 of the DSU.

(Panel Report, *US – Continued Suspension*, para. 7.383; Panel Report, *Canada – Continued Suspension*, para. 7.380)
[651]Panel Report, *US – Continued Suspension*, para. 7.385; Panel Report, *Canada – Continued Suspension*, para. 7.382.
[652]Panel Report, *US – Continued Suspension*, para. 7.385; Panel Report, *Canada – Continued Suspension*, para. 7.382.
[653]Panel Report, *US – Continued Suspension*, para. 7.385; Panel Report, *Canada – Continued Suspension*, para. 7.382.
[654]Panel Report, *US – Continued Suspension*, para. 7.386; Panel Report, *Canada – Continued Suspension*, para. 7.383.
[655]Panel Report, *US – Continued Suspension*, para. 7.847; Panel Report, *Canada – Continued Suspension*, para. 7.832. The Panel's analysis is summarized *infra*, in sections VI and VII.

by the United States and Canada and thus there was no violation of Articles 23.1 and 3.7 of the DSU as a result of a breach of Article 22.8.[656]

6. The Panel's Suggestion

285. After setting out its conclusions, the Panel observed that the parties had "apparently diverging opinions as to how this report should be implemented by the respondent".[657] The Panel then noted that, although it had "performed functions similar to that of an Article 21.5 panel, this was done only in order to determine whether Article 22.8 of the DSU had been breached" and that it "was not called upon, nor [did] it have jurisdiction, to determine the compatibility of Directive 2003/74/EC with the covered agreements".[658] Thus, the Panel suggested that, "in order to implement its findings under Article 23 and in order to ensure the prompt settlement of this dispute, [the United States and Canada] should have recourse to the rules and procedures of the DSU without delay."[659]

C. *Claims and Arguments on Appeal*

1. Appeal by the European Communities

286. The European Communities raises three claims of error on appeal. First, the European Communities submits that the Panel erred by failing to find that Article 23.2(a), read together with Articles 21.5 and 23.1 of the DSU, required the United States and Canada to initiate Article 21.5 proceedings if they considered that Directive 2003/74/EC did not bring the European Communities into compliance with the DSB's recommendations and rulings in *EC – Hormones*.[660] The European Communities maintains that recourse to procedures under Article 21.5 is required in order to examine the consistency of Directive 2003/74/EC with the *SPS Agreement*, and Article 21.5 proceedings may only be initiated by the original complainants, in this case, the United States and Canada.[661] Secondly, the European Communities asserts that Article 22.8 required the termination of the suspension of concessions upon the adoption and the subsequent notification of Directive 2003/74/EC to the DSB.[662] Thus, the European Communities considers that the Panel erred in finding that its claim under Article 23.1, read together with Articles 22.8 and 3.7 of the DSU, was premised on the actual conformity of Directive 2003/74/EC with the *SPS Agreement*[663]; as a result, the Panel also erred in finding that the United States and Canada did not breach Article 22.8 of the DSU, even though they continued to suspend concessions without having recourse to Article 21.5. Thirdly, the European Communities alleges that the Panel went beyond its terms of reference and erroneously assumed the functions of an Article 21.5 panel by examining the compatibility of

[656]Panel Report, *US – Continued Suspension*, paras. 7.850 and 7.851; Panel Report, *Canada – Continued Suspension*, paras. 7.385 and 7.836. Having found a violation of Articles 23.2(a) and 23.1 of the DSU and addressed the alleged violation of Article 22.8 as part of its review of the European Communities' second main claim, the Panel considered it unnecessary to address the European Communities' conditional claim of violation of Article 22.8 of the DSU *per se* in the alternative. (Panel Report, *US – Continued Suspension*, paras. 7.855; Panel Report, *Canada – Continued Suspension*, para. 7.840)

[657]Panel Report, *US – Continued Suspension*, para. 8.3; Panel Report, *Canada – Continued Suspension*, para. 8.3.

[658]Panel Report, *US – Continued Suspension*, para. 8.3; Panel Report, *Canada – Continued Suspension*, para. 8.3.

[659]Panel Report, *US – Continued Suspension*, para. 8.3; Panel Report, *Canada – Continued Suspension*, para. 8.3.

[660]European Communities' appellant's submission, para. 94.

[661]*Ibid.*, paras. 49 and 73.

[662]*Ibid.*, para. 155.

[663]*Ibid.*, paras. 99 and 100 (referring to Panel Report, *US – Continued Suspension*, para. 7.272; and Panel Report, *Canada – Continued Suspension*, para. 7.288).

Directive 2003/74/EC with the *SPS Agreement*.[664] In addition to these three claims of error, the European Communities requests the Appellate Body to "improve"[665] the Panel's suggestion that the United States and Canada "should have recourse to the rules and procedures of the DSU without delay"[666], so as to make it clear that the United States and Canada must cease applying their suspension of concessions and have recourse to Article 21.5 of the DSU, or other dispute settlement proceedings to which the parties may agree, in order to seek multilateral resolution of any remaining disagreements over the European Communities' import ban.[667]

287. The United States maintains that the Panel correctly interpreted the phrase "recourse to dispute settlement in accordance with the rules and procedures of this Understanding" in Article 23.2(a) as encompassing all procedures under the DSU, rather than relating exclusively to Article 21.5 panel proceedings.[668] The United States further submits that Article 21.5 refers to "these dispute settlement procedures" without specifying any particular subset of the procedures provided in the DSU.[669] In addition, the United States argues that the Panel correctly interpreted Article 22.8 of the DSU when finding that the United States did not breach its obligation under that provision. The United States asserts that the European Communities "simply switched" the legal instruments underlying the import ban and, in so doing, failed to remove the ban, that is, the inconsistent measure within the meaning of Article 22.8.[670] The United States further claims that the European Communities specifically asked the Panel to review whether the United States acted inconsistently with Article 22.8. Thus, in order to adjudicate that claim, the Panel correctly interpreted and applied Article 22.8 by examining the consistency of Directive 2003/74/EC with the *SPS Agreement* and did not exceed its terms of reference.[671] Moreover, the United States argues that the Panel's suggestion does not require it to terminate the suspension of concessions. Finally, the United States observes that "improving" the suggestion, as requested by the European Communities, "is not within the purview of what the Appellate Body is called upon to do with respect to panel reports".[672]

288. Canada submits that, contrary to the European Communities' contentions, the Panel correctly found that "recourse to dispute settlement" within the meaning of Article 23.2(a) is not limited to Article 21.5 panel proceedings. Canada maintains that the European Communities' unilateral assertion of compliance regarding Directive 2003/74/EC does not compel Canada to initiate Article 21.5 proceedings, and does not require Canada to lift the suspension of concessions.[673] Canada alleges that the European Communities, as the original respondent, is not legally precluded from initiating Article 21.5 proceedings[674], and that other procedural avenues are also available to the European Communities, including new panel proceedings.[675] Canada further claims that the Panel correctly interpreted Article 22.8 by concluding that the phrase "until such time as the measure found to be inconsistent with a covered agreement has been removed" means that the inconsistency itself, and not only the originally impugned measure, has been removed.[676] Finally, Canada maintains that the Panel did not exceed its terms of reference in examining the consistency of Directive 2003/74/EC

[664]European Communities' appellant's submission, para. 175.

[665]*Ibid.*, para. 479.

[666]Panel Report, *US – Continued Suspension*, para. 8.3; Panel Report, *Canada – Continued Suspension*, para. 8.3.

[667]European Communities' appellant's submission, para. 480.

[668]United States' appellee's submission, para. 126.

[669]*Ibid.*, para. 127.

[670]*Ibid.*, para. 99.

[671]*Ibid.*, paras. 120 and 121.

[672]*Ibid.*, para. 140. The United States points out that "the Appellate Body, under Article 17.13, 'may uphold, modify, or reverse the legal findings and conclusions of the panel', but not its suggestions, which are made pursuant to Article 19.1 of the DSU."

[673]Canada's appellee's submission, para. 8.

[674]*Ibid.*, para. 11.

[675]*Ibid.*, paras. 14 and 15.

[676]*Ibid.*, paras. 25 and 26.

with the *SPS Agreement*. Rather, Canada asserts that, because the European Communities' claim that Canada breached Article 22.8 is premised on actual compliance by the European Communities, the Panel was required to review the consistency of Directive 2003/74/EC with the *SPS Agreement* to resolve the dispute.[677]

2. Other Appeals by the United States and Canada

289. The United States claims that the Panel erred in finding that the United States was "seeking the redress of a violation" within the meaning of Article 23.1 of the DSU through the continued suspension of concessions. The United States maintains that it "had extensive and lengthy recourse to multiple procedures under the DSU"[678] before obtaining the authorization of the DSB to suspend concessions on 26 July 1999, and this authorization to suspend concessions has never been revoked.[679] By finding that the United States was seeking the redress of a violation, the Panel "re-characteriz[ed]"[680], without any legal basis, the United States' suspension of concessions as directed against Directive 2003/74/EC. Furthermore, the United States takes issue with the Panel's finding that the United States' statements regarding Directive 2003/74/EC at DSB meetings constituted a "determination" within the meaning of Article 23.2(a) of the DSU. The United States maintains that such a "determination" cannot be inferred or implied, and the Panel erred in drawing such an inference from the United States' "inaction"[681] regarding the suspension of concessions. In the event that the Appellate Body upholds the Panel's findings under Articles 23.2(a) and 23.1, the United States requests reversal of the Panel's "erroneous suggestion"[682] that the United States "must have recourse to the rules and procedures of the DSU without delay". The United States contends that "recourse to the rules and procedures" of the DSU has already been achieved by the United States' participation in this dispute initiated by the European Communities.[683] The United States further submits that the Panel erred in concluding that it had no jurisdiction to rule on the compatibility of Directive 2003/74/EC with the *SPS Agreement*. Consequently, the Panel's findings regarding the inconsistency of Directive 2003/74/EC with the *SPS Agreement* should be considered "direct" findings and the conclusion that the United States needs to bring its measure into conformity with the DSU should be reversed.[684]

290. Canada alleges that the Panel erred by examining the European Communities' claim under Articles 23.2(a) and 23.1 in isolation from its analysis under Article 22.8 of the DSU. According to Canada, the Panel should have first applied the requirements of Article 22.8 to determine whether the suspension of concessions had to be terminated, and the Panel's failure to do so resulted in "contradictory findings"[685] concerning the first and second sets of claims of the European Communities. Canada conditionally appeals two other issues, in case the Appellate Body were to find that the Panel was correct in making findings in respect of Articles 23.1 and 23.2(a) without taking into account its finding in respect of Article 22.8. First, Canada contends that, even if the Panel were correct to consider Article 23 in isolation, the Panel erred in finding that Canada was "seeking the redress" of a WTO violation by continuing the suspension of concessions. Canada maintains that it has "sought and obtained"[686] the DSB's authorization to suspend concessions and that, contrary to the

[677] *Ibid.*, para. 41.
[678] United States' other appellant's submission, para. 29.
[679] *Ibid.*, para. 18.
[680] *Ibid.*, para. 31.
[681] United States' other appellant's submission, para. 98.
[682] *Ibid.*, para. 108.
[683] *Ibid.*, para. 112.
[684] *Ibid.*, para. 119. The United States clarifies that the Appellate Body need not address these last two points should it reverse the Panel's findings and conclusions concerning Articles 23.1 and 23.2(a) of the DSU. (*Ibid.*, para. 9)
[685] Canada's other appellant's submission, para. 43.
[686] *Ibid.*, para. 80.

Panel's finding, simply because Directive 2003/74/EC is a new measure does not imply that the legal basis for Canada's suspension of concessions has changed.[687] Secondly, Canada alleges that the Panel erred in finding that Canada made a unilateral determination of non-compliance regarding Directive 2003/74/EC, within the meaning of Article 23.2(a), on the basis of Canada's statements at the DSB meetings, as well as the fact that Canada continued to suspend concessions.[688] In the alternative, should the Appellate Body uphold the Panel's findings under Articles 23.2(a) and 23.1, Canada requests the Appellate Body to reverse the Panel's conclusion that it did not have jurisdiction to determine the compatibility of Directive 2003/74/EC with the *SPS Agreement*.[689] Finally, Canada claims that the Panel erred in making the suggestion that "Canada should have recourse to the rules and procedures of the DSU without delay"[690] because this conclusion, according to Canada, contradicts the Panel's own finding that Canada had not breached Article 22.8.[691]

291. The European Communities responds that Article 23 of the DSU is fully applicable in the implementation and post-suspension stage of a dispute[692], because the multilateral dispute settlement system relies on good faith compliance and the presumption of conformity with the covered agreements of measures taken by WTO Members.[693] The European Communities further contends that the adoption of a measure taken to comply, which must be presumed to be consistent with the WTO agreements, triggers the following duties on the original complainant: (i) to form a view on whether the measure that has been found to be inconsistent has been removed; (ii) to have recourse to Article 21.5 proceedings if it considers that the measure taken to comply is not consistent with the covered agreements; and (iii) to cease the suspension of concessions.[694] The European Communities disagrees with the argument of the United States and Canada that they are not seeking the redress of a violation within the meaning of Article 23.1 by maintaining the suspension of concessions, because the notification of Directive 2003/74/EC does not change the legal basis for the suspension of concessions.[695] The European Communities submits that Article 22.8 of the DSU does not specify that it is for the original respondent to show that it has removed the original measure[696], and that, in any event, the European Communities has effectively shown that the inconsistent measure, namely Directive 96/22/EC, has been removed.[697] Thus, the United States and Canada could no longer maintain their suspension of concessions once the European Communities had adopted Directive 2003/74/EC.[698]

292. The European Communities further argues that the Panel correctly found that the United States and Canada made a determination to the effect that a violation has occurred within the meaning of Article 23.2(a) of the DSU. The European Communities maintains that the statements by the United States and Canada at the DSB meetings, together with the fact that the United States and Canada have maintained their suspension of concessions, indicate that they made a "definitive" determination with sufficient "firmness or immutability" regarding the inconsistency of Directive 2003/74/EC with the covered agreements.[699] Furthermore, the European Communities disagrees with the United States' view that the Panel inferred the existence of a "determination" from inaction. According to the European Communities, the United States "actively considered" that

[687] *Ibid.*, para. 82.
[688] *Ibid.*, para. 87.
[689] Canada's other appellant's submission, para. 92.
[690] *Ibid.*, para. 96.
[691] *Ibid.*, para. 95.
[692] European Communities' appellee's submission, para. 47.
[693] *Ibid.*, para. 40.
[694] *Ibid.*, para. 62.
[695] *Ibid.*, paras. 103, 104, and 113.
[696] *Ibid.*, para. 114.
[697] *Ibid.*, para. 115.
[698] *Ibid.*, paras. 105 and 115.
[699] European Communities' appellee's submission, paras. 126 and 136-138.

Directive 2003/74/EC is not consistent with the covered agreements and "actively continued" the suspension of concessions.[700]

3. Arguments of the Third Participants

293. Australia agrees with the European Communities that the disagreement as to whether Directive 2003/74/EC has removed the measure found to be inconsistent with the WTO agreements should have been resolved through recourse to panel proceedings under Article 21.5.[701] However, Australia believes that it is open to a Member to continue the suspension of concessions pending the outcome of the Article 21.5 panel proceedings.[702] Finally, Australia underscores that no provision of the *SPS Agreement* is included in the Panel's terms of reference, and that to include claims under the *SPS Agreement* within the scope of this dispute effectively reverses the burden of proof between the parties. This "is inconsistent with a fundamental principle ... that the party asserting non-compliance with a covered agreement bears the burden of establishing a *prima facie* case."[703]

294. Brazil contends that none of the three conditions set out in Article 22.8 regarding the termination of the suspension of concessions has been fulfilled, and thus the DSB's authorization granted to the United States and Canada to suspend concessions remains in place.[704] Brazil agrees with the Panel that the removal of the measure found to be inconsistent, within the meaning of Article 22.8, must be interpreted as requiring substantive compliance. Furthermore, Brazil asserts that, in the post-suspension stage of a dispute, the original responding Member bears the burden of proving that its implementing measure is WTO-consistent.[705]

295. New Zealand submits that the Panel failed to interpret Articles 23.1 and 23.2(a) in the context of Article 22.8 of the DSU. According to New Zealand, Article 22.8 refers to situations where the original inconsistent measure has actually been removed, and not where the measure is merely claimed to have been removed.[706] Therefore, New Zealand considers that the Panel erred in finding that the European Communities' claims under Articles 23.1 and 23.2(a) were completely unrelated to whether the European Communities had implemented the DSB's recommendations and rulings in *EC – Hormones*.[707]

296. Norway maintains that Article 22.8 requires that the suspension of concessions be temporary and conditional. Thus, once compliance is achieved, be it through a simple revocation of the inconsistent measure or its replacement with another measure that ensures compliance, the right to suspend concessions "*automatically* lapses"[708] without a need for formal revocation of the authorization by the DSB. Where the parties disagree as to whether the measure taken to comply actually achieves compliance, as is the case in this dispute, both the original complainant and the original respondent can resort to Article 21.5 panel proceedings.[709]

[700] *Ibid.*, para. 133.
[701] Australia's third participant's submission, para. 15.
[702] *Ibid.*, para. 21.
[703] *Ibid.*, para. 25.
[704] Brazil's third participant's submission, para. 10.
[705] *Ibid.*, para. 33.
[706] New Zealand's third participant's submission, para. 3.17.
[707] New Zealand's third participant's submission, para. 3.18.
[708] Norway's third participant's submission, para. 6. (original emphasis)
[709] *Ibid.*, para. 9.

D. *Cessation of the Suspension of Concessions – Article 22.8 of the DSU*

1. Preliminary Comments

297. The European Communities alleges that the Panel erred by failing to find that Article 23.2(a), read together with Articles 21.5 and 23.1 of the DSU, required the United States and Canada to initiate Article 21.5 proceedings if they considered that Directive 2003/74/EC did not bring the European Communities into compliance with the DSB's recommendations and rulings in *EC – Hormones*.[710] The European Communities further asserts that the Panel erred in finding that Article 22.8 of the DSU requires actual compliance with the DSB's recommendations and rulings in *EC – Hormones* before the suspension of concessions has to be terminated[711], and that the Panel exceeded its terms of reference by examining such compliance when analyzing the European Communities' claims under Articles 23.1, 22.8, and 3.7 of the DSU.[712]

298. For the sake of simplicity, we refer to the Member applying the suspension of concessions pursuant to the DSB's authorization as the "suspending Member". We refer to the Member against whom the suspension of concessions is applied as the "implementing Member".

299. The European Communities' claims raise several questions concerning the position of the suspending Member in circumstances where a measure is taken by the implementing Member to comply with the DSB's recommendations and rulings. The first question concerns whether the suspending Member is required to initiate Article 21.5 proceedings, if it considers that the implementing measure fails to bring about compliance. The second question concerns the substantive issue as to whether an obligation to lift the suspension of concessions, pursuant to Article 22.8, arises when an implementing measure replaces the impugned measure. We recall that this dispute concerns the legality of the suspension of concessions maintained by the United States and Canada subsequent to the adoption and notification of the European Communities' implementing measure. The suspension of concessions that is authorized by the DSB must be applied consistently with Article 22.8 of the DSU. Therefore, we first examine whether the Panel erred in finding that Article 22.8 requires actual compliance by the European Communities with the DSB's recommendations and rulings before the suspension of concessions must be terminated by the United States and Canada. We will then turn, in section E, to the issue of whether Article 21.5 proceedings are the proper procedures to follow and which party must initiate such proceedings.

2. When Must a WTO Member Cease to Suspend Concessions Pursuant to Article 22.8 of the DSU?

300. The European Communities submits that its claims under Article 23.1, read together with Articles 22.8 and 3.7 of the DSU, are based on its "*interpretation* of Article 22.8, according to which the words 'the measure found to be inconsistent with a covered agreement' refer to the measure identified in the recommendations of the DSB".[713] The European Communities submits that the "measure found to be inconsistent with a covered agreement" in *EC – Hormones* was Directive 96/22/EC.[714] The European Communities maintains that Directive 96/22/EC "was removed"[715], within the meaning of Article 22.8, after being replaced by Directive 2003/74/EC. Thus, by continuing the suspension of concessions, the United States and Canada made a unilateral determination that Directive 2003/74/EC was not consistent with the *SPS Agreement*, in violation of

[710] European Communities' appellant's submission, para. 94.
[711] *Ibid.*, para. 152.
[712] *Ibid.*, para. 175.
[713] European Communities' appellant's submission, para. 102. (original emphasis)
[714] *Ibid.*, para. 129.
[715] *Ibid.*, para. 146.

Article 23.1 "read in the light of Article 22.8".[716] Therefore, the European Communities asserts that, contrary to the Panel's finding, it "never argued" that the claim under Article 23.1, read together with Articles 22.8 and 3.7 of the DSU, was premised on a violation of Article 22.8 by the United States and Canada and "never argued" that this claim was premised on the conformity of the implementing measure with the *SPS Agreement*.[717]

301. The European Communities' arguments are premised on its interpretation of Article 22.8 as requiring the termination of suspension of concessions whenever an implementing measure is adopted to replace the measure found to be inconsistent in proceedings that led to the DSB's recommendations and rulings. According to this interpretation, termination is required irrespective of the content of the implementing measure. Therefore, we proceed to examine the proper interpretation of Article 22.8 and, in particular, the phrase "the measure found to be inconsistent with a covered agreement has been removed" in that provision.

302. Article 3.7 of the DSU states that "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with ... the covered agreements." If this cannot be achieved, the "last resort" provided under the DSU "to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions ... on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB". Accordingly, in the event that the DSB's recommendations and rulings are not implemented within a reasonable period of time, Article 22.1 provides for the suspension of concessions as a "temporary measure" available to the Member that originally initiated the dispute settlement procedures.[718]

303. The suspension of concessions may not be maintained indefinitely. The authorization to suspend concessions is contingent and limited in time. Article 22.8 of the DSU provides that the suspension of concessions shall be "temporary" and shall only be applied until one of the three resolutive conditions set out in that provision obtains, namely, when:

> ... the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.

304. The participants agree that this dispute concerns the first condition listed in Article 22.8, that is, when "the measure found to be inconsistent with a covered agreement has been removed". In most cases, the first condition in Article 22.8 will be met where the implementing Member repeals the inconsistent measure without adopting any new measure in its place. The issue that arises in this dispute, however, is whether an inconsistent measure should be considered "removed" when it is replaced by a new implementing measure. Taken literally, removal of the inconsistent measure could mean that the implementing Member has adopted an act that formally repeals the inconsistent measure and replaces it with another measure, regardless of the content of the new measure and, in particular, of its compliance with the DSB's recommendations and rulings. Such a literal interpretation of the first condition in Article 22.8, however, does not comport with the other two conditions provided in that provision. The second condition in Article 22.8 requires termination of

[716] *Ibid.*, para. 102.

[717] *Ibid.*, paras. 99 and 100 (referring to Panel Report, *US – Continued Suspension*, para. 7.272; and Panel Report, *Canada – Continued Suspension*, para. 7.288).

[718] Article 22.6 specifies that the DSB, upon a request made within 30 days of the expiry of the reasonable period of time by the Member invoking the dispute settlement procedures, shall grant authorization to suspend concessions, or decide by consensus to reject the request. In addition, an arbitration procedure is envisaged under Article 22.6 in order to determine the proper level of the suspension of concessions and/or the sectors with respect to which the suspension is authorized. As regards the level of the suspension of concessions, Article 22.4 requires that it be "equivalent to the level of the nullification or impairment".

the suspension of concessions if "the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits", while the third condition refers to a situation where "a mutually agreed solution is reached". The reference to "a solution to the nullification or impairment of benefits" indicates that it is the inconsistency resulting from the measure, rather than the mere existence of the measure, that must be remedied before the obligation to cease the suspension of concessions arises. Moreover, by predicating the termination of the suspension of concessions on a "solution" either provided unilaterally (in the second condition) or reached by agreement (in the third condition), the two conditions require substantive resolution of the dispute. Under these two conditions, termination of the suspension of concessions is the final step in a dispute to which there is substantive resolution of the inconsistency found by the DSB. To achieve a similar result under the first condition, Article 22.8 cannot be understood as requiring the termination of the suspension of concessions merely on the basis of a formal repeal of the measure that has been found to be inconsistent by the DSB. All three conditions in Article 22.8 concern the circumstances under which the suspension of concessions must be terminated because there has been a final and substantive resolution to the dispute.

305. Reading the first sentence of Article 22.8 as a whole, the "removal" of "the measure found to be inconsistent" should be properly understood to require nothing less than substantive removal of the inconsistent measure. Substantive removal may be achieved by repealing the inconsistent measure. Where a WTO Member adopts an implementing measure that replaces the inconsistent measure, the implementing measure must bring about substantive compliance, that is, compliance with the DSB's recommendations and rulings and consistency with the covered agreements. We recognize that the first condition in Article 22.8 may be understood more narrowly as referring only to compliance with the DSB's recommendations and rulings. However, a dispute could not be brought to its finality unless the implementing measure rectifies the inconsistencies found in the DSB's recommendations and rulings and is not in other ways inconsistent with the covered agreements. Interpreting the first condition as requiring substantive compliance, therefore, will ensure that the first condition in Article 22.8 achieves the result obtained under the other two conditions in the same provision, that is, the final and substantive resolution of a dispute. Such an interpretation is also congruent with the scope of compliance proceedings under Article 21.5 of the DSU. Pursuant to the first sentence of that provision, compliance proceedings cover the existence and consistency with the covered agreements of a measure taken to comply with the DSB's recommendations and rulings. As further discussed in section E, proceedings under Article 21.5 is the proper procedure to follow in determining whether the inconsistent measure has been removed within the meaning of Article 22.8.

306. In terms of the first condition in Article 22.8, therefore, the application of the suspension of concessions may continue until the removal of the measure found by the DSB to be inconsistent results in substantive compliance. If a disagreement arises as to whether substantive compliance is achieved, the fulfilment of the first condition in Article 22.8 cannot be confirmed unless the disagreement is resolved through multilateral dispute settlement. Thus, the suspension of concessions continues to apply pending the outcome of the dispute settlement proceedings concerning the first resolutive condition in Article 22.8. If, by recourse to a multilateral dispute settlement process, the implementing measure is found to bring about substantive compliance, the suspension of concessions may no longer be applied pursuant to the first condition in Article 22.8 and cessation of the suspension is required.

307. This interpretation is supported by the second sentence of Article 22.8, which provides:

> In accordance with paragraph 6 of Article 21, the DSB shall continue to *keep under surveillance* the implementation of adopted recommendations or rulings, including those cases where ... concessions or other obligations have been suspended *but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.*

The second sentence of Article 22.8 requires surveillance by the DSB until its recommendations to bring a measure into conformity with the covered agreements have been implemented. In other words, DSB surveillance is required until substantive compliance is achieved.

308. Moreover, this interpretation of Article 22.8 is consistent with the broader context provided by other provisions of the DSU relating to implementation of the DSB's recommendations and rulings and with the object and purpose of the DSU. Article 22.1 of the DSU provides that the suspension of concessions is not to be "preferred to *full* implementation of a recommendation to bring a measure into conformity with the covered agreements".[719] The requirements in Article 21.5 to examine whether compliance measures exist and whether the measures taken to comply are consistent with the covered agreements also suggest that substantive compliance is required, rather than formal removal of the inconsistent measure. Furthermore, pursuant to Article 3.7, the suspension of concessions is the "last resort" available to the Member invoking the dispute settlement procedures when compliance with the DSB's recommendations and rulings has not been achieved within a reasonable period of time. To require the termination of suspension of concessions before substantive compliance is achieved would significantly weaken the effectiveness of the WTO dispute settlement mechanism. A Member authorized by the DSB to suspend concessions enjoys the assurance under Article 22.8 that, until substantive compliance is achieved or, in case of disagreement, multilaterally-confirmed, the suspension of concessions continues to be permitted under the DSU.

309. The European Communities contends that the three conditions in Article 22.8 concerning the termination of the suspension of concessions are alternatives to each other and that it is sufficient to only look at one condition without considering the others when determining whether the suspension of concessions must cease.[720] We agree that the three conditions in Article 22.8 are alternatives to each other. However, they are alternatives leading to the same result, that is, the termination of the suspension of concessions and final resolution of a dispute. It is difficult to envisage how a dispute could be finally resolved merely because the inconsistent measure is formally removed, regardless of whether substantive compliance has been achieved. The European Communities further submits that the second sentence of Article 22.8 contemplates that there may be situations in which "a measure has been removed" but "the matter remains under surveillance of the DSB".[721] The second sentence of Article 22.8 specifically requires surveillance by the DSB where "*concessions ... have been suspended but* the recommendations to bring a measure into conformity with the covered agreement has not been implemented". Thus, this provision clearly situates the ongoing surveillance within the context of the continued suspension of concessions, indicating that the authorization to suspend concessions does not lapse under Article 22.8 until substantive compliance is achieved. Moreover, the European Communities' position, which requires the termination of the suspension of concessions whenever an implementing measure is notified, undermines the effectiveness of the suspension of concessions in inducing full compliance. Such a position is difficult to reconcile with the DSU's objective of providing security and predictability to the multilateral trading system.

310. Although Article 22.8 sets forth the resolutive conditions under which the suspension of concessions must cease to apply, it does not identify the procedures to be followed should a dispute arise as to whether one of the conditions has been satisfied. This does not mean that Members can remain passive once concessions have been suspended pursuant to the DSB's authorization. The requirement that the suspension of concessions must be temporary indicates that the suspension of concessions, as the last resort available under the DSU when compliance is not achieved, is an abnormal state of affairs that is not meant to remain indefinitely. Members must act in a cooperative manner so that the normal state of affairs, that is, compliance with the covered agreements and

[719]Moreover, pursuant to Article 3.3, the "prompt settlement" of disputes "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members".

[720]European Communities' statement at the oral hearing.

[721]*Ibid.*

absence of the suspension of concessions, may be restored as quickly as possible. Thus, both the suspending Member and the implementing Member share the responsibility to ensure that the application of the suspension of concessions is "temporary". Moreover, the fulfilment of the first resolutive condition in Article 22.8 requires certain actions from both Members. The implementing Member is required to remove the measure found to be inconsistent with a covered agreement. At the same time, the suspending Member is required to ensure that the suspension of concessions is only applied within the limits of Article 22.8. Where, as in this dispute, an implementing measure is taken and Members disagree as to whether this measure achieves substantive compliance, both Members have a duty to engage in WTO dispute settlement in order to establish whether the conditions in Article 22.8 have been met and whether, as a consequence, the suspension of concessions must be terminated. Once substantive compliance has been confirmed through WTO dispute settlement procedures, the authorization to suspend concessions lapses by operation of law (*ipso jure*), because it has been determined that one of the resolutive conditions pursuant to Article 22.8 is fulfilled.[722] We examine in section E the procedural avenues that would be available should a disagreement arise as to whether the conditions in Article 22.8 have been satisfied.

3. The Panel's Analysis Concerning Article 22.8 of the DSU

311. The Panel found that "the phrase 'until such time as the measure found to be inconsistent with a covered agreement has been removed' [in Article 22.8] means the illegality itself, and not only the measure, has been removed."[723] The Panel considered that this interpretation is confirmed by the second sentence of Article 22.8, which refers to the DSB keeping under surveillance the situations in which concessions have been suspended but the recommendations and rulings of the DSB have not been implemented. In the Panel's view, the second sentence implied that "what is to be achieved is not the removal of the measure but the actual compliance with the recommendations and rulings of the DSB."[724] Therefore, according to the Panel, "Article 22.8 may be breached only if the European Communities has complied with the recommendations and rulings of the DSB and [the United States and Canada have] failed to immediately remove its suspension of concessions or other obligations."[725] We consider that the Panel was correct in reaching this finding. In subsection 2, we found that the terms "until such time as the inconsistent measure has been removed" in Article 22.8 require substantive compliance and that, until it is achieved, the suspension of concessions may continue.

312. The European Communities highlights the Panel's statements, made in the context of its findings of procedural violations under Articles 23.2(a) and 23.1, that Directive 2003/74/EC "shows all the signs of an implementing measure ... adopted in good faith".[726] The European Communities maintains that once a Member has adopted an implementing measure which it believes in good faith to bring about compliance, the suspension of concessions can no longer be applied.[727] The question raised by this claim, therefore, is whether the "removal" of an inconsistent measure within the meaning of Article 22.8 may be established on the sole basis of a presumption of good faith compliance by the European Communities.

[722]In contrast, where an inconsistent measure is removed without being replaced by a new measure, the objective condition in Article 22.8 would, in most cases, be met and the authority to suspend concessions would automatically lapse.

[723]Panel Report, *US – Continued Suspension*, para. 7.283; Panel Report, *Canada – Continued Suspension*, para. 7.299.

[724]Panel Report, *US – Continued Suspension*, para. 7.284; Panel Report, *Canada – Continued Suspension*, para. 7.300.

[725]Panel Report, *US – Continued Suspension*, para. 7.285; Panel Report, *Canada – Continued Suspension*, para. 7.301.

[726]Panel Report, *US – Continued Suspension*, para. 7.238; Panel Report, *Canada – Continued Suspension*, para. 7.231.

[727]European Communities' appellant's submission, para. 141.

313. The DSU makes reference to "good faith" in two provisions, namely, Article 4.3, which relates to consultations, and Article 3.10, which provides that, "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." These provisions require Members to act in good faith with respect to the initiation of a dispute and in their conduct during a dispute settlement proceedings. Neither provision specifically addresses the question of whether a Member enjoys a presumption of good faith compliance in respect of measures taken to implement the DSB's recommendations and rulings.

314. The Appellate Body has recognized that the principle of good faith, a principle well-recognized in international law, applies in WTO dispute settlement. As the Appellate Body stated in *EC – Sardines*:

> We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in Article 26 of the *Vienna Convention*. *And, always in dispute settlement, every Member of the WTO must assume the good faith of every other Member*.[728] (emphasis added)

315. The Member required to implement the DSB's recommendations and rulings may be presumed to have acted in good faith when adopting the implementing measure. However, the presumption of good faith attaches to the actor, but not to the action itself. Thus, whilst the presumption of good faith concerns the reasons for which a Member acts, such a presumption does not answer the question whether the measure taken by the implementing Member has indeed brought about substantive compliance. Similarly, the suspending Member can also be presumed to act in good faith in maintaining the suspension of concessions, but that does not entail that the suspension of concessions is necessarily consistent with Article 22.8. When a disagreement arises as to whether the implementing measure achieves substantive compliance and whether the suspension of concessions may continue, it should be submitted for adjudication in dispute settlement proceedings. In sum, a presumption of good faith, which can be claimed by both parties, does not offer a clear answer to the question of when inconsistencies arising from the original measure should be considered to have been removed within the meaning of Article 22.8 of the DSU.

316. In the light of our understanding of the presumption of good faith, we do not agree with the European Communities that there is a contradiction between the proposition that Directive 2003/74/EC is a measure adopted in good faith and the interpretation of Article 22.8 that substantive compliance is required for the first resolutive condition to be met. Even if the European Communities should be presumed to have acted in good faith when adopting the implementing measure, that does not mean that the measure has achieved substantive compliance.

317. If the removal of a measure found to be inconsistent were to be established on the sole basis of a presumption of good faith compliance, the DSB's authorization to suspend concessions would expire upon the adoption of an implementing measure and a mere unilateral declaration of the implementing Member that it removed the inconsistent measure. As described above, the suspension of concession is the last resort available to a Member who has successfully challenged the consistency with the covered agreements of another Member's measure. The DSB's authorization to suspend concessions is necessarily preceded by a multi-stage dispute settlement process. This process may encompass: (i) consultations, (ii) panel proceedings, (iii) appellate review, (iv) the adoption of the panel and Appellate Body reports, (v) an arbitration to determine the reasonable period of time for implementation, (vi) compliance panel proceedings, (vii) compliance appellate review, and (viii) an arbitration to determine the level of suspension of concessions. The authorization to suspend concessions is thus granted following a long process of multilateral dispute settlement in which relevant adjudicative bodies, as well as the DSB, render multilateral decisions at key stages of the

[728]Appellate Body Report, *EC – Sardines*, para. 278.

process. To allow the suspension of concessions to expire as a result of the application of a presumption of good faith with respect to a unilateral declaration of compliance would create an imbalance between the rights and obligations of the complainants and the respondents enshrined in the DSU and would undermine the effectiveness of the dispute settlement mechanism in providing security and predictability. Rather, if the original respondent considers that it has implemented the DSB's recommendations and rulings such that it has achieved substantive compliance, and the complainant who has been authorized to suspend concessions disagrees, that disagreement must be resolved multilaterally through WTO dispute settlement. Thus, we share Canada's view that the interpretation proposed by the European Communities is an "overly narrow and formalistic interpretation that fails to situate Article 22.8 in its proper context within the terms of the DSU."[729]

318. Consequently, we disagree with the European Communities' assertion that "the mere *existence* of an implementing measure adopted in good faith and its subsequent notification to the DSB" requires the United States and Canada to cease the application of the suspension of concessions authorized by the DSB.[730]

319. The European Communities additionally alleges that the Panel "fundamentally erred" in the manner in which it identified the "measure found to be inconsistent with a covered agreement" in order to determine whether "it has been removed" within the meaning of Article 22.8.[731] The European Communities claims that the Panel found that Directive 96/22/EC, that is, the measure found to be inconsistent with the *SPS Agreement* in *EC – Hormones*, "was removed". Nonetheless, the Panel also held that considering Directive 96/22/EC as the measure found to be inconsistent with a covered agreement within the meaning of Article 22.8 is "unsatisfactory, as Directive 96/22/EC was replaced by Directive 2003/74/EC which also imposes an import ban".[732]

320. We recall that, in *EC – Hormones*, Directive 96/22/EC was found to be inconsistent with Article 5.1 of the *SPS Agreement* because the import ban imposed by that Directive on meat from cattle treated with the six hormones at issue was not based on a risk assessment that conformed to the requirements of the *SPS Agreement*.[733] In order to comply with the DSB's recommendations and rulings, the European Communities had to remove the import ban or ensure that the import ban had a proper justification under the *SPS Agreement* by being based on a risk assessment under Article 5.1 or as a provisional measure under Article 5.7. Thus, the replacement of Directive 96/22/EC with Directive 2003/74/EC is insufficient for the measure found to be inconsistent in *EC – Hormones* to be considered removed for purposes of Article 22.8 of the DSU.

321. The European Communities also asserts that "interpreting Article 22.8 as referring to 'actual compliance' allows the original complaining Member to make a unilateral determination of the substantive merits of the 'measure taken to comply', without recourse to the procedures of the DSU and without respecting Article 23.1 of the DSU."[734] In our view, this argument conflates the proper interpretation of Article 22.8 with the issue as to the proper procedure for resolving a dispute involving Article 22.8. As discussed, Article 22.8 sets forth the resolutive conditions under which the suspension of concessions must cease, including the condition that the suspension of concessions shall only apply until the measure found to be inconsistent has been removed. The correct interpretation of Article 22.8 is that once substantive compliance is achieved, the suspending Member is required to cease the application of the suspension of concessions. This, however, does not answer the question regarding the procedures to be followed in the event a disagreement arises as to whether substantive

[729]Canada's appellee's submission, para. 21.
[730]European Communities' appellant's submission, para. 101. (original emphasis)
[731]*Ibid*., para. 145.
[732]Panel Report, *US – Continued Suspension*, para. 7.283; Panel Report, *Canada – Continued Suspension*, para. 7.299.
[733]Appellate Body Report, *EC – Hormones*, paras. 6 and 253.
[734]European Communities' appellant's submission, para. 152.

compliance has been achieved and the resolutive condition in Article 22.8 has been met. We address the available procedural avenues in section E.

4. Did the Panel Exceed Its Mandate by Addressing the Conformity of Directive 2003/74/EC with the *SPS Agreement*?

322. The European Communities claims that, in the context of reviewing the European Communities' second set of main claims under Article 23.1, read together with Articles 22.8 and 3.7 of the DSU, the Panel exceeded the scope of its mandate by examining the conformity of Directive 2003/74/EC with the *SPS Agreement*. The European Communities maintains that it made a claim under Article 22.8 of the DSU in the alternative, that is, only in the event that the Panel did not find any violation under Articles 23.1, 23.2(a), 3.7, 22.8, and 21.5 of the DSU.[735] In the alternative claim, the European Communities alleges that the United States and Canada were required to terminate the suspension of concessions pursuant to Article 22.8 because Directive 2003/74/EC achieved actual (rather than presumed) compliance with the DSB's recommendations and rulings.[736] The European Communities explains that it made the alternative claim because "it was confident that, in any event, ... Directive 2003/74/EC was fully consistent with its WTO obligations."[737] Therefore, the European Communities asserts, the Panel exceeded its terms of reference by "ignoring the sequencing order of the legal claims made by the European Communities" and by addressing the issue of actual compliance in order to determine whether the United States and Canada breached Article 22.8 of the DSU.[738]

323. We recall that, in support of its claim under Article 23.1, read together with Articles 22.8 and 3.7, the European Communities maintains that Directive 96/22/EC "was removed"[739] within the meaning of Article 22.8 after being replaced by Directive 2003/74/EC and that "the mere *existence* of an implementing measure adopted in good faith and its subsequent notification to the DSB" required the United States and Canada to cease the application of the suspension of concessions.[740] The European Communities adds that the continuation of the suspension of concessions by the United States and Canada and their failure to initiate Article 21.5 proceedings necessarily implies that they have made a unilateral determination on the inconsistency of the implementing measure with the DSB's recommendations and rulings, "in breach of Article 23.1 read together with Articles 22.8 and 3.7 of the DSU".[741] Therefore, the European Communities' assertion that the United States and Canada breached Article 23.1 in making "a unilateral determination" is premised on their alleged failure to terminate the suspension of concessions pursuant to Article 22.8 after the removal of Directive 96/22/EC, as well as their alleged failure to initiate Article 21.5 proceedings.

324. As we concluded in the previous sections, the inconsistent measure will not be considered removed within the meaning of Article 22.8 unless substantive compliance is achieved. Therefore, whether Directive 2003/74/EC brings the European Communities into compliance with the DSB's recommendations and rulings in *EC – Hormones* was an issue the Panel had to resolve in order to determine whether the United States and Canada were required to terminate the suspension of concessions pursuant to Article 22.8 and whether failing to do so constituted a violation of Article 23.1, read together with Articles 22.8, and 3.7 of the DSU. Before the Panel, the European Communities maintained that it did not have to demonstrate actual compliance with the DSB's recommendations and rulings because it should benefit from a presumption of good faith compliance

[735]European Communities' appellant's submission, para. 166.
[736]Panel Report, *US – Continued Suspension*, para. 7.156; Panel Report, *Canada – Continued Suspension*, para. 7.143.
[737]European Communities' appellant's submission, para. 103.
[738]*Ibid*., para. 175.
[739]*Ibid*., para. 146.
[740]European Communities' appellant's submission, para. 101. (original emphasis)
[741]*Ibid*., para. 101.

with respect to Directive 2003/74EC.[742] We concluded, however, that a presumption that the European Communities acted in good faith when adopting Directive 2003/74/EC is insufficient for establishing removal, within the meaning of Article 22.8, of the measure found to be inconsistent in *EC – Hormones*.

325. On appeal, the European Communities emphasizes that Directive 96/22/EC was replaced by Directive 2003/74/EC and thus the inconsistent measure has been removed. In the previous sections, we rejected the European Communities' formalistic understanding of the phrase "the measure found to be inconsistent has been removed" according to which the repeal of the original measure and its replacement with a new measure would require cessation of suspension, regardless of the content of the new measure. Therefore, the distinction drawn by the European Communities between its second set of main claims and its alternative claim is, in our view, based on an incorrect interpretation of Article 22.8. The fact that the European Communities described the question of actual compliance of Directive 2003/74/EC as an alternative claim did not preclude the Panel from evaluating whether there is substantive compliance, if doing so was necessary to adjudicate the second main claim of the European Communities under Articles 23.1, 22.8, and 3.7. On the contrary, the Panel would have failed to correctly interpret and apply Article 22.8 if it had followed the approach of the European Communities and had refrained from addressing the issue of whether the repeal of Directive 96/22/EC and its replacement by Directive 2003/74/EC resulted in substantive compliance.

326. In *EC – Hormones*, the European Communities' import ban on meat from cattle treated with oestradiol-17β, progesterone, testosterone, trenbolone acetate, zeranol, or MGA was found to be inconsistent with Article 5.1 of the *SPS Agreement* because it was not based on a proper risk assessment.[743] To implement the DSB's recommendations and rulings, the European Communities adopted Directive 2003/74/EC, which repealed Directive 96/22/EC. Directive 2003/74/EC applies a ban on the importation of meat from cattle treated with oestradiol-17β for growth-promotion purposes, while the importation of meat from cattle treated with the other five hormones is provisionally forbidden. According to the European Communities, Directive 2003/74/EC is based on a comprehensive risk assessment that "sufficiently warrants"[744] the permanent import prohibition regarding oestradiol-17β and is therefore consistent with Article 5.1 of the *SPS Agreement*. The European Communities also contends that the risk assessment provides the "available pertinent information" on the basis of which the provisional prohibition regarding the other five hormones has been enacted. Thus, in the European Communities' view, the provisional import ban is consistent with Article 5.7 of the *SPS Agreement*, which allows Members to adopt provisional SPS measures on the basis of available pertinent information in cases where "relevant scientific evidence is insufficient". On this basis, the European Communities argues that it has implemented the DSB's recommendations and rulings in *EC – Hormones*.[745]

327. The Panel addressed the consistency with Articles 5.1 and 5.7 of the *SPS Agreement* of the import ban imposed by Directive 2003/74/EC.[746] We have found that the European Communities was

[742]Panel Report, *US – Continued Suspension*, para. 7.286; Panel Report, *Canada – Continued Suspension*, para. 7.302.
[743]Appellate Body Report, *EC – Hormones*, para. 208.
[744]European Communities' first written submission to the Panel, para. 17 (quoting Appellate Body Report, *EC – Hormones*, para. 253(l)).
[745]*Ibid*., para. 17.
[746]We note that the Panel reviewed, and rejected, the United States' claim that Directive 2003/74/EC was inconsistent with Article 5.2 of the *SPS Agreement*. (Panel Report, *US – Continued Suspension*, para. 7.573) Moreover, both the United States and Canada claimed before the Panel that Directive 2003/74/EC was inconsistent with Article 3.3 of the *SPS Agreement*. The Panel found it unnecessary to examine the claims under Article 3.3, having already concluded that Directive 2003/74/EC was not consistent with Articles 5.1 and 5.7 of the *SPS Agreement*. (*Ibid*., para. 7.846; Panel Report, *Canada – Continued Suspension*, para. 7.831) The Panel's findings with respect to Articles 5.2 and 3.3 of the *SPS Agreement* were not appealed. We therefore find it unnecessary to examine whether these two provisions were properly before the Panel.

required to bring about substantive compliance for the United States and Canada to be under an obligation to terminate the suspension of concessions pursuant to Article 22.8 of the DSU. The DSB's recommendations and rulings from *EC – Hormones* included a finding that the import ban on meat from cattle treated with oestradiol-17β was inconsistent with Article 5.1 of the *SPS Agreement* because it was not based on a proper risk assessment. Thus, in order to determine whether the European Communities had complied with the DSB's recommendations and rulings, the Panel had to examine whether the European Communities had brought its import ban relating to oestradiol-17β into conformity with Article 5.1 of the *SPS Agreement* by basing the import ban in Directive 2003/74/EC relating to the same substance on a proper risk assessment.

328. We face a somewhat different situation in relation to Article 5.7 of the *SPS Agreement*. The European Communities did not invoke that provision in *EC – Hormones* to justify its import ban on meat from cattle treated with the other five hormones. Thus, the DSB's recommendations and rulings in *EC – Hormones* did not include findings under Article 5.7 of the *SPS Agreement*. Instead, the import ban relating to the other five hormones was found to be inconsistent with Article 5.1 because it was not based on a proper risk assessment. This raises the question as to whether the European Communities' changed justification precluded the Panel from examining its consistency with the *SPS Agreement*, and particularly with Article 5.7, a provision that was not part of the DSB's recommendations and rulings in *EC – Hormones*. In our view, the Panel was not precluded from assessing the consistency of Directive 2003/74/EC with Article 5.7 for the following reasons. The definitive import ban that was the subject of *EC – Hormones* and found to be inconsistent with Article 5.1 has been replaced, under Directive 2003/74/EC, by a provisional ban relating to the five other hormones. The import ban applies to the same products: meat from cattle treated with progesterone, testosterone, trenbolone acetate, zeranol, and MGA. The European Communities replaced the original definitive ban with a provisional ban and invoked Article 5.7 as an alternative justification to Article 5.1. The European Communities has characterized the import ban as a provisional one and has sought to justify it under Article 5.7 of the *SPS Agreement*:

> The new Directive provides that the use for animal growth promotion of one of the six hormones in dispute is permanently prohibited while the use of the other five is provisionally forbidden. It is based on a comprehensive risk assessment and, thus, is fully compliant with the DSB recommendations and rulings. In particular, as stipulated by the Appellate Body, the results of the risk assessment "sufficiently warrant" the definite import prohibition regarding one of the hormones (Article 5.1 of the *SPS Agreement*), and provide the "available pertinent information" on the basis of which the provisional prohibition regarding the other five hormones has been enacted (Article 5.7 of the *SPS Agreement*). Consequently, through Directive 2003/74/EC the European Communities has implemented the rulings and recommendations in the *Hormones* case.[747] (footnote omitted)

Article 22.8 demands substantive compliance with the DSB's recommendations and rulings. A change in justification, by itself, cannot be said to achieve substantive compliance. Compliance with the DSB's recommendations and rulings concerning Article 5.1 and the definitive ban on the five hormones cannot be established without reviewing the alternative justification for the provisional ban under Article 5.7. If the new justification for the ban is not consistent with the *SPS Agreement*, substantive compliance has not been achieved.

[747] European Communities' first written submission to the Panel, para. 17.

329. We recall that the Appellate Body has stated that, "pursuant to Article 7 of the DSU, the panel's terms of reference are governed by the request for the establishment of a panel."[748] We recognize that the European Communities' requests for the establishment of a panel do not list Articles 5.1 and 5.7.[749] Also, we are mindful that a panel request submitted by an original respondent in the post-suspension stage is different from a panel request in original and compliance proceedings in the pre-suspension stage. In the requests for establishment of a panel, the European Communities asserts that it has brought itself into compliance with the DSB's recommendations and rulings which included a violation of Article 5.1. It gives the following reason why the suspensions of concessions could no longer be justified:

> In the same communication [in which Directive 2003/74/EC was notified to the DSB], the European Communities explained that it considers itself to have fully implemented the recommendations and rulings of the DSB in the *EC – Hormones* dispute and that, as a consequence, it considers [the United States' and Canada's] suspension of concessions vis-à-vis the European Communities to be no longer justified.[750] (footnote omitted)

330. Directive 2003/74/EC specifies that the original definitive import ban that had been found to be inconsistent with the covered agreements was replaced by a permanent ban in respect of oestradiol-17β and a provisional ban in relation to the other five hormones. Such a provisional ban implicates Article 5.7 as explained above. Moreover, the requests for establishment of a panel acknowledge that the United States and Canada did not consider that Directive 2003/74/EC complied with the *SPS Agreement*:

> The [United States and Canada] disagreed and denied that the new Directive was based on science and that it implemented the DSB's recommendations and rulings. The [United States and Canada] formally stated in the DSB that [they] considered the new Directive to be inconsistent with the European Communities obligations under the *SPS Agreement* and that [they] would continue to impose retaliatory duties on certain products from the European Communities.[751] (footnotes omitted)

331. Finally, the European Communities claims in its request that the United States' and Canada's conduct is inconsistent with Article 22.8 of the DSU. It is evident from the panel requests that the consistency of the United States' and Canada's continued suspension with Article 22.8 was linked to the European Communities' implementation of the DSB's recommendations and rulings in *EC – Hormones*. We fail to see how the claims explicitly listed in the panel requests by the European Communities could be resolved in isolation from the question of whether Directive 2003/74/EC has brought the European Communities into compliance with these DSB's recommendations and rulings.

332. Taken together, these elements support the conclusion that the consistency of Directive 2003/74/EC with Articles 5.1 and 5.7 of the *SPS Agreement* was part of the matter to be examined by the Panel. In these circumstances, we reject the European Communities' claim that the Panel exceeded its terms of reference by addressing the consistency of Directive 2003/74/EC with Articles 5.1 and 5.7 of the *SPS Agreement*. We uphold the Panel's finding that "it has jurisdiction to consider the compatibility of the [European Communities'] implementing measure with the *SPS*

[748] Appellate Body Report, *US – Carbon Steel*, para. 124.
[749] WT/DS320/6; WT/DS321/6.
[750] *Ibid.*
[751] WT/DS320/6; WT/DS321/6.

Agreement as part of its review of the claim raised by the European Communities with respect to Article 22.8 of the DSU."[752]

E. *Procedural Avenues for Resolving Disagreements as to Whether the Inconsistent Measure Has Been Removed under Article 22.8 of the DSU*

1. What Is the Appropriate Procedural Avenue to Resolve a Disagreement as to Whether the Inconsistent Measure Has Been Removed?

333. The European Communities argues that, where a WTO Member continues to suspend concessions because it considers that the implementing measure does not achieve compliance with the DSB's recommendations and rulings or is otherwise inconsistent with the covered agreements, the Member has an obligation to initiate Article 21.5 proceedings.

334. Article 21.5 provides that:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within the time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

335. The European Communities reads the words "shall be decided" and "including" as indicating an obligation to have recourse to an Article 21.5 panel in the sense that it constitutes a mandatory step in the process of adjudicating disagreements over the existence or consistency of measures taken to comply, even though additional procedural steps may also be available under the DSU. However, the United States and Canada read the phrase "shall be decided through recourse to these dispute settlement procedures" to mean that recourse could encompass any of the procedures available under the DSU, and not just an Article 21.5 panel procedure. The phrase "including wherever possible ... the original panel" would then be read as one of several options. This seems to be the view taken by the Panel when it read the phrase to mean resort "to the panelists that reviewed the original case, rather than to other individuals."[753] The Panel further found that several procedural means are available to the European Communities for obtaining the termination of the suspension of concessions, including good offices and consultations, arbitration under Article 25 of the DSU, panel proceedings under Article 21.5 of the DSU, and new panel proceedings involving a challenge against the continued suspension of concessions.[754]

336. The opening clause of Article 21.5 specifies the types of disputes that fall within the scope of this provision, that is, those involving a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB. The word "shall" in Article 21.5 indicates that such disagreements must be resolved through recourse

[752]Panel Report, *US – Continued Suspension*, para. 7.379; Panel Report, *Canada – Continued Suspension*, para. 7.376.
[753]Panel Report, *US – Continued Suspension*, para. 7.351; Panel Report, *Canada – Continued Suspension*, para. 7.349.
[754]Panel Report, *US – Continued Suspension*, para. 7.350; Panel Report, *Canada – Continued Suspension*, para. 7.348.

to "these dispute settlement procedures". Read together with the second sentence of Article 21.5, "these dispute settlement procedures" do not refer generally to all proceedings under the DSU, but specifically to the panel proceedings envisaged in Article 21.5, in which the original panelists are preferred for the composition of the panel and in which the time frame of the proceedings is shortened. In other words, Article 21.5 dictates that panel proceedings pursuant to this provision are the procedures that must be followed for adjudicating the cause of action as framed in its opening clause.

337. As we see it, at the core of this dispute is a disagreement as to whether Directive 2003/74/EC, the measure taken by the European Communities to comply with the DSB's recommendations and rulings in *EC – Hormones*, achieves substantive compliance. Before the Panel, the European Communities claimed that it had removed Directive 96/22/EC, which had been found to be inconsistent in *EC – Hormones*, and that the United States and Canada breached Article 23.1, read together with Articles 22.8 and 3.7, by failing to terminate the suspension of concessions.[755] The United States and Canada disagreed that they were in breach of Article 22.8 and argued that it has not been demonstrated that the European Communities has in fact removed its WTO-inconsistent measure.[756] Because the phrase "until such time as the measure found to be inconsistent with a covered agreement has been removed" in Article 22.8 must be properly interpreted as referring to substantive compliance, the disagreement as to whether such compliance has been achieved is the central issue that must be resolved in order to assess the legality of the continued suspension.

338. Article 21.5 provides for specific procedures for adjudicating a disagreement as to the consistency with the covered agreements of measures taken by a Member to implement the DSB's recommendations and rulings. Thus, panel proceedings under Article 21.5 is the proper procedure for resolving the disagreement as to whether Directive 2003/74/EC has achieved substantive compliance and whether, consequently, the resolutive condition in Article 22.8 that requires the termination of the suspension of concessions has been met. Indeed, as the Panel pointed out, "the option naturally coming to mind when it comes to reviewing compliance is the procedure provided under Article 21.5 of the DSU."[757] The Panel also recognized that it "performed functions similar to that of an Article 21.5 panel" by addressing the consistency with the covered agreements of Directive 2003/74/EC.[758]

339. The Panel nonetheless found that Article 21.5 panel proceedings were not "the only avenue available to address a claim of compliance by a Member alleging to have complied with recommendations and rulings of the DSB".[759] Rather, as described above, the Panel found that good offices, consultations, and arbitration under Article 25 of the DSU were other procedures available to the European Communities for obtaining the termination of the suspension of concessions.

340. Certainly, parties to a dispute are not precluded from pursuing consensual or alternative means of dispute settlement foreseen in the DSU. Article 3.7 of the DSU provides that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." To reach a mutually acceptable solution, Members can engage in consultations or resort to mediation and good offices. Moreover, Article 25 provides for arbitration as an alternative to panel proceedings for dispute resolution. Consultations, mediation, good offices, and arbitration are,

[755]Panel Report, *US – Continued Suspension*, para. 7.252; Panel Report, *Canada – Continued Suspension*, para. 7.245.
[756]Panel Report, *US – Continued Suspension*, para. 7.264; Panel Report, Canada – Continued Suspension, para. 7.261.
[757]Panel Report, *US – Continued Suspension*, para. 7.351; Panel Report, *Canada – Continued Suspension*, para. 7.349.
[758]Panel Report, *US – Continued Suspension*, para. 8.3; Panel Report, *Canada – Continued Suspension*, para. 8.3.
[759]Panel Report, *US – Continued Suspension*, para. 7.355; Panel Report, *Canada – Continued Suspension*, para. 7.353.

however, alternatives to compulsory adjudication and require the consent of the parties. In the absence of such consent, they cannot lead to a binding decision. Thus, it is important to distinguish between these consensual means of dispute resolution, which are always at the Members' disposal, and adjudication through panel proceedings, which are compulsory. It is in this sense that Article 21.5 is cast in obligatory language. In this dispute, it is clear that a mutually acceptable solution was not reached and the European Communities decided to resort to adjudication. In addition, the parties to this dispute were unable to agree on an arbitration procedure pursuant to Article 25 of the DSU.[760] The issue before us, therefore, is which procedure must be followed when parties do not avail themselves of the consensual and alternative means of dispute resolution provided in the DSU, and the dispute must proceed to the adjudication phase.

341. Another possibility the Panel identified are new panel proceedings involving a challenge against the legality of the continued suspension of concessions, such as the European Communities' initiation of the current proceedings.[761] As discussed, the legality of the continued suspension of concessions in this dispute hinges on whether Directive 2003/74/EC achieves substantive compliance, an issue that should be properly adjudicated in Article 21.5 proceedings. The Panel itself recognized that it had to "perform functions similar to that of an Article 21.5 panel".[762] By contrast, the cause of action in new panel proceedings normally does not involve the issue of whether a measure taken to comply with the DSB's recommendations and rulings is consistent with the covered agreements. The European Communities initiated the current proceedings, in part, on account of its belief that an original respondent is precluded from initiating Article 21.5 panel proceedings. We address this issue in subsection 2 below.

342. Furthermore, a disagreement under Article 22.8 concerning the removal of "a measure found to be inconsistent" in an original proceeding does not exist in the abstract but, rather, occurs in the context of a pre-existing dispute that gave rise to the DSB's recommendations and rulings. Recourse to Article 21.5 proceedings keeps the successive proceedings relating to the same dispute within "a continuum of events"[763], and is conducive to reaching a final resolution of the dispute.

343. Finally, in contrast to new panel proceedings, recourse to Article 21.5 is a more efficient use of the dispute settlement system. As the Appellate Body observed:

> First, the composition of an Article 21.5 panel is, in principle, already determined—wherever possible, it is the original panel. These individuals will be familiar with the contours of the dispute, and the experience gained from the original proceedings should enable them to deal more efficiently with matters arising in an Article 21.5 proceeding "against the background of the original proceedings". Secondly, the time-frames are shorter—an Article 21.5 panel has, in principle, 90 days in which to issue its report, as compared to the six to nine months afforded original panels.[764]

344. As discussed, underlying this dispute concerning the continued suspension of concessions lies a disagreement over the consistency with the covered agreements of Directive 2003/74/EC, a measure taken by the European Communities to comply with the DSB's recommendations and rulings in *EC – Hormones*. The individuals who served in the panel in *EC – Hormones* were familiar with the background of the dispute and the inconsistencies with the covered agreements they had found with respect to Directive 96/22/EC. Recourse to Article 21.5 panel proceedings would allow these individuals to examine whether the inconsistencies found in *EC – Hormones* have been rectified by Directive 2003/74/EC. Such proceedings would benefit from their knowledge and expertise gained from serving as panelists in *EC – Hormones*, and would be adjudicated within a shorter time frame than regular panel proceedings. Recourse to Article 21.5 proceedings under such circumstances is therefore also consistent with the objective of the dispute settlement system of achieving prompt settlement of disputes.

[760]The European Communities alleges that it proposed to the United States to submit the dispute to arbitration under Article 25 of the DSU, but the United States refused. (European Communities' appellant's submission, para. 62)

[761]Panel Report, *US – Continued Suspension*, para. 7.350; Panel Report, *Canada – Continued Suspension*, para. 7.348.

[762]Panel Report, *US – Continued Suspension*, para. 8.3; Panel Report, *Canada – Continued Suspension*, para. 8.3.

[763]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121.

[764]Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 71.

345. In sum, we consider that recourse to Article 21.5 panel proceedings is the proper course of action within the procedural structure of the DSU in cases where, as in this dispute, a Member subject to the suspension of concessions has taken an implementing measure and a disagreement arises as to whether "the measure found to be inconsistent with a covered agreement has been removed" within the meaning of Article 22.8. Therefore, we share the European Communities' view that Article 21.5 panel proceedings are the procedures to be followed where there is disagreement as to whether Directive 2003/74/EC has achieved substantive compliance. We turn now to examine which party may initiate the Article 21.5 panel proceedings.

2. Is the European Communities Precluded from Initiating Article 21.5 Panel Proceedings Regarding Whether Directive 2003/74/EC Has Brought It into Compliance?

346. The European Communities argues that the Panel erred in finding that proceedings under Article 21.5 could have been initiated by the European Communities as the original responding party in *EC – Hormones*.[765] According to the European Communities, "it is inherent in the wording, context and object and purpose of the provision that it is the obligation of the complaining party to have recourse to Article 21.5."[766]

347. A "disagreement" as to the consistency with the WTO agreements of a measure taken to comply arises from the existence of conflicting views: the original complainant's view that such a measure is inconsistent with the WTO agreements or brings about only partial compliance, and the original respondent's view that a measure is consistent with the WTO agreements and brings about full compliance with the DSB's recommendations and rulings. Article 21.5 does not indicate which party may initiate proceedings under this provision. Rather, the language of the provision is neutral on this matter, and it is open to either party to refer the matter to an Article 21.5 panel to resolve this disagreement. The text of Article 21.5, therefore, leaves open the possibility that either party to the original dispute may initiate the proceedings. Thus, contrary to the European Communities' argument, the text of Article 21.5 does not preclude an original respondent from initiating proceedings under that provision to obtain confirmation of the consistency with the WTO agreements of its implementing measure.

348. Moreover, we recall that the suspension of concessions is an abnormal state of affairs because it is the last resort available under the DSU when compliance is not achieved. Pursuant to Article 22.8, this abnormal state of affairs must be "temporary" and must be brought back to normality as soon as possible. Consequently, both the suspending Member and the implementing Member share the responsibility to ensure that the suspension of concessions is not applied indefinitely. Thus, initiation of Article 21.5 proceedings by either Member, as soon as possible, to examine the consistency with the covered agreements of Directive 2003/74/EC would contribute to a

[765]Panel Report, *US – Continued Suspension*, para. 7.355; Panel Report, *Canada – Continued Suspension*, para. 7.353.

[766]European Communities' appellant's submission, para. 75.

prompt resolution of the disagreement as to whether the inconsistent measure has been removed and whether the suspension of concessions must be terminated pursuant to Article 22.8.

349. The European Communities advances several reasons why initiation of Article 21.5 panel proceedings by the original respondent is not permissible, including: (i) the adversarial nature of the WTO dispute settlement system and its inapplicability to a Member's request for an "abstract confirmation" of the consistency of a measure; (ii) the difficulty in defining the Article 21.5 panel's terms of reference; (iii) the possibility that the original complainants would refuse to participate; and (iv) the lack of recommendations and rulings directly addressing the illegality of the continued suspension of concessions should the measure taken to comply be found to be consistent with the WTO agreements. We address below each of the objections raised by the European Communities.

(a) The "Adversarial" Nature of the WTO Dispute Settlement System

350. According to the European Communities, an implementing Member cannot have recourse to Article 21.5 of the DSU to confirm the consistency with the WTO agreements of its own measures, because the dispute settlement system is based on adversarial proceedings and is not applicable to "requests for an abstract confirmation of the consistency of a measure".[767] The European Communities adds that its understanding of Article 21.5 is confirmed by the concept of a "dispute" as reflected in Article 3.3 of the DSU, which, according the European Communities, "assumes a situation where one Member challenges the measure of another Member" because the former considers that its rights are being affected.[768] The European Communities also refers to the text of Article XXIII:1 of the GATT 1994 which contains language similar to that in Article 3.3 of the DSU.

351. Article 3.3 provides that:

> The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

352. It is evident that the implementing Member would not normally consider its benefits to have been impaired by the measure it has itself taken to comply with the DSB's recommendations and rulings. In the post-suspension stage of a dispute, however, an original respondent would initiate Article 21.5 panel proceedings for a specific reason: to obtain a multilateral confirmation that its implementing measure has achieved substantive compliance, so as to render the continued application of the suspension of concessions unlawful pursuant to Article 22.8. The situation is thus one of those envisaged under Article 3.3, in that the original respondent considers that its benefits under the covered agreement are being impaired by the suspension of concessions maintained by the original complainant, which is denied by the suspending Member. The task of an Article 21.5 panel,

[767]European Communities' appellant's submission, para. 78. (emphasis omitted)
[768]*Ibid*., para. 85.

established at the request of the original respondent, is to determine whether the implementing measure brings about substantive compliance. There is nothing "abstract" about such a determination; it results in an adjudication with real consequences, including, in particular, whether the application of the suspension of concessions may continue.

(b) The Terms of Reference of an Article 21.5 Panel Requested by the Original Respondent

353. The European Communities submits that "[i]t would be manifestly impossible for the European Communities to fulfil the very basic requirements of Article 6 for the purposes of seeking confirmation of the consistency with the WTO agreements of its implementing measure since it would not be in a position to identify the provisions of the *SPS Agreement* that are violated."[769] We agree that the original respondent that has taken a measure to comply cannot be expected to speculate as to the violations that could possibly be raised against its measure by other Members, and this is not what the original respondent is expected to do if it initiates Article 21.5 panel proceedings. Rather, the original respondent will be able to identify in its panel request the measure it has taken to comply and the specific inconsistencies found in the DSB's recommendations and rulings in the original proceedings, and claim before the Article 21.5 panel that it has complied with the DSB's recommendations and rulings by rectifying those inconsistencies. It would then be for the Article 21.5 panel to determine if the measure taken to comply does, in fact, rectify the inconsistencies identified in the DSB's recommendations and rulings.

354. The original complainant may respond to the allegations of compliance made by the original respondent. If, however, the original complainant considers that the implementing measure is inconsistent with provisions of the WTO agreements not covered in the request for the establishment of a panel by the implementing Member, it may file its own request for the establishment of a panel under Article 21.5 identifying those provisions that it considers should be examined by the Article 21.5 panel. It would be for the Article 21.5 panel to determine if the implementing measure violates the WTO agreements in ways different from the original measure or whether certain claims fall outside the scope of Article 21.5 proceedings.[770] The original complainant would be expected to do so as soon as possible after adoption of an implementation measure or after the filing of the original respondent's panel request, so that both Article 21.5 panel requests may be referred to the original panel wherever possible, allowing review of all the issues relating to substantive compliance in the same Article 21.5 proceedings.[771]

355. Such an approach is consistent with the requirements of Article 22.8 of the DSU. As noted above, Article 22.8 provides certain resolutive conditions which, if met, render the suspension of concessions without legal basis. The suspending Member and the implementing Member share the responsibility to ensure that the suspension of concessions is applied only insofar as none of the conditions laid down in Article 22.8 are met. Thus, both Members have an obligation to engage in a

[769]European Communities' appellant's submission, para. 88.
[770]As the Appellate Body has explained, a complainant who had failed to make out a *prima facie* case in the original proceedings regarding an element of the measure that remains unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings. (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 87 and 96) Similarly, a complainant may not reassert the same claim against an unchanged aspect of the measure that was found to be *WTO-consistent* in the original proceedings. (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 96) Moreover, a complaining Member ordinarily would not be allowed to raise claims in the Article 21.5 proceedings that it could have pursued in the original proceedings, but did not. (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211)
[771]Even if delays between the original respondent's and original complainant's panel requests do not allow for harmonization pursuant to Article 9 of the accelerated working schedules under Article 21.5, the matter raised by the original respondent and the original complainant would nevertheless, wherever possible, be referred to the same individuals that served on the original panel.

cooperative manner in WTO dispute settlement to establish whether the suspension of concessions can continue or must be discontinued pursuant to Article 22.8. Irrespective of who initiates the Article 21.5 panel proceedings, a finding of an Article 21.5 panel that the implementing Member has removed the inconsistent measure means that one of the resolutive conditions in Article 22.8 is met. This finding, once adopted by the DSB–the same body that authorized the suspension of concessions– signifies that the inconsistency against which the suspension of concessions was authorized has now been remedied. Thus, by operation of law (*ipso jure*), the suspension of concessions may no longer be applied.

(c) The Original Complainants' Incentive to Participate in Article 21.5 Panel Proceedings Initiated by the Original Respondent

356. The European Communities further submits that it "appears that the United States and Canada as 'defending parties' would not be obliged to participate"[772] in Article 21.5 panel proceedings initiated by the European Communities. In support of this argument, the European Communities referred to the fact that in *EC – Bananas III (Article 21.5 – EC)*, one of the original complainants (the United States) refused to participate in the Article 21.5 panel proceedings that the original respondent (the European Communities) had initiated. The European Communities therefore takes issue with the Panel's reference to that dispute in finding that Article 21.5 panel proceedings may be initiated by the original respondent.

357. We note that the panel in *EC – Bananas III (Article 21.5 – EC)* did not find that it was precluded from examining the European Communities' claims because the European Communities had been the respondent in the original proceedings.[773] Moreover, the exceptional circumstances in *EC – Bananas III (Article 21.5 – EC)*, including the particular request made by the European Communities in those proceedings, could explain the lack of participation of certain original complainants and that panel's decision not to make a ruling on the consistency of the European Communities' first implementing measure. In *EC – Bananas III (Article 21.5 – EC)*, an Article 21.5 panel was established at the request of one of the original complainants, Ecuador, in which the European Communities' first implementing measure was found to be inconsistent with the WTO agreements. There was also an ongoing arbitration pursuant to Article 22.6 of the DSU between the European Communities and the United States.[774] That dispute, on its unusual facts, does not lead to the conclusion that an Article 21.5 panel would be precluded from making an objective assessment of the matter referred to it by the original respondent.

358. We recognize that it is theoretically possible for the original complainant to refuse to participate in Article 21.5 proceedings initiated by the original respondent.[775] Yet, this is not a feature that may only occur in Article 21.5 proceedings initiated by the original respondent, because the DSU does not provide the means to compel any party to participate in any dispute settlement proceedings. A defending party who refuses to participate in dispute settlement proceedings will lose the opportunity to defend its position and will risk a finding in favour of the complaining party that has established a *prima facie* case.[776] Similarly, in Article 21.5 panel proceedings initiated by the original respondent, the original complainant who refuses to participate forgoes the opportunity to explain to the Article 21.5 panel why the measure taken to comply fails to rectify the inconsistencies found in the original proceeding and, consequently, why the suspension of concessions remains justified under Article 22.8 despite the measure taken to comply. Absent any rebuttal by the original complainant, the Article 21.5 panel will make its determination on the basis of a *prima facie* case

[772]European Communities' appellant's submission, para. 90.
[773]Panel Report, *EC – Bananas III (Article 21.5 – EC)*, para. 4.18.
[774]We do not need to express a view here on whether the consistency of the implementation measure could or should have been addressed by the arbitrators acting pursuant to Article 22.6 of the DSU.
[775]European Communities' appellant's submission, para. 89.
[776]For the appellate stage, see Rule 29 of the *Working Procedures*.

presented by the original respondent that its implementing measure has brought it into compliance with the DSB's recommendations and rulings. Therefore, where the original complainant has suspended concessions according to the DSB's authorization, the original complainant would have a strong incentive to participate lest the authorization to suspend concessions lapses as a result of the adoption by the DSB of the Article 21.5 panel's finding that the original respondent has brought itself into compliance.

359. Like any other panel, an Article 21.5 panel established in the post-suspension stage, at the request of the original respondent, would be bound to make an objective assessment of the matter. The ultimate issue before such a panel is whether the measure found to be inconsistent with a covered agreement has been removed. We have interpreted "removed" to mean substantive compliance. The question is which party bears the burden of proof in respect of the issues of substantive compliance. Is the burden to be allocated according to a mechanistic rule that it is for the party initiating the proceedings to prove substantive compliance or is it the case that the burden of proof is allocated according to different principles? Much of the reluctance of the parties to secure a definitive determination in respect of Article 22.8 is the apprehension that, upon initiation, a party will attract the full burden of proof.

360. In our view, the allocation of the burden of proof, in the context of Article 22.8, should not be determined simply on the basis of a mechanistic rule that the party who initiates the proceedings bears the burden of proof. As we have indicated, in case of a disagreement, both parties are under an obligation to secure a definitive multilateral determination as to whether the suspension of concessions must be terminated. The burden of proof does not attach to a party simply because such party discharges this obligation. To hold otherwise would create a disincentive to act in a manner which we consider to be obligatory and desirable.

361. The allocation of the burden of proof in the context of claims arising under Article 22.8 is a function of the following considerations. First, what is the nature of the cause of action that is framed under Article 22.8. Second, the practical question as to which party may be expected to be in a position to prove a particular issue. Third, consideration must be given to the requirements of procedural fairness.

362. Since the suspension of concessions is a remedy of last resort imposed after an elaborate multilateral dispute settlement process, in our view, it is appropriate that the Member whose measure has brought about the suspension of concessions should make some showing that it has removed the measure found to be inconsistent by the DSB in the original proceedings, so that normality can be lawfully restored. This requires that the original respondent will have an onus to show that its implementing measure has cured the defects identified in the DSB's recommendations and rulings. The quantum of proof entailed by this is a clear description of its implementing measure, and an adequate explanation regarding how this measure rectifies the inconsistencies found in the original proceedings, so as to place the Article 21.5 panel in a position to make an objective assessment of the matter and, in the absence of rebuttal, to rule in favour of the original respondent.

363. If the original respondent initiates Article 21.5 proceedings to determine that the first resolutive condition in Article 22.8 has been fulfilled, and, consequently, that the suspension of concessions must end, and the original complainant fails to appear and answer the case, what would the original respondent need to establish to satisfy a panel that the resolutive condition has been fulfilled? The original respondent, in this situation, would be required to place evidence before the Article 21.5 panel sufficient to permit the panel, in carrying out its duty, to make an objective assessment of the matter. The quantum of evidence necessary for this purpose is the burden of proof, described above, that attaches to the original respondent.

364. In respect of all other issues, the burden of proof rests upon the original complainant. Such issues may include a claim that the implementing measure is otherwise inconsistent with the covered

agreements or that the implementing measure remains wanting for reasons not traversed by the original respondent in discharging its burden of proof.

365. This allocation of the burden of proof is also consistent with the parties' shared responsibility to ensure that the suspension of concessions is "temporary", and that the normal state of affairs, that is, conformity with the covered agreements and absence of the suspension of concessions, is restored as quickly as possible.

(d) The Lack of Recommendations and Rulings Regarding the Legality of the Continued Suspension of Concessions

366. The European Communities further states that, if it had initiated Article 21.5 panel proceedings in this case, the Article 21.5 panel could not have made recommendations addressed to the United States and Canada to cease the suspension of concessions, because an Article 21.5 panel would only have had jurisdiction to rule on the compliance of the implementing measure.[777]

367. A finding that the implementing Member has achieved substantive compliance means that the first resolutive condition in Article 22.8 has been met. Such a finding, adopted by the DSB as part of the Article 21.5 panel (and Appellate Body) report(s), would, by operation of law (*ipso jure*), result in the termination of the DSB's authorization to suspend concessions. This result obtains irrespective of whether the Article 21.5 panel was initiated by the original respondent or by the original complainant. It does not depend on which party initiates the Article 21.5 panel proceedings. Rather, the result depends on whether the Article 21.5 panel confirms that the implementing Member has brought itself into substantive compliance, thereby triggering the obligation to cease applying the suspension of concessions, as required by Article 22.8 of the DSU.

368. In sum, we are not persuaded by the European Communities' argument that an original respondent in the post-suspension stage of a dispute would be precluded from initiating Article 21.5 proceedings. Therefore, we find that the Panel did not err in stating that proceedings under Article 21.5 of the DSU may be initiated not only by the complainant, but also by the respondent in the original proceedings.

F. *Analysis of the Panel's Findings of "Procedural Violations"*

369. The United States and Canada allege that the Panel erred in finding that they breached Articles 23.2(a) and 23.1 of the DSU by continuing the suspension of concessions after the notification of Directive 2003/74/EC[778], and request the Appellate Body to reverse these findings. In particular, the United States and Canada assert that the Panel erred in finding that: (i) through the maintenance of the suspension of concessions against the European Communities, they are seeking the redress of a violation with respect to Directive 2003/74/74/EC; and (ii) they made a unilateral determination to the effect that a violation has occurred without recourse to dispute settlement under the DSU, in contravention of Article 23.2(a).

1. The Prohibition on Certain Unilateral Actions – Article 23 of the DSU

370. We begin our analysis with the interpretation of the terms of Article 23 that are relevant to this dispute. Entitled "Strengthening of the Multilateral System", Article 23 provides that:

[777]European Communities' appellant's submission, para. 92.
[778]Panel Report, *US – Continued Suspension*, paras. 7.251 and 7.856; Panel Report, *Canada – Continued Suspension*, paras. 7.244 and 7.841.

> 1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.
>
> 2. In such cases, Members shall:
>
> (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;
>
> (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
>
> (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

371. As the Appellate Body has explained, Article 23.1 lays down the fundamental obligation of WTO Members to have recourse to the rules and procedures of the DSU when seeking redress of a violation of the covered agreements.[779] Article 23 restricts WTO Members' conduct in two respects. First, Article 23.1 establishes the WTO dispute settlement system as the exclusive forum for the resolution of such disputes and requires adherence to the rules of the DSU. Secondly, Article 23.2 prohibits certain unilateral action by a WTO Member. Thus, a Member cannot unilaterally: (i) determine that a violation has occurred, benefits have been nullified or impaired, or that the attainment of any objective of the covered agreements has been impeded; (ii) determine the duration of the reasonable period of time for implementation; or (iii) decide to suspend concessions and determine the level thereof.

372. The phrase "[i]n such cases, Members shall" with which Article 23.2 begins refers back to the situation described in Article 23.1, namely, when a Member is seeking the redress of, *inter alia*, a violation of obligations under the covered agreements. We share the view of the panel in *US – Section 301 Trade Act* that the terms "[i]n such cases, Members shall" used in the chapeau of Article 23.2 make clear that Article 23.2 is "explicitly linked to, and has to be read together with and subject to, Article 23.1".[780] Therefore, the specific prohibitions of unilateral actions in Article 23.2 must be understood in the context of the overarching provision of Article 23.1. In other words, the unilateral actions prohibited by Article 23.2 are those taken by a Member with a view to seeking redress of a violation. Moreover, the phrase "[i]n such cases, Members shall" at the beginning of Article 23.2 indicates that the specific obligations set forth in its subparagraphs clarify and illustrate

[779]Appellate Body Report, *US – Certain EC Products*, para. 111.
[780]Panel Report, *US – Section 301 Trade Act*, para. 7.44.

the scope of the general and ongoing obligation in Article 23.1. This does not mean, however, that the scope of Article 23.1 is exhausted by the situations described in Article 23.2.[781]

373. Seeking the redress of a violation is of course not by itself prohibited by Article 23.1 of the DSU. Rather, to be in breach of Article 23.1, a Member must be seeking redress without having recourse to, or abiding by, the rules of the DSU.

374. An initial question that arises in this case is whether the continued application of a previously authorized suspension of concessions can be said to constitute the seeking of redress. On the one hand, the authorization to suspend concessions can be said to be the result of a previous act of seeking redress that involved initiating a dispute. On the other hand, the continued application of the suspension of concessions can be said to reflect a continuous act of seeking redress for a violation found by the DSB that has not yet been rectified. In any event, the suspension of concessions that has been duly authorized by the DSB will not constitute a violation of Article 23.1, as long as it is consistent with other rules of the DSU, including paragraphs 2 through 8 of Article 22, even if the continued application of the suspension of concessions is regarded as an action or part of a process of "seeking the redress". This is because, before obtaining the DSB's authorization to suspend concessions, a Member must initiate a dispute settlement process in which it challenges the consistency with the covered agreements of a measure taken by another Member. The Member initiating the process will only be authorized to suspend concessions when the measure is found by the panel (and the Appellate Body, if appealed) to be inconsistent with the covered agreements and the Member taking the measure fails to implement the panel's (or Appellate Body's) findings within a reasonable period of time or, if it takes a measure to comply, that measure is found by the panel (and the Appellate Body) in compliance proceedings not to have brought the Member concerned into compliance. In other words, the Member will only be able to suspend concessions pursuant to the DSB's authorization after having had extensive recourse to, and abided by, the rules and procedures of the DSU, consistent with the requirements of Article 23.1.

375. This does not mean that Article 23.1 ceases to apply once the suspension of concessions has been authorized by the DSB. Article 23.2(c) specifically refers to Article 22 of the DSU. Paragraph 8 of this provision states that the suspension of concessions shall only be applied until the inconsistent measure has been removed or one of the other two conditions in Article 22.8 is met. Thus, if the Member subject to the suspension of concessions takes an implementing measure and that measure is found in WTO dispute settlement proceedings to bring this Member into substantive compliance, the suspension of concessions would no longer be consistent with Article 22.8 of the DSU, and, as a result, would become a unilateral action prohibited by Articles 23.1 and 23.2. In other words, the requirements in Article 22.8 and Article 23 apply and must be read together in the post-suspension stage of a dispute. Therefore, Article 23 must be seen as containing an ongoing obligation and continues to apply even after the suspension of concessions has been duly authorized by the DSB.

376. With this in mind, we turn to examine the issues raised by the United States and Canada on appeal.

[781] As the panel in *US – Section 301 Trade Act* pointed out, the prohibitions mentioned in Article 23.2 are examples of conduct that contradicts the rules and procedures of the DSU which, under the obligation in Article 23.1 to "abide by the rules and procedures" of the DSU, Members are obligated to follow. These rules and procedures cover more than those specifically mentioned in Article 23.2 and "[t]here is a great deal more State conduct which can violate the general obligation in Article 23.1 to have recourse to, and abide by, the rules and procedures of the DSU than the instances especially singled out in Article 23.2." (Panel Report, *US – Section 301 Trade Act*, para. 7.45) (footnote omitted)

2. The Panel's Alleged Examination of Articles 23.2(a) and 23.1 in Isolation from the Requirements in Article 22.8 of the DSU

377. The United States and Canada submit that the Panel erred by examining the European Communities' claims under Articles 23.2(a), 23.1, and 21.5 independently from the question of whether Article 22.8 required the termination of the suspension of concessions. The United States argues that the Panel ignored the fact that none of the conditions requiring the cessation of the suspension of concessions under Article 22.8 of the DSU had occurred. Thus, the United States maintains, the Panel's findings that the suspension of concessions by the United States is "without recourse to the procedures under the DSU"[782] would effectively undermine the DSB's authorization to suspend concessions, rendering it "meaningless".[783] Canada claims that the "[k]ey to this case is Article 22.8 of the DSU"[784] which, as *lex specialis* in the post-suspension phase of a dispute, sets out the three conditions that must be met in order to have the suspension of concessions terminated, one of the conditions being actual compliance with the DSB's recommendations and rulings. Canada adds that "the continuous involvement of the DSB", pursuant to the second sentence of Article 22.8, "suggests that [the DSB] retains jurisdiction over the matter until its recommendations and rulings have been fully implemented."[785] Thus, in Canada's view, the Panel should have first considered whether Canada was required to discontinue the suspension of concessions pursuant to Article 22.8.[786]

378. We note that the suspension of concessions maintained by the United States and Canada were duly authorized by the DSB subsequent to its adoption of the recommendations and rulings in *EC – Hormones* and an arbitration award resulting from proceedings under Article 22.6 regarding the level of the suspension of concessions.[787] As discussed above, where the suspension of concessions has been duly authorized by the DSB and is applied consistently with the rules of the DSU, including Article 22.8, it does not constitute a violation of Article 23.1, because it is not imposed without recourse to or without abiding by the DSU. The requirements in Article 22 and those in Article 23 must be read together, in the post-suspension stage of the dispute, to determine the legality of the continued suspension when an implementing measure has been taken. Thus, we share the view of the United States and Canada that, in order to determine whether they acted inconsistently with Article 23 by continuing the suspension of concessions subsequent to the notification of Directive 2003/74/EC, the Panel had to first determine whether the suspension of concessions was being applied consistently with Article 22.8 of the DSU.

379. The European Communities asserts that the United States and Canada "entirely ignore"[788] the fact that the European Communities' first series of main claims, alleging violations of Articles 23.1, 23.2(a), and 21.5, did not include Article 22.8 of the DSU. The European Communities further contends that the Panel's approach in examining the claims under Articles 23.1 and 23.2(a) was correct, because Directive 2003/74/EC, as a measure taken to comply, must be presumed to be compliant with the covered agreements until shown otherwise in Article 21.5 proceedings.

380. In section D above, we found that the presumption that an implementing Member acts in good faith is insufficient to establish substantive compliance. The European Communities should be presumed to have acted in good faith when adopting the implementing measure; however, this did not mean that the taking of such measure in itself establishes that the measure achieves substantive compliance. We also rejected the formalistic interpretation of Article 22.8 advanced by the European

[782] United States' other appellant's submission, para. 29.
[783] *Ibid.*, para. 30.
[784] Canada's other appellant's submission, para. 35.
[785] *Ibid.*, para. 36.
[786] *Ibid.*, paras. 60 and 61.
[787] Article 22.4 provides that "[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment."
[788] European Communities' appellee's submission, para. 29.

Communities that the adoption, and notification to the DSB, of a measure taken to comply replacing the original measure is sufficient to establish the removal of the measure found to be inconsistent with a covered agreement within the meaning of Article 22.8. Rather, a proper interpretation of Article 22.8, in its context and in the light of the object and purpose of the DSU, indicates that substantive compliance is required before the suspension of concessions must be terminated. Where parties disagree as to whether there is substantive compliance, the duty to cease the suspension of concessions is not triggered until substantive compliance is determined through multilateral dispute settlement proceedings. A unilateral declaration of compliance cannot have the same effect. We note that, as the original respondent, the European Communities has the option to initiate Article 21.5 panel proceedings for purposes of determining whether the DSB's recommendations and rulings have been implemented through the adoption of Directive 2003/74/EC.

381. The European Communities further submits that, upon the adoption of Directive 2003/74/EC in good faith, the suspension of concessions would have achieved its objective and would do nothing to induce compliance. Article 22.1 of the DSU provides that the suspension of concessions is not to be "preferred to *full* implementation of a recommendation to bring a measure into conformity with the covered agreements".[789] Requiring termination of the suspension of concessions simply because a Member declares that it has removed the inconsistent measure, without a multilateral determination that substantive compliance has indeed been achieved, would undermine the important function of the suspension of concessions in inducing compliance. This would significantly weaken the effectiveness of the WTO dispute settlement system and its ability to provide security and predictability to the multilateral trading system.

382. The European Communities additionally submits that its position is consistent with the approach taken in the Articles on Responsibility of States for Internationally Wrongful Acts[790] (the "Articles on State Responsibility"), which require that countermeasures be suspended if the internationally wrongful act has ceased and the dispute is pending before a tribunal that has the authority to make decisions binding upon the parties.[791] Yet, the Articles on State Responsibility do not lend support to the European Communities' position. For example, Article 53 provides that countermeasures must be terminated as soon as the State "has complied with its obligations" in relation to the internationally wrongful act. Thus, relevant principles under international law, as reflected in the Articles on State Responsibility, support the proposition that countermeasures may continue until such time as the responsible State has ceased the wrongful act by fully complying with its obligations.

383. In sum, the suspension of concessions maintained by the United States and Canada has been duly authorized by the DSB and was obtained through recourse to the relevant rules and procedures of the DSU, consistently with Article 23.1 of the DSU. Pursuant to Article 22.8, the legality of the continued suspension of concessions depends on whether the measure found to be inconsistent in *EC – Hormones* has been removed, and this requires substantive compliance. We therefore find that the Panel erred in considering that the European Communities' claims under Articles 23.2(a), 23.1, and 21.5 may be examined "completely separately" from whether the European Communities implemented the DSB's recommendations and rulings in *EC – Hormones*.[792]

384. The DSB's authorization does not mean that Article 23 becomes irrelevant. Rather, as Article 23.2(c) specifies, the suspension of concessions is subject to Article 22, including the

[789]Moreover, pursuant to Article 3.3, the "prompt settlement" of disputes "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members".

[790]See *supra*, footnote 480.

[791]See European Communities' appellee's submission, paras. 94-96.

[792]Panel Report, *US – Continued Suspension*, para. 7.182; Panel Report, *Canada – Continued Suspension*, para. 7.164.

requirement in Article 22.8 that it shall only be applied until such time as the measure found to be inconsistent with the covered agreements has been removed. Therefore, the suspension of concessions by the United States and Canada would be in breach of Article 23.2(c), and consequently Article 23.1, if it were established in WTO dispute settlement that the inconsistent measure has indeed been removed within the meaning of Article 22.8 and the suspension is not immediately terminated. Article 22.8 thus provides relevant context for the analysis of the issues appealed under Article 23. Moreover, the application of DSB-authorized suspension of concessions is temporary and subject to the objective conditions laid down in Article 22.8. The United States, Canada, as well as the European Communities, have the shared responsibility to ensure that the suspension of concessions is not applied beyond the time foreseen in Article 22.8. Consequently, the United States and Canada have a duty to engage actively in dispute settlement proceedings concerning whether the suspension of concessions is applied consistently with such conditions. Failing to do so could be contrary to the overarching principle in Article 23.1 prohibiting Members from seeking redress without having recourse to, or abiding by the rules of, the DSU. Nonetheless, this is not currently the case, because both the United States and Canada are actively engaged in these proceedings initiated by the European Communities to determine whether the measure found to be inconsistent with a covered agreement in *EC – Hormones* has been removed within the meaning of Article 22.8.

3. Whether the Panel Erred in Finding that the United States and Canada Are "Seeking the Redress of a Violation" with Respect to Directive 2003/74/EC

385. We turn to examine the claim by the United States and Canada that the Panel erred in finding that, by continuing the suspension of concessions subsequent to the notification of Directive 2003/74/EC, they were seeking the redress of a violation without having recourse to, or abiding by, the rules and procedures of the DSU within the meaning of Article 23.1 of the DSU.

386. The Panel found that Directive 2003/74/EC, which the European Communities adopted to implement the DSB's recommendations and rulings in *EC – Hormones*, is a new measure that "has never been as such subject to recourse to the rules and procedures of the DSU".[793] The Panel stated that, although Directive 2003/74/EC, like Directive 96/22/EC (which was found to be WTO-inconsistent in *EC – Hormones*), also imposed an import ban, "it is not the ban ... but the justification for this ban which was found insufficient" in *EC – Hormones*.[794] According to the Panel, therefore, the fact that the ban remains in place does not mean that no new measure has been adopted. The Panel thus found that, through the continued suspension of concessions, the United States and Canada are seeking redress of a violation caused by Directive 2003/74/EC, a measure they had not challenged by having recourse to the DSU.[795]

387. We recall that the suspension of concessions maintained by the United States and Canada was authorized by the DSB as a result of the finding in *EC – Hormones* that Directive 96/22/EC was inconsistent with the *SPS Agreement*. The Panel correctly noted that the existence of an import ban in Directive 2003/74/EC (which replaced Directive 96/22/EC) does not mean that no implementing measure has been adopted. Yet, the Panel's analysis under Article 23 stopped short of considering whether the European Communities' implementing measure resulted in substantive compliance. As we explained earlier, such analysis is necessary to determine whether the suspension of concessions was required to be terminated pursuant to Article 22.8 of the DSU. Even if the United States and Canada could be said to continue to seek redress of the violation resulting from Directive 96/22/EC by maintaining the suspension of concessions, they are not prevented from doing so as long as the

[793]Panel Report, *US – Continued Suspension*, para. 7.206; Panel Report, *Canada – Continued Suspension*, para. 7.198.

[794]Panel Report, *US – Continued Suspension*, para. 7.207; Panel Report, *Canada – Continued Suspension*, para. 7.199.

[795]Panel Report, *US – Continued Suspension*, para. 7.215; Panel Report, *Canada – Continued Suspension*, para. 7.207.

removal of the inconsistent measure has not been established in WTO dispute settlement. In obtaining DSB authorization for that suspension, the United States and Canada abided by the DSU as required by Article 23.1. The Panel's finding that, by maintaining the suspension of concessions, the United States and Canada are seeking the redress of a violation without abiding by the rules of the DSU thus appears to presuppose what is yet to be established, that is, that the inconsistent measure against which the suspension of concessions was authorized (Directive 96/22/EC) has actually been "removed" within the meaning of Article 22.8 by Directive 2003/74/EC.[796] This finding of the Panel flows from its erroneous approach of considering Articles 23.1 and 23.2(a) completely separately from the requirements of Article 22.8, which we discussed and rejected earlier.

388. The Panel rejected the arguments by the United States and Canada that they were authorized to suspend concessions and that this authorization has not been revoked.[797] The Panel stated that the DSB's authorization to suspend concessions is "only an *authorization*, not an *obligation*".[798] According to the Panel, this meant that the United States and Canada were "free to apply" the suspension of concessions or not, and the fact that they did not lift the suspension after the notification of Directive 2003/74/EC indicated their intention to seek redress of a violation arising from Directive 2003/74/EC.[799] We fail to see the relevance of the distinction between an authorization and an obligation to suspend concessions for purposes of analyzing whether the United States and Canada are seeking the redress of a violation concerning Directive 2003/74/EC. The relevant question before the Panel was whether the authorization to suspend concessions had lapsed because one of three conditions in Article 22.8 has been met. In the absence of a finding in WTO dispute settlement that the first condition in Article 22.8 had been met, the authorization to suspend concessions did not cease to be legally valid.

389. In addition, the Panel observed that "[i]n none of the circumstances foreseen by [the first sentence of] Article 22.8 does this provision require a decision of the DSB".[800] We agree that, under the first sentence of Article 22.8, a decision of the DSB is not required if Members reach a mutually agreed solution. Similarly, a DSB decision is not required if the suspending Member does not dispute that the measure found to be inconsistent with a covered agreement has been removed. However, where a disagreement arises as to whether the measure found to be inconsistent has indeed been removed, this disagreement must be resolved through Article 21.5 proceedings to determine whether the suspension of concessions is still applied consistently with the objective conditions under Article 22.8 or must be terminated. Under such circumstances, DSB decisions are required for the dispute to proceed pursuant to the rules of the DSU, including the decision to establish a panel and the adoption of the panel or Appellate Body reports examining the implementing measure. Moreover, the second sentence of Article 22.8 requires the DSB to keep under surveillance the implementation of adopted recommendations and rulings in cases where concessions have been suspended. Article 22.8 therefore clearly contemplates an ongoing role of the DSB in reviewing the implementation of recommendation and rulings, thus confirming that a dispute concerning implementation should be

[796]In the context of addressing the European Communities' claim that the United States and Canada also breached Article 22.8, the Panel found that "it has not been established that the European Communities has removed the measure found to be inconsistent with a covered agreement." (Panel Report, *US – Continued Suspension*, para. 7.847; and Panel Report, *Canada – Continued Suspension*, para. 7.832) For this reason, the Panel concluded that the European Communities "did not demonstrate a breach of Article 22.8 of the DSU" by the United States and Canada. (Panel Report, *US – Continued Suspension*, para. 7.850; Panel Report, *Canada – Continued Suspension*, para. 7.835)

[797]Panel Report, *US – Continued Suspension*, para. 7.208; Panel Report, *Canada – Continued Suspension*, para. 7.200.

[798]Panel Report, *US – Continued Suspension*, para. 7.209; Panel Report, *Canada – Continued Suspension*, para. 7.201. (original emphasis)

[799]Panel Report, *US – Continued Suspension*, paras. 7.209 and 7.210; Panel Report, *Canada – Continued Suspension*, paras. 7.201 and 7.202.

[800]Panel Report, *US – Continued Suspension*, para. 7.211; Panel Report, *Canada – Continued Suspension*, para. 7.203.

subject to multilateral resolution and not be decided on the basis of a unilateral declaration of compliance or non-compliance.

390. We also note the Panel's statement that, "pursuant to Article XVI:4 of the [*WTO Agreement*], Members must ensure the conformity of their laws, regulations and administrative procedures with their obligations as provided" in the covered agreements, "including the DSU".[801] According to the Panel, this obligation also applies to the suspension of concessions. Article XVI:4 applies equally to all WTO Members. The European Communities was required to ensure the conformity of its implementing measure, just as it is the obligation of the United States and Canada to ensure the conformity of their continued application of suspension of concessions.[802] We do not see the relevance of this provision in the Panel's analysis under Article 23.1 of the DSU, as long as the conditions for the cessation of suspension under Article 22.8 have not been established.

391. On appeal, the European Communities submits that "the *adoption* of a measure taken to comply" that is "*different* from the original [measure] *triggers* the presumption of good faith compliance" and, consequently, the "obligation to remove the suspension of concessions".[803] The European Communities' argument is again premised on the proposition that the implementing measure should be presumed to bring about full compliance as a result of the application of the presumption of good faith, as well as its understanding of the phrase "the measure found to be inconsistent with a covered agreement has been removed" in Article 22.8 as requiring merely the formal removal of the original measure, both of which we rejected in section D.

392. The European Communities further asserts that "even the United States acknowledged that it was maintaining its suspension of concessions against the new measure", as demonstrated by the United States' statements at the DSB meetings subsequent to the notification of Directive 2003/74/EC and in its Trade Policy Agenda in 2005.[804] As will be discussed in subsection 4 below, the DSB statements referred to by the European Communities do not, in themselves, have the legal effects that the Panel attributed to them. Moreover, the Trade Policy Agenda document referred to by the European Communities states that the United States "maintains its WTO-authorized sanctions on [European Communities'] products because the United States fails to see how the revised [European Communities'] measure could be considered to implement the recommendations and rulings of the DSB in this matter".[805] Thus, contrary to the European Communities' arguments, the statements make clear that the legal basis for maintaining the suspension of concessions was not the new measure. Rather, the basis for maintaining the suspension of concessions was that the United States considered that the European Communities had failed to implement the DSB's recommendations and rulings in *EC – Hormones* flowing from the inconsistency of Directive 96/22/EC.

393. Accordingly, we find that the Panel erred in concluding that, "by maintaining the suspension of concessions even after the notification of [Directive 2003/74/EC]", the United States and Canada are "seeking redress of a violation with respect to [this Directive], within the meaning of Article 23.1 of the DSU".[806]

[801]Panel Report, *US – Continued Suspension*, para. 7.212; Panel Report, *Canada – Continued Suspension*, para. 7.204.

[802]As the United States argues, this provision "militates equally in favor of a finding that the continued suspension of concessions by the United States" after the European Communities' notification of Directive 2003/74/EC "did *not* demonstrate that the United States was 'seeking redress of a violation' within the meaning of Article 23.1 with respect to" this Directive. (United States other appellant's submission, para. 58) (original emphasis)

[803]European Communities' appellee's submission, para. 104. (original emphasis)

[804]*Ibid.*, para. 106 (referring to Panel Report, *US – Continued Suspension*, paras. 7.219-7.221).

[805]*Ibid.*

[806]Panel Report, *US – Continued Suspension*, para. 7.215; Panel Report, *Canada – Continued Suspension*, para. 7.207.

4. Whether the Panel Erred in Finding that the United States and Canada Made a Determination of Violation Without Recourse to the DSU, Within the Meaning of Article 23.2(a)

394. We turn now to review the claims by the United States and Canada that the Panel erred in finding that they made a determination of violation regarding Directive 2003/74/EC without having recourse to dispute settlement in accordance with the rules and procedures of the DSU, contrary to Article 23.2(a) of the DSU.

395. We recall that, on the basis of the statements made by Canadian and United States delegates at two DSB meetings[807] concerning Directive 2003/74/EC, the Panel concluded that the United States and Canada had reached "a more or less final decision"[808] that this Directive is inconsistent with the *SPS Agreement* and fails to implement the DSB's recommendations and rulings in *EC – Hormones*. Such statements, in the Panel's view, constitute a "determination" under Article 23.2(a) of the DSU and, because the determination was made unilaterally without recourse to the DSU, it breached Article 23.2(a).[809]

396. We share the view of the panel in *US – Section 301 Trade Act* that a "determination" within the meaning of Article 23.2(a) "implies a high degree of firmness or immutability, i.e. a more or less final decision by a Member in respect of the WTO consistency of a measure taken by another Member".[810] Moreover, preliminary opinions or views expressed without a clear intention to seek redress are not covered by Article 23.2(a).[811] The statements made by delegates of the United States and Canada, on which the Panel focused its attention, were made shortly after the European Communities notified Directive 2003/74/EC to the DSB. The statements were made at the two DSB meetings held, respectively, two weeks and five weeks from the DSB meeting at which Directive 2003/74/EC was notified by the European Communities.[812] These statements, therefore, seem no more than initial reactions to the European Communities' self-proclaimed compliance with the DSB's recommendations and rulings in *EC – Hormones*. Considering the complexity of the issues that arise with respect to the consistency of Directive 2003/74/EC (as demonstrated in sections VI and VII of the Report), it is reasonable to assume that the United States and Canada needed some time before forming a definitive view regarding whether the European Communities had brought itself into compliance. We thus share the United States' and Canada's view that the statements at the DSB meetings lack sufficient amount of "firmness or immutability" for them to constitute a determination within the meaning of Article 23.2(a).[813]

[807]See Panel Report, *US – Continued Suspension*, paras. 7.219 and 7.220 (quoting Minutes of the DSB Meetings held on 7 November and 1 December 2003, WT/DSB/M/157, paras. 29 and 30, and WT/DSB/M/159, para. 25, respectively); and Panel Report, *Canada – Continued Suspension*, paras. 7.211-7.213 (quoting Minutes of the DSB Meetings held on 7 November and 1 December 2003, WT/DSB/M/157, para. 31, and WT/DSB/M/159, para. 24, respectively).

[808]Panel Report, *US – Continued Suspension*, para. 7.222; Panel Report, *Canada – Continued Suspension* , para. 7.215 (quoting Panel Report, *US – Section 301 Trade Act*, footnote 657 to para. 750).

[809]Panel Report, *US – Continued Suspension*, paras. 7.225 and 7.226; Panel Report, *Canada – Continued Suspension*, paras. 7.219, 7.222, and 7.223.

[810]Panel Report, *US – Section 301 Trade Act*, footnote 657 to para. 7.50.

[811]See *ibid.*. See also Panel Report, *US – Certain EC Products*, para. 6.18.

[812]The European Communities notified the DSB of the adoption of Directive 2003/74/EC on 27 October 2003. See Panel Report, *US – Continued Suspension*, para. 7.219; and Panel Report, *Canada – Continued Suspension*, para. 7.211.

[813]United States' other appellant's submission, paras. 79-81; Canada's other appellant's submission, para. 89. Canada adds that the statements made at the two DSB meetings were "the equivalent of Canada reserving its rights while not acquiescing to the [European Communities'] assertions of compliance". (*Ibid.*) We consider this a proper characterization of these statements.

397. In their statements, the United States and Canada indicated that they would be willing to engage in further bilateral discussions regarding the alleged scientific justification for Directive 2003/74/EC.[814] This readiness to discuss Directive 2003/74/EC is difficult to reconcile with a finding that the DSB statements constituted a "determination" with the type of firmness and immutability required by its ordinary meaning and the relevant context of Article 23, as interpreted by the panel in *US – Section 301 Trade Act*. The Panel recognized this intention to engage in bilateral discussions evidenced in the DSB statements, but found that the consultations that took place after the notification of Directive 2003/74/EC "largely related to procedural issues".[815] Simply because subsequent consultations related largely to procedural issues does not mean that, *at the time the DSB statements were made*, the United States and Canada had made a unilateral determination without recourse to the DSU within the meaning of Article 23.2(a).

398. Moreover, DSB statements are not intended to have legal effects and do not have the legal status of a definitive determination in themselves. Rather, they are views expressed by Members and should not be considered to prejudice Members' position in the context of a dispute. As the United States rightly points out, "[s]tatements made by Members at DSB meetings, especially those expressing a view as to the WTO consistency of another Member's measures or actions, are generally diplomatic or political in nature" and "generally have no legal effect or status in and of themselves".[816]

399. The Panel's finding that DSB statements could constitute a definitive determination concerning the WTO-inconsistency of a Member's measure could adversely affect WTO Members' ability to freely express their views on the potential compatibility with the covered agreements of measures adopted by other Members.[817] This would result in a "chilling" effect on those statements[818], because Members would refrain from expressing their views at DSB meetings regarding the WTO-inconsistency of other Members' measures lest such statements be found to constitute a violation of Article 23. If this were the case, the DSB would be inhibited from properly carrying out its function, pursuant to Article 21.6 of the DSU, to keep under surveillance the implementation of its recommendations and rulings.

400. The European Communities disagrees with the United States' argument that statements made at DSB meetings have no legal effect in themselves, arguing, instead, that "those statements can be used as *evidence* of a particular position, view or determination taken by a Member."[819] The European Communities refers to the Appellate Body's observation in *US – Upland Cotton (Article 21.5 – Brazil)* that certain statements in a United States Government press release indicated

[814]Panel Report, *US – Continued Suspension*, para. 7.220; Panel Report, *Canada – Continued Suspension*, para. 7.212. The United States indicated at the meeting of 1 December 2003 that "[t]he United States would be pleased to discuss with [European Communities'] officials any outstanding issues regarding the [European Communities'] ban on certain beef produced in the United States, including their reactions to the detailed points that the United States had raised in its statement at the 7 November DSB meeting. With regard to the suggestion made by the [European Communities] at the present meeting that multilateral proceedings be initiated, the United States would be happy to discuss this suggestion with the [European Communities] along with other procedural options." (Panel Report, *US – Continued Suspension*, para. 7.220) Canada indicated at the meeting of 7 November 2003 that "Canada did not see any reason for WTO procedures at this time, but would welcome the opportunity for further discussion with the [European Communities] concerning the justification for its measures." (Panel Report, *Canada – Continued Suspension*, para. 7.211)

[815]Panel Report, *US – Continued Suspension*, para. 7.224; Panel Report, *Canada – Continued Suspension*, para. 7.222.

[816]United States' other appellant's submission, para. 93.

[817]We note the United States' concern that "[t]he Panel has thereby made the bold and novel move of transforming the minutes of DSB, other WTO committee meetings, and even Trade Policy Review meetings into a fertile source of comments that ... could constitute 'determinations' actionable under Article 23.2(a)." (*Ibid.*, para. 94)

[818]*Ibid.*, para. 95.

[819]European Communities' appellee's submission, para. 131. (original emphasis)

that it was taking a measure to comply with the DSB's recommendations and rulings.[820] The European Communities' reliance on the Appellate Body's findings in *US – Upland Cotton (Article 21.5 – Brazil)* is misplaced. In that dispute, the Appellate Body did not rely on the press release of the United States Government in making a finding on the scope of the "measure taken to comply", but only referred to the statements of the United States' officials as providing confirmation of its earlier conclusion, reached on the basis of an examination of the measure itself and the DSB's recommendations and rulings in the original dispute. In contrast, the Panel in this dispute based its finding that the United States and Canada made a determination of violation directly on the statements they made at the DSB.

401. We agree therefore with the United States and Canada that their statements at the DSB meetings did not involve the degree of firmness or immutability necessary in order to constitute a "determination" within the meaning of Article 23 of the DSU.[821]

402. The Panel went on to find that, even if the DSB statements were considered to be provisional, "the subsequent continuation of the suspension of concessions by [the United States and Canada] without alteration and without saying that [they were] still studying [Directive 2003/74/EC]" confirmed that they made such a "determination".[822] The United States and Canada submit that the Panel "inferred"[823], or "construed"[824] the existence of a determination on the basis of the mere continuation of the suspension of concessions. They argue that the Panel's reasoning is flawed because it draws an inference from the "inaction"[825], or "non-feasance"[826], of the United States and Canada in failing to terminate the suspension of concessions.

403. As we stated earlier, the DSB authorization of the suspension of concessions by the United States and Canada flowed from the inconsistency of Directive 96/22/EC and continued to be legally valid until the measure found to be inconsistent with a covered agreement in *EC – Hormones* was removed within the meaning of Article 22.8. Although the European Communities may have claimed to have removed the inconsistent measure and declared compliance, the United States and Canada disagreed that this was in fact the case. Thus, until the removal of the European Communities' inconsistent measure was determined through WTO dispute settlement, the United States' and Canada's authorization to suspend concessions did not lapse. Under these circumstances, the suspension of concessions applied pursuant to the DSB's authorization in respect of Directive 96/22/EC was maintained through recourse to, and abiding by, the rules and procedures of the DSU. Its continuation thus did not "confirm" that the United States and Canada made a unilateral determination regarding Directive 2003/74/EC, as the Panel found, in violation of Article 23.2(a) of the DSU.[827]

404. The United States further asserts that, by inferring the existence of a "determination" within the meaning of Article 23.2(a) on the basis of the continued suspension of concessions, the Panel

[820] *Ibid.* (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 204).

[821] United States' other appellant's submission, para. 96; Canada's other appellant's submission, para. 89.

[822] Panel Report, *US – Continued Suspension*, para. 7.230; Panel Report, *Canada – Continued Suspension*, para. 7.224.

[823] United States' other appellant's submission, para. 98.

[824] Canada's other appellant's submission, para. 81.

[825] United States' other appellant's submission, para. 98.

[826] Canada's other appellant's submission, para. 81.

[827] Nonetheless, we do not share the view of the United States and Canada that the continued suspension of concessions should be properly characterized as inaction. Upon the authorization to suspend concessions in 1999, the United States and Canada respectively took the measures to impose tariffs on all imports of certain European Communities products at rates substantially exceeding the bound tariff rates and have continuously collected the additional tariffs since then. Thus, the continued suspension of concessions by the United States and Canada is more properly characterized as an ongoing action.

effectively read into Article 23 a deadline by which a unilateral determination inconsistent with Article 23.2(a) will be imputed to a Member, even though Article 23 contains no such deadline.[828] The European Communities contends that the Panel correctly observed that the deadline by which a Member shall have recourse to the DSU pursuant to Articles 23.1 and 23.2(a) "was not an issue before the Panel".[829] However, without a proper identification of the time at which the continued suspension of concessions would be found to constitute a unilateral determination inconsistent with the DSU, WTO Members would be unsure as to when or for how long they could properly rely on a DSB authorization to suspend concessions. Such an outcome is contrary to the DSU's objective of providing security and predictability.[830] In any event, given that we have found above that an original respondent may initiate Article 21.5 proceedings, and that the authority to suspend concessions lapses once one of the three conditions in Article 22.8 is met, we feel no need to further explore this question.

405. Thus, we conclude that the Panel erred in finding that the United States and Canada "made a 'determination' within the meaning of Article 23.2(a) in relation to Directive 2003/74/EC" on the basis of statements made at DSB meetings and the fact that the suspension of concessions continued subsequent to the notification of Directive 2003/74/EC.[831]

406. Having found that the United States and Canada made a determination of violation in relation to Directive 2003/74/EC, the Panel went on to find that, because "the authorization to suspend concessions" does not amount to "a multilateral determination of inconsistency"[832] of Directive 2003/74/EC, the United States and Canada had not made the determination through recourse to dispute settlement in accordance with the rules and procedures of the DSU.[833] However, whether Directive 2003/74/EC "removed" the inconsistencies within the meaning of Article 22.8 was disputed and had not yet been determined through WTO dispute settlement. Therefore, the DSB's authorization remained valid. The Panel's finding also contradicts its own approach, correctly taken in the context of its examination of Article 22.8, that the suspension of concessions is not required to be terminated merely on the basis of a formal removal of the inconsistent measure but, rather, is required once there is substantive compliance.

407. Because we have found that the Panel erred in concluding that the United States and Canada made a determination that a violation has occurred within the meaning of Article 23.2(a), the Panel's finding that the United States and Canada had "failed to make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under the DSU", in breach of Article 23.2(a)[834], also fails.

5. Conclusion

408. We concluded in the preceding sections that the Panel erred in finding that the United States and Canada were seeking the redress of a violation with respect to Directive 2003/74/EC, within the meaning of Article 23.1 of the DSU, and made a determination in relation to that Directive to the

[828] United States' other appellant's submission, para. 105.

[829] European Communities' appellee's submission, para. 134 (referring to Panel Report, *US – Continued Suspension*, para. 7.232).

[830] See Canada's other appellant's submission, para. 81.

[831] Panel Report, *US – Continued Suspension*, para. 7.239; Panel Report, *Canada – Continued Suspension*, para. 7.232.

[832] Panel Report, *US – Continued Suspension*, para. 7.242; Panel Report, *Canada – Continued Suspension*, para. 7.235.

[833] Panel Report, *US – Continued Suspension*, para. 7.243; Panel Report, *Canada – Continued Suspension*, para. 7.236.

[834] Panel Report, *US – Continued Suspension*, para. 7.244; Panel Report, *Canada – Continued Suspension*, para. 7.237.

effect that a violation has occurred, within the meaning of Article 23.2(a) of the DSU. Therefore, we reverse the Panel's finding that the United States and Canada have "violated Article[s] 23.1 and 23.2(a) of the DSU by seeking redress of violation of the WTO Agreement through a determination that the [European Communities'] implementing measure did not comply with the DSB recommendations and rulings in the *EC – Hormones* case without having recourse to dispute settlement in accordance with the rules and procedures of the DSU."[835]

409. The European Communities claims that, in order to fulfil their obligations under Articles 23.1 and 23.2(a) of the DSU to have recourse to dispute settlement in accordance with the DSU, the United States and Canada were required to initiate Article 21.5 panel proceedings if they considered that Directive 2003/74/EC fails to bring the European Communities into compliance. The European Communities submits that, upon finding that the United States and Canada breached Articles 23.2(a) and 23.1 by seeking the redress of a violation without recourse to the DSU, the Panel should have also found that the United States and Canada breached Article 21.5 by failing to initiate panel proceedings under that provision. We have reversed the Panel's finding that the United States and Canada breached Articles 23.2(a) and 23.1 by seeking the redress of a violation without recourse to the DSU. We also recall our earlier finding that the original respondent is not precluded under Article 21.5 from initiating Article 21.5 compliance proceedings. Consequently, we dismiss the European Communities' claim. This does not mean that the United States and Canada do not have an obligation to engage in the dispute settlement procedures in an cooperative manner. Rather, the United States, Canada, and the European Communities have an obligation to engage in Article 21.5 proceedings in order to obtain objective ascertainment of whether substantive compliance has been achieved in this case and whether the resolutive condition in Article 22.8 has been met.

G. *The Panel's Finding that It Had No Jurisdiction to Make Findings under the SPS Agreement*

410. The United States and Canada request that, should the Appellate Body uphold the Panel's findings that they breached Articles 23.2(a) and 23.1 of the DSU, it reverse the Panel's statement, in the last paragraph of its Report, that it had no jurisdiction to determine the compatibility of Directive 2003/74/EC with the *SPS Agreement*.[836] Because we have reversed the Panel's finding that the United States and Canada breached Articles 23.2(a) and 23.1 of the DSU, the condition upon which the United States' and Canada's requests rest is not met. We note, however, that in section D.4 above we upheld the Panel's finding that "it has jurisdiction to consider the compatibility of the [European Communities'] implementing measure with the *SPS Agreement* as part of its review of the claim raised by the European Communities with respect to Article 22.8 of the DSU."[837] In any event, in sections VI and VII below, we reverse the Panel's findings under Articles 5.1 and 5.7 of the *SPS Agreement*.

H. *The Panel's Suggestion*

411. In addition to finding that the United States and Canada committed procedural violations under Article 23 of the DSU, the Panel suggested, pursuant to Article 19.1 of the DSU, that the United States and Canada "should have recourse to the rules and procedures of the DSU without delay".[838] The European Communities, the United States, and Canada all take issue with this suggestion.

[835]Panel Report, *US – Continued Suspension*, para. 7.251; Panel Report, *Canada – Continued Suspension*, para. 7.244.

[836]United States' other appellant's submission, paras. 108 and 120; Canada's other appellant's submission, para. 92.

[837]Panel Report, *US – Continued Suspension*, para. 7.379; Panel Report, *Canada – Continued Suspension*, para. 7.376.

412. The United States and Canada request that, in the event that the Appellate Body upholds the Panel's finding that the United States and Canada committed procedural violations under Articles 23.2(a) and 23.1 of the DSU, the Appellate Body reverse the Panel's suggestion that they should have recourse to the DSU without delay.[839]

413. The European Communities contends that the Panel's suggestion, that the United States and Canada should have recourse to dispute settlement without delay, is "too vague to be of much assistance", because it is unclear to "which rules and procedures of the DSU" the United States and Canada should have recourse.[840] Therefore, the European Communities requests the Appellate Body to "improve the Panel's suggestion in order to bring it into a clear form that is also more in line with the Panel's own findings".[841] More specifically, the European Communities requests the Appellate Body to "modify" the suggestion so as to make clear that the United States and Canada should: (i) cease applying the suspension of concessions; and (ii) seek resolution of any disagreement regarding the consistency of Directive 2003/74/EC through recourse to panel proceedings under Article 21.5 of the DSU, or any other dispute settlement proceedings that the parties may agree.[842]

414. The Panel's suggestion that the United States and Canada "should have recourse to the rules and procedures of the DSU without delay" rests on its findings that the United States and Canada breached Articles 23.2(a) and 23.1 of the DSU by seeking redress of a violation of the covered agreement without having recourse to dispute settlement under the DSU. We have reversed these findings of the Panel. Thus, the Panel's suggestion cannot stand.

V. Due Process in the Panel's Consultations with the Scientific Experts

415. We now turn to the European Communities' claims that the Panel failed to respect the principle of due process and, consequently, also failed to make an objective assessment of the matter under Article 11 of the DSU, in selecting and relying upon two of the scientific experts consulted by the Panel.

A. *The Panel's Findings*

416. On 25 November 2005, following consultation with the parties, the Panel adopted Working Procedures for Consultations with Scientific and/or Technical Experts (the "Experts Working Procedures").[843] The Panel decided not to establish an expert review group as had been suggested by the European Communities, but to consult experts on an individual basis.[844] Moreover, the Panel

[838]Panel Report, *US – Continued Suspension*, para. 8.3; Panel Report, *Canada – Continued Suspension*, para. 8.3.

[839]United States' other appellant's submission, paras. 108 and 116; Canada's other appellant's submission, paras. 92 and 98.

[840]European Communities' appellant's submission, para. 479.

[841]*Ibid.*

[842]*Ibid.*, para. 480.

[843]Panel Report, *US – Continued Suspension*, para. 7.71; Panel Report, *Canada – Continued Suspension*, para. 7.69. The Experts Working Procedures are reproduced in Annex A-5 of the Panel Reports. A single expert selection process was carried out for both disputes. (Panel Report, *US – Continued Suspension*, para. 7.76; Panel Report, *Canada – Continued Suspension*, para. 7.74)

[844]Panel Report, *US – Continued Suspension*, para. 7.71; Panel Report, *Canada – Continued Suspension*, para. 7.69. The European Communities initially indicated that the Panel did not have to consult experts. (Panel Report, *US – Continued Suspension*, para. 7.56; Panel Report, *Canada – Continued Suspension*, para. 7.54)

"sought information not only from selected experts but also from three relevant international entities, the Codex Alimentarius Commission (Codex), the Joint FAO/WHO Expert Committee on Food Additives (JECFA), and the International Agency for Research on Cancer (IARC)."[845]

417. In accordance with paragraph 3 of the Experts Working Procedures, the Panel solicited suggestions for experts from the Secretariats of Codex, JECFA, and the IARC.[846] From these suggestions, the Panel provided to the parties all the information received from the 11 experts that were interested and available, and asked them to indicate any "compelling reasons" why particular experts should not be chosen.[847] The European Communities objected to the inclusion of experts that had participated in JECFA's risk assessment work, explaining that "the scientific controversy over the JECFA reports is at the heart of this case and is the reason why the Panel is now seeking advice from outside experts."[848] The European Communities added that such experts "cannot be considered to be objective and impartial in these circumstances, because this would amount to asking them to review and criticise their proper work".[849]

418. Because the parties' positions with respect to the experts "differed significantly", the Panel sought additional names of experts from the parties pursuant to paragraph 6 of the Experts Working Procedures.[850] Of the 71 experts suggested by the international organizations and the parties, 40 experts indicated that they were available, and 35 responded to the request for their *curriculum vitae* and information regarding potential conflicts of interest.[851] This information was provided to the parties for comments and objections.[852] As the Panel explained:

> One party or another submitted objections with regard to all but one of the experts by arguing either that an expert lacked sufficient expertise in the areas of the dispute identified as needing scientific or technical expertise, or was affiliated with the government of a party to this dispute; or was affiliated with JECFA; or had received funding from the pharmaceutical industry; or had been involved in the regulatory approval of any of the six hormones.[853]

419. On 24 March 2006, the Panel informed the parties of the six experts it had selected. The Panel explained its considerations in the selection process as follows:

> The Panel excluded experts with close links with governmental authorities directly involved in policy-making regarding the six hormones and experts with close links to pharmaceutical companies or involved in public advocacy activities. The Panel chose not to exclude *a priori* experts who had participated in the preparation and drafting of JECFA's risk assessments because this would deprive the Panel and the parties of the benefit of the contribution of internationally recognized specialists and because the Panel was of the opinion that experts familiar with the JECFA reports would be well-placed to assist the Panel in understanding the work of JECFA extensively referred to by the parties in their submissions, in particular by the European Communities. Moreover, the Panel, who was fully aware of the fields of competence of these experts, considered that they would be competent to answer questions with respect to risk assessment regarding the hormones at issue. The Panel also decided not to exclude *a priori* all experts who were current or past governmental employees unless a potential conflict of interests could reasonably be assumed from their official functions. In selecting the experts, the Panel also had in mind the need to choose experts with expertise to cover all the fields identified as at issue in the dispute.[854]

[845]Panel Report, *US – Continued Suspension*, para. 7.78; Panel Report, *Canada – Continued Suspension*, para. 7.76. (footnotes omitted)
[846]Panel Report, *US – Continued Suspension*, para. 7.79; Panel Report, *Canada – Continued Suspension*, para. 7.77.
[847]Panel Report, *US – Continued Suspension*, para. 7.79; Panel Report, *Canada – Continued Suspension*, para. 7.77.
[848]Letter from the European Communities to the Panel dated 16 January 2006 (quoted in European Communities' appellant's submission, para. 193).
[849]*Ibid.*
[850]Panel Report, *US – Continued Suspension*, para. 7.80; Panel Report, *Canada – Continued Suspension*, para. 7.78.
[851]Panel Report, *US – Continued Suspension*, para. 7.82; Panel Report, *Canada – Continued Suspension*, para. 7.80.
[852]Panel Report, *US – Continued Suspension*, para. 7.83; Panel Report, *Canada – Continued Suspension*, para. 7.81.
[853]Panel Report, *US – Continued Suspension*, para. 7.84; Panel Report, *Canada – Continued Suspension*, para. 7.82.

420. The European Communities asked the Panel to reconsider its decision with respect to two experts, Dr. Jacques Boisseau[855] and Dr. Alan Boobis[856], arguing that "these experts had real or perceived conflicts of interests that should disqualify them from assisting the Panel."[857] In addition to reiterating concerns about the involvement of the two selected experts "in the drafting and adoption of the JECFA reports concerning the subject matter of this dispute"[858], the European Communities advanced other reasons to exclude Drs. Boisseau and Boobis. The European Communities argued that Dr. Boisseau should be dismissed because he had not "submitted a statement of conflict of interest to the Panel", had "already taken a position on the issue at stake in this dispute" in a public hearing before the French Senate, had taken a position in a public debate "that only 'major' risks are relevant in precautionary decision making", and had neither "carried out any real scientific research" nor "written anything on the substances under consideration".[859] With regard to Dr. Boobis, the European Communities alleged that he had received funding from, and provided consultancy to, several pharmaceutical companies, some of which had not been disclosed in his statement on conflicts of interest.[860] The Panel did not consider that the European Communities' objections were "justified"[861], adding:

> The Panel found in particular that the statement that one expert had made before the French Senate in 1996 had not been made in relation to hormones used for growth promotion purposes. Rather, it had been made with respect to hormones used for medical treatment purposes.

[854]Panel Report, *US – Continued Suspension*, para. 7.85; Panel Report, *Canada – Continued Suspension*, para. 7.83. (footnote omitted)
[855]Former Director, French Agency for Veterinary Medical Products. (See Panel Report, *US – Continued Suspension*, para. 7.86; and Panel Report, *Canada – Continued Suspension*, para. 7.84)
[856]Director, Experimental Medicine and Toxicology Division of Medicine, Faculty of Medicine, Imperial College, London; Professor of Biochemical Pharmacology at Imperial College, London. (See Panel Report, *US – Continued Suspension*, para. 7.86; and Panel Report, *Canada – Continued Suspension*, para. 7.84)
[857]Panel Report, *US – Continued Suspension*, para. 7.87; Panel Report, *Canada – Continued Suspension*, para. 7.85.
[858]Letter from the European Communities to the Panel dated 28 March 2006 (quoted in European Communities' appellant's submission, para. 196).
[859]Letter from the European Communities to the Panel dated 28 March 2006 (quoted in European Communities' appellant's submission, para. 196).
[860]*Ibid.*
[861]Panel Report, *US – Continued Suspension*, para. 7.87; Panel Report, *Canada – Continued Suspension*, para. 7.85.

> The Panel also found that the links of another expert with two companies involved in research and counselling were not in the area of veterinary drugs or hormonal substances. … In addition, having considered the information available about the various candidates, the Panel found that these two experts were the best choices among the very few individuals available with expertise in the area of risk assessment and would be able to provide the Panel with insight on international standards on the hormones at issue.[862]

421. At the interim review stage, and upon a request made by the European Communities for clarification of certain passages, the Panel said that it "remain[ed] however puzzled by the [European Communities'] suggestions that a scientist who worked with JECFA could be deemed to be biased in assessing the scientific evidence on which [European Communities'] Directive 2003/74/EC relies and could be assumed to defend JECFA's work".[863] The Panel explained:

> First, scientists would readily admit that science is constantly evolving and the fact that new studies are peer reviewed is evidence that assessing new ideas and findings is part of scientific work. Assuming that scientists may lack objectivity because they participated in the preparation and drafting of JECFA's risk assessments on the hormones at issue would call into question the whole principle of peer review. The Panel also notes that JECFA is the body that provides the independent scientific advice on which the work of Codex is based and Codex is expressly recognized by the *SPS Agreement* as having responsibilities for the establishment of "international standards, guidelines and recommendations". The Panel also recalls the role given to international standards, guidelines and recommendations by Article 3.1 and 3.2 of the *SPS Agreement*. It is therefore consistent with this role for the Panel to rely on experts who contributed in the preparation and drafting of JECFA's risk assessments of the substances at issue.[864]

422. The Panel elaborated further that:

> ... it was necessary for the Panel to be able to rely on the advice of experts intimately knowledgeable about the substance of JECFA's risk assessments. ... Second, the Panel recalls that JECFA is an international, independent entity composed of highly qualified experts selected by the WHO or FAO according to strict procedures. JECFA also regularly reassesses its risk assessments. ... Moreover,

[862] *Ibid.* The Panel further commented that:

> The Panel wishes to highlight the challenges it encountered in selecting experts. There was a limited number of specialists suggested and actually available in each of the fields on which the Panel needed assistance and almost always one or more of the parties objected to that specialist. For example, only six of the identified available experts were deemed to have extensive expertise in risk analysis. All of these experts were objected to by at least one party.

(Panel Report, *US – Continued Suspension*, footnote 382 to para. 7.87; Panel Report, *Canada – Continued Suspension*, footnote 374 to para. 7.85)

[863] Panel Report, *US – Continued Suspension*, para. 6.22; Panel Report, *Canada – Continued Suspension*, para. 6.21.

[864] Panel Report, *US – Continued Suspension*, para. 6.22; Panel Report, *Canada – Continued Suspension*, para. 6.21.

> JECFA reaches its conclusions by consensus. So the opinions expressed by the two experts were given with regard to the consensual view of JECFA on this matter, not just their own personal positions in the past. This does not mean, however, that JECFA's work is these particular experts' own work: it is a joint work by several experts.
>
> The experts that the European Communities claims were defending their work acknowledge that the state of knowledge can evolve. ... The experts consulted by the Panel are used to considering and peer reviewing studies that go beyond what they have published themselves or perhaps even contradict them. In other words, they are not likely to feel any need to defend their own previous work results in the light of new, convincing evidence or techniques that put such previous work into doubt.[865]

423. The Panel also rejected the European Communities' argument that "the two experts at issue should not be described as 'internationally recognized specialists'"[866]:

> The Panel recalls that they have been selected by the FAO and WHO as part of the JECFA selection process. The selection procedure has been described in JECFA's reply to question 14 to JECFA. The Panel fails to understand why the JECFA selection would not be evidence of the international reputation of the scientists at issue. The [European Communities] concerns about JECFA's work and the selection of experts to participate in that work are in contradiction with the role attributed by the *SPS Agreement* to Codex and to international standards, guidelines and recommendations. The Panel was fully aware of the area of expertise of the two scientists at issue, and believed that they would be more at liberty to comment on the content of JECFA's work than officials of the JECFA Secretariat. It also specified the reasons why those experts were selected in spite of not having carried out experiments with the substances at issue and does not see any need for further substantial elaboration.[867]

424. During the Panel proceedings, the experts provided written responses to scientific and technical questions posed by the Panel.[868] The Panel held a meeting with the scientific experts, which included the participation of the parties. At the meeting, the parties and the Panel had the opportunity "to ask questions to the experts and for the experts to clarify points that they had made in their written responses to the questions".[869]

[865] Panel Report, *US – Continued Suspension*, paras. 6.62 and 6.63; Panel Report, *Canada – Continued Suspension*, paras. 6.57 and 6.58. (footnotes omitted)

[866] Panel Report, *US – Continued Suspension*, para. 6.23; Panel Report, *Canada – Continued Suspension*, para. 6.22.

[867] Panel Report, *US – Continued Suspension*, para. 6.23; Panel Report, *Canada – Continued Suspension*, para. 6.22. (footnotes omitted)

[868] Panel Report, *US – Continued Suspension*, paras. 7.95-7.97; Panel Report, *Canada – Continued Suspension*, paras. 7.92-7.94.

[869] Panel Report, *US – Continued Suspension*, para. 7.98; Panel Report, *Canada – Continued Suspension*, para. 7.95. (footnote omitted) The Panel's meeting with the scientific experts took place immediately before the second substantive meeting of the Panel with the parties.

B. *Claims and Arguments on Appeal*

425. On appeal, the European Communities asserts that "the consultation of experts by the Panel[] for the purposes of scientific and technical advice including their selection must respect general principles of law, and in particular the principle of due process."[870] The European Communities adds that "[i]t is inherent in the principle of due process that the parties to a dispute are given a fair hearing including that the experts a court, tribunal or panel hears or consults are *independent and impartial*."[871] The European Communities takes issue with the Panel's selection of Dr. Jacques Boisseau and Dr. Alan Boobis. The European Communities claims that "any 'reliance' the Panel[] [has] placed on what these two experts from JECFA said is a violation of the relevant rules on conflict of interest, of its rights of due process and of the requirement for the Panel[] to perform an 'objective assessment' of the matter before [it]"[872] as required under Article 11 of the DSU. As a result, the European Communities requests that the Appellate Body "reverse all findings of the Panel[] which depend on the advice [it] received from these experts".[873]

426. The European Communities contends that "the relevant legal test" the Panel should have applied is whether there was "likelihood or justifiable doubts" as to the experts' independence, a test that the European Communities describes as "quite simple and low", and not requiring "certainty or high probability".[874] The standard applied by the Panel, however, was "based on a very narrow definition of a perceived conflict of interest because it required an actual or almost certain conflict, not a perceived, likelihood or a justifiable doubts test".[875] The European Communities asserts that Dr. Boisseau took "a position in favour of the safety of these hormones" and that "Dr. Boobis has been receiving funding from the pharmaceutical industry in his research and counselling".[876] In addition, the European Communities alleges that, since Drs. Boisseau and Boobis were among the authors of the JECFA reports, which are criticized in Directive 2003/74/EC on scientific grounds, they should have been precluded from providing expert advice to the Panel. The European Communities observes that, as co-authors of the JECFA reports, "[t]hey cannot be considered to be independent and impartial in these circumstances, because this would amount to asking them to review and criticise reports that are their own doing."[877]

427. The European Communities also faults the Panel for "relying overwhelmingly"[878] on the opinions of Drs. Boisseau and Boobis; for failing to ensure that the self-disclosure requirement under the *Rules of Conduct* be complied with before selecting these experts[879]; for failing to "actually examine[] whether all of the experts had a potential conflict of interest"; and for accepting as experts persons whose independence and impartiality was not assured.[880] Finally, the European Communities argues that, "even if one were to take the view that the Panel[] could accept the non-independent experts provided that [it] would constantly bear in mind the potential conflicts when weighing the expert opinions, it is clear that the Panel[] refused to do so, considering the issue of the experts finally resolved when dismissing the European Communities' objections."[881] Indeed, these experts

[870]European Communities' appellant's submission, para. 188.
[871]*Ibid.* (original emphasis)
[872]*Ibid.*, para. 202.
[873]*Ibid.*, para. 212.
[874]European Communities' appellant's submission, para. 195.
[875]*Ibid.*, para. 203.
[876]*Ibid.* The European Communities qualifies its charges against both experts. It admits, for instance, that Dr. Boisseau's position on the safety of hormones was taken "in the context of a discussion on therapeutic treatment in animals", and that the funding Dr. Boobis received from the pharmaceutical industry was "not from companies in the area of veterinary drugs or these hormones". (*Ibid.*)
[877]*Ibid.*, para. 205.
[878]*Ibid.*, para. 212.
[879]*Ibid.*, para. 192.
[880]*Ibid.*
[881]*Ibid.*, para. 211. (footnote omitted)

"dominate[d] the entire scientific examination by the Panel[] both from the point of view of how often they [were] referred to and whether the Panel[] ever question[ed] their opinions and whether their opinions go beyond science and stray into the area of the risk regulator."[882]

428. The United States argues that the Panel's conduct in the selection of experts was transparent and consultative, providing the parties with notice and opportunities to respond, express their concerns, and be heard before the Panel made its decisions. The United States further asserts that "[t]he fact of the matter is that the Panel and the parties were provided with full disclosure of the experts' professional affiliations and financial interests" and "[t]he record demonstrates that the Panel took the [European Communities'] concerns into account in concluding that the two experts in question were not disqualified from serving."[883] Moreover, the United States alleges that the European Communities provides no support for the claims regarding due process rights, arguing that the European Communities cited nothing more "than the most general statement" by the Appellate Body in *Thailand – H-Beams* and a judgment by the European Court of Human Rights that the European Communities had already relied upon in its challenge to the panel's expert selection process in *EC – Hormones*.[884] Finally, in respect of the European Communities' allegation of breach of Article 11 of the DSU, the United States argues that the Panel acted within the proper bounds of its discretion as fact-finder.[885]

429. Canada rejects the position of the European Communities that the relevant legal standard to determine independence or impartiality is "likelihood or justifiable doubt".[886] Rather, it observes that the only standard governing conflict of interest questions is found in Section II (Governing Principle) of the *Rules of Conduct*. That provision requires that all persons covered under the *Rules of Conduct*, including experts, "shall be independent and impartial" and "shall avoid direct or indirect conflicts of interest".[887] Moreover, Canada asserts that Drs. Boisseau and Boobis met the disclosure requirement in the Experts Working Procedures, and that, in particular, both complied with the requirements by disclosing their involvement in JECFA. In Canada's view, "it was up to the Panel to evaluate whether this had an impact [on] the independence and impartiality of these candidates in this case."[888]

430. Canada argues that the Panel correctly found that Drs. Boisseau and Boobis were independent and impartial. It notes that the Panel "expressly addressed" the allegation that these two experts were defending their work when it explained that the purpose of consulting them was to obtain advice about the substance of JECFA's risk assessment, and to help identify the extent to which concerns raised by the European Communities had been considered in JECFA's risk assessment.[889] Canada also points to language in the Panel Report, noting that the Panel was asking the experts about JECFA's consensual view, which may differ from the experts' personal views, and that both experts admitted to the Panel that the state of scientific knowledge can evolve.[890] In Canada's view, it is inaccurate to portray the participation by Drs. Boisseau and Boobis in JECFA panels as "giving them an (almost proprietary) interest in the outcome of the JECFA process that they would have felt compelled to defend when advising the Panel".[891] Canada cautions that the practical consequence of the Panel excluding Drs. Boisseau and Boobis as experts would have been that "the pool of eligible

[882]*Ibid.*, para. 208.
[883]United States' appellee's submission, para. 88.
[884]*Ibid.*, para. 89.
[885]*Ibid.*, para. 90.
[886]Canada's appellee's submission, para. 47 (quoting European Communities' appellant's submission, para. 195).
[887]*Ibid.*, para. 47.
[888]*Ibid.*, para. 49.
[889]*Ibid.*, para. 54 (quoting Panel Report, *Canada – Continued Suspension*, para. 6.57).
[890]Canada's appellee's submission, para. 54 (quoting Panel Report, *Canada – Continued Suspension*, para. 6.57).
[891]*Ibid.*, para. 56.

experts would have been shrunk significantly, such that it would have become very difficult for the Panel to appoint experts in all the areas of expertise that it had identified."[892]

431. Therefore, the United States and Canada request that the Appellate Body reject the European Communities' claim that the Panel acted inconsistently with the principle of due process, the requirements of the *Rules of Conduct*, and Article 11 of the DSU, in selecting Drs. Boisseau and Boobis, and to reject the request to reverse the Panel's findings that relied on the advice of these two experts.

432. Australia agrees with the European Communities' submission that panels must observe due process in selecting and consulting with experts, and considers that fundamental fairness and due process "permeate[] all aspects of the WTO dispute settlement process, including a panel's use of experts".[893]

C. *Did the Panel Infringe the European Communities' Due Process Rights and Fail to Make an Objective Assessment of the Matter in the Consultations with the Scientific Experts*

433. The Appellate Body has previously found that the obligation to afford due process is "inherent in the WTO dispute settlement system"[894] and it has described due process requirements as "fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings".[895] In our view, the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU. Due process protection guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute.

434. The Appellate Body has recognized the need for panels to afford due process to the parties with respect to specific procedural issues. For instance, the Appellate Body has recognized due process as requiring that parties to proceedings be afforded an adequate opportunity to respond to claims, arguments, or evidence presented by other parties.[896] It has also referred to the principle of due process in suggesting the need for panels to have standard working procedures[897], and for panels to have discretion to allow for the enhanced participation by third parties.[898] Moreover, the Appellate Body has found that due process is required by Article 11 of the DSU. In *US – Gambling*, the Appellate Body stated:

> [A]s part of their duties, under Article 11 of the DSU, to "make an objective assessment of the matter" before them, panels must ensure that the due process rights of parties to a dispute are respected.[899]

[892] *Ibid.*, para. 57.
[893] Australia's third participant's submission, para. 48.
[894] Appellate Body Report, *Chile – Price Band System*, para. 176. See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107.
[895] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[896] Appellate Body Report, *US – Gambling*, paras. 269-273; Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 177; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 47; Appellate Body Report, *Australia – Salmon*, paras. 272 and 278; and Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167, at 186.
[897] Appellate Body Report, *Argentina – Textiles and Apparel*, footnote 68 to para. 79; Appellate Body Report, *India – Patents (US)*, para. 95.
[898] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 243; Appellate Body Report, *EC – Hormones*, para. 154.
[899] Appellate Body Report, *US – Gambling*, para. 273.

435. These due process considerations are reflected in the *Rules of Conduct*. Section II (Governing Principle) of the *Rules of Conduct* provides that all covered persons, such as panelists and experts advising panels:

> ... shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved.

436. Scientific experts and the manner in which their opinions are solicited and evaluated can have a significant bearing on a panel's consideration of the evidence and its review of a domestic measure, especially in cases like this one involving highly complex scientific issues. Fairness and impartiality in the decision-making process are fundamental guarantees of due process. Those guarantees would not be respected where the decision-makers appoint and consult experts who are not independent or impartial. Such appointments and consultations compromise a panel's ability to act as an independent adjudicator. For these reasons, we agree with the view of the European Communities that the protection of due process applies to a panel's consultations with experts. This due process protection applies to the process for selecting experts and to the panel's consultations with the experts, and continues throughout the proceedings.

(a) Standard for Selection of Experts

437. The authority to seek information from individuals or to consult experts is provided to panels pursuant to Article 13 of the DSU (Right to Seek Information). Article 13.2 provides:

> Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

438. Article 11.2 of the *SPS Agreement* specifically addresses the consultation of experts in disputes under that Agreement.[900] It reads:

> In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.

439. Panels are understood to have "significant investigative authority"[901] under Article 13 of the DSU and Article 11.2 of the *SPS Agreement* and broad discretion in exercising this authority. In *US – Shrimp*, the Appellate Body expounded on the comprehensive authority of panels under Article 13:

[900] Article 11.2 of the *SPS Agreement* is listed in Appendix 2 of the DSU (Special or Additional Rules and Procedures contained in the covered agreements).
[901] Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

> The comprehensive nature of the authority of a panel to "seek" information and technical advice from "any individual or body" it may consider appropriate, or from "any relevant source", should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.[902]

440. The European Communities has not challenged on appeal the Panel's decision to consult experts *per se*, nor does it claim that the Panel failed to consult with the parties on expert selection.[903] The European Communities disagrees with the Panel's decision to consult experts individually, rather than establish an expert review group, but does not raise a claim in this respect on appeal.[904]

441. Paragraph 9 of the Experts Working Procedures adopted by the Panel prescribes that experts will be selected "on the basis of their qualification and the need for specialized scientific or technical expertise". Paragraph 11 additionally provides:

> The selected experts shall act in their individual capacities and not as representatives of any entity. They shall be subject to the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (WT/DSB/RC1), including the self-disclosure requirement set out in Section VI of the *Rules of Conduct*.

442. As we noted earlier, experts advising panels are specifically covered by the *Rules of Conduct* and, pursuant to Section II (Governing Principle), they "shall be independent and impartial, [and] shall avoid direct or indirect conflicts of interest ... , so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved".

[902]Appellate Body Report, *US – Shrimp*, para. 104. (original emphasis) Given the manner in which the Appellate Body has addressed the scope of a panel's authority under Article 13 of the DSU, this discretion would seem to apply equally to the discretion of panels under Article 11.2 of the *SPS Agreement*.

[903]The Appellate Body has found that panels are free to consult experts as individuals or as part of an expert review group. (Appellate Body Report, *EC – Hormones*, para. 147)

[904]The European Communities notes that the Panel "for no good reason declined to follow the European Communities' suggestion to constitute an expert review group", and that "[i]n retrospect, this has proven disastrous in this case in view of the very different, conflicting and irreconcilable opinions it received on many crucial issues from its experts." (European Communities' appellant's submission, footnote 76 to para. 187) The Panel explained its decision to consult experts on an individual basis with the following reasons: (1) the experts' varying fields of competence would make it important, on relevant subjects, to consult experts individually on their respective field of expertise; and (2) it did not want a consensus text from an expert review group that would reflect a minimum common position, but wished to hear dissenting or minority views among the experts. (Panel Report, *US – Continued Suspension*, para. 7.71; Panel Report, *Canada – Continued Suspension*, para. 7.69)

443. Selected experts are also subject to certain self-disclosure and confidentiality obligations set out elsewhere in the *Rules of Conduct*, and procedures exist for the referral of a "material violation" of these obligations to the Chairman of the DSB for appropriate action.[905]

444. The European Communities claims that due process requires that the "experts a court, tribunal or panel hears or consults are *independent and impartial*."[906] It then asserts that the relevant legal test for evaluating whether an expert is independent and impartial is founded on the self-disclosure obligation in Section VI.2 of the *Rules of Conduct*, which requires that experts "disclose any information ... which is likely to affect or give rise to justifiable doubts as to their independence or impartiality". This is a standard the European Communities asserts is "simple and low" and "does not require certainty or high probability".[907]

445. The requirements under Section VI of the *Rules of Conduct* relate, as the title indicates, to the self-disclosure obligation of covered persons, including experts. The *Rules of Conduct* do not provide for automatic exclusion of a covered person upon the disclosure of information pursuant to Section VI and the Illustrative List of Information to be Disclosed, which is attached to the *Rules of Conduct* as Annex 2. However, we fail to see on what basis a panel, presented with information likely to affect or give rise to justifiable doubts as to the independence or impartiality of an expert, could choose to consult such an expert.

446. We do not agree, however, with the European Communities' characterization of Section VI.2 as setting out a "low" standard. On the contrary, we consider the standard set forth in Section VI.2 to be a strict one. Covered persons should be encouraged to disclose any information that may be relevant for purposes of ascertaining whether there may be justifiable doubts as to their independence or impartiality. Disclosure should not lead to automatic exclusion. Whether the disclosed information is likely to affect or give rise to justifiable doubts as to the person's independence or impartiality must be objectively determined and properly substantiated. In the case of an expert, the panel should assess the disclosed information against information submitted by the parties or other information that may be available. It should then determine whether, on the correct facts, there is a likelihood that the expert's independence and impartiality may be affected, or if justifiable doubts arise as to the expert's independent or impartiality. If this is indeed the case, the panel must not appoint such person as an expert.

(b) Disclosure of Conflicts of Interest

447. The European Communities also argues that the Panel did not enforce compliance with the self-disclosure requirement, and did not adequately explore potential conflicts of interest. The European Communities charges that the Panel "failed to require that the self-disclosure requirement be complied with"[908] for Dr. Boisseau and therefore rendered paragraph 4 of the Experts Working Procedures "a dead letter".[909]

448. Section VI.2 of the *Rules of Conduct* requires all covered persons, including experts, to "disclose any information that could reasonably be expected to be known to them at the time which, coming within the scope of the Governing Principle of these Rules, is likely to affect or give rise to justifiable doubts as to their independence or impartiality". The Illustrative List of Information to be Disclosed pursuant to Section VI includes the following examples of matters to be disclosed:

[905]*Rules of Conduct*, Sections VI (Self-Disclosure Requirements by Covered Persons), VII (Confidentiality), and VIII (Procedures Concerning Possible Material Violations).

[906]European Communities' appellant's submission, para. 188. (original emphasis)

[907]*Ibid*., para. 195.

[908]European Communities' appellant's submission, para. 192.

[909]*Ibid*., para. 197.

> (b) professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);
>
> (c) other active interests (e.g. active participation in public interest groups or other organizations which may have a declared agenda relevant to the dispute in question);
>
> (d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements).

449. Paragraph 4 of the Experts Working Procedures adopted by the Panel provides:

> The Panel will seek a *curriculum vitae*, including all relevant publications, from each individual suggested. The candidate experts will also be asked to provide information about potential conflicts of interest and indications on whether they have worked for, been funded by or provided advice to the industries concerned, or to domestic or international regulatory bodies involved in issues similar to those addressed in this dispute. A list of eligible experts, including their *curricula vitae* and declarations of interest will be provided to the parties. Parties will have sufficient time to examine them and will be given the opportunity to comment on and to make known any compelling objections to any particular expert.[910]

450. In his self-disclosure statement, Dr. Boisseau stated that "[h]aving worked as a civil servant, I have no conflict of interest which could prevent me to serve as a scientific expert to these two WTO panels."[911] The purpose of the self-disclosure statement is to reveal relevant facts that would allow the Panel to determine whether the information is likely to affect or give rise to justifiable doubts as to the expert's independence or impartiality. Instead, Dr. Boisseau's statement draws a conclusion on a matter that was for the Panel to decide. Dr. Boisseau's statement does not identify whether he has "worked for, been funded by, or provided advice to, the industries concerned, or to domestic or international regulatory bodies involved in issues similar to those addressed in this dispute". The statement does not mention his affiliation with JECFA, nor the fact that he was the Chairman or Vice-Chairman of JECFA panels that evaluated some of the hormones at issue in this dispute.[912] Also, Dr. Boisseau's position as a civil servant did not itself shield him from having a conflict of interest. Thus, we agree with the European Communities that Dr. Boisseau's statement would not appear to comply fully with the requirements of Section VI.2 of the *Rules of Conduct* or paragraph 4 of the Experts Working Procedures adopted by the Panel.

451. We note that, in Canada's view, the self-disclosure requirement was satisfied by the information provided on Dr. Boisseau's *curriculum vitae*, which it considers provided full disclosure of Dr. Boisseau's involvement with JECFA.[913] While panels should insist that self-disclosure requirements under the *Rules of Conduct* are observed by potential experts, and while parties are entitled to full self-disclosure by experts, we find that the Panel did not exceed its authority in concluding that Dr. Boisseau's brief statement, when considered together with the information contained in his *curriculum vitae*, provided sufficient disclosure in this case. Dr. Boisseau's

[910]Panel Reports, Annex A-5, p. A-10.
[911]See Panel record document, "Information on Conflict of Interest by Dr. Jacques Boisseau" (undated).
[912]See *infra*, para. 458.
[913]Canada's appellee's submission, para. 49.

curriculum vitae provides information about his involvement with JECFA and his other professional activities.[914]

452. The European Communities also claims that the Panel "never actually examined whether all of the experts had a potential conflict of interest and whether the experts fulfilled the conditions to be truly independent and impartial".[915] We understand this claim to refer to the objections of the European Communities, also raised in its letter to the Panel dated 28 March 2006, that: (i) Dr. Boisseau stated "in a public hearing in the French Senate, in 1996 ... that the three natural hormones do not present a danger for public health"; (ii) Dr. Boisseau took the position "in a public debate ... that only 'major' risks are relevant in precautionary decision making"; and (iii) Dr. Boobis allegedly received funding from one pharmaceutical company at the time of his disclosure, and did not disclose potential funding and affiliations with two others.[916]

453. The Panel stated that it had "carefully considered the European Communities' request, including the information given regarding potential conflicts of interest".[917] Nonetheless, the Panel found that the European Communities' objections "were not justified"[918], adding:

> The Panel found in particular that the statement that one expert had made before the French Senate in 1996 had not been made in relation to hormones used for growth promotion purposes. Rather, it had been made with respect to hormones used for medical treatment purposes. The Panel also found that the links of another expert with two companies involved in research and counselling were not in the area of veterinary drugs or hormonal substances.[919]

454. The European Communities challenges the "narrow" conflict of interest definition applied by the Panel, and reiterates the "undisputed facts" that:

> ... Dr. Boisseau did take a position in favour of the safety of these hormones, albeit in the context of a discussion on therapeutic treatment in animals, and that Dr. Boobis has been receiving funding from the pharmaceutical industry in his research and counselling, albeit not from companies in the area of veterinary drugs or these hormones (although this has never been specifically verified). ... As regards the industry funding of Dr. Boobis, the Panels refrained from

[914]Dr. Boisseau's *curriculum vitae* indicates that he was a member of JECFA between 1988-2001, its Chairman in 1994, 1998, 2000, and 2002, and its Vice-Chairman in 1992, 1994, 1995, 1997, and 2001.
[915]European Communities' appellant's submission, para. 192.
[916]Letter from the European Communities to the Panel dated 28 March 2006 (quoted in European Communities' appellant's submission, para. 196).
[917]Panel Report, *US – Continued Suspension*, para. 7.87; Panel Report, *Canada – Continued Suspension*, para. 7.85.
[918]Panel Report, *US – Continued Suspension*, para. 7.87; Panel Report, *Canada – Continued Suspension*, para. 7.85.
[919]Panel Report, *US – Continued Suspension*, para. 7.87; Panel Report, *Canada – Continued Suspension*, para. 7.85. The Panel further commented that:

> The Panel wishes to highlight the challenges it encountered in selecting experts. There was a limited number of specialists suggested and actually available in each of the fields on which the Panel needed assistance and almost always one or more of the parties objected to that specialist. For example, only six of the identified available experts were deemed to have extensive expertise in risk analysis. All of these experts were objected to by at least one party.

(Panel Report, *US – Continued Suspension*, footnote 382 to para. 7.87; Panel Report, *Canada – Continued Suspension*, footnote 374 to para. 7.85)

> verifying whether there were any actual or possible links of the companies funding him with other companies producing veterinary drugs or these hormones. In fact, as far as the European Communities knows, the Panels refrained from asking any question to Dr. Boobis on this precise issue.[920]

As we have found, the standard to be applied by panels when selecting experts is whether there is an objective basis to conclude that an expert's independence or impartiality is likely to be affected or there are justifiable doubts about that expert's independence or impartiality. In this instance, the Panel explained that it "carefully considered" the objections, "including the information given regarding potential conflicts of interest", before concluding that the objections were "not justified".[921] Moreover, the Panel provided specific explanations as to why it disagreed with the objections of the European Communities.[922]

455. On appeal, the European Communities recognizes that Dr. Boisseau's statement in the French Senate did not refer to the use of the hormones for growth-promotion purposes. The European Communities does not provide argumentation explaining why Dr. Boisseau's statement concerning the use of the hormones for therapeutic purposes signifies that he would not be impartial in his views concerning the use of these hormones for growth-promotion purposes. The European Communities itself regulates the use of the hormones at issue for veterinary purposes differently from the use for growth-promotion purposes in Directive 2003/74/EC.[923] In addition, we do not consider that in this case the information about Dr. Boobis' links to certain pharmaceutical companies provided an objective basis to conclude that there were justifiable doubts as to his impartiality or independence. The European Communities did not present evidence indicating that the companies from which Dr. Boobis received funding had links with other companies producing veterinary drugs or the hormones at issue. Thus, we consider that the Panel did not exceed its authority in dismissing the European Communities' objections relating to disclosure statements given by Drs. Boisseau and Boobis pursuant to the *Rules of Conduct* and paragraph 4 of the Experts Working Procedures adopted by the Panel.

(c) Previous Affiliation with JECFA

456. The European Communities claims that the reasons provided by the Panel for declining to exclude Drs. Boisseau and Boobis never addressed the fundamental question of their affiliation with JECFA. In the view of the European Communities, the Panel disregarded its "most important objection"[924] that an expert who has participated in the drafting of JECFA reports cannot be independent and impartial because, in this case, the experts were being asked to evaluate new scientific evidence underlying reports that were directly critical of, or in conflict with, their prior contribution to the JECFA reports. The European Communities argues that as "authors of the JECFA reports"[925], Drs. Boisseau and Boobis "cannot be considered to be independent and impartial in these

[920]European Communities' appellant's submission, para. 203.
[921]Panel Report, *US – Continued Suspension*, para. 7.87; Panel Report, *Canada – Continued Suspension*, para. 7.85.
[922]*Ibid.*
[923]Directive 2003/74/EC states that "the use of certain of the [hormones at issue], where this is necessary, for therapeutic purposes or zootechnical treatment may continue to be authorised as it is not likely to constitute a hazard for public health owing to the nature and the limited duration of the treatments, the limited quantities administered and the strict conditions laid down in Directive 96/22/EC in order to prevent any possible misuse." (Directive 2003/74/EC, Recital 11)
[924]European Communities' appellant's submission, para. 203.
[925]*Ibid.*, para. 205.

circumstances, because this would amount to asking them to review and criticise reports that are their own doing".[926]

457. JECFA, which is administered jointly by the FAO and the WHO, is "an international expert scientific committee" that evaluates the safety of food additives, contaminants, naturally-occurring toxicants and residues of veterinary drugs in food.[927] JECFA "performs risk assessments and provides advice to FAO, WHO and the member countries of both organizations".[928] Some countries use information from JECFA in their national food safety control programmes.[929] Requests for scientific advice "are in general channelled through the Codex Alimentarius Commission (Codex)".[930] Codex also adopts international standards based on evaluations performed by JECFA.[931] Codex has adopted international standards for five of the hormones at issue in this case, that is, oestradiol-17β, testosterone, progesterone, trenbolone acetate, and zeranol, on the basis of evaluation performed by JECFA.[932] In addition, Codex has initiated a standard-setting process for MGA, also on the basis of JECFA's evaluation, but this process has not yet concluded.[933]

458. The risk assessments performed by JECFA in relation to oestradiol-17β, testosterone, progesterone, trenbolone acetate, and zeranol lie at the centre of the dispute between the participants in this case. In the case of oestradiol-17β, the European Communities argued that "the Codex approach has serious limitations in non-linear situations, such as with regard to these hormones", and explained that "currently available Codex guidance poorly addresses cases such as this where the risks are embedded in changes in exposure to biologically active molecules which may, with minute differences in their bioavailability, have dramatic effects, such as turning on or off complete developmental programmes of the human genome, or inducing pathological conditions."[934] The European Communities also argued that JECFA's evaluation was based on "outdated" data.[935] As for the four hormones that are subject to the provisional ban and for which there is an international standard, the European Communities asserted that the conclusions reached by JECFA in 1988 and 1999 are "no longer valid".[936] As regards MGA, which is also subject to the provisional ban, the European Communities notes that "nearly all the studies" referred to in the 2000 JECFA report evaluating MGA "date from the 1960s and 1970s".[937] The European Communities considered JECFA's assessment of these hormones to be "insufficient"[938] for purposes of conducting a risk assessment of the type required by the *SPS Agreement*, in light of the fact that the European Communities had decided to adopt a higher level of protection than that underlying JECFA's

[926]European Communities' appellant's submission, para. 205.
[927]Panel Report, *US – Continued Suspension*, footnote 377 to para. 7.78; Panel Report, *Canada – Continued Suspension*, footnote 369 to para. 7.76.
[928]*Ibid.*
[929]*Ibid.*
[930]*Ibid.*
[931]*Ibid.*
[932]Codex Alimentarius Commission, *Maximum Residue Limits for Veterinary Drugs in Foods*, updated as at the 29th Session of the Codex Alimentarius Commission (July 2006), CAC/MRL 2 (Exhibit CDA-22 submitted by Canada to the Panel in *Canada – Continued Suspension*).
[933]See Panel Report, *US – Continued Suspension*, para. 7.813; Panel Report, *Canada – Continued Suspension*, para. 7.799.
[934]Panel Report, *US – Continued Suspension*, para. 7.458; Panel Report, *Canada – Continued Suspension*, para. 7.446 (referring to reply of the European Communities to Question 24 posed by the Panel, Panel Reports, Annex B-1, para. 140).
[935]Panel Report, *US – Continued Suspension*, para. 7.423; Panel Report, *Canada – Continued Suspension*, para. 7.414.
[936]Panel Report, *US – Continued Suspension*, para. 4.226; Panel Report, *Canada – Continued Suspension*, para. 4.217.
[937]Panel Report, *US – Continued Suspension*, para. 4.233; Panel Report, *Canada – Continued Suspension*, para. 4.221.
[938]Panel Report, *US – Continued Suspension*, para. 4.234; Panel Report, *Canada – Continued Suspension*, para. 4.222.

international standards.[939] In these circumstances, the Panel should have closely scrutinized any institutional links the experts may have had with JECFA and objectively determined whether those links were likely to affect or give rise to justifiable doubts as to the experts' independence or impartiality.

459. Both Drs. Boisseau and Boobis had close institutional links with JECFA. Dr. Boisseau was a member of JECFA from 1987 to 2002.[940] Dr. Boobis was a member from 1997 to 2006. Membership of JECFA, in our view, reflects international recognition of the expertise of a particular scientist. The Panel observed, in this regard, that JECFA is an "international, independent entity composed of highly qualified experts selected by the WHO or FAO according to strict procedures".[941] We agree with the Panel that Drs. Boisseau and Boobis are highly qualified scientists. We do not see the fact that Drs. Boisseau and Boobis are qualified and knowledgeable—and thus experts—as giving rise to concerns about their impartiality and independence. On the contrary, we would expect a person who is regarded as an expert to hold views, and even very strong views, on his or her particular area of expertise. However, we agree with the European Communities that the qualifications and relevant knowledge of Drs. Boisseau and Boobis are not by themselves sufficient guarantees of their independence and impartiality.[942] An expert could be very qualified and knowledgeable and yet his or her appointment could give rise to concerns about his or her impartiality or independence, because of that expert's institutional affiliation or for other reasons. Similarly, the fact that JECFA may select its experts according to strict procedures does not in itself ensure that these experts are independent and impartial in respect of the issues that may arise in a WTO dispute.

460. Not only did Drs. Boisseau and Boobis participate in JECFA, they were directly involved in JECFA's evaluations of the six hormones at issue. Dr. Boisseau was a member of JECFA in 1987 when the Committee evaluated oestradiol-17β, progesterone, testosterone, trenbolone acetate, and zeranol.[943] Both Drs. Boisseau and Boobis were members of JECFA in 1999 when it again evaluated oestradiol-17β, progesterone, and testosterone. During its 1999 session, JECFA adopted recommended Acceptable Daily Intakes ("ADIs") for oestradiol-17β, testosterone, and

[939]By contrast, as we explain in section VII.E, the Panel considered that the existence of international standards (or, in the case of MGA, of an advanced process that could eventually lead to the adoption of an international standard) established a presumption that there was sufficient scientific evidence to conduct a risk assessment. The Panel explained its view as follows:

> The presumption of consistency of measures conforming to international standards, guidelines and recommendations with the relevant provisions of the *SPS Agreement* implies that these standards, guidelines or recommendations, particularly those referred to in this case, are based on risk assessments that meet the requirements of the *SPS Agreement*. This means, therefore, that there was sufficient evidence for JECFA to undertake the appropriate risk assessments.

(Panel Report, *US – Continued Suspension*, para. 7.644; Panel Report, *Canada – Continued Suspension*, para. 7.622) (footnote omitted)

[940]Dr. Boisseau's *curriculum vitae* indicates that he was a member of JECFA from 1988-2001. However, he is listed as a member in JECFA's 32nd Report, which corresponds to a session held in Rome on 15-23 June 1987, and also in JECFA's 58th Report, which corresponds to a session held in Rome on 21-27 February 2002. (See Exhibit US-25 submitted by the United States to the Panel; and Exhibits CDA-29 and CDA-34 submitted by Canada to the Panel)

[941]Panel Report, *US – Continued Suspension*, para. 6.62; Panel Report, *Canada – Continued Suspension*, para. 6.57.

[942]European Communities' appellant's submission, para. 196.

[943]JECFA, "Evaluation of Certain Drug Residues in Food", 32nd Report, 1988 (Exhibit US-25 submitted by the United States to the Panel in *US – Continued Suspension*).

progesterone.[944] The report of the 1999 session lists Dr. Boisseau as the Chairman and Dr. Boobis as one of two Joint Rapporteurs. Drs. Boisseau and Boobis also participated in the evaluation of MGA in 2000.[945] On this occasion, the relevant JECFA report lists Dr. Boisseau as Vice-Chairman and Dr. Boobis as a Joint Rapporteur.[946] Thus, Dr. Boisseau was a member of JECFA when it evaluated all six hormones at issue in this dispute, while Dr. Boobis participated in the evaluation of four of the six hormones. As Chairman, Vice-Chairman, and Joint Rapporteur, they would be expected to have played a significant role in the discussions.

461. Rather than being a source of concern, the Panel considered that Drs. Boisseau's and Boobis' participation in JECFA would make them more useful as experts:

> The Panel chose not to exclude *a priori* experts who had participated in the preparation and drafting of JECFA's risk assessments because this would deprive the Panel and the parties of the benefit of the contribution of internationally recognized specialists and because the Panel was of the opinion that experts familiar with the JECFA reports would be well-placed to assist the Panel in understanding the work of JECFA extensively referred to by the parties in their submissions, in particular by the European Communities.[947]

462. The Panel also observed that "since JECFA's risk assessments were used as the reference risk assessments for purposes of the analysis under Article 5.7 of the *SPS Agreement*, it was necessary for the Panel to be able to rely on the advice of experts intimately knowledgeable about the substance of JECFA's risk assessments."[948] We are not persuaded by the Panel's reasoning. It is precisely because JECFA's risk assessments have such a prominent role in this dispute that the Panel should have exercised particular caution before appointing persons with institutional links to JECFA as experts. The Panel gave the experts wide latitude in terms of their examination of the evidence and the advice they provided. Given how the Panel framed its consultations with the experts, it would have been very difficult for it to limit the scope of the advice it received from Drs. Boisseau and Boobis to the "work of JECFA". In fact, our review of the panel record indicates that the Panel did not limit its consultations with Drs. Boisseau and Boobis to the "work of JECFA".[949] For example, as regards the

[944]JECFA, "Evaluation of Certain Drug Residues in Food", 52nd Report, 2000. The Committee did not specify MRLs for these three hormones because it found that "available data on the identity and concentration of residues of the veterinary drug in animal tissues indicate a wide margin of safety for consumption of residues in food when the drug is used according to good practice in the use of veterinary drugs". Thus, the Committee "concluded that the presence of drug residues in the named animal product does not present a health concern and that there is no need to specify a numerical MRL". (JECFA, 52nd Report, p. 101, footnote 1 (Exhibit US-5 submitted by the United States to the Panel in *US – Continued Suspension*))

[945]Dr. Boobis also participated in the evaluation of MGA in 2004 (JECFA, "Evaluation of Certain Drug Residues in Food", 62nd Report, 2004 (Exhibit CDA-20 submitted by Canada to the Panel in *Canada – Continued Suspension*)).

[946]JECFA, "Evaluation of Certain Drug Residues in Food", 54th Report, 2001 (Exhibit US-24 submitted by the United States to the Panel in *US – Continued Suspension*).

[947]Panel Report, *US – Continued Suspension*, para. 7.85; Panel Report, *Canada – Continued Suspension*, para. 7.83. (footnote omitted)

[948]Panel Report, *US – Continued Suspension*, para. 6.62; Panel Report, *Canada – Continued Suspension*, para. 6.57.

[949]The Panel posed 62 written questions to the six scientific experts. Dr. Boisseau provided responses to 59 questions and Dr. Boobis replied to 45. These stand in sharp contrast to the other experts who provided responses to far fewer questions. Dr. Brabander replied to 17 questions, Dr. Cogliano answered 12 questions, Dr. Guttenplan responded to 31 questions, and Dr. Sippel gave responses to 4 questions. (See Panel record document, *Statistics on Replies of the Scientific Experts*) We do not mean to suggest that it is problematic for an expert to answer too many questions. We refer to these numbers merely to illustrate the breadth of the advice provided by Drs. Boisseau and Boobis in this case.

European Communities' permanent ban on meat from cattle treated with oestradiol-17β, the Panel asked the experts (including Drs. Boisseau and Boobis):

> To what extent, in your view, does the [European Communities'] risk assessment identify the potential for adverse effects on human health, including the carcinogenic or genotoxic potential, of the residues of oestradiol-17β found in meat derived from cattle to which this hormone had been administered for growth promotion purposes in accordance with good veterinary practice? To what extent does the [European Communities'] risk assessment evaluate the potential occurrence of these adverse effects?[950]

463. This question goes directly to the adequacy of the European Communities' risk assessment and does not concern JECFA's work. Both Drs. Boisseau and Boobis responded to this question and their responses were relied on by the Panel in its analysis:

> Dr. Boisseau concluded that the European Communities did not demonstrate that a potential for adverse effects on human health arises from the consumption of meat from cattle treated with any of the six hormones in dispute for growth promotion purposes.[951]

> Dr. Boobis stated that, in his view, none of the information provided by the European Communities demonstrates the potential for adverse effects in humans of any of the six hormones in meat from cattle in which they are used for growth promotion purposes at the levels to which those consuming such meat would be exposed. The studies on genotoxicity provide no convincing evidence of potential for harm in consumers. The carcinogenic effects observed are entirely consistent with a hormonal mode of action that exhibits a threshold that would be well above the intake arising from consumption of meat from treated cattle.[952]

In their replies, Drs. Boisseau and Boobis directly evaluated the appropriateness of the European Communities' risk assessment.

464. The Panel also asked the experts whether the European Communities' risk assessment examined the risks arising specifically from the consumption of meat from cattle treated with the six hormones at issue:

> Do the risk assessment of the European Communities or any other scientific materials referred to by the European Communities demonstrate that a potential for adverse effects on human health arises from the consumption of meat from cattle treated with any of the six hormones in dispute for growth-promotion purposes? If yes, why? If not, what kind of evidence would be required to demonstrate such potential adverse effects? Would your response have been different at the time of adoption of the Directive in September 2003?[953]

[950]Panel Reports, Annex D, p. D-22, Question 13.

[951]Panel Report, *US – Continued Suspension*, para. 7.526; Panel Report, *Canada – Continued Suspension*, para. 7.498 (referring to replies of the scientific experts to questions posed by the Panel, Panel Reports, Annex D, para. 406).

[952]Panel Report, *US – Continued Suspension*, para. 7.527; Panel Report, *Canada – Continued Suspension*, para. 7.499 (referring to replies of the scientific experts to questions posed by the Panel, Panel Reports, Annex D, para. 408).

465. The question concerns the specificity requirement discussed by the Appellate Body in *EC – Hormones*.[954] Drs. Boisseau and Boobis both volunteered responses, and the Panel again relied on both of their replies in its examination of the consistency with the *SPS Agreement* of the European Communities' risk assessment. The Panel summarizes the response of Dr. Boisseau as follows:

> Dr. Boisseau concluded that the European Communities did not demonstrate that a potential for adverse effects on human health arises from the consumption of meat from cattle treated with any of the six hormones in dispute for growth promotion purposes. Additionally, Dr. Boisseau stated that the kind of evidence required to demonstrate such potential adverse effects should be (a) toxicological data indicating that the values of the ADIs established by JECFA are not conservative enough, and (b) data on residues in treated/non-treated cattle and on daily production of hormones in sensitive individuals [such as pre-pubertal children] indicating that the hormonal residue intake associated with the consumption of meat from treated cattle is such that the established ADIs would be exceeded in the case of use of growth promoters.[955]

466. This excerpt is a good illustration of the problems arising from Drs. Boisseau's and Boobis' involvement with JECFA's evaluation of the hormones at issue in this dispute. Dr. Boisseau's response shows that he considered JECFA and, in particular, its approach of using ADIs, as the benchmark against which to evaluate the European Communities' risk assessment.[956]

467. Another illustration of this problem can be seen in Dr. Boisseau's response to the Panel's question regarding whether the scientific evidence in the SCVPH Opinions supported the conclusion that the carcinogenic effects of the hormones at issue are related to a mechanism other than hormonal activity.[957] For each of the hormones at issue, except for oestradiol-17β (in respect of which he referred to an earlier response), Dr. Boisseau compared the European Communities' risk assessment with JECFA's conclusions. For example, Dr. Boisseau gave the following response in relation to progesterone:

> In its thirty second session, JECFA concluded that "Although equivocal results have been reported for the induction of single-strand DNA breaks and DNA adducts have been seen in vivo and in vitro in some studies, progesterone was not mutagenic … progesterone has no genotoxic potential". It concluded also that "these effects on tumour production occurred only with doses of progesterone causing obvious hormonal effects … the effects of progesterone on tumour production was directly related to its hormonal activity".

[953]Panel Reports, Annex D, p. D-84, Question 52.

[954]Appellate Body Report, *EC – Hormones*, para. 199.

[955]Panel Report, *US – Continued Suspension*, para. 7.526; Panel Report, *Canada – Continued Suspension*, para. 7.498 (referring to replies of the scientific experts to questions posed by the Panel, Panel Reports, Annex D, para. 406).

[956]This excerpt also shows that there is a problem in the standard applied by the Panel to review the European Communities' risk assessment. We discuss this in section VII.E of this Report.

[957]Panel Reports, Annex D, p. D-27, Question 16.

> In its 1999 report, SCVPH concluded, about the carcinogenicity of progesterone, that "At present, the data are insufficient to make any quantitative estimate of the risk arising from the exposure to residues in meat"[.] Therefore, the scientific evidence relied upon in the SCVPH Opinions does not support the conclusion that the carcinogenic effects of progesterone are related to a mechanism other than hormonal activity.[958]

The response in relation to testosterone is similar:

> In its thirty second session, JECFA concluded that the increase of the incidence of prostactic and uterine tumours observed in rodents treated with high doses of testosterone ["]resulted from the hormonal activity of testosterone". In its fifty second session held in 1999, JECFA concluded that "In mammalian cells, no chromosomal aberrations, mutations or DNA adducts were found following treatment with testosterone … testosterone has no genotoxic potential".
>
> In its 1999 report, SCVPH concluded, about the carcinogenicity of testosterone, that, given the limited data on genotoxicity and on carcinogenicity in humans, no conclusive quantitative estimate of the risk arising from the excess intake with meat from treated animals can be made. Therefore, the scientific evidence relied upon in the SCVPH Opinions does not support the conclusion that the carcinogenic effects of testosterone are related to a mechanism other than hormonal activity.[959]

Both of these responses are cited in the Panel's reasoning.[960] Dr. Boisseau also drew a comparison with JECFA at the end of his response, when he summarized his views as follows:

> [C]onsidering the conclusions of JECFA and the fact that SCVPH bases always its reservations on the lack of data more than on data establishing the genotoxicity and the capacity of the five other hormones (progesterone, testosterone, melengestrol, trenbolone and zeranol) to act as complete carcinogens, it can be said that the scientific evidence relied upon in the SCVPH Opinions does not support the conclusion that the carcinogenic effects of these five hormones are related to a mechanism other than hormonal activity.[961]

468. A similar problem can be seen as regards the question of the sufficiency of the evidence under Article 5.7 of the *SPS Agreement*. At the meeting with the Panel and the parties, the United States asked the experts whether they considered that the scientific evidence relied on by the European Communities in the SCVPH Opinions supported the conclusion that it is not possible to complete a

[958]Panel Reports, Annex D, paras. 157 and 158.
[959]*Ibid*., paras. 159 and 160.
[960]Panel Report, *US – Continued Suspension*, para. 7.732 and footnote 859 thereto, para. 7.738 and footnote 865 thereto, and para. 7.752 and footnote 878 thereto; Panel Report, *Canada – Continued Suspension*, para. 7.709 and footnote 807 thereto, para. 7.715 and footnote 813 thereto, and para. 7.731 and footnote 828 thereto.
[961]Panel Reports, Annex D, para. 167.

risk assessment for the five hormones that are the subject of the provisional ban.[962] Dr. Boobis referred to his experience in JECFA, replying:

> I cannot speak for the [European Communities], and I think what has just been said is quite correct. I can speak for JECFA in which I participated, and in our view we had enough information to complete a risk assessment. I don't know if that is helpful, but that was the situation when we looked at the available data on those five other hormones.[963]

469. The European Communities, however, based much of its case before the Panel on the limitations of JECFA's approach. Given that in its own risk assessment the European Communities called into question the validity of JECFA's risk assessments, it was improper for the Panel to have asked Drs. Boisseau and Boobis, who participated directly in JECFA's evaluations, to evaluate the European Communities' risk assessment. The natural inclination of someone placed in that situation would be to compare the risk assessments, rather than to assess whether the science relied upon by the European Communities can support the conclusions it reached, and to favour or defend JECFA's approach. The manner in which the Panel used these experts does not ensure impartiality and cannot be said to ensure fairness in the consultations with the experts. Such a result is not compatible with the due process obligations that are inherent in the WTO dispute settlement system.

470. Canada argues that it is "incorrect to portray" the participation in JECFA panels by Drs. Boisseau and Boobis as "giving them an (almost proprietary) interest in the outcome of the JECFA process that they would have felt compelled to defend".[964] Canada maintains that the JECFA process "is a diffuse one, in which a number of scientists participate" and is "aimed at reaching a consensus out of what may initially be a variety of scientific views".[965] Therefore, Canada argues, "the process is very different from scientific conclusions arrived at by one individual's scientific efforts that are published under his or her name"[966], and Drs. Boisseau and Boobis were no more responsible for authoring the JECFA reports than was any other "expert participating in a JECFA meeting and subscribing to a resulting report [which] might be considered part of the collective authorship of the scientists involved."[967] At the oral hearing, Canada additionally noted that, at JECFA meetings, the experts reviewed previously prepared monographs that, in this case, did not contain the input of Drs. Boisseau and Boobis.

471. The Panel also reasoned that Drs. Boisseau and Boobis may have contributed to the development of JECFA reports, but the nature of their participation ensured that they could remain independent and impartial. In response to objections from the European Communities during the interim review, the Panel explained:

> Moreover, JECFA reaches its conclusions by consensus. So the opinions expressed by the two experts were given with regard to the consensual view of JECFA on this matter, not just their own personal positions in the past. This does not mean, however, that JECFA's work is these particular experts' own work: it is a joint work by several experts.[968]

[962]Panel Reports, Annex G, para. 770.
[963]*Ibid*., para. 774.
[964]Canada's appellee's submission, para. 56.
[965]*Ibid.*
[966]*Ibid.*
[967]*Ibid*., para. 52.
[968]Panel Report, *US – Continued Suspension*, para. 6.62; Panel Report, *Canada – Continued Suspension*, para. 6.57.

472. We recognize that JECFA involves a decision-making process based on consensus and that the outcome of the process need not necessarily reflect the views of its individual members. However, the fact that this process involves several individuals and that the outcome may be the result of a compromise does not mean that the joint outcome of the process can be disconnected from the experts that participated in the process.[969] On the contrary, one would expect that the views of the experts that participated in the process would be reflected, in various degrees, in the outcome. As noted earlier, Drs. Boisseau's and Boobis' participation was not indirect or marginal. Rather, both would be expected to have had particular influence in the process given their respective roles as Chairman and Vice-Chairman, and Joint Rapporteur. Moreover, irrespective of their degree of influence in the process, both would be expected to have a natural inclination to identify with JECFA's evaluation as participants in the consensus. Therefore, we do not consider that the fact that JECFA reaches its conclusions by consensus dispels our concerns regarding the propriety of the Panel asking Drs. Boisseau and Boobis to evaluate the European Communities' risk assessment.

473. The United States emphasizes the fact that the Panel consulted with the parties when it adopted the Experts Working Procedures and in the expert selection process.[970] We agree with the United States that consultation with the parties in the adoption of working procedures for selecting the experts and in the expert selection process is a means for ensuring that the parties' due process rights are respected. However, as we explained earlier, the obligation to afford the protection of due process to the parties is not circumscribed to the expert selection stage and does not end with the appointment of the experts. Due process protection continues to apply throughout the consultations with the experts. Thus, the fact that the Panel may have consulted with the parties in this case when preparing the Experts Working Procedures and in selecting the experts does not provide a basis for concluding that due process was also respected in the subsequent stages of the proceedings, including the consultations with the experts. Moreover, in the consultations that the Panel held with the parties, the European Communities repeatedly objected to the selection of experts affiliated with JECFA.[971]

474. The Panel additionally expressed the view that Drs. Boisseau and Boobis, by virtue of their work as scientists, could be relied upon to be objective in their assessment of critiques of their work, as well as of new scientific evidence that might require altering the conclusions of their prior work. During the interim review stage, the Panel responded to objections of the European Communities as follows:

[969]In the meeting with the Panel and the parties, Dr. Boobis suggested that JECFA had been operating since 1997 on the basis of unanimity. Dr. Boobis' description of JECFA decision-making does not support Canada's argument that JECFA reports may not necessarily reflect the views of Drs. Boisseau and Boobis. Dr. Boobis explained:

> The JECFA Committee—at least as far back as 1997—have been able to reach an agreed position on all the questions before them. In the event that there was a disagreement, there would be two possible options – one would be not to proceed further and seek further evidence, and the other would be, as has been indicated already by the secretariat, if the majority was of one view and a minority was of another view, to issue a so-called minority opinion or minority report as well, which reflects a contrary view on the interpretation of the data. As I said earlier, this has not happened, there was unanimity. Generally what happens is that there is a discussion, there may be varying interpretations of a dataset, the experts get together over the period of a meeting and explore the various possibilities, bringing new information, or new insights and reach a common position, and that has worked generally very successfully in the evaluation of the compounds over the last 10 years I have been involved in JECFA.

(Panel Reports, Annex G, para. 511)

[970]United States' appellee's submission, para. 85.

[971]Panel Report, *US – Continued Suspension*, para. 7.79; Panel Report, *Canada – Continued Suspension*, para. 7.77 (referring to the European Communities' comments on the proposed experts of 16 January 2006).

> [S]cientists would readily admit that science is constantly evolving and the fact that new studies are peer reviewed is evidence that assessing new ideas and findings is part of scientific work. Assuming that scientists may lack objectivity because they participated in the preparation and drafting of JECFA's risk assessments on the hormones at issue would call into question the whole principle of peer review.[972]

475. The Panel added:

> The experts that the European Communities claims were defending their work acknowledge that the state of knowledge can evolve. ... The experts consulted by the Panel are used to considering and peer reviewing studies that go beyond what they have published themselves or perhaps even contradict them. In other words, they are not likely to feel any need to defend their own previous work results in the light of new, convincing evidence or techniques that put such previous work into doubt.[973]

476. The European Communities argues that the principle of peer review is not found in any of the WTO agreements, and that scientific journals "require that new work submitted for publication must not be given for review by the same persons whose theories the submitted articles contest".[974] The key question, the European Communities maintains, is "whether an expert that has been the author of a given report is impartial and independent to act as a 'peer' in 'reviewing' reports that explicitly criticise the report where the 'peer' is a co-author."[975]

477. We recognize that scientists will often be asked to review studies performed by other scientists and that the scientific community must constantly reassess theories in the light of scientific progress. However, as we pointed out above, the Panel did not simply ask Drs. Boisseau and Boobis about JECFA's work and risk assessments. In the consultations with experts, the Panel asked Drs. Boisseau and Boobis to evaluate the European Communities' risk assessment and they did so using JECFA's evaluations as a benchmark. This is problematic in this case because the European Communities' risk assessment called into question the validity of JECFA's evaluations and explicitly stated that it would not follow them. In the light of this, it was improper for the Panel to consult with Drs. Boisseau and Boobis, who were directly involved in JECFA's evaluations. The concerns raised in this situation are not addressed by the fact that scientists regularly conduct "peer reviews" or may recognize that science evolves. Nor are the concerns addressed by the Panel's explanation that JECFA's work is linked to Codex, which is expressly recognized by the *SPS Agreement* as having responsibilities for the "establishment of international standards, guidelines and recommendations".[976]

478. The Panel also referred to the presumption of consistency that applies to SPS measures based on international standards under Articles 3.1 and 3.2 of the *SPS Agreement* as an additional justification for its appointment of Drs. Boisseau and Boobis because of their involvement in the risk assessments underlying the international standards at issue in this case. However, we fail to see why the appointment of such experts would be justified in a case such as this one where the WTO Member adopts a higher level of protection than that reflected in the international standards, pursuant to

[972]Panel Report, *US – Continued Suspension*, para. 6.22; Panel Report, *Canada – Continued Suspension*, para. 6.21.

[973]Panel Report, *US – Continued Suspension*, paras. 6.62 and 6.63; Panel Report, *Canada – Continued Suspension*, paras. 6.57 and 6.58.

[974]European Communities' appellant's submission, para. 199.

[975]*Ibid.*

[976]Panel Report, *US – Continued Suspension*, para. 6.22; Panel Report, *Canada – Continued Suspension*, para. 6.21.

Article 3.3. The Panel's view that it is consistent with JECFA's role in setting international standards "for the Panel to rely on experts who contributed in the preparation and drafting of JECFA's risk assessments on the substances at issue"[977] rather confirms our impression that the Panel improperly relied on Drs. Boisseau and Boobis to evaluate the European Communities' risk assessment against the evaluations conducted by JECFA.[978]

479. Accordingly, we consider that it was improper for the Panel to consult Drs. Boisseau and Boobis. We reiterate that our concerns do not relate to the qualifications of Drs. Boisseau and Boobis, who are highly recognized experts, nor do they relate to the fact that, as experts, they would have been expected to hold views on issues in their area of expertise. Rather, our concerns arise from their direct involvement in the risk assessments performed by JECFA for the hormones at issue in this dispute and from the particular role that JECFA's risk assessments, and the Codex standards adopted on the basis of those risk assessments, had in this case. As we noted earlier[979], in its case before the Panel, the European Communities argued that there were limitations in JECFA's evaluation of oestradiol-17β and that the evidence relied upon by JECFA in the evaluation of the other five hormones was outdated. The Panel, for its part, considered that the existence of an international standard established a presumption that the scientific evidence was not "insufficient" to perform a risk assessment within the meaning of Article 5.7 of the *SPS Agreement*.[980]

480. We understand that panels often face practical difficulties in selecting experts who have the required level of expertise and whose selection is not objected to by the parties.[981] We do not wish to make the expert selection process more difficult than it may already be. However, experts consulted by a panel can have a decisive role in a case, especially when it involves highly complex scientific questions such as this one. The Panel in this case said "the role of the experts was to act as an 'interface' between the scientific evidence and the Panel, so as to allow it to perform its task as the trier of fact."[982] Experts appointed by a panel can significantly influence the decision-making process. If a panel does not ensure that the requirements of independence and impartiality are respected in its consultations with the experts, this can compromise the fairness of the proceedings and the impartiality of the decision-making. In these circumstances, the practical difficulties that a panel may encounter in selecting experts cannot displace the need to ensure that the consultations with the experts respect the parties' due process rights.

481. For these reasons, we consider that there was an objective basis to conclude that the institutional affiliation with JECFA of Drs. Boisseau and Boobis, and their participation in JECFA's evaluations of the six hormones at issue, was likely to affect or give rise to justifiable doubts as to their independence or impartiality given that the evaluations conducted by JECFA lie at the heart of

[977]Panel Report, *US – Continued Suspension*, para. 6.22; Panel Report, *Canada – Continued Suspension*, para. 6.21.

[978]Panel Report, *US – Continued Suspension*, para. 6.63; Panel Report, *Canada – Continued Suspension*, para. 6.58.

[979]See *supra*, para. 458.

[980]See *supra*, para. 939.

[981]The Panel described some of the difficulties it encountered in this case:

> The Panel wishes to highlight the challenges it encountered in selecting experts. There was a limited number of specialists suggested and actually available in each of the fields on which the Panel needed assistance and almost always one or more of the parties objected to that specialist. For example, only six of the identified available experts were deemed to have extensive expertise in risk analysis. All of these experts were objected to by at least one party.

(Panel Report, *US – Continued Suspension*, footnote 382 to para. 7.87; Panel Report, *Canada – Continued Suspension*, footnote 374 to para. 7.85)

[982]Panel Report, *US – Continued Suspension*, para. 6.72; Panel Report, *Canada – Continued Suspension*, para. 6.67.)

the controversy between the parties. The appointment and consultations with Drs. Boisseau and Boobis compromised the adjudicative independence and impartiality of the Panel. Therefore, we find that the Panel infringed the European Communities' due process rights as a result of the Panel having consulted with Drs. Boisseau and Boobis as scientific experts.

482. Because the appointment and consultations with Drs. Boisseau and Boobis compromised the Panel's ability to act as an independent adjudicator, the Panel cannot be said to have made "an objective assessment of the matter" as required by Article 11 of the DSU. We recall that, in *US – Gambling*, the Appellate Body held that "as part of their duties, under Article 11 of the DSU, to 'make an objective assessment of the matter' before them, panels must ensure that the due process rights of parties to a dispute are respected."[983] Consequently, we find that the Panel failed to comply with its duties under Article 11 of the DSU, as a result of the appointment and consultations with Drs. Boisseau and Boobis in the circumstances of this case.

483. The European Communities argues that, if we were to find that the Panel erred in relying on the advice of Drs. Boisseau and Boobis, we would have to reverse all of the Panel's findings under the *SPS Agreement*.[984] At the oral hearing, the United States and Canada disagreed that this would be the necessary consequence of our making the finding requested by the European Communities.

484. Where a panel's ability to act as an independent adjudicator has been compromised, as we have found in this case, this raises serious issues as to whether the panel's findings may be sustained. We recall, moreover, that Drs. Boisseau and Boobis provided responses to the majority of questions posed by the Panel and the Panel relied extensively on their responses in its assessment of the consistency of Directive 2003/74/EC with Articles 5.1 and 5.7 of the *SPS Agreement*.[985] Thus, the Panel's findings on Articles 5.1 and 5.7 of the *SPS Agreement* would be difficult to sustain upon exclusion of the testimony of Drs. Boisseau and Boobis, assuming that disentangling their testimony from the other elements of the Panel's analysis was possible. Although our finding on this issue could, by itself, lead to the invalidation of the Panel's findings under Articles 5.1 and 5.7 of the *SPS Agreement*, we nevertheless proceed to examine the other claims of error raised by the European Communities in respect of the Panel's assessment of the consistency of Directive 2003/74/EC with the *SPS Agreement*. The significance to the Panel's analysis of the testimony of Drs. Boisseau and Boobis will become more evident from our review of the Panel's findings under Articles 5.1 and 5.7 of the *SPS Agreement*.

VI. The Consistency with Article 5.1 of the *SPS Agreement* of the European Communities' Import Ban on Meat from Cattle Treated with Oestradiol-17β for Growth-Promotion Purposes

A. *Introduction*

485. We turn next to the European Communities' appeal of the Panel's finding that the permanent ban on meat and meat products from cattle treated with oestradiol-17β for growth-promotion purposes provided for in Directive 2003/74/EC does not meet the requirements of Article 5.1 of the *SPS Agreement*. Section B provides a summary of the European Communities' risk assessment in relation to oestradiol-17β, which the European Communities contends brought it into compliance with the recommendations and rulings of the DSB in *EC – Hormones*. This is followed by a summary of the Panel's findings under Article 5.1 of the *SPS Agreement* in section C and of the claims and arguments raised on appeal in section D. We then analyze in section E the specific issues raised by

[983]Appellate Body Report, *US – Gambling*, para. 273.

[984]European Communities' appellant's submission, paras. 181, 182, and 212.

[985]See *supra*, footnote 949.

the European Communities' appeal against the Panel's assessment of Directive 2003/74/EC under Article 5.1 of the *SPS Agreement*. Finally, our conclusions are set out in section F.

486. We recall that the Panel found that the European Communities' claim under Article 23.1, read together with Articles 22.8 and 3.7 of the DSU, was premised on the "*conformity* (presumed or actual) with the *SPS Agreement*"[986] of Directive 2003/74/EC. This is because, in the Panel's view, the phrase "until such time as the measure found to be inconsistent ... has been removed" in Article 22.8 implies that what is to be achieved is not the removal of the measure, but actual compliance with the DSB's recommendations and rulings.[987] For this reason, the Panel considered that it had to address the consistency of Directive 2003/74/EC with Articles 5.1 and 5.7 of the *SPS Agreement*.

B. *The European Communities' Risk Assessment for Meat from Cattle Treated with Oestradiol-17β*

487. We recall that, in *EC – Hormones*, the European Communities' import ban on meat and meat products from cattle treated with six hormones—oestradiol-17β, testosterone, progesterone, trenbolone acetate, zeranol, and MGA—was found to be inconsistent with Article 5.1 of the *SPS Agreement*. The Appellate Body found that the scientific studies submitted by the European Communities in that dispute were not "sufficiently specific to the case at hand"[988], because they were "general studies which do indeed show the existence of a general risk of cancer; but they do not focus on and do not address the particular kind of risk here at stake—the carcinogenic or genotoxic potential of the residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes."[989] For this reason, the Appellate Body concluded that "no risk assessment that reasonably support[ed] or warrant[ed] the import prohibition embodied in the [European Communities'] Directives was furnished to the Panel"[990], and accordingly found that the European Communities' import ban, imposed under Directive 96/22/EC, was not "based on" a risk assessment within the meaning of Article 5.1.

488. Following the adoption by the DSB of the Panel and Appellate Body Reports in *EC – Hormones*, the European Commission initiated and funded 17 scientific studies to evaluate the potential for adverse effects to human health from residues in bovine meat and meat products resulting from the use of oestradiol-17β, progesterone, testosterone, zeranol, trenbolone acetate, and MGA in cattle for growth-promotion purposes. The results of these studies, as well as other publicly available information and data collected from international organizations such as Codex and JECFA were reviewed by the SCVPH.[991]

489. On 30 April 1999, the SCVPH published an Opinion entitled "Assessment of Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products"[992] (the "1999 Opinion"). The 1999 Opinion found that "consumption of beef from hormone-treated non-pregnant cattle can result in excess exposure to oestrogens"[993] and that the "toxicological issues of concern" arising from such excess exposure include "endocrine, developmental, immunological,

[986]Panel Report, *US – Continued Suspension*, para. 7.272; Panel Report, *Canada – Continued Suspension*, para. 7.288. (original emphasis)
[987]Panel Report, *US – Continued Suspension*, para. 7.284; Panel Report, *Canada – Continued Suspension*, para. 7.300.
[988]Appellate Body Report, *EC – Hormones*, para. 200.
[989]*Ibid.*
[990]*Ibid.*, para. 208.
[991]Panel Report, *US – Continued Suspension*, para. 2.3; Panel Report, *Canada – Continued Suspension*, para. 2.3.
[992]See *supra*, footnote 20.
[993]1999 Opinion, p. 36.

neurobiological, immunotoxic, genotoxic and carcinogenic effects."[994] The 1999 Opinion reached the following conclusions in relation to the potential risks to human health from residues of oestradiol-17β in bovine meat:

> - In summary, 17 β-oestradiol has genotoxic[995] potential. Evidence is building that oestrogens, most likely through oxidative metabolism to catechols and beyond to semiquinones and quinones, are DNA reactive and mutagenic.[996]
>
> - ... in consideration of the recent data on the formation of genotoxic metabolites of oestradiol, suggesting that 17 β-oestradiol acts as complete carcinogen, by exerting tumour initiating and promoting effects, it has to be concluded, that no quantitative estimate of the risk related to residues in meat could be presented.[997]
>
> - These observations strongly suggest that environmental 17 β-oestradiol can, even when administered at very low doses, modulate growth of children of both sexes and decrease the age when final height is achieved and puberty is reached.[998]
>
> - ... it is suggested that environmental 17 β-oestradiol could exert deleterious effects on fertility in men and women, by acting through various, direct and indirect, mechanisms.[999]
>
> - ... at relatively high doses oestradiol does produce a number of adverse effects on the immune system in humans e.g. allergy to topical oestradiol (Boehnke and Gall, 1996). The above findings while indicating a possible concern are insufficient to identify whether immune effects could occur in consumers from the ingestion of meat or meat products containing 17 β-oestradiol residues.[1000]

490. The 1999 Opinion also reached the following conclusions as to the relevant risks to human health posed by the six hormones, and in particular by oestradiol-17β:

> - As concerns excess intake of hormone residues and their metabolites, and in view of the intrinsic properties of hormones and epidemiological findings, a risk to the consumer has been identified with different levels of conclusive evidence for the [six] hormones in question.
>
> - In the case of oestradiol-17β, there was a substantial body of recent evidence suggesting that it had to be considered as a complete carcinogen, as it exerted both tumour initiating and tumour promoting effects. The data available did not, however, allow a quantitative estimate of the risk.

[994]1999 Opinion, p. 39.
[995]See *supra*, footnote 155.
[996]1999 Opinion, p. 41. Mutagenicity is the ability of a physical, chemical, or biological agent to induce heritable changes (mutations) in the genetic material in a cell as a consequence of alterations or loss of genes or chromosomes (or parts thereof). Panel Report, *US – Continued Suspension*, footnote 673 to para. 7.549; Panel Report, *Canada – Continued Suspension*, footnote 623 to para. 7.517 (referring to replies of the experts to Question 2 posed by the Panel to the scientific experts, Panel Reports, Annex D, paras. 34 and 55).
[997]1999 Opinion, p. 43.
[998]*Ibid.*
[999]*Ibid.*, p. 44.
[1000]*Ibid.*, p. 45.

...

- For all six hormones endocrine, developmental, immunological, neurobiological, immunotoxic, genotoxic and carcinogenic effects could be envisaged. Of the various susceptible risk groups, pre-pubertal children was the group of greatest concern. Again the available data did not enable a quantitative estimate of the risk.

- In view of the intrinsic properties of the hormones and in consideration of epidemiological findings, no threshold levels could be defined for any of the six substances.[1001]

491. Subsequent to the adoption of the 1999 Opinion, additional scientific information was made available to the European Commission, in the form of a report by the Committee for Veterinary Medicinal Products ("CVMP") of the European Union (a subcommittee of the European Medicines Agency (EMEA)), and a report by the United Kingdom's Veterinary Products Committee sub-group on the 1999 Opinion. At the request of the European Commission, the SCVPH examined this scientific information and, on 3 May 2000, issued a review of its 1999 Opinion in which it declined to alter the conclusions contained therein[1002] (the "2000 Opinion"). The SCVPH observed that "particularly in regards to the subject of estrogenic effects during [various stages of] development, there is no compelling evidence suggesting that these effects do not also occur at low doses."[1003] The 2000 Opinion concluded that recent scientific information "did not provide convincing data and arguments demanding revision of the conclusions drawn in the [1999 Opinion] on the potential risks to human health from hormone residues in bovine meat and meat products".[1004]

492. On 10 April 2002, a second review of the 1999 Opinion was issued by the SCVPH[1005] (the "2002 Opinion"), on the basis of scientific data collected since the previous review. The scientific data reviewed by the SCVPH included the final results of all 17 studies that had been commissioned by the European Commission, as well as scientific data from relevant international organizations and other sources. The SCVPH considered that the data from the 17 scientific studies and recent scientific literature confirmed the validity of the 1999 Opinion, as reviewed in 2000, and that no amendments to those Opinions were justified.[1006] The 2002 Opinion also drew the following conclusions about the potential health risks posed by residues of oestradiol-17β in meat:

- Ultra-sensitive methods to detect residues of hormones in animal tissues have become available, but need further validation.

- Studies on the metabolism of oestradiol-17β in bovine species indicated the formation of lipoidal esters, disposed particularly in body fat. These lipoidal esters showed a high oral bioavailability[1007] in rodent experiments. Thus, the consequence of their consumption needed to be considered in a risk assessment.

- Experiments with heifers, one of the major target animal groups for the use of hormones, indicated a dose-dependent increase in residue levels of all hormones, particularly at the implantation sites. Misplaced implants and repeated implanting, which seemed to occur frequently, represented a considerable risk that highly contaminated meats could enter the food chain. ...

- Convincing data had been published confirming the mutagenic and genotoxic potential of oestradiol-17β as a consequence of metabolic activation to reactive quinones. *In vitro*[1008] experiments indicated that oestrogenic compounds might alter the expression of an array of genes. Considering that endogenous oestrogens also exert these effects, the data highlighted the diverse biological effects of this class of hormones.

...

- Epidemiological studies with opposite-sexed twins, suggest that the exposure of the female co-twin *in utero* to hormones results in an increased birth weight and consequently an increased adult breast cancer risk.[1009]

493. In light of the conclusions of the 1999, 2000, and 2002 Opinions, the European Communities adopted Directive 2003/74/EC on 22 September 2003[1010], which amended Directive 96/22/EC. Directive 2003/74/EC provides for the *permanent* prohibition on the importation of meat and meat products from animals treated with oestradiol-17β for growth-promotion purposes, on the basis of the SCVPH assessment that "recent evidence suggests that [oestradiol-17β] has to be considered as a complete carcinogen, as it exerts both tumour-initiating and tumour-promoting effects and that the data currently available do not make it possible to give a quantitative estimate of the risk."[1011] Directive 2003/74/EC also provides for a *provisional* ban on meat and meat products from cattle treated with progesterone, testosterone, zeranol, trenbolone acetate and MGA for growth-promoting purposes.

494. Before the Panel, the European Communities argued that the 1999, 2000, and 2002 Opinions, supported by the 17 studies conducted between 1998 and 2001, constitute the risk assessment upon which Directive 2003/74/EC is based.[1012]

C. *The Panel's Findings*

495. As noted earlier in section IV of this Report, the European Communities has challenged in these proceedings the continued application of the suspension of concessions by the United States and

[1001]Panel Report, *US – Continued Suspension*, para. 7.391; Panel Report, *Canada – Continued Suspension*, para. 7.388 (quoting 1999 Opinion, p. 73).
[1002]See *supra*, footnote 21.
[1003]2000 Opinion, p. 2.
[1004]Panel Report, *US – Continued Suspension*, para. 7.392; Panel Report, *Canada – Continued Suspension*, para. 7.389 (quoting 2000 Opinion, p. 4).
[1005]See *supra*, footnote 22.
[1006]Panel Report, *US – Continued Suspension*, para. 7.394; and Panel Report, *Canada – Continued Suspension*, para. 7.391 (referring to 2002 Opinion, pp. 21 and 22).

[1007]Bioavailability refers to the capacity of a substance to enter the general blood circulation and to diffuse into the human or animal body, or the fraction of a dose of a substance that is available for systemic circulation. See Panel Report, *US – Continued Suspension*, footnote 508 to para. 7.393; and Panel Report, *Canada – Continued Suspension*, footnote 499 to para. 7.390 (referring to replies of the experts to Question 43 posed by the Panel to the scientific experts, Panel Reports, Annex D, paras. 344-357).
[1008]See *supra*, footnote 364.
[1009]Panel Report, *US – Continued Suspension*, para. 7.393; Panel Report, *Canada – Continued Suspension*, para. 7.390.
[1010]See *supra*, footnote 5.
[1011]Panel Report, *US – Continued Suspension*, para. 7.395; Panel Report, *Canada – Continued Suspension*, para. 7.392 (referring to Directive 2003/74/EC).
[1012]Panel Report, *US – Continued Suspension*, para. 7.389; Panel Report, *Canada – Continued Suspension*, para. 7.386.

Canada subsequent to the notification of Directive 2003/74/EC. The European Communities argued, *inter alia*, that Article 22.8 of the DSU permits the application of the suspension of concessions and other obligations only until such time as the measure found to be inconsistent with a covered agreement has been removed, a condition that it claims was met with the adoption and notification of Directive 2003/74/EC.[1013] According to the European Communities, the United States and Canada acted inconsistently with Article 23.1, read together with Articles 22.8 and 3.7 of the DSU, by failing to have recourse to, and abide by, the rules and procedures of the DSU subsequent to the adoption and notification to the DSB of Directive 2003/74/EC.

496. The Panel observed that the European Communities' claim under Article 22.8 of the DSU was premised on the European Communities' contention that Directive 2003/74/EC has brought its import ban on meat and meat products from cattle treated with hormones for growth-promotion purposes into compliance with the *SPS Agreement*. For this reason, the Panel considered that it had jurisdiction to "address the compatibility" of Directive 2003/74/EC with the *SPS Agreement* to the extent necessary to determine whether the "'measure found to be inconsistent' in the *EC – Hormones* case has been removed".[1014]

497. Turning to the allocation of the burden of proof, the Panel observed, first, that it was incumbent upon the European Communities as the complaining party to establish a *prima facie* case of a violation of Article 22.8 of the DSU. The Panel found that the European Communities had met this burden because of the presumption of good faith compliance that the Panel had previously found to apply in relation to the European Communities' implementing measure.[1015] As a result, the burden shifted to the responding parties. The Panel found that the United States and Canada had sufficiently refuted, "in [their] first written submission[s] through positive evidence of breach of the *SPS Agreement*"[1016] the European Communities' allegation that its implementing measure complied with the *SPS Agreement*. The Panel further stated that, "[i]n its subsequent submissions before the Panel, the European Communities responded to the allegations of violation made by [the United States and Canada]".[1017] The Panel added that "[w]hile the presumptions based on good faith enjoyed by each party may have played a role in the burden of proof in the early stage of the Panel proceedings, it is the opinion of the Panel that they eventually 'neutralized' each other since each party also submitted evidence in support of its allegations."[1018] The Panel ultimately concluded that "each party had to prove its specific allegations in response to evidence submitted by the other party", and that it had "weigh[ed] all the evidence before it"[1019] in reaching its findings.

498. The Panel then explained that it needed to review Directive 2003/74/EC against: (a) the recommendations and rulings of the DSB in the *EC – Hormones* case and (b) the provisions with which the European Communities purports to comply as part of its claim of violation of Article 22.8 by the United States and Canada.[1020] The Panel acknowledged that in a case such as this it would be difficult for the complainant to identify all the potential problems of incompatibility. At the same time, the Panel recognized that, in this case, where a finding of violation is conditional on the compliance of a measure of the complainant with the WTO agreements, difficulties could arise if the

[1013]We discuss the meaning of "removal" *supra*, section IV.D.

[1014]Panel Report, *US – Continued Suspension*, para. 7.375; Panel Report, *Canada – Continued Suspension*, para. 7.372.

[1015]Panel Report, *US – Continued Suspension*, para. 7.385; Panel Report, *Canada – Continued Suspension*, para. 7.382.

[1016]*Ibid.*

[1017]*Ibid.*

[1018]Panel Report, *US – Continued Suspension*, para. 7.386; Panel Report, *Canada – Continued Suspension*, para. 7.383.

[1019]Panel Report, *US – Continued Suspension*, para. 7.386; Panel Report, *Canada – Continued Suspension*, para. 7.383.

[1020]Panel Report, *US – Continued Suspension*, para. 7.402; Panel Report, *Canada – Continued Suspension*, para. 7.399.

scope of review of that measure is defined only by the complainant. Indeed, the complainant could limit the scope of the panel's review to provisions with which it believes that its measure is most likely to be found compatible.[1021] Under these circumstances, the Panel found it preferable, both from a legal and a practical point of view, to consider *all* the allegations and arguments raised by each party, as long as the other party had the opportunity to comment on those allegations and arguments. Accordingly, the Panel sought to "circumscribe" the scope of its review under the *SPS Agreement*[1022], on the basis of the claims and arguments raised by each party, and determined that it would review, to the extent necessary for assessing the European Communities' Article 22.8 claim, the "compatibility"[1023] of Directive 2003/74/EC with Articles 5.1, 5.2[1024], 5.7, and 3.3 of the *SPS Agreement*.

499. The Panel next outlined the standard that it would apply in reviewing the compatibility of Directive 2003/74/EC with those provisions. The Panel noted that the standard of review applicable to legal and factual issues regarding measures reviewed under the *SPS Agreement* is found in Article 11 of the DSU and explained that, as regards the assessment of the facts, this standard has been understood as requiring "neither *de novo review* as such, nor 'total deference', but rather the 'objective assessment of the facts'".[1025] According to the Panel, this corresponds to a duty to "consider the evidence presented to us and to make factual findings on the basis of that evidence".[1026] However, the Panel retained the discretion to "decide which evidence [it chose] to utilise in making findings"[1027] and to decide "which [experts'] statements [were] useful to refer to explicitly as long as [it did] not deliberately disregard or distort evidence."[1028]

500. The Panel recalled that it had consulted six scientific experts individually, "in order to obtain a more complete picture both of mainstream scientific opinion and of any divergent views."[1029] The Panel explained that, while it generally followed the opinion of a majority of experts that had expressed concurrent views on the scientific questions before it, sometimes divergences of views rendered this approach impracticable. In these circumstances, the Panel accepted the position(s) that it considered most specific to the question at issue, or best supported by arguments and evidence. The experts were also made aware of their role—which was, *inter alia*, to present scientific issues to the members of the Panel in a way that could be understood by them—and of the role of the Panel in the WTO dispute settlement system—which includes being the trier of facts. In assessing the scientific advice received from the experts, the Panel said it fully took into account the comments of the parties, when appropriate. The Panel also recalled the approach followed by the Appellate Body in *Japan – Apples*, which required it to address the compatibility of Directive 2003/74/EC with respect to each of

[1021]Panel Report, *US – Continued Suspension*, para. 7.403; Panel Report, *Canada – Continued Suspension*, para. 7.400.

[1022]Panel Report, *US – Continued Suspension*, para. 7.398; Panel Report, *Canada – Continued Suspension*, para. 7.395.

[1023]Panel Report, *US – Continued Suspension*, para. 7.411; Panel Report, *Canada – Continued Suspension*, para. 7.402.

[1024]Only the United States argued that Directive 2003/74/EC was inconsistent with Article 5.2 of the *SPS Agreement*. Accordingly, the Panel Report in *Canada – Continued Suspension* does not address the consistency of Directive 2003/74/EC with this provision.

[1025]Panel Report, *US – Continued Suspension*, para. 7.414; Panel Report, *Canada – Continued Suspension*, para. 7.405 (quoting Appellate Body Report, *EC – Hormones*, para. 117).

[1026]Panel Report, *US – Continued Suspension*, para. 7.416; Panel Report, *Canada – Continued Suspension*, para. 7.407.

[1027]*Ibid.* (referring to Appellate Body Report, *EC – Hormones*, para. 135).

[1028]*Ibid.* (referring to Appellate Body Report, *EC – Hormones*, para. 138).

[1029]Panel Report, *US – Continued Suspension*, para. 7.418; Panel Report, *Canada – Continued Suspension*, para. 7.409. The Panel noted that, in some circumstances, only one or two experts have expressed their views on an issue. Sometimes these views were similar or complemented each other. (Panel Report, *US – Continued Suspension*, para. 7.420; Panel Report, *Canada – Continued Suspension*, para. 7.411) In other circumstances, a larger number of experts expressed opinions and, sometimes, they expressed diverging opinions.

the six hormones covered by the measure. Nevertheless, where the evidence was similar for all hormones, or where information was not provided in relation to each hormone, the Panel addressed the hormones collectively.[1030]

501. Next, the Panel found that Directive 2003/74/EC is an SPS measure within the meaning of paragraph 1 of Annex A to the *SPS Agreement*, and particularly item (b).[1031] The Panel then sought to determine whether the permanent ban on meat and meat products treated with oestradiol-17β for growth-promoting purposes provided by Directive 2003/74/EC was based on a risk assessment within the meaning of Articles 5.1 of the *SPS Agreement*. The European Communities argued that the three Opinions issued by the SCVPH, supported by the 17 studies conducted between 1998-2001, constituted a risk assessment within the meaning of Article 5.1, and that the permanent ban on meat and meat products from cattle treated with oestradiol-17β was "based on" such risk assessment.

502. At the outset of its analysis, the Panel noted that, in order to determine whether the SCVPH Opinions constituted a risk assessment within the meaning of Article 5.1 of the *SPS Agreement*, it would have to examine whether the SCVPH Opinions: (1) took into account risk assessment techniques of the relevant international organizations; (2) took into account the factors listed in Article 5.2 of the *SPS Agreement*[1032]; (3) satisfied the definition of "risk assessment" contained in Annex A, paragraph 4, of the *SPS Agreement*; and (4) whether the conclusions in the SCVPH Opinions are supported by the scientific evidence evaluated.[1033]

503. Relying on the reasoning of the panel in *Japan – Apples*, the Panel found that Article 5.1 of the *SPS Agreement* does not require compliance with the risk assessment techniques developed by international organizations, insofar as it requires that such techniques are "taken into account" by the risk assessor. The Panel observed that, although the SCVPH Opinions did not strictly follow the CODEX and JECFA risk assessment guidelines, the European Communities "was aware of" and

[1030]Panel Report, *US – Continued Suspension*, paras. 7.420-7.422; Panel Report, *Canada – Continued Suspension*, paras. 7.411-7.413.

[1031]Panel Report, *US – Continued Suspension*, para. 7.434; Panel Report, *Canada – Continued Suspension*, para. 7.425. Annex A(1)(b) of the *SPS Agreement* reads:

> 1. Sanitary or phytosanitary measure – Any measure applied:
>
> ...
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs[.]
>
> ...
>
> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including *inter alia* end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

None of the parties has argued that Directive 2003/74/EC is not an SPS measure.

[1032]Canada did not allege that Directive 2003/74/EC was inconsistent with Article 5.2 of the *SPS Agreement*, and therefore this element was only examined in the case involving the United States. (See *supra*, footnote 1024)

[1033]Panel Report, *US – Continued Suspension*, para. 7.445; Panel Report, *Canada – Continued Suspension*, para. 7.434.

"considered" such guidelines when preparing the SCVPH Opinions, and therefore had taken them into account within the meaning of Article 5.1.[1034]

504. The Panel in the case involving the United States also examined whether the SCVPH Opinions took into account the factors listed in Article 5.2.[1035] The Panel noted that the United States alleged that the European Communities had failed to take into account two of the specific elements listed in Article 5.2, namely: (i) the available scientific information; and (ii) the relevant inspection, sampling, and testing methods.[1036] In relation to the first element, the Panel concluded that the SCVPH Opinions had specifically addressed evidence available with respect to bioavailability, susceptibility of sensitive populations, and DNA adducts and DNA damages, and took into account the very scientific studies that the United States alleged were not considered.[1037] Regarding the second element, the Panel found that the European Communities had compiled a "Working Document"[1038] recording visits to United States' regulatory agencies, on-site inspections, and data concerning failures in the United States' inspection regime. The Panel also observed that a lengthy section of the 1999 Opinion is dedicated to discussing the relevant inspection, sampling, and testing methods. For these reasons, the Panel concluded that the European Communities had taken into account both the available scientific information and the relevant inspection, sampling and testing methods in preparing the SCVPH Opinions, as required by Article 5.2 of the *SPS Agreement*.[1039]

505. Next, the Panel examined whether the SCVPH Opinions satisfied the definition of "risk assessment" contained in paragraph 4 of Annex A of the *SPS Agreement*.[1040] Recalling the Appellate Body's jurisprudence from *EC – Hormones* and *Australia – Salmon*, the Panel stated that the definition of a risk assessment in paragraph 4 of Annex A required WTO Members to: (a) identify the additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs; (b) identify any possible adverse effect on human or animal health; and (c) evaluate the potential for that adverse effect to arise from the presence of the identified additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.[1041]

506. The Panel found that the SCVPH Opinions satisfied the first and second requirements of the definition of risk assessment because they sufficiently identified both the contaminant (oestradiol-17β) and the food (meat and meat products) at issue, as well as the possible adverse effects on human or animal health (neurobiological, developmental, reproductive, and immunological effects; and immunotoxicity, genotoxicity and carcinogenicity).[1042] However, the Panel found that the European Communities failed to evaluate specifically the third requirement, that is, the possibility that the identified adverse effects "came into being, originated, or resulted"[1043] from the presence of residues of oestradiol-17β in meat or meat products as a result of the administration of that hormone to cattle for growth-promoting purposes. The Panel gave the following reasons for its decision.

[1034]Panel Report, *US – Continued Suspension*, para. 7.469; Panel Report, *Canada – Continued Suspension*, para. 7.459.

[1035]This section does not appear in the Panel Report in the case against Canada because Canada did not raise Article 5.2. (See *supra*, footnote 1024)

[1036]Panel Report, *US – Continued Suspension*, para. 7.479.

[1037]*Ibid.*, para. 7.482.

[1038]*Ibid.*, para. 7.483.

[1039]*Ibid.*, paras. 7.483 and 7.484.

[1040]See *infra*, para. 525.

[1041]Panel Report, *US – Continued Suspension*, para. 7.507; Panel Report, *Canada – Continued Suspension*, para. 7.479.

[1042]Panel Report, *US – Continued Suspension*, para. 7.508; Panel Report, *Canada – Continued Suspension*, para. 7.480.

[1043]Panel Report, *US – Continued Suspension*, para. 7.513; Panel Report, *Canada – Continued Suspension*, para. 7.485.

507. First, the Panel rejected the European Communities' argument that the definition of "risk assessment" in Article 5 and Annex A of the *SPS Agreement* also included a "risk management" component, in which the WTO Member concerned "weigh[ed] policy alternatives in the light of the results of the risk assessment and, if required, select[ed] and implement[ed] appropriate control options, including regulatory measures."[1044] The Panel took note of the Appellate Body's finding that a risk assessment can take into account "matters not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences".[1045] After discussing the Appellate Body's decision in *EC – Hormones*, the Panel reasoned that there is no textual basis in the *SPS Agreement* to support the inclusion of a "risk management" component in the definition of risk assessment.[1046]

508. Secondly, the Panel "asked the experts whether the [SCVPH] Opinions identified the potential for adverse effects on human health, including the carcinogenic or genotoxic potential, of the residues of oestradiol-17β found in meat derived from cattle to which this hormone had been administered for growth promotion purposes in accordance with good veterinary practice and to what extent the Opinions evaluated the potential occurrence of these adverse effects."[1047] The Panel observed, in this regard, that four of the experts concurred that the scientific evidence adduced in relation to the possibility that carcinogenic or genotoxic effects would result from consumption of meat treated with oestradiol-17β was either missing or insufficient.[1048] To the extent that the European Communities argued that the relevant risk from hormones is an "additive risk", the experts concluded that the European Communities did not assess the extent to which residues of hormones in meat and meat products as a result of the cattle being treated with the hormones for growth-promoting purposes contribute to additive risks arising from the cumulative exposures of humans to multiple hazards, in addition to the endogenous production of some of these hormones by animals and human beings.[1049] The Panel then itself "looked at the Opinions and found statements that indicate that specific studies on the potential for the adverse health effects identified by the European Communities to arise from consumption of meat and meat products from cattle treated with oestradiol-17β for growth promotion purposes were not conducted."[1050]

509. The Panel concluded:

> All of the statements of the experts, and indeed statements from the Opinions, indicate that the European Communities has evaluated the potential for the identified adverse effects to be associated with oestrogens in general, but has not provided analysis of the potential for these effects to arise from consumption of meat and meat products which contain residues of oestradiol-17β as a result of the cattle they are derived from being treated with the hormone for growth promotion purposes. The Panel, therefore, concludes that although the European Communities has evaluated the association between excess hormones and neurobiological, developmental, reproductive and immunological effects, as well as immunotoxicity, genotoxicity, and carcinogenicity, it has not satisfied the requirements of the definition of a risk assessment contained in Annex A(4) because it has not evaluated specifically the possibility that these adverse effects come into being, originate, or result from the consumption of meat or meat products which contain veterinary residues of oestradiol-17β as a result of the cattle being treated with the hormone for growth promotion purposes.[1051]

[1044]Panel Report, *US – Continued Suspension*, para. 7.517; Panel Report, *Canada – Continued Suspension*, para. 7.489. (footnote omitted)

[1045]Panel Report, *US – Continued Suspension*, para. 7.520; Panel Report, *Canada – Continued Suspension*, para. 7.492 (referring to Appellate Body Report, *EC – Hormones*, para. 187).

[1046]Panel Report, *US – Continued Suspension*, paras. 7.519 and 7.520; Panel Report, *Canada – Continued Suspension*, paras. 7.491 and 7.492 (referring to Appellate Body Report, *EC – Hormones*, paras. 181 and 187).

[1047]Panel Report, *US – Continued Suspension*, para. 7.521; Panel Report, *Canada – Continued Suspension*, para. 7.493 (referring to replies to Questions posed by the Panel to the scientific experts, Panel Reports, Annex D, para. 180).

[1048]Panel Report, *US – Continued Suspension*, paras. 7.522-7.525; Panel Report, *Canada – Continued Suspension*, paras. 7.494-7.497 (referring to replies of Drs. Boobis, Guttenplan, Boisseau, and Cogliano to Questions posed by the Panel to the scientific experts, Panel Reports, Annex D, paras. 144, 145, 132, and 180, respectively).

[1049]Panel Report, *US – Continued Suspension*, para. 7.529; Panel Report, *Canada – Continued Suspension*, para. 7.501 (referring to replies to Question 56 posed by the Panel to the scientific experts, Panel Reports, Annex D, paras. 422-431).

[1050]Panel Report, *US – Continued Suspension*, para. 7.531; Panel Report, *Canada – Continued Suspension*, para. 7.503. The Panel noted that the 1999 Opinion looked at three main areas of potential adverse effects: developmental effects on different stages of life; the relationship between oestrogens and cancer; and the effect of sex hormones on the immune system. (Panel Report, *US – Continued Suspension*, para. 7.532; Panel Report, *Canada – Continued Suspension*, para. 7.504)

510. Despite its finding, the Panel proceeded to examine the fourth element of the test that it had set out to determine whether the SCVPH met the definition of "risk assessment", that is, whether the conclusions of the SCVPH Opinions were sufficiently supported by the scientific evidence evaluated. On the basis of the opinions of the experts consulted and its own review of the SCVPH Opinions, the Panel found that the scientific evidence referred to in the SCVPH Opinions did not support the conclusion that the genotoxicity of oestradiol-17β has been demonstrated and that residues of oestradiol-17β in meat and meat products lead to increased risk of cancer or adverse immunological and developmental effects.[1052]

511. Accordingly, the Panel concluded that the "[SCVPH] Opinions do not constitute a risk assessment because the Opinions do not satisfy the definition of a risk assessment contained in Annex A(4) second sentence and because the scientific evidence referred to in the Opinions does not support the conclusions therein".[1053] As a consequence of this finding, the Panel also found that the permanent ban on meat and meat products treated with oestradiol-17β for growth-promoting purposes is not a measure "based on" a risk assessment within the meaning of Article 5.1 of the *SPS Agreement*.[1054] Therefore, the Panel concluded that "the [European Communities'] implementing measure on oestradiol-17β is not compatible with Article 5.1 of the *SPS Agreement*."[1055]

D. *Claims and Arguments on Appeal*

512. The European Communities challenges on appeal several aspects of the Panel's assessment of Directive 2003/74/EC under Article 5.1 of the *SPS Agreement*. First, the European Communities argues that the Panel erred in its interpretation of Article 5.1, as informed by Article 5.2, of the *SPS Agreement*, by excluding from the scope of its analysis arguments and evidence concerning the abusive use and difficulties of control in the administration of hormones to cattle for growth promotion.[1056] Secondly, the European Communities submits that the Panel erred in finding that the

[1051]Panel Report, *US – Continued Suspension*, para. 7.537; Panel Report, *Canada – Continued Suspension*, para. 7.509.

[1052]Panel Report, *US – Continued Suspension*, para. 7.572; Panel Report, *Canada – Continued Suspension*, para. 7.540.

[1053]Panel Report, *US – Continued Suspension*, para. 7.578; Panel Report, *Canada – Continued Suspension*, para. 7.548.

[1054]*Ibid.*

[1055]Panel Report, *US – Continued Suspension*, para. 7.579; Panel Report, *Canada – Continued Suspension*, para. 7.549.

[1056]European Communities' appellant's submission, paras. 331 and 332.

European Communities failed to evaluate specifically the risks arising from residues of oestradiol-17β in bovine meat treated with this hormone for growth-promoting purposes.[1057] Thirdly, the European Communities alleges that the Panel erred in interpreting the definition of a risk assessment in paragraph 4 of Annex A of the *SPS Agreement* as requiring the quantification of the risks arising from the consumption of residues of oestradiol-17β in bovine meat.[1058]

513. The European Communities also argues that the Panel erroneously allocated the burden of proof under Article 5.1 of the *SPS Agreement*, when it "shift[ed] the burden of proof to the European Communities without first examining, provision by provision under the *SPS Agreement* as required by the Appellate Body, whether the arguments of the United States and Canada had sufficient merits to shift the burden of proof back to the European Communities."[1059]

514. Finally, the European Communities charges the Panel with failing to conduct an objective assessment of the facts of the case, as required by Article 11 of the DSU, in reaching its finding under Article 5.1 of the *SPS Agreement*. According to the European Communities, the Panel applied an improper standard of review to the evidence before it, by seeking to determine "the correct scientific conclusions"[1060] as to the risks arising from the hormones at issue, even though Members are entitled to rely on divergent opinions coming from qualified and respected sources. Instead, the appropriate standard of review required the Panel to determine whether there was any "reasonable scientific basis"[1061] for the European Communities' measure, while respecting the "important and autonomous" right of Members to set their level of SPS protection.[1062] The European Communities submits that a panel should not substitute its scientific judgement for that of the Member taking the measure and should recognize the significance of "genuine and legitimate scientific controversy".[1063] The European Communities challenges the Panel's examination of three distinct aspects of the European Communities' risk assessment of oestradiol-17β: (i) the risks arising from exposure to hormones from multiple endogenous and exogenous sources[1064]; (ii) actual or potential genotoxicity of oestradiol-17β[1065]; and (iii) specificity or direct causality in the demonstration of risks arising from the consumption of bovine meat containing residues of oestradiol-17β as a result of cattle being treated with this substance for growth promotion.[1066]

515. The United States considers that the Panel did not err in finding that the European Communities' permanent ban on oestradiol-17β was not based on a risk assessment within the meaning of Article 5.1 of the *SPS Agreement*. According to the United States, the Panel did not misinterpret Article 5.1 by excluding from its analysis evidence regarding misuse or abuse in the administration of oestradiol-17β. Rather, the Panel "fully appreciated"[1067] the significance of the European Communities' assertion that misuse or abuse in the administration of oestradiol-17β could add to the particular risk identified, but correctly held that those risks would only be relevant had the European Communities succeeded in demonstrating that a specific risk arose from residues of oestradiol-17β in meat. With respect to the European Communities' allegation that the Panel erred in finding that it had failed to evaluate specifically the particular risks at issue, the United States maintains that the Panel's specificity requirement is based on a "careful tracing"[1068] of the Appellate Body's jurisprudence on Article 5.1, and that the evidentiary record before the Panel supported its

[1057] *Ibid.*, para. 343.
[1058] European Communities' appellant's submission, para. 355.
[1059] *Ibid.*, para. 294.
[1060] *Ibid.*, para. 240.
[1061] *Ibid.*, para. 243.
[1062] *Ibid.*, para. 222 (quoting Appellate Body Report, *EC – Hormones*, para. 172). (emphasis omitted)
[1063] *Ibid.*, para. 248.
[1064] *Ibid.*, para. 249.
[1065] *Ibid.*, paras. 250-258.
[1066] *Ibid.*, paras. 259-270.
[1067] United States' appellee's submission, para. 54.
[1068] *Ibid.*, para. 57.

conclusion that the European Communities "identified only 'general risks' and failed to address the specific risk required by the *SPS Agreement*."[1069] The United States argues that "one expert's statement, divorced from the rest of the evidentiary record"[1070] is not sufficient to demonstrate that the European Communities evaluated the specific risk at issue. The United States also dismisses the European Communities' allegation that the Panel required the quantification of risks, because the Panel did not preclude a qualitative demonstration of risks. The Panel's reference to the potential occurrence of adverse effects focused instead on "whether the [European Communities'] purported risk assessment appeared to be 'sufficiently specific to the case at hand.'"[1071]

516. Furthermore, the United States maintains that the Panel did not err in its allocation of the burden of proof under Article 5.1. The Panel was correct in allocating the initial burden of proving consistency with Article 5.1 to the European Communities, because its claim under Article 22.8 of the DSU was premised on an allegation of consistency of Directive 2003/74/EC. Having found that the European Communities had met this burden, the Panel shifted the burden of proof to the United States, and correctly found that the United States had rebutted the European Communities' allegation of consistency "by submitting positive evidence that demonstrated a breach of the *SPS Agreement* by the [European Communities]."[1072] As a result, the burden of proof "shifted back and forth between the parties"[1073] and the Panel rightly "followed the practice of other panels to weigh all the evidence before it."[1074]

517. Finally, the United States rejects the European Communities' contention that the Panel failed to conduct an objective assessment of the matter in its appreciation of the evidence. The United States submits that the more deferential "reasonableness" standard articulated by the European Communities for disputes under Article 5.1 has been rejected by the Appellate Body in *EC – Hormones* because it finds no support in the text of the *SPS Agreement* and "conflates the concept of 'standard of review' and the application of law to facts."[1075] Under the "objective assessment of the facts" standard that applies to disputes under the *SPS Agreement*, panels retain a margin of discretion as the triers of facts, and may properly "determine that certain elements of evidence should be accorded more weight than other elements."[1076] For the United States, the Panel's exercise of judgement in evaluating the evidence was "part and parcel"[1077] of its duty to make an objective assessment of the facts. Therefore, the Panel's findings in relation to the risks arising from exposure to hormone residues from multiple sources, the actual or potential genotoxicity of oestradiol-17β, the specificity of the risk assessment, and the relevance of misuse and abuse in a risk assessment, were all within the bounds of the Panel's discretion as the trier of facts.

518. Canada submits that the Panel did not err in its interpretation of Article 5.1, as informed by Article 5.2, of the *SPS Agreement*. Canada argues that the Panel did not ignore evidence related to misuse and abuse in the administration of hormones in its analysis, but rather correctly considered that such evidence was not "material"[1078] to its analysis, having found earlier that the European Communities had failed to demonstrate specifically the possibility of adverse effects arising from the consumption of bovine meat containing residues of oestradiol-17β. Canada additionally asserts that the Panel correctly held that the European Communities' risk assessment was not sufficiently specific to the particular risks at issue. The European Communities' assertion that the genotoxicity of oestradiol-17β did not make it possible to perform a quantitative risk assessment is unsubstantiated by

[1069] *Ibid.*, para. 61.
[1070] *Ibid.*, para. 60.
[1071] *Ibid.*, para. 64 (quoting Appellate Body Report, *EC – Hormones*, para. 200).
[1072] *Ibid.*, para. 93.
[1073] *Ibid.*, para. 94.
[1074] *Ibid.* (quoting Panel Report, *US – Continued Suspension*, para. 7.386).
[1075] United States' appellee's submission, para. 39.
[1076] *Ibid.*, para. 42 (quoting Appellate Body Report, *Japan – Apples*, para. 221).
[1077] *Ibid.*, para. 47.
[1078] Canada's appellee's submission, para. 88.

the evidence, because "the fact that a hormone may be an *in vitro* genotoxin does not mean that it is an *in vivo* genotoxin."[1079] Canada considers that the Panel had a "solid basis" for finding that the risk assessment was not sufficiently specific to the risk, because the scientific experts assisting the Panel "indicat[ed] very clearly that the [European Communities] did not have scientific evidence to support the assertion of the specific risk."[1080] Canada also rejects the European Communities' allegation that the Panel erred in requiring a quantitative analysis of risk. According to Canada, the evidence upon which the European Communities' risk assessment relies does not contain either a qualitative or a quantitative analysis of risk, because the European Communities has offered no evidence demonstrating the genotoxicity of oestradiol-17β *in vivo*.

519. Canada contends, moreover, that the Panel did not fail to conduct an objective assessment of the matter in reaching its finding under Article 5.1 of the *SPS Agreement*. As the trier of facts, the Panel retained the discretion "to give greater weight to advice of certain experts over that of others" and was not required to "treat all advice received from the experts on an equal footing."[1081] Canada submits that the European Communities has failed to demonstrate that the Panel exceeded the bounds of its discretion in its analysis of the evidence on multiple exposure, genotoxicity, and specificity or direct causality.

520. Australia agrees with the European Communities' argument that the Panel erred in the standard of review that it applied in its assessment under Article 5.1 of the *SPS Agreement*. Australia submits that the standard of review applicable under Article 5.1 required the Panel to accord "considerable deference (but not total deference)"[1082] to a Member's risk assessment, and therefore the Panel should have focused on "whether the European Communities' risk assessment represented an objective and credible view"[1083] from a qualified and respected source.

521. New Zealand disagrees with the European Communities' claims that the Panel erred in its assessment of Directive 2003/74/EC under Article 5.1 of the *SPS Agreement.* In New Zealand's view, the Panel's conclusion that the permanent ban on oestradiol-17β provided in Directive 2003/74/EC was not based on a risk assessment under Article 5.1 was supported by an exhaustive review of all the scientific evidence, drawing upon the expertise and knowledge of a group of eminent scientific and technical experts.[1084]

E. *The Panel's Assessment of Directive 2003/74/EC under Article 5.1 of the SPS Agreement*

1. General Disciplines Applicable to the Adoption of an SPS Measure

522. The *SPS Agreement* recognizes the right of WTO Members to take measures necessary to protect human, animal or plant life or health. The right to take a protective measure must be exercised consistently with a series of obligations that are set forth in that Agreement, and that seek to ensure that such measures are properly justified.[1085]

[1079] *Ibid.*, para. 95.
[1080] *Ibid.*, para. 99.
[1081] Canada's appellee's submission, para. 73.
[1082] Australia's third participant's submission, para. 36.
[1083] *Ibid.*, para. 42.
[1084] New Zealand's third participant's submission, para. 3.47.
[1085] See the first Recital of the Preamble of the *SPS Agreement.* Article 2.3 of the *SPS Agreement* also 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, including between their own territory and that of other Members" and that SPS measures "shall not be applied in a manner which would constitute a disguised restriction on international trade."

523. There are several concepts that are defined in the *SPS Agreement* and that describe aspects of a WTO Member's decision-making process when taking an SPS measure. The "appropriate level of protection" is defined in paragraph 5 of Annex A to the *SPS Agreement* as "[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory." It is the "prerogative"[1086] of a WTO Member to determine the level of protection that it deems appropriate.[1087] The SPS measure is the "instrument" chosen by the WTO Member to implement its sanitary or phytosanitary objective.[1088] Based on the wording of Article 5.6 of the *SPS Agreement*, the Appellate Body has explained that the "determination of the level of protection is an element in the decision-making process which logically precedes and is separate from the establishment or maintenance of the SPS measure".[1089] In other words, the appropriate level of protection determines the SPS measure to be introduced or maintained, rather than the appropriate level of protection being determined by the SPS measure.[1090] The Appellate Body has also found that "the *SPS Agreement* contains an implicit obligation to determine the appropriate level of protection."[1091] Although it need not be determined in quantitative terms, the level of protection cannot be determined "with such vagueness or equivocation that the application of the relevant provisions of the *SPS Agreement* ... becomes impossible".[1092]

524. Another important aspect of the decision-making process is the "risk assessment". Pursuant to Article 5.1 of the *SPS Agreement*, an SPS measure must be "based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health". Under Article 5.7 of the *SPS Agreement*, WTO Members are also allowed to take an SPS measure, on a provisional basis, where certain conditions are fulfilled, including where the relevant scientific evidence is insufficient to perform a risk assessment. We examine Article 5.7 in more detail in section VII.

525. A "risk assessment" is defined in paragraph 4 of Annex A to the *SPS Agreement* as:

> The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

[1086] Appellate Body Report, *Australia – Salmon*, para. 199. (emphasis omitted)
[1087] Although it is for a WTO Member to choose its level of protection, the *SPS Agreement* provides for disciplines that a Member must respect when it has done so. Pursuant to Article 5.5, a WTO Member "shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade." Article 5.6 states that Members "shall ensure that [SPS] measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility". In addition, Article 5.4 provides that "Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects."
[1088] Appellate Body Report, *Australia – Salmon*, para. 200. (emphasis omitted)
[1089] *Ibid.*, para. 203. (emphasis omitted)
[1090] *Ibid.*, para. 206.
[1091] *Ibid.*
[1092] *Ibid.*, para. 203.

526. Article 5.1 is a "specific application of the basic obligations contained in Article 2.2 of the *SPS Agreement*."[1093] Article 2.2 focuses on the need for an SPS measure to be based on scientific principles and sufficient scientific evidence. It provides:

> 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.

The Appellate Body has observed that "Articles 2.2 and 5.1 should constantly be read together" because "Article 2.2 informs Articles 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1."[1094]

527. A list of factors that must be taken into account in a risk assessment is provided in Article 5.2. The list begins with "available scientific evidence" and also includes: "relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment." In *EC – Hormones*, the panel described a "risk assessment" as a "scientific process aimed at establishing the scientific basis" for the SPS measure.[1095] The Appellate Body understood the panel to refer to "a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions".[1096] Science therefore plays a central role in a risk assessment. However, the Appellate Body has cautioned against taking too narrow an approach to a risk assessment:

> It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.[1097]

528. As we noted earlier, Article 5.1 requires that SPS measures be "based on" a risk assessment. This does not mean that the SPS measures have to "conform to" the risk assessment. Instead, "the results of the risk assessment must sufficiently warrant—that is to say, reasonably support—the SPS measure at stake".[1098] Put differently, there must be a "rational relationship" between the SPS measure and the risk assessment.[1099]

529. Moreover, the risk assessment need not "come to a monolithic conclusion that coincides with the scientific conclusion or view implicit in the SPS measure", nor does the risk assessment have to "embody only the view of a majority of the relevant scientific community."[1100] While recognizing that, in most cases, WTO Members "tend to base their legislative and administrative measures on 'mainstream' scientific opinion", the Appellate Body has observed that, "[i]n other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given

[1093]Appellate Body Report, *EC – Hormones*, para. 180.
[1094]*Ibid.*
[1095]*Ibid.*, para. 187 (quoting Panel Report, *EC – Hormones (US)*, para. 8.107; and Panel Report, *EC – Hormones (Canada)*, para. 8.110).
[1096]*Ibid.*, para. 187.
[1097]Appellate Body Report, *EC – Hormones*, para. 187.
[1098]*Ibid.*, para. 193.
[1099]*Ibid.*
[1100]*Ibid.*, para. 194.

time, may be a divergent opinion coming from qualified and respected sources."[1101] The Appellate Body added that an approach based on a divergent opinion from a qualified and respected source, "does not necessarily signal the absence of a reasonable relationship between the SPS measure and the risk assessment, especially where the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health and safety."[1102]

530. An SPS measure need not be based on a risk assessment performed by the WTO Member taking the measure. It can be based on a risk assessment performed by a relevant international organization or by another WTO Member.[1103] The risk assessment can be quantitative or qualitative in nature.[1104] Nevertheless, the Appellate Body has noted that "theoretical uncertainty"[1105] is not the kind of risk to be assessed under Article 5.1; instead, the risk to be assessed must be an "ascertainable" risk.[1106] In addition, the risk assessment must have the requisite degree of specificity. The assessment must be "sufficiently specific"[1107] in terms of the harm concerned and the precise agent that may possibly cause the harm.[1108]

531. Whilst WTO Members have the right to take SPS measures, they are not required to do so. The risk assessment may conclude that there is no ascertainable risk, in which case no SPS measure can be taken. Alternatively, a WTO Member may conclude that an SPS measure is not necessary in the light of the risks determined in the risk assessment and the acceptable level of protection determined by that WTO Member.

532. International standards are given a prominent role under the *SPS Agreement*, particularly in furthering the objective of promoting the harmonization of sanitary and phytosanitary standards between WTO Members.[1109] This is to be achieved by encouraging WTO Members to base their SPS measures on international standards, guidelines or recommendations, where they exist.[1110] There is a rebuttable presumption that SPS measures that conform to international standards, guidelines or recommendations are "necessary to protect human, animal or plant life or health, and ... [are] consistent with the relevant provisions of this Agreement and of GATT 1994".[1111] While use of international standards is encouraged, the *SPS Agreement* recognizes the right of WTO Members to introduce or maintain an SPS measure which results in a higher level of protection than would be achieved by measures based on such international standards. Where a Member exercises its right to adopt an SPS measure that results in a higher level of protection, that right is qualified in that the SPS measure must comply with the other requirements of the *SPS Agreement*[1112], including the requirement to perform a risk assessment.[1113] However, the Appellate Body has found that the adoption of an SPS measure that does not conform to an international standard and results in a higher level of protection does not give rise to a more exacting burden of proof under the *SPS Agreement*:

> The presumption of consistency with relevant provisions of the *SPS Agreement* that arises under Article 3.2 in respect of measures that conform to international standards may well be an *incentive* for Members so to conform their SPS measures with such standards. It

[1101]*Ibid.*
[1102]*Ibid.*
[1103]*Ibid.*, para. 190.
[1104]*Ibid.*, para. 186.
[1105]*Ibid.*
[1106]*Ibid.*
[1107]*Ibid.*, para. 200.
[1108]Appellate Body Report, *Japan – Apples*, para. 202.
[1109]See Article 3 and Recital 6 of the Preamble of the *SPS Agreement*.
[1110]Article 3.1 of the *SPS Agreement*.
[1111]Article 3.2 of the *SPS Agreement*.
[1112]Article 3.3 of the *SPS Agreement*.
[1113]Appellate Body Report, *EC – Hormones*, paras. 176 and 177.

> is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*.[1114] (original emphasis)

533. At the oral hearing, we explored the relationship between the appropriate level of protection and the risk assessment. The European Communities considers that the appropriate level of protection can clearly be taken into account in a risk assessment and may, in some cases, be reflected in the mandate and parameters given to the risk assessors. The United States and Canada recognize that the acceptable level of risk may sometimes play a role, albeit a limited one, in respect of the risk assessment. The United States and Canada, however, caution about the need to maintain the objectivity of the risk assessment process and reject the notion that subjective policy choices have a role to play in a risk assessment. In their view, these policy choices may be taken into account by a WTO Member in determining its appropriate level of risk and in selecting the SPS measure, but should not be part of the risk assessment process, which must remain an objective and scientific evaluation.

534. The risk assessment cannot be entirely isolated from the appropriate level of protection. There may be circumstances in which the appropriate level of protection chosen by a Member affects the scope or method of the risk assessment. This may be the case where a WTO Member decides not to adopt an SPS measure based on an international standard because it seeks to achieve a higher level of protection. In such a situation, the fact that the WTO Member has chosen to set a higher level of protection may require it to perform certain research as part of its risk assessment that is different from the parameters considered and the research carried out in the risk assessment underlying the international standard. However, the chosen level of protection must not affect the rigour or objective nature of the risk assessment, which must remain, in its essence, a process in which possible adverse effects are evaluated using scientific methods.[1115] Likewise, whatever the level of protection a Member chooses does not pre-determine the results of the risk assessment. Otherwise, the purpose of performing the risk assessment would be defeated.[1116]

535. We understand that Codex draws a distinction between "risk assessment" and "risk management".[1117] It defines "risk management" as "the process, *distinct from risk assessment*, of weighing policy alternatives ... considering risk assessment and other factors relevant for the health

[1114] *Ibid.*, para. 102.

[1115] We recall, however, that the scientific process must not be understood narrowly as being confined to matters that are "susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences." Instead, the risk to be evaluated also includes the "risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die". (Appellate Body Report, *EC – Hormones*, para. 187)

[1116] This is consistent with the Appellate Body's views about the relationship between the risk assessment and the SPS measure:

> We understand this phrase to imply that a risk assessment should not be limited to an examination of the measure already in place or favoured by the importing Member. In other words, the evaluation contemplated in paragraph 4 of Annex A to the *SPS Agreement* should not be distorted by preconceived views on the nature and the content of the measure to be taken; nor should it develop into an exercise tailored to and carried out for the purpose of justifying decisions *ex post facto*.

(Appellate Body Report, *Japan – Apples*, para. 208)

[1117] Codex Alimentarius Commission, Procedural Manual, 15th edition, p. 44. See also Panel Report, *US – Continued Suspension*, para. 7.515; and Panel Report, *Canada – Continued Suspension*, para. 7.487.

protection of consumers and for the promotion of fair trade practices, and, if needed, selecting appropriate prevention and control options."[1118] In *EC – Hormones*, the Appellate Body noted that the *SPS Agreement* does not refer to the concept of "risk management" and it rejected the panel's restrictive interpretation of a "risk assessment" based on that distinction.[1119] The Appellate Body has not provided a clear demarcation of the factors that may be considered in a "risk assessment" under the *SPS Agreement*, but it has held that the list of factors provided in Article 5.2 is not a closed list and, in particular, that abuse or misuse and difficulties of control in the administration of hormones may be considered in the context of a risk assessment.[1120]

536. Before we proceed to examine the European Communities' claims, we briefly summarize some of the relevant facts of this case. We note that Codex has adopted an international standard for oestradiol-17β, based on evaluations carried out by JECFA.[1121] The European Communities asserts that it has determined a higher level of protection than that which would be achieved under Codex's standard. According to the European Communities, its level of protection is "no (avoidable) risk, that is a level of protection that does not allow any unnecessary addition from exposure to genotoxic chemical substances that are intended to be added deliberately to food."[1122] The European Communities also notes that it has performed a risk assessment for meat from cattle treated with oestradiol-17β for growth-promotion purposes. This risk assessment consists of the 1999, 2000, and 2002 Opinions, as supported by 17 studies conducted between 1998 and 2001. The European Communities further explains that its SPS measure—that is, the import and marketing ban applied pursuant to Directive 2003/74/EC—was taken in the light of the higher level of protection that it determined for itself and is properly based on its risk assessment.[1123]

2. The Panel's Interpretation and Application of Articles 5.1 and 5.2 of the *SPS Agreement*

537. We examine, first, the European Communities' claim that the Panel erred by adopting "an extremely narrow and consequently erroneous interpretation of Article 5.1 and failed to take into account that risk assessment and risk management partly overlap in the *SPS Agreement*".[1124] The European Communities argues that the Panel's restrictive interpretation of risk assessment led it to wrongfully exclude from the scope of its analysis under Article 5.1 evidence concerning misuse or abuse and difficulties of control in the administration of hormones to cattle for growth promotion.

538. We begin by reviewing the Panel's understanding of the Appellate Body's interpretation of Article 5.1 in *EC – Hormones* and particularly its discussion of the relevance of risk management factors for the purposes of a risk assessment within the meaning of Annex A and Article 5.1 of the *SPS Agreement*. The Panel in this case interpreted the Appellate Body's ruling in *EC – Hormones* as follows:

> Although the Appellate Body disapproved of the original panel's distinction between "risk assessment" and "risk management" because it had no textual basis in the Agreement, this Panel can find no statement by the Appellate Body confirming that what the

[1118] Codex Alimentarius Commission, Procedural Manual, 15th edition, p. 45. (emphasis added)

[1119] Appellate Body Report, *EC – Hormones*, para. 181.

[1120] *Ibid.*, paras. 187 and 206.

[1121] See *supra*, footnote 932.

[1122] Panel Report, *US – Continued Suspension*, para. 7.607; Panel Report, *Canada – Continued Suspension*, para. 7.585 (referring to replies of the European Communities to questions posed by the Panel after the second substantive meeting, Panel Reports, Annex C-1, para. 69). See also 1999 Opinion, section I.2.

[1123] Panel Report, *US – Continued Suspension*, para. 7.390; Panel Report, *Canada – Continued Suspension*, para. 7.387.

[1124] European Communities' appellant's submission, para. 308.

> European Communities describes as risk management is included within the definition of a risk assessment as set forth in Annex A(4) of the *SPS Agreement*. In fact, the Appellate Body stressed that Article 5 and Annex A speak of *risk assessment* only and that the term *risk management* is not to be found either in Article 5 or in any other provision of the *SPS Agreement*.
>
> The Panel agrees with the Appellate Body that its role as a treaty interpreter is to "read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used." The Panel takes note of the Appellate Body's finding that a risk assessment can take into account "matters not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences." However, the Panel finds that neither that finding nor the text of the Agreement includes within the definition of a risk assessment the concepts put forward by the European Communities as "risk management."[1125] (footnote omitted)

539. Therefore, the Panel stated that it would ask questions of the experts relating to whether the SCVPH Opinions identified the potential for adverse effects on human health of residues of oestradiol-17β in the meat of cattle treated with this hormone when applied in accordance with good veterinary practice.[1126]

540. At the interim review stage, the European Communities asserted that the Panel "misinterpret[ed]" what the Appellate Body had said in *EC – Hormones*.[1127] In response, the Panel explained:

> The Appellate Body disapproved of the panel's use in the original *EC – Hormones* dispute of the distinction between "risk assessment" and "risk management" because it had no textual basis. However, this did not mean that the Appellate Body endorsed an interpretation of Article 5.1 or Annex A(4) of the *SPS Agreement* that included a risk management stage. In fact, it emphatically stated that the term "risk management" is not to be found in Article 5 or any other provision of the *SPS Agreement*. The Panel, therefore, finds no basis for the European Communities' assertion that the Appellate Body "confirmed that a risk assessment within the meaning of Article 5.1 includes a risk management stage which is the responsibility of the regulator to carry out and not of the scientific bodies."[1128] (footnote omitted)

[1125]Panel Report, *US – Continued Suspension*, paras. 7.519 and 7.520; Panel Report, *Canada – Continued Suspension*, paras. 7.491 and 7.492.

[1126]Panel Report, *US – Continued Suspension*, para. 7.521; Panel Report, *Canada – Continued Suspension*, para. 7.493.

[1127]Panel Report, *US – Continued Suspension*, para. 6.97; Panel Report, *Canada – Continued Suspension*, para. 6.89.

[1128]Panel Report, *US – Continued Suspension*, para. 6.99; Panel Report, *Canada – Continued Suspension*, para. 6.91. The Panel added:

> Nowhere in the texts of Article 5.1 and Annex A(4) does the Panel find support for the European Communities' contention that a risk assessment within the meaning of the *SPS Agreement* includes "weighing policy alternatives in light of the results of risk assessment and, if required, selecting and implementing appropriate control options, including regulatory measures." What the European Communities seems to be describing is how a government chooses an appropriate SPS measure based on a risk assessment. The Panel does not find that this is contemplated by the texts of Article 5.1 and Annex A(4) of the *SPS Agreement*.

(Panel Report, *US – Continued Suspension*, para. 6.102; Panel Report, *Canada – Continued Suspension*, para. 6.94. (footnote omitted)) Similarly, the Panel did not address evidence on misuse or abuse in the administration of the hormones in its analysis under Article 5.7 of the *SPS Agreement*. The Panel reasoned that:

> ... Article 5.7 is applicable when relevant scientific evidence is not sufficient to undertake a risk assessment in conformity with Article 5.1. Whether instances of misuse or abuse in the administration of hormones exist or not is not as such a scientific issue likely to make a risk assessment within the meaning of Article 5.1 and Annex A(4) of the *SPS Agreement* impossible.

(Panel Report, *US – Continued Suspension*, para. 7.603; Panel Report, *Canada – Continued Suspension*, para. 7.578)

[1129]Appellate Body Report, *EC – Hormones*, para. 181.

[1130]*Ibid.*, para. 206. (emphasis added) The Appellate Body considered that the language in Article 5.2 ("relevant processes and production methods; relevant inspection, sampling and testing methods"), Article 8, and Annex C ("control, inspection and approval procedures") "is amply sufficient to authorize the taking into account of risks arising from failure to comply with the requirements of good veterinary practice in the administration of hormones for growth promotion purposes, as well as risks arising from difficulties of control, inspection and enforcement of the requirements of good veterinary practice." (*Ibid.*, para. 205)

[1131]*Ibid.*, para. 181.

541. We find it difficult to reconcile the Panel's understanding of *EC – Hormones* with what the Appellate Body held in that Report. As we noted above, in that case, the Appellate Body rejected the rigid distinction drawn by the panel between "risk assessment" and "risk management", explaining:

> We must stress, in this connection, that Article 5 and Annex A of the *SPS Agreement* speak of "risk assessment" only and that the term "risk management" is not to be found either in Article 5 or in any other provision of the *SPS Agreement*. Thus, the Panel's distinction, which it apparently employs to achieve or support what appears to be a restrictive notion of risk assessment, has no textual basis.[1129]

Subsequently in the same Report, the Appellate Body reiterated its view that "the concept of 'risk management' is not mentioned in any provision of the *SPS Agreement* and, as such, cannot be used to sustain a more *restrictive* interpretation of 'risk assessment' than is justified by the actual terms of Article 5.2, Article 8 and Annex C of the *SPS Agreement*".[1130]

542. Therefore, in our view, the Panel's interpretation of "risk assessment" resulted in the same "restrictive notion of risk assessment"[1131] that the Appellate Body found to be erroneous in *EC – Hormones*. The Panel sought in this case to rewrite the Appellate Body Report in *EC – Hormones* and to re-establish the rigid distinction between "risk assessment" and "risk management" that the Appellate Body had rejected in that case.

543. We set out above our understanding of the Appellate Body's finding in *EC – Hormones* in so far as the distinction between "risk assessment" and "risk management" is concerned. We now turn to the European Communities' argument that the distinction that the Panel drew between "risk assessment" and "risk management" resulted in the exclusion of certain factors from the Panel's analysis under Article 5.1 of the *SPS Agreement*. In particular, the European Communities asserts

that the Panel improperly excluded the evidence concerning misuse or abuse and difficulties of control in the administration of hormones to cattle for growth promotion.[1132]

544. The relevance of the risks relating to abuse or misuse in the administration of hormones was also addressed in *EC – Hormones*. In that case, the Appellate Body noted that "[s]ome of the kinds of factors listed in Article 5.2 such as 'relevant processes and production methods' and 'relevant inspection, sampling and testing methods' are not necessarily or wholly susceptible of investigation according to laboratory methods of, for example, biochemistry or pharmacology" and that "there is nothing to indicate that the listing of factors that may be taken into account in a risk assessment of Article 5.2 was intended to be a closed list."[1133] It then specifically examined whether risks relating to misuse or abuse in the administration of the hormones could be considered as part of the "risk assessment":

> Where the condition of observance of good veterinary practice (which is much the same condition attached to the standards, guidelines and recommendations of Codex with respect to the use of the five hormones for growth promotion) is *not* followed, the logical inference is that the use of such hormones for growth promotion purposes may or may not be "safe". The *SPS Agreement* requires assessment of the potential for adverse effects on human health arising from the presence of contaminants and toxins in food. We consider that the object and purpose of the *SPS Agreement* justify the examination and evaluation of all such risks for human health whatever their precise and immediate origin may be. We do not mean to suggest that risks arising from potential abuse in the administration of controlled substances and from control problems need to be, or should be, evaluated by risk assessors in each and every case. When and if risks of these types do in fact arise, risk assessors may examine and evaluate them. Clearly, the necessity or propriety of examination and evaluation of such risks would have to be addressed on a case-by-case basis. What, in our view, is a fundamental legal error is to exclude, on an *a priori* basis, any such risks from the scope of application of Articles 5.1 and 5.2. We disagree with the Panel's suggestion that exclusion of risks resulting from the combination of potential abuse and difficulties of control is justified by distinguishing between "risk assessment" and "risk management". As earlier noted, the concept of "risk management" is not mentioned in any provision of the *SPS Agreement* and, as such, cannot be used to sustain a more restrictive interpretation of "risk assessment" than is justified by the actual terms of Article 5.2, Article 8 and Annex C of the *SPS Agreement*.[1134] (original emphasis; footnote omitted)

545. Thus, the risks arising from the abuse or misuse in the administration of hormones can properly be considered as part of a risk assessment. Where a WTO Member has taken such risks into account, they must be considered by a panel reviewing that Member's risk assessment. Any suggestion that such risks cannot form part of a risk assessment would constitute legal error.

[1132]European Communities' appellant's submission, para. 325. At the oral hearing, the European Communities confirmed that its appeal focuses on misuse and abuse in the administration of hormones only, and that it is not claiming that the Panel erroneously excluded other factors on the basis of its general distinction between "risk assessment" and "risk management".

[1133]Appellate Body Report, *EC – Hormones*, para. 187.

[1134]Appellate Body Report, *EC – Hormones*, para. 206.

546. At the interim review stage, the Panel dismissed the relevance of the evidence concerning misuse or abuse in the administration of hormones under Article 5.1 for the following reasons[1135]:

> The Panel agrees with the European Communities that the question of misuse and abuse in the administration of hormones may apply to all six hormones at issue and is an element that can be taken into account in risk assessment, as set forth in Article 5.2 of the *SPS Agreement* and confirmed by the Appellate Body in *EC – Hormones*. However, the Panel did not deem it necessary to address this question in the section regarding the conformity with Article 5.1 of the definitive ban on oestradiol-17β, to the extent that the question whether misuse or abuse exists in the administration of hormones did not have an impact on the issues addressed by the Panel under Article 5.1. Indeed, the question of misuse or abuse in the administration of hormones is relevant to the extent that it can lead to higher concentrations of hormone residues in meat and meat products than would occur if good veterinary practices were applied. As stated by the 1999 Opinion, it is an aspect of exposure assessment. In this case, the Panel found that the European Communities had not evaluated specifically the possibility that the adverse effect[s] that it had identified in its risk assessment come into being, originate, or result from the consumption of meat or meat products which contain veterinary residues of oestradiol-17β as a result of the cattle being treated with this hormone for growth promotion purposes. Therefore, whether the concentrations of hormone residues in meat and meat products could be higher as a result of misuse or abuse did not have to be addressed. The Panel does not deem it necessary to move this section to another part of its findings.[1136] (footnote omitted)

547. The United States and Canada consider that this statement indicates that the Panel did address the European Communities' arguments relating to misuse or abuse.[1137] We note that in this statement, the Panel acknowledges that those risks are "an element that can be taken into account in risk assessment, as set forth in Article 5.2 of the *SPS Agreement* and confirmed by the Appellate Body in *EC – Hormones*." Although the Panel does not seem to reject *a priori* the relevance of the potential risks of misuse or abuse, it then states that it was not necessary to address this question in its analysis, to the extent that it did not have an impact on the issues addressed by the Panel under Article 5.1. However, some of the scientific experts consulted by the Panel indicated that risks arising from residues of oestradiol-17β in bovine meat are likely to increase where good veterinary practices in the administration of this hormone are not followed. Indeed, these experts agreed that their conclusions in relation to the risks posed by oestradiol-17β were predicated on good veterinary practices being followed. Accordingly, the abuse or misuse in the administration of oestradiol-17β has a bearing on the particular risks being assessed by the European Communities. The Panel's conclusion was thus premature because the Panel could not have decided whether the European Communities failed to

[1135]At the interim review stage, the European Communities criticized the Panel for referring to misuse or abuse only in the analysis of whether the European Communities had taken account of the factors listed under Article 5.2, which the Panel examined at the request of the United States. The European Communities asserted "that the Panel's discussion of the potential misuse and abuse in the administration of hormones is in the wrong place, to the extent that this is an aspect of risk assessment, in the sense of Article 5.1 to 5.3 of the *SPS Agreement*, that is applicable across all identified potential risks and for all six hormones." (Panel Report, *US – Continued Suspension*, para. 6.164; Panel Report, *Canada – Continued Suspension*, para. 6.154)

[1136]Panel Report, *US – Continued Suspension*, para. 6.164; Panel Report, *Canada – Continued Suspension*, para. 6.154.

[1137]United States' appellee's submission, para. 54; and Canada's response to questioning at the oral hearing.

evaluate specifically the possible adverse effects of residues of oestradiol-17β in meat before considering the evidence on abuse or misuse. The Panel's summary dismissal of the relevance of the evidence on misuse or abuse at the interim review stage gives the appearance of being an *ex post* rationalization of an earlier decision to exclude such risks from consideration.

548. The risks of abuse or misuse of the hormones at issue were examined by the European Communities as part of its risk assessment. The 1999 Opinion examines the risks arising from misplaced implants and the consumption of meat from implantation sites, off-label use of the hormones (such as in animals for which the implant or feed pre-mix is not approved), possible uses of non-authorized pharmaceutical formulations, and secondary risks for residues of other drugs.[1138] The 1999 Opinion concludes:

> it has to be noted that misplaced implants and black market drugs comprise the risk that extremely high levels of residues of hormones remain in edible tissues of animals. In addition, it has to be noted that the contemporaneous use of growth promoting hormones and veterinary therapeutics drugs increases the prevalence of undesirable r[e]sidues in edible tissues of bovines.[1139]

549. The 2002 Opinion also addresses the risks of abuse or misuse.[1140] It refers to a study that simulated the disregard of good veterinary practices and to two studies relating to MGA. The 2002 Opinion concludes:

> ... these experiments clearly identify a risk for excessive exposure of consumers to residues from misplaced or off-label used implants and incorrect dose regimes. In these cases, levels of oestradiol and its metabolites in muscle, fat, liver and kidney from hormone treated cattle may be 2-fold up to several hundred folds higher as compared to untreated meat. The level of increase depends on the treatment regime and the actual hormone levels in the implants used.[1141]

550. In its consultations with the scientific experts, the Panel explored the relevance of the failure to observe good veterinary practices. The Panel asked the experts whether identification of oestradiol-17β as a human carcinogen indicates that there are potential adverse effects on human health when it is consumed in meat from cattle treated with hormones for growth-promotion purposes. The experts were also asked whether their answer would depend on whether good veterinary practices are followed.[1142] Dr. Guttenplan responded:

> If potential is taken to mean possible, then an adverse effect cannot be ruled out, but it is unlikely if good veterinary practices are followed. If good veterinary practices are not followed, the potential for adverse effects may be significant.[1143]

[1138]1999 Opinion, pp. 30-32.

[1139]*Ibid.*, p. 32.

[1140]2002 Opinion, pp. 11 and 12. The 2002 Opinion also concludes that "[MGA] applied in concentrations exceeding the licensed doses by a factor of 3 would result in a violation of the tolerance levels as proposed by US-FDA." (2002 Opinion, p. 11) Similarly, the 2002 Opinion found that "[m]odel calculations indicated that, depending on the actual implanted total dose, processing of such injection sites can contaminate tons of (minced) meat or meat products with hormone concentrations violating the ADI/MRL levels as proposed by JECFA and other regulatory bodies." (*Ibid.*, p. 11)

[1141]*Ibid.*, pp. 11 and 12.

[1142]Panel Reports, Annex D, p. D-26, Question 15.

In response to another question on the subject posed by the Panel, Dr. De Brabander recognized that "[i]mproper administration of implants or misplaced implants create potential hazards to human health".[1144]

551. The European Communities also submitted to the Panel the final reports of two missions carried out in the United States and Canada to evaluate their control procedures.[1145] The Panel asked the scientific experts whether this evidence "call[ed] into question the potential applicability of Codex standards with regard to imports of meat from cattle treated with hormones from the United States and Canada.[1146] Dr. De Brabander agreed that this evidence was relevant:

> The material put forth by the European Communities regarding misuse or abuse of the hormones at issue in the United States and Canada calls indeed into question the potential applicability of Codex standards with regard to imports of meat from cattle treated with hormones from the United States and Canada.[1147]

552. As noted earlier, the relevance of abuse or misuse in the administration of the hormones at issue was recognized by the Appellate Body in *EC – Hormones*. The Appellate Body observed that, "[w]here the condition of observance of good veterinary practice (which is much the same condition attached to the standards, guidelines and recommendations of Codex with respect to the use of the five hormones for growth promotion) is *not* followed, the logical inference is that the use of such hormones for growth promotion purposes may or may not be 'safe'."[1148]

553. The Panel does not address the evidence on misuse or abuse referred to in the 1999 and 2002 Opinions in its analysis under Article 5.1 of the *SPS Agreement*. Neither does the Panel discuss the testimony of the scientific experts that recognized the relevance of this evidence and the potential adverse effects of the misuse or abuse in the administration of the hormones. The Panel summarily dismissed the relevance of the evidence on misuse or abuse stating that it relates to exposure

[1143]*Ibid.*, para. 155. Dr. Cogliano disagreed. In his view, the "answer does not depend on whether good veterinary practices are followed. It depends on the presence of the hormone in the meat that people consume". (*Ibid.*, para. 154)

[1144]*Ibid.*, para. 393. Dr. Boobis also recognized the potential hazards arising form abuse or misuse, although his response was qualified:

> In my view, the potential hazards from the use of large quantities of the six hormones in dispute are those dependent on their endocrine activity, including cancer in hormonally responsive tissues. However, I should stress that this is their potential hazard. The potential risk, i.e. the probability that effects would occur, would depend on a number of factors. These include the magnitude of the exposure, the duration of the exposure and the life stage of the exposed individual. From the range of exposures likely from anticipated misuse or abuse the risks are likely to be very low (see Question 62).

(*Ibid.*, para. 392)

[1145]See Final Report of a mission carried out in the United States from 19-30 June 2000 in order to review the systems in place for approval, control and supervision of cold stores and the certification of fresh meat and meat products, DG(Sanco)/1176/2000-MR Final, and Final Report of a mission carried out in Canada from 19-29 September 2000 in order to evaluate the control of residues in live animals and animal products, DG(Sanco)/1188/2000-MR final (Exhibits EC-67 and EC-68 submitted by the European Communities to the Panel).

[1146]Panel Reports, Annex D, p. D-83, Question 51.

[1147]*Ibid.*, para. 403.

[1148]Appellate Body Report, *EC – Hormones*, para. 206. (original emphasis; footnote omitted)

assessment and adding that it is not necessary to address it given the finding that the European Communities had not evaluated *specifically* the possibility that the adverse effects arise from the consumption of meat from cattle treated with oestradiol-17β for growth-promotion purposes. We recognize that the 1999 Opinion examines the risks of misuse or abuse under the heading "Exposure considerations upon misuse".[1149] After discussing the evidence on misuse and abuse, the 2002 Opinion states that "these data have to be considered in any quantitative exposure assessment exercise."[1150] This, however, cannot justify the Panel's failure to address the evidence on misuse or abuse. The European Communities made it clear that the risks of abuse or misuse were a relevant consideration in its risk assessment. This is confirmed in the 1999 and 2002 Opinions. At least two of the scientific experts consulted by the Panel recognized that the misuse or abuse in the administration of the hormones could give rise to adverse effects. The Panel had a duty to engage with this evidence and with the discussion of this evidence in the SCVPH Opinions. By summarily dismissing the evidence on the misuse or abuse in the administration of the hormones and the consequent conclusions in the SCVPH Opinions in the manner that it did, the Panel incorrectly applied Article 5.1 and the definition of "risk assessment" in Annex A of the *SPS Agreement*, as interpreted by the Appellate Body.

554. The United States and Canada submit that there are no economic incentives to fail to observe good veterinary practices by, for example, giving higher doses of hormones to the cattle.[1151] This is something the Panel could have examined, but it did not. Therefore, it cannot justify the Panel's inadequate treatment of the issue.

555. Accordingly, we find that the Panel erred in its interpretation and application of Article 5.1 of the *SPS Agreement* in relation to risks of misuse and abuse in the administration of hormones to cattle for growth-promoting purposes.

3. The Panel's Specificity Requirement

556. The European Communities claims that the Panel erred in finding that the European Communities had acted inconsistently with Article 5.1 of the *SPS Agreement* by failing to evaluate specifically the risks arising from residues of oestradiol-17β in meat from cattle treated with this hormone for growth promotion. The European Communities argues that "[a]t no stage did the Panel[] correctly identify what the Appellate Body found to be wanting in the risk assessments carried out for the purposes of Directive 96/22/EC in the original hormones dispute."[1152]

557. Relying on the Appellate Body's findings in *EC – Hormones*, the Panel observed that "a risk assessment in this instance required not a general evaluation of the carcinogenic potential of entire categories of hormones, but rather should include an examination of residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes."[1153] The Panel also noted the Appellate Body's finding in *Japan – Apples* that "a risk assessment should refer in general to the harm concerned as well as to the precise agent that may

[1149]1999 Opinion, p. 30.
[1150]2002 Opinion, p. 12.
[1151]Canada's appellee's submission, para. 87; and United States' responses to questioning at the oral hearing.
[1152]European Communities' appellant's submission, para. 341.
[1153]Panel Report, *US – Continued Suspension*, para. 7.511; Panel Report, *Canada – Continued Suspension*, para. 7.483 (referring to Appellate Body Report, *EC – Hormones*, para. 200).

possibly cause the harm"[1154], and its explanation that "an evaluation of risk must connect the possibility of adverse effects with an antecedent or cause."[1155] The Panel concluded:

> [T]he European Communities was required to evaluate the possibility that the identified adverse effect came into being, originated, or resulted from the presence of residues of oestradiol-17β in meat or meat products as a result of the cattle being treated with the hormone for growth promoting purposes.[1156]

558. The European Communities alleges that the Panel improperly required demonstration of *actual* effects while the Appellate Body had required mere demonstration of the *possibility of adverse effects*.[1157] The European Communities' allegation is unfounded. In the statement quoted above, the Panel focused on the *possibility* that the adverse effects could arise from the consumption of meat from cattle treated with oestradiol-17β. The test articulated by the Panel is compatible with the definition of the term "risk assessment" in paragraph 4 of Annex A of the *SPS Agreement* and with the interpretation developed by the Appellate Body in *EC – Hormones*. In that dispute, the European Communities presented a number of scientific studies and opinions of individual scientists indicating that the hormones at issue in that case had "carcinogenic potential".[1158] Yet, the Appellate Body found that those studies fell short of the requirements of paragraph 4 of Annex A of the *SPS Agreement*, because:

> The 1987 IARC Monographs and the articles and opinions of individual scientists submitted by the European Communities constitute general studies which do indeed show the existence of a general risk of cancer; but they do not focus on and do not address the particular kind of risk here at stake—the carcinogenic or genotoxic potential of the residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes—as is required by paragraph 4 of Annex A of the *SPS Agreement*. Those general studies, are in other words, relevant but do not appear to be sufficiently specific to the case at hand.[1159]

559. The definition of a risk assessment in paragraph 4 of Annex A, as interpreted by the Appellate Body, required the European Communities to conduct a risk assessment that addresses the specific risk at issue. The particular risk being evaluated by the European Communities in this case was the potential for neurobiological, developmental, reproductive, and immunological effects, as well as immunotoxic, genotoxic and carcinogenic effects[1160] from the residues of oestradiol-17β found in meat derived from cattle to which this hormone was administered for growth-promoting purposes. Although the European Communities is correct in arguing that it was not required to demonstrate that these adverse health effects would actually arise, it was nevertheless required to demonstrate that these adverse effects could arise from the presence of residues of oestradiol-17β in meat from treated cattle. In our view, this is what the Panel required when it examined whether the European Communities had "evaluate[d] the possibility that the identified adverse effect ... resulted from the

[1154]Panel Report, *US – Continued Suspension*, para. 7.512; Panel Report, *Canada – Continued Suspension*, para. 7.484 (referring to Appellate Body Report, *Japan – Apples*, para. 202). (emphasis omitted)
[1155]*Ibid.* (quoting Appellate Body Report, *Japan – Apples*, footnote 372 to para. 202).
[1156]Panel Report, *US – Continued Suspension*, para. 7.513; Panel Report, *Canada – Continued Suspension*, para. 7.485.
[1157]European Communities' appellant's submission, para. 261.
[1158]Appellate Body Report, *EC – Hormones*, para. 199.
[1159]*Ibid.*, para. 200.
[1160]Panel Report, *US – Continued Suspension*, para. 7.508; *Canada – Continued Suspension*, para. 7.480 (referring to 1999 Opinion, p. 72).

presence of residues of oestradiol-17β in meat or meat products as a result of the cattle being treated with the hormone for growth promoting purposes."[1161]

560. The European Communities also argues that the Panel erred by requiring a demonstration of "direct causality", which the European Communities posits constitutes "a very narrow reading" by the Panel of the definition of risk assessment in paragraph 4 of Annex A.[1162]

561. The Appellate Body explained in *Japan – Apples* that:

> Indeed, we are of the view that, as a general matter, "risk" cannot usually be understood only in terms of the disease or adverse effects that may result. Rather, an evaluation of risk must connect the possibility of adverse effects with an antecedent or cause. For example, the abstract reference to the "risk of cancer" has no significance, in and of itself, under the *SPS Agreement*; but when one refers to the "risk of cancer from smoking cigarettes", the particular risk is given content.[1163]

562. The particular risk being assessed by the European Communities is the possibility of adverse health effects from the consumption of residues of oestradiol-17β in meat treated with this hormone for growth promotion. In *EC – Hormones*, the Appellate Body required evaluation of "the carcinogenic or genotoxic potential of the residues of [the] hormones"[1164] at issue found in meat from treated cattle. In this case, the European Communities had to evaluate whether a causal connection exists between the consumption of meat from cattle treated with oestradiol-17β and the possibility of adverse health effects. This does not mean that the European Communities was required to establish a direct causal relationship between the possibility of adverse health effects and the residues of oestradiol-17β in bovine meat. In order to meet the requirements of Article 5.1 and Annex A of the *SPS Agreement*, it was sufficient for the European Communities to demonstrate that the additional human exposure to residues of oestradiol-17β in meat from treated cattle is one of the factors contributing to the possible adverse health effects. The European Communities was not required to isolate the contribution made by residues of oestradiol-17β in meat from cattle treated with the hormone for growth promotion from the contributions made by other sources.[1165] Where multiple factors may contribute to a particular risk, a risk assessor is not required to differentiate the individual contribution made by each factor. Article 5.1 requires that SPS measures be based on a risk assessment "as appropriate to the circumstances", which suggests that the scientific inquiry involved in a risk assessment must take due account of particular methodological difficulties posed by the nature and characteristics of the particular substance and risk being evaluated. However, that does not excuse the risk assessor from evaluating whether there is a connection between the particular substance being evaluated and the possibility that adverse health effects may arise.

563. Finally, we are not persuaded by the European Communities suggestion that the Panel required testing in humans in order to specifically evaluate the risks associated with the consumption of meat from cattle treated with oestradiol-17β.[1166] We do not see this as a necessary implication of

[1161]Panel Report, *US – Continued Suspension*, para. 7.513; *Canada – Continued Suspension*, para. 7.485.

[1162]European Communities' appellant's submission, para. 260.

[1163]Appellate Body Report, *Japan – Apples*, footnote 372 to para. 202.

[1164]Appellate Body Report, *EC – Hormones*, para. 200.

[1165]In this respect, we recall that in *EC – Hormones*, the Appellate Body considered that "there is a fundamental distinction between added hormones (natural or synthetic) and naturally-occurring hormones in meat and other foods." (*Ibid.*, para. 221) It also noted that regulatory action in respect of the latter would "entail[] such a comprehensive and massive governmental intervention in nature and in the ordinary lives of people" as to reduce the comparison between these types of hormones "to an absurdity". (*Ibid.*)

[1166]European Communities' appellant's submission, para. 263.

the Panel's analysis. There is no indication in the Panel Report to suggest that the evaluation could not proceed on the basis of experimentation in laboratory animals and extrapolating the results to humans, or by other means. Certainly, where a substance may be potentially toxic, requiring a WTO Member to evaluate specifically the risks through actual human consumption of the substance would be unethical and would not be "appropriate to the circumstances" within the meaning of Article 5.1.

564. For these reasons, we find that the Panel did not err in requiring a specific evaluation of the risks arising from the presence of residues of oestradiol-17β in meat or meat products from cattle treated with the hormone for growth-promoting purposes.[1167]

565. The European Communities makes two additional arguments relating to the specificity requirement. First, the European Communities asserts that the Panel's analysis and the legal test it used "are simply a cover for allowing the Panel[] to decide *what the correct science in* [*its*] *view is*, not on assessing whether the scientific evidence evaluated in the Opinions of the SCVPH *focussed on and addressed* 'the particular kind of risk here at stake—carcinogenic or genotoxic potential of the residues of those hormones found in meat derived from cattle to which [17β-oestradiol] had been administered for growth promotion purposes', as identified by the Appellate Body in the original case."[1168] Second, the European Communities argues that, because the SCVPH Opinions demonstrated that oestradiol-17β is a "complete carcinogen by exerting tumour initiating and promoting effects", "it has to be concluded that no quantitative estimate of risk related to residues in meat could be presented".[1169] According to the European Communities, "[t]his conclusion alone demonstrates that the Opinions focussed on and addressed very specifically the particular kind of risk here at stake—carcinogenic and genotoxic potential of the residues of those hormones found in meat derived from cattle to which [17β-oestradiol] had been administered for growth promotion purposes as identified by the Appellate Body."[1170] In our view, both of these arguments relate to the standard of review applied by the Panel and to the Panel's evaluation of the evidence before it. We address this aspect of the European Communities' appeal in section VI.D.6.

4. Quantification of Risk

566. Next, we turn to the European Communities' claim that the Panel erred in requiring the quantification of the risks arising from the consumption of meat containing residues of oestradiol-17β. The European Communities asserts that, by referring to "potential occurrence"[1171] of adverse effects when asking questions to the experts, the Panel incorrectly "imposed a quantitative method of risk assessment on the European Communities borrowed from Codex Alimentarius and JECFA."[1172]

567. In *EC – Hormones*, the Appellate Body held that:

> What needs to be pointed out at this stage is that the Panel's use of "probability" as an alternative term for "potential" creates a significant concern. The ordinary meaning of "potential" relates to "possibility" and is different from the ordinary meaning of "probability". "Probability" implies a higher degree or a threshold of potentiality or possibility. It thus appears that here the Panel

[1167]Panel Report, *US – Continued Suspension*, para. 7.513; Panel Report, *Canada – Continued Suspension*, para. 7.485.

[1168]European Communities' appellant's submission, para. 341. (original emphasis).

[1169]*Ibid.*, para. 337.

[1170]*Ibid.* (original emphasis and footnote omitted)

[1171]European Communities' appellant's submission, para. 346.

[1172]*Ibid.*, para. 308.

introduces a quantitative dimension to the notion of risk.[1173] (footnote omitted)

568. The Appellate Body further stated that:

> It is not clear in what sense the Panel uses the term "scientifically identified risk." The Panel also frequently uses the term "identifiable risk", and does not define this term either. The Panel might arguably have used the terms "scientifically identified risk" and "identifiable risk" simply to refer to an ascertainable risk: if a risk is not ascertainable, how does a Member ever know or demonstrate that it exists? In one part of its Reports, the Panel opposes a requirement of an "identifiable risk" to the uncertainty that theoretically always remains since science can *never* provide *absolute* certainty that a given substance will not *ever* have adverse health effects. We agree with the Panel that this theoretical uncertainty is not the kind of risk which, under Article 5.1, is to be assessed. In another part of its Reports, however, the Panel appeared to be using the term scientifically identified risk" to prescribe implicitly that a certain *magnitude* or threshold level of risk be demonstrated in a risk assessment if an SPS measure based thereon is to be regarded as consistent with Article 5.1. To the extent that the Panel purported to require a risk assessment to establish a minimum magnitude of risk, we must note that imposition of such a quantitative requirement finds no basis in the *SPS Agreement*.[1174] (original emphasis; footnotes omitted;)

569. Although the definition of a risk assessment does not require WTO Members to establish a minimum magnitude of risk, it is nevertheless difficult to understand the concept of risk as being devoid of any indication of potentiality. A risk assessment is intended to identify adverse effects and evaluate the possibility that such adverse effects might arise. This distinguishes an ascertainable risk from theoretical uncertainty. However, the assessment of risk need not be expressed in numerical terms or as a minimum quantification of the level of risk. We are also mindful that the risk assessment at issue in this case concerns the *potential* for adverse effects under the second sentence of paragraph 4 of Annex A and not an evaluation of likelihood under the first sentence of paragraph 4.[1175]

570. The European Communities' challenge in this case is directed at the following question that the Panel posed to the scientific experts:

> The Panel specifically asked the experts whether the [European Communities] Opinions identified the potential for adverse effects on human health, including the carcinogenic or genotoxic potential, of the residues of oestradiol-17β found in meat derived from cattle to which this hormone had been administered for growth promotion purposes in accordance with good veterinary practice and to what extent the Opinions evaluated the potential occurrence of these adverse effects.[1176]

[1173]Appellate Body Report, *EC – Hormones*, para. 184.

[1174]Appellate Body Report, *EC – Hormones*, para. 186. Similarly, in *Australia – Salmon*, the Appellate Body referred to the first sentence of the definition of a "risk assessment" in paragraph 4 of Annex A of the *SPS Agreement*, and noted that the *SPS Agreement* "does not require that the evaluation of the likelihood needs to be done quantitatively. The likelihood may be expressed either quantitatively or qualitatively." (Appellate Body Report, *Australia – Salmon*, para. 124)

[1175]The Appellate Body found in *EC – Hormones* that the term "potential" in the second sentence of paragraph 4 of Annex A refers to the "possibility" of occurrence of adverse effects, which implies a lower degree of potentiality than "probability". (Appellate Body Report, *EC – Hormones*, para. 184).

571. The European Communities does not consider this formulation to be "problematic" as such. The European Communities argues, however, that if this formulation is understood as requiring a Member to specify in quantitative terms "to what extent [it] evaluated *the potential occurrence* of these adverse effects"[1177], it would lead to an error in law. The European Communities submits that this is precisely how the Panel addressed the issue and how it invited the experts to analyse the SCVPH Opinions.[1178]

572. As the European Communities acknowledges, "a quantitative dimension may not be immediately evident from the ordinary meaning of the words 'potential occurrence'."[1179] The terms "potential occurrence of adverse effects" can be understood as referring to the possibility that the adverse effects might occur, without necessarily requiring that this be expressed in numerical terms. This would be consistent with the definition of "risk assessment" in paragraph 4 of Annex A of the *SPS Agreement*, as interpreted by the Appellate Body. Moreover, it would be consistent with the Appellate Body's view that "theoretical uncertainty"[1180] is not the kind of risk to be assessed under Article 5.1, but rather the risk to be assessed must be an "ascertainable" risk.[1181] In this sense, we agree with Canada that "to examine the 'potential' for adverse effects is to ask whether those adverse effects could ever occur".[1182]

573. Other statements by the Panel confirm that it did not require that the possibility of the risks arising be expressed in numerical terms. For example, the Panel took note of the Appellate Body's finding that a risk assessment can take into account "matters not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences."[1183] The Panel also stated that "it must determine whether the European Communities evaluated the *possibility* that the identified adverse effects came into being, originated, or resulted from the presence of residues of oestradiol-17β in meat or meat products as a result of the cattle being treated with the hormone for growth promotion purposes."[1184]

574. The European Communities additionally draws attention to the Panel's use of the term "magnitude" in the following statement:

> Indeed, whether a Member considers that its population should be exposed or not to a particular risk, or at what level, is not relevant to determining whether a risk exists and what its magnitude is. *A fortiori*, it should have no effect on whether there is sufficient evidence of the existence and magnitude of this risk.

[1176]Panel Report, *US – Continued Suspension*, para. 7.521; Panel Report, *Canada – Continued Suspension*, para. 7.493.

[1177]European Communities' appellant's submission, para. 344 (quoting Panel Report, *US – Continued Suspension*, para. 7.521; and Panel Report, *Canada – Continued Suspension*, para. 7.493) (original emphasis)

[1178]*Ibid.*, para. 344. (footnote omitted)

[1179]European Communities' appellant's submission, para. 346.

[1180]Appellate Body Report, *EC – Hormones*, para. 186.

[1181]In *Japan – Apples*, the Appellate Body cautioned, however, that "scientific prudence" should "not be 'completely assimilated'" to such theoretical uncertainty. (Appellate Body Report, *Japan – Apples*, para. 241)

[1182]Canada's appellee's submission, para. 107. (original underlining)

[1183]Panel Report, *US – Continued Suspension*, para. 7.520; Panel Report, *Canada – Continued Suspension*, para. 7.492 (quoting Appellate Body Report, *EC – Hormones*, para. 187).

[1184]Panel Report *US – Continued Suspension*, para. 7.520; Panel Report, *Canada – Continued Suspension*, para. 7.492. (emphasis added)

> A risk-averse Member may be inclined to take a protective position when considering the measure to be adopted. However, the determination of whether scientific evidence is sufficient to assess the existence and *magnitude* of a risk must be disconnected from the intended level of protection.[1185] (emphasis added)

We note that these statements were made by the Panel in its discussion of the consistency of the European Communities' provisional ban in respect of the other fives hormones and, therefore, was not made in the context of the Panel's examination of the European Communities' import ban on meat from cattle treated with oestradiol-17β. However, we recall that a "risk assessment" involves an indication of potentiality, even though this need not be expressed in numerical terms or as a minimum quantification of the level of risk. In this sense, the Panel's reference to "magnitude" is in our view not sufficient to establish that the Panel incorrectly interpreted Article 5.1 and paragraph 4 of Annex A as requiring a quantitative risk assessment.

575. For these reasons, we consider that the Panel's reference to "potential occurrence" of adverse health effects could be read consistently with the definition of a risk assessment in paragraph 4 of Annex A of the *SPS Agreement*, as interpreted by the Appellate Body. Accordingly, we dismiss the European Communities' claim that the Panel incorrectly interpreted Article 5.1 and paragraph 4 of Annex A of the *SPS Agreement* as requiring quantification of risk.

5. Burden of Proof

576. We now examine the European Communities' claim that the Panel erred by incorrectly allocating the burden of proof. The European Communities argues that the fact that it is the complaining party in this case "does not change the basic standard on the burden of proof under the *SPS Agreement*."[1186] According to the European Communities, the Panel "erred in law in shifting the burden of proof to the European Communities without first examining, provision by provision under the *SPS Agreement* as required by Appellate Body, whether the arguments of the United States and Canada had sufficient merits to shift the burden of proof back to the European Communities".[1187]

577. The United States argues that the Panel was correct in initially allocating to the European Communities the burden of proving its claim that the United States acted inconsistently with Article 22.8 of the DSU. The United States considers that the Panel properly found that the European Communities' claim was premised on an assertion by the European Communities that it had brought itself into conformity with the *SPS Agreement* through Directive 2003/74/EC. For this reason, the Panel was justified in allocating to the European Communities the burden of establishing a *prima facie* case of conformity with the *SPS Agreement*, including Article 5.1. The United States accepts that, once the Panel found that the European Communities had established such *prima facie* case, the burden of proof shifted to the United States. However, the Panel then rightly found that the United States had rebutted the European Communities' *prima facie* case of consistency through positive evidence of breach of the *SPS Agreement*. On this basis, the United States suggests that "the burden shifted back and forth between the parties and eventually 'neutralized' each other since each party also submitted evidence in support of its allegations."[1188]

578. Canada agrees with the United States that the European Communities has the burden of proving that it has removed the inconsistent measure within the meaning of Article 22.8 of the

[1185]Panel Report, *US – Continued Suspension*, paras. 7.611 and 7.612; Panel Report, *Canada – Continued Suspension*, paras. 7.589 and 7.590.

[1186]European Communities' appellant's submission, para. 286.

[1187]*Ibid.*, para. 294.

[1188]United States' appellee's submission, para. 94 (referring to Panel Report, *US – Continued Suspension*, para. 7.386).

DSU.[1189] Canada asserts that, in order to demonstrate that the suspension of concessions is no longer justified, the European Communities must establish that it has brought its measure into compliance with Article 5.1 of the *SPS Agreement*.

579. The Panel explained how it would allocate the burden of proof as follows:

> With respect to the violation of Article 22.8 as such, the Panel considered that it had, in principle, no reason to address [the] burden of proof any differently than any other panel established under Article 6 of the DSU. Indeed, as stated by the Complainant itself, this case is about a measure taken by [the United States and Canada]. The fact that this dispute takes place in the context of the [European Communities'] alleged compliance with the recommendations and rulings of the DSB in the *EC – Hormones* dispute should have no impact on the question of the burden of proof regarding the actual *claim* before us. This means that the principles identified by the Appellate Body above apply, and that the European Communities must prove its claim that [the United States and Canada] breach[] Article 22.8 of the DSU.
>
> Yet, one of the particularities of this case is that the [European Communities'] claim of violation of Article 22.8 of the DSU by [the United States and Canada] is premised on the removal of the European Communities' measure found to be inconsistent with the *SPS Agreement*. In other words, in order to demonstrate that [the United States and Canada have] breached Article 22.8, the European Communities also alleges that its implementing measure is itself in conformity with the *SPS Agreement*.
>
> In theory, this should not raise any difficulty in terms of burden of proof since it is well established that each party has to prove its own allegations. We agree, however, with the European Communities that in a case like this one, this could generate for the complainant at the beginning of the proceedings a situation equivalent to having to "prove a negative", since the spectrum of provisions against which the legality of the [European Communities'] measure may have to be reviewed remains very broad as long as the respondent has not made its own allegations of inconsistency of the implementing measure. However, we recall that we found above that the European Communities enjoyed a presumption of good faith compliance, even though that presumption was rebuttable before this Panel. As soon as the European Communities established a prima facie case thanks to the presumption of good faith compliance, the burden shifted on the [the United States and Canada] to rebut that presumption. We recall that "... a prima facie case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case." We believe that the [United States and Canada] sufficiently refuted the [European Communities'] allegation of compliance in [their] first written submission through positive evidence of breach of the *SPS Agreement* by the European Communities. In its subsequent submissions before the Panel, the European Communities responded

[1189]Canada's responses to questioning at the oral hearing.

> to the allegations of violation made by [the United States and Canada]. Thus, the European Communities never actually had to "prove a negative" in this case.
>
> While the presumptions based on good faith enjoyed by each party may have played a role in the burden of proof in the early stage of the Panel proceedings, it is the opinion of the Panel that they eventually "neutralized" each other since each party also submitted evidence in support of its allegations. Ultimately, each party had to prove its specific allegations in response to the evidence submitted by the other party. Thereafter, when considering whether an allegation had been proven or not, the Panel followed the practice of other panels to weigh all the evidence before it.[1190] (original emphasis: footnotes omitted)

580. In section IV, we explained that this case involves a disagreement as to the consistency of a measure taken to comply and, therefore, should have properly been brought under Article 21.5 of the DSU. We also explained how the burden of proof should have been allocated had the dispute been brought under Article 21.5. Although these proceedings were not brought under Article 21.5, the Panel said that it "perform[ed] functions similar to those of an Article 21.5 panel".[1191] The European Communities had to provide a clear description of its implementing measure, and an adequate explanation regarding how this measure rectifies the inconsistencies found in the original proceedings, so as to have placed the Panel in a position to make an objective assessment of the matter and, in the absence of rebuttal, to rule in favour of the original respondent. Therefore, to the extent the Panel did not allocate the burden of proof in its analysis of whether Directive 2003/74/EC met the requirements of Article 5.1 of the *SPS Agreement* according to the principles outlined above, we find that the Panel has erred.

581. We have, moreover, several additional concerns with the Panel's analysis. First, as we indicated in section IV, we do not believe that it was sufficient for the European Communities to have based its case under Article 22.8 on a presumption of good faith. The European Communities may be presumed to have acted in good faith in adopting Directive 2003/74/EC, but this does not respond to the question as to whether Directive 2003/74/EC achieved substantive compliance. Thus, it was incorrect for the Panel to have relied on a presumption of good faith compliance for purposes of determining the allocation of the burden of proof and finding that the European Communities established a *prima facie* case.

582. Secondly, we have difficulty following the reasoning behind the Panel's conclusion that the presumptions of good faith enjoyed by each party "eventually 'neutralized' each other" and that "[u]ltimately, each party had to prove its specific allegations in response to the evidence submitted by the other party."[1192] The statement is ambiguous about which party made which allegation and how the burden of proof was allocated. In the section in which the Panel describes the scope of its review and circumscribes its terms of reference, the Panel states that, in submissions subsequent to the first written submission, "the European Communities has argued the compatibility of its implementing measure with the provisions referred to in the quotation above (i.e. Article[s] 5.1 and 5.7 of the *SPS Agreement*)".[1193] However, a few paragraphs later, the Panel refers to the allegation of incompatibility with Article 5.1 of the *SPS Agreement* as an allegation made by the United States and Canada.[1194] Thus, it is difficult to understand which party had the burden of proving which allegation.

[1190]Panel Report, *US – Continued Suspension*, paras. 7.383-7.386; Panel Report, *Canada – Continued Suspension*, paras. 7.380-7.383.
[1191]Panel Report, *US – Continued Suspension*, para. 7.376; Panel Report, *Canada – Continued Suspension*, para. 7.373.
[1192]Panel Report, *US – Continued Suspension*, para. 7.386; Panel Report, *Canada – Continued Suspension*, para. 7.383.

583. Thirdly, we note the Panel's statement that the United States and Canada "sufficiently refuted the [European Communities'] allegation of compliance in [their] first written submission through positive evidence of breach of the *SPS Agreement* by the European Communities".[1195] This statement is made before the Panel has undertaken any analysis of the conformity of Directive 2003/74/EC with Article 5.1 of the *SPS Agreement*. In its appellant's submission, the European Communities takes issue with this statement and argues that the Panel should have first examined "provision by provision ... whether the arguments of the United States and Canada had sufficient merits to shift the burden of proof back to the European Communities".[1196] We agree that it was premature for the Panel to have stated that the United States and Canada had succeeded in refuting the European Communities' allegation of compliance before the Panel had addressed the consistency of Directive 2003/74/EC with the *SPS Agreement*.

584. Accordingly, we find that the Panel erred in the allocation of the burden of proof in its assessment of the consistency of Directive 2003/74/EC with Article 5.1 of the *SPS Agreement*. We discuss the consequences of this error in section E below.

6. The Panel's Articulation and Application of the Standard of Review under Article 5.1 of the *SPS Agreement*

585. We turn next to the European Communities' claim that the Panel erred in the standard that it applied to review whether Directive 2003/74/EC was based on a risk assessment within the meaning of Article 5.1 of the *SPS Agreement*. The European Communities argues that the Panel sought to determine "what the correct scientific conclusions are"[1197] in relation to the hormones at issue. The European Communities adds that, instead of determining whether "there was any reputable support within the relevant scientific community for the determination made by the European Communities in the light of its chosen level of protection"[1198], the Panel decided "to become the jury on the correct science ... by picking and choosing between conflicting and contradictory opinions of the experts in an arbitrary manner."[1199] As a result, the Panel impermissibly engaged in a *de novo* review of the European Communities' risk assessment, and failed to take into account diverging views among the experts reflecting a "genuine and legitimate scientific controversy"[1200] concerning three particular issues: exposure of humans to hormones from multiple endogenous and exogenous sources; genotoxicity of oestradiol-17β; and specificity or direct causality.[1201]

586. The United States and Canada consider that the Panel identified and applied the correct standard of review to the facts before it, and maintain that the Panel did not exceed the bounds of its discretion as the trier of facts when assessing the weight and determining the credibility to be attributed to the opinions of the scientific experts.

[1193]Panel Report, *US – Continued Suspension*, para. 7.400; Panel Report, *Canada – Continued Suspension*, para. 7.397.
[1194]Panel Report, *US – Continued Suspension*, para. 7.405; Panel Report, *Canada – Continued Suspension*, para. 7.398.
[1195]Panel Report, *US – Continued Suspension*, para. 7.385; Panel Report, *Canada – Continued Suspension*, para. 7.382.
[1196]European Communities' appellant's submission, para. 294.
[1197]*Ibid.*, para. 240.
[1198]*Ibid.*
[1199]*Ibid.*, para. 239. (emphasis added)
[1200]*Ibid.*, para. 248.
[1201]*Ibid.*

587. We discuss our views on the applicable standard of review before turning to our examination of the Panel's assessment of Directive 2003/74/EC. The European Communities claims that the appropriate standard of review is one which limits a panel's mandate to determining whether there is any "reasonable scientific basis" for the SPS measure.[1202] The United States and Canada object to such a standard. We recall that in *EC – Hormones*, the Appellate Body rejected the European Communities' argument that a "deferential 'reasonableness' standard" is applicable under the *SPS Agreement* to "all highly complex factual situations, including the assessment of the risks to human health arising from toxins and contaminants".[1203] The Appellate Body cautioned that the applicable standard of review "must reflect the balance established in [the *SPS Agreement*] between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves" and concluded that Article 11 of the DSU "articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels"[1204] reviewing the assessment of facts under the *SPS Agreement*.

588. Article 11 of the DSU states, in relevant part:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

589. The Appellate Body has observed that, so far as fact-finding by panels is concerned, the applicable standard is "neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of facts'".[1205] It further explained that, while panels are "poorly suited to engage in [a *de novo*] review", "'total deference to the findings of the national authorities' ... 'could not ensure an "objective assessment" as foreseen by Article 11 of the DSU'."[1206]

590. A panel reviewing the consistency of an SPS measure with Article 5.1 must determine whether that SPS measure is "based on" a risk assessment. It is the WTO Member's task to perform the risk assessment. The panel's task is to review that risk assessment. Where a panel goes beyond this limited mandate and acts as a risk assessor, it would be substituting its own scientific judgement for that of the risk assessor and making a *de novo* review and, consequently, would exceed its functions under Article 11 of the DSU. Therefore, the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable.

591. The Appellate Body has observed that a WTO Member may properly base an SPS measure on divergent or minority views, as long as these views are from qualified and respected sources.[1207] This must be taken into account in defining a panel's standard of review. Accordingly, a panel reviewing the consistency of an SPS measure with Article 5.1 of the *SPS Agreement* must, first, identify the scientific basis upon which the SPS measure was adopted. This scientific basis need not reflect the majority view within the scientific community but may reflect divergent or minority views. Having identified the scientific basis underlying the SPS measure, the panel must then verify that the scientific basis comes from a respected and qualified source. Although the scientific basis need not represent the majority view within the scientific community, it must nevertheless have the necessary scientific and methodological rigour to be considered reputable science. In other words, while the correctness of the views need not have been accepted by the broader scientific community, the views

[1202]European Communities' appellant's submission, para. 243.
[1203]Appellate Body Report, *EC – Hormones*, paras. 113 and 114.
[1204]*Ibid.*, paras. 115 and 116.
[1205]*Ibid.*, para. 117.
[1206]*Ibid.* (quoting Panel Report, *US – Underwear*, para. 7.10).
[1207]Appellate Body Report, *EC – Hormones*, para. 194.

must be considered to be legitimate science according to the standards of the relevant scientific community. A panel should also assess whether the reasoning articulated on the basis of the scientific evidence is objective and coherent. In other words, a panel should review whether the particular conclusions drawn by the Member assessing the risk find sufficient support in the scientific evidence relied upon. Finally, the panel must determine whether the results of the risk assessment "sufficiently warrant" the SPS measure at issue.[1208] Here, again, the scientific basis cited as warranting the SPS measure need not reflect the majority view of the scientific community provided that it comes from a qualified and respected source.

592. A panel may and should rely on the advice of experts in reviewing a WTO Member's SPS measure, in accordance with Article 11.2 of the *SPS Agreement* and Article 13.1 of the DSU. In doing so, however, a panel must respect the due process rights of the parties.[1209] Moreover, a panel may not rely on the experts to go beyond its limited mandate of review. The purpose of a panel consulting with experts is not to perform its own risk assessment. The role of the experts must reflect the limited task of a panel. The panel may seek the experts' assistance in order to identify the scientific basis of the SPS measure and to verify that this scientific basis comes from a qualified and respected source, irrespective of whether it represents minority or majority scientific views. It may also rely on the experts to review whether the reasoning articulated on the basis of the scientific evidence is objective and coherent, and whether the particular conclusions drawn by the Member assessing the risk find sufficient support in the evidence. The experts may also be consulted on the relationship between the risk assessment and the SPS measure in order to assist the panel in determining whether the risk assessment "sufficiently warrants" the SPS measure. The consultations with the experts, however, should not seek to test whether the experts would have done a risk assessment in the same way and would have reached the same conclusions as the risk assessor. In other words, the assistance of the experts is constrained by the kind of review that the panel is required to undertake.

593. In this case, the Panel correctly identified Article 11 of the DSU as setting out the standard of review applicable to its examination of the consistency of the European Communities' risk assessment with Article 5.1 of the *SPS Agreement*.[1210] The Panel also referred to the guidance provided by the Appellate Body in *EC – Hormones* concerning the standard of review.[1211] Moreover, the Panel made reference to the interpretation of Article 5.1 of the *SPS Agreement* developed by the Appellate Body in *EC – Hormones* and acknowledged that a risk assessment may be based on divergent or minority views.[1212]

594. Next, the Panel referred to its consultations with scientific experts, noting that it had consulted six scientific experts individually, and not as an expert review group. The Panel stated that:

> Although the Panel is not carrying out its own risk assessment, its situation is similar in that it may benefit from hearing the full spectrum of experts' views and thus obtain a more complete picture both of the mainstream scientific opinion and of any divergent views.[1213]

[1208]*Ibid.*, para. 193.
[1209]See *supra*, section V.
[1210]Panel Report, *US – Continued Suspension*, para. 7.413; Panel Report, *Canada – Continued Suspension*, para. 7.404.
[1211]Panel Report, *US – Continued Suspension*, paras. 7.414-7.416; Panel Report, *Canada – Continued Suspension*, paras. 7.405-7.407.
[1212]Panel Report, *US – Continued Suspension*, para. 7.417; Panel Report, *Canada – Continued Suspension*, para. 7.408 (quoting Appellate Body Report, *EC – Hormones*, para. 194).
[1213]Panel Report, *US – Continued Suspension*, para. 7.418; Panel Report, *Canada – Continued Suspension*, para. 7.409.

595. The analogy that the Panel draws between its situation and that of a risk assessor is unfortunate, but is not in itself a sufficient indication that the Panel incorrectly understood the applicable standard of review. We do not think that the Panel meant to suggest that it saw its task under Article 5.1 as requiring it to perform a risk assessment. At the beginning of the statement, the Panel expressly recognizes that it "is not carrying out its own risk assessment".

596. The Panel then elaborated on the approach it would take in respect of the testimony of the experts:

> We note that, in some circumstances, only one or two experts have expressed their views on an issue. Sometimes these views were similar or complemented each other. In other circumstances, a larger number of experts expressed opinions and, sometimes, they expressed diverging opinions. While, on some occasions, we followed the majority of experts expressing concurrent views, in some others the divergence of views were such that we could not follow that approach and decided to accept the position(s) which appeared, in our view, to be the most specific in relation to the question at issue and to be best supported by arguments and evidence.[1214] (footnotes omitted)

597. The European Communities submits that "the majority view is not probative simply because it represents the majority".[1215] We agree that automatically giving more weight to the testimony of the majority of experts would be too rigid an approach. The fact that a majority in the spectrum of the scientific experts consulted by the Panel had a particular view is not a proper basis for determining whether a WTO Member's risk assessment complies with the requirements of Article 5.1 and Annex A of the *SPS Agreement*.

598. Looking at the Panel's analysis of whether the European Communities specifically assessed the risks arising from the consumption of meat from cattle treated with oestradiol-17β, we note that a significant portion of the Panel's reasoning consists of summaries of the responses of the experts. It is only after summarizing the experts' responses that the Panel describes some of the issues discussed in the 1999 Opinion. Given the applicable standard of review and the role of the Panel that is determined by it, the Panel's analysis should have proceeded differently. The Panel should have first looked at the European Communities' risk assessment. It should then have determined whether the scientific basis relied upon in that risk assessment came from a respected and qualified source. The Panel should have sought assistance from the scientific experts in confirming that it had properly identified the scientific basis underlying the European Communities' risk assessment or to determine whether that scientific basis originated in a respected and qualified source. The Panel should also have sought the experts' assistance in determining whether the reasoning articulated by the European Communities on the basis of the scientific evidence is objective and coherent, so that the conclusions reached in the risk assessment sufficiently warrant the SPS measure. Instead, the Panel seems to have conducted a survey of the advice presented by the scientific experts and based its decisions on whether the majority of the experts, or the opinion that was most thoroughly reasoned or specific to the question at issue, agreed with the conclusion drawn in the European Communities' risk

[1214]Panel Report, *US – Continued Suspension*, para. 7.420; Panel Report, *Canada – Continued Suspension*, para. 7.411. At the interim stage, the Panel further explained that "in case of divergence of opinions between the experts, and having due regard to the comments of the parties and the clarifications provided by the experts at the meeting with the Panel, it was a sound approach to take into account, in forming its own opinion, the opinions that were the most precise and elaborate." (Panel Report, *US – Continued Suspension*, para. 6.72; Panel Report, *Canada – Continued Suspension*, para. 6.67).

[1215]European Communities' appellant's submission, para. 240.

assessment. This approach is not consistent with the applicable standard of review under the *SPS Agreement*.

599. The Panel's flawed approach is evident in its analysis of the genotoxicity of oestradiol-17β, one of the central issues in the European Communities' risk assessment.[1216] The 1999 Opinion refers to several studies that investigated the genotoxicity of oestradiol.[1217] It also states that certain metabolites of oestradiol-17β "have been found to be directly or indirectly genotoxic" and that "[t]his implies that 17-β oestradiol may act as tumor initiator as well as tumor promoter".[1218] The 1999 Opinion goes on to state that "[t]his implies that any excess exposure towards 17-β oestradiol and its metabolites resulting from the consumption of meat and meat products presents a potential risk to public health in particular to those groups of the population which have been identified as particularly sensitive such as prepubertal children".[1219] Finally, the 1999 Opinion explains that a threshold cannot be established for these genotoxic metabolites.[1220] The European Communities explained that a "threshold" is the "level below which intakes from residue should be considered to be safe."[1221]

600. The genotoxicity of oestradiol-17β is also examined in the 2002 Opinion, which concludes:

> Convincing data have been published confirming the mutagenic and genotoxic potential of 17β-oestradiol as a consequence of metabolic activation to reactive quinines. *In vitro* experiments indicated that oestrogenic compounds *might* alter the expression of an array of genes.[1222] (original emphasis)

601. Following the approach that we outlined earlier regarding the applicable standard of review, the first step in the Panel's analysis should have been to identify what in the European Communities' risk assessment was the scientific basis for the conclusions on the genotoxicity of oestradiol-17β; verify whether this scientific basis came from a respected and qualified source; and determine whether the reasoning articulated on the basis of that scientific evidence is objective and coherent. As a second step, the Panel should have pursued a similar inquiry concerning the conclusion that the genotoxicity of oestradiol-17β did not permit the establishment of a threshold, as the European Communities submits. In that context, the Panel would have sought the experts' view as to whether the conclusions reached by the European Communities can find support in the scientific evidence relied upon by the European Communities (even if the expert in question was of a different scientific view).

602. Rather than turning first to the European Communities' risk assessment in order to identify the scientific basis for the conclusions on the genotoxicity of oestradiol-17β, the Panel begins with a survey of the views of the scientific experts on this issue in general. The Panel tries to justify its approach on its inability to evaluate the evidence itself:

> The Panel is not in a position to evaluate the scientific data the SCVPH reviewed in drawing its conclusions. For this reason, the Panel consulted a group of scientific experts and asked them to

[1216]The United States characterizes the issue of genotoxicity as a "central underpinning" of the European Communities' risk assessment relating to oestradiol-17β. (Panel Report, *US – Continued Suspension*, para. 7.543)

[1217]1999 Opinion, pp. 39-41.

[1218]*Ibid.*, p. 75.

[1219]*Ibid.*

[1220]*Ibid.*

[1221]Panel Report, *US – Continued Suspension*, para. 4.238. See also Panel Report, *Canada – Continued Suspension*, footnote 259 to para. 6.88.

[1222]2002 Opinion, p. 21.

> evaluate the [European Communities'] Opinions as well as the underlying science.[1223]

However, under the applicable standard of review, neither the Panel nor the experts it consulted were called upon to evaluate the correctness of the European Communities' risk assessment. The Panel's role was more limited and consisted, as we explained earlier, of identifying the scientific basis and evidence relied upon in the risk assessment; verifying that the scientific evidence comes from respected and qualified sources; and determining whether the reasoning articulated by the European Communities on the basis of the scientific evidence is objective and coherent.

603. The summary of the experts' opinions, which constitutes the lengthiest portion of the Panel's reasoning, often appears to be a general discussion as to whether the genotoxicity of oestradiol-17β is widely accepted by the broader scientific community, rather than a discussion of the evidence relied upon in the European Communities' risk assessment. The Panel concludes that the "scientific evidence referred to in the Opinions does not support the European Communities' conclusion that for oestradiol-17β genotoxicity had already been demonstrated explicitly."[1224] The Panel's conclusion appropriately focuses on the scientific evidence in the SCVPH Opinions. Yet, the Panel's reasoning reveals several flaws. First, some of the experts seemed to accept the European Communities' position on the genotoxicity of oestradiol-17β. For example, the Panel quotes the following opinion of Dr. Cogliano in its reasoning:

> Dr. Cogliano explained that "the [European Communities'] statement that a threshold cannot be identified reflects their view of genotoxic mechanisms, just as the contrary statement that there is a threshold and that this threshold is above the levels found in meat residues reflects how Canada and the [United States] view genotoxic mechanisms. Neither statement has been demonstrated by the scientific evidence, rather, they are different assumptions that each party uses in their interpretation of the available evidence."[1225]

604. The Panel also refers to the following testimony of Dr. Cogliano:

> Dr. Cogliano stated in his written responses that the identification of oestradiol-17β as a human carcinogen indicates that there are potential adverse effects on human health when oestrodiol-17β is consumed in meat from cattle treated with hormones for growth promotion purposes. At the meeting with the Panel, Dr. Cogliano clarified that the IARC has classified oestradiol-17β as possibly carcinogenic based on sufficient evidence in experimental animals. The agents that are known to be carcinogenic in humans are the steroidal oestrogens, non-steroidal oestrogens, and various oestrogen-progestin combinations as used either as birth-control pills or menopausal therapy.[1226]

[1223]Panel Report, *US – Continued Suspension*, para. 7.553; Panel Report, *Canada – Continued Suspension*, para. 7.521.

[1224]Panel Report, *US – Continued Suspension*, para. 7.572; Panel Report, *Canada – Continued Suspension*, para. 7.540 (referring to 1999 Opinion, p. 75).

[1225]Panel Report, *US – Continued Suspension*, para. 7.559; Panel Report, *Canada – Continued Suspension*, para. 7.527 (referring to replies of the scientific experts to questions posed by the Panel, Panel Reports, Annex D, para. 186).

605. The Panel should have addressed whether Dr. Cogliano's statements provided evidence that the European Communities' position on the genotoxicity of oestradiol-17β had some acceptance in the scientific community, even if it did not constitute the majority view. At the interim review, the Panel rejected the relevance of Dr. Cogliano's statement, explaining that "the *SPS Agreement* requires an analysis that goes beyond the identification of a potential adverse effect".[1227] According to the Panel, "[t]he analysis must include an examination of the potential for that adverse affect to come into being, originate, or result from the presence of the specific substance under review in food, beverages, or feedstuffs, in this case oestradiol-17β in meat and meat products derived from cattle treated with the hormone for growth promotion purposes."

606. There is no indication in the Panel's reasoning about how to reconcile Dr. Cogliano's statements with the Panel's conclusion that the scientific evidence in the SCVPH Opinions do not support the European Communities' conclusions that "for oestradiol-17β genotoxicity had already been demonstrated explicitly" or that the "presence of residues of oestradiol-17β in meat and meat products as a result of the cattle being treated with the hormone for growth promotion purposes leads to increased cancer risk."[1228]

607. The genotoxicity of oestradiol-17β also comes up in connection with the European Communities' conclusion that a threshold could not be established for oestradiol-17β. As with genotoxicity, the risk assessment would need to provide a scientific basis for the conclusion that a threshold could not be established for oestradiol-17β. The Panel does not identify what was the scientific basis for this conclusion, as it should have done. Rather, the Panel's reasoning reproduces the views of the experts on the issue of genotoxicity, with some of them mentioning the distinction between *in vivo* and *in vitro* genotoxicity. The discussion seeks to establish whether the genotoxicity *in vivo* of oestradiol-17β had been accepted by the general scientific community, rather than whether the European Communities' risk assessment provided scientific evidence of the genotoxicity *in vivo* of oestradiol-17β and whether this evidence came from a respected and qualified source. For example, the Panel relies on the following opinion provided by Dr. Boobis:

> Dr. Boobis concluded that there is no good evidence that oestradiol is genotoxic *in vivo* or that it causes cancer by a genotoxic mechanism. Indeed the evidence is against this. Hence, the scientific evidence does not support the European Communities' position that the levels of the hormones in meat from treated cattle are not of relevance.[1229]

608. Dr. Boisseau's response also goes beyond a verification of whether the European Communities' evidence on genotoxicity came from a respected and qualified source, into an examination of the general acceptance of the scientific basis of the European Communities' risk assessment:

[1226]Panel Report, *US – Continued Suspension*, para. 7.561; Panel Report, *Canada – Continued Suspension*, para. 7.529 (referring to replies of the scientific experts to questions posed by the Panel, Panel Reports, Annex D, para. 154, and transcript of the Panel meeting with the scientific experts, Panel Reports, Annex G, para. 327).

[1227]Panel Report, *US – Continued Suspension*, para. 6.118; Panel Report, *Canada – Continued Suspension*, para. 6.110.

[1228]Panel Report, *US – Continued Suspension*, para. 7.572; Panel Report, *Canada – Continued Suspension*, para. 7.540. (footnote omitted)

[1229]Panel Report, *US – Continued Suspension*, para. 7.562; Panel Report, *Canada – Continued Suspension*, para. 7.530 (referring to replies of the scientific experts to questions posed by the Panel, Panel Reports, Annex D, para. 184).

> In a review of the scientific literature and the 1999 report of the Committee for Veterinary Medicinal Products of the European Medicine Agency, Dr. Boisseau concluded that the demonstration remains to be made that the observed indicator effects are representative of mutagenesis at the gene or chromosome level and also occur in somatic cells *in vivo*. This is not likely in the view of the following: earlier studies had mostly indicated that hormones do not induce micronuclei or other chromosomes aberration types *in vivo*. With the exception of the study reported by Dhillon and Dhillon, the recent data confirm the earlier findings and clearly indicate that hormones and/or their synthetic analogues are not associated with genotoxicity properties in the bone marrow micronucleas assay *in vivo*.[1230]

609. At the same time, the Panel fails to explain how it reconciled its conclusion with the testimony of other experts that appear to acknowledge that the European Communities' risk assessment was based on evidence of genotoxicity *in vivo* of oestradiol-17β. In his written responses to questions by the Panel, Dr. Guttenplan referred to a study, cited by the European Communities, allegedly indicating that the reactive metabolite oestradiol-3, 4-quinone induces mutations in mice skin *in vivo*.[1231] Dr. Guttenplan testified that "[t]he catechol oestrogen-quinone form DNA adducts in cultured cells and in mouse skin", and concluded that "[t]his evidence was stronger compared to previous reports" , adding that "the evidence now is much stronger."[1232] The Panel further explained, in the interim review, that it did "not read this statement as implying that the residues of oestradiol-17β in meat from treated cattle are definitely genotoxic".[1233] The Panel added that, "even if this were the case, the issue of genotoxicity is only relevant to the issue of whether a threshold could be determined for this substance."[1234]

610. We reiterate that the Panel was not called upon to determine whether there is general acceptance that oestradiol-17β is genotoxic *in vivo* or that it causes cancer by a genotoxic mechanism. Instead, the focus should have been on the evidence relied upon by the European Communities in its risk assessment. As we noted earlier, the 1999 Opinion refers to several studies on the genotoxicity of oestradiol-17β.[1235] Additional studies are discussed in the 2002 Opinion.[1236] These studies should have been the focus of the Panel's analysis, yet they are not mentioned in the Panel's analysis. The Panel does not give any reasons why it did not consider them relevant.

611. The European Communities' risk assessment also focused on the endogenous levels of hormones in pre-pubertal children and observed that these levels were lower than previously thought.[1237] Dr. Guttenplan seemed to accept the European Communities' position on this issue:

> Dr. Guttenplan found that the levels in meat could result in bioavailable oestrogen exceeding the daily production rate of oestradiol in pre-pubertal children. "For pre-pubertal children, even with the low bioavailabilty of estrogen ... and its low levels in meats,

[1230]Panel Report, *US – Continued Suspension*, para. 7.563; Panel Report, *Canada – Continued Suspension*, para. 7.531 (referring to replies of the scientific experts to questions posed by the Panel, Panel Reports, Annex D, para. 136).
[1231]Replies of the scientific experts to questions posed by the Panel, Panel Reports, Annex D, para. 181.
[1232]*Ibid*.
[1233]Panel Report, *US – Continued* Suspension, para. 6.113; Panel Report, *Canada – Continued Suspension*, para. 6.105.
[1234]*Ibid*.
[1235]1999 Opinion, pp. 39-41.
[1236]2002 Opinion, pp. 13 and 14.
[1237]1999 Opinion, p. 38.

> it appears possible that intake levels would be within an order of magnitude of those of the daily production rate. This is greater than FDA's [(Food and Drug Administration of the United States)] ADI and suggests some risk to this population. If there [are] genotoxic effects of estradiol in children, they may be reflected over a lifetime, as mutations arising from DNA damage are permanent. It seems the more accurate methods of analysis could now be used to measure the effect of eating hormone-treated beef on blood levels of estrogen in children and post-menopausal women. If practical, this experiment would be important in establishing or refuting the arguments of the [European Communities]."[1238]

The Panel does not address this statement further nor does the Panel explain how Dr. Guttenplan's conclusion should be reconciled with the Panel's conclusion that the European Communities' risk assessment did not examine the specific risks arising from the consumption of meat from cattle treated with oestradiol-17β.

612. We have identified above how the Panel approached its task without proper regard to the standard of review and the limitations this places upon the appraisal of expert testimony. Ultimately, the Panel reviewed the scientific experts' opinions and somewhat peremptorily decided what it considered to be the best science, rather than following the more limited exercise that its mandate required. In addition, the European Communities has drawn our attention to the following response provided by Dr. Guttenplan to the Panel's question on the specificity of the European Communities' risk analysis:

> I believe the [European Communities] has done a thorough job in identifying the potential for adverse effects on human health of oestradiol-17β found in meat derived from cattle to which this hormone had been administered. They have identified a number of potential adverse effects of oestradiol-17β in humans. They have established metabolic pathways relevant to these effects, and have examined mechanisms of these effects. In addition they have performed thorough studies of residue levels in cattle, and the environment. The evidence evaluating the occurrence of adverse effects is weak. Animal models are very limited and the target organs do not coincide well with the target organs in humans. There are basically no epidemiological studies comparing matched populations consuming meat from untreated and hormone-treated cattle. Thus, little can be inferred about the potential occurrence of the adverse effects, the potential for adverse effects seems reasonable.[1239]

613. In his response, Dr. Guttenplan seems to recognize that the European Communities' risk assessment did specifically examine the potential for adverse effects from the consumption of meat from cattle treated with oestradiol-17β. Dr. Guttenplan's response is summarized in the Panel's reasoning.[1240] Yet, the Panel does not address that response any further. Given that the European

[1238]Panel Report, *US – Continued* Suspension, para. 7.528; Panel Report, *Canada – Continued Suspension*, para. 7.500 (quoting replies of the scientific experts to Question 52 posed by the Panel, Panel Reports, Annex D, para. 413.
[1239]Replies of the scientific experts to questions posed by the Panel, Panel Reports, Annex D, para. 145).
[1240]Panel Report, *US – Continued Suspension*, para. 7.523; Panel Report, *Canada – Continued Suspension*, para. 7.495.

Communities was entitled to rely on minority views, the Panel was required to explain why it did not consider that Dr. Guttenplan's testimony supported the European Communities' position.

614. An additional flaw in the Panel's reasoning relates to the following remark at the end of Panel's summary of the experts' responses:

> Additionally, in response to direct questioning during the Panel meeting with the experts, Drs. Boobis, Boisseau, and Guttenplan all agreed that there is no appreciable risk of cancer from residues of oestradiol-17β in meat and meat products from cattle treated with the hormone for growth promotion purposes. While all the experts who responded to the question agreed that a zero risk could not be guaranteed, the actual level of risk was in their view so small as to not be calculable.[1241]

It was not the Panel's task, much less that of the experts that the Panel consulted, to determine whether there is an appreciable risk of cancer arising from the consumption of meat from cattle treated with oestradiol-17β. Instead, the Panel was called upon to review the European Communities' risk assessment.

615. The United States and Canada argue that the Panel properly exercised its discretion as the trier of facts.[1242] We have found that the Panel did not apply the proper standard of review. This is a legal error and does not fall within the authority of the Panel as the trier of facts. Moreover, we have found instances in which the Panel exceeded its authority in the assessment of the testimony of the scientific experts. By merely reproducing testimony of some experts that would appear to be favourable to the European Communities' position, without addressing its significance, the Panel effectively disregarded evidence that was potentially relevant for the European Communities' case. This cannot be reconciled with the Panel's duty to make an "objective assessment of the facts of the case" pursuant to Article 11 of the DSU.

616. For these reasons, we find that the Panel failed to conduct an objective assessment of the facts of the case, as required by Article 11 of the DSU, in determining whether the European Communities' risk assessment satisfied the requirements of Article 5.1 and Annex A of the *SPS Agreement*.

F. *Conclusion*

617. We recall that we have found above that the Panel erred in its interpretation and application of Article 5.1 in relation to risks of misuse and abuse in the administration of hormones to cattle for growth-promoting purposes. We have also found that the Panel misallocated the burden of proof, and failed to conduct an objective assessment of the facts, in its analysis of whether the European Communities' risk assessment met the requirements of Article 5.1 of the *SPS Agreement*.

618. In addition, we found earlier that the Panel has infringed the European Communities' due process rights by inappropriately relying on the testimony of Drs. Boisseau and Boobis in its evaluation of the consistency with Article 5.1 of the *SPS Agreement* of the European Communities' risk assessment relating to oestradiol-17β. Thus, the Panel's conclusions rest, to a large extent, on an improper evidentiary basis.

[1241]Panel Report, *US – Continued Suspension*, para. 7.569; Panel Report, *Canada – Continued Suspension*, para. 7.537 (referring to the transcript of the Panel meeting with the scientific experts, Panel Reports, Annex G, paras. 707-742).

[1242]United States' appellee's submission, para. 47; Canada's appellee's submission, para. 73.

619. Accordingly, we reverse the Panel's finding that the European Communities has not satisfied the requirements of Article 5.1 and Annex A, paragraph 4, of the *SPS Agreement*. As a consequence, we also reverse the Panel's findings that Directive 2003/74/EC was not based on a risk assessment within the meaning of Article 5.1 of the *SPS Agreement* and that the European Communities' "implementing measure on oestradiol-17β is not compatible with Article 5.1 of the *SPS Agreement*."[1243]

620. Having reversed the Panel, we must now determine whether we can complete the analysis by reviewing ourselves the consistency of the European Communities' risk assessment relating to oestradiol-17β with Article 5.1 of the *SPS Agreement*. In the past, the Appellate Body has completed the analysis when there were sufficient factual findings by the panel or undisputed facts on the Panel record to enable it to do so.[1244] In light of the numerous flaws we have found in the Panel's analysis, and the highly contested nature of the facts, we do not consider it possible to complete the analysis in this case. Thus, we make no findings on the consistency or inconsistency of the European Communities' import ban relating to oestradiol-17β.

VII. The Consistency with Article 5.7 of the *SPS Agreement* of the European Communities' Provisional Import Ban on Meat from Cattle Treated with Testosterone, Progesterone, Trenbolone Acetate, Zeranol, and MGA for Growth-Promotion Purposes

A. *Introduction*

621. We turn finally to the European Communities' appeal of the Panel's finding that the European Communities' provisional ban on meat from cattle treated with testosterone, progesterone, trenbolone acetate, zeranol, and MGA failed to meet the requirements of Article 5.7 of the *SPS Agreement* because the relevant scientific evidence was not "insufficient" within the meaning of that provision. Section B describes the conclusions of the European Communities' evaluation of the potential adverse health effects of the five hormones, and section C summarizes the Panel's findings under Article 5.7 of the *SPS Agreement*. Section D provides an overview of the claims and arguments raised on appeal. In section E, we review the Panel's findings that the relevant scientific evidence in relation to the five hormones was not "insufficient" within the meaning of Article 5.7. Our conclusions are set out in section F.

B. *The European Communities' Evaluation of the Five Hormones Subject to the Provisional Ban*

622. As we noted above[1245], following the adoption of the DSB's recommendations and rulings in *EC – Hormones*, the European Communities initiated 17 scientific studies aimed at evaluating, *inter alia*, the potential for adverse effects to human health from residues in bovine meat and meat products resulting from the use of oestradiol-17β, testosterone, progesterone, zeranol, trenbolone acetate, and MGA. The results of these studies, as well as other publicly available information, were reviewed by the SCVPH. On 30 April 1999, the SCVPH issued the "1999 Opinion, in which it concluded that "in view of the intrinsic properties of hormones and epidemiological findings, a risk to the consumer has been identified with different levels of conclusive evidence for the six hormones in question."[1246] As regards the five hormones, the 1999 Opinion further provided that "in spite of the individual toxicological and epidemiological data described in the report, the current state of knowledge did not

[1243]Panel Report, *US – Continued Suspension*, para. 7.579; Panel Report, *Canada – Continued Suspension*, para. 7.549.

[1244]Appellate Body Report, *US – Section 211 Appropriations Act*, para. 343.

[1245]See *supra*, sections I and IV.B.

[1246]1999 Opinion, p. 73.

allow a quantitative estimate of the risk."[1247] The European Communities concluded that "the currently available information for testosterone, progesterone and the synthetic hormones zeranol, trenbolone and particularly MGA has been considered inadequate to complete [a risk] assessment."[1248] The 1999 Opinion also states that "no final conclusions can be drawn with respect to the safety" of the five hormones.[1249]

623. The SCVPH subsequently reviewed the 1999 Opinion in 2000 and 2002, in the light of additional scientific information it received, but did not find it necessary to amend the conclusions originally reached in the 1999 Opinion. The 2000 Opinion emphasized "the obvious gaps in the present knowledge on target animal metabolism and residue disposition of the hormones under consideration, including the synthetic hormones", and stated that it expected "that the on-going [European Communities'] research programs will provide additional data on both topics".[1250] The 2002 Opinion arrived at the following specific conclusions in relation to potential risks arising from residues of the five hormones in bovine meat:

> (e) No new data regarding testosterone and progesterone relevant to bovine meat or meat products were available. However, it was emphasized that these natural hormones were used only in combination with oestradiol-17β or other oestrogenic compounds in commercial preparations.
>
> (f) Experiments with zeranol and trenbolone acetate suggested a more complex oxidative metabolism than previously assumed. These data needed further clarification as they might influence a risk assessment related to tissue residues of these compounds.
>
> (g) Zeranol and trenbolone acetate had been tested for their mutagenic and genotoxic potential in various systems with different endpoints. Both compounds exhibited only very weak effects.
>
> (h) Data on the genotoxicity of [MGA] indicated only weak effects. However, pro-apoptotic effects were noted in some cell-based assays, which were attributed to the impurities in commercial formulation. Further experiments should clarify the toxicological significance of these impurities.
>
> (i) Model experiments with rabbits treated with zeranol, trenbolone acetate or [MGA], mirroring their use in bovines, were designed to study the consequences of pre- and perinatal exposure to exogenous hormones. All compounds crossed the placental barrier easily and influenced to varying degrees the development of the foetus, at the doses used in the experiments.

[1247]Panel Report, *US – Continued Suspension*, para. 7.391 (quoting 1999 Opinion (Exhibit US-4 submitted by the United States to the Panel), p. 73); Panel Report, *Canada – Continued Suspension*, para. 7.388 (quoting 1999 Opinion (Exhibit CDA-2 submitted by Canada to the Panel), p. 73). The 1999 Opinion also concludes that "endocrine, developmental, immunological, neurobiological, immunotoxic, genotoxic and carcinogenic effects could be envisaged" for the five hormones, but "[i]n view of the intrinsic properties of the hormones and in consideration of epidemiological findings, no threshold levels could be defined". (See *ibid.*)

[1248]1999 Opinion, p. 75.

[1249]*Ibid.*

[1250]Panel Report, *US – Continued Suspension*, para. 7.392 (quoting 2000 Opinion (Exhibit US-17 submitted by the United States to the Panel), p. 4); Panel Report, *Canada – Continued Suspension*, para. 7.389 (quoting 2000 Opinion (Exhibit CDA-4 submitted by Canada to the Panel), p. 4).

> ...
>
> (k) Several studies were devoted to the potential impact of the extensive use of hormones on the environment. Convincing data were presented indicating the high stability of trenbolone acetate and [MGA] in the environment, whereas preliminary data were provided on the potential detrimental effects of hormonal compounds in surface water.[1251]

624. The European Communities enacted Directive 2003/74/EC, which provides for a *provisional* ban on meat and meat products from cattle treated with progesterone, testosterone, zeranol, trenbolone acetate and MGA for growth-promotion purposes. Before the Panel, the European Communities argued that the SCVPH Opinions and supporting studies provided the "available pertinent information" within the meaning of Article 5.7 on the basis of which the provisional ban on the five hormones had been enacted.[1252]

C. *The Panel's Findings*

625. At the outset of its analysis, the Panel recalled its earlier conclusion that the measure at issue, to the extent that it provisionally bans the importation of meat from cattle treated with the hormones progesterone, testosterone, zeranol, trenbolone acetate, and MGA, is an SPS measure within the meaning of Article 1 and paragraph 1 of Annex A to the *SPS Agreement*.[1253] The Panel, furthermore, observed that the "parties address the issue of the compatibility of the provisional ban on the above-mentioned five hormones with the provisions of Article 5.7 of the *SPS Agreement*" and that "[n]one ... discussed the compatibility of the ban imposed with respect to these five hormones with Article 5.1".[1254] Therefore, the Panel stated that it would "limit its review to the conformity of the [European Communities'] ban on the five hormones with the requirements of Article 5.7".[1255]

626. Having identified Article 5.7 as the relevant provision, the Panel referred to the Appellate Body's interpretation of this provision as setting out the following four cumulative requirements that must be satisfied in order to adopt and maintain a provisional measure under the *SPS Agreement*:

> (a) the measure is imposed in respect to a situation where "relevant scientific evidence is insufficient";
>
> (b) the measure is adopted "on the basis of available pertinent information";
>
> (c) the WTO Member which adopted the measure must "seek to obtain the additional information necessary for a more objective assessment of risk"; and

[1251]Panel Report, *US – Continued Suspension*, para. 7.393 (quoting 2002 Opinion (Exhibit US-1 submitted by the United States to the Panel), pp. 21 and 22); Panel Report, *Canada – Continued Suspension*, para. 7.390 (quoting 2002 Opinion (Exhibit CDA-7 submitted by Canada to the Panel), pp. 21 and 22).

[1252]Panel Report, *US – Continued Suspension*, para. 7.581; Panel Report, *Canada – Continued Suspension*, para. 7.551.

[1253]Panel Report, *US – Continued Suspension*, para. 7.590; Panel Report, *Canada – Continued Suspension*, para. 7.565. (footnote omitted)

[1254]Panel Report, *US – Continued Suspension*, para. 7.591; Panel Report, *Canada – Continued Suspension*, para. 7.566. (footnote omitted)

[1255]*Ibid.*

(d) the Member which adopted the measure must "review the ... measure accordingly within a reasonable period of time".[1256]

627. Turning to the first requirement, the Panel referred to the Appellate Body's statement in *Japan – Apples* that scientific evidence will be 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 risk assessment.[1257] Recalling the approach it had adopted under Articles 5.1 and 5.2, the Panel dismissed the relevance of instances of misuse or abuse and difficulties of control in the administration of the five hormones for the purposes of its determination of whether the relevant scientific evidence on the five hormones was insufficient under Article 5.7. The Panel reasoned that instances of misuse and abuse are not, as such, a scientific issue likely to make a risk assessment impossible, and concluded that:

> In our opinion, the scientific issue is related to the effect of the ingestion of high doses of hormones residues, not to potential or actual misuse or abuse in the administration of hormones. Therefore, we will not address the issue of non compliance with good veterinary practices in our analysis under Article 5.7 of the *SPS Agreement*.[1258]

628. The Panel then addressed the European Communities' argument that the appropriate level of protection is relevant for the purposes of determining whether the scientific evidence is insufficient.[1259] The Panel rejected the European Communities' argument on the basis of the following reasoning:

> We note that sufficient scientific evidence is what is needed to make a risk assessment. The assessment whether there is sufficient scientific evidence or not to perform a risk assessment should be an objective process. The level of protection defined by each Member may be relevant to determine the measure to be selected to address the assessed risk, but it should not influence the performance of the risk assessment as such.
>
> Indeed, whether a Member considers that its population should be exposed or not to a particular risk, or at what level, is not relevant to determining whether a risk exists and what its magnitude is. *A fortiori*, it should have no effect on whether there is sufficient evidence of the existence and magnitude of this risk.
>
> A risk-averse Member may be inclined to take a protective position when considering the measure to be adopted. However, the determination of whether scientific evidence is sufficient to assess

[1256]Panel Report, *US – Continued Suspension*, para. 7.593; Panel Report, *Canada – Continued Suspension*, para. 7.568 (quoting Appellate Body Report, *Japan – Agricultural Products II*, para. 89).

[1257]Panel Report, *US – Continued Suspension*, para. 7.608; Panel Report, *Canada – Continued Suspension*, para. 7.586.

[1258]Panel Report, *US – Continued Suspension*, para. 7.603; Panel Report, *Canada – Continued Suspension*, para. 7.578.

[1259]The Panel described the European Communities' level of protection as:

> no (avoidable) risk, that is a level of protection that does not allow any unnecessary addition from exposure to genotoxic chemical substances that are intended to be added deliberately to food.

(Panel Report, *US – Continued Suspension*, para. 7.607; Panel Report, *Canada – Continued Suspension*, para. 7.585 (quoting replies of the European Communities to questions posed by the Panel after the second Panel meeting, Panel Reports, Annex C-1, para. 69))

> the existence and magnitude of a risk must be disconnected from the intended level of protection.[1260]

629. The Panel next observed that the United States and Canada argued that JECFA and several national regulatory bodies have determined that the scientific evidence regarding these hormones is adequate or sufficient to conduct a risk assessment. The Panel, however, agreed with the parties that scientific evidence which was previously deemed to be sufficient could subsequently become insufficient.[1261] On this basis, the Panel sought to determine under what circumstances could relevant, previously sufficient, scientific evidence become insufficient within the meaning of Article 5.7.

630. Recalling the Appellate Body's decision in *Japan – Apples*, the Panel reasoned that "Article 5.7 will apply in situations where, in substance, the relevant scientific evidence does not allow the completion of an objective evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages, or feedstuffs."[1262] Also referring to the Appellate Body's decision in *Japan – Apples*, the Panel stated that "the existence of scientific uncertainty does not automatically amount to a situation of insufficiency of relevant scientific evidence".[1263] The Panel added that, although it agreed that "under certain circumstances what was previously sufficient evidence could become insufficient", it did not "believe that the existence of scientific uncertainty means that previously sufficient evidence has in fact become insufficient nor should it *ipso facto* justify the applicability of Article 5.7 of the *SPS Agreement*".[1264]

631. The Panel then turned to examine the relationship between insufficiency of the evidence and the existence of an international standard. According to the Panel, "[t]he presumption of consistency of measures conforming to international standards, guidelines and recommendations with the relevant provisions of the *SPS Agreement* implies that these standards, guidelines or recommendations, particularly those referred to in this case, are based on risk assessments that meet the requirements of the *SPS Agreement*."[1265] The Panel recognized that "science continuously evolves", and that it "cannot be excluded that new scientific evidence or information calls into question existing evidence" or that "different risk assessments reach different interpretations of the same scientific evidence".[1266] For the Panel, the existence of international standards meant "that there was sufficient evidence for JECFA to undertake the appropriate risk assessments".[1267] The Panel added:

> As a result, we consider that, in order to properly take into account the existence of international standards, guidelines and recommendations in this case, our approach should be to assess

[1260]Panel Report, *US – Continued Suspension*, paras. 7.610-7.612; Panel Report, *Canada – Continued Suspension*, paras. 7.588-7.590.

[1261]Panel Report, *US – Continued Suspension*, para. 7.620; Panel Report, *Canada – Continued Suspension*, para. 7.598.

[1262]Panel Report, *US – Continued Suspension*, para. 7.628; Panel Report, *Canada – Continued Suspension*, para. 7.606 (referring to Appellate Body Report, *Japan – Apples*, para. 179).

[1263]Panel Report, *US – Continued Suspension*, para. 7.631; Panel Report, *Canada – Continued Suspension*, para. 7.609 (referring to Appellate Body Report, *Japan – Apples*, para. 184).

[1264]Panel Report, *US – Continued Suspension*, para. 7.637; Panel Report, *Canada – Continued Suspension*, para. 7.615. In this respect, the Panel referred to the comments of Drs. Boisseau and Boobis on how scientific uncertainty is addressed in risk assessment. (Panel Report, *US – Continued Suspension*, para. 7.635; Panel Report, *Canada – Continued Suspension*, para. 7.613)

[1265]Panel Report, *US – Continued Suspension*, para. 7.644; Panel Report, *Canada – Continued Suspension*, para. 7.622.

[1266]Panel Report, *US – Continued Suspension*, para. 7.645; Panel Report, *Canada – Continued Suspension*, para. 7.623.

[1267]Panel Report, *US – Continued Suspension*, para. 7.644; Panel Report, *Canada – Continued Suspension*, para. 7.622.

> whether scientific evidence has become insufficient by determining whether the European Communities has produced any evidence of some sufficient change in the scientific knowledge so that what was once sufficient to perform an adequate risk assessment has now become insufficient (i.e., "deficient in force, quality or amount"). In this respect, suggesting hypothetical correlations or merely arguing that there could be more evidence on one concern or another should not be deemed sufficient to successfully claim that relevant scientific evidence has become *insufficient*.[1268] (original emphasis; footnote omitted)

632. The Panel concluded:

> ... if relevant evidence already exists, not any degree of insufficiency will satisfy the criterion under Article 5.7 that "relevant scientific evidence is insufficient". Having regard to our reasoning above, particularly with respect to scientific uncertainty and the existence of international standards, we consider that, depending on the existing relevant evidence, there must be a *critical mass* of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient. In the present case where risk assessments have been performed and a large body of quality evidence has been accumulated, this would be possible only if it put into question existing relevant evidence *to the point that* this evidence is no longer sufficient to support the conclusions of existing risks assessments. We therefore need to determine whether this is the case here.[1269] (original emphasis; footnote omitted)

633. Next, the Panel sought to identify the alleged insufficiencies in the scientific evidence that it would have to address. The Panel observed that, "[w]hereas, in application of the burden of proof in relation to Article 5.7 of the *SPS Agreement*, it should be for the party challenging the applicability of Article 5.7 to make a *prima facie* case that the relevant scientific evidence regarding the five hormones is sufficient, it is also for the European Communities, in application of the principle that it is for each party to prove its allegations, to support its own allegations with appropriate evidence."[1270] The Panel further noted that "even though in this case the European Communities is the complainant, it also argues as part of its allegations under Article 22.8 of the DSU that its implementing measure complies with Article 5.7 of the *SPS Agreement*."[1271] The Panel also recalled "the consequence of the presumption of consistency with the *SPS Agreement* and the GATT 1994 of measures which conform to international standards, guidelines and recommendations on the risk assessments on which such measures are based."[1272] From this, the Panel reasoned that, "[s]ince, in that context, the European Communities argues that the relevant scientific evidence is insufficient, we consider that it is for the European Communities to identify the issues for which such evidence is insufficient."[1273]

[1268]Panel Report, *US – Continued Suspension*, para. 7.647; Panel Report, *Canada – Continued Suspension*, para. 7.625.

[1269]Panel Report, *US – Continued Suspension*, para. 7.648; Panel Report, *Canada – Continued Suspension*, para. 7.626.

[1270]Panel Report, *US – Continued Suspension*, para. 7.652; Panel Report, *Canada – Continued Suspension*, para. 7.629. (footnote omitted)

[1271]*Ibid.*

[1272]*Ibid.*

[1273]*Ibid.*

Thus, the Panel did "not consider that, as Panel, we have any obligation to go beyond the insufficiencies identified by the European Communities."[1274]

634. Before turning to the alleged insufficiencies of the scientific evidence, however, the Panel noted that arguments and information presented to it were sometimes general and did not permit the Panel to address each insufficiency on a hormone-specific basis. For this reason, the Panel decided to address separately, on the basis of the insufficiencies discussed and identified by the European Communities: (i) the insufficiencies commonly identified for all of the five hormones at issue, "to the extent that information was not submitted on a hormone-specific basis, or to the extent an issue was raised with respect to all hormones, but evidence submitted only for one or two of them"[1275]; and (ii) the insufficiencies alleged for each hormone on the basis of the information that was specific for that hormone.

635. The Panel stated that the following insufficiencies in the relevant scientific evidence were identified and discussed by the European Communities in relation to all the five hormones at issue: (a) effects of hormones on certain categories of the population, such as pre-pubertal children; (b) dose response; (c) bioavailability; (d) long latency period for cancer; (e) the impact of the five hormones on the immune system; and (f) the impact of the five hormones at issue on development and reproduction.[1276]

636. With regard to the effects of the hormones on certain categories of the population, the Panel referred to the conclusions in the European Communities' risk assessment that individuals that have the lowest endogenous levels of sex hormones, particularly prepubescent children and post-menopausal women, might be at an increased risk of adverse health effects associated with exposure to exogenous sources of both oestrogens and testosterone.[1277] The Panel noted that the European Communities' risk assessment made reference to the development of new detection methods that had identified considerably lower levels of oestradiol endogenously produced by pre-pubertal children than the levels previously identified using traditional detection methods. The Panel also observed the European Communities' statement in the 1999 Opinion that "this is a critical area requiring additional study".[1278]

637. The Panel recalled the "critical mass" standard that it had developed to assess the insufficiency of the relevant scientific evidence under Article 5.7, and concluded that its task was to

[1274]Panel Report, *US – Continued Suspension*, para. 7.653; Panel Report, *Canada – Continued Suspension*, para. 7.630. The Panel also stated its view "that it is incumbent upon a party making a particular allegation to identify in its submissions the *relevance* of the evidence on which it relies to support its arguments". (Panel Report, *US – Continued Suspension*, para. 7.658; Panel Report, *Canada – Continued Suspension*, para. 7.635) (original emphasis) The Panel observed that, "in light of its functions under the DSU, it should limit its review of alleged insufficiencies in the relevant scientific evidence to those specifically discussed by the European Communities in its submissions", and would "only address the issues identified in the Opinions to the extent they are sufficiently related to an issue *discussed* by the European Communities." (Panel Report, *US – Continued Suspension*, para. 7.659; Panel Report, *Canada – Continued Suspension*, para. 7.636) (original emphasis)

[1275]Panel Report, *US – Continued Suspension*, para. 7.661; Panel Report, *Canada – Continued Suspension*, para. 7.638.

[1276]Panel Report, *US – Continued Suspension*, para. 7.663; Panel Report, *Canada – Continued Suspension*, para. 7.640. The European Communities also referred to "misuse and abuse (unspecified implants, off-label use, black market drugs, etc." in its first submission to the Panel. The Panel believed that this issue was not relevant to the insufficiency of the relevant scientific evidence under Article 5.7. (Panel Report, *US – Continued Suspension*, footnote 787 to para. 7.654, and para. 7.483; Panel Report, *Canada – Continued Suspension*, footnote 734 to para. 7.631)

[1277]See Panel Report, *US – Continued Suspension*, para. 7.664; and Panel Report, *Canada – Continued Suspension*, para. 7.641.

[1278]Panel Report, *US – Continued Suspension*, para. 7.665; Panel Report, *Canada – Continued Suspension*, para. 7.642. (footnote omitted)

examine "whether the more sensitive detection methods which identified lower hormonal levels in prepubertal children than thought until now are such as to call into question the range of physiological levels of the sex hormones in humans currently believed to exist".[1279]

638. The Panel concluded that:

> We note that the evidence presented relates only to oestradiol, but that the claim we are examining with regard to the insufficiencies of the evidence are with respect to the five other hormones at issue, not oestradiol. We note furthermore that the 2002 Opinion concludes that these more sensitive detection methods have not yet been validated.
>
> ... we are not convinced that the studies discussed by the experts call into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient evidence now insufficient in relation to the effect of the five hormones on pre-pubertal children. Particularly, it has not been established that the data regarding the effects of hormones on which the JECFA assessments are based are insufficient in light of new evidence relating to the other five hormones at issue.[1280]

639. Regarding dose response, the Panel noted that the European Communities questioned JECFA's findings on dose response, in the light of new detection methods that called into question previous knowledge about the endogenous production levels of hormones in pre-pubertal children. The Panel then observed that JECFA could identify a dose response for the five hormones at issue. It also noted that the European Communities' argument was premised on the notion that endogenous production of natural hormones was lower than previously thought, and recalled its previous conclusion that scientific studies in support of this notion were not yet validated and applied exclusively to oestradiol. The Panel found that "it has not been established that new evidence was such as to put into question existing data on dose response and prevent the performance of a risk assessment."[1281]

640. With respect to bioavailability, the Panel observed that the new studies performed by the European Communities related exclusively to the bioavailability of oestradiol-17β, and that it was unclear whether their findings would be relevant to hormones other than oestrogens.[1282] The Panel then stated that "bioavailability would be an issue if the new evidence suggested that bioavailability in the case of ingestion of meat treated for growth promotion purposes is higher than previously thought."[1283] However, the Panel noted that, in the absence of data, JECFA appears to have assumed 100 per cent bioavailability. The Panel referred to the testimony of Drs. Boisseau and Boobis, which confirmed that the bioavailability of the synthetic hormones in humans has not been determined, and

[1279]Panel Report, *US – Continued Suspension*, para. 7.666; Panel Report, *Canada – Continued Suspension*, para. 7.643.

[1280]Panel Report, *US – Continued Suspension*, paras. 7.670 and 7.671; Panel Report, *Canada – Continued Suspension*, paras. 7.647 and 7.648.

[1281]Panel Report, *US – Continued Suspension*, para. 7.675; Panel Report, *Canada – Continued Suspension*, para. 7.652.

[1282]Panel Report, *US – Continued Suspension*, para. 7.677; Panel Report, *Canada – Continued Suspension*, para. 7.654 (referring to European Communities' second written submission to the Panel, paras. 123 and 124). These paragraphs describe excerpts contained in the 1999 and 2002 Opinions, which call into question NOEL (no-observed effect level) studies conducted by JECFA. (See 1999 Opinion, pp. 36 and 37, and 2002 Opinion, p. 12)

[1283]Panel Report, *US – Continued Suspension*, para. 7.679; Panel Report, *Canada – Continued Suspension*, para. 7.656.

for this reason JECFA assumed 100 per cent bioavailability.[1284] For these reasons, the Panel concluded that it was not established that "any new evidence on bioavailability has been developed regarding specifically the five hormones at issue, which would affect the current knowledge on the subject."[1285]

641. Regarding the long latency period[1286] of cancer and confounding factors[1287], the Panel noted the European Communities' allegation that "it may not be in a position to demonstrate the existence of a clear harm in case of cancer because of the long latency period and the numerous confounding factors that play a role in the development of cancer."[1288] The Panel then observed that Drs. Boobis, Cogliano, and Guttenplan agreed that it was important to take account of the long latency period of cancer in conducting a risk assessment.[1289] The Panel noted further Drs. Boisseau's and Boobis' opinions that epidemiological studies, even if taking into account long latency periods for cancer, might not be able to identify the specific agent that has caused the disease, by virtue of the many confounding factors.[1290] In this respect, the Panel referred to Dr. Cogliano's statement that "it was generally possible to identify confounding factors in epidemiological studies" but it was often difficult to "determine whether the observed tumours can be attributed to the agent under study or to a confounding factor".[1291] The Panel observed that Drs. Cogliano, Guttenplan, and Boobis expressed the view that the epidemiological studies submitted by the European Communities did not establish a link or correlation between higher incidence of cancer and the consumption of residues of hormones in treated meat[1292], and found that:

> On the one hand, the comments of the experts suggest that epidemiological studies have not been able to single out residues of hormones in meat treated for growth promotion purposes as a cause of cancer, and that this would be difficult. On the other hand, the Panel notes that it is possible to assess long term effects through long term studies of experimental animals, even if they involve much higher doses than would be encountered in consumption of meat from animals treated with growth promoting hormones. It has also been possible to take into account the risk attached to latency through the setting of ADI. The European Communities has not identified

[1284]Panel Report, *US – Continued Suspension*, paras. 7.680 and 7.682; Panel Report, *Canada – Continued Suspension*, para. 7.657 and 7.659 (quoting replies of the scientific experts to Question 43 posed by the Panel, Panel Reports, Annex D, paras. 347 and 351).

[1285]Panel Report, *US – Continued Suspension*, para. 7.684; Panel Report, *Canada – Continued Suspension*, para. 7.661.

[1286]A "latency period" is the period between exposure to an agent or process and the appearance of symptoms. (*Merriam-Webster Medical Dictionary* available at: <www.merriam-webster.com>)

[1287]Confounding factors are factors other than the one investigated which may also correlate with the disease endpoint. (Replies of the scientific experts to Question 24 posed by the Panel, Panel Reports, Annex D, para. 221)

[1288]Panel Report, *US – Continued Suspension*, para. 7.685; Panel Report, *Canada – Continued Suspension*, para. 7.662.

[1289]Panel Report, *US – Continued Suspension*, paras. 7.687-7.690; Panel Report, *Canada – Continued Suspension*, paras. 7.664-7.667 (quoting replies of the scientific experts to Question 23 posed by the Panel, Panel Reports, Annex D, paras. 210, 213, and 214).

[1290]Panel Report, *US – Continued Suspension*, paras. 7.691 and 7.692; Panel Report, *Canada – Continued Suspension*, paras. 7.668 and 7.669 (quoting replies of the scientific experts to Question 23 posed by the Panel, Panel Reports, Annex D, paras. 209 and 211).

[1291]Panel Report, *US – Continued Suspension*, para. 7.693; Panel Report, *Canada – Continued Suspension*, para. 7.670 (quoting replies of the scientific experts to Question 24 posed by the Panel, Panel Reports, Annex D, para. 220).

[1292]Panel Report, *US – Continued Suspension*, paras. 7.695-7.697; Panel Report, *Canada – Continued Suspension*, paras. 7.672-7.674 (quoting replies of the scientific experts to Question 26 posed by the Panel, Panel Reports, Annex D, paras. 241, 242, and 239).

> any evidence quantitatively and qualitatively sufficient to call into question the fundamental precepts of existing knowledge and evidence and the approach followed so far in order to integrate the long latency period of cancer in risk assessment.[1293]

642. Turning to the effects of the hormones on the immune system, the Panel noted the conclusion contained in the 1999 Opinion that there is insufficient evidence as to the effects of the hormones on the immune system. The Panel rejected the European Communities' contention that it was for the responding parties to present evidence that adverse immune effects could not occur from residues of hormone-treated meat, because all the responding parties had to prove was their assertion that the relevant scientific evidence on these particular risks was sufficient to perform an adequate risk assessment.[1294] Next, the Panel observed that the experts identified potential adverse effects on the immune system arising exclusively from oestrogens[1295], and that there was no evidence to suggest that those risks could not be addressed through a dose-response approach.[1296] The Panel also concluded that the 1999 Opinion itself does not provide evidence of impact of any of the five hormones on the immune system.[1297] For these reasons, the Panel found that "it is not established that there exists a critical mass of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence on hormone effects on the immune system now insufficient."[1298]

643. Finally, as regards the effects on growth and reproduction, the Panel initially observed that the European Communities had advanced no specific argument in relation to the insufficiency of the evidence of adverse effects of the five hormones on growth and reproduction. Nevertheless, the Panel decided to address this issue in light of the European Communities' contention that the new data revealed "important gaps, insufficiencies and contradictions"[1299] in the relevant scientific evidence. The Panel observed that Dr. Guttenplan initially identified a number of gaps in the scientific evidence that could relate to growth and reproduction, but subsequently declared that it was possible to conduct a risk assessment of the five hormones.[1300] Dr. Boobis, in turn, expressed the view that the scientific studies do not "support the contention that they have identified important new gaps, insufficiencies and contradictions in the scientific information" and that additional information obtained "was often not definitive, sometimes it was not relevant, in some instances it confirmed or expanded on previous knowledge".[1301] Next, the Panel dismissed the opinions of Drs. Sippell and Guttenplan about potential developmental effects of hormones in children on the basis that these statements reflected

[1293]Panel Report, *US – Continued Suspension*, para. 7.699; Panel Report, *Canada – Continued Suspension*, para. 7.676.
[1294]Panel Report, *US – Continued Suspension*, para. 7.705; Panel Report, *Canada – Continued Suspension*, para. 7.682.
[1295]Panel Report, *US – Continued Suspension*, para. 7.706; Panel Report, *Canada – Continued Suspension*, para. 7.683.
[1296]Panel Report, *US – Continued Suspension*, para. 7.707; Panel Report, *Canada – Continued Suspension*, para. 7.684.
[1297]Panel Report, *US – Continued Suspension*, para. 7.706; Panel Report, *Canada – Continued Suspension*, para. 7.683 (referring to 1999 Opinion, pp. 51, 55, 60, and 66).
[1298]Panel Report, *US – Continued Suspension*, para. 7.708; Panel Report, *Canada – Continued Suspension*, para. 7.685.
[1299]Panel Report, *US – Continued Suspension*, para. 7.709; Panel Report, *Canada – Continued Suspension*, para. 7.686.
[1300]Panel Report, *US – Continued Suspension*, para. 7.710; Panel Report, *Canada – Continued Suspension*, para. 7.687.
[1301]Panel Report, *US – Continued Suspension*, para. 7.711; Panel Report, *Canada – Continued Suspension*, para. 7.688 (quoting replies of the scientific experts to Question 62 posed by the Panel, Panel Reports, Annex D, para. 495).

"doubts" but did not constitute "evidence of risks".[1302] Finally, the Panel considered that the evidence referred to by the European Communities related only to oestradiol-17β, and that the European Communities had not substantiated its assertion that the scientific evidence was insufficient to conduct a risk assessment with respect to the other five hormones. On this basis, the Panel concluded that "it has not been established that there is a critical mass of new evidence ... so as to make relevant, previously sufficient evidence now insufficient in relation to the growth and reproduction effects".[1303]

644. Next, the Panel turned to the specific insufficiencies alleged in relation to each of the five hormones individually.

645. In relation to progesterone, the Panel focused on the European Communities' allegation that the relevant scientific evidence on carcinogenic or genotoxic potential of this hormone was insufficient, because the other insufficiencies identified by the European Communities had already been addressed by the Panel in its analysis of the insufficiencies common to the five hormones.[1304] The Panel noted that the 2002 Opinion concluded that "[t]here is no evidence that progesterone or testosterone have genotoxic potential".[1305] The Panel observed that Drs. Boisseau, Boobis, and Guttenplan agreed that there was no evidence that progesterone was genotoxic. The Panel also referred to Dr. Boisseau's opinion that the scientific evidence submitted by the European Communities did not support the conclusion that carcinogenic effects of progesterone are related to a mechanism other than hormonal activity.[1306] The Panel noted further that IARC opinions had not evaluated the carcinogenicity of residues of progesterone in beef, and quoted the opinions of Drs. Boobis and Guttenplan that the relevant scientific evidence on progesterone was sufficient to conduct a risk assessment.[1307] The Panel concluded that it had not been established that the relevant scientific evidence with respect to progesterone was insufficient within the meaning of Article 5.7 of the *SPS Agreement*.

646. Turning to testosterone, the Panel noted that many of the insufficiencies in the relevant scientific evidence had been addressed in common with the other four hormones.[1308] The Panel's analysis therefore focused on the evidence of genotoxicity and carcinogenicity of testosterone. The Panel observed that the 1999 Opinion stated that no information was available on DNA damage induced by testosterone or its metabolites, and that "[w]hereas the evidence in favour of carcinogenicity was considered sufficient for testosterone in experimental animals, data in humans are limited".[1309] According to the Panel, this statement had to be read in conjunction with the conclusion that "the evidence regarding the role of testosterone in prostate cancer is currently weak".[1310] In the

[1302]Panel Report, *US – Continued Suspension*, para. 7.719; Panel Report, *Canada – Continued Suspension*, para. 7.696 (quoting transcript of the Panel's joint meeting with scientific experts on 27-28 September 2006, Panel Reports, Annex G, paras. 1061 and 1063).
[1303]Panel Report, *US – Continued Suspension*, para. 7.721; Panel Report, *Canada – Continued Suspension*, para. 7.698.
[1304]Panel Report, *US – Continued Suspension*, para. 7.729; Panel Report, *Canada – Continued Suspension*, para. 7.706.
[1305]Panel Report, *US – Continued Suspension*, para. 7.731; Panel Report, *Canada – Continued Suspension*, para. 7.708 (quoting 2002 Opinion, section 4.3, p. 15).
[1306]Panel Report, *US – Continued Suspension*, paras. 7.738; Panel Report, *Canada – Continued Suspension*, para. 7.715 (quoting replies of the scientific experts to Question 16 posed by the Panel, Panel Reports, Annex D, para. 158).
[1307]Panel Report, *US – Continued Suspension*, paras. 7.740 and 7.741; Panel Report, *Canada – Continued Suspension*, paras. 7.717 and 7.718.
[1308]Panel Report, *US – Continued Suspension*, para. 7.746; Panel Report, *Canada – Continued Suspension*, para. 7.726.
[1309]Panel Report, *US – Continued Suspension*, para. 7.749; Panel Report, *Canada – Continued Suspension*, para. 7.729 (quoting 1999 Opinion, p. 49).
[1310]Panel Report, *US – Continued Suspension*, para. 7.749; Panel Report, *Canada – Continued Suspension*, para. 7.729.

Panel's view, this evidence did not meet the "critical mass" test that it articulated to assess insufficiency within the meaning of Article 5.7. The Panel noted, moreover, Dr. Boisseau's opinion that the scientific evidence submitted by the European Communities did not support the conclusion that carcinogenic effects of testosterone are related to a mechanism other than hormonal activity.[1311] The Panel therefore found that it had not been established that the relevant scientific evidence with respect to testosterone was insufficient within the meaning of Article 5.7 of the *SPS Agreement*.

647. The Panel limited its analysis concerning trenbolone acetate to two distinct "insufficiencies" that were identified by the European Communities in the scientific evidence: (i) the metabolism of trenbolone acetate; and (ii) inadequate evidence of carcinogenicity in humans.[1312] Regarding the metabolism of trenbolone, the Panel contrasted the statement in the 2002 Opinion that "experiments with ... trenbolone acetate suggested a more complex oxidative metabolism than previously assumed"[1313] with Dr. Boobis' opinion that "these data do not affect the risk assessment of trenbolone acetate."[1314] In relation to the evidence on carcinogenicity of trenbolone, the Panel referred to Dr. Boobis' opinion that "[t]hese data are insufficient ... to alter the conclusion that ... trenbolone acetate has genotoxic potential in vivo"[1315]; Dr. Guttenplan's view that "[t]renbolone is either negative or marginally active in *in vitro* genotoxic assays"[1316]; and Dr. Boisseau's statement that "the scientific evidence relied upon in the SCVPH Opinions does not support the conclusion that the carcinogenic effects of trenbolone are related to a mechanism other than hormonal activity."[1317] The Panel also noted Dr. Boobis' opinion that the information available was sufficient for the European Communities to conduct a risk assessment in relation to the six hormones. In addition, the Panel observed that, although Dr. Guttenplan stated that no "accurate ADIs can be established [for trenbolone] at this point"[1318], he later clarified that this "does not mean that you can't make a risk assessment, it just means that the accuracy of the risk assessment is different."[1319] Thus, the Panel concluded that the relevant scientific evidence on trenbolone was not insufficient within the meaning of Article 5.7.

648. As regards zeranol, the Panel began by recalling the 1999 Opinion's conclusion that the scientific evidence "gave equivocal results insufficient for an evaluation of the mutagenic/genotoxic properties of zeranol" and that, as far as carcinogenicity of zeranol was concerned, "there is clear

[1311]Panel Report, *US – Continued Suspension*, paras. 7.752; Panel Report, *Canada – Continued Suspension*, para. 7.732 (quoting replies of the scientific experts to Question 16 posed by the Panel, Panel Reports, Annex D, para. 160).

[1312]Panel Report, *US – Continued Suspension*, para. 7.761; Panel Report, *Canada – Continued Suspension*, para. 7.743.

[1313]Panel Report, *US – Continued Suspension*, para. 7.762; Panel Report, *Canada – Continued Suspension*, para. 7.744 (quoting 2002 Opinion, section 7, p. 21).

[1314]Panel Report, *US – Continued Suspension*, para. 7.763; Panel Report, *Canada – Continued Suspension*, para. 7.745 (quoting replies of the scientific experts to Question 62 posed by the Panel, Panel Reports, Annex D, para. 480).

[1315]Panel Report, *US – Continued Suspension*, para. 7.770; Panel Report, *Canada – Continued Suspension*, para. 7.752 (quoting replies of the scientific experts to Question 62 posed by the Panel, Panel Reports, Annex D, para. 483).

[1316]Panel Report, *US – Continued Suspension*, para. 7.771; Panel Report, *Canada – Continued Suspension*, para. 7.753 (quoting replies of the scientific experts to Question 21 posed by the Panel, Panel Reports, Annex D, para. 200).

[1317]Panel Report, *US – Continued Suspension*, para. 7.775; Panel Report, *Canada – Continued Suspension*, para. 7.757 (quoting replies of the scientific experts to Question 16 posed by the Panel, Panel Reports, Annex D, para. 164).

[1318]Panel Report, *US – Continued Suspension*, para. 7.779; Panel Report, *Canada – Continued Suspension*, para. 7.761 (quoting replies of the scientific experts to Question 61 posed by the Panel, Panel Reports, Annex D, para. 457).

[1319]Panel Report, *US – Continued Suspension*, para. 7.780; Panel Report, *Canada – Continued Suspension*, para. 7.762 (quoting transcript of the Panel's joint meeting with scientific experts on 27-28 September 2006, Panel Reports, Annex G, para. 983).

evidence for the induction of liver adenomas and carcinomas in one animal species, but no assessment of the possible carcinogenicity of zeranol can be made."[1320] The Panel then analyzed the views expressed by the experts on the scientific evidence relating to the mutagenic, genotoxic and carcinogenic properties of zeranol, in particular Dr. Boisseau's remark that JECFA "concluded that the 'tumorigenic effect of zeranol was associated with its oestrogenic properties'"[1321] and the statement in the 2002 Opinion that an *in vitro* study of zeranol in which it "did not induce genotoxicity or mutagenicity."[1322] Dr. Sippell opined that zeranol and its metabolites "have been shown to be as potent as [oestradiol] ... in increasing the expression of estrogen-related genes in human breast cancer cells."[1323] However, referring to the same evidence, Dr. Boobis noted that *in vitro* studies have limited relevance "to the situation *in vivo*, where kinetic and metabolic factors will influence the magnitude of the response".[1324] Therefore, according to Dr. Boobis, "[t]hese data are insufficient to support the conclusion that these hormones have genotoxic potential in vivo."[1325] Dr. Guttenplan also noted that "[z]eranol can induce transformation of breast epithelial cells in culture with efficiency similar to that of oestradiol, but the mechanism is now known, and it is negative or marginally active in other assays."[1326] Dr. Boisseau opined that "the scientific evidence relied upon in the SCVPH Opinions does not support the conclusion that the carcinogenic effects of zeranol are related to a mechanism other than hormonal activity."[1327] Finally, the Panel also referred to Dr. Guttenplan's opinion that a more recent study suggested a risk from zeranol, but "the results were obtained in cultured cells and the relevance to human exposure to hormone-treated [meat] cannot be extrapolated from this study because of a myriad of uncertainties in such extrapolation. The study does suggest that additional tests of zeranol should be carried out."[1328] On this basis, the Panel concluded that "it is not established that relevant scientific evidence is insufficient in relation to the carcinogenicity of zeranol, within the meaning of Article 5.7 of the *SPS Agreement*."[1329]

649. Finally, in relation to MGA, the Panel focused on two distinct "insufficiencies" in the scientific evidence: (i) whether only limited data were available on residues of MGA in treated cattle; and (ii) whether the evidence for carcinogenicity of MGA in humans was inadequate.[1330] As a

[1320]Panel Report, *US – Continued Suspension*, para. 7.788; Panel Report, *Canada – Continued Suspension*, para. 7.772 (referring to 1999 Opinion, sections 4.5.5 to 4.5.7, pp. 64 and 65).

[1321]Panel Report, *US – Continued Suspension*, para. 7.790; Panel Report, *Canada – Continued Suspension*, para. 7.774 (quoting replies of the scientific experts to Question 16 posed by the Panel, Panel Reports, Annex D, para. 165).

[1322]Panel Report, *US – Continued Suspension*, para. 7.791; Panel Report, *Canada – Continued Suspension*, para. 7.775 (quoting 2002 Opinion, section 4.4.3, p. 16).

[1323]Panel Report, *US – Continued Suspension*, para. 7.792; Panel Report, *Canada – Continued Suspension*, para. 7.776 (quoting replies of the scientific experts to Question 41 posed by the Panel, Panel Reports, Annex D, para. 336).

[1324]*Ibid.* (quoting replies of the scientific experts to Question 62 posed by the Panel, Panel Reports, Annex D, para. 475).

[1325]Panel Report, *US – Continued Suspension*, para. 7.793; Panel Report, *Canada – Continued Suspension*, para. 7.777 (quoting replies of the scientific experts to Question 21 posed by the Panel, Panel Reports, Annex D, para. 198).

[1326]Panel Report, *US – Continued Suspension*, para. 7.795; Panel Report, *Canada – Continued Suspension*, para. 7.779 (quoting replies of the scientific experts to Question 21 posed by the Panel, Panel Reports, Annex D, para. 200).

[1327]Panel Report, *US – Continued Suspension*, para. 7.796; Panel Report, *Canada – Continued Suspension*, para. 7.780 (quoting replies of the scientific experts to Question 16 posed by the Panel, Panel Reports, Annex D, para. 166).

[1328]Panel Report, *US – Continued Suspension*, para. 7.797; Panel Report, *Canada – Continued Suspension*, para. 7.781 (quoting replies of the scientific experts to Question 25 posed by the Panel, Panel Reports, Annex D, para. 234).

[1329]Panel Report, *US – Continued Suspension*, para. 7.800; Panel Report, *Canada – Continued Suspension*, para. 7.784.

[1330]Panel Report, *US – Continued Suspension*, para. 7.812; Panel Report, *Canada – Continued Suspension*, para. 7.798.

preliminary remark, however, the Panel noted that no international standards for MGA existed, but "intensive work" had been performed on MGA at the international level, particularly two risk assessments by JECFA.[1331] The Panel observed that MGA was on Codex's priority list for recalculation of Maximum Residue Levels ("MRLs"), and that the draft MRL for MGA was at Step 7 of the Codex elaboration procedure. The Panel stated that "the role of JECFA in the international risk assessment process is such that some degree of relevance should be given to that work"[1332], and, on this basis, concluded that the existence of assessments by JECFA "suggests that evidence has been at one point sufficient."[1333]

650. As for the data on residues of MGA, which the European Communities suggested were outdated, the Panel noted that both Drs. Boisseau and De Brabander recognized that nearly all studies used by JECFA dated back to the 1960s and 1970s. Neither of them, however, stated that those studies were no longer valid. The Panel also recalled its earlier conclusion that the fact that a study is old does not *per se* put in doubt the validity of the study.[1334] The Panel, furthermore, quoted opinions by Drs. Boisseau and Boobis to the effect that new scientific studies did not undermine the MRLs for MGA calculated by JECFA, because the latter were based on very conservative assumptions.[1335]

651. Turning to the evidence on the carcinogenicity in humans of MGA, the Panel noted that the statement in the 2002 Opinion that "[t]he results [for genotoxicity of MGA] were negative in several experiments"[1336] seemed to confirm JECFA's conclusions. The Panel also made reference to Dr. Boobis' opinion that "[MGA was] negative in a range of tests for genotoxicity"[1337], and Dr. Guttenplan's statement that "MGA is negative in genotoxic assays".[1338] On the potential carcinogenicity of MGA, the Panel stressed that IARC has not assessed the specific risks of cancer arising from the consumption of meat treated with MGA, and recalled Dr. Boisseau's view that "the scientific evidence relied upon in the SCVPH Opinions does not support the conclusion that the carcinogenic effects of [MGA] are related to a mechanism other than hormonal activity."[1339] The Panel also referred to Dr. Boobis' opinion that the evidence was sufficient to conduct a risk assessment in relation to all six hormones at issue, and Dr. Guttenplan's statements that "[JECFA's] assessment for [MGA] seems sound" and that "[t]horough metabolic and estrogenic studies have been

[1331]Panel Report, *US – Continued Suspension*, para. 7.806; Panel Report, *Canada – Continued Suspension*, para. 7.799.
[1332]Panel Report, *US – Continued Suspension*, para. 7.813; Panel Report, *Canada – Continued Suspension*, para. 7.799.
[1333]Panel Report, *US – Continued Suspension*, para. 7.827; Panel Report, *Canada – Continued Suspension*, para. 7.813.
[1334]Panel Report, *US – Continued Suspension*, para. 7.816 (referring to *ibid.*, para. 7.423 *et seq.*); Panel Report, *Canada – Continued Suspension*, para. 7.802 (referring to *ibid.*, paras. 7.414 *et seq.*).
[1335]Panel Report, *US – Continued Suspension*, paras. 7.817 and 7.818; Panel Report, *Canada – Continued Suspension*, para. 7.803 and 7.804 (quoting replies of the scientific experts to Panel Questions 35 and 62, Panel Reports, Annex D, paras. 303 and 484).
[1336]Panel Report, *US – Continued Suspension*, para. 7.820; Panel Report, *Canada – Continued Suspension*, para. 7.806 (quoting 2002 Opinion, section 4.5.3, p. 18).
[1337]Panel Report, *US – Continued Suspension*, para. 7.822; Panel Report, *Canada – Continued Suspension*, para. 7.808 (quoting replies of the scientific experts to Question 21 posed by the Panel, Panel Reports, Annex D, para. 198).
[1338]Panel Report, *US – Continued Suspension*, para. 7.823; Panel Report, *Canada – Continued Suspension*, para. 7.809 (quoting replies of the scientific experts to Question 21 posed by the Panel, Panel Reports, Annex D, para. 200).
[1339]Panel Report, *US – Continued Suspension*, para. 7.826; Panel Report, *Canada – Continued Suspension*, para. 7.812 (quoting replies of the scientific experts to Question 16 posed by the Panel, Panel Reports, Annex D, para. 162).

carried out."[1340] The Panel concluded that the relevant evidence for MGA was not insufficient within the meaning of Article 5.7.[1341]

652. At the end of its analysis, the Panel said that it had asked the scientific experts whether the scientific evidence relied upon by the European Communities supported the European Communities' contention that the scientific studies initiated since 1997 had identified new important gaps, insufficiencies and contradictions in the scientific information and knowledge available on these hormones such that more scientific studies are necessary before the risk to human health from the consumption of meat from cattle treated with these hormones for growth-promotion purposes can be assessed. The Panel recalled its test that there must be a critical mass of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient evidence now insufficient and noted that the experts who expressed themselves in detail on this matter confirmed, both in general and for each of the five hormones subject to a provisional ban, that such critical mass had not been reached.[1342]

653. Thus, the Panel found:

> For all these reasons, we conclude that it has not been demonstrated that relevant scientific evidence was insufficient, within the meaning of Article 5.7 of the *SPS Agreement*, in relation to any of the five hormones with respect to which the European Communities applies a provisional ban.[1343]

654. Having made this finding, the Panel recalled that the four requirements outlined by the Appellate Body in *Japan – Agricultural Products II* applied cumulatively.[1344] The Panel added that, "[s]ince we found that the first requirement (the measure is imposed in respect to a situation where 'relevant scientific evidence is insufficient') has not been satisfied, we do not find it necessary to address any of the three other requirements."[1345] The Panel concluded:

> We therefore conclude that the [European Communities'] compliance measure does not meet the requirements of Article 5.7 of the *SPS Agreement* as far as the provisional ban on progesterone, testosterone, zeranol, trenbolone acetate and melengestrol acetate is concerned.[1346]

655. After setting out its conclusion, the Panel made the following clarification of its implications:

> Having reached that conclusion, we want to make clear that we only determined that it had not been established that the existing relevant scientific evidence was insufficient. This does not mean that no measure can be imposed by the European Communities under the

[1340]Panel Report, *US – Continued Suspension*, para. 7.829; Panel Report, *Canada – Continued Suspension*, para. 7.815 (quoting replies of the scientific experts to Question 61 posed by the Panel, Panel Reports, Annex D, para. 458).
[1341]Panel Report, *US – Continued Suspension*, para. 7.830; Panel Report, *Canada – Continued Suspension*, para. 7.816.
[1342]Panel Report, *US – Continued Suspension*, para. 7.834; Panel Report, *Canada – Continued Suspension*, para. 7.820.
[1343]Panel Report, *US – Continued Suspension*, para. 7.835; Panel Report, *Canada – Continued Suspension*, para. 7.821.
[1344]Panel Report, *US – Continued Suspension*, para. 7.836; Panel Report, *Canada – Continued Suspension*, para. 7.822.
[1345]*Ibid.*
[1346]*Ibid.*

> *SPS Agreement* in relation to the five hormones at issue. Indeed, our determinations are without prejudice to the legality of any [European Communities'] measure regarding these hormones, should the European Communities decide to complete its risk assessments pursuant to Article 5.1 of the *SPS Agreement*.[1347]

D. *Claims and Arguments on Appeal*

656. The European Communities claims that the Panel erred in finding that the relevant scientific evidence on the five hormones was not "insufficient" within the meaning of Article 5.7 of the *SPS Agreement* and that, consequently, the provisional ban on the importation and marketing of meat from cattle treated with the five hormones does not meet the requirements of that provision.

657. First, the European Communities argues that the Panel erred in finding that the European Communities' chosen level of protection was not relevant for the determination of whether the relevant scientific evidence on the five hormones was "insufficient" within the meaning of Article 5.7. The European Communities emphasizes that Article 3.3 of the *SPS Agreement* permits it to adopt SPS measures that result in a higher level of protection than the one "implie[d] or encapsulate[d]"[1348] in the relevant international standards, and for this reason its intended level of protection must be relevant for determining whether the scientific evidence is "insufficient" within the meaning of Article 5.7.

658. Secondly, the European Communities challenges the Panel's finding that the presumption of consistency that applies under Article 3.2 of the *SPS Agreement* to measures that conform to international standards "implies that these standards ... are based on risk assessments that meet the requirements of the *SPS Agreement*" and that therefore "there was sufficient evidence for JECFA to undertake the appropriate risk assessments."[1349] According to the European Communities, the presumption that applies to measures that conform to international standards does not necessarily mean that the international standards themselves are based on a risk assessment within the meaning of Article 5.1 because the international standard may not be based on a risk assessment, or it may be based on an assessment that takes into account different factors or outdated scientific opinions.

659. Thirdly, the European Communities argues that the Panel erred in allocating to the European Communities the burden of demonstrating that the provisional ban on meat and meat products treated with the five hormones met the requirements of Article 5.7 of the *SPS Agreement.* In doing so, the Panel erroneously interpreted Article 5.7 to be an exception to Article 5.1. The European Communities maintains that Article 5.7 confers on WTO Members a "qualified right"[1350] to take provisional SPS measures in cases where they consider that the relevant scientific evidence is insufficient. Therefore, the United States and Canada bore the burden of demonstrating that this condition had not been fulfilled by the European Communities. The European Communities asserts that the Panel mistakenly shifted the burden of proof under Article 5.7 to the European Communities by limiting its review exclusively to the "insufficiencies" in the scientific evidence that were identified by the European Communities in its submissions.[1351]

[1347]Panel Report, *US – Continued Suspension*, para. 7.837; Panel Report, *Canada – Continued Suspension*, para. 7.823.

[1348]European Communities' appellant's submission, para. 397.

[1349]European Communities' appellant's submission, para. 387 (quoting Panel Report, *US – Continued Suspension*, para. 7.644; and Panel Report, *Canada – Continued Suspension*, para. 7.622).

[1350]European Communities' appellant's submission, para. 368.

[1351]European Communities' appellant's submission, para. 380 (referring to Panel Report, *US – Continued Suspension*, para. 7.653; and Panel Report, *Canada – Continued Suspension*, para. 7.630).

660. Fourthly, the European Communities argues that the Panel erred in finding that, where international standards for a substance exist, a "critical mass" of new scientific evidence that calls into question the fundamental precepts of previous knowledge is required to render the relevant scientific evidence "insufficient" within the meaning of Article 5.7.[1352] The European Communities suggests that, if a Member may legitimately follow a "respectable minority view" in its risk assessment, "it must be incorrect and entirely disproportionate to exclude *a priori* that a respectable minority could not make the available scientific evidence insufficient."[1353] Thus, the Panel's "critical mass" standard imposed an excessively "high quantitative and qualitative threshold"[1354] with respect to the new scientific evidence that is required to render the relevant scientific evidence insufficient. According to the European Communities, the quality of the scientific evidence is more important that the quantity, and even a single study made by qualified and respectable scientists could be *a priori* sufficient to conclude that the scientific relevant scientific evidence is insufficient, provided that its merits are particularly relevant for the circumstances of the risk assessment.[1355] The European Communities also submits that the Panel's "critical mass" standard effectively "preclude[d] [the] application"[1356] of the precautionary principle in the interpretation of Articles 5.1 and 5.7, because it implies that the relevant scientific evidence passes immediately from a state of insufficiency under Article 5.7 to a state of complete knowledge under Article 5.1; there will be no transitional period in which Article 5.7 could apply.[1357] Furthermore, the European Communities submits that the application of the "critical mass" standard led the Panel to "ignore highly relevant scientific evidence"[1358], which demonstrated that the relevant scientific evidence was insufficient to perform a risk assessment. According to the European Communities, the relevant scientific evidence was insufficient to perform a risk assessment in the areas of: (i) effects of hormones on certain population groups; (ii) dose response; (iii) long latency periods for cancer and confounding factors; and (iv) adverse effects of the five hormones on growth and reproduction. The European Communities also asserts that the relevant scientific evidence was insufficient in relation to each of the five hormones assessed individually.

661. Finally, the European Communities asserts that the Panel failed to make an objective assessment of the facts, as required by Article 11 of the DSU, in reaching its findings under Article 5.7 of the *SPS Agreement*. The European Communities charges the Panel with ignoring Dr. Cogliano's statement that "the data are not sufficient" to conduct a "low-dose prediction of risk at levels you might find in hormone-treated meat."[1359] The European Communities adds that the Panel "arbitrarily chose between different scientific opinions" instead of determining whether the European Communities had "followed a scientifically plausible alternative"[1360] when adopting Directive 2003/74/EC. Therefore, the Panel impermissibly engaged in a *de novo* review of the scientific evidence in relation to the five hormones, in violation of Article 11of the DSU.

662. The United States responds that the Panel correctly found that the relevant scientific evidence on the five hormones subject to the provisional ban was not "insufficient" within the meaning of Article 5.7 of the *SPS Agreement*.

663. The United States submits that the Panel correctly interpreted Article 5.7, taking into account the context provided by Articles 3.2 and 3.3 of the *SPS Agreement*. This is because, in light of the

[1352]*Ibid*., para. 409 (quoting Panel Report, *US – Continued Suspension*, para. 7.648; and Panel Report, *Canada – Continued Suspension*, para. 7.626).

[1353]*Ibid*., para. 409.

[1354]*Ibid*., para. 412.

[1355]*Ibid*., para. 413.

[1356]*Ibid*., para. 427.

[1357]European Communities' statement at the oral hearing.

[1358]European Communities' appellant's submission, para. 447.

[1359]European Communities' appellant's submission, para. 279 (quoting transcript of the Panel's joint meeting with the scientific experts, Panel Reports, Annex G, para. 871).

[1360]*Ibid*., para. 281.

presumption of consistency with the *SPS Agreement* that applies to measures which conform to international standards under Article 3.2, the Panel was justified in finding that the existence of such standards indicated that there had been sufficient scientific evidence to conduct a risk assessment within the meaning of Article 5.1 for the five hormones at issue.[1361] The United States also argues that the Panel correctly concluded that the European Communities' desired level of protection was irrelevant for the determination of whether the relevant scientific evidence on the five hormones was "insufficient" within the meaning of Article 5.7. The United States suggests that the European Communities failed to demonstrate that its chosen level of protection is different from the level of protection that the Codex standards for the hormones at issue are designed to achieve.[1362] The United States adds that a risk assessment is a scientific process aimed at identifying whether a risk exists and, for this reason, risk assessors "need not have any particular level of protection in mind in conducting the risk assessment."[1363]

664. The United States also rejects the European Communities' assertion that the Panel misallocated the burden of proof in its analysis under Article 5.7. The United States argues that the Panel correctly noted that "one of the particularities of this case"[1364] was that the European Communities' claim that the United States breached Article 22.8 of the DSU was premised on an assertion that the European Communities had brought itself into conformity with the *SPS Agreement*. Taking into account the European Communities' concern that it should not be required to "prove a negative", all the Panel initially required was that the European Communities established a *prima facie* case of conformity with the *SPS Agreement*.[1365] According to the United States, the Panel only shifted the burden of proof to the United States once it had found that the European Communities had established such a *prima facie* case, and subsequently found that the United States had rebutted the European Communities' *prima facie* case of conformity with the *SPS Agreement* "by submitting positive evidence that demonstrated a breach of the *SPS Agreement*".[1366] The United States agrees with the Panel that "the burden [of proof] shifted back and forth between the parties and eventually 'neutralized' each other since each party also submitted evidence in support of its allegations".[1367] The United States further notes that "the Panel never described or treated Article 5.7 as an exception to Article 5.1"[1368], and for this reason the European Communities' allegation that the Panel interpreted Article 5.7 to be an exception to Article 5.1 is "speculation".[1369]

665. The United States maintains that the Panel did not err in finding that "a critical mass of new evidence" is required to render previously sufficient scientific evidence "insufficient" within the meaning of Article 5.7. In the United States' view, the Panel's "critical mass" standard did not impose a minimum quantitative requirement, because it refers to situations where "evidence becomes so quantitatively and qualitatively sufficient to call into question the fundamental precepts of previous knowledge and evidence", such that new scientific information is "at the origin of a change in the understanding of a scientific issue."[1370] The United States considers that it was "appropriate" for the Panel to focus on the question of "whether the relevant scientific evidence had *become* insufficient"[1371], because the five hormones at issue had been studied intensively for decades, international standards for four of them had existed for over 20 years, and because the European Communities itself had argued in *EC – Hormones* that the relevant scientific evidence on the five hormones was sufficient for it to conduct a risk assessment. Thus, there was "plentiful" evidence on

[1361]United States' appellee's submission, para. 70.
[1362]*Ibid.*, para. 71.
[1363]United States' appellee's submission, para. 72.
[1364]*Ibid.*, para. 93 (quoting Panel Report, *US – Continued Suspension*, para. 7.384).
[1365]*Ibid.*
[1366]*Ibid.*, para. 93.
[1367]*Ibid.*, para. 94 (referring to Panel Report, *US – Continued Suspension*, para. 7.386).
[1368]*Ibid.*, para. 96.
[1369]*Ibid.*
[1370]*Ibid.*, para. 78 (quoting Panel Report, *US – Continued Suspension*, para. 6.141). (emphasis omitted)
[1371]*Ibid.*, para. 80. (original emphasis)

record demonstrating that the relevant scientific evidence "[was] and remains sufficient" to conduct a risk assessment for the five hormones.[1372]

666. Finally, the United States argues that the Panel did not fail to make an objective assessment of the facts as required by Article 11 of the DSU in reaching its findings under Article 5.7 of the *SPS Agreement*. The United States asserts that the Panel acted within the bounds of its discretion as the trier of the facts by attributing to the different pieces of evidence a different weight and significance than the one attributed by the European Communities. The United States reiterates that "there was plentiful evidence in the record demonstrating that the relevant scientific evidence"[1373] remains sufficient to conduct a risk assessment for these five hormones, and therefore the Panel's consideration of whether there was a "'critical mass of new evidence' was proper and well-supported."[1374]

667. Canada also argues that the Panel properly found that the relevant scientific evidence on the five hormones subject to the provisional ban was not "insufficient" within the meaning of Article 5.7 of the *SPS Agreement*.

668. Canada submits that the Panel correctly found that the existence of international standards "implies" that sufficient evidence has existed to complete a risk assessment, in light of the presumption of compliance that applies to measures that conform with international standards under Article 3.2.[1375] According to Canada, the Panel accepted that this presumption could be rebutted, as it subsequently recognized that previously sufficient evidence could subsequently become "insufficient" within the meaning of Article 5.7 when it is "unsettled"[1376] by new studies. Canada considers that the Panel properly excluded from the scope of its analysis under Article 5.7 the level of protection chosen by the European Communities. Canada asserts that the European Communities' argument that the "sufficiency" of scientific evidence depends on the acceptable level of risk adopted by a Member[1377] undermines the "basic logic" of the *SPS Agreement*, according to which Article 5.7 operates as a "temporary 'safety valve'"[1378] in situations where there is insufficient scientific evidence to allow a Member to conduct a risk assessment that fulfils the requirements of Articles 2.2 and 5.1.

669. Canada maintains that the Panel did not err in allocating to the European Communities the burden of proving the insufficiency of the scientific evidence under Article 5.7. Canada additionally considers that the Panel correctly characterized Article 5.7 as a "qualified exemption"[1379] from the obligation under Article 2.2 not to maintain SPS measures without sufficient scientific evidence and only shifted the burden of proof under Article 5.7 to the European Communities once it was satisfied that Canada had sufficiently refuted the European Communities' allegation of compliance through positive evidence of a breach of Article 5.7. Canada posits further that this allocation of the burden of proof is consistent with the Appellate Body's ruling in *US – Wool Shirts and Blouses*, because it was for the European Communities, as the party alleging a breach of Article 22.8 of the DSU, to demonstrate that its implementing measure complied with Article 5.7 of the *SPS Agreement*.[1380]

[1372]United States' appellee's submission, para. 81.
[1373]*Ibid.* (referring to comments by the United States on the replies of the scientific experts, Codex, JECFA, and the IARC to questions posed by the Panel, Panel Reports, Annex F, paras. 47 and 48).
[1374]*Ibid.*, para. 82.
[1375]Canada's appellee's submission, para. 118 (quoting Panel Report, *Canada – Continued Suspension*, para. 7.622).
[1376]*Ibid.*, para. 119 (quoting Panel Report, *Canada – Continued Suspension*, para. 7.598).
[1377]*Ibid.*, para. 121 (referring to European Communities' appellant's submission, para. 397.
[1378]Canada's appellee's submission, para. 122.
[1379]*Ibid.*, para. 114 (quoting Appellate Body Report, *Japan – Agricultural Products II*, para. 80).
[1380]*Ibid.*, para. 115 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335).

670. Moreover, Canada argues that the Panel did not err in finding that, in situations where international risk assessments have been conducted for the substances at issue, a "critical mass" of new evidence would be required to render the relevant scientific evidence "insufficient" for the purposes of Article 5.7. Canada dismisses the European Communities' argument that the "critical mass" standard excludes *a priori* the possibility that a WTO Member base its risk assessment on respectable minority views, because in such situations there is "inherently"[1381] sufficient evidence to perform a risk assessment that provides a basis for the SPS measure. Canada asserts that Article 5.7 only applies to situations where there is insufficient scientific evidence so that it is not possible to conduct a risk assessment "at all", regardless of whether a measure is based on minority or mainstream scientific opinions.[1382] Canada adds that the notion of "critical mass" used by the Panel does not specify how much evidence would be needed to make insufficient scientific evidence that was previously sufficient, and does not "exclude the possibility that a new study or series of studies could call into question the scientific assumptions underpinning the current understanding of a scientific issue."[1383] Thus, Canada submits, the Panel's "critical mass" standard "correctly sets a high threshold"[1384] reflecting the presumption in this dispute that the available scientific evidence had been sufficient to adopt the relevant international standards.

671. Canada also asserts that the Panel did not fail to conduct an objective assessment of the facts under Article 11 of the DSU in reaching its findings under Article 5.7 of the *SPS Agreement*. Canada observes that, as the trier of facts, the Panel had the discretion to determine what weight to attach to the statements made by the experts in the course of the proceedings, and assess their expertise and credibility. Canada rejects the European Communities' allegations that the Panel "systematically downplay[ed]"[1385] the expert opinions indicating that the scientific evidence was insufficient to carry out a risk assessment. Such allegations fail to take into account the fact that, in addition to reviewing the written answers by the experts to the Panel's questions, the Panel was able to "observe these experts" during the meetings with them and was able to "arrive at an assessment of their respective expertise and their credibility in particular areas".[1386] Therefore, Canada considers that the Panel's reliance on the views of these experts was commensurate with its function as the trier of facts, and consequently was consistent with Article 11 of the DSU.

672. Australia agrees with the European Communities that the existence of international standards cannot be determinative of whether there is sufficient evidence to conduct a risk assessment under the first requirement of Article 5.7 of the *SPS Agreement*.[1387] Australia also considers that the Panel's interpretation of Article 5.7 failed to attribute significance to a Member's right under Article 3.3 of the *SPS Agreement* to adopt measures that result in a higher level of protection than would be achieved by measures based on the relevant international standards.[1388]

673. New Zealand disagrees with the European Communities' claims that the Panel erred in its assessment of Directive 2003/74/EC under Article 5.7 of the *SPS Agreement*. New Zealand argues that it was incumbent upon the European Communities, as the Member invoking Article 5.7, to demonstrate that the requirements of that provision have been met.[1389] New Zealand submits that the Panel correctly concluded that the European Communities has failed to meet this burden.[1390]

[1381] *Ibid.*, para. 127.
[1382] *Ibid.*, para. 128.
[1383] *Ibid.*
[1384] *Ibid.*
[1385] Canada's appellee's submission, para. 130 (referring to European Communities' appellant's submission, paras. 427 and 429).
[1386] *Ibid.*, para. 130.
[1387] Australia's third participant's submission, para. 55.
[1388] *Ibid.*, para. 56.
[1389] New Zealand's third participant's submission, para. 3.58.
[1390] *Ibid.*, para. 3.60.

E. *The Panel's Finding that the Relevant Scientific Evidence in Relation to the Five Hormones Was Not "Insufficient" Within the Meaning of Article 5.7 of the SPS Agreement*

674. 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*."[1391] This 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.

675. Having discussed the relationship between Articles 2.2, 5.1 and 5.7, we now focus on the conditions for the application of a provisional SPS measure pursuant to the latter provision. Article 5.7 provides:

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

676. The Appellate Body has explained that Article 5.7 sets out four obligations. Two of these obligations set conditions that must be met before a provisional SPS measure is adopted. The other two obligations are conditions for maintaining the provisional SPS measure once it has been taken. These four obligations are:

> (1) [the measure is] imposed in respect of a situation where "relevant scientific information is insufficient";
>
> (2) [the measure is] adopted "on the basis of available pertinent information";

[1391] Appellate Body Report, *Japan – Apples*, para. 179.

> (3) [the Member that adopted the measure] "seek[s] to obtain the additional information necessary for a more objective assessment of risk"; and
>
> (4) [the Member that adopted the measure] "review[s] the ... measure accordingly within a reasonable period of time."[1392]

677. Article 5.7 begins with the requirement that the "relevant scientific evidence" be "insufficient". As explained earlier, the relevant scientific evidence is "insufficient" where "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*."[1393] Under Article 5.1, WTO Members are allowed to base SPS measures on divergent or minority views provided they are from a respected and qualified source.[1394] Thus the existence of scientific controversy in itself is not enough to conclude that the relevant scientific evidence is "insufficient". It may be possible to perform a risk assessment that meets the requirements of Article 5.1 even when there are divergent views in the scientific community in relation to a particular risk. By contrast, Article 5.7 is concerned with situations where deficiencies in the body of scientific evidence do not allow a WTO Member to arrive at a sufficiently objective conclusion in relation to risk. When determining whether such deficiencies exist, a Member must not exclude from consideration relevant scientific evidence from any qualified and respected source. Where there is, among other opinions, a qualified and respected scientific view that puts into question the relationship between the relevant scientific evidence and the conclusions in relation to risk, thereby not permitting the performance of a sufficiently objective assessment of risk on the basis of the existing scientific evidence, then a Member may adopt provisional measures under Article 5.7 on the basis of that qualified and respected view.

678. WTO Members' right to take provisional measures in circumstances where the relevant scientific information is "insufficient" is also subject to the requirement that such measures be adopted "on the basis of available pertinent information". Such information may include information from "the relevant international organizations" or deriving from SPS measures applied by other WTO Members. Thus, Article 5.7 contemplates situations where there is some evidentiary basis indicating the possible existence of a risk, but not enough to permit the performance of a risk assessment. Moreover, there must be a rational and objective relationship between the information concerning a certain risk and a Member's provisional SPS measure. In this sense, Article 5.7 provides a "temporary 'safety valve' in situations where some evidence of a risk exists but not enough to complete a full risk assessment, thus making it impossible to meet the more rigorous standards set by Articles 2.2 and 5.1."[1395]

679. The second sentence of Article 5.7 requires that the available pertinent information which provides a basis for a Member's provisional SPS measure be supplemented with "the additional information necessary for a more objective assessment of risk" within a "reasonable period of time". As the Appellate Body noted, these two conditions "relate to the *maintenance* of a provisional [SPS] measure and highlight the *provisional* nature of measures adopted pursuant to Article 5.7."[1396] The requirement that the WTO Member "shall seek to obtain the additional information necessary for a more objective assessment of risk" implies that, as of the adoption of the provisional measure, a WTO Member must make best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research or by gathering information from relevant international organizations or

[1392]Appellate Body Report, *Japan – Agricultural Products II*, para. 89.
[1393]Appellate Body Report, *Japan – Apples*, para. 179.
[1394]See *supra*, section VI.E.
[1395]Canada's appellee's submission, para. 114.
[1396]Appellate Body Report, *Japan – Apples*, footnote 318 to para. 176. (original emphasis)

other sources.[1397] Otherwise, the provisional nature of measures taken pursuant to Article 5.7 would lose meaning. The "insufficiency" of the scientific evidence is not a perennial state, but rather a transitory one, which lasts only until such time as the imposing Member procures the additional scientific evidence which allows the performance of a more objective assessment of risk. The Appellate Body has noted that Article 5.7 does not set out "explicit prerequisites regarding the additional information to be collected or a specific collection procedure".[1398] Nevertheless, the WTO Member adopting a provisional SPS measure should be able to identify the insufficiencies in the relevant scientific evidence, and the steps that it intends to take to obtain the additional information that will be necessary to address these deficiencies in order to make a more objective assessment and review the provisional measure within a reasonable period of time. The additional information to be collected must be "germane" to conducting the assessment of the specific risk.[1399] A Member is required under Article 5.7 to seek to obtain additional information but is not expected to guarantee specific results. Nor is it expected to predict the actual results of its efforts to collect additional information at the time when it adopts the SPS measure. Finally, the Member taking the provisional SPS measure must review it within a reasonable period of time.[1400]

680. These four conditions set out in Article 5.7, however, must be interpreted keeping in mind that the precautionary principle finds reflection in this provision.[1401] As the Appellate Body has emphasized:

> 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 the perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned.[1402]

In emergency situations, for example, a WTO Member will take a provisional SPS measure on the basis of limited information and the steps it takes to comply with its obligations to seek to obtain additional information and review the measure will be assessed in the light of the exigencies of the emergency.

681. The European Communities argues that SPS measures are either "based on" a risk assessment under Article 5.1, or otherwise the relevant scientific evidence will be "insufficient" within the meaning of Article 5.7, so that provisional SPS measures may be justified. We do not agree. There may be situations where the relevant scientific evidence is sufficient to perform a risk assessment, a WTO Member performs such a risk assessment, but does not adopt an SPS measure either because the risk assessment did not confirm the risk, or the risk identified did not exceed that Member's chosen level of protection. Also, there may be situations where there is no pertinent scientific information available indicating a risk such that an SPS measure would be unwarranted even on a provisional basis.

[1397]Pursuant to Article 10.1 of the *SPS Agreement*, due account shall be taken of the special needs of developing country Members in respect of their ability to procure the additional information for a more objective assessment of risk.
[1398]Appellate Body Report *Japan – Agricultural Products II*, para. 92.
[1399]*Ibid.*
[1400]"[W]hat constitutes a 'reasonable period of time' ... depends on the specific circumstances of each case, including the difficulty of obtaining additional information necessary for the review *and* the characteristics of the provisional SPS measure." (*Ibid.*, para. 93) (original emphasis)
[1401]Appellate Body Report, *EC – Hormones*, para. 124.
[1402]*Ibid.*

1. Insufficiency and the Acceptable Level of Protection

682. The European Communities argues that the Panel failed to take into account that the European Communities had chosen a higher level of protection when determining whether the relevant scientific evidence is "insufficient" within the meaning of Article 5.7 of the *SPS Agreement*.[1403] According to the European Communities, the context provided by Article 3.3 of the *SPS* Agreement, and the cross-reference to Article 5 contained therein, compels a panel to consider a Member's chosen level of protection in examining whether the requirements of Article 5.7 have been met. As we noted earlier, Article 3.3 permits that WTO Members adopt measures which result in a higher level of protection than the one achieved by measures based on the relevant international standards.

683. In their appellee's submissions, both the United States and Canada emphasize that risk assessment is an "objective" process aimed at identifying and evaluating a certain risk, and that a Member's appropriate level of protection is therefore entirely separate from the question of whether scientific evidence is "insufficient" to perform a risk assessment.[1404] At the oral hearing, however, the United States and Canada recognized that the chosen level of protection may have a role to play in framing the scope and methods of a risk assessment in the particular circumstances where a WTO Member chooses a higher level of protection than that which would be achieved by a measure based on the international standard.

684. The Panel noted that the terms of Article 5.1 and Annex A of the *SPS Agreement* "do not indicate that a Member's level of protection is pertinent to determine whether a risk assessment can be performed or not."[1405] The Panel quoted approvingly the reasoning of the panel in *EC – Approval and Marketing of Biotech Products*, which stated that "[t]he protection goals of a legislator may have a bearing on the question of which risks a Member decides to assess .... [a]nd are certainly relevant to the determination of the measure ... to be taken for achieving a Member's level of protection against risk. Yet there is no apparent link between a legislator's protection goals and the task of assessing the existence and magnitude of potential risks."[1406] The Panel concluded that:

> The assessment [of] whether there is sufficient scientific evidence or not to perform a risk assessment should be an objective process. The level of protection defined by each Member may be relevant to determine the measure to be selected to address the assessed risk, but it should not influence the performance of the risk assessment as such.
>
> Indeed, whether a Member considers that its population should be exposed or not to a particular risk, or at what level, is not relevant to determining whether a risk exists and what its magnitude is. *A fortiori*, it should have no effect on whether there is sufficient evidence of the existence and magnitude of this risk.
>
> A risk-averse Member may be inclined to take a protective position when considering the measure to be adopted. However, the determination of whether scientific evidence is sufficient to assess the existence and magnitude of a risk must be disconnected from the intended level of protection.[1407]

[1403]See European Communities' appellant's submission, paras. 397 and 398.

[1404]See United States' appellee's submission, paras. 72 and 73; and Canada's appellee's submission, paras. 121 and 122.

[1405]Panel Report, *US – Continued Suspension*, para. 7.609; Panel Report, *Canada – Continued Suspension*, para. 7.587.

[1406]*Ibid.* (quoting Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3238).

685. A WTO Member that adopts an SPS measure resulting in a higher level of protection than would be achieved by measures based on international standards must nevertheless ensure that its SPS measure complies with the other requirements of the *SPS Agreement*, in particular Article 5.[1408] This includes the requirement to perform a risk assessment.[1409] At the same time, we recognize that, in order to perform a risk assessment, a WTO Member may need scientific information that was not examined in the process leading to the adoption of the international standard. We see no basis in Articles 3.3 and 5.1 of the *SPS Agreement* to conclude that WTO Members choosing a higher level of protection than would be achieved by a measure based on an international standard must frame the scope and methods of its risk assessment, including the scientific information to be examined, in the same manner as the international body that performed the risk assessment underlying the international standard. Thus, where the chosen level of protection is higher than would be achieved by a measure based on an international standard, this may have some bearing on the scope or method of the risk assessment.[1410] In such a situation, the fact that the WTO Member has chosen to set a higher level of protection may require it to perform certain research as part of its risk assessment that is different from the parameters considered and the research carried out in the risk assessment underlying the international standard.

686. For these reasons, we disagree with the Panel's finding that "the determination of whether scientific evidence is sufficient to assess the existence and magnitude of a risk must be disconnected from the intended level of protection."[1411] We emphasize, however, that whatever level of protection a WTO Member chooses does not pre-determine the outcome of its determination of the sufficiency of the relevant scientific evidence. The determination as to whether available scientific evidence is sufficient to perform a risk assessment must remain, in essence, a rigorous and objective process.[1412]

687. The European Communities refers to the chosen level of protection to support its argument that the existence of JECFA risk assessments for the five hormones does not necessarily mean that the relevant scientific evidence was sufficient for the European Communities to perform its own risk assessment. Before the Panel, the European Communities explained that "the evidence which served as the basis for the 1988 and 1999-2000 JECFA evaluations is not sufficient 'to perform a definitive risk assessment within the meaning of Article 5.7, in particular by the WTO Members applying a high level of health protection of no risk from exposure to unnecessary additional residues in meat of animals treated with hormones for growth promotion'."[1413] We turn to this issue next.

[1407]Panel Report, *US – Continued Suspension*, paras. 7.610-7.612; Panel Report, *Canada – Continued Suspension*, paras. 7.588-7.590.

[1408]Article 3.3 of the *SPS Agreement*.

[1409]Appellate Body Report, *EC – Hormones*, paras. 176 and 177.

[1410]We noted earlier that, at the oral hearing, the United States and Canada recognized that the acceptable level of risk may sometimes play a role, albeit a limited one, in respect of the risk assessment.

[1411]Panel Report, *US – Continued Suspension*, para. 7.612; Panel Report, *Canada – Continued Suspension*, para. 7.590.

[1412]The Appellate Body has held in relation to risk assessments under Article 5.1 that the assessment "should not be distorted by preconceived views on the nature and the content of the measure to be taken; nor should it develop into an exercise tailored to and carried out for the purpose of justifying decisions *ex post facto*." (Appellate Body Report, *Japan – Apples*, para. 208)

[1413]Panel Report, *US – Continued Suspension*, para. 7.604; Panel Report, *Canada – Continued Suspension*, para. 7.579 (quoting European Communities' second written submission, para. 149, and reply of the European Communities to Question 31 posed by the Panel after the first substantive meeting, Panel Reports, Annex B-1, paras. 167-172).

2. Relevance of International Standards under Article 5.7 of the *SPS Agreement*

688. The European Communities claims that the Panel erred in finding that the existence of international standards demonstrates "sufficiency" of scientific evidence to perform a risk assessment within the meaning of Article 5.1 of the *SPS Agreement*, and thereby precludes adoption of provisional measures under Article 5.7. According to the European Communities, the Panel considered that the existence of international standards established an "irrebuttable presumption"[1414] that the relevant scientific evidence in this case is not "insufficient" for the purposes of Article 5.7.

689. After recalling that international standards, guidelines or recommendations existed with respect to progesterone, testosterone, trenbolone acetate, and zeranol, the Panel observed "the important role given"[1415] to international standards by the *SPS Agreement*, and recalled that Article 3.2 of the *SPS Agreement* provides that measures which conform to international standards, guidelines or recommendations shall be presumed to be consistent with the relevant provisions of the *SPS Agreement*. On this basis, the Panel concluded that:

> The presumption of consistency of measures conforming to international standards, guidelines and recommendations with the relevant provisions of the *SPS Agreement* implies that these standards, guidelines or recommendations, particularly those referred to in this case, are based on risk assessments that meet the requirements of the *SPS Agreement*. This means, therefore, that there was sufficient evidence for JECFA to undertake the appropriate risk assessments.[1416]

690. In relation to MGA, the Panel noted that, even though Codex has not adopted a standard for this substance, "intensive work"[1417] has been performed at the international level. The Panel observed that JECFA has conducted two risk assessments of MGA in 2000 and 2004, and that MGA is currently at Step 7 of the Codex international standards elaboration procedure. The Panel concluded that "the role of JECFA in the international risk assessment process is such that some degree of relevance should be given to that work."[1418]

691. On appeal, the European Communities argues that, under the Panel's interpretation, "the mere existence of an international standard would *ipso jure* make it impossible for a Member to adopt measures under Article 5.7 of the *SPS Agreement*."[1419] According to the European Communities, the presumption of consistency that applies to measures that conform to international standards under Article 3.2 of the *SPS Agreement*[1420] does not necessarily lead to the conclusion that the risk assessment underlying the international standards is consistent with the *SPS Agreement*; nor does this

[1414]European Communities' appellant's submission, para. 406.
[1415]Panel Report, *US – Continued Suspension*, para. 7.643; Panel Report, *Canada – Continued Suspension*, para. 7.621.
[1416]Panel Report, *US – Continued Suspension*, para. 7.644; Panel Report, *Canada – Continued Suspension*, para. 7.622.
[1417]Panel Report, *US – Continued Suspension*, para. 7.813; Panel Report, *Canada – Continued Suspension*, para. 7.799.
[1418]Panel Report, *US – Continued Suspension*, para. 7.813; Panel Report, *Canada – Continued Suspension*, para. 7.799.
[1419]European Communities' appellant's submission, para. 393.
[1420]Article 3.2 provides:

> Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

presumption establish that scientific evidence underlying the international standards is sufficient to conduct a risk assessment under Article 5.1. This is so particularly where a Member chooses not to conform to such international standards pursuant to Article 3.2 and introduces measures that result in a higher level of SPS protection than would be achieved by measures based on international standards pursuant to Article 3.3.

692. As the preamble of the *SPS Agreement* recognizes, one of the primary objectives of the *SPS Agreement* is to "further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations".[1421] This objective finds reflection in Article 3 of the *SPS Agreement*, which encourages the harmonization of SPS measures on the basis of international standards, while at the same time recognizing the WTO Members' right to determine their appropriate level of protection.[1422] Article 3.1 of the *SPS Agreement* establishes that Members shall "base their [SPS] measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided in this Agreement, and in particular in paragraph 3."

693. The relevant "international standards, guidelines or recommendations" that are referred to in Articles 3.1 and 3.2 are those set by the international organizations listed in Annex A, paragraph 3 of the *SPS Agreement*, which includes Codex as the relevant standard-setting organization for matters of food safety.[1423] As we noted above, Codex adopts international standards for veterinary drug residues based on evaluations performed by JECFA. In this case, Codex has adopted international standards for testosterone, progesterone, trenbolone acetate, and zeranol, on the basis of evaluation performed by JECFA.[1424] In addition, Codex has initiated a standard-setting process for MGA, also on the basis of JECFA's evaluation, but this process has not yet been concluded.

694. It is therefore undisputed that JECFA has performed risk assessments for the six hormones at issue and that Codex has adopted international standards for five of these hormones on the basis of JECFA's risk assessments. The fact that JECFA has performed risk assessments for all six hormones means that the relevant scientific evidence was in its estimation sufficient to do so. Article 3.2 provides that SPS measures which conform to international standards shall be deemed necessary to protect human, animal or plant life or health, and shall be presumed to be consistent with the relevant provisions of the *SPS Agreement* and of the GATT 1994. This presumption, however, does not apply where a Member has not adopted a measure that conforms with an international standard. Article 3.2 is inapplicable where a Member chooses a level of protection that is higher than would be achieved by a measure based on an international standard. The presumption in Article 3.2 cannot be

[1421]See also Appellate Body Report, *EC – Hormones*, para. 165.
[1422]As the Appellate Body explained in *EC – Hormones*:

> In generalized terms, the object and purpose of Article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people. The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both "necessary to protect" human life or health and "based on scientific principles", and without requiring them to change their appropriate level of protection.

(*Ibid.*, para. 177)
[1423]Paragraph 3(a) of Annex A of the *SPS Agreement* reads:

> ... for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice.

[1424]See *supra*, footnote 932.

interpreted to imply that there is sufficient scientific evidence to perform a risk assessment where a Member chooses a higher level of protection.

695. This is borne out by Article 5.7, which provides that WTO Members may adopt provisional SPS measures "on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members". There is no indication in Article 5.7 that a WTO Member may not take a provisional SPS measure wherever a relevant international organization or another Member has performed a risk assessment. Information from relevant international organizations may not necessarily be considered "sufficient" to perform a risk assessment, as it may be part of the "available pertinent information" which provides the basis for a provisional SPS measure under Article 5.7. Moreover, scientific evidence that may have been relied upon by an international body when performing the risk assessment that led to the adoption of an international standard at a certain point in time may no longer be valid, or may become insufficient in the light of subsequent scientific developments. Therefore, the existence of a risk assessment performed by JECFA does not mean that scientific evidence underlying it must be considered to be sufficient within the meaning of Article 5.7.

696. In our view, it is reasonable for a WTO Member challenging the consistency with Article 5.7 of a provisional SPS measure adopted by another Member to submit JECFA's risk assessments and supporting studies leading to the adoption of international standards as evidence that the scientific evidence is not insufficient to perform a risk assessment. However, such evidence is not dispositive and may be rebutted by the Member taking the provisional SPS measure.

697. The European Communities argues that the Panel considered the existence of international standards as establishing an "irrebuttable presumption"[1425] that the relevant scientific evidence in this case is not "insufficient" for the purposes of Article 5.7. As we pointed out above, the existence of an international standard does not create a legal presumption of sufficiency for purposes of Article 5.7. The Panel recognized that "[i]t cannot be excluded that new scientific evidence or information call into question existing evidence", and acknowledged the possibility that "different risk assessments reach different interpretations of the same scientific evidence."[1426] The Panel examined the specific points raised by the European Communities concerning the insufficiencies it saw in the scientific evidence considered in JECFA's risk assessment. There would not have been a need for the Panel to undertake such an assessment if it had considered that the existence of international standards established an irrebuttable presumption that the relevant scientific evidence was not insufficient within the meaning of Article 5.7. Thus we find no fault with the Panel to the extent that it treated the evidence underlying JECFA's risk assessment as having probative value for determining whether the relevant scientific evidence was insufficient. In our view, the existence of risk assessments conducted by JECFA in relation to the five hormones at issue has probative value, but is not dispositive, of the question of whether the relevant scientific evidence on those hormones is "insufficient" within the meaning of Article 5.7.

698. The Panel relied on the existence of international standards to adopt a "critical mass" test for determining when scientific information that was previously considered sufficient becomes insufficient for purposes of Article 5.7 of the *SPS Agreement*. The European Communities also challenges this test on appeal. We examine this issue in the section that follows.

[1425]European Communities' appellant's submission, para. 406.

[1426]Panel Report, *US – Continued Suspension*, para. 7.645; Panel Report, *Canada – Continued Suspension*, para. 7.623.

3. The Panel's "Critical Mass" Standard for Determining "Insufficiency" under Article 5.7 of the *SPS Agreement*

699. The European Communities asserts that the Panel's "critical mass" standard imposed an excessively "high quantitative and qualitative threshold" with respect to the new evidence that is required to render "insufficient" scientific evidence that was previously considered sufficient.[1427] According to the European Communities, the quality of the scientific evidence is more important than the quantity, and therefore even a single study could be considered *a priori* sufficient to question the sufficiency of previous scientific evidence.[1428] The European Communities adds that the Panel's "critical mass" standard effectively precluded the application of the precautionary principle in the interpretation of Articles 5.1 and 5.7, because the scientific evidence would pass immediately from a state of insufficiency under Article 5.7 to a state of sufficiency under Article 5.1.[1429]

700. Both the United States and Canada accept that evidence which at some point in time was sufficient to perform a risk assessment could become insufficient at a later point in time.[1430] The United States said this could happen, for example, if there was new pathway for a risk for which the information was insufficient.[1431] Canada gave as an example the situation in which there is new scientific data that identifies new adverse effects or adverse effects at lower exposure levels.[1432] Another example given by Canada is the identification of new sources of exposure.[1433] The Panel also recognized that:

> ... there could be situations where existing scientific evidence can be put in question by new studies and information. There could even be situations where evidence which supported a risk assessment is unsettled by new studies which do not constitute sufficient relevant scientific evidence as such to support a risk assessment but are sufficient to make the existing, previously relevant scientific evidence insufficient.[1434] (footnote omitted)

701. We agree that scientific progress may lead a WTO Member and international organizations to reconsider the risk assessment underlying an SPS measure. In some cases, new scientific developments will permit a WTO Member to conduct a new risk assessment with the sufficient degree of objectivity. There may be situations, however, where the new scientific developments themselves do not permit the performance of a new risk assessment that is sufficiently objective. Such a situation would fall within the scope of Article 5.7 of the *SPS Agreement*.

702. The Appellate Body has explained that "'relevant scientific evidence' will be 'insufficient' within the meaning 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*."[1435] The body of scientific evidence

[1427]European Communities' appellant's submission, para. 412.

[1428]*Ibid.*, para. 413.

[1429]*Ibid.*, para. 427.

[1430]Panel Report, *US – Continued Suspension*, para. 7.617; Panel Report, *Canada – Continued Suspension*, para. 7.593.

[1431]Panel Report, *US – Continued Suspension*, para. 7.617.

[1432]Panel Report, *Canada – Continued Suspension*, para. 7.593.

[1433]In addition, Canada mentioned the situation where there is a change in the basic understanding of a biological event that is triggered by the chemical under assessment. (Panel Report, *Canada – Continued Suspension*, para. 7.593)

[1434]Panel Report, *US – Continued Suspension*, para. 7.620; Panel Report, *Canada – Continued Suspension*, para. 7.598.

[1435]Appellate Body Report, *Japan – Apples*, para. 179.

underlying a risk assessment can always be supplemented with additional information. Indeed, the nature of scientific inquiry is such that it is always possible to conduct more research or obtain additional information. The possibility of conducting further research or of analyzing additional information, by itself, should not mean that the relevant scientific evidence is or becomes insufficient.

703. Moreover, as the Panel noted, science continuously evolves.[1436] It may be useful to think of the degree of change as a spectrum. On one extreme of this spectrum lies the incremental advance of science. Where these scientific advances are at the margins, they would not support the conclusion that previously sufficient evidence has become insufficient. At the other extreme lie the more radical scientific changes that lead to a paradigm shift. Such radical change is not frequent. Limiting the application of Article 5.7 to situations where scientific advances lead to a paradigm shift would be too inflexible an approach. WTO Members should be permitted to take a provisional measure where new evidence from a qualified and respected source puts into question the relationship between the pre-existing body of scientific evidence and the conclusions regarding the risks. We are referring to circumstances where new scientific evidence casts doubts as to whether the previously existing body of scientific evidence still permits of a sufficiently objective assessment of risk.

704. The Panel next discussed its understanding of "insufficiency" in the specific circumstances where international standards exist for the particular substance. It concluded:

> We therefore conclude that if relevant evidence already exists, not any degree of insufficiency will satisfy the criterion under Article 5.7 that "relevant scientific evidence is insufficient". Having regard to our reasoning above, particularly with respect to scientific uncertainty and the existence of international standards, we consider that, depending on the existing relevant evidence, there must be a *critical mass* of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient. In the present case where risk assessments have been performed and a large body of quality evidence has been accumulated, this would be possible only if it put into question existing relevant evidence *to the point that* this evidence is no longer sufficient to support the conclusions of existing risks assessments.[1437] (original emphasis; footnote omitted)

705. The Panel's statement that "there must be a *critical mass* of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient" could be understood as requiring that the new scientific evidence lead to a paradigm shift. As we have said, such an approach is too inflexible. Although the new evidence must call into question the relationship between the body of scientific evidence and the conclusions concerning risk, it need not rise to the level of a paradigm shift.

706. Some of the Panel's statements intended to explain what it meant by "critical mass" similarly can be understood as requiring a paradigm shift, which is too high a threshold. At the interim review stage, the European Communities requested that the Panel identify the provenance of the "critical mass" standard and explain how it should be reconciled with the Appellate Body's findings in *EC – Hormones*. The Panel responded as follows:

[1436]Panel Report, *US – Continued Suspension*, para. 7.645; Panel Report, *Canada – Continued Suspension*, para. 7.623.

[1437]Panel Report, *US – Continued Suspension*, para. 7.648; Panel Report, *Canada – Continued Suspension*, para. 7.626.

> The Panel used the term "critical mass" in full knowledge of its meaning.[294] It used it in the sense of a situation where evidence becomes quantitatively and qualitatively sufficient to call into question the fundamental precepts of previous knowledge and evidence. The Panel does not mean that there must be sufficient evidence to perform a new risk assessment. Otherwise, Article 5.7 of the *SPS Agreement* would become meaningless. It used the term "critical mass" very much in its common scientific usage, i.e. the new scientific information and evidence must be such that they are *at the origin* of a change in the understanding of a scientific issue. We do not see in what respect this approach by the Panel, which applies to the specific situation in this case (i.e. one where a party alleges that previously sufficient scientific evidence has become insufficient) would be contrary to the findings of the Appellate Body in *EC – Hormones*.[1438] (original emphasis)
>
> [294]In mathematics and physics "critical" is defined as "constituting or relating to a point of transition from one state, etc. to another". "Critical size" or "critical mass" are defined as the minimum size or mass of a body of a given fissile material which is capable of sustaining a nuclear chain reaction (Shorter Oxford English Dictionary, 5th edition (1993), p. 558). In other words, the Panel assessed whether it had been provided with the minimum evidence necessary to conclude that knowledge has become quantitatively and qualitatively sufficient to call into question the fundamental precepts of previous knowledge and evidence.

707. In the reasoning quoted above, the Panel again required that the scientific evidence be "sufficient to call into question the fundamental precepts of previous knowledge and evidence". The Panel's explanation that "the new scientific information and evidence must be such that they are *at the origin* of a change in the understanding of a scientific issue" also connotes a paradigm shift.

708. We earlier observed that the existence of an international standard for which a risk assessment was conducted could be offered as evidence in support of an assertion that the relevant scientific evidence is not insufficient within the meaning of Article 5.7 of the *SPS Agreement*. It is an evidentiary issue in the sense that the scientific information underlying the international standard has probative value as to the sufficiency of the scientific evidence needed for conducting a risk assessment at a discrete point in time. However, in circumstances where a Member adopts a higher level of protection than that reflected in the international standard, the legal test that applies to the "insufficiency" of the evidence under Article 5.7 is not made stricter. Thus, it is incorrect to use JECFA's risk assessments as a legal benchmark for assessing insufficiency as the Panel did in this case.

709. In the interim review, the Panel expressly recognized that it used JECFA's risk assessments as a "benchmark":

> [I]t is correct that the Panel considered that, in order to determine whether relevant scientific evidence was insufficient within the meaning of Article 5.7 of the *SPS Agreement*, it had to take the results of the risk assessments made by JECFA as a "benchmark" of the existence of sufficient scientific evidence. This is in line with the findings of the Appellate Body in *Japan – Apples* that the relevant scientific evidence will be insufficient within the meaning of

[1438]Panel Report, *US – Continued Suspension*, para. 6.141; Panel Report, *Canada – Continued Suspension*, para. 6.133.

> 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*, as well as with the presumption of compliance under Article 3.2 of the *SPS Agreement*.[1439] (footnote omitted)

710. We recall that the presumption in Article 3.2 is inapplicable where a WTO Member adopts an SPS measure that results in a higher level of protection than that reflected in an international standard. For this reason, Article 3.2 did not provide a basis for the Panel's use of the JECFA risk assessments as the legal benchmark against which the insufficiencies in the relevant scientific evidence identified by the European Communities had to be evaluated. As the Appellate Body explained in *EC – Hormones*:

> The presumption of consistency with relevant provisions of the *SPS Agreement* that arises under Article 3.2 in respect of measures that conform to international standards may well be an *incentive* for Members so to conform their SPS measures with such standards. It is clear, however, that a decision of a Member not to conform a particular measure with an international standard does not authorize imposition of a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*.[1440] (original emphasis)

711. The particular insufficiencies in the relevant scientific evidence identified by the European Communities had to be evaluated on their own terms. As indicated earlier, the scientific evidence underlying the risk assessments conducted by JECFA has probative value as to the sufficiency of the scientific evidence needed to perform an assessment of risks in relation to the five hormones; however, it was by no means dispositive of that question, in particular where a WTO Member has elected to adopt an SPS measure that does not conform to the international standard.

712. For these reasons, we reverse the Panel's finding that, where international standards exist, "there must be a *critical mass* of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient" within the meaning of Article 5.7.[1441]

4. The Panel's Allocation of the Burden of Proof under Article 5.7 of the *SPS Agreement*

713. We turn now to the European Communities' claim that the Panel erred by allocating to the European Communities the burden of demonstrating that Directive 2003/74/EC met the requirements of Article 5.7 of the *SPS Agreement* in relation to the provisional ban on the five hormones at issue. The European Communities argues that, by limiting its review to the "insufficiencies" in the scientific evidence identified by the European Communities, the Panel erroneously shifted to the European Communities the burden of proof under Article 5.7 of the *SPS Agreement*.[1442] In doing so, the

[1439]Panel Report, *US – Continued Suspension*, para. 6.60; Panel Report, *Canada – Continued Suspension*, para. 6.55.
[1440]Appellate Body Report, *EC – Hormones*, para. 102.
[1441]Panel Report, *US – Continued Suspension*, para. 7.648; Panel Report, *Canada – Continued Suspension*, para. 7.626. (original emphasis)
[1442]European Communities' appellant's submission, paras. 380-382.

European Communities submits that the Panel misconstrued Articles 5.1 and 5.7 to stand on a rule-exception relationship[1443], even though Article 5.7 confers to WTO Members a "qualified right"[1444] to take provisional measures under certain conditions. In such circumstances, the United States and Canada should have borne the onus of demonstrating that the conditions provided under Article 5.7 had not been met.[1445]

714. In particular, the European Communities challenges the following statement by the Panel:

> Whereas, in the application of the burden of proof in relation to Article 5.7 of the *SPS Agreement*, it should be for the party challenging the applicability of Article 5.7 to make a prima facie case that the relevant scientific evidence regarding the five hormones is sufficient, it is also for the European Communities, in application of the principle that it is for each party to prove its allegations, to support its own allegations with appropriate evidence. This also has to be considered in the light of the fact that, even though in this case the European Communities is the complainant, it also argues as part of its allegations under Article 22.8 of the DSU that its implementing measure complies with Article 5.7 of the *SPS Agreement.* Moreover, we recall the consequence of the presumption of consistency with the *SPS Agreement* and GATT 1994 of measures which conform to international standards, guidelines and recommendations on the risk assessments on which such measures are based. Since, in that context, the European Communities argues that the relevant scientific evidence is insufficient, we consider that it is for the European Communities to identify the issues for which such evidence is insufficient.
>
> Therefore, we do not consider that, as Panel, we have any obligation to go beyond the insufficiencies identified by the European Communities. ... we deem it appropriate to limit our review exclusively to the "insufficiencies" expressly identified by the European Communities in its submissions to the Panel.[1446] (footnotes omitted)

715. The United States and Canada assert that the Panel correctly allocated the burden of proof under Article 5.7 of the *SPS Agreement*.[1447] The United States and Canada point out that the Panel only shifted the burden of proof to the European Communities once it was satisfied that the United States and Canada had sufficiently refuted the European Communities' allegation of compliance through positive evidence of a breach of Article 5.7.[1448] Canada argues that the Panel correctly identified Article 5.7 as a "qualified exemption" to Article 2.2[1449], while the United States dismisses as speculative the European Communities' contention that the Panel treated Article 5.7 as an exception to Article 5.1.[1450]

[1443]European Communities' appellant's submission, para. 362.
[1444]*Ibid.*, para. 368.
[1445]*Ibid.*, para. 379.
[1446]Panel Report, *US – Continued Suspension*, paras. 7.652 and 7.653; Panel Report, *Canada – Continued Suspension*, paras. 7.629 and 7.630.
[1447]United States' appellee's submission, para. 98; Canada's appellee's submission, para. 115.
[1448]United States' appellee's submission, para. 93; Canada's appellee's submission, para. 115.
[1449]Canada's appellee's submission, para. 112.
[1450]United States' appellee's submission, para. 96.

716. In section IV.E, we explained how we see the allocation of the burden of proof in a post-suspension situation in which the parties disagree as to whether an implementing measure brings about substantive compliance. The European Communities had to provide a clear description of its implementing measure, and an adequate explanation regarding how this measure rectifies the inconsistencies found in the original proceedings. We recall that the definitive import ban that was the subject of *EC – Hormones* and found to be inconsistent with Article 5.1 has been replaced, under Directive 2003/74/EC, by a provisional ban relating to the five other hormones. The import ban applies to the same products: meat from cattle treated with progesterone, testosterone, trenbolone acetate, zeranol and MGA. The European Communities replaced the original definitive ban with a provisional ban and invoked Article 5.7 as an alternative justification to Article 5.1. Thus, the European Communities had to provide an adequate explanation of how the provisional ban taken under Article 5.7 rectifies the inconsistencies found in *EC – Hormones*. Such explanation had to include, *inter alia*, an identification of the insufficiencies in the relevant scientific evidence that precluded the European Communities from performing a sufficiently objective risk assessment. Accordingly, we do not consider that the Panel erred by limiting its review to the insufficiencies identified by the European Communities.

717. Having said that, we referred above[1451] to the Panel's discussion of how it would allocate the burden of proof for purposes of its analysis under Articles 5.1 and 5.7 of the *SPS Agreement* and we identified several flaws in the Panel's approach, which we need not repeat here. We also explained how the Panel should have allocated the burden of proof in relation to the European Communities' contention that Directive 2003/74/EC meets the requirements of Articles 5.1 and 5.7 of the *SPS Agreement*. To the extent that the Panel did not allocate the burden of proof in its analysis of whether Directive 2003/74/EC met the requirements of Article 5.7 of the *SPS Agreement* according to the principles outlined above, we find that the Panel has erred.

718. Accordingly, we find that the Panel erred in the allocation of the burden of proof in its examination of the consistency of Directive 2003/74/EC with Article 5.7 of the *SPS Agreement.*

5. The Panel's Application of Article 5.7 of the *SPS Agreement*

719. We turn finally to the European Communities' claim that the Panel incorrectly applied Article 5.7 of the *SPS Agreement.* On appeal, the European Communities asserts that the Panel "systematically downplay[ed]"[1452] and ignored "highly relevant scientific evidence"[1453] which "go[es] against the evaluations of the JECFA or support the position of the European Communities and that in fact the scientific evidence was indeed insufficient"[1454] to perform a risk assessment, particularly in the following areas: (a) effects of hormones on certain population groups; (b) dose response; (c) bioavailability; (d) long latency periods for cancer and confounding factors; and (e) adverse effects on growth and reproduction.[1455] The European Communities also points to several errors committed by the Panel when determining whether the evidence concerning the risks posed by each of the five hormones individually was insufficient to conduct a risk assessment under Article 5.7.[1456]

720. The United States responds that the scientific evidence on record, including the statements of the experts, support the conclusion that the relevant scientific evidence on the five hormones is and remains sufficient to conduct a risk assessment.[1457] Canada argues that the European Communities'

[1451]See *supra*, para. 579.
[1452]European Communities' appellant's submission, para. 427.
[1453]*Ibid.*, para. 447.
[1454]*Ibid.*, para. 427.
[1455]*Ibid.*, paras. 430-436.
[1456]*Ibid.*, paras. 437-447.
[1457]United States' appellee's submission, para. 81.

allegations are without merit, and considers that the Panel properly weighed the scientific evidence before it.[1458]

721. As we noted in subsection 3, the Panel's "critical mass" test imposed an excessively high threshold in terms of the change in the scientific evidence that would make previously sufficient evidence insufficient. Rather than requiring that the new evidence call into question the relationship between the body of scientific evidence and the conclusions concerning risk, the Panel's test required a paradigm shift to the extent the evidence needed to call into question the "fundamental precepts of previous knowledge and evidence" on the five hormones. This erroneous threshold led the Panel to fail to attribute significance to evidence that could cast doubt as to whether the relevant scientific evidence still permits of a sufficiently objective assessment of risk. One such example is the Panel's analysis of the European Communities' contention that the relevant scientific evidence concerning the effects of the hormones on certain categories of the population, in particular pre-pubertal children, was "insufficient" within the meaning of Article 5.7 of the *SPS Agreement.*

722. Before the Panel, the European Communities argued that the development of more sensitive detection methods had identified lower endogenous levels of oestradiol in pre-pubertal children than previously assumed by the detection method referred to in JECFA's risk assessments. According to the European Communities, this suggested that individuals that have the lowest endogenous levels of sex hormones, such as pre-pubertal children and post-menopausal women, might be at an increased risk for adverse health effects that might be associated with exposure to exogenous sources of both oestrogens and testosterone.[1459]

723. The new detection method was examined in a scientific study conducted by Klein et al. (1994), and was reviewed by the European Communities in the 1999 Opinion. The Panel described the Klein study, and the conclusions the European Communities derived from it, as follows:

> The 1999 Opinion specifies that the hormone levels on which it relies were determined by radio-immunoassays (RIA) and that the use of these assays has frequently been associated with production of variable results, particularly when used to detect low levels of endogenous hormones. The 1999 Opinion notes that Klein et al. (1994) developed an ultrasensitive assay (100-fold more sensitive than RIAs) which identified values of oestradiol considerably lower than the range of oestradiol levels found through RIAs for prepubertal children.[1460] (footnote omitted)

724. In its analysis, the Panel recalled its earlier finding that, in order to determine that the evidence on the five hormones was "insufficient" within the meaning of Article 5.7, there must be "a critical mass of new evidence and/or information that calls into question the fundamental precepts of knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient."[1461] On this basis the Panel concluded that its task was to examine "whether the more sensitive detection methods which identified lower hormonal levels in prepubertal children than thought until now are such as to call into question the range of physiological levels of the sex hormones in humans currently believed to exist."[1462] The Panel referred to Dr. Sippell's testimony, which characterized the development of ultra-sensitive detection methods as a "quantum leap in [oestrogen] assay

[1458]Canada's appellee's submission, para. 130.
[1459]See Panel Report, *US – Continued Suspension*, para. 7.664; and Panel Report, *Canada – Continued Suspension*, para. 7.641.
[1460]Panel Report, *US – Continued Suspension*, para. 7.665; Panel Report, *Canada – Continued Suspension*, para. 7.642.
[1461]Panel Report, *US – Continued Suspension*, para. 7.666; Panel Report, *Canada – Continued Suspension*, para. 7.643.
[1462]*Ibid.*

methodology"[1463] The Panel noted Dr. Sippell's statement that "[t]he risk to children arising from hormones that are naturally present in meat as compared to residues of hormonal growth promoters has, to my knowledge, been estimated for [oestradiol-17β] only".[1464] The Panel then observed that the 2000 Opinion stated that such new detection methods had not been validated[1465], and quoted Dr. Boobis' opinion questioning the validity of the new study presented by the European Communities.[1466] On this basis, the Panel concluded that:

> We note that the evidence presented relates only to oestradiol, but that the claim we are examining with regard to the insufficiencies of the evidence are with respect to the five other hormones at issue, not oestradiol. We note furthermore that the 2002 Opinion concludes that these more sensitive detection methods have not yet been validated.
>
> On the basis of the above, we are not convinced that the studies discussed by the experts call into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient evidence now insufficient in relation to the effect of the five hormones on pre-pubertal children. Particularly, it has not been established that the data regarding the effects of hormones on which the JECFA assessments are based are insufficient in light of new evidence relating to the other five hormones at issue.[1467]

725. In concluding that it is "not convinced" that the ultra-sensitive assay study referred to by the European Communities "call[s] into question the fundamental precepts of previous knowledge" in relation to the effect of the five hormones on pre-pubertal children, the Panel applied an excessively high threshold in relation to the new scientific evidence which is required to render previously sufficient scientific evidence "insufficient" within the meaning of Article 5.7. Irrespective of whether the Panel was itself persuaded by the Klein study, the Panel erred to the extent that it considered that a paradigmatic shift in the scientific knowledge was required in order to render the scientific evidence relied by JECFA now "insufficient" within the meaning of Article 5.7. The "insufficiency" requirement in Article 5.7 does not imply that new scientific evidence must entirely displace the scientific evidence upon which an international standard relies. It suffices that new scientific developments call into question whether the body of scientific evidence still permits of a sufficiently objective assessment of risk.

726. The Panel seemed to rely on two pieces of evidence in coming to the conclusion that the ultra-sensitive detection method discussed in the Klein study had not yet been validated: a statement to that effect in the 2002 Opinion[1468], and the testimony of Dr. Boobis, who questioned the validity of the

[1463]Panel Report, *US – Continued Suspension*, para. 7.667; Panel Report, *Canada – Continued Suspension*, para. 7.644 (quoting replies of the scientific experts to Question 40 posed by the Panel, Panel Reports, Annex D, para. 328).

[1464]Panel Report, *US – Continued Suspension*, para. 7.668; Panel Report, *Canada – Continued Suspension*, para. 7.645 (quoting replies of the scientific experts to Question 41 posed by the Panel, Panel Reports, Annex D, para. 335).

[1465]Panel Report, *US – Continued Suspension*, para. 7.669; Panel Report, *Canada – Continued Suspension*, para. 7.646 (referring to 2000 Opinion, p. 3).

[1466]*Ibid.* (referring to replies of the scientific experts to Question 40 posed by the Panel, Panel Reports, Annex D, paras. 325 and 326).

[1467]Panel Report, *US – Continued Suspension*, paras. 7.670 and 7.671; Panel Report, *Canada – Continued Suspension*, paras. 7.647 and 7.648.

[1468]Panel Report, *US – Continued Suspension*, para. 7.670; Panel Report, *Canada – Continued Suspension*, para. 7.647 (referring to 2002 Opinion, para. 4.4.1, para. 9).

Klein study.[1469] However, the Panel record shows that at least some of the scientific experts considered that the Klein study could possibly cast doubt as to whether the body of scientific evidence relied on by JECFA still permitted of a sufficiently objective assessment of risks posed by the five hormones in relation to pre-pubertal children.

727. Dr. Sippell seemed to agree with the European Communities' position that the relevant scientific evidence on the effects of hormones in pre-pubertal children was not "sufficient" to conduct a risk assessment under Article 5.1. Dr. Sippell observed that "[w]e just don't have yet everywhere where it would be necessary the methodology, the analytical tools to measure as sensitively as we should do it, and therefore I think that the data available are insufficient."[1470] Dr. Sippell also explained that:

> ... it is difficult to calculate the exact [hormone] production rates in prepubertal children. ... [JECFA values] have been based on the, so to speak, traditional levels measured by radio immuno assays, and usually by radio immuno assays without prior extraction. We all know that the sensitivity of such procedures is not enough compared with more modern techniques ... the extractive procedures involving radio immuno assays, but even more modern molecular base techniques like recombinant cell bioassays, of oestrogen, oestradiol or oestrogen activity. And these ... are significantly below the levels previously thought, and by that the production rate is now significantly lower. And this of course implies that any risk from exogenous sources, for example, beef treated with hormones, treated with oestradiol-17β, is much higher.[1471]

728. Dr. De Brabander concurred, stating that "I cannot say that the [JECFA] data are bad ... I just say you don't know that they are good, and you have to check them with modern analytical methods."[1472] Dr. Guttenplan espoused a similar view, noting that "more accurate methods of analysis could now be used to measure the effect of eating hormone-treated beef on blood levels of estrogen in children and post-menopausal women."[1473] He also observed that "in boys the [oestrogen] levels are even lower, and there I think we have to worry about developmental effects ... I still think that these could be investigated epidemiologically or in or some type of study. We might ... need a surrogate, perhaps saliva or urine, but I think it is perhaps the most important issue to address is the sensitivity of children."[1474]

729. Dr. Boobis, who as the Panel noted questioned the validity of the ultra-sensitive recombinant assay used in the Klein study, also testified that the levels of oestradiol endogenously produced in pre-pubertal children may be lower than previously thought. In response to direct questioning by the United States, Dr. Boobis explained that:

> .... having looked at these data is that, first of all, the recombinant assay has not yet been validated adequately, but secondly there is

[1469]Panel Report, *US – Continued Suspension*, para. 7.669; Panel Report, *Canada – Continued Suspension*, para. 7.646 (quoting replies of the scientific experts to Question 40 posed by the Panel, Panel Reports, Annex D, paras. 325 and 326).

[1470]Transcript of the Panel's joint meeting with scientific experts on 27-28 September 2006, Panel Reports, Annex G, para. 891.

[1471]*Ibid.*, para. 557.

[1472]*Ibid.*, para. 675.

[1473]Replies of the scientific experts to Question 52 posed by the Panel, Panel Reports, Annex D, para. 413.

[1474]Transcript of the Panel's joint meeting with scientific experts on 27-28 September 2006, Panel Reports, Annex G, para. 1061.

> evidence, when one looks at these data, to suggest that the circulating levels of oestradiol in male children are lower than previously thought, I would accept that, but I would not think they are as low as in the original publication by Klein *et al*, because there have been numerous publications since then using a variety of assays which suggest that the levels are certainly higher than those very low levels first reported.[1475]

730. Although the Panel was correct in observing that the Klein study only examined endogenous levels of oestradiol, lower levels of endogenous production of hormones in humans played a key role in the European Communities' conclusion that no safe threshold level or ADI could be established for any of the six hormones assessed. The 1999 Opinion states that, in the light of "uncertainties in the estimates of endogenous hormone production rates and metabolic clearance capacity, particularly in prepubertal children, no threshold level and therefore no ADI can be established for any of the [six] hormones."[1476] For this reason, the Panel should have explored further the question of what relevance, if any, the study relied on by the European Communities examining endogenous levels of oestradiol could have in relation to potential adverse health effects relating to the other five hormones. During the course of the oral hearing, the European Communities argued that some scientists agree with its position that measurements of the endogenous levels of natural hormones are relevant for synthetic hormones that share similar toxicological properties and effects.

731. In sum, the Panel erred in its interpretation and application of Article 5.7 of the *SPS Agreement* by adopting an incorrect legal test to assess the European Communities' explanations concerning the insufficiencies in the relevant scientific evidence.

732. The European Communities argues further that the Panel failed to conduct an objective assessment of the facts of the case, as required by Article 11 of the DSU, in its analysis under Article 5.7. Having determined that the Panel incorrectly interpreted and applied Article 5.7 of the *SPS Agreement*, we do not find it necessary to address the European Communities' claim that the Panel acted inconsistently with Article 11 of the DSU.

F. *Conclusions*

733. We found above that the Panel drew too rigid a distinction between the chosen level of protection and the "insufficiency" of the relevant scientific evidence under Article 5.7 of the *SPS Agreement*.[1477] We also reversed the Panel's finding that, where international standards exist, a "critical mass of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence" is required to render the relevant scientific evidence "insufficient" within the meaning of Article 5.7.[1478] We found, moreover, that the Panel erred in the allocation of the burden of proof.[1479] Finally, we found that the Panel incorrectly interpreted and applied Article 5.7 in determining whether the relevant scientific evidence in relation to the five hormones was "insufficient" within the meaning of that provision.[1480] In addition, we have found that the

[1475] *Ibid*., para. 572.
[1476] 1999 Opinion, pp. 72 and 73. The 1999 Opinion also concludes that: "For all six hormones endocrine, developmental, immunological, neurobioloical, immunotoxic, genotoxic, and carcinogenic effects could be envisaged. Of the various susceptible risk groups, prepubertal children is the group of greatest concern. Again the available data do not enable a quantitative estimate of the risk".
[1477] See *supra*, para. 686.
[1478] See *supra*, para. 712.
[1479] See *supra*, para. 718.
[1480] See *supra*, para. 731.

Panel's analysis was compromised because its consultations with Drs. Boisseau and Boobis infringed the European Communities' due process rights.[1481]

734. In the light of these errors, we reverse the Panel's finding that "it has not been demonstrated that relevant scientific evidence was insufficient, within the meaning of Article 5.7 of the *SPS Agreement*, in relation to any of the five hormones with respect to which the European Communities applies a provisional ban."[1482] As a consequence of its finding, the Panel also concluded that "the [European Communities'] compliance measure does not meet the requirements of Article 5.7 of the *SPS Agreement* as far as the provisional ban on progesterone, testosterone, zeranol, trenbolone acetate and melengestrol acetate is concerned."[1483] Because it is premised on the Panel's earlier finding concerning the "insufficiency" of the relevant scientific information, which we have reversed, the Panel's conclusion cannot stand.

735. Given the numerous flaws that we identified in the Panel's analysis, and the highly contested nature of the facts, we do not consider it possible to complete the analysis. Thus, we make no findings on the consistency or inconsistency of the European Communities' provisional SPS measure relating to progesterone, testosterone, zeranol, trenbolone acetate and MGA.

VIII. Findings and Conclusions

736. For the reasons set out in this Report, the Appellate Body:

(a) As regards the DSU:

(i) finds that the Panel did not err in stating that proceedings under Article 21.5 of the DSU are open to not only the original complainant[1484], because they may be initiated by original complainants and original respondents;

(ii) upholds the Panel's finding that "it has jurisdiction to consider the compatibility of the [European Communities'] implementing measure with the *SPS Agreement* as part of its review of the claim raised by the European Communities with respect to Article 22.8 of the DSU"[1485];

(iii) because it has not been established that the measure found to be inconsistent with the *SPS Agreement* in the *EC – Hormones* dispute has been removed[1486], upholds the Panel's finding that "the European Communities has not established a violation of Articles 23.1 and 3.7 of the DSU *as a result of a breach of Article 22.8*"[1487];

(iv) reverses the Panel's finding that, "by maintaining its suspension of concessions even after the notification of [Directive 2003/74/EC]", the

[1481] See *supra*, section V.
[1482] Panel Report, *US – Continued Suspension*, para. 7.835; Panel Report, *Canada – Continued Suspension*, para. 7.821.
[1483] Panel Report, *US – Continued Suspension*, para. 7.836; Panel Report, *Canada – Continued Suspension*, para. 7.822.
[1484] Panel Report, *US – Continued Suspension*, para. 7.355.
[1485] *Ibid*., para. 7.379.
[1486] See subparagraphs (c) and (d) *infra*.
[1487] Panel Report, *US – Continued Suspension*, para. 7.857(b). (original emphasis)

United States is "seeking redress of a violation with respect to [this Directive], within the meaning of Article 23.1 of the DSU"[1488]; and

(v) reverses the Panel's findings that the United States "made a 'determination' within the meaning of Article 23.2(a) in relation to Directive 2003/74/EC" on the basis of statements made at DSB meetings and the fact that the suspension of concessions continued subsequent to the notification of Directive 2003/74/EC[1489], and that the United States "failed to make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under the DSU", in breach of Article 23.2(a).[1490]

(b) As regards the Panel's consultations with the scientific experts, finds that the Panel infringed the European Communities' due process rights, because the institutional affiliation of Drs. Boisseau and Boobis compromised their appointment and thereby the adjudicative independence and impartiality of the Panel. Accordingly, the Panel failed to comply with its duties under Article 11 of the DSU.

(c) As regards the consistency with Article 5.1 of the *SPS Agreement* of the European Communities' import ban on meat from cattle treated with oestradiol-17β for growth-promotion purposes, which is applied pursuant to Directive 2003/74/EC:

(i) finds that the Panel erred in its interpretation and application of Article 5.1 in relation to risks of misuse and abuse in the administration of hormones to cattle for growth-promotion purposes;

(ii) finds that the Panel did not err in requiring the European Communities to evaluate specifically the risks arising from the presence of residues of oestradiol-17β in meat or meat products from cattle treated with the hormone for growth-promotion purposes;

(iii) finds that the Panel did not err in its interpretation of Article 5.1 and paragraph 4 of Annex A of the *SPS Agreement* as regards quantification of risk;

(iv) finds that the Panel erred in the allocation of the burden of proof in its assessment of the consistency of Directive 2003/74/EC with Article 5.1 of the *SPS Agreement*;

(v) finds that the Panel applied an incorrect standard of review in examining whether the European Communities' risk assessment satisfied the requirements of Article 5.1 and paragraph 4 of Annex A of the *SPS Agreement*, and thereby failed to comply with its duties under Article 11 of the DSU; and

(vi) reverses the Panel's finding that the European Communities' import ban relating to oestradiol-17β is not based on a risk assessment as required by Article 5.1 of the *SPS Agreement*[1491]; however, the Appellate Body is unable to complete the analysis and therefore makes no findings as to the consistency or inconsistency of the import ban relating to oestradiol-17β with Article 5.1 of the *SPS Agreement*.

[1488] *Ibid.*, para. 7.215. See also *ibid.*, para. 7.856(a).
[1489] Panel Report, *US – Continued* Suspension, para. 7.239. See also *ibid.*, para. 7.856(b).
[1490] *Ibid.*, para. 7.244. (emphasis omitted) See also *ibid.*, para. 7.856(b).
[1491] Panel Report, *US – Continued Suspension*, paras. 7.573, 7.578, and 7.579.

(d) As regards the consistency with Article 5.7 of the *SPS Agreement* of the European Communities' provisional import ban on meat from cattle treated with testosterone, progesterone, trenbolone acetate, zeranol, and MGA, for growth-promotion purposes, which is applied pursuant to Directive 2003/74/EC:

(i) reverses the Panel's finding that "the determination of whether scientific evidence is sufficient to assess the existence and magnitude of a risk must be disconnected from the intended level of protection"[1492];

(ii) reverses the Panel's finding that, where international standards exist, "there must be a *critical mass* of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient, evidence now insufficient"[1493];

(iii) finds that the Panel erred in the allocation of the burden of proof in its examination of the consistency of Directive 2003/74/EC with Article 5.7 of the *SPS Agreement*;

(iv) finds that the Panel erred in its interpretation and application of Article 5.7 of the *SPS Agreement* by adopting an incorrect legal test in determining whether the relevant scientific evidence was "insufficient";

(v) does not find it necessary to address the European Communities' claim that the Panel acted inconsistently with Article 11 of the DSU; and

(vi) reverses the Panel's finding that the provisional import ban relating to testosterone, progesterone, trenbolone acetate, zeranol, and MGA does not meet the requirements of Article 5.7 of the *SPS Agreement*[1494]; however, the Appellate Body is unable to complete the analysis and therefore makes no findings as to the consistency or inconsistency of the European Communities' provisional import ban with Article 5.7 of the *SPS Agreement*.

737. Because we have been unable to complete the analysis as to whether Directive 2003/74/EC has brought the European Communities into substantive compliance within the meaning of Article 22.8 of the DSU, the recommendations and rulings adopted by the DSB in *EC – Hormones* remain operative. In the light of the obligations arising under Article 22.8 of the DSU, we recommend that the Dispute Settlement Body request the United States and the European Communities to initiate Article 21.5 proceedings without delay in order to resolve their disagreement as to whether the European Communities has removed the measure found to be inconsistent in *EC – Hormones* and whether the application of the suspension of concessions by the United States remains legally valid.

[1492] *Ibid.*, para. 7.612.
[1493] *Ibid.*, para. 7.648. (original emphasis; footnote omitted)
[1494] Panel Report, *US – Continued Suspension*, paras. 7.835 and 7.836.

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS320/12
WT/DS321/12
2 June 2008
(08-2559)

Original: English

UNITED STATES – CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC – HORMONES DISPUTE

CANADA – CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC – HORMONES DISPUTE

Notification of an Appeal by the European Communities under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 29 May 2008, from the Delegation of the European Commission, is being circulated to Members.

Notification of an Appeal by the European Communities under Article 16.4 and Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), and under Rule 20.1 of the *Working Procedures for Appellate Review*.

1. Pursuant to Article 16.4 and Article 17 of the DSU and to Rule 20.1 of the *Working Procedures for Appellate Review*, the European Communities submits its Notice of Appeal on certain issues of law covered in the Reports of the Panels in DS320, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* and DS321, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* and certain legal interpretations developed by the Panels in those Reports.

2. The European Communities seeks review by the Appellate Body of the following errors of law and legal interpretation contained in the Reports of the Panels:

(a) The Panels incorrectly interpreted and applied the words "recourse to dispute settlement in accordance with the rules and procedures of this Understanding" in Article 23.2(a) of the DSU in the presence of an implementation measure in a post-retaliation situation. This is due principally to the Panels' incorrect interpretation of Article 21.5 of the DSU. The Panels' errors are contained in particular in paragraphs 7.246 to 7.249 and 7.346 to 7.359 of the Panel Report in DS320 and paragraphs 7.239 to 7.242 and 7.344 to 7.357 of the Panel Report in DS321.

(b) The Panels erred in failing to make a proper finding of violation of Article 23.1 read together with Article 22.8 and 3.7 of the DSU when stating that "to the extent the measure found to be

inconsistent with the *SPS Agreement* in the *EC – Hormones* dispute … has not been removed by the European Communities, [the United States and Canada] have not breached Article 22.8 of the DSU; and to the extent that Article 22.8 has not been breached, the European Communities has not established a violation of Articles 23.1 and 3.7 of the DSU as a result of a breach of Article 22.8". This error is due to the Panels' incorrect interpretation of Article 22.8 of the DSU and in particular the words "the measure found to be inconsistent with a covered agreement has been removed" therein. The Panels' conclusion and the corresponding reasoning are contained in paragraphs 7.857 and 7.252 to 7.386 of the Panel Report in DS320 and paragraphs 7.842 and 7.245 to 7.383 of the Panel Report in DS321.

(c) The Panels went beyond their terms of reference and assumed the function of Article 21.5 DSU panels contrary to Articles 7 and 21.5 of the DSU. This appears in particular in paragraph 8.3 of the two Panel Reports and paragraphs 7.150 to 7.182, 7.270 to 7.291 and 7.360 to 7.379 of the Panel Report in DS320 and paragraphs 7.137 to 7.164, 7.286 to 7.307 and 7.358 to 7.376 of the Panel Report in DS321.

(d) The Panels failed to respect the fundamental principle of due process when selecting and taking the advice of scientific experts under Articles 13.2 of the DSU and 11.2 of the *SPS Agreement* with the result that the Panels failed to make an objective assessment of the matter before them in breach of Article 11 of the DSU. This appears in particular in paragraphs 7.55 to 7.99 and 6.21 to 6.25 and the subsequent analysis of the Panel under the *SPS Agreement* in paragraphs 7.387 to 7.846 of the Panel Report in DS320 and paragraphs 7.53 to 7.96 and the subsequent analysis of the Panel under the *SPS Agreement* in paragraphs 7.384 to 7.831 of the Panel Report in DS321.

(e) The Panels failed to correctly determine and apply the standard of review under in particular Articles 5.1 and 5.7 of the *SPS Agreement* in breach thereof and in breach of Article 11 of the DSU. The Panels seriously mischaracterised and misinterpreted the evidence on which the European Communities based itself and conducted a *de novo* review of the matter before them and *inter alia* failed to take into account or properly evaluate the scientific basis of the European Communities' measure. They also failed to attach proper legal relevance to genuine uncertainties and scientific controversies on the matter before them and arbitrarily chose between the opinions of their experts and those presented by the other parties to the disputes. The Panels also relied incorrectly on the opinions of Codex Alimentarius and JECFA. This appears *inter alia* in paragraphs 7.412 to 7.427 and paragraphs 7.435 to 7.846 of the Panel Report in DS320 and paragraphs 7.403 to 7.418 and paragraphs 7.426 to 7.831 of the Panel Report in DS321.

(f) The Panels failed to correctly determine and apply the burden of proof under the *SPS Agreement* and in particular Articles 5.1 and 5.7 thereof. The Panels imposed the burden of proof on the European Communities to prove the consistency of its measure with the *SPS Agreement* and in particular Articles 5.1 and 5.7 thereof. This appears in particular in paragraphs 7.380 to 7.386 and paragraphs 7.435 to 7.846 of the Panel Report in DS320 and paragraphs 7.377 to 7.383 and paragraphs 7.426 to 7.831 of the Panel Report in DS321.

(g) The Panels incorrectly interpreted and applied Article 5.1 of the *SPS Agreement* and failed to make an objective assessment of the matter before them in breach of Article 11 of the DSU. The Panels erroneously adopted an overly restrictive notion of "an assessment, as appropriate to the circumstances, of the risk" under Article 5.1 of the *SPS Agreement* as informed by Article 5.2 thereof, ignored that the EC risk assessments had focussed on and addressed the particular risk at stake and required that the risk be quantified. The Panels' erroneous assessments arose out of its application of an inappropriate standard of review, as set out in paragraph (e) above. In particular, it arbitrarily chose between the opinions of their scientific experts in their review of the matter before them. This appears in particular in

paragraphs 7.435 to 7.579 of the Panel Report in DS320 and paragraphs 7.426 to 7.549 of the Panel Report in DS321.

(h) The Panels incorrectly interpreted and applied Article 5.7 of the *SPS Agreement* and failed to make an objective assessment of the matter before them in breach of Article 11 of the DSU. The Panels incorrectly interpreted the relationship of Article 5.7 with the other provisions of the *SPS Agreement* and in particular Articles 3.2, 3.3 and 5.1 thereof and adopted and applied an erroneous criterion of critical mass of new scientific evidence and/or information for the purposes of applying Article 5.7. The Panels' erroneous assessments arose out of its application of an inappropriate standard of review, as set out in paragraph (e) above. In particular, it arbitrarily chose between the opinions of its scientific experts in their review of the matter before them. This appears in particular in paragraphs 7.580 to 7.837 of the Panel Report in DS320 and paragraphs 7.550 to 7.823 of the Panel Report in DS321.

(i) The Panels erred in making a suggestion that insufficiently clarifies the implications of their findings contrary to Article 3.7 and 19.1 of the DSU. This appears in particular in paragraphs 8.2 and 8.3 of the Panel Reports.

ANNEX II

WORLD TRADE ORGANIZATION

WT/DS320/13
16 June 2008
(08-2784)

Original: English

UNITED STATES – CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC – HORMONES DISPUTE

Notification of an Other Appeal by the United States
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 10 June 2008, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS320/R) ("Panel Report") and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the United States breached Article 23.1 of the DSU (e.g., Panel Report, paras. 7.250, 7.856(a)). This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations, including the Panel's findings that, by maintaining its suspension of concessions after the notification by the European Communities ("EC") of Directive 2003/74/EC, the United States was seeking the redress of a violation of obligations under a covered agreement without having recourse to, and abiding by, the rules and procedures of the DSU (e.g., Panel Report, paras. 7.215, 7.856(a)), and the Panel's interpretation and understanding of the legal basis for the U.S. suspension of concessions (e.g., Panel Report, paras. 7.209-7.214).

2. The United States also seeks review of the Panel's conclusion that the United States breached DSU Article 23.2(a) (e.g., Panel Report, paras. 7.245, 7.856(b)). This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations, including the Panel's findings that the United States made a determination to the effect that a violation had occurred without recourse to dispute settlement in accordance with the rules and procedures of the DSU (e.g., Panel Report, paras. 7.239, 7.856(b)), on the basis of U.S. statements made at the meetings of the Dispute Settlement Body on November 1 and December 7, 2003 (e.g., Panel Report paras. 7.223-7.230) and/or the continuation of the U.S. suspension of concessions after the EC's notification of Directive 2003/74/EC (e.g., Panel Report paras. 7.226, 7.230, 7.232).

3. The United States seeks review of the Panel's suggestion that the United States should have recourse to the rules and procedures of the DSU without delay (e.g., Panel Report paras. 6.45, 8.3)

and the Panel's conclusion that it was restricted from a direct determination of the compatibility of Directive 2003/74/EC with the covered agreements (e.g., Panel Report paras. 7.162-7.164, 7.360, 7.855, 8.3). The suggestion and conclusion are in error and based on erroneous findings on issues of law and related legal interpretations. However, the Appellate Body would not need to review the suggestion and conclusion if it reverses the Panel's findings and conclusions on DSU Articles 23.1 and 23.2(a).

ANNEX III

WORLD TRADE ORGANIZATION

WT/DS321/13
16 June 2008
(08-2783)

Original: English

CANADA – CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC – HORMONES DISPUTE

Notification of an Other Appeal by Canada
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 10 June 2008, from the Delegation of Canada, is being circulated to Members.

Pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and paragraph 1 of Rule 23 of the *Working Procedures for Appellate Review*, the Government of Canada hereby submits its Notice of Other Appeal concerning certain other issues of law covered in the Panel Report on *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS321/R) and certain legal interpretations developed by the Panel.

In the view of the Government of Canada, the Panel erred in interpreting Article 23 of the DSU in isolation from Article 22.8 of the DSU and committed an error in law by applying, in particular, Article 23.1 and 23.2(a) of the DSU to the situation of post-retaliation in this case. These errors are contained in paragraphs 7.162 to 7.164, 7.189 to 7.244 and 7.841 of the Panel Report.

The Government of Canada is also of the view that the Panel erred in finding that by continuing to suspend concessions *vis-à-vis* the European Communities following its notification to the Dispute Settlement Body of Directive 2003/74/EC Canada was: (i) seeking the redress of a violation of obligations under a covered agreement without having recourse to, and abiding by, the rules and procedures of the DSU in violation of Article 23.1 of the DSU; and (ii) making a determination to the effect that a violation had occurred without having recourse to dispute settlement in accordance with the rules and procedures of the DSU, in violation of Article 23.2(a) of the DSU. These errors are due to the Panel's misinterpretation of the legal basis for Canada's suspension of concessions. The Panel's findings and corresponding reasoning are contained in paragraphs 7.841 and 7.189 to 7.244 of its report.

In the alternative, should the Appellate Body confirm the findings of the Panel in respect of DSU Article 23.1 and 23.2(a) in relation to Canada, the Government of Canada submits that the Panel erred in stating that it did not have jurisdiction to determine the compatibility of Directive 2003/74/EC with the covered agreements and by making the suggestion that Canada should have recourse to the rules and procedures of the DSU without delay in order to implement its findings under Article 23 of

the DSU. These statements are contained in paragraph 8.3 of the Panel Report and are contrary to Articles 3.3, 3.7, 19.2 and 22.8 of the DSU.

The Government of Canada respectfully requests the Appellate Body to reverse the findings and conclusions of the Panel referred to above and to modify accordingly the recommendations of the Panel.

ANNEX IV –

PROCEDURAL RULING OF 10 JULY TO ALLOW
PUBLIC OBSERVATION OF THE ORAL HEARING

10 July 2008

United States – Continued Suspension of Obligations in the EC – Hormones Dispute

AB-2008-5

Canada – Continued Suspension of Obligations in the EC – Hormones Dispute

AB-2008-6

Procedural Ruling

1. On 3 June 2008, Canada, the European Communities, and the United States each filed a request to allow public observation of the oral hearing in these proceedings.[1] The participants argued that nothing in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") or the *Working Procedures for Appellate Review* (the "*Working Procedures*") precludes the Appellate Body from authorizing public observation of the oral hearing. On 4 June 2008, we invited the third participants to comment in writing on the requests of Canada, the European Communities, and the United States. In particular, we asked third parties to provide their views on the permissibility of opening the hearing under the DSU and the Working Procedures, and, if they so wished, on the specific logistical arrangements proposed in the requests. We received comments on 12 June 2008 from Australia, Brazil, China, India, Mexico, New Zealand, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu. Australia, New Zealand, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu expressed their support for the request of the participants. Brazil, China, India, and Mexico requested the Appellate Body to deny the participants' request. According to these third participants, the oral hearing forms part of the proceedings of the Appellate Body and, therefore, is subject to the requirement of Article 17.10 of the DSU that "[t]he proceedings of the Appellate Body shall be confidential." On 16 June 2008, we invited Canada, the European Communities, and the United States to comment on the submissions made by the third participants. We also invited third participants who wished to do so to submit comments on the submissions made by the other third participants. Additional comments from Canada, the European Communities, and the United States were received on 23 June 2008. We held an oral hearing with the participants and third participants on 7 July 2008 exclusively dedicated to exploring the issues raised by the request of the participants. The participants and third participants were invited to submit by close of business, 8 July 2008, additional comments relating specifically to the technical modalities proposed by the participants for public observation. Comments were received from Brazil, China, India, and Mexico, as well as Canada, the European Communities, and the United States.

2. We consider it necessary that a ruling is made by us on the request of the participants without delay. Accordingly, we give a ruling with concise reasons. These reasons may be further elaborated in the Appellate Body report.

[1]The participants expressed a preference for simultaneous, closed-circuit television broadcast to another room. As alternatives, they mentioned delayed television broadcast and having a separate session for the third participants who elect not to participate in the open hearing.

3. The participants have different views on the scope of the term "proceedings" in Article 17.10 of the DSU. The European Communities argues that the term "proceedings" in Article 17.10 should be interpreted narrowly as referring to the Appellate Body's internal work and does not include its oral hearing.[2] The United States refers to the Recommendations by the Preparatory Committee for the WTO. The United States contends that the Preparatory Committee viewed Article 17.10 as focused on the deliberations of the Appellate Body.[3] Canada concedes that the term "proceedings" covers the oral hearing. A similar view has been put forward by Brazil, China, India, and Mexico. We consider the term "proceedings" to mean the entire process by which an appeal is prosecuted, from the initiation of an appeal to the circulation of the Appellate Body report, including the oral hearing. This is also how the Appellate Body understood the term in *Canada – Aircraft*.[4] Having agreed with this broad interpretation of the term "proceedings", we now consider the precise meaning and scope of the confidentiality requirement in Article 17.10.

4. The third participants that object to the request to allow public observation argue that the confidentiality requirement in Article 17.10 is absolute and permits of no derogation. We disagree with this interpretation because Article 17.10 must be read in context, particularly in relation to Article 18.2 of the DSU. The second sentence of Article 18.2 expressly provides that "[n]othing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public". Thus, under Article 18.2, the parties may decide to forego confidentiality protection in respect of their statements of position. With the exception of India, the participants and third participants agreed that the term "statements of its own positions" in Article 18.2 extends beyond the written submissions referred to in the first sentence of Article 18.2, and includes oral statements and responses to questions posed by the Appellate Body at the oral hearing. The third sentence of Article 18.2 states that "Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential." This provision would be redundant if Article 17.10 were interpreted to require absolute confidentiality in respect of all elements of appellate proceedings. There would be no need to require, pursuant to Article 18.2, that a Member designate certain information as confidential. The last sentence of Article 18.2 ensures that even such designation by a Member does not put an end to the right of another Member to make disclosure to the public. Upon request, a Member must provide a non-confidential summary of the information contained in its written submissions that it designated as confidential, which can then be disclosed to the public. Thus, Article 18.2 provides contextual support for the view that the confidentiality rule in Article 17.10 is not absolute. Otherwise, no disclosure of written submissions or other statements would be permitted during any stage of the proceedings.

5. In practice, the confidentiality requirement in Article 17.10 has its limits. Notices of Appeal and Appellate Body reports are disclosed to the public. Appellate Body reports contain summaries of the participants' and third participants' written and oral submissions and frequently quote directly from them. Public disclosure of Appellate Body reports is an inherent and necessary feature of our rules-based system of adjudication. Consequently, under the DSU, confidentiality is relative and time-bound.

[2]European Communities' request for an open hearing, para. 9. Norway also argued for a narrower understanding of the term "proceedings".

[3]United States' comments on the third participants' submissions regarding open hearings, paras. 5 and 6 (referring to Establishment of the Appellate Body: Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995 (WT/DSB/1), para. 9).

[4]Appellate Body Report, *Canada – Aircraft*, para. 143. However, we note that that case did not involve a request to lift confidentiality; rather, that dispute concerned a request for additional confidentiality protection for business confidential information.

6. In our view, the confidentiality requirement in Article 17.10 is more properly understood as operating in a relational manner.[5] There are different sets of relationships that are implicated in appellate proceedings. Among them are the following relationships. First, a relationship between the participants and the Appellate Body. Secondly, a relationship between the third participants and the Appellate Body. The requirement that the proceedings of the Appellate Body are confidential affords protection to these separate relationships and is intended to safeguard the interests of the participants and third participants and the adjudicative function of the Appellate Body, so as to foster the system of dispute settlement under conditions of fairness, impartiality, independence and integrity. In this case, the participants have jointly requested authorization to forego confidentiality protection for their communications with the Appellate Body at the oral hearing. The request of the participants does not extend to any communications, nor touches upon the relationship, between the third participants and the Appellate Body. The right to confidentiality of third participants vis-à-vis the Appellate Body is not implicated by the joint request. The question is thus whether the request of the participants to forego confidentiality protection satisfies the requirements of fairness and integrity that are the essential attributes of the appellate process and define the relationship between the Appellate Body and the participants. If the request meets these standards, then the Appellate Body would incline towards authorizing such a joint request.

7. We note that the DSU does not specifically provide for an oral hearing at the appellate stage. The oral hearing was instituted by the Appellate Body in its *Working Procedures*, which were drawn up pursuant to Article 17.9 of the DSU. The conduct and organization of the oral hearing falls within the authority of the Appellate Body (*compétence de la compétence*) pursuant to Rule 27 of the *Working Procedures*. Thus, the Appellate Body has the power to exercise control over the conduct of the oral hearing, including authorizing the lifting of confidentiality at the joint request of the participants as long as this does not adversely affect the rights and interests of the third participants or the integrity of the appellate process. As we observed earlier, Article 17.10 also applies to the relationship between third participants and the Appellate Body. Nevertheless, in our view, the third participants cannot invoke Article 17.10, as it applies to their relationship with the Appellate Body, so as to bar the lifting of confidentiality protection in the relationship between the participants and the Appellate Body. Likewise, authorizing the participants' request to forego confidentiality, does not affect the rights of third participants to preserve the confidentiality of their communications with the Appellate Body.

8. Some of the third participants argued that the Appellate Body is itself constrained by Article 17.10 in its power to authorize the lifting of confidentiality. We agree that the powers of the Appellate Body are themselves circumscribed in that certain aspects of confidentiality are incapable of derogation—even by the Appellate Body—where derogation may undermine the exercise and integrity of the Appellate Body's adjudicative function. This includes the situation contemplated in the second sentence of Article 17.10, which provides that "[t]he reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made." As noted by the participants, the confidentiality of the deliberations is necessary to protect the integrity, impartiality, and independence of the appellate process. In our view, such concerns do not arise in a situation where, following a joint request of the participants, the Appellate Body authorizes the lifting of the confidentiality of the participants' statements at the oral hearing.

9. The Appellate Body has fostered the active participation of third parties in the appellate process in drawing up the *Working Procedures* and in appeal practice. Article 17.4 provides that third participants "may make written submissions to, and be given an opportunity to be heard by, the Appellate Body." In its *Working Procedures*, the Appellate Body has given full effect to this right by providing for participation of third participants during the entirety of the oral hearing, while third

[5]This relational view of rights and obligations of confidentiality is consistent with the approach followed in domestic jurisdictions with respect to similar issues, such as privilege.

parties meet with panels only in a separate session at the first substantive meeting. Third participants, however, are not the main parties to a dispute. Rather, they have a systemic interest in the interpretation of the provisions of the covered agreements that may be at issue in an appeal. Although their views on the questions of legal interpretation that come before the Appellate Body are always valuable and thoroughly considered, these issues of legal interpretation are not inherently confidential. Nor is it a matter for the third participants to determine how the protection of confidentiality in the relationship between the participants and the Appellate Body is best dealt with. In order to sustain their objections to public observation of the oral hearing, third participants would have to identify a specific interest in their relationship with the Appellate Body that would be adversely affected if we were to authorize the participants' request—in this case, we can discern no such interests.

10. The request for public observation of the oral hearing has been made jointly by the three participants, Canada, the European Communities, and the United States. As we explained earlier, the Appellate Body has the power to authorize a joint request by the participants to lift confidentiality, provided that this does not affect the confidentiality of the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process. The participants have suggested alternative modalities that allow for public observation of the oral hearing, while safeguarding the confidentiality protection enjoyed by the third participants. The modalities include simultaneous or delayed closed-circuit television broadcasting in a room separate from the room used for the oral hearing. Finally, we do not see the public observation of the oral hearing, using the means described above, as having an adverse impact on the integrity of the adjudicative functions performed by the Appellate Body.

11. For these reasons, the Division authorizes the public observation of the oral hearing in these proceedings on the terms set out below. Accordingly, pursuant to Rule 16(1) of the *Working Procedures*, we adopt the following additional procedures for the purposes of these appeals:

(a) The oral hearing will be open to public observation by means of simultaneous closed-circuit television. The closed-circuit television signal will be shown in a separate room to which duly-registered delegates of WTO Members and members of the general public will have access.

(b) Oral statements and responses to questions by third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation.

(c) Any third participant that has not already done so may request authorization to disclose its oral statements and responses to questions on the basis of paragraph (a), set out above. Such requests must be received by the Appellate Body Secretariat no later than 5:30 p.m. on 18 July 2008.

(d) An appropriate number of seats will be reserved for delegates of WTO Members in the room where the closed-circuit broadcast will be shown.

(e) Notice of the oral hearing will be provided to the general public through the WTO website. WTO delegates and members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat.

(f) Should practical considerations not allow simultaneous broadcast of the oral hearing, deferred showing of the video recording will be used in the alternative.

Report of the Appellate Body, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 14 December 1999

WORLD TRADE ORGANIZATION

WT/DS121/AB/R
14 December 1999
(99-5419)

Original: English

ARGENTINA – SAFEGUARD MEASURES ON IMPORTS OF FOOTWEAR

AB-1999-7

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Argentina – Safeguard Measures on Imports of Footwear

Argentina, *Appellant/Appellee*
European Communities, *Appellant/Appellee*

Indonesia, *Third Participant*
United States, *Third Participant*

AB-1999-7

Present:

Bacchus, Presiding Member
Beeby, Member
Matsushita, Member

I. Introduction

1. Argentina and the European Communities appeal certain issues of law and legal interpretation in the Panel Report, *Argentina – Safeguard Measures on Imports of Footwear* (the "Panel Report").[1] The Panel was established to consider a complaint by the European Communities with respect to the application by Argentina of certain safeguard measures on imports of footwear.

2. On 14 February 1997, Argentina initiated a safeguard investigation and adopted Resolution 226/97, which imposed provisional measures in the form of minimum specific duties on imports of certain footwear.[2] On the same day, the Argentine Ministry of Economy and Public Works repealed the minimum specific duties on imports of footwear ("DIEMs") that had been maintained by Argentina since 31 December 1993.[3] The opening of the safeguard investigation and the implementation of a provisional safeguard measure were notified to the Committee on Safeguards by Argentina in a communication dated 21 February 1997[4] and, by further communication dated 5 March 1997, Argentina transmitted a copy of the provisional duty resolution to the Committee on Safeguards.[5]

3. On 25 July 1997, Argentina notified the Committee on Safeguards of the determination of serious injury made by its competent authorities, the Comisión Nacional de Comercio Exterior ("CNCE").[6] Attached to this notification was Act 338, the report of the CNCE on serious injury. Act 338 incorporates by reference the Technical Report, a summary by CNCE staff of the factual data gathered during the safeguard investigation.[7] On 1 September 1997, Argentina notified the Committee on Safeguards of its intention to impose a definitive safeguard measure.[8] On 12 September 1997, Argentina adopted Resolution 987/97, which imposed, effective 13 September 1997, a definitive safeguard measure in the form of minimum specific duties on certain imports of footwear. On 26 September 1997, Argentina transmitted a copy of this Resolution to the

[1]WT/DS121/R, 25 June 1999.

[2]Panel Report, para. 2.1. The Resolution became effective on 25 February 1997.

[3]*Ibid*., para. 8.2.

[4]G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, 25 February 1997.

[5]G/SG/N/6/ARG/1Suppl.1 and G/SG/N/7/ARG/1/Suppl.1, 18 March 1997.

[6]G/SG/N/8/ARG/1, 21 August 1997.

[7]Panel Report, paras. 5.250-5.251 and 8.127-8.128.

[8]G/SG/N/10/ARG/1, G/SG/N/11/ARG/1, 15 September 1997; corrigendum 18 September 1997.

Committee on Safeguards[9], and Uruguay, as Pro Tempore President of the Mercado Común del Sur ("MERCOSUR")[10] notified the definitive safeguard measure imposed by that Resolution.[11] On 28 April 1998, Argentina published Resolution 512/98 modifying Resolution 987/97.[12] On 26 November 1998, Argentina published Resolution 1506/98, further modifying Resolution 987/97, and, on 7 December 1998, the Argentine Secretariat of Industry, Commerce and Mines published Resolution 837/98 implementing Resolution 1506/98.[13] The relevant factual aspects of this dispute are set out in further detail at paragraphs 2.1–2.6 and 8.1–8.20 of the Panel Report.

4. The Panel considered claims made by the European Communities that Argentina's safeguard measures are inconsistent with Articles 2, 4, 5, 6 and 12 of the *Agreement on Safeguards*, and with Article XIX:1(a) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 25 June 1999.

5. The Panel concluded that "the definitive safeguard measure on footwear based on Argentina's investigation and determination is inconsistent with Articles 2 and 4 of the Agreement on Safeguards" and, therefore, "that there is nullification or impairment of the benefits accruing to the European Communities under the Agreement on Safeguards within the meaning of Article 3.8 of the DSU."[14] The Panel found "no basis to address the [European Communities'] claims under Article XIX of GATT separately and in isolation from those under the Safeguards Agreement."[15] The Panel rejected the claims of the European Communities under Article 12 of the *Agreement on Safeguards*[16] and, in light of its determination that the definitive safeguard measure is inconsistent with Articles 2 and 4 of the *Agreement on Safeguards*, the Panel did not consider it necessary to make findings with respect to the claims of the European Communities under Articles 5 and 6 of that Agreement.[17]

6. On 15 September 1999, Argentina notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 27 September 1999, Argentina filed its appellant's submission.[18] On 30 September 1999, the European Communities filed its own appellant's submission.[19] On 11 October 1999, Argentina[20] and

[9]G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1, 10 October 1997.

[10]MERCOSUR was established on 26 March 1991, when Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asunción, which provides for the creation of a common market among its four State Parties.

[11] G/SG/N/10/ARG/1/Suppl.2, G/SG/N/11/ARG/1/Supp.2, G/SG/14/Suppl.1 and G/L/195/Suppl.1, 22 October 1997.

[12]Panel Report, para. 2.5.

[13]*Ibid*., para. 2.6.

[14]Panel Report, para. 9.1. The Panel's conclusions applied to "the definitive safeguard measure in its original legal form (i.e., Resolution 987/97) as well as in its subsequently modified form (i.e., Resolutions 512/98, 1506/98 and 837/98)." (Panel Report, para. 8.305) This finding has not been appealed and, therefore, stands.

[15]Panel Report, para. 8.69.

[16]*Ibid*., paras. 8.301 and 8.304.

[17]*Ibid*., paras. 8.289 and 8.292.

[18]Pursuant to Rule 21(1) of the *Working Procedures*.

[19]Pursuant to Rule 23(1) of the *Working Procedures*.

[20]Pursuant to Rule 23(3) of the *Working Procedures*.

the European Communities[21] each filed an appellee's submission. On the same day, Indonesia and the United States each filed a third participant's submission.[22]

7. On 19 October 1999, the Appellate Body received a letter from the Government of Paraguay indicating its interest "in attending" the oral hearing in this appeal. On 25 October 1999, the Appellate Body received a second letter from Paraguay clarifying that it was not requesting an opportunity to "make oral arguments or presentations at the oral hearing" as set forth in Rule 27.3 of the *Working Procedures*. Rather, Paraguay maintained that, as a third party which had notified its interest to the Dispute Settlement Body under Article 10.2 of the DSU, it had the right to "participate passively" in the oral hearing before the Appellate Body in the present dispute. No participant or third participant objected to the participation of Paraguay on a "passive" basis. On 26 October 1999, the Members of the Division hearing this appeal informed Paraguay, the participants and third participants that, having regard to the provisions of Articles 10.2 and 17.4 of the DSU as well as the provisions of Rules 24 and 27 of the *Working Procedures*, Paraguay would be allowed to attend the oral hearing as a "passive observer".

8. The oral hearing in the appeal was held on 29 October 1999. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

II. Arguments of the Participants

A. *Claims of Error by Argentina – Appellant*

1. Terms of Reference

9. Argentina argues that the Panel violated Article 7.2 of the DSU and exceeded its jurisdiction because the Panel not only considered, but relied on[23], alleged violations of Article 3 of the *Agreement on Safeguards* even though the European Communities' request for the establishment of a panel and the Panel's terms of reference mentioned alleged violations of only Articles 2 and 4 of the *Agreement on Safeguards*.

10. Argentina notes that Articles 3 and 4 of the *Agreement on Safeguards* are separate provisions, each of which sets out distinct requirements. In Argentina's view, Members intended with these provisions to allow national authorities to separate the Article 3 "*findings and conclusions*" requirement from the Article 4 requirement of a "*detailed analysis*", as is done in practice in Argentina. In this case, the "findings and conclusions" to which Article 3 refers are contained exclusively in Act 338 (on which the Panel relied), but no claim of a violation of Article 3 was before the Panel.

11. Argentina emphasizes that due process concerns underlie the rule that a Panel's jurisdiction is limited by its terms of reference, as recognized in the Appellate Body Reports in *Brazil – Measures Affecting Desiccated Coconut* ("*Brazil – Desiccated Coconut*")[24] and *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents*").[25] Argentina concludes that, by excluding Article 3 from its panel request, the European Communities essentially notified Argentina that it would not have to defend itself against Article 3 allegations. Argentina adds that

[21]Pursuant to Rule 22 of the *Working Procedures*.

[22]Pursuant to Rule 24 of the *Working Procedures*.

[23]In paras. 8.126, 8.127, 8.205, 8.207, 8.218 and 8.238 of the Panel Report.

[24]Appellate Body Report, WT/DS22/AB/R, adopted 20 March 1997, p. 22.

[25]Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, para. 92.

since Article 3 is central to the Panel's decision-making, the Panel's statements about Article 3 cannot be considered harmless error, "*purely gratuitous comment*" or not "*a legal finding or conclusion.*"[26]

2. Imposition of Safeguard Measures by a Member of a Customs Union

12. Argentina argues that the Panel erred in its legal reasoning and interpretation of the *Agreement on Safeguards* with respect to Argentina's right to exclude its partners in MERCOSUR from the application of safeguard measures. In Argentina's view, the Panel misinterpreted footnote 1 to Article 2.1 of the *Agreement on Safeguards*, and imposed an obligation to apply safeguard measures to customs union members when imports from all sources are taken into account for the injury determination, as well as a "parallelism requirement". Argentina maintains that neither of these supposed obligations has any basis in the *Agreement on Safeguards*.

13. Argentina contends that the footnote to Article 2.1 addresses comprehensively the conditions applicable to a safeguard investigation when a Member is part of a customs union. The fourth sentence of the footnote reflects the fact that Members could not agree on how to reconcile the requirements of Article XXIV:8 of the GATT 1994 with the most-favoured-nation requirement in Article 2.2 of the *Agreement on Safeguards*. Thus, in the last sentence of the footnote, Members specifically acknowledged that there was no resolution of this conflict in the *Agreement on Safeguards*. Argentina notes that the drafting history of footnote 1 shows that the Members deleted the very provisions that the Panel has attempted to "read in" to the existing text of the footnote.[27]

14. Argentina alleges as well that the Panel erred in law by imposing a "parallelism requirement" between the determination of injury and the application of the safeguard measure that is not found in the *Agreement on Safeguards*. Article 5, which sets out the requirements for the *application* of safeguard measures, makes no reference to any requirement of "parallelism", except to the extent that a measure may not exceed what is necessary to remedy the injury. Similarly, Article 9, which exempts developing countries from the *application* of safeguard measures in certain circumstances, does not impose a requirement that parallel modifications be made as part of the injury determination. In Argentina's view, the only "parallelism" on which the Members agreed is that only the market where injury is found can apply safeguard measures.

3. Claims Under Articles 2 and 4 of the *Agreement on Safeguards*

15. Argentina argues that, despite articulating a standard of review which essentially requires that a decision be "reasoned" and the decision-making process "explained", the Panel committed "significant legal error" by engaging in a "wholesale exercise of *de novo* review".[28] In its appellant's submission, Argentina referred to the standard of review applied by the panel in *United States – Imposition of Antidumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*

[26]Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, para. 110.

[27]Argentina cites a text tabled on 31 October 1990 by the Chairman of the Negotiating Group on Safeguards (MTN.GNG/NG9/W/25/Rev.3), which included the following proposal for the last sentence of the footnote:

> It is understood that when a safeguard measure is applied by a customs union on behalf of a member state, [any injury attributable to competition from producers established in other member states in the customs union shall not be attributed to increased imports, in conformity with the provisions of sub-paragraph 7(b)] [such a measure shall be applied to imports from other member states of the customs union]. (emphasis added by Argentina)

[28]Argentina's appellant's submission, p. 25.

("*United States – Salmon*")[29], as well as certain national rules of judicial review, for example, in the United States Court of Appeals for the Federal Circuit. Argentina clarified during the oral hearing that it accepts that the appropriate standard of review is found in Article 11 of the DSU, and that the Panel correctly identified this standard of review. Argentina's position is, rather, that having identified the proper standard of review, the Panel did not apply it correctly. Instead, Argentina contends, the Panel erred in conducting a "*de facto de novo*" review of the findings and conclusions of the Argentine investigating authority.

16. In Argentina's view, the Panel's approach demonstrates confusion about the meaning of *de novo* review.[30] The Panel repeatedly substituted its judgment for that of the Argentine authorities and set out its own view of the correct analysis to be made and the conclusions to be drawn. The Panel's analysis went far beyond the approach used in the cases to which to the Panel referred.[31] The Panel read methodologies into the *Agreement on Safeguards* where that Agreement itself is silent, and it did so despite the fact that the Members have reached no agreement on such methodologies. Argentina also contests the Panel's characterization of the object and purpose of the *Agreement on Safeguards* as focused on limiting trade restrictions, and its reliance on this characterization in its reasoning and decision making. Argentina argues that the *Agreement on Safeguards* was in fact intended *both* to increase discipline and transparency in safeguards cases *and* to liberalize some of the rules relating to Article XIX in order to encourage Members to eliminate grey-area measures.

17. With respect to the Panel's analysis of Argentina's determination that imports had increased, Argentina argues that the Panel collapsed the "increased imports" requirement with other requirements of Article 2, and wrongly treated it as a qualitative, rather than a quantitative requirement. In Argentina's view, the ordinary meaning of increased imports is that imports have become greater, and, contrary to the position of the European Communities, there is no factual or contextual support for any additional requirements in the *Agreement on Safeguards*.

18. Argentina emphasizes that the Panel took a very specific view of how the "increase" in imports must be calculated and compared. Even though the Panel recognized that the five-year base period selected was not inappropriate and that, on the basis of such review period, imports increased, the Panel nevertheless continued its inquiry and imposed a number of methodological hurdles which must be overcome before a finding of "increased imports" can be justified. The Panel misdefined the word "rate" in Article 4 to include "direction", and found that there could only be "increased imports" in this case if: (i) a change in the base year from 1991 to 1992 would still result in an increase; (ii) the analysis of end points and interim periods were mutually reinforcing; and (iii) it was found that the decrease in imports in 1994 and 1995 was temporary.

19. Argentina argues that, in its attempt to arrive at the "correct" result, the Panel ignored the following: (i) 1991 was an appropriate starting point to measure any increase because 1991 was the year in which market reforms were completed in Argentina; (ii) the "mutually reinforcing" requirement means that virtually any decrease in imports during a review period could prevent a finding of increased imports; and (iii) the Argentine decision in Act 338 specifically notes that the decline in imports was due to the specific duties that had been placed on footwear imports.

[29]Panel Report, ADP/87, adopted 27 April 1994, BISD 41S/229, para. 406.

[30]Argentina notes that "*de novo* review" has been defined as "trying the matter anew – as if it had not been heard before." *Black's Law Dictionary* (West Publishing Co., 5th ed., 1979) p. 392.

[31]Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear* ("*United States – Underwear*"), WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report WT/DS24/AB/R; Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses* ("*United States – Shirts and Blouses*"), WT/DS33/R, adopted 23 May 1997, as upheld by the Appellate Body Report WT/DS33/AB/R.

20. Argentina contends that, in effect, the Panel did not object to the *analysis* made by the Argentine authorities, but to their *conclusion* that imports increased absolutely. The Panel erred because the effect of its approach was to redetermine the weight to be assigned to each fact. Such an approach does not meet the requirement of Article 11 of the DSU that an objective assessment be provided. The Panel also violated Article 11 of the DSU by referring to the *preliminary*, rather than the *final* determination of the Argentine authorities, in support of its findings. In addition, the Panel violated Article 3.2 of the DSU by imposing obligations on Argentina that are not found in the *Agreement on Safeguards*.

21. Argentina submits also that the Panel erred in its analysis of Argentina's determination of "serious injury". In Argentina's view, Article 4.2(c) of the *Agreement on Safeguards* only requires a demonstration of the relevance of the factors examined, and not an examination of whether all factors are relevant. The Panel wrongly found that Argentina had not properly considered the factors of capacity utilization and productivity, despite the fact that productivity is explicitly mentioned in Act 338 and the data to calculate capacity utilization was available to the Argentine authorities.

22. Argentina argues further that the Panel misinterpreted the evidence on "serious injury" and then found it to be legally deficient. The Panel improperly "required" Argentina to consider 1996 data as part of its injury determination, and erred in dismissing Argentina's argument that it could not have relied on 1996 data, as the record clearly shows that the data for 1996 was incomplete. Argentina submits that it was appropriate and reasonable to use a single review period for which all data was available as the basis for its consideration of all injury factors.

23. Despite certain statements made by the Panel, Argentina argues that the record is clear about the data used for each injury factor. Accordingly, the Panel erred in: (i) finding that Argentina violated the *Agreement on Safeguards* because the questionnaire results did not match such public industry-wide data; (ii) criticizing the Argentine authorities' treatment of interested party data which differed from questionnaire results; (iii) criticizing as inconsistent the data on overall firm profitability and its break-even point analysis; and (iv) finding that Argentina did not explain how a shift to higher-value production was a sign of injury.

24. Argentina argues that the Panel further erred in its findings with respect to causation. The Argentine authorities concluded that imports took market share from the domestic industry, and that this led to a fall in domestic production that caused financial and economic indicators to fall for the companies investigated. The Panel criticized this analysis and set out three of its own "standards". First, the Panel required that an upward trend in imports *coincide* with a *downward* trend in the injury factors. Argentina notes that Article 4.2(c) of the *Agreement on Safeguards* refers to "changes", not "downward trends", so there is no requirement that there be a *downward* trend in each year of the period of review. Moreover, the Panel's requirement of "coincidence" in time is not implied by the term "cause". Second, the Panel used the phrase "under such conditions" to develop a requirement that the "conditions of competition" between imported and domestic footwear in the Argentine footwear market demonstrate a "causal link" between increased imports and injury. Argentina asserts that there is no basis in the *Agreement on Safeguards* for this requirement. Third, the Panel required the Argentine authorities to establish that other relevant factors have been analyzed, and that injury caused by factors other than imports has not been attributed to imports. Argentina maintains that this requirement goes far beyond those actually contained in the *Agreement on Safeguards*, and fails to acknowledge the approach of the Argentine authorities, which ensured that general macroeconomic factors were not attributed to imports.

25. Finally, Argentina believes that the Panel violated Article 12.7 of the DSU, which requires that a panel report include the "basic rationale" behind any findings and recommendations that a panel makes. For example, Act 338 specifically notes that the decline in imports was due to the specific duties placed on footwear imports in 1993. Argentina contends that the Panel ignored this in its insistence that the *Agreement on Safeguards* requires an analysis of intervening trends and its

criticism of Argentina for failing to take such trends into account. Argentina contends also that the Panel misinterpreted the evidence before it on "serious injury" and then found that evidence to be legally deficient. In Argentina's opinion, therefore, the Panel's conclusions "are not rational and do not follow logically from the evidence".[32]

B. *Arguments by the European Communities – Appellee*

1. Terms of Reference

26. The European Communities does not agree with Argentina that the Panel erred in considering or relying, in its reasoning, on Article 3 of the *Agreement on Safeguards* and, accordingly asks the Appellate Body to affirm the Panel's conclusions in that respect. The European Communities notes that the Panel has not found a violation of Article 3 of the *Agreement on Safeguards as such*. Instead the Panel legitimately referred to the requirements contained in Article 3.1 when considering the violation of Article 4.2(c) (which the European Communities did invoke), because Article 4.2(c) contains a cross-reference to Article 3. Moreover, the European Communities argues that, even in the absence of a specific cross-reference, panels and the Appellate Body may, in their reasoning, legitimately rely on a provision that was not mentioned in the request for the establishment of a panel. The European Communities notes also that it made no claim of a violation of Article 3.

2. Imposition of Safeguard Measures by a Member of a Customs Union

27. The European Communities agrees with the Panel that the *Agreement on Safeguards* contains a "parallelism" requirement. By taking into consideration imports from MERCOSUR countries for the purposes of making its injury determination, even though it never intended to impose measures on those imports, Argentina violated its obligations under the *Agreement on Safeguards* and Article XIX of the GATT 1994. During the oral hearing, the European Communities emphasized, however, that the Panel's interpretation of Article XXIV of the GATT 1994 and Article 2.2 of the *Agreement on Safeguards* was not necessary to support its conclusion that a parallelism requirement exists, that no claim relating to the legal status of MERCOSUR was made before the Panel, and that neither party to this dispute has appealed the Panel's apparent assumption that Article XXIV is applicable.

28. The European Communities points out that the text of Article 2.1 of the *Agreement on Safeguards* sets out the *requirements* which should be fulfilled before a Member may apply a *safeguard measure*. This provision therefore underscores the inherent link between the *requirements* and the *measure*. Article 5 of the *Agreement on Safeguards* reinforces such a link by providing that "[a] Member shall apply safeguard measures only *to the extent necessary* to prevent or remedy serious injury" and that "Members should choose measures *most suitable* for the achievement of these objectives." In the view of the European Communities, Article 9 of the *Agreement on Safeguards* does not support Argentina's position that there is no "parallelism requirement" in the *Agreement on Safeguards*. Article 9 contains an express exception to the concept of "parallelism", but no similar express exception is foreseen for members of customs unions.

29. The European Communities argues that Article XIX of the GATT 1994 also requires parallelism. A liberalization obligation must give rise to increased imports, which in turn must cause serious injury. Under Article XIX, the authorized remedy for that serious injury can only be the suspension of the relevant GATT or WTO liberalization obligation. Accordingly, obligations incurred by Argentina *within the framework of its customs union* cannot justify a safeguard measure, and imports subject to such obligations must be excluded from the analysis. The European

[32]Argentina's appellant's submission, p. 61.

Communities notes in this context that there is no WTO obligation on Argentina not to impose safeguard measures on its MERCOSUR partners, only an internal MERCOSUR commitment.

3. Claims Under Articles 2 and 4 of the *Agreement on Safeguards*

30. The European Communities maintains that the Panel correctly interpreted and applied the standard of review contained in Article 11 of the DSU, and did not engage in a *de novo* review.

31. The European Communities requests the Appellate Body to uphold the Panel's findings on "increased imports". The European Communities submits that the requirement of "increased imports" in Article 2.1 of the *Agreement on Safeguards* "should now be read in the light of the new package of rights and obligations,"[33] including Article XIX of the GATT 1994, and the *Agreement on Safeguards*, as well as on the basis of the object and purpose of these agreements. Given the content of the new "package", the determination of "increased imports" necessarily contains more than it did under the safeguard regime governed by Article XIX of the GATT 1947. The European Communities concludes that a strictly quantitative interpretation of the "increased imports" requirement (assuming *arguendo* that such an interpretation existed under Article XIX of the GATT 1947) can no longer be reconciled with the functioning of the safeguard mechanism under the WTO.

32. In the view of the European Communities, the Panel did not, as Argentina claims, require that both the end point to end point analysis and the intervening periods *must be* mutually reinforcing. Rather, the Panel concluded that the Member taking a safeguard measure should determine whether or not imports increased by examining the issue from more than just one angle. If one analysis goes in a different direction from the other, then, as the Panel says, this "raises doubts" as to whether the conclusion that "imports increased" is justified, and a proper explanation is required. The European Communities also highlights the fact that the Panel has based its reasoning on the "increased imports" requirement on the import figures for *all* countries, that is, *including* MERCOSUR countries. The European Communities argues that Argentina's non-fulfilment of the requirement of "increased imports" is even more striking when third-country imports are separated out.

33. The European Communities submits that the Panel correctly analysed Argentina's serious injury determination as required by Article 11 of the DSU and was justified in concluding that this determination did not comply with the *Agreement on Safeguards*. In the view of the European Communities, the ordinary meaning of the requirement contained in Article 4.2(a) of the *Agreement on Safeguards* that "the competent authorities shall evaluate all relevant factors" is that such authorities are required to: (i) evaluate *at least* all of the factors mentioned in Article 4.2(a), and possibly more, if necessary; and (ii) on the basis of this examination demonstrate – and publish – the relevance of the factors considered. The European Communities submits that the Panel correctly concluded that Argentina failed to undertake these legally required steps with regard to capacity utilization and productivity.

34. The European Communities also requests the Appellate Body to uphold the Panel's analysis of Argentina's treatment of 1996 data. Article 4.2(a) of the *Agreement on Safeguards* requires "*all relevant factors*" to be considered, and the most *relevant* information is the most *recent*. The European Communities rejects Argentina's claim that, since it could consider 1996 data for some but not for all factors, it was reasonable to use a single review period for which all data are available. The *Agreement on Safeguards* does not oblige Members to base their determinations on a complete set of data for *all* factors for a *fixed* time-frame. By deliberately ignoring the 1996 information for those factors for which it *had* collected the information, Argentina made conclusions which were not reasonably supported by the facts.

[33]European Communities' appellee's submission, para. 71.

35. The European Communities submits that the Panel correctly analysed Argentina's causation determination, as required by Article 11 of the DSU, and was justified in concluding that this determination did not meet the requirements set out in Article 4 of the *Agreement on Safeguards*. In the view of the European Communities, the ordinary meaning of the term causation is "the act of causing or producing an effect".[34] One event (the increase in imports) must *produce* the other event (serious injury). If the two events take place simultaneously, then the probability that the events are linked is greater than if they happen many years apart. The longer the time between the two events, the more a compelling analysis is required of why causation is still present.

36. The European Communities considers that the Panel correctly interpreted the "under such conditions" requirement in Article 2.1 of the *Agreement on Safeguards* as indicating the need to analyse the conditions of competition between the imported product and the domestic like or directly competitive products as part of the causation analysis required by Article 4.2(a) and (b).[35] The European Communities disputes Argentina's claim that Article 4.2(b) of the *Agreement on Safeguards* does not require a separate analysis of possible "other" factors. In order to conclude that no "other" factor had caused the serious injury, the European Communities submits that it is necessary to examine whether there were such other factors present and to examine their impact on the domestic industry. In the view of the European Communities, by not providing such an analysis, in particular of the "tequila effect", Argentina violated Article 4.2(b) and (c) of the *Agreement on Safeguards*.

37. With respect to Argentina's claim of a violation of Article 12.7 of the DSU, the European Communities submits that, as the Appellate Body found in *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*")[36], the Panel has set out a detailed and thorough rationale for its findings and recommendations in this case, as required by Article 12.7 of the DSU, and, therefore, there is no violation.

C. *Claims of Error by the European Communities – Appellant*

1. Relationship Between Article XIX of the GATT 1994 and the *Agreement on Safeguards*

38. The European Communities appeals and requests the Appellate Body to reverse the Panel's conclusion that safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new *Agreement on Safeguards* also thereby satisfy the requirements of Article XIX of the GATT 1994, as well as the Panel's consequent refusal to rule on the European Communities' Article XIX claim. The European Communities further requests the Appellate Body to reverse the legal interpretations and findings made in support of this conclusion, notably the Panel's erroneous reference to the "*express omission* of the criterion of unforeseen developments" in the *Agreement on Safeguards*. The European Communities requests the Appellate Body to complete the Panel's reasoning and find, on the basis of the uncontested facts, that Argentina did not comply with the requirement contained in Article XIX:1(a) of the GATT 1994 to take safeguard measures only where the alleged increase in imports is "*as a result of unforeseen developments*".

39. The European Communities asserts that the requirement that increased imports result from "unforeseen developments" is a fundamental characteristic of safeguard measures, and lies at the beginning of the "logical continuum" of events justifying the invocation of the safeguard mechanism. This starts with a WTO Member incurring an obligation under the GATT 1994. After this obligation is implemented, an unforeseen development occurs, resulting in increased imports, which occur under

[34]European Communities' appellee's submission, para. 121.

[35]Panel Report, para. 8.250.

[36]Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, para. 168.

conditions such that serious injury (or a threat thereof) is caused. In the view of the European Communities, if this chain of events has occurred, then a WTO Member may take a safeguard measure.

40. The European Communities is convinced that the WTO agreements are a "single undertaking" which constitutes an "integrated system". The requirement that increased imports must result from "unforeseen developments" and the other fundamental characteristics of safeguard measures were not expressly repeated in the *Agreement on Safeguards* because they did not need to be clarified, added to or modified.

41. The European Communities submits that there are four possible relationships between a provision of the GATT 1994 and an Agreement in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), namely: a *conflict* between provisions of the two texts; an *overlap* of provisions of the two texts[37]; *an express derogation* in an Agreement in Annex 1A of the *WTO Agreement* that allows for a violation of the GATT 1994; and provisions that are *complementary*. The European Communities argues that the fourth option, i.e, *complementary* provisions, describes the relationship between Article XIX:1(a) and Article 2.1 of the *Agreement on Safeguards*, and should have formed the basis for the Panel's reasoning. The Appellate Body has confirmed in *Brazil – Desiccated Coconut*[38] and *Guatemala – Antidumping Investigation Regarding Grey Portland Cement from Mexico* ("*Guatemala – Cement*")[39] that provisions of the GATT 1994 and the relevant Agreement in Annex 1A of the *WTO Agreement* represent a package of rights and disciplines that must be considered in conjunction. Applying this to the present case, the European Communities argues that the *Agreement on Safeguards* does not supersede or replace the GATT 1994, and that it is possible to apply the conditions in the GATT 1994 and the *Agreement on Safeguards* together, because there is no formal *conflict* between them.

42. The European Communities argues that the ordinary meaning of the term "*as a result of unforeseen developments*" is "as a consequence of a sudden change in a course of action or events or in conditions that has not been foreseen".[40] The European Communities agrees that the opening phrase of Article XIX:1(a) of the GATT 1994 is relevant context for the "*as a result of unforeseen developments*" requirement, but comes to a conclusion opposite to that reached by the Panel. This phrase makes clear that there are two pre-conditions which need to be present before a safeguard action can be taken. Imports should increase *as a result of* unforeseen developments, and also *as a result of* the effect of tariff concessions or any other obligations under the GATT 1994.

43. The European Communities rejects the reasoning of the Panel on the object and purpose of the *Agreement on Safeguards*. In the view of the European Communities, the object and purpose of the *Agreement on Safeguards* is inherently linked with Article XIX of the GATT 1994, entitled "*Emergency Action* on Imports of Particular Products". (emphasis added) Therefore, safeguard measures are by definition a mechanism based on "emergencies": the very nature of a safeguard measure is to tackle an *urgent* situation which was *not expected*.

[37]See e.g., Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*European Communities – Bananas*"), WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, para. 203.

[38]*Supra,* footnote 24.

[39]Appellate Body Report, WT/DS60/AB/R, adopted 25 November 1998.

[40]European Communities' appellant's submission, para. 24.

44. The European Communities is of the view also that the Panel mis-interpreted the 1951 *Hatters' Fur* case[41] by stating that it "made it easier" to meet the "*unforeseen developments*" condition, and that the Panel wrongly gave credit to the view of one legal scholar that this case "essentially read the unforeseen developments condition out of the text of Article XIX:1(a) of GATT 1947".[42] In fact, the *Hatters' Fur* Working Party confirmed the validity and relevance of the "*as a result of unforeseen developments*" requirement. The European Communities adds that further support for the continuing validity of the "*as a result of unforeseen developments*" requirement is found in recent texts of national legislation notified by WTO Members. Korea, Costa Rica, Norway, Panama and Japan have all incorporated the phrase in their national laws.

D. *Arguments by Argentina – Appellee*

1. Relationship Between Article XIX of the GATT 1994 and the *Agreement on Safeguards*

45. Argentina requests the Appellate Body to affirm the Panel's finding that "safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT"[43] and to decline to consider the claims of the European Communities under Article XIX separately. Argentina maintains that the "unforeseen developments" requirement in Article XIX has not been included in the *Agreement on Safeguards*, and that this significant omission can only be attributed to the intention of Members to eliminate that requirement *as a condition separate from and independent of the provisions of the Agreement on Safeguards*.

46. Argentina finds no legal text or other element that supports the reasoning of the European Communities that there is a "logical continuum of events" that conditions the application of a safeguard measure and that begins with the condition that "unforeseen developments" must occur. To Argentina, it is clear that the Uruguay Round undertook to recast the disciplines governing the application of safeguard measures by clarifying, developing and, where appropriate, modifying some aspects of those disciplines. If the entire content of Article XIX were perfectly consistent with the *Agreement on Safeguards*, there would have been no need to include in Article 11.1(a) the reference to "provisions of that Article applied in accordance with this Agreement".

47. In Argentina's view, the fact that certain Article XIX provisions are not expressly incorporated in the *Agreement on Safeguards* does not support the position of the European Communities. For example, the concept of "emergency action" is incorporated *by reference* in Article 11.1(a), with the clarification that any measure of this kind must be applied in conformity both with the *Agreement on Safeguards* and with Article XIX, and the provision that safeguard measures consist of the suspension of the relevant GATT obligation or the withdrawal or modification of the relevant concession appears in Article 8 of the *Agreement on Safeguards*. Similarly, the concept of "unforeseen developments" is now fully met once the conditions under Article 2 of the *Agreement on Safeguards* have been satisfied. Consequently, Argentina submits that it is clear that a situation in which a product is being imported "in such increased quantities" and "under such conditions" as to cause or threaten serious injury is now, by definition, an instance of "unforeseen developments" within the meaning of Article XIX and Article 2 of the *Agreement on Safeguards*.

[41] *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX*, ("*Hatters' Fur*"), GATT/CP/106, adopted 22 October 1951.

[42] Panel Report, para. 8.65, footnote 470.

[43] Panel Report, para. 8.69.

48. Argentina argues that none of the four possible interpretations put forward by the European Communities constitutes the proper analytical approach based on *Brazil - Desiccated Coconut*. The panel in *Brazil – Desiccated Coconut* specifically rejected the notion that the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") merely imposed *additional* substantive and procedural obligations[44] or that a measure imposed under that Agreement and under Article VI of the GATT 1994 would necessarily be consistent with Article VI in isolation.[45] Argentina interprets this case to mean that Article VI in and of itself can no longer have an independent, separate meaning, and that both agreements must be considered in conjunction.[46]

49. Argentina refers to the negotiating history of the *Agreement on Safeguards* in support of its position, noting that the June 1989 draft of that Agreement contained the concept of an "unforeseen increase … " in imports.[47] By mid-1990, though, all references to measures taken as a result of unforeseen or emergency situations had disappeared from the drafts of the *Agreement on Safeguards*.[48] Thus, in Argentina's view, the requirement that the increase in imports should result from unforeseen circumstances was expressly considered during the negotiation and intentionally left out of the text.

50. Argentina highlights the fact that the European Communities eliminated the "unforeseen developments" requirements from its domestic legislation on safeguards.[49] Argentina considers this to be proof that the European Communities did not itself consider that the requirement existed in the context of the new rights and obligations defined and interpreted in the *Agreement on Safeguards*.

51. Argentina requests that if the Appellate Body does not accept the Panel's interpretation, then, in the alternative, the Appellate Body should find that there is a "conflict" between the *Agreement on Safeguards* and Article XIX, and confirm that the *Agreement on Safeguards* takes precedence over Article XIX in accordance with the General Interpretative Note to Annex 1A. Finally, in the event that the Appellate Body finds that there is a separate obligation to verify the existence of unforeseen developments, Argentina requests, in the further alternative, that the Appellate Body find that Argentina did verify such unforeseen developments in its investigation. Argentina stated in its decision that "the pressure of imports was unforeseen on account of its rapid pace of increase at a time when the national economy was facing macroeconomic problems".[50]

E. *Arguments by the Third Participants*

1. Indonesia

52. Indonesia agrees with the European Communities that Argentina's safeguard measure was "fatally flawed" because it was not imposed in response to "unforeseen developments" as required by Article XIX of the GATT 1994. Indonesia also joins the European Communities in its request that the Appellate Body complete the Panel's analysis and hold that Argentina acted in violation of Article XIX. In Indonesia's view, the Panel's treatment of Article XIX and the *Agreement on Safeguards* is in direct conflict with the construction of the relationship between the GATT 1994 and the Annex 1A Agreements by previous panels and by the Appellate Body. Referring to the panel

[44] Panel Report, WT/DS22/R, adopted 20 March 1997, as upheld by the Appellate Body Report, WT/DS22/AB/R, para. 246.

[45] *Ibid.*, para. 247.

[46] Appellate Body Report, *Brazil – Desiccated Coconut*, *supra*, footnote 24, p. 16

[47] MTN.GNG/NG9/W/25, 27 June 1989.

[48] MTN.GNG/NG9/W/25/Rev.2, 13 July 1990.

[49] EC Regulation 3285/94, OJ 1994 L349/53.

[50] Act 338, folio 5350.

report in *European Communities – Bananas*[51], as well as to the Appellate Body reports in *Brazil – Desiccated Coconut*[52] and *Guatemala – Cement*[53], Indonesia submits that the Panel erred in law when it refused to apply Article XIX and the *Agreement on Safeguards* together, giving meaning to *all* terms in *both* agreements. Indonesia adds that, by reading the "unforeseen developments" requirement out of the WTO system altogether, the Panel removed an important protection against abuse of the safeguard mechanism.

53. Indonesia submits that Argentina's interpretation of footnote 1 to Article 2.1 of the *Agreement on Safeguards* is incorrect. Footnote 1 relates to the imposition of a safeguard measure by a customs union. Here, however, no action was taken *by a customs union*. Rather, Argentina independently investigated and imposed the safeguard measure on its own behalf. Footnote 1 says *nothing* about the obligations of, or any conditions affecting, a member of a customs union *acting individually*. For the same reason, even assuming *arguendo* that Argentina's interpretation of the negotiating history of footnote 1 is correct, it does not support Argentina's argument, because the language on which the parties allegedly could not reach agreement would not have applied to Argentina's actions in this case, i.e., to where a safeguard measure is applied *by a state acting independently*. Indonesia also questions whether Article XXIV is applicable to MERCOSUR, as the members of MERCOSUR did not notify the customs union under Article XXIV of either the GATT 1947 or the GATT 1994.

54. Indonesia adds that even if footnote 1 were somehow applicable to Argentina's action by virtue of its MERCOSUR membership, that footnote would only permit a derogation from the obligations contained in *Article 2.1* of the *Agreement on Safeguards*. However, Argentina's independent imposition of a safeguard against only non-MERCOSUR countries violates *Article 2.2*, which obliges Members to apply safeguard measures in a nondiscriminatory fashion.

55. Indonesia maintains that the Panel's analysis of the "parallelism requirement" is best understood, not as an interpretation of the terms of the *Agreement on Safeguards* as such, but as an explanation of how – in practical terms – a Member can reconcile its WTO obligations under the *Agreement* with commitments that it may have made separately to members of its customs union. Argentina agreed with its fellow MERCOSUR members to refrain from applying safeguard measures against one another. That "extra-WTO" agreement, however, cannot exempt Argentina from its obligations *vis-à-vis* all other WTO Members under the *Agreement on Safeguards*.

56. Indonesia submits that the Panel properly refrained from conducting a *de novo* review of the determinations by Argentine authorities. In Indonesia's view, it was well within the scope of the Panel's authority to assess whether those determinations were reasonably supported by the results of the investigation. Moreover, Indonesia believes that, because Argentina failed to demonstrate "increased imports", failed to demonstrate "serious injury", and failed to demonstrate causation, the Panel correctly concluded that Argentina violated Articles 2 and 4 of the *Agreement on Safeguards*.

57. With respect to "increased imports", Indonesia characterizes Argentina's principal complaint as a belief that the Panel imposed new obligations on Members to use specific methodologies. In Indonesia's view, however, the Panel Report merely points out analytical flaws in Argentina's analysis; it is *not* fairly read as imposing specific requirements. Indonesia contends that Argentina ignored the "tense" of Article 2 of the *Agreement on Safeguards* – its focus on present and future rather than past events. In this respect, Indonesia points out that Argentina's failure to consult 1996 data did not itself constitute a violation of Article 2 and also that the Panel did not characterize it as

[51]*Supra*, footnote 37, para. 7.160.

[52]See *Brazil – Desiccated Coconut*, *supra*, footnote 24, p. 14.

[53]*Supra*, footnote 39, para. 65.

such. The Panel simply found fault with Argentina's failure to weigh *all* the available data, particularly where the missing data would tend to contradict Argentina's finding of an "increase."

58. With respect to "serious injury", Indonesia underlines that Argentina failed to consider two factors that it was specifically required to evaluate under Article 4.2(a) – productivity and capacity utilization. Indonesia rejects Argentina's claim that it may pick and choose *a priori* the factors that it wishes to examine, and explain the relevance of those selected factors after the fact. Indonesia is also of the view that the Panel correctly held that Argentina relied on inadequate evidence even for those "serious injury" factors that it did choose to consider.

59. Indonesia submits that the Panel's conclusion that Argentina had not identified evidence or analysis on which it could reasonably base a determination of causation should also be upheld. Argentina failed to separate out the effects of other economic factors – such as the "tequila effect" – from the effects of footwear imports on the domestic industry. Indonesia agrees with the Panel that it is not enough simply to juxtapose the imports and the injury, and then to assert that there must be a link between them. If Argentina did not or cannot explain *how* the alleged increase in imports caused the alleged harm to its domestic manufacturers, then, Indonesia submits, the mere correspondence of these events in time will not support the imposition of a safeguard measure.

2. United States

60. The United States submits that the Panel correctly found that safeguard investigations conducted and safeguard measures imposed since the entry into force of the WTO agreements which meet the requirements of the *Agreement on Safeguards* also thereby satisfy the requirements of Article XIX of the GATT 1994. The United States requests the Appellate Body to uphold this ruling, as well as the Panel's consequent decision to decline to rule on the Article XIX claim by the European Communities.

61. The United States notes that while the *Agreement on Safeguards* defines "safeguard measures" as "those measures provided for in Article XIX", a number of the provisions of the Agreement, including Articles 2, 3, 4, 5, 7, 8.3, 9 and 10, either limit the rights provided in Article XIX or provide rights ruled out by Article XIX. In addition, the United States observes that the preamble of the Agreement refers to a "comprehensive agreement, applicable to all Members", and notes the need to re-establish control over safeguards measures and to eliminate grey-area measures. These objectives were achieved through an agreement that imposed new procedural requirements, enhanced transparency and consultation requirements, but loosened in some respects the strict requirements of Article XIX, while explicitly prohibiting grey-area measures. If it were possible for Members to pick and choose between the rights and obligations in the original package of Article XIX, and the rights and obligations in the *Agreement on Safeguards*, then the entire project represented by that Agreement would be revised *post hoc*, and the negotiated balance would be fundamentally upset.

62. The United States argues that the rebalancing of Article XIX was a fundamental premise of the negotiations on safeguards. Because of the problem of grey-area measures, the agreement had to be comprehensive and had to apply to all contracting parties. That rebalancing included the removal of the "unforeseen developments" condition for safeguard measures. Therefore, the text of Article XIX now cannot be read outside the context of the *Agreement on Safeguards*, and that Agreement now completely occupies the field of regulation of safeguard measures in the WTO system. The United States concludes that the omission of "unforeseen developments" from the Agreement was intentional, and that this express omission must be given meaning.

63. The United States notes that legal scholars agree that under the *Agreement on Safeguards*, "unforeseen developments" are no longer a prerequisite for a safeguard action[54], and that state practice has also treated the question of "unforeseen developments" as "marginal, legally nonbinding or subsumed by other aspects of the safeguards process".[55] The United States underlines that the great majority of safeguards legislation notified to the WTO (including that of the European Communities) does not even refer to "unforeseen developments". With respect to the *Hatters' Fur* case of 1951[56], the United States considers that, while this case cannot contradict the substantive rebalancing that took place in the Uruguay Round, it does help to clarify the legal interpretation of "unforeseen developments" under the GATT 1947, the reasons why negotiators were willing to omit this concept from the Uruguay Round results, and how a determination which fully satisfies the requirements of Article 2.1 may also satisfy the "unforeseen developments" requirement.

64. With respect to the Panel's interpretation of footnote 1 to Article 2.1 of the *Agreement on Safeguards*, the United States refers to its view of the negotiating history of the footnote, as set out *in extenso* in paragraph 6.32 of the Panel Report and in footnote 396 to that paragraph. The United States emphasizes the reason why this footnote follows the word "Member": due to the unique status of the European Communities in the GATT, and to the fact that the European Communities did take safeguards measures, a special provision was needed to deal with the application of safeguards by the European Communities.

65. The United States also notes that Argentina and the Panel have wrongly referred to Article XXIV of the GATT 1994. In the view of the United States, MERCOSUR has never been notified under Article XXIV. The parties to MERCOSUR have chosen to notify it instead exclusively under the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries[57] (the "Enabling Clause"). The United States contends that, having made this legal choice, Argentina is now precluded from basing its arguments on the assumption that MERCOSUR is an Article XXIV agreement, and that, therefore, the fourth sentence of footnote 1 to Article 2.1 of the *Agreement on Safeguards* is legally irrelevant in this case.

66. The United States submits that the Panel identified and applied the proper standard of review. A fair reading of the Panel Report demonstrates that the Panel did not, as Argentina alleges, engage in *de novo* review or construct alternate methodologies that it then concluded Argentina had failed to satisfy. Rather, the Panel properly examined whether Argentina had evaluated the relevant evidence, reached conclusions that were reasonably supported by the evidence, and adequately explained the reasoning set forth in its findings and conclusions. On this basis, and in keeping with the applicable standard of review, the Panel properly concluded that Argentina's actions were inconsistent with Articles 2 and 4 of the *Agreement on Safeguards*.

67. With respect to "increased imports", the United States emphasizes that the Panel *did not* re-evaluate the facts or impose a specific methodology for collecting or evaluating the evidence. The Panel did not conclude that an end point analysis is *per se* inconsistent with the *Agreement on Safeguards*. Rather, the United States believes, the contrary evidence on interim periods was so significant that, in the absence of an explanation in Argentina's determination concerning how it had evaluated that contrary evidence, the Panel could not conclude that Argentina's determination that imports had increased constituted an objective evaluation of the record as a whole.

[54]M.C.E.J. Bronckers, "Voluntary Export Restraints and the GATT 1994 Agreement on Safeguards," in J.H.J. Bourgeois, F. Berrod and E.Fournier (eds.), *The Uruguay Round Results: A European Lawyers' Perspective*" (European University Press, 1995), p. 275; M. Trebilcock and R. Howse, *The Regulation of International Trade* (2nd ed., 1999), p. 228.

[55]United States' third participant's submission, para. 22.

[56]*Supra*, footnote 41.

[57]L/4903, adopted 28 November 1979, BISD 26S/203.

68. The United States argues also that the Panel properly found that Argentina's conclusions with respect to "serious injury" were not adequately supported by the evidence. The Panel's determination that, under Article 4.2(a), a Member must evaluate *all* relevant factors is consistent with past panel practice, including *United States – Underwear* and *United States – Shirts and Blouses*.[58] The United States also rejects as without merit Argentina's attacks on the Panel's determination that Argentina's findings and conclusions were not adequately explained and supported by the evidence.

69. On the question of causation, the United States notes that Argentina alleges *inter alia* that the Panel articulated a series of "new standards" that Argentina had to satisfy, rather than analyzing the adequacy of Argentina's actual decision. However, the United States asserts that the Panel's determination makes clear that what is at issue is Argentina's failure to provide sufficient evidence to justify its decision. The United States concludes that the Panel correctly found that Argentina's measure cannot be sustained where the underlying decision does not demonstrate that Argentina considered the relevant evidence and provided a reasoned explanation of its conclusions.

III. Issues Raised In This Appeal

70. This appeal raises the following issues:

(a) whether the Panel exceeded its terms of reference in its consideration of Article 3 of the *Agreement on Safeguards*;

(b) whether the Panel erred: in concluding that "safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT"; in its consequent refusal to consider the EC's claims under Article XIX of the GATT 1994; and in its conclusion that the phrase "as a result of unforeseen developments" in Article XIX:1(a) of the GATT 1994 was "*expressly omitted*" from the *Agreement on Safeguards* and, therefore, has no relevance for a safeguard measure imposed under the *Agreement on Safeguards*;

(c) whether the Panel erred in its interpretation and application of Article 2 of the *Agreement on Safeguards* and Article XXIV of the GATT 1994 as these provisions relate to the application of the safeguard measure at issue in this case;

(d) whether the Panel: enunciated and applied the correct standard of review in this case; erred in its interpretation and application of the conditions for imposing a safeguard measure set forth in Articles 2 and 4 of the *Agreement on Safeguards*, in particular, increased imports, serious injury and causation; and set out a "basic rationale" for its findings as required by Article 12.7 of the DSU.

IV. Terms of Reference

71. Argentina argues, on appeal, that the Panel violated Article 7.2 of the DSU and exceeded its terms of reference, because the Panel not only considered, but also relied on, alleged violations of Article 3 of the *Agreement on Safeguards* even though the request for the establishment of a Panel submitted by the European Communities only alleged violations of Articles 2 and 4 of the *Agreement on Safeguards*. Argentina maintains, in particular, that the Panel's references to Article 3 contained in

[58]*Supra*, footnote 31.

paragraphs 8.205, 8.207, 8.218 and 8.238 of the Panel Report[59] demonstrate that the Panel relied on obligations contained in Article 3 in reaching its conclusion that Argentina did not act in compliance with its obligations under Article 4.2(c) of the *Agreement on Safeguards*.

72. Article 4.2(c) of the *Agreement on Safeguards* provides as follows:

> The competent authorities shall publish promptly, *in accordance with the provisions of Article 3*, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. (emphasis added)

Article 3 provides, in relevant part:

> 1. … The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

73. We have examined the specific paragraphs in the Panel Report cited by Argentina, and we see no *finding* by the Panel that Argentina acted inconsistently with Article 3 of the *Agreement on Safeguards*. In one instance[60], the Panel referred to Article 3 parenthetically in support of its reasoning on Article 4.2(a) of the *Agreement on Safeguards*. Every other reference to Article 3 cited by Argentina was made by the Panel in conjunction with the Panel's reasoning and findings relating to Article 4.2(c) of the *Agreement on Safeguards*. None of these references constitutes a legal finding or conclusion by the Panel regarding Article 3 itself.

74. We note that the very terms of Article 4.2(c) of the *Agreement on Safeguards* expressly incorporate the provisions of Article 3. Thus, we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the *Agreement on Safeguards*. More particularly, given the express language of Article 4.2(c), we do not see how a panel could ignore the publication requirement set out in Article 3.1 when examining the publication requirement in Article 4.2(c) of the *Agreement on Safeguards*. And, generally, we fail to see how the Panel could have interpreted the requirements of Article 4.2(c) *without* taking into account in some way the provisions of Article 3. What is more, we fail to see how any panel could be expected to make an "objective assessment of the matter", as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims.

75. Consequently, we conclude that the Panel did not exceed its terms of reference by referring in its reasoning to the provisions of Article 3 of the *Agreement on Safeguards*. On the contrary, we find that the Panel was *obliged* by the terms of Article 4.2(c) to take the provisions of Article 3 into account. Thus, we do not believe that the Panel erred in its reasoning relating to the provisions of Article 3 of the *Agreement on Safeguards* in making its findings under Article 4.2(c) of that Agreement.

[59] At page 1 of its appellant's submission, Argentina also referred to the Panel's reasoning in paragraphs 8.126 and 8.127 of the Panel Report. During the oral hearing, however, Argentina limited its arguments to paragraphs 8.205, 8.207, 8.218 and 8.238 of the Panel Report.

[60] Panel Report, para. 8.238.

V. Article XIX of the GATT 1994 and "Unforeseen Developments"

76. The European Communities appeals the Panel's conclusion "that safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT."[61] The European Communities appeals as well the Panel's consequent refusal to rule on the European Communities' Article XIX claim, and asks the Appellate Body to reverse the legal interpretations and findings of the Panel made in support of this conclusion, notably the "fundamental error" made by the Panel when it referred to the "*express omission* of the criterion of unforeseen developments" in the *Agreement on Safeguards*.[62] The European Communities argues that the requirement of increased imports resulting from "unforeseen developments" is a fundamental characteristic of a safeguard measure because it lies at the beginning of a "logical continuum" of events justifying the invocation of a safeguard measure.[63] The European Communities requests the Appellate Body to find, on the basis of uncontested facts in the Panel Report, that Argentina did not comply with the requirement in Article XIX:1(a) of the GATT 1994 that safeguard measures may only be taken when the alleged increase in imports is "a result of unforeseen developments".[64]

77. In concluding that safeguard investigations and safeguard measures imposed after the entry into force of the *Agreement on Safeguards* which meet the requirements of that Agreement also thereby "*satisfy*" the requirements of Article XIX of the GATT 1994, the Panel made the following observations about the relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards*:

> … the application of safeguard measures in the meaning of Article XIX requires - since the entry into force of the Safeguards Agreement - conformity with the requirements and conditions of the latter agreement. Although all the provisions of Article XIX of GATT continue to legally co-exist with the Safeguards Agreement in the framework of the single undertaking of the Uruguay Round agreements, any implementation of safeguard measures in the meaning of Article XIX presupposes the application of and thus compliance with the provisions of the Safeguards Agreement.[65]
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> …
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> … While the Safeguards Agreement does not supersede or replace Article XIX, which continues to remain in force as part of the GATT, the original conditions contained in Article XIX have to be read in the light of the subsequently negotiated and much more specific provisions of the Safeguards Agreement. Those provisions of the Safeguards Agreement place the original rule of Article XIX within the entire package of the new WTO legal system and make it operational in practice.[66]
>
> …

[61] Panel Report, para. 8.69.

[62] European Communities' appellant's submission, para. 5.

[63] *Ibid.*, para. 17.

[64] *Ibid.*, para. 138.

[65] Panel Report, para. 8.55.

[66] *Ibid.*, para. 8.56.

> … Given the reasoning developed by the panel and the Appellate Body in the *Brazil - Desiccated Coconut* case, it is our view that Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction. Therefore, we conclude that Article XIX of GATT cannot be understood to represent the total rights and obligations of WTO Members, but that rather the Safeguards Agreement as applying the disciplines of Article XIX of GATT, reflects the latest statement of WTO Members concerning their rights and obligations concerning safeguards. Thus the Safeguards Agreement should be understood as *defining, clarifying, and in some cases modifying* the whole package of rights and obligations of Members with respect to safeguard measures as they currently exist. By the same token, and in the light of the principle of effective treaty interpretation, the *express omission* of the criterion of unforeseen developments in the new agreement (which otherwise transposes, reflects and refines in great detail the essential conditions for the imposition of safeguard measures provided for in Article XIX of GATT) must, in our view, have meaning.[67]
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> …
>
> … it is our conclusion that safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT. Therefore, we see no basis to address the EC's claims under Article XIX of GATT separately and in isolation from those under the Safeguards Agreement.[68]

78. In addressing this issue, we will examine, first, whether the Panel is correct in its conclusion about the relationship between the *Agreement on Safeguards* and Article XIX of the GATT 1994, and, second, whether the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " in Article XIX:1(a) of the GATT 1994 continues to have any meaning and legal effect.

79. With respect to the relationship between the *Agreement on Safeguards* and Article XIX of the GATT 1994, we begin with Article II of the *WTO Agreement*. Paragraph 2 of that Article stipulates:

> The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are *integral parts* of this Agreement, *binding on all Members*. (emphasis added)

Paragraph 4 of that Article provides:

> The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is *legally distinct* from the General Agreement on Tariffs and Trade, dated 30 October 1947 … (hereinafter referred to as "GATT 1947"). (emphasis added)

[67] *Ibid.*, para. 8.58.

[68] Panel Report, para. 8.69.

80. We note that the GATT 1994 is the first agreement that appears in Annex 1A to the *WTO Agreement*, and that it consists of: the provisions of the GATT 1947, as rectified, amended or modified by the terms of legal instruments that entered into force before the entry into force of the *WTO Agreement*; the provisions of certain legal instruments, such as protocols and certifications, decisions on waivers and other decisions of the CONTRACTING PARTIES to the GATT 1947, that entered into force under the GATT 1947 before the entry into force of the *WTO Agreement*; certain Uruguay Round Understandings relating to specific GATT articles; and the Marrakesh Protocol to the GATT 1994 containing Members' Schedules of Concessions.[69]

81. Thus, the GATT 1994 is *not* the GATT 1947. It is "legally distinct" from the GATT 1947. The GATT 1994 and the *Agreement on Safeguards* are *both* Multilateral Agreements on Trade in Goods contained in Annex 1A of the *WTO Agreement*, and, as such, are *both* "integral parts" of the same treaty, the *WTO Agreement*, that are "binding on all Members".[70] Therefore, the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members. And, as these provisions relate to the same thing, namely the application by Members of safeguard measures, the Panel was correct in saying that "Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction."[71] Yet a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.[72] And, an appropriate reading of this "inseparable package of rights and disciplines" must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements.

82. The drafters of the *WTO Agreement* addressed this issue specifically. The precise nature of the relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards* within the *WTO Agreement* is described in Articles 1 and 11.1(a) of the *Agreement on Safeguards* as follows:

> *Article 1*
>
> *General Provision*
>
> This Agreement establishes rules for the application of *safeguard measures* which shall be understood to mean *those measures provided for in Article XIX of GATT 1994*. (emphasis added)
>
> *Article 11*

[69] See paragraph 1 of the language incorporating the GATT 1994 into Annex 1A of the *WTO Agreement*.

[70] *WTO Agreement*, Article II:2.

[71] Panel Report, para. 8.58.

[72] We have recently confirmed this principle in our Report in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, circulated 14 December 1999, para. 81. See also Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, p. 23; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 12; Appellate Body Report, *India – Patents*, *supra*, footnote 25, para. 45.

Prohibition and Elimination of Certain Measures

> 1. (a) A Member shall not take or seek any *emergency action* on imports of particular products *as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement*. (emphasis added)

83. We see nothing in the language of either Article 1 or Article 11.1(a) of the *Agreement on Safeguards* that suggests an intention by the Uruguay Round negotiators to *subsume* the requirements of Article XIX of the GATT 1994 within the *Agreement on Safeguards* and thus to render those requirements no longer applicable. Article 1 states that the purpose of the *Agreement on Safeguards* is to establish "rules for the application of safeguard measures which shall be understood to mean *those measures provided for* in Article XIX of GATT 1994." (emphasis added) This suggests that Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures. Furthermore, in Article 11.1(a), the ordinary meaning of the language "unless such action *conforms with the provisions of that Article applied in accordance with this Agreement*" (emphasis added) clearly is that any safeguard action must *conform with* the provisions of Article XIX of the GATT 1994 *as well as* with the provisions of the *Agreement on Safeguards*. Neither of these provisions states that any safeguard action taken after the entry into force of the *WTO Agreement* need only conform with the provisions of the *Agreement on Safeguards*.[73]

84. Thus, we conclude that any safeguard measure[74] imposed after the entry into force of the *WTO Agreement* must comply with the provisions of *both* the *Agreement on Safeguards and* Article XIX of the GATT 1994.

85. As a consequence, we must examine the claims of the European Communities under Article XIX of the GATT 1994, and, specifically, its claim on appeal that the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – in Article XIX:1(a) of the GATT 1994 is a requirement that must be satisfied in order for a safeguard measure to be imposed.

86. The provisions of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*, which together set out the conditions for applying a safeguard measure under the *WTO Agreement*, read as follows:

[73]We note that the provisions of Article 11.1(a) of the *Agreement on Safeguards* are significantly different from the provisions of Article 2.4 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*, which state:

> 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). (emphasis added)

[74]With the exception of special safeguard measures taken pursuant to Article 5 of the *Agreement on Agriculture* or Article 6 of the *Agreement on Textiles and Clothing*.

GATT 1994

Article XIX

Emergency Action on Imports of Particular Products

> 1. (*a*) If, *as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions*, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (emphasis added)

Agreement on Safeguards

Article 2

Conditions

> 1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. (footnote omitted)

87. In comparing the language of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*, we observe that although much of the language in the two provisions is very similar, and, in fact, identical, the initial clause in Article XIX:1(a) – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – does not appear in Article 2.1 of the *Agreement on Safeguards*. After making this same observation, the Panel concluded that the "unforeseen developments" clause was "expressly omitted" by the Uruguay Round negotiators. And, although the Panel conceded at one point in its reasoning that Article XIX and the *Agreement on Safeguards* "legally co-exist"[75] as part of the *WTO Agreement*, the Panel concluded from this supposedly "*express omission*" that the "omitted" phrase has no meaning.

88. We believe that, with this conclusion, the Panel failed to give meaning and legal effect to *all* the relevant terms of the *WTO Agreement*, contrary to the principle of effectiveness (*ut res magis valeat quam pereat*) in the interpretation of treaties.[76] The Panel states that the "*express omission* of

[75]Panel Report, para. 8.55.

[76]We note that in our Report *United States – Gasoline*, (*supra,* footnote 72, p. 23), we emphasized that:

> … One of the corollaries of the "general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

the criterion of unforeseen developments" in Article XIX:1(a) from the *Agreement on Safeguards* "must, in our view, have meaning."[77] On the contrary, in our view, if they had intended to *expressly omit* this clause, the Uruguay Round negotiators would and could have said so in the *Agreement on Safeguards*. They did not.

89. Furthermore, it is clear from Articles 1 and 11.1(a) of the *Agreement on Safeguards* that the Uruguay Round negotiators did not intend that the *Agreement on Safeguards* would entirely replace Article XIX. Instead, the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards* confirms that the intention of the negotiators was that the provisions of Article XIX of the GATT 1994 and of the *Agreement on Safeguards* would apply *cumulatively*, except to the extent of a conflict between specific provisions.[78] We do not see this as an issue involving a conflict between specific provisions of two Multilateral Agreements on Trade in Goods. Thus, we are obliged to apply the provisions of Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 *cumulatively*, in order to give meaning, by giving legal effect, to all the applicable provisions relating to safeguard measures.

90. Having concluded that the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – in Article XIX:1(a) of the GATT 1994 does have meaning, we are obliged by virtue of that conclusion to consider what that meaning *is*. Toward this end, we refer again to the language of Article XIX:1(a), in its entirety:

> If, *as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement*, *including tariff concessions*, *any product is being imported* into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (emphasis added)

91. To determine the meaning of the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – in sub-paragraph (a) of Article XIX:1, we must examine these words in their ordinary meaning, in their context and in light of the object and purpose of Article XIX.[79] We look first to the ordinary meaning of these words. As to the meaning of "unforeseen developments", we note that the dictionary definition of "unforeseen", particularly as it relates to the word "developments", is synonymous with

See also Appellate Body Report, *Japan – Alcoholic Beverages*, *supra,* footnote 72, p. 12; and Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 October 1999, para. 133.

[77]Panel Report, para. 8.58.

[78]As set out in the General Interpretative Note to Annex 1A of the *WTO Agreement.*

[79]As we have said in Appellate Body Report, *United States – Gasoline*, *supra*, footnote 72, p.17; Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 72, p. 11; Appellate Body Report, *India – Patents*, *supra*, footnote 25, para. 46; Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, para. 47; Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, adopted 22 June 1998, para. 84; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 114.

"unexpected".[80] "Unforeseeable", on the other hand, is defined in the dictionaries as meaning "unpredictable" or "incapable of being foreseen, foretold or anticipated".[81] Thus, it seems to us that the ordinary meaning of the phrase "as a result of unforeseen developments" requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected". With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … ", we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994.

92. When we examine this clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – in its immediate context in Article XIX:1(a), we see that it relates directly to the second clause in that paragraph – "If, … , any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products …". The latter, or second, clause in Article XIX:1(a) contains the three *conditions* for the application of safeguard measures. These *conditions*, which are reiterated in Article 2.1 of the *Agreement on Safeguards*[82], are that: (1) a product is being imported "in such quantities and under such conditions"; (2) "as to cause"; (3) serious injury or the threat of serious injury to domestic producers. The first clause in Article XIX:1(a) – "as a result of unforeseen developments and of the obligations incurred by a Member under the Agreement, including tariff concessions … " – is a dependent clause which, in our view, is linked grammatically to the verb phrase "is being imported" in the second clause of that paragraph. Although we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994. In this sense, we believe that there is a logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure.

93. Our reading is supported by the context of these provisions. As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: "*Emergency Action on Imports of Particular Products*". The words "emergency action" also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported "*in such increased quantities* and *under such conditions* as *to cause or threaten serious injury* to domestic producers". (emphasis added) Clearly, this is not the language of ordinary events in routine commerce. In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, "emergency actions." And, such "emergency actions" are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation. The remedy that Article XIX:1(a) allows in

[80]See *Webster's Third New International Dictionary*, (Encyclopaedia Britannica Inc., 1966) Vol. 3, p. 2496; and *Black's Law Dictionary*, 6th ed., (West Publishing Company, 1990) p. 1530.

[81]*Ibid.*

[82]We note that the title of Article 2 of the *Agreement on Safeguards* is: "*Conditions*".

this situation is temporarily to "suspend the obligation in whole or in part or to withdraw or modify the concession". Thus, Article XIX is clearly, and in every way, an extraordinary remedy.

94. This reading of these phrases is also confirmed by the object and purpose of Article XIX of the GATT 1994. The object and purpose of Article XIX is, quite simply, to allow a Member to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with "unexpected" and, thus, "unforeseen" circumstances which lead to the product "being imported" in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products". In perceiving and applying this object and purpose to the interpretation of this provision of the *WTO Agreement*, it is essential to keep in mind that a safeguard action is a "fair" trade remedy. The application of a safeguard measure does not depend upon "unfair" trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.

95. Our reading of these prerequisites does precisely this, by making certain that *all* the relevant provisions of the *Agreement on Safeguards* and Article XIX of the GATT 1994 relating to safeguard measures are given their full meaning and their full legal effect. Our reading, too, is consistent with the desire expressed by the Uruguay Round negotiators in the Preamble to the *Agreement on Safeguards* "to clarify and *reinforce* the disciplines of GATT 1994, and *specifically those of its Article XIX* …, to re-establish *multilateral control* over safeguards and eliminate measures that escape such control …".[83] In furthering this statement of the object and purpose of the *Agreement on Safeguards*, it must always be remembered that safeguard measures result in the temporary suspension of concessions or withdrawal of obligations, such as those in Article II and Article XI of the GATT 1994, which are fundamental to the *WTO Agreement*. As such, safeguard measures may be applied only when *all* the provisions of the *Agreement on Safeguards* and Article XIX of the GATT 1994 are clearly demonstrated.

96. In addition, we note that our reading of the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – in Article XIX:1(a) is also consistent with the one GATT 1947 case that involved Article XIX, the so-called "*Hatters' Fur*" case.[84] Members of the Working Party in that case, in 1951, stated:

> … "unforeseen developments" should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.[85]

97. In the light of all of this, we do not agree with the Panel that any safeguard investigations conducted or safeguard measures imposed after the entry into force of the *WTO Agreement* "which meet the requirements of the new Safeguards Agreement *satisfy* the requirements of Article XIX of GATT." (emphasis added) Therefore, we reverse the Panel's conclusion in paragraph 8.69 of the

[83] *Agreement on Safeguards*, Preamble.

[84] *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX*, ("*Hatters' Fur*"), GATT/CP/106, adopted 22 October 1951.

[85] *Supra*, footnote 84, para. 9. This interpretation was proposed by the representative of Czechoslovakia, and was accepted by the majority of the Working Party with the exception of the United States.

Panel Report that safeguard measures imposed after entry into force of the *WTO Agreement* which meet the requirements of the *Agreement on Safeguards* necessarily "satisfy" the requirements of Article XIX of the GATT 1994, as well as the Panel's finding that the Uruguay Round negotiators "expressly omitted" the clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – from Article 2 of the *Agreement on Safeguards*.

98. As will be seen, in the final section of this Report, we uphold the conclusions of the Panel that Argentina's investigation in this case was inconsistent with the requirements of Articles 2 and 4 of the *Agreement on Safeguards*. As a consequence, there is *no legal basis* for the safeguard measures imposed by Argentina. For this reason, we do not believe that it is necessary to complete the analysis of the Panel relating to the claim made by the European Communities under Article XIX of the GATT 1994 by ruling on whether the Argentine authorities have, in their investigation, demonstrated that the increased imports in this case occurred "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … ".

VI. Imposition of Safeguard Measures by a Member of a Customs Union

99. Argentina claims on appeal that the Panel misinterpreted footnote 1 to Article 2.1 of the *Agreement on Safeguards* and erred by "imposing an obligation" on a member of a customs union to apply any safeguard measure on other members of that customs union whenever imports from all sources are taken into account in a safeguards investigation.

100. The Panel described the issue before it as follows:

> … the essential question is whether Argentina was permitted under the Safeguards Agreement to take MERCOSUR imports into account in the analysis of injury factors and of a causal link between increased imports and the alleged (threat of) serious injury, and was at the same time permitted to exclude MERCOSUR countries from the application of the safeguard measure imposed.[86]

101. Article 2 of the *Agreement on Safeguards* provides as follows:

> *Conditions*
>
> 1. A Member[1] may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
>
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source.

[1] A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole.

[86] Panel Report, para. 8.75.

> When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

102. The Panel examined the ordinary meaning of footnote 1 to Article 2.1, and stated that "*in the case of measures imposed by a customs union* there are two options for imposing safeguard measures, i.e., (i) as a single unit or (ii) on behalf of a member State."[87] (emphasis added) The Panel assumed that it was dealing with a safeguard measure imposed by a customs union "on behalf of a member State" within the meaning of the first and third sentences of footnote 1, and concluded that the "footnote does not concern *to whom* but rather *by whom* a safeguard measure may be applied."[88] The Panel then proceeded to examine the context of Article 2.1 and the footnote thereto. The Panel declared this context to be Article 2.2, which provides that "[s]afeguard measures shall be applied to a product being imported irrespective of its source."[89] The Panel then stated that:

> The ordinary meaning of Article 2.2 would appear to imply that, as a result of a member-State-specific investigation, safeguard measures have to be imposed on a non-discriminatory basis against products from all sources of supply, regardless of whether they originate from within or from outside of the customs union.[90]

103. On the basis of this reasoning, the Panel stated its interpretation that:

> … the two options offered by the footnote to Article 2.1 read in conjunction with Article 2.2 imply a *parallelism* between the scope of a safeguard *investigation* and the scope of the *application* of safeguard measures. Thus, in the light of the context of the footnote to Article 2.1, a member-state-specific investigation in which serious injury or threat thereof is found based on imports from all sources could only lead to the imposition of safeguard measures on a MFN-basis against all sources of intra-regional as well as extra-regional supply of a customs union.[91]

The Panel concluded, on the basis of its reasoning relating to Article 2, that "a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources cannot serve as a basis for imposing a safeguard measure on imports only from third-country sources of supply."[92]

104. The Panel then turned its attention to Article XXIV of the GATT 1994, in response to an argument by Argentina that Article XXIV of the GATT 1994 and certain MERCOSUR regulations prohibited Argentina from imposing safeguard measures on other MERCOSUR countries. After a lengthy analysis of Article XXIV:8 of the GATT 1994, the Panel stated:

[87] *Ibid.*, para. 8.78.

[88] *Ibid.*, para. 8.83.

[89] *Ibid.*, para. 8.84.

[90] Panel Report, para. 8.84.

[91] *Ibid.*, para. 8.87.

[92] *Ibid.*, para. 8.91.

> … we do not agree with the argument that in the case before us Argentina is prevented by Article XXIV:8 of GATT from applying safeguard measures to all sources of supply, i.e., third countries as well as other member States of MERCOSUR.[93]

105. Finally, the Panel concluded as follows:

> … in the light of Article 2 of the Safeguards Agreement and Article XXIV of GATT, we conclude that in the case of a customs union the imposition of a safeguard measure only on third-country sources of supply cannot be justified on the basis of a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources of supply from within and outside a customs union.[94]

106. We question the Panel's implicit assumption that footnote 1 to Article 2.1 of the *Agreement on Safeguards* applies to the facts of this case. The ordinary meaning of the first sentence of footnote 1 appears to us to be that the footnote only applies when a customs union applies a safeguard measure "as a single unit or on behalf of a member State".[95] On the facts of this case, Argentina applied the safeguard measures at issue after an investigation by Argentine authorities of the effects of imports from all sources on the Argentine domestic industry.

107. MERCOSUR did not apply these safeguard measures, either as a single unit or on behalf of Argentina.[96] When the safeguard measures at issue in this case were adopted by the government of Argentina, the transitional provisions in Chapter XII of the Regulation on the Application of Safeguard Measures to Imports from Non-Members of MERCOSUR (the "Regulation"), approved by Common Market Decision No. 17/96, were in effect among the State Parties of MERCOSUR.[97] According to these transitional provisions, the investigation procedure for the adoption of safeguard measures was to be conducted by the competent authorities of the State Party in question, applying relevant national legislation.[98]

[93] *Ibid.*, para. 8.101.

[94] Panel Report, para. 8.102.

[95] We also note that footnote 1 relates to the word "Member" in Article 2.1, which is commonly understood to mean a Member of the WTO.

[96] It is true that on 26 September 1997, Uruguay, as Pro Tempore President of MERCOSUR and on behalf of Argentina, notified the definitive safeguard measure imposed by Argentina. (G/SG/N/10/ARG/1/Suppl.2, G/SG/N/11/ARG/1/Supp.2, G/SG/14/Suppl.1 and G/L/195/Suppl.1, 22 October 1997). However, all relevant resolutions were adopted by Argentina alone, pursuant to Argentine national laws. We further note that that all other notifications relating to the measures at issue in this case were made by Argentina acting on its own behalf. In particular, on 26 September 1997 – the same day as Uruguay notified the measure on behalf of Argentina – Argentina itself transmitted a copy of Resolution 987/87 to the Committee on Safeguards (G/SG/N/10/ARG/1/Suppl.1, G/SG/N/11/ARG/1/Suppl.1, 10 October 1997).

[97] Adopted by the Council of Ministers of MERCOSUR in December 1996. See Panel Report, para. 5.103.

[98] In response to questions during the oral hearing, Argentina confirmed that:

> … until 31 December 1998, the common safeguards regime of MERCOSUR provided for this modality of application of a measure which would permit a state member of the customs union to apply the measure uniquely and that it would be notified by MERCOSUR. That is why the measure was applied by Argentina within its regulatory framework.

108. Therefore, at the time the safeguard measures at issue in this case were imposed by the Government of Argentina, these measures were not applied by MERCOSUR "on behalf of" Argentina, but rather, they were applied by Argentina. It is Argentina that is a Member of the WTO for the purposes of Article 2 of the *Agreement on Safeguards*, and it is Argentina that applied the safeguard measures after conducting an investigation of products being imported into *its* territory and the effects of those imports on *its* domestic industry. For these reasons, we do not believe that footnote 1 to Article 2.1 applies to the safeguard measures imposed by Argentina in this case. As a result, we find that the Panel erred in assuming that footnote 1 applied, and we, therefore, reverse the legal reasoning and findings of the Panel relating to footnote 1 to Article 2.1 of the *Agreement on Safeguards*.

109. Having found that footnote 1 to Article 2.1 is not applicable in this case, we also are not persuaded that an analysis of Article XXIV of the GATT 1994 was relevant to the specific issue that was before the Panel. This issue, as the Panel itself observed, is whether Argentina, after including imports from all sources in its investigation of "increased imports" of footwear products into its territory and the consequent effects of such imports on its domestic footwear industry, was justified in excluding other MERCOSUR member States from the application of the safeguard measures. In our Report in *Turkey – Restrictions on Imports of Textile and Clothing Products*, we stated that under certain conditions, "Article XXIV may justify a measure which is inconsistent with certain other GATT provisions."[99] We indicated, however, that this defence is available only when it is demonstrated by the Member imposing the measure that "the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV" and "that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue."[100]

110. In this case, we note that Argentina did not argue before the Panel that Article XXIV of the GATT 1994 provided it with a defence to a finding of violation of a provision of the GATT 1994. As Argentina did not argue that Article XXIV provided it with a defence against a finding of violation of a provision of the GATT 1994, and as the Panel did not consider whether the safeguard measures at issue were introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV, we believe that the Panel erred in deciding that an examination of Article XXIV:8 of the GATT 1994 was relevant to its analysis of whether the safeguard measures at issue in this case were consistent with the provisions of Articles 2 and 4 of the *Agreement on Safeguards*. Accordingly, as we have found that the Panel's analysis of Article XXIV of the GATT 1994 was not relevant in this case, we reverse the Panel's legal findings and conclusions relating to Article XXIV of the GATT 1994.[101]

111. We now turn to examine whether the Panel was correct in its interpretation that there is an implied "*parallelism* between the scope of a safeguard *investigation* and the scope of the *application* of safeguard measures."[102] Article 2.1 provides that:

> A *Member may* apply a safeguard measures … *only* if *that Member* has determined … that such product is being imported into *its territory* in such increased quantities … and under such conditions as to cause or threaten to cause serious injury to the domestic industry … (emphasis added)

[99]Appellate Body Report, WT/DS34/AB/R, adopted 19 November 1999, para. 58.

[100]*Ibid.*

[101]Panel Report, paras. 8.93-8.102.

[102]*Ibid.*, para. 8.87.

Article 4.1(c) defines "domestic industry" as meaning "the producers as a whole of the like or directly competitive products operating *within the territory of a Member* …". (emphasis added) Taken together, the provisions of Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* demonstrate that a Member of the WTO may only apply a safeguard measure after that Member has determined that a product is being imported *into its territory* in such increased quantities and under such conditions as to cause or threaten to cause serious injury to *its* domestic industry *within its territory*. According to Articles 2.1 and 4.1(c), therefore, all of the relevant aspects of a safeguard investigation must be conducted by the Member that ultimately applies the safeguard measure, on the basis of increased imports entering its territory and causing or threatening to cause serious injury to the domestic industry within its territory.

112. While Articles 2.1 and 4.1(c) set out the conditions for imposing a safeguard measure and the requirements for the scope of a safeguard *investigation*, these provisions do not resolve the matter of the scope of *application* of a safeguard measure. In that context, Article 2.2 of the *Agreement on Safeguards* provides:

> Safeguard measures shall be applied to a product being imported irrespective of its source.

As we have noted, in this case, Argentina applied the safeguard measures at issue after conducting an investigation of products being imported into Argentine territory and the effects of those imports on Argentina's domestic industry. In applying safeguard measures on the basis of this investigation in this case, Argentina was also required under Article 2.2 to apply those measures to imports from all sources, including from other MERCOSUR member States.

113. On the basis of this reasoning, and on the facts of this case, we find that Argentina's investigation, which evaluated whether serious injury or the threat thereof was caused by imports from *all* sources, could only lead to the imposition of safeguard measures on imports from *all* sources. Therefore, we conclude that Argentina's investigation, in this case, cannot serve as a basis for excluding imports from other MERCOSUR member States from the application of the safeguard measures.

114. For all the above reasons, we reverse the Panel's legal findings and conclusions relating to footnote 1 to Article 2.1 of the *Agreement on Safeguards* and Article XXIV of the GATT 1994. We conclude that Argentina, on the facts of this case, cannot justify the imposition of its safeguard measures only on non-MERCOSUR third country sources of supply on the basis of an investigation that found serious injury or threat thereof caused by imports from all sources, including imports from other MERCOSUR member States. However, as we have stated, we do not agree that the Panel was dealing, on the facts of this case, with a safeguard measure applied by a customs union *on behalf of* a member State. And we wish to underscore that, as the issue is not raised in this appeal, we make no ruling on whether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure.

VII. Claims under Articles 2 and 4 of the *Agreement on Safeguards*

115. Although Argentina acknowledges that the Panel correctly articulated the proper standard of review based on Article 11 of the DSU, Argentina alleges that the Panel erred in *applying* that standard of review, by conducting a "*de facto de novo* review"[103] of the findings and conclusions of the Argentine authorities. As a consequence, Argentina maintains that the Panel read certain methodologies into the *Agreement on Safeguards* where that Agreement itself is silent, and thereby added to the rights and obligations of Members under that Agreement in violation of Article 3.2 of the

[103]Argentina's appellant's submission, p. 26.

DSU.[104] The *Agreement on Safeguards*, in Argentina's view, allows Members discretion in the way it is implemented; however, the Panel, in its reasoning, created new requirements that are not contained in the *Agreement on Safeguards*. Argentina also claims that the Panel made several legal errors in its analysis of the requirements of Articles 2 and 4 of the *Agreement on Safeguards*, in particular, relating to the conditions of increased imports, serious injury and causation that must be satisfied before a safeguard measure may be applied.[105] Finally, Argentina submits that the Panel Report was not adequately reasoned because the Panel failed to reach reasonable conclusions based on the totality of the evidence before the Argentine authorities, and that the Panel has therefore not fulfilled the requirement of Article 12.7 of the DSU that it provide a "basic rationale" for its ruling.[106]

A. *Standard of Review*

116. The Panel stated its approach to the standard of review as follows:

> In our view, we have no mandate to conduct a *de novo* review of the safeguard investigation conducted by the national authority. Rather, we must determine whether Argentina has abided by its multilateral obligations under the Agreement on Safeguards … in reaching its affirmative finding of injury and causation in the footwear investigation.[107]
>
> …
>
> … our review will be limited to an objective assessment, pursuant to Article 11 of the DSU, of whether the domestic authority has considered all relevant facts, including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contains adequate explanation of how the facts support the determination made, and consequently of whether the determination made is consistent with Argentina's obligations under the Safeguards Agreement. We note that this was the standard of review applied by the Panel in *United States – Underwear*, with which we agree.[108]

117. Although the Panel ultimately stated the standard of review correctly, we are surprised that the Panel based its approach on several reports by previous panels reviewing domestic investigations in the context of two Tokyo Round Agreements: the *Agreement on Implementation of Article VI of GATT* and the *Agreement on Interpretation and Application of Article VI, XVI and XXIII of GATT*[109] as well as two previous WTO panels in *United States – Underwear* and *United States – Shirts and Blouses*.[110]

[104]*Ibid.*, p. 43.

[105]*Ibid.*, pp. 43-66.

[106]Argentina's appellant's submission, pp. 42, 49 and 61.

[107]Panel Report, para. 8.117.

[108]*Ibid.*, para. 8.124.

[109]Panel Report, *New Zealand – Imports of Electrical Transformers from Finland*, adopted on 18 July 1985, BISD 32S/55; Panel Report, *United States – Salmon*, *supra*, footnote 29, para. 494.

[110]*Supra*, footnote 31.

118. We have stated, on more than one occasion, that, for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels.[111] The only exception is the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, in which a specific provision, Article 17.6, sets out a special standard of review for disputes arising under that Agreement.

119. In our report in *European Communities – Hormones*, we stated that:

> Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements. …[112]
>
> …
>
> So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor "total deference", but rather the "objective assessment of the facts".[113]

120. Although that case dealt with the panel's assessment of the facts, and this case deals with the Panel's assessment of the matter, more generally, the same reasoning applies here. The *Agreement on Safeguards*, like the *Agreement on the Application of Sanitary and Phytosanitary Measures*, is silent as to the appropriate standard of review. Therefore, Article 11 of the DSU, and, in particular, its requirement that "… a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements", sets forth the appropriate standard of review for examining the consistency of a safeguard measure with the provisions of the *Agreement on Safeguards*.

121. Based on our review of the Panel's reasoning, we find that the Panel correctly stated the appropriate standard of review, as set forth in Article 11 of the DSU. And, with respect to its *application* of the standard of review, we do not believe that the Panel conducted a *de novo* review of the evidence, or that it substituted its analysis and judgement for that of the Argentine authorities. Rather, the Panel examined whether, as required by Article 4 of the *Agreement on Safeguards*, the Argentine authorities had considered all the relevant facts and had adequately explained how the facts supported the determinations that were made. Indeed, far from departing from its responsibility, in our view, the Panel was simply fulfilling its responsibility under Article 11 of the DSU in taking the approach it did. To determine whether the safeguard investigation and the resulting safeguard measure applied by Argentina were consistent with Article 4 of the *Agreement on Safeguards*, the Panel was obliged, by the very terms of Article 4, to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.

122. In addition to "an objective assessment of the facts ", we note, too, that part of the "objective assessment of the matter" required of a panel by Article 11 of the DSU is an assessment of "the applicability of and conformity with the relevant covered agreements". Consequently, we must also

[111]See e.g., Appellate Body Report, *EC Measures Concerning Meat and Meat Products* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 114-119; *Australia – Salmon*, *supra*, footnote 26, para. 2.67.

[112]Appellate Body Report, *European Communities – Hormones*, *supra*, footnote 111, para. 116.

[113]*Ibid.*, para. 117.

examine whether the Panel correctly interpreted and applied the substantive provisions of Articles 2 and 4 of the *Agreement on Safeguards*, in particular, those relating to the requirements of imports "in such increased quantities", "serious injury" to the domestic industry, and causation.

B. *Interpretation and Application of Articles 2 and 4 of the Agreement on Safeguards*

123. Articles 2.1 and 4.2 of the *Agreement on Safeguards* provide as follows:

> *Article 2*
>
> *Conditions*
>
> 1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. (footnote omitted)
>
> *Article 4*
>
> *Determination of Serious Injury or Threat Thereof*
>
> 2. (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.
>
> (b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.
>
> (c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

124. We recall the Panel's ultimate conclusions on Articles 2.1 and 4.2:

> For the foregoing reasons, we conclude that Argentina's investigation did not demonstrate that there were increased imports within the meaning of Articles 2.1 and 4.2(a); that the investigation did not evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry within the meaning of Article 4.2(a); that the investigation did not demonstrate on the basis of objective evidence the existence of a causal link between increased imports and serious injury within the meaning of Article 2.1 and 4.2(b); that the investigation did not adequately take into account factors other than increased imports within the meaning of Article 4.2(b); and that the published report concerning the investigation did not set forth a complete analysis of the case under investigation as well as a demonstration of the relevance of the factors examined within the meaning of Article 4.2(c).
>
> Therefore, we find that Argentina's investigation and determinations of increased imports, serious injury and causation are inconsistent with Articles 2 and 4 of the Safeguards Agreement. As such, we find that Argentina's investigation provides *no* legal basis for the application of the definitive safeguard measure at issue, or any safeguard measure.[114]

1. Increased Imports

125. With respect to the requirement relating to "increased imports", the Panel stated as follows:

> The Agreement on Safeguards requires an increase in imports as a basic prerequisite for the application of a safeguard measure. The relevant provisions are in Articles 2.1 and 4.2(a).[115]
>
> …
>
> Thus, to determine whether imports have increased in "such quantities" for purposes of applying a safeguard measure, these two provisions require an analysis of the rate and amount of the increase in imports, in absolute terms and as a percentage of domestic production.[116]

126. In its evaluation of whether the investigation by the Argentine authorities demonstrated the required increase in imports under Articles 2.1 and 4.2(a), the Panel stated the following:

> *… the Agreement requires not just an increase (i.e., any increase) in imports, but an increase in "such…quantities" as to cause or threaten to cause serious injury*. The Agreement provides no numerical guidance as to how this is to be judged, nor in our view could it do so. But this does not mean that this requirement is meaningless. To the contrary, we believe that it means that the increase in imports must be judged in its full context, in particular with regard to its "rate and amount" as required by Article 4.2(a). Thus, considering the changes in import levels over the entire period of investigation, as discussed above, seems unavoidable when making a determination of whether

[114]Panel Report, paras. 8.279 and 8.280.

[115]*Ibid.*, para. 8.138.

[116]*Ibid.*, para. 8.141.

> there has been an increase in imports "in such quantities" in the sense of Article 2.1.[117] (emphasis added)

127. The Panel concluded that Argentina did not adequately consider the "intervening trends in imports, in particular the steady and significant declines in imports beginning in 1994, as well as the sensitivity of the analysis to the particular end points of the investigation period used."[118] For these reasons, the Panel concluded that "Argentina's investigation did not demonstrate that there were increased imports within the meaning of Articles 2.1 and 4.2(a)".[119] The Panel, though, rejected an argument made by the European Communities "that only a 'sharply increasing' trend in imports at the end of the investigation period can satisfy this requirement."[120]

128. Argentina maintains that, in its interpretation and application of the requirement of "increased imports" in Articles 2.1 and 4.2 of the *Agreement on Safeguards*, the Panel "impose[d] a variety of methodological hurdles which must be overcome before a finding of 'increased imports' can be justified."[121] In particular, Argentina argues that the Panel misinterpreted the word "rate" in Article 4.2(a) to include "direction", and found that there could only be "increased imports" if: (i) a change in the base year from 1991 to 1992 would still result in an increase; (ii) the analysis of end points and interim periods is mutually reinforcing; and (iii) it is found that the decrease in imports in 1994 and 1995 was temporary.[122] Argentina also asserts that the Panel "collapsed" the "increased imports" requirement "with the other qualitative requirements of Article 2" and wrongly treated it as a "qualitative, rather than a separate quantitative requirement."[123] The ordinary meaning of "increased imports", in Argentina's view, is that imports have become greater, and Argentina argues that there is no factual or contextual support for any additional requirements in the *Agreement on Safeguards*.[124]

129. We agree with the Panel that Articles 2.1 and 4.2(a) of the *Agreement on Safeguards* require a demonstration not merely of *any* increase in imports, but, instead, of imports "in such increased quantities … and under such conditions as to cause or threaten to cause serious injury."[125] In addition, we agree with the Panel that the specific provisions of Article 4.2(a) require that "the *rate* and *amount* of the increase in imports … in absolute and relative terms" (emphasis added) must be evaluated.[126] Thus, we do not dispute the Panel's view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a).[127] As a result, we agree with the Panel's conclusion that "Argentina did not adequately consider the intervening trends in imports, in particular the steady and significant declines in imports beginning in 1994, as well as the sensitivity of the analysis to the particular end points of the investigation period used."[128]

[117]Panel Report, para. 8.161.

[118]*Ibid.*, para. 8.276.

[119]*Ibid.*, para. 8.279.

[120]*Ibid.*, para. 8.165.

[121]Argentina's appellant's submission, p. 45.

[122]*Ibid.*, p. 46.

[123]*Ibid.*, p. 45.

[124]Statement by Argentina at the oral hearing.

[125]Article 2.1 of the *Agreement on Safeguards*.

[126]Panel Report, paras. 8.140-8.141.

[127]*Ibid.*, para. 8.276.

[128]*Ibid.*

130. All the same, while we do not find that the Panel erred in its application of the requirement in Article 2.1 of the *Agreement in Safeguards* that the "product *is being imported* … in such increased quantities", we do find the Panel's interpretation of that requirement somewhat lacking. We note that the Panel characterized this condition in Article 2.1 on several occasions in the Panel Report simply as "increased imports". However, the actual requirement, and we emphasize that this requirement is found in *both* Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, is that "such product *is being imported* … in such increased quantities"[129], "and under such conditions as to cause or threaten to cause serious injury to the domestic industry". (emphasis added) Although we agree with the Panel that the "increased quantities" of imports cannot be just *any* increase, we do not agree with the Panel that it is reasonable to examine the trend in imports over a five-year historical period. In our view, the use of the present tense of the verb phrase "is being imported" in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of several years.[130] In our view, the phrase "is being imported" implies that the increase in imports must have been sudden and recent.

131. We recall here our reasoning and conclusions above on the meaning of the phrase "as a result of unforeseen developments" in Article XIX:1(a) of the GATT 1994. We concluded there that the increased quantities of imports should have been "unforeseen" or "unexpected".[131] We also believe that the phrase "in *such* increased quantities" in Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 is meaningful to this determination. In our view, the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be "*such* increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".

2. Serious Injury

132. With respect to the requirement relating to "serious injury", Article 4.2(a) of the *Agreement on Safeguards* provides, in relevant part:

> In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities *shall evaluate all relevant factors* of an objective and quantifiable nature *having a bearing on the situation of that industry*, *in particular*, … the share of the domestic market taken by increased imports,

[129]Article 2.1 of the *Agreement on Safeguards* contains the additional words "absolute or relative to domestic production".

[130]The Panel, in footnote 530 to para. 8.166 of the Panel Report, recognizes that the present tense is being used, which it states "would seem to indicate that, whatever the starting-point of an investigation period, it has to *end* no later than the very recent past." (emphasis added) Here, we disagree with the Panel. We believe that the relevant investigation period should not only *end* in the very recent past, the investigation period should *be* the recent past.

[131]*Supra*, paras. 91-98.

> changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

133. The Panel stated that the requirements of Article 4.2(a) obliged it to:

> … consider, first, whether all injury factors listed in the Agreement were considered by Argentina, as the text of Article 4.2(a) of the Agreement ("all relevant factors … including … changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment") is unambiguous that at a minimum each of the factors listed, in addition to all other factors that are "relevant", must be considered.[132]

The Panel also concluded that, pursuant to the provisions of Article 4.2(c) and, by reference, Article 3 of the *Agreement on Safeguards*, it was required to examine whether Argentina's findings and conclusions on "serious injury" were supported by the evidence before the Argentine authorities.

134. The Panel read Article 4.2(a) literally to mean that all the listed factors: "changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment" – must be evaluated in every investigation. In addition, the Panel stated that all other relevant factors having a bearing on the situation of the industry must also be evaluated. As the Panel found that Argentina had not evaluated two of the listed factors, capacity utilization and productivity, the Panel concluded that Argentina's investigation was not consistent with the requirements of Article 4.2(a).[133]

135. Argentina submits that the Panel erred in its analysis of Argentina's determination of "serious injury". According to Argentina, Article 4.2(c) of the *Agreement on Safeguards* requires only a demonstration of the relevance of the factors examined, rather than an examination of all the listed factors as relevant.[134] In response to the Panel's finding that Argentina had not properly evaluated the factors of capacity utilization and productivity, Argentina replies by maintaining that the factor of productivity is explicitly mentioned in Act 338 and that data sufficient to calculate capacity utilization was available to the Argentine authorities.[135] Furthermore, Argentina argues that neither capacity utilization nor productivity was a principal or a significant issue in the investigation.[136] Argentina also takes issue with the Panel's view that the available data for 1996 should have been examined by Argentina in its investigation of "serious injury". Here, Argentina responds that the record clearly shows that the data for 1996 was incomplete, and Argentina submits that it was appropriate and reasonable to use a single review period for which all the data was available as a basis for its determination of "serious injury". In addition, Argentina argues that the Panel erred in several aspects of its examination of the evidence considered by the Argentine authorities.

136. We agree with the Panel's interpretation that Article 4.2(a) of the *Agreement on Safeguards* requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned. Furthermore, we do not dispute the Panel's finding that Argentina did not evaluate all of the listed factors, in particular, capacity utilization and productivity. We consider the other points that Argentina has raised in this appeal, relating to the availability of data for 1996 and to the Panel's

[132]Panel Report, para. 8.206.

[133]*Ibid.*, para. 8.277.

[134]Argentina's appellant's submission, p. 60.

[135]*Ibid.*, p. 59.

[136]*Ibid.*, p. 60.

evaluation of the evidence considered by the Argentine authorities, to relate to matters of fact which are not within our mandate, under Article 17.6 of the DSU, to examine on appeal.

137. For these reasons, we uphold the Panel's conclusion that Argentina did not evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry" as required by Article 4.2(a) of the *Agreement on Safeguards*.

138. However, although it was not necessary for the Panel to go beyond where it did in this case, as the Panel found that Argentina had *not* evaluated all of the required listed factors, we do not believe that an evaluation of the listed factors in Article 4.2(a) is all that is required to justify a determination of "serious injury" under the *Agreement on Safeguards*. We note, in this respect, that there is a definition of "serious injury" in Article 4.1(a) of the *Agreement on Safeguards*, which reads as follows:

> "serious injury" shall be understood to mean a *significant overall impairment* in the position of a domestic industry. (emphasis added)

And we note that, in its legal analysis of "serious injury" under Article 4.2(a), the Panel made no use whatsoever of this definition.

139. In our view, it is only when the *overall position* of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is "a significant overall impairment" in the position of that industry. Although Article 4.2(a) technically requires that certain listed factors must be evaluated, and that all other relevant factors must be evaluated, that provision does not specify what such an evaluation must demonstrate. Obviously, any such evaluation will be different for different industries in different cases, depending on the facts of the particular case and the situation of the industry concerned. An evaluation of each listed factor will not necessarily have to show that each such factor is "declining". In one case, for example, there may be significant declines in sales, employment and productivity that will show "significant overall impairment" in the position of the industry, and therefore will justify a finding of serious injury. In another case, a certain factor may not be declining, but the overall picture may nevertheless demonstrate "significant overall impairment" of the industry. Thus, in addition to a technical examination of whether the competent authorities in a particular case have evaluated all the listed factors and any other relevant factors, we believe that it is essential for a panel to take the definition of "serious injury" in Article 4.1(a) of the *Agreement on Safeguards* into account in its review of any determination of "serious injury".

3. Causation

140. With respect to the requirement of causation, Article 4.2(b) of the *Agreement on Safeguards* provides that a determination of serious injury:

> … shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

141. The Panel interpreted the requirements of Article 4.2(b) as follows:

> … we will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in

> imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.[137]

142. On causation, the Panel stated:

> … the *trends* -- in both the injury factors and the imports -- matter as much as their absolute levels. In the particular context of a causation analysis, we also believe that this provision means that it is the *relationship* between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination.
>
> In practical terms, we believe therefore that this provision means that if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot *prove* causation (because, *inter alia*, Article 3 requires an explanation – i.e., "findings and reasoned conclusions"), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present.[138]

143. Argentina argues on appeal that the Panel erred in establishing and applying three "standards" in its analysis of causation. First, Argentina maintains that the Panel required that an upward trend in imports must *coincide* with a *downward* trend in the injury factors. On this point, Argentina maintains that Article 4.2(c) of the *Agreement on Safeguards* refers to "changes" and not to "downward trends", so that there is no requirement that there be a "downward trend" in each year of the period of investigation. Moreover, Argentina maintains that the Panel's requirement of "coincidence" in time is not implied by the term "cause". Second, Argentina asserts that the Panel used the phrase "under such conditions" to develop a requirement that the "conditions of competition" between imported and domestic footwear in the Argentine market demonstrate a causal link between the increased imports and injury. Argentina asserts that there is no basis in the *Agreement on Safeguards* for this requirement. Third, Argentina maintains that the Panel required the Argentine authorities to establish that other relevant factors had been analyzed, and that injury caused by factors other than imports is not evidence of serious injury caused by imports. In Argentina's opinion, this requirement goes far beyond what is actually required in Article 4.2(b) of the *Agreement on Safeguards*.

144. We note that Article 4.2(a) requires the competent authorities to evaluate "the rate and amount of the increase in imports", "the share of the domestic market taken by increased imports", as well as the "changes" in the level of factors such as sales, production, productivity, capacity utilization, and others. We see no reason to disagree with the Panel's interpretation that the words "rate and amount" and "changes" in Article 4.2(a) mean that "the *trends* -- in both the injury factors

[137]Panel Report, para. 8.229.

[138]Panel Report, paras. 8.237 and 8.238.

and the imports -- matter as much as their absolute levels."[139] We also agree with the Panel that, in an analysis of causation, "it is the *relationship* between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination."[140] (emphasis added) Furthermore, with respect to a "coincidence" between an increase in imports and a decline in the relevant injury factors, we note that the Panel simply said that this should "normally" occur if causation is present.[141] The Panel qualified this statement, however, in the following sentence:

> While such a coincidence by itself cannot *prove* causation (because, *inter alia*, Article 3 requires an explanation – i.e., "findings and reasoned conclusions"), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present.[142]

145. We are somewhat surprised that the Panel, having determined that there were no "increased imports", and having determined that there was no "serious injury", for some reason went on to make an assessment of causation. It would be difficult, indeed, to demonstrate a "causal link" between "increased imports" that did not occur and "serious injury" that did not exist. Nevertheless, we see no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the *Agreement on Safeguards*. Rather, we believe that Argentina has mischaracterized the Panel's interpretation and reasoning. Furthermore, we agree with the Panel's conclusions that "the conditions of competition between the imports and the domestic product were not analysed or adequately explained (in particular price); and that 'other factors' identified by the CNCE in the investigation were not sufficiently evaluated, in particular, the tequila effect."[143]

146. For all these reasons, we uphold the Panel's conclusion that "Argentina's findings and conclusions regarding causation were not adequately explained and supported by the evidence."[144]

147. And, on the basis of all of the above reasoning, we uphold the Panel's findings and conclusions in paragraph 8.279 and paragraph 8.280 of the Panel Report, including the conclusions that "Argentina's investigation and determinations of increased imports, serious injury and causation are inconsistent with Articles 2 and 4 of the Safeguards Agreement."[145] We also uphold the Panel's ultimate conclusion that "Argentina's investigation provides *no* legal basis for the application of the definitive safeguard measure at issue, or any safeguard measure."[146]

[139]*Ibid.*, para. 8.237.

[140]*Ibid.*

[141]Panel Report., para. 8.238.

[142]*Ibid.*

[143]*Ibid.*, para. 8.278.

[144]*Ibid.*

[145]*Ibid.*, para. 8.280.

[146]*Ibid.*

C. *Article 12.7 of the DSU*

148. Argentina also contends that the Panel violated Article 12.7 of the DSU by failing to provide "a basic rationale" for its findings and conclusions. Article 12.7 of the DSU reads, in relevant part:

> … the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the *basic rationale* behind any findings and recommendations that it makes. (emphasis added)

149. In our reports in *Korea – Alcoholic Beverages* [147] and *Chile – Taxes on Alcoholic Beverages* [148], we found that the panels in those cases had provided sufficient reasons for their findings and recommendations, and that, therefore, the requirements of Article 12.7 of the DSU were fulfilled. In this case, the Panel conducted *extensive* factual and legal analyses of the competing claims made by the parties, set out numerous factual findings based on detailed consideration of the evidence before the Argentine authorities as well as other evidence presented to the Panel, and provided extensive explanations of how and why it reached its factual and legal conclusions. Although Argentina may not agree with the rationale provided by the Panel, and we do not ourselves agree with all of its reasoning, we have no doubt that the Panel set out, in its Report, a "basic rationale" consistent with the requirements of Article 12.7 of the DSU.

150. For these reasons, we reject Argentina's appeal under Article 12.7 of the DSU. Indeed, we cannot help but note that, in this appeal, Argentina seems to be arguing that the Panel said and did both too much and too little.

VIII. Findings and Conclusions

151. For the reasons set out in this Report, the Appellate Body:

(a) concludes that the Panel did not exceed its terms of reference by referring in its reasoning to Article 3 of the *Agreement on Safeguards*;

(b) reverses the Panel's conclusion in paragraph 8.69 of the Panel Report that "safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT", and also reverses the Panel's finding that the Uruguay Round negotiators "*expressly omitted*" the phrase "as a result of unforeseen developments" from Article 2 of the *Agreement on Safeguards*;

(c) declines to make a finding with respect to the European Communities' claim under Article XIX of the GATT 1994 since, in light of the findings in paragraph (f) below, there is, in any event, no legal basis for the safeguard measures imposed by Argentina;

(d) reverses the Panel's findings and conclusions relating to footnote 1 to Article 2.1 of the *Agreement on Safeguards* and Article XXIV of the GATT 1994, and concludes that Argentina, on the facts of this case, cannot justify the imposition of its safeguard measures only on non-MERCOSUR third country sources of supply on the basis of an investigation that found serious injury or threat thereof caused by imports from all sources, including imports from other MERCOSUR member States;

[147] *Supra*, footnote 36, para. 168.

[148] Appellate Body Report, circulated 13 December 1999, WT/DS87/AB/R, WT/DS110/AB/R, para. 78.

(e) concludes that the Panel correctly stated and applied the appropriate standard of review, as set forth in Article 11 of the DSU;

(f) upholds the Panel's findings and conclusions that Argentina's investigation and determinations of increased imports, serious injury and causation are inconsistent with Articles 2 and 4 of the *Agreement on Safeguards*, and that, accordingly, Argentina's investigation provides no legal basis for the application of the definitive safeguard measure at issue or any safeguard measure; and

(g) concludes that the Panel did not fail to set out the "basic rationale" behind its findings and recommendations as required by Article 12.7 of the DSU.

152. The Appellate Body *recommends* that the DSB request that Argentina bring its safeguard measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Agreement on Safeguards*, into conformity with its obligations under that Agreement.

Report of the Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, adopted 10 November 2003

WORLD TRADE ORGANIZATION

WT/DS248/AB/R
WT/DS249/AB/R
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WT/DS253/AB/R
WT/DS254/AB/R
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10 November 2003
(03-5966)

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UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS

AB-2003-3

Report of the Appellate Body

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Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
India – Quantitative Restrictions	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – Fur Felt Hats	Working Party Report, *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, adopted 22 October 1951, GATT/CP/106.
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Line Pipe	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body Report, WT/DS202/AB/R
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001

TABLE OF ABBREVIATIONS IN THIS REPORT

"AUV"	average unit value
"CCFRS"	certain carbon flat-rolled steel
"COGS"	cost of goods sold
"cold-finished bar"	carbon and alloy cold-finished bar
"FFTJ"	carbon and alloy fittings, flanges and tool joints
"FTA"	free-trade area
"GSP"	Generalised System of Preferences
"hot-rolled bar"	carbon and alloy hot-rolled bar and light shapes
"NAFTA"	North American Free Trade Agreement
"Proclamation"	Proclamation 7529 of 5 March 2002 - To Facilitate Positive Adjustment to Competition from Imports of Certain Steel Products, United States Federal Register, 7 March 2002 (Volume 67, Number 45). (Exhibit CC-13 submitted by the Complaining Parties to the Panel)
"rebar"	carbon and alloy rebar
"welded pipe"	carbon and alloy welded pipe, other than oil country tubular goods (OCTG)
the "*Anti-Dumping Agreement*"	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
the "Complaining Parties"	Brazil, China, the European Communities, Japan, Korea, New Zealand, Norway, and Switzerland
the "DSB"	Dispute Settlement Body
the "DSU"	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
the "GATT 1994"	*General Agreement on Tariffs and Trade 1994*
the "Panel Reports"	Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*
the "USITC"	United States International Trade Commission

the "USTR"	United States Trade Representative
the "*Working Procedures*"	*Working Procedures for Appellate Review*
the "*WTO Agreement*"	*Marrakesh Agreement Establishing the World Trade Organization*
the "WTO"	World Trade Organization
"tin mill products"	carbon and alloy tin mill products
"USITC Report, Vol. I"	USITC, Certain Steel Products, Inv. No. TA-201-73, USITC Pub. 3479 (Dec. 2001): Volume I – Determinations and Views of the Commissioners. (Exhibit CC-6 submitted by the Complaining Parties to the Panel)
"USITC Second Supplementary Report"	USITC supplementary information on unforeseen developments and injury determination for imports from all sources other than Canada and/or Mexico, 4 February 2002. (Exhibit CC-11 submitted by the Complaining Parties to the Panel)

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Definitive Safeguard Measures on Imports of Certain Steel Products

United States, *Appellant/Appellee*
Brazil, *Appellant/Appellee*
China, *Appellant/Appellee*
European Communities, *Appellant/Appellee*
Japan, *Appellant/Appellee*
Korea, *Appellant/Appellee*
New Zealand, *Appellant/Appellee*
Norway, *Appellant/Appellee*
Switzerland, *Appellant/Appellee*

Canada, *Third Participant*
Cuba, *Third Participant*
Mexico, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*
Thailand, *Third Participant*
Turkey, *Third Participant*
Venezuela, *Third Participant*

AB-2003-3

Present:

Bacchus, Presiding Member
Abi-Saab, Member
Lockhart, Member

I. Introduction

1. The United States appeals certain issues of law and legal interpretations developed in the Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (the "Panel Reports").[1]

2. The Panel was established by the DSB on 3 June 2002, pursuant to a request by the European Communities, to examine the consistency of ten safeguard measures applied by the United States on 20 March 2002 on imports of certain steel products.[2] On 14 June 2002, pursuant to Article 9.1 of the DSU, the DSB referred to the Panel complaints on the same matter brought by Japan and Korea. On 24 June 2002, the DSB, pursuant to Article 9.1 of the DSU, also referred to this single Panel complaints on the same matter submitted by China, Norway, and Switzerland. On 8 July 2002, the DSB, pursuant to Article 9.1 of the DSU, also referred to this single Panel a complaint on the same matter submitted by New Zealand. On 29 July 2002, the DSB, pursuant to Article 9.1 of the DSU, also referred to this single Panel a complaint on the same matter submitted by Brazil.

3. In their requests for the establishment of a panel, the Complaining Parties claimed that the ten safeguard measures applied by the United States on imports of certain steel products were inconsistent with the obligations of the United States contained in Articles 2, 3, 4, 5, 7, 8, 9, and 12 of the *Agreement on Safeguards*, Articles I, II, X, XIII, and XIX of the GATT 1994, as well as Article XVI of the *WTO Agreement*.[3]

4. The Panel issued eight Panel Reports—in the form of one document—that were circulated to the Members of the WTO on 11 July 2003. The Panel concluded, in all of the Panel Reports, that all ten safeguard measures imposed by the United States were inconsistent with the *Agreement on Safeguards* and the GATT 1994.

5. In particular, the Panel found that:

(a) the application of safeguard measures by the United States on imports of CCFRS, hot-rolled bar, and stainless steel rod was inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to 'increased imports'"[4];

(b) the application of safeguard measures by the United States on imports of CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar was inconsistent with Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation that a 'causal link' existed between any increased imports and serious injury to the relevant domestic producers"[5];

(c) the application of safeguard measures by the United States on imports of tin mill products and stainless steel wire was inconsistent with Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determinations with respect to 'increased imports'" and the existence of a "causal link" between any increased imports and serious injury, "since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance"[6]; and

(d) the application of safeguard measures by the United States on imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire was inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, because "the United States failed to comply with the requirement of 'parallelism' between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure".[7]

6. In addition, the Panel concluded, in the Panel Reports concerning the complaints of China, the European Communities, New Zealand, Norway, and Switzerland, that:

> the application of safeguard measures by the United States on imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire was inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation demonstrating that 'unforeseen developments' had resulted in increased imports causing serious injury to the relevant domestic producers".[8]

7. The Panel concluded that, to the extent that the United States had acted inconsistently with the provisions of the *Agreement on Safeguards* and the GATT 1994 set out above, it had nullified or impaired the benefits accruing to the Complaining Parties under the *Agreement on Safeguards* and the GATT 1994.[9] The Panel recommended that the DSB request the United States to bring all the safeguard measures into conformity with its obligations under the *Agreement on Safeguards* and the GATT 1994.[10]

8. On 11 August 2003, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of

[1] WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R and Corr.1, 11 July 2003. China, the European Communities, New Zealand, Norway, Switzerland, as well as Brazil, Japan and Korea acting jointly, submit conditional appeals on certain issues not addressed by the Panel.

[2] Safeguard measures were applied on imports of CCFRS; tin mill products; hot-rolled bar; cold-finished bar; rebar; welded pipe; FFTJ; stainless steel bar; stainless steel rod; and stainless steel wire.

[3] Panel Reports, paras. 3.1–3.8.

[4] *Ibid.*, para. 11.2.

[5] Panel Reports, para. 11.2.

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.*

[9] Panel Reports, para. 11.3.

[10] *Ibid.*, para. 11.4.

the *Working Procedures*.[11] On 21 August 2003, the United States filed its appellant's submission.[12] On 26 August 2003, China, the European Communities, New Zealand, Norway, and Switzerland each filed an other appellant's submission.[13] Further, on the same day, Brazil, Japan and Korea filed a joint other appellants' submission.[14] On 5 September 2003, Brazil, China, the European Communities, Japan, Korea, New Zealand, Norway, Switzerland, and the United States each filed an appellee's submission.[15] On the same day, Canada filed a third participant's submission.[16] Cuba, Mexico, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Thailand, Turkey, and Venezuela notified the Appellate Body of their intention to appear at the oral hearing as third participants.[17]

9. On 16 September 2003, the Appellate Body received an *amicus curiae* brief from the American Institute for International Steel. The European Communities, in a letter dated 23 September 2003, requested the Appellate Body to inform the parties whether the Appellate Body intended to accept and take account of the *amicus curiae* brief. In a letter dated 24 September 2003, Brazil requested that the *amicus curiae* brief be disregarded.

10. The Appellate Body responded to the requests of the European Communities and Brazil on 24 September 2003, stating that a determination on whether it would accept the brief or take account of it would be made after the Division had considered all submissions to be made by the participants in this appeal, including submissions to be made at the oral hearing.[18]

11. The oral hearing was held on 29 and 30 September 2003.[19] The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Appellate Body Division hearing the appeal.

II. Factual Background

12. On 28 June 2001, the USITC initiated a safeguard investigation at the request of the USTR, in order to determine whether certain steel products were being imported into the United States in such increased quantities as to cause or threaten to cause serious injury to the domestic industry producing like or directly competitive products.[20] Pursuant to this investigation, the USITC made affirmative determinations of serious injury to the domestic industry with respect to imports of: CCFRS; hot-rolled bar; cold-finished bar; rebar; FFTJ; stainless steel bar; stainless steel rod; and a

[11]WT/DS248/17, WT/DS249/11, WT/DS251/12, WT/DS252/10, WT/DS/253/10, WT/DS254/10, WT/DS258/14, WT/DS259/13, 14 August 2003, attached as Annex 1 to this Report.

[12]Pursuant to Rule 21(1) of the *Working Procedures*.

[13]Pursuant to Rule 23(1) of the *Working Procedures*.

[14]*Ibid.*

[15]Pursuant to Rules 22(1) and 23(3) of the *Working Procedures*.

[16]Pursuant to Rule 24(1) of the *Working Procedures*.

[17]Pursuant to Rule 24(2) of the *Working Procedures*.

[18]Letter dated 24 September 2003, from the Director of the Appellate Body Secretariat to the Ambassadors of the Permanent Mission of Brazil and the Permanent Delegation of the European Communities.

[19]Pursuant to Rule 27 of the *Working Procedures*.

[20]USITC, Investigation No. TA-201-73, Institution and Scheduling of an Investigation under Section 202 of the Trade Act of 1974, United States Federal Register, 3 July 2001 (Volume 66, Number 128), pp. 35267-35268. (Exhibit CC-2 submitted by the Complaining Parties to the Panel)

determination of threat of serious injury with respect to imports of welded pipe.[21] The USITC made divided determinations with respect to tin mill products; stainless steel wire; stainless steel fittings and flanges; and tool steel.[22] The USITC recommended that tariffs and tariff-rate quotas be imposed for the products for which it made affirmative determinations.[23] Subsequently, following a request from the USTR, the USITC issued supplementary information on the economic analysis of remedy options[24], on unforeseen developments, and an injury determination for imports from all sources other than Canada and Mexico.[25]

13. Based on the USITC determination, the President of the United States imposed definitive safeguard measures on imports of certain steel products pursuant to Proclamation 7529 of 5 March 2002. The Proclamation imposed tariffs ranging from 30 percent to 8 percent on imports of certain carbon flat-rolled steel, hot-rolled bar, cold-finished bar, rebar, welded pipe, fittings, flanges and tool joints, stainless steel bar, stainless steel rod, tin mill products, and stainless steel wire.[26] The products subject to these safeguard measures were products for which the USITC had made affirmative determinations; with respect to tin mill products and stainless steel wire, for which the USITC had made divided determinations, the President decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to each of these products to be the determination of the USITC.[27] Imports from Canada, Israel, Jordan, and Mexico were excluded from the application of the measures.[28] The measures were imposed for a period of three years and one day[29], and became effective on 20 March 2002.[30]

III. Arguments of the Participants and the Third Participants

A. *Claims of Error by the United States – Appellant*

1. Unforeseen Developments, Article 3.1 of the *Agreement on Safeguards*, and Article 12.7 of the DSU

14. The United States requests that the Appellate Body reverse the Panel's findings that the USITC failed to provide a reasoned and adequate explanation demonstrating that "unforeseen

[21]USITC Report, Vol. I, p. 1 and footnote 1 thereto.

[22]*Ibid.*

[23]*Ibid.*, pp. 2 and 3.

[24]USITC supplementary information on the economic analysis of remedy options, 9 January 2002. (Exhibit CC-10 submitted by the Complaining Parties to the Panel)

[25]USITC Second Supplementary Report.

[26]Proclamation, paras. 7 and 9. For a more detailed listing of the specific measures imposed, see Panel Reports, para. 1.34.

[27]*Ibid.*, para. 4.

[28]*Ibid.*, para. 11. Imports from developing Members of the WTO, whose shares of total imports were found not to exceed three percent individually, and nine percent collectively, were also exempted from the application of the measures. *Ibid.*, para. 12. In addition, the USTR was authorized to exclude particular products pursuant to the procedure set out in the Proclamation. *Ibid.*, clauses (5) and (6). For information on the product specific exclusions granted until 22 August 2002, see Panel Reports, paras. 1.40–1.47.

[29]*Ibid.*, para. 9(b).

[30]*Ibid.*, clause (8).

developments" had resulted in increased imports causing serious injury to the relevant domestic industry.

15. According to the United States, in articulating the applicable standard of review, the Panel mistakenly reflected concerns relevant to Article 4.2 of the *Agreement on Safeguards*, and disregarded concerns relevant to the requirement of unforeseen developments, under Article XIX:1(a) of the GATT 1994. The United States submits that the appropriate standard of review is "not one derived from Article 4.2, but from Article XIX:1(a)".[31] According to the United States, "Article 4.2 indicates factors the competent authorities must evaluate and outlines the causation analysis. In contrast … 'Article XIX provides no express guidance' on when, where or how that demonstration [of unforeseen developments] should occur."[32] In response to questioning at the oral hearing, the United States clarified that it was not requesting a specific ruling from the Appellate Body under Article 11 of the DSU in respect of the Panel's findings on unforeseen developments.

16. The United States takes issue with the statement of the Panel that "[t]he timing of the explanation [relating to unforeseen developments], its extent and its quality are all factors that can affect whether [that] explanation is reasoned and adequate."[33] According to the United States, there is no basis in the *Agreement on Safeguards* for finding that "timing" and/or "extent" are relevant to determining whether the competent authorities' explanations are reasoned and adequate.[34] With regard to the term "explanation" and the term "adequate", the United States submits that because the *Agreement on Safeguards* does not explicitly require an "explanation" and does not employ the term "adequate", those terms can only be understood as a shorthand for the obligations that are in the Agreement. Those obligations are that the published report contain "reasoned conclusions" on "all pertinent issues" and "a detailed analysis of the case", including "a demonstration of the relevance of the factors examined".[35] The United States stresses that "the key consideration [under Article 3.1] is whether the authorities present a logical basis for their conclusion."[36]

17. The United States refers to the finding of the Appellate Body in *US - Line Pipe* which states that "to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports."[37] As it did for the terms "explanation" and "adequate", the United States emphasizes that the term "explicit" does not appear in the *Agreement on Safeguards*. As the *Agreement on Safeguards* "does not expressly require that the competent authorities' determination, findings, or conclusions be 'explicit,' that term can only be understood as a shorthand for the obligations that *are* in the Agreement – that the published report contain 'reasoned conclusions' on 'all pertinent issues' and 'a detailed analysis of the case,' including 'a demonstration of the relevance of the factors examined.'"[38]

18. The United States submits that, because "the Panel based many of its findings against the United States on its conclusions that the USITC report failed to provide a 'reasoned and adequate explanation' of certain findings"[39], it follows that there can only be a violation of Article 3.1 and not of Articles 2 and 4 of the *Agreement on Safeguards*. The United States argues that a failure to explain a finding does not automatically prove that the USITC had not performed the analysis necessary to make the finding.[40]

19. The United States contends that the Panel concluded that the USITC failed to distinguish the impact the alleged unforeseen developments had on the different product categories subject to the various safeguard measures. According to the United States, this conclusion of the Panel reflects two misconceptions. First, Article XIX of the GATT 1994 does not specify a particular type of analysis to demonstrate unforeseen developments, nor does it require the competent authorities to differentiate their respective impact on particular imports. Second, the Panel did not point to any facts suggesting that the USITC's general conclusions as to unforeseen developments were in any way unrepresentative of the specific steel industries and imports covered by the various measures. In addition, the United States contends that the Panel erred by requiring that the impact of various unforeseen developments be differentiated with respect to the individual industries, and even economies, of other countries.

20. The United States also argues that the Panel erred in finding that data and analysis contained in the USITC report, but outside the section of the report addressing unforeseen developments, were not relevant to an evaluation of the USITC's findings on unforeseen developments. Although the Panel, according to the United States, asserted that the USITC provided no data to support a conclusion that imports increased in the wake of the unforeseen developments, it nevertheless recognized that the USITC report cited to data tables showing imports into the United States for each country and for each product over the entire period of investigation. In the United States' view, the Panel was "required"[41] to consider this information. According to the United States, in *EC – Tube or Pipe Fittings*, the fact that the investigating authority had failed to mention one of the factors specifically listed in the *Anti-Dumping Agreement* did not prevent the Appellate Body from finding, after a close reading of the investigating authority's report, that the investigating authority had in fact considered the enumerated factor.[42]

21. The United States also contends that in some instances the Panel acted inconsistently with Article 12.7 of the DSU by failing to undertake the requisite analysis and failing to articulate why it considered that the USITC did not provide the requisite reasoned conclusions.[43] The United States submits that the Panel cited no evidence that contradicted the USITC's conclusions, did not find an explanation alternative to the one provided by the USITC, and failed to set forth explanations and reasons sufficient to justify its findings and recommendations.

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[31]United States' appellant's submission, para. 79.

[32]*Ibid.*

[33]The United States refers in paragraph 10 of its appellant's submission to paragraph 10.115 of the Panel Reports.

[34]United States' appellant's submission, para. 58.

[35]*Ibid.*, para. 59 and footnote 29 to para. 62, referring to the obligations set out in Articles 3.1 and 4.2(c) of the *Agreement on Safeguards*.

[36]United States' appellant's submission, para. 60.

[37]*Ibid.*, para. 63, referring to Appellate Body Report, *US – Line Pipe*, para. 217.

[38]United States' appellant's submission, para. 64.

[39]*Ibid.*, para. 73.

[40]*Ibid.*, para. 74.

[41]United States' appellant's submission, para. 92.

[42]*Ibid.*, para. 93, referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 161–163.

[43]In response to questioning at the oral hearing, the United States clarified that it was seeking a specific ruling on Article 12.7 of the DSU only with respect to the Panel's findings on "unforeseen developments".

2. Increased Imports

(a) General

22. The United States requests the Appellate Body to reverse the Panel's findings regarding increased imports with respect to the product categories CCFRS, tin mill products, hot-rolled bar, stainless steel wire and stainless steel rod.

23. The United States contends that the Panel's finding that a determination of increased imports can be made only when there is a "certain degree of recentness, suddenness, sharpness and significance" cannot be justified by the *Agreement on Safeguards* or Article XIX of the GATT 1994.[44] According to the United States, the phrase "in such increased quantities" "simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of the period of investigation must be higher than at some unspecified earlier point in time."[45] The United States submits that the text of Article 2.1 of the *Agreement on Safeguards* can support only an interpretation that an increase in imports must be "recent" in the sense of the ability of imports to cause or threaten to cause serious injury.

24. With regard to the requirement that the increase in imports must be "sudden", the United States notes that the Panel based this requirement on the reference to "unforeseen developments" in Article XIX of the GATT 1994. The United States contends that the Panel read into Article XIX a requirement that it does not contain, thus violating customary rules of treaty interpretation. The United States further argues that the "suddenness" requirement is in opposition with the manner in which serious injury often occurs. The United States finds support for this argument in the Appellate Body's observation in *US – Line Pipe* that "[s]erious injury does not generally occur suddenly".[46]

25. The United States submits that the Appellate Body's finding in *Argentina – Footwear (EC)* referred to by the Panel stands for the proposition that the "attributes of recentness, suddenness, sharpness and significance are inexorably linked to the ability of imports to cause or threaten to cause serious injury".[47] In the United States' view, because Article 2.1 of the *Agreement on Safeguards* encompasses the entire investigative authority of the competent authority, the issue of whether the increase was recent, sudden, sharp and significant enough should be considered as competent authorities proceed with the remainder of their investigation, that is, with their consideration of serious injury or threat of serious injury.

(b) Specific Arguments with respect to CCFRS

26. The United States maintains that the Panel erred in finding that the USITC did not provide a reasoned and adequate explanation of increased imports because it did not account for the decrease in imports from interim 2000 to interim 2001. The United States argues that there is no provision in the WTO Agreements requiring the USITC to address interim 2001 imports as part of its increased imports analysis, or to give the change in the levels of imports between interim periods dispositive weight. The Panel also erred in finding that the increase in imports until 1998 was no longer recent

[44]United States' appellant's submission, para. 100, referring to Panel Reports, para. 10.167.

[45]United States' appellant's submission, para. 102.

[46]United States' appellant's submission, para. 105, referring to Appellate Body Report, *US – Line Pipe*, para. 168.

[47]United States' appellant's submission, para. 24.

enough at the time of the determination to support a finding of increased imports. In the United States' view, the Panel failed to consider that the effects of the 1998 import surge were still occurring at the time of the determination and that the imports remained at significantly higher levels in 1999 and 2000 than in 1996.

(c) Specific Arguments with respect to Hot-Rolled Bar

27. The United States contends that the Panel erred in finding that this requirement was not met. According to the United States, the Panel focused almost exclusively on the decrease in imports in interim 2001, while improperly disregarding the increases in imports over the five preceding years of the investigation.

(d) Specific Arguments with respect to Stainless Steel Rod

28. The United States argues that the Panel erred in finding that the increased imports requirement was not met for stainless steel rod. According to the United States, the Panel placed too much weight on the decline in import volumes in interim 2001, and improperly rejected the USITC's analysis of this decline. The United States argues that the USITC acknowledged the decrease in imports in interim 2001, but explained that, despite this decrease, the market share of imports remained essentially stable in interim 2001. Thus, the United States argues that the USITC was correct in concluding that the decline in imports in interim 2001 was not so significant as to outweigh the increases of the previous years.

(e) Specific Arguments with respect to Tin Mill Products and Stainless Steel Wire[48]

29. The United States argues that the Panel erred in asserting that there is an inconsistency in the increased imports findings of those Commissioners who defined the like product in different ways. The United States argues that it is not necessary to reconcile the increased imports findings of each Commissioner or group of Commissioners. The United States also argues that there is "nothing intrinsically irreconcilable" about findings based on different product groupings and that the findings of the three Commissioners under each determination are not "mutually exclusive".[49] The United States contends that the issue of whether the USITC satisfied the increased imports requirement should be addressed by examining separately the findings of the individual Commissioners. In the United States' view, had the Panel done so, it would have found that each Commissioner separately satisfied the conditions of Article 2.1.

30. In the United States' view, neither the text of Articles 2.1 and 3.1, nor the object and purpose of the *Agreement on Safeguards*, supports the Panel's interpretation of a requirement of uniform like product definition among Commissioners making affirmative determinations. In addition, according to the United States, the Appellate Body Report in *US – Line Pipe* supports the USITC's practice of aggregating mixed votes of individual Commissioners. Finally, the United States argues that, by construing the *Agreement on Safeguards* to require uniformity in the like product definition by a

[48]The United States notes that the Panel cross-referenced its conclusions with respect to the increased imports requirement for tin mill products in its analysis of causation for both tin mill products and stainless steel wire. United States' appellant's submission, para. 46.

[49]United States' appellant's submission, paras. 372 and 374.

multi-member competent authority, the Panel is infringing unnecessarily upon the manner in which a Member may structure the decision-making process of its competent authority.

3. Parallelism

31. The United States requests that the Appellate Body reverse the Panel's findings that the United States' safeguard measures are inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, because the United States did not, with respect to any of the product categories at issue, establish explicitly that imports from the sources included in the relevant safeguard measures satisfied, alone, the conditions for the application of a safeguard measure.

32. The United States argues that the Panel based its product-specific analysis on two general conclusions. First, the United States argues, the Panel rejected nine of the ten safeguard measures on the grounds that the USITC had failed to account for the effects of imports from excluded sources. The United States acknowledges that the Appellate Body has stated that parallelism requires authorities to focus separately on imports from sources that are not excluded from the safeguard measure. However, the United States argues that the Appellate Body has not set conditions on *how* an authority must conduct its parallelism analysis. According to the United States, the Panel required a separate analysis of imports from those sources not subject to the safeguards measure, a requirement without a textual basis in the *Agreement on Safeguards*.

33. Second, the United States contends that the Panel incorrectly interpreted the requirement that the competent authorities must establish "explicitly" that imports covered by the measure satisfy the conditions for the application of the measure. The United States points to what it considers to be low import levels from Israel and Jordan, as well as to the USITC's finding that "exclusion of imports from Israel and Jordan would not change the conclusion of the Commission or of individual Commissioners."[50] The United States believes that, in the context in which this statement appears, its meaning was that imports from Israel and Jordan were either non-existent or so small that the Commission's conclusions for imports from sources other than Canada and Mexico were also applicable to imports from sources other than Canada, Mexico, Israel, and Jordan. In the view of the United States, the Panel required that the USITC repeat its findings on non-NAFTA imports "word for word in a section specifically addressing non-FTA imports"[51]. In the United States' view, there is no basis in the *Agreement on Safeguards* for requiring an authority to make redundant or unnecessary findings.

34. The United States further contends that if the Appellate Body reverses the Panel's findings, the Appellate Body will not be able to complete the analysis, because there is insufficient factual basis in the Panel Reports. The United States argues that should the Appellate Body nevertheless decide to complete this analysis, it should find that the USITC's parallelism analysis was in compliance with Article 2.1 of the *Agreement on Safeguards*.

[50]United States' appellant's submission, para. 338.

[51]United States' appellant's submission, para. 343.

4. Causation

(a) General

35. The United States requests the Appellate Body to reverse the Panel's finding on causation for CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, and stainless steel wire. As a general matter, the United States emphasizes that, as recognized by the Panel, there is nothing in the "substantial cause" test applied by the USITC that would necessarily mean that the WTO obligation to separate and distinguish the effects of other causes of injury on the state of the industry cannot be fulfilled.

36. The United States next submits that the Panel incorrectly concluded that Article 4.2(b) requires the competent authorities to perform a collective assessment of the injurious effects of other factors. The United States argues that this interpretation is inconsistent with the text of Article 4.2(b) and with the Appellate Body's findings under the *Agreement on Safeguards* as well as in *EC – Tube or Pipe Fittings*; moreover, the United States argues that a collective analysis of the effects of "other" factors is not any more accurate than an individual analysis. A competent authority is furthermore, in the United States' view, not bound to assess whether the effects of all "other" factors "outweigh" the effects of imports.[52]

(b) Specific Arguments with respect to CCFRS

37. The United States disagrees with the Panel's finding that the USITC did not establish a "coincidence in trends" between increases in imports and declines in the industry's condition. The Panel conducted an impermissible *de novo* review by not addressing the USITC's reasoned conclusions and instead "prepar[ing] its own data set"[53] so as to assess whether a coincidence of trends existed. This analysis of the Panel, moreover, did not address certain other factors which, according to the United States, "clearly had a bearing on the situation of the CCFRS industry [ ]."[54]

38. The United States further contends that the Panel misunderstood the USITC's underselling analysis. The fact that the USITC did not specifically discuss the price comparisons for the other constituent items of CCFRS does not mean that the USITC was "conveniently selective"[55] and failed to evaluate the data for these items. The Panel also incorrectly characterized the USITC's AUV analysis.

39. The United States disputes the Panel's finding that the USITC's definition of the CCFRS product category was so broad that it prevented the USITC from properly performing its pricing analysis. The United States relies on the panel report in *Argentina – Footwear (EC)*, as well as on the Appellate Body Report in *US – Lamb*, to argue that, when reviewing an authority's causation findings, a panel must assume that the authorities' findings on the definition of "like product" and "domestic industry" were proper.

40. The United States also submits that the USITC adequately distinguished the injurious effects of demand declines from those of imports. In the United States' view, the Panel appears to

[52]*Ibid.*, para. 173.

[53]United States' appellant's submission, para. 187.

[54]*Ibid.*, para. 192.

[55]United States' appellant's submission, para. 202, referring to the Panel Reports, para. 10.379.

erroneously require a valid non-attribution analysis for "each and every moment" during the period of investigation.[56] The USITC, according to the United States, adequately distinguished the effects of capacity increases, as well as of the effects of minimill competition; the USITC reasonably concluded that there was no change in the minimills' relative cost advantage that would have caused them to drive prices down and, therefore, correctly rejected the cost advantage as a significant factor in domestic price decline. Finally, the United States argues that the USITC evaluated whether legacy costs had increased the industry's costs and correctly noted that the industry's legacy costs predated the period of investigation. The USITC, therefore, did not find that legacy costs were a source of injury during the period of investigation.

(c) Specific Arguments with respect to Hot-Rolled Bar

41. The United States argues that the Panel erred in rejecting the USITC's finding—that increases in the industry's COGS had not been a source of serious injury to the industry during the period of investigation—as not being reasoned and adequate. The USITC evaluated all the record evidence and correctly concluded that the evidence showed that COGS increases in 2000 were not a cause of injury to the industry. In the United States' view, the Panel's conclusion is based on the mistaken assumption that the USITC did not examine whether the industry's profitability and pricing declines coincided with increases in its costs.

(d) Specific Arguments with respect to Cold-Finished Bar

42. The United States contends that the Panel erred in rejecting the USITC's finding that aggressive underselling by imports caused the industry to lose market share in 2000 and 2001 and to suffer corresponding declines in its production, shipment, and sales revenue levels. In the United States' view, the Panel failed to recognize that the declines in 2000 and 2001 were caused by separate events, namely demand declines in 1999, and a surge in import volume in 2000.

43. Furthermore, the United States argues that the Panel mistakenly rejected the USITC's finding of aggressive underselling by imports in 1999 and 2000 because of the USITC's reliance on quarterly price comparison data, rather than annual AUV data. The Panel's findings are an improper attempt to question the USITC's choice of methodology. Further, the USITC, contrary to the Panel's finding, separated and distinguished the effects of demand declines from those of imports by examining whether the industry's profitability and revenue declines correlated with demand declines during 1999 and 2000.

(e) Specific Arguments with respect to Rebar

44. The United States argues that the USITC adequately distinguished the injurious effects of changes in the industry's COGS. Contrary to the Panel's findings, the USITC provided a detailed and reasoned assessment of the manner in which changes in the industry's costs had an impact on the industry's price and profitability levels in 1999 and 2000. Moreover, the United States submits, the USITC's analysis showed clearly that rising input costs were not a cause of injury to the industry.

[56]United States' appellant's submission, para. 227.

(f) Specific Arguments with respect to Welded Pipe

45. In the United States' view, the USITC was not obliged to distinguish and separate the effects of the industry's capacity increases because the USITC found that the effects of these increases were minimal. According to the United States, the Appellate Body findings in *EC – Tube or Pipe Fittings* support the view that a competent authority is not required to distinguish the effects of an "other" factor if that factor is found to contribute to injury in a "minimal", "minor" or "not significant" way. The USITC, furthermore, adequately explained why it found the allegedly "aberrant" performance of one member of the welded pipe industry not to be a source of injury for the industry during the period. According to the United States, Article 4.2(b) does not preclude a competent authority from making "subjective" judgements about the meaning of that evidence or from describing its assessment of that evidence in a "subjective" way.

(g) Specific Arguments with respect to FFTJ

46. The United States submits that the USITC bore no obligation to assess the nature and extent of capacity increases on the industry because the USITC found that capacity increases by the FFTJ industry would not place substantial pressure on domestic prices. The United States relies on the Appellate Body Report in *EC – Tube or Pipe Fittings* in arguing that an authority need not "separate and distinguish" the effects of an "other" known factor, if the factor contributes only "minimally" to the injury being suffered by an industry.[57] With respect to the factor "purchaser consolidation", the United States submits that the USITC properly assessed the nature and extent of any injury caused by this factor by correctly noting that the serious injury was associated with factors not directly affected by declines in price.

(h) Specific Arguments with respect to Stainless Steel Bar

47. The United States argues that the USITC adequately distinguished the injurious effects of late period demand declines by evaluating whether declines in the industry's condition correlated more closely with imports than demand declines during the period. The USITC thereby performed the very analysis by which, according to the Panel itself, the USITC could have satisfied the non-attribution requirement. The United States also argues that the USITC also separated and distinguished, in a reasoned and adequate manner, the effects of increased energy costs from those of increased imports by evaluating whether declines in the industry's condition correlated more closely with imports than energy cost increases.

B. *Arguments of Brazil – Appellee*

1. Article 3.1 of the *Agreement on Safeguards* and Article 12.7 of the DSU

48. Brazil submits that the articulation by the Panel of the applicable standard of review is consistent with the *Agreement on Safeguards* and previous findings of the Appellate Body.

49. Referring to the phrase "reasoned and adequate explanation", Brazil notes that although, as the United States pointed out, "adequate" and "explanation", are not explicitly found in the text of the *Agreement on Safeguards*, both terms "are easily discerned"[58] from what is in the Agreement, and

[57]United States' appellant's submission, para. 297.

[58]Brazil's appellee's submission, paras. 11 and 13.

particularly the language found in Article 3.1 and Article 4.2(c) of the *Agreement on Safeguards* (that is, "reasoned conclusions" and "detailed analysis" and "demonstration of the relevance of factors").

50. With respect to the United States' argument that explanations do not need to be "explicit," Brazil stresses that the need for an explicit determination "is clearly embedded in the requirement under Article 3.1 that an authority 'set forth' its findings and reasoned conclusions reached on all pertinent issues of fact and law."[59]

51. Brazil also does not agree with the United States that the Panel "improperly merged" the substantive requirements for establishing the right to take a safeguard measure with the procedural requirements set out in Articles 3.1 and 4.2(c) of the *Agreement on Safeguards* by presuming that a failure to explain a finding automatically proved that the USITC Commissioners had not performed the analysis necessary to make a finding.[60] Brazil argues that the position of the United States that the substantive obligations of Articles 2.1, 4.1 and 4.2 "do not require that the reasoning supporting [the determinations of competent authorities] expressly appear in [their] written report"[61], is "tantamount to relieving authorities of their substantive obligations".[62] According to Brazil, the United States is "essentially arguing that we should trust that the USITC performed the appropriate analyses even if there is no clear basis for discerning what it did."[63] Under this rationale, Brazil asserts, "one could never move beyond arguments centered on a failure to provide a reasoned and adequate explanation, since arguments attacking the underlying analyses almost always rely on whatever explanation the authority actually did provide."[64]

52. Finally, according to Brazil, the Panel complied with Article 12.7 of the DSU, as it performed the requisite factual and legal analyses of the parties' competing claims, set out numerous factual findings, and provided extensive explanation of how and why it reached its factual and legal conclusions. Brazil argues that the fact that the United States may not agree with the Panel's rationale does not imply that the Panel did not comply with Article 12.7.

2. Increased Imports

(a) General

53. Brazil requests that the Appellate Body dismiss the United States' appeal from the Panel's conclusions concerning increased imports. Brazil submits that the Panel correctly interpreted and applied the increased imports requirement. Brazil notes that the Panel correctly found that the increased imports requirement represents both a quantitative and qualitative standard, independent of the causation analysis. According to Brazil, the requirement is that increased imports must be recent enough, sudden enough, sharp enough and significant enough to cause injury, based on an

[59] *Ibid.*, para. 17.

[60] *Ibid.*, para. 22, referring to the United States' appellant's submission, paras. 73–76.

[61] Brazil's appellee's submission, para. 22, referring to the United States' appellant's submission, para. 76.

[62] Brazil's appellee's submission, para. 22.

[63] Brazil's appellee's submission, para. 23.

[64] *Ibid.*

examination of trends over the entire period of investigation, with an emphasis on the most recent period.

54. Brazil agrees with the Panel's conclusion that a finding that imports have increased pursuant to Article 2.1 can be made when the increase evidences a certain degree of recentness, suddenness, sharpness and significance, and believes that this conclusion is fully supported by the Appellate Body jurisprudence. Specifically, Brazil alleges that the requirement of "recentness" has been construed by the Appellate Body based on a sound understanding of the relationship between Article 2.1 and Article 4.2(a) of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, and that the Panel was correct in adopting this interpretation. Moreover, Brazil submits that the element of suddenness was recognized as inherent in Article XIX of the GATT 1994 by the Panel and, previously, the Appellate Body. In addition, Brazil argues that the increase in imports cannot be confirmed by an analysis of end points since, in *Argentina – Footwear (EC)*, the Appellate Body specifically repudiated such an approach.

(b) Specific Arguments with respect to CCFRS

55. Brazil further contends that the Panel correctly found that the USITC did not meet the increased imports requirement with respect to CCFRS. In Brazil's view, the USITC performed the same type of analysis that the Appellate Body rejected in *Argentina – Footwear (EC)*—an end-point-to-end-point analysis—without considering trends, and mentioned the decline at the end of the investigation period "only in passing", adopting a "any increase will do" approach.[65]

3. Parallelism

56. Brazil submits that the Panel's findings on parallelism are fully consistent with the Appellate Body jurisprudence, as set out in *US – Wheat Gluten* and *US – Line Pipe*, and requests that the Appellate Body dismiss the United States' appeal on parallelism.

57. Brazil agrees with the Panel's conclusion that the USITC failed to account for the different effects of non-FTA imports of CCFRS as compared to the effects of all imports of CCFRS. In Brazil's view, the USITC's parallelism analysis in its Second Supplementary Report was based on its finding that the statements made on all imports as regards AUVs could also be made with respect to non-NAFTA imports. The Panel did not read into the *Agreement on Safeguards* a new requirement that the effects of NAFTA imports be considered on their own or as an alternative cause, or that an authority must specifically analyze the effects of excluded products; rather, the Panel, in Brazil's view, stated what was necessary to ensure a proper assessment of the effects of included products.

58. As regards the exclusion of imports from Israel and Jordan, Brazil is of the view that the United States essentially argues that because imports from these countries were so small, they need not be part of a parallelism analysis. However, in Brazil's view, in order to establish that imports from sources covered by the measure satisfy all the conditions for imposing a safeguard measure, a Member must determine whether its conclusions on causation would change if imports from excluded sources, taken together, were removed from the equation. In Brazil's view, there is no second standard for excluded sources of small volumes of imports.

[65] Brazil's appellee's submission, para. 49.

4. Causation

59. Brazil requests the Appellate Body to uphold the Panel's finding on causation. Brazil claims that there was no coincidence between import trends and domestic industry performance. The Panel neither ignored the USITC's report, nor engaged in a *de novo* review; rather, the Panel "did little more than compile and republish information that was before the USITC."[66] Brazil also disagrees with the United States that the Panel did not analyze relevant factors and failed to include an analysis of import pricing in its coincidence analysis.

60. Brazil next submits that the USITC's treatment of import underselling failed to meet the requirement to provide a "compelling analysis". Brazil agrees with the Panel that the existence of underselling does not, by itself, demonstrate that imports were driving prices down and cannot demonstrate even the presence of competition between imports and domestic products. In Brazil's view, underselling by imports, combined with a declining import market share and the absence of coincidence between import trends and industry performance, does not provide a compelling explanation of a causal link between increased imports and serious injury.

61. Further, according to Brazil, the Panel did not misunderstand the USITC's analysis, but rather identified a "serious problem" often inherent in the use of AUVs. Brazil submits that, contrary to the United States' assertion, the USITC did not fully consider the reliability of aggregate AUVs for CCFRS. Brazil also points out that United States courts have on occasions reversed the USITC's findings for "excessive reliance" on AUVs.[67] The USITC, in Brazil's view, did not establish why it considered the aggregate AUV data to be reliable.

62. According to Brazil, the Panel was also correct to address the CCFRS like product definition in the context of its causation analysis. Brazil submits that like products must be defined in such a way as to permit the analysis required by the *Agreement on Safeguards*. A like product that is too broadly defined will yield data that is too aggregated to offer an accurate depiction of the market. The reliance of the United States on the panel report in *Argentina – Footwear (EC)* in this respect is, in Brazil's opinion, incorrect. The panel in that dispute stated that "statistics for the industry and imports as a whole will only show averages, and therefore will not … provide sufficiently specific information on the locus of competition in the market."[68] That panel did not subsequently explore this issue further, because no party had challenged the like product definition.

63. Brazil contends that the Panel in the present case was not required to make specific findings on the like product definition for CCFRS before discussing the "analytical problems" with respect to causation inherent in the USITC's CCFRS definition.[69] However, in the event that the Appellate Body should find fault with this aspect of the Panel's causation analysis, Brazil refers to its conditional appeal, contained in its other appellant's submission.

64. Furthermore, Brazil submits that the Panel correctly concluded that the United States failed to ensure that it did not attribute to imports of CCFRS the injurious effects of other factors. Brazil emphasizes that panels need not accept the conclusions of authorities if those conclusions are

[66]Brazil's appellee's submission, para. 62.

[67]*Ibid.*, para. 72.

[68]Brazil's appellee's submission, para. 80, referring to Panel Report, *Argentina – Footwear (EC)*, para. 8.261 and footnote 557 thereto.

[69]Brazil's appellee's submission, para. 81.

demonstrably wrong or insufficient in the light of the facts. With respect to capacity increases, Brazil submits that the Panel correctly found that the USITC failed to perform an adequate non-attribution analysis. Brazil contends that the USITC itself found that capacity increases had an effect on pricing, but subsequently failed to distinguish the effect of capacity increases from the effect of imports.

65. Brazil argues further that the USITC acknowledged that declining demand played a role in the injury suffered by the industry, but then dismissed the role of declining demand on the grounds that this decline manifested itself late in the period of investigation. Brazil submits that such analysis does not actually separate and distinguish the effect of declining demand during the period for which the USITC "found the condition of the domestic industry [to be] most dire".[70] Brazil submits further that the operating performance of the CCFRS industry deteriorated most sharply in 2000 and 2001, thereby showing correlation only with declining demand, and not also with increased imports.

66. Brazil submits that the Panel also correctly found that the USITC failed to distinguish the effects of intra-industry competition from the effects of imports. The USITC, according to Brazil, acknowledged that a greater volume of lower-cost minimill capacity and output did have an effect on prices, but subsequently dismissed this factor "without any serious analysis".[71] With respect to the USITC's pricing analysis, Brazil submits that the relevant question is not the existence or the extent of underselling, but rather whether there is a correlation between underselling and injury to the domestic industry; the USITC never examined this question. Moreover, Brazil points out that, even as the prices for minimills' products fell, these minimills nevertheless enjoyed stronger financial performance than the integrated producers. In the light of this fact, according to Brazil, the USITC could not satisfy the non-attribution requirement by means of "a few cursory comments on relative costs of production and import pricing".[72]

67. With respect to legacy costs, Brazil argues that the USITC did acknowledge that this factor was a source of injury, but subsequently dismissed legacy costs on the basis that they predated the injury and did not increase during the period of investigation; Brazil considers this explanation insufficient and contends that in circumstances where an increasing portion of production is undertaken by companies without legacy costs, companies with legacy costs will be at a competitive disadvantage, which will ultimately affect their performance.

68. Finally, Brazil agrees with the Panel that Article 4.2(b) requires an overall assessment of "other factors". Brazil submits that, for instance, declining demand cannot be evaluated in isolation from the fact that capacity was increasing at the same time. The USITC never analyzed the relationship of various non-import factors and did not enquire how one of these factors might "compound the effect of the other".[73] In Brazil's view, the Appellate Body in *US – Line Pipe* recognized that a proper non-attribution analysis must include an "overall assessment", and in *EC – Tube or Pipe Fittings* "recognized that circumstances may require an assessment of how factors interact".[74] In Brazil's view, the facts of this case require such an assessment. In any event, in Brazil's view, since the USITC failed to separate and distinguish other facts even on an individual basis, the USITC's report does not meet the requirements of the *Agreement on Safeguards*.

[70]*Ibid.*, para. 93.

[71]*Ibid.*, para. 96.

[72]Brazil's appellee's submission, para. 102.

[73]*Ibid.*, para. 111.

[74]*Ibid.*, para. 113.

C. *Arguments of China – Appellee*

1. Unforeseen Developments, Article 3.1 of the *Agreement on Safeguards*, and Article 12.7 of the DSU

69. China requests that the Appellate Body reject the United States' appeal of the Panel's conclusions concerning unforeseen developments. China argues that the Panel applied the correct standard in requiring that a report must contain a coherent and logical explanation with respect to unforeseen developments. The Panel did not apply the standard set out in relation to Article 4.2; rather, China argues, the Panel referred to the standard derived by the Appellate Body from an interpretation of Article 3.1 of the *Agreement on Safeguards* in the context of claims arising under Articles 2 and 4 of that Agreement. In China's view, this standard uses a "general formula" that "stems" from Article 3.1[75] and that can be applied to all relevant conditions for applying safeguard measures.

70. China argues that, pursuant to Article XIX of the GATT 1994 and the Appellate Body decision in *US – Lamb*, safeguard measures are imposed on imports of "particular" products. Contrary to the United States' arguments, the Panel did not suggest that the USITC was required to determine to what extent each unforeseen development affected each product and each country. Rather, the Panel correctly applied the requirement that the USITC demonstrate a logical connection between unforeseen developments and increased imports for each safeguard measure. In China's view, this requirement ensures that such measures are not applied to products having no connection to the unforeseen developments.

71. China submits that the Panel did not act inconsistently with Article 12.7 of the DSU. That provision requires the Panel to provide a basic rationale behind its findings; China notes in this respect that the Panel identified the legal standard, specified its approach for the application of this standard, examined all relevant facts and assessed them in the light of the standard as well as the applicable provisions, and, finally, provided reasons for its conclusions. In China's view, this is sufficient, in the light of the Appellate Body's standard, to satisfy the requirements under Article 12.7 of the DSU.

2. Increased Imports

(a) General

72. China argues that the Panel was correct in finding that the United States acted inconsistently with Articles 2.1 and 3.1 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation of how the facts supported its determination with respect to "increased imports". China considers that, in order to satisfy the "increased imports" requirement, the rate and amount of the increase in imports must be evaluated; a comparison of the end points of the period of investigation is not sufficient. The competent authorities must furthermore examine recent imports, and recent data should not be considered in isolation from the data pertaining to the entire period of investigation. China further submits that the increase in imports must, furthermore, be sudden and recent. The increase in imports must also have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury". Moreover, since safeguard measures are of an extraordinary nature, the increase cannot have been

[75]China's appellee's submission, para. 37.

steady and gradual. China adds that, if there is a decrease in imports during the period of investigation, the competent authority must explain in a reasoned and adequate manner why such a decrease does—or does not—invalidate a finding on increased imports.

73. Finally, China disagrees with what it sees as the United States' claim that the analysis of increased imports is not distinct from the analysis of serious injury and causation. In China's view, the United States' arguments in this respect are contrary to previous findings of the Appellate Body.

(b) Specific Arguments with respect to CCFRS

74. China believes that the USITC "failed to provide any explanation as to why the decrease in imports occurring since 1998 could not offset the previous increase occurring three years ago."[76] In China's view, such a "gap" cannot be "completed" by a "re-explanation" of the facts by the United States before the Appellate Body.[77] China considers that to follow the United States' arguments with respect to CCFRS would mean that a simple end-point to end-point comparison would be sufficient to fulfil the "increased imports" requirement of the *Agreement on Safeguards*, an interpretation clearly rejected by the Appellate Body in *Argentina – Footwear (EC)*. China submits that the Panel did not give undue weight to interim 2001 imports, but rather applied the findings of the Appellate Body which require the competent authority to focus specifically on the most recent imports. Finally, China argues that the finding that the 1998 surge in imports "was no longer recent enough at the time of the determination" is "fully in line" with the requirements of the *Agreement on Safeguards* and their interpretation by the Appellate Body.[78]

(c) Specific Arguments with respect to Hot-Rolled Bar

75. China agrees with the Panel that the USITC failed to provide a reasoned and adequate explanation as to why the most recent decrease in imports in interim 2001 had no impact on the USITC's conclusion that hot-rolled bar was being imported in "increased quantities". China asserts that it was for the USITC to explain why that decrease had no impact on its final conclusion. Furthermore, China disagrees with the United States that the Panel failed to place the data for the end of the investigation period in the context of the data from the earlier part of the period of investigation.

(d) Specific Arguments with respect to Stainless Steel Rod

76. China agrees with the Panel's findings on stainless steel rod. The USITC, in China's view, failed to provide a reasoned and adequate explanation of why the most recent decrease in imports in interim 2001 had no impact on the USITC's conclusion that stainless steel rod was being imported in "increased quantities". China believes that, contrary to the United States' arguments, the Panel appropriately placed the data for the end of the investigation period in the context of the data from the earlier part of the period of investigation. In any event, the USITC failed to explain why it found an increase in imports in absolute numbers, while the decrease between interim 2000 and interim 2001 was 31.3 percent.

[76]China's appellee's submission, para. 117.

[77]*Ibid.*

[78]*Ibid.*, para. 125.

(e) Specific Arguments with respect to Tin Mill Products and Stainless Steel Wire

77. China argues that decisions of the Appellate Body demonstrate that the USITC was free to rely on the findings made by three Commissioners and that the findings of those Commissioners may constitute the determination required under Article 2.1 of the *Agreement on Safeguards*. However, these findings must be reconcilable in order to provide a reasoned and adequate explanation as to how the facts support the determination on increased imports. There is no such explanation in the present case, because the Commissioners' findings departed from each other and were based on different product groupings. Although findings based on these different groupings might sometimes be reconcilable, this would merely be by coincidence and is certainly not always the case. China also believes that the Appellate Body's decision in *US – Line Pipe* addressed the correct interpretation of Article 2.1; the present case, however, concerns the number of Commissioners making determinations or the differences between such determinations. Moreover, China argues that in *US – Line Pipe*, unlike in the present case, the Commissioners at issue had made affirmative injury determinations. China submits that the United States was free to decide that a singular act results from decisions by six Commissioners; however, according to China, the United States is not free to rely on these decisions when the decisions by these Commissioners cannot be reconciled one with another as a matter of substance.[79]

3. Parallelism

78. China argues that the Panel was correct in finding that the United States acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* by failing to establish that imports from sources not excluded from the scope of the measures alone satisfy the conditions required for the application of the measures.

79. China contends that Articles 2.1 and 4.2 of the *Agreement on Safeguards*, as interpreted by panels and the Appellate Body, require authorities to justify explicitly any gap between imports covered by the investigation and imports falling within the scope of the measure. The competent authority must provide a reasoned and adequate explanation as to why imports falling within the scope of the safeguard measure alone satisfy the conditions of Article 2.1, as elaborated in Article 4.2. In doing so, according to China, the USITC was required to "establish explicitly that non-FTA imports are able to cause serious injury distinctively from injury possibly caused, at the same time, by other sources of imports."[80]

80. China also claims that the United States made only implicit findings with respect to imports from sources other than Canada and Mexico. Moreover, according to China, the United States is incorrect in arguing that, "when the volume of FTA imports is extremely small, the authority's conclusions with respect to all imports are applicable to imports from all sources other than FTA sources, with no need for additional explanation."[81] China argues that, even if imports from Israel and Jordan were small—or sometimes even "quasi-inexistent"—this fact does not "release" the United States from conducting a proper parallelism analysis.[82] China believes that there "cannot be a double

[79]China's appellee's submission, para. 409.

[80]China's appellee's submission, para. 357.

[81]*Ibid*.., para. 335.

[82]*Ibid*., para. 359.

standard", depending on the level of imports.[83] According to China, although a small volume of imports from FTA sources may make it easier to explain why non-FTA imports satisfy the conditions of Article 2.1, the authorities must still provide such an explanation.

4. Causation

81. China argues that the Panel was correct in finding that the United States acted inconsistently with Articles 2.1, 3.1 and 4.2(b) of the *Agreement on Safeguards* by failing to demonstrate a causal link between increased imports and serious injury.

82. China maintains that the Panel found, with respect to two specific products, that the USITC should have assessed the cumulative effect of factors other than increased imports. Contrary to the United States' arguments, the Panel did not suggest that authorities must conduct such an assessment in all cases and its interpretation of the non-attribution requirement is supported by previous decisions of the Appellate Body. In particular, the Appellate Body in *EC – Tube or Pipe Fittings* recognized that an authority may need to conduct a collective analysis in certain factual circumstances. Although the USITC's approach to non-attribution was not inherently flawed, the USITC failed to complete its non-attribution analysis because it disregarded other factors once it had established that they did not individually cause injury equal to or greater than that caused by increased imports. The United States is incorrect in suggesting that the USITC need not conduct a non-attribution analysis regarding factors making only a "minor" contribution to injury. Furthermore, even if this were correct, the Panel correctly found that the USITC had not provided a reasoned and adequate explanation that these factors made only a minor contribution. In any case, China maintains that most of the United States' arguments regarding the Panel's findings on causation relate to the Panel's consideration of facts.

(a) Specific Arguments with respect to CCFRS

83. China notes that the United States challenges the Panel's finding that the USITC failed to explain why it relied on annual AUV data. However, this finding is consistent with the USITC's own acknowledgement that some combined data may involve double counting. The Panel did not specifically conclude that the CCFRS product grouping was improper. However, the Panel did make an independent determination that the USITC's pricing analysis was not reasoned and adequate due to flaws in the data and the USITC's selective reliance on the data. On the question of non-attribution, the Panel did not require the USITC to distinguish the effects of imports from those of other factors at every moment during the investigation. Rather, it required an explanation of why injury caused by other factors was not attributed to increased imports. The need for such an explanation was particularly important given that the USITC itself acknowledged the potential injurious impact of declining demand, increased capacity, intra-industry competition, and legacy costs.

(b) Specific Arguments with respect to Cold-Finished Bar

84. According to China, the United States is improperly challenging on appeal the Panel's findings of fact. China states that the Panel determined that the USITC could not simply dismiss declining demand as a possible injury factor, because the Panel found that another plausible interpretation of the data was that this factor could contribute significantly to injury.

[83]*Ibid*., para. 373.

(c) Specific Arguments with respect to Rebar

85. China claims that the United States is improperly challenging, on appeal, the Panel's findings of fact. In particular, the United States challenges the Panel's finding that the USITC had not provided a reasoned and adequate explanation that capacity increases and the aberrant performance of one domestic producer were insignificant causes of serious injury. China also maintains that the United States is improperly disputing the Panel's choice of the relevant facts on which to base its analysis.

(d) Specific Arguments with respect to Welded Pipe

86. China argues that, despite the USITC's view that capacity increases or the aberrant performance of one domestic producers were minor factors, the USITC was nevertheless required to explain this view and provide evidence to support it. However, the USITC made only a subjective assertion that did not satisfy the non-attribution test. The Panel did not find that subjective judgements are prohibited under Article 4.2(b) of the *Agreement on Safeguards*. However, China maintains that the Panel considered that a subjective judgement without further explanation, of the kind made by the USITC, did not constitute a reasoned conclusion.

(e) Specific Arguments with respect to FFTJ

87. China asserts that the Panel did not confirm the factual findings underlying the USITC's determination that capacity increases did not have a substantial injurious impact. The United States' arguments distort the Panel Reports in suggesting otherwise. In addition, the USITC itself recognized that purchaser consolidation played a role in causing injury, but then dismissed this factor without further explanation. In any case, China maintains that the United States' arguments improperly challenge factual findings of the Panel.

(f) Specific Arguments with respect to Stainless Steel Bar

88. China argues that the United States is improperly challenging the Panel's findings of fact regarding the factors of declining demand and increases in energy costs. In particular, the Panel found that the USITC dismissed declining demand as an injury factor despite acknowledging that this factor did play a role in causing injury. Contrary to the United States' arguments, the Panel did not enunciate any standard regarding the second sentence of Article 4.2(b). According to China, the Panel simply provided an example of what could have been a reasoned and adequate explanation that this factor was not causing injury to the domestic industry.

D. *Arguments of European Communities – Appellee*

1. Unforeseen Developments, Article 3.1 of the *Agreement on Safeguards*, and Article 12.7 of the DSU

89. The European Communities requests that the Appellate Body reject the United States' appeal of the Panel's conclusions concerning unforeseen developments. The European Communities recalls that, as the Appellate Body found in *US – Lamb*, the existence of unforeseen developments is a "pertinent issue of fact and law" within the meaning of Article 3.1 of the *Agreement on Safeguards*

and, therefore, the "report of the competent authorities, … must contain a 'finding' or 'reasoned conclusion' on 'unforeseen developments'."[84]

90. The European Communities further recalls that Article XIX:1(a) of the GATT 1994 requires that increased imports must result from unforeseen developments. The relevant "unforeseen developments" must, therefore, be linked to increased imports of each specific product that may be subject to a safeguard measure. According to the European Communities, the USITC failed to make that link for each product.

91. The European Communities also submits that data not used by the USITC in its unforeseen developments analysis, but used elsewhere in the USITC's report, is not relevant for the Panel's analysis. A reasoned conclusion is one that links the pertinent facts to the conclusion reached, not one where "key elements of the analysis are left to guess work and supposition".[85] It was not for the Panel, as the United States suggests, to undertake a *de novo* review of the USITC record and provide the analysis and reasoning that the USITC failed to disclose.

92. The European Communities argues that the United States' challenge to the Panel's finding that "[t]he timing of the explanation, its extent and its quality are all factors that can affect whether an explanation is reasoned and adequate" is unsupported. According to the European Communities, the United States misconstrues the word "extent" as signifying "length". The European Communities considers that the Panel did not demand that the USITC report be longer, but that it contain a more reasoned and adequate explanation of the findings.

93. The European Communities argues that the United States wrongly focuses only on the word "reasoned" in Article 3.1 of the *Agreement on Safeguards* to question the obligation to provide an "explanation" for the conclusions reached in the investigation. In the European Communities' view, the meaning of Article 3.1 must be established taking into consideration all the terms used; the two terms "setting forth" and "reasoned" suggest the same meaning, that is, that a reasoned and adequate explanation must be contained in the report. The European Communities contends that the United States' interpretation of the term "reasoned conclusion"—that the report need only provide a "logical basis" for a conclusion—would fail to give meaning and effect to all the terms of the treaty.

94. As for the United States' argument that the word "explicit" is not contained in Article 3.1 of the *Agreement on Safeguards*, the European Communities refers to the term "set forth" in that Article and argues that it would be "difficult to conceive of how an account can be given *distinctly* or *in detail* in an implicit manner or how an *exposition*, a *narrative*, or a *description* can be other than explicit."[86]

95. The European Communities agrees with the United States' argument that competent authorities may choose any structure, any order of analysis, and any format for explanation that they see fit, as long as the report complies with Articles 3.1 and 4.2(c). However, the European Communities argues, Members imposing safeguard measures are still required to set forth a reasoned and adequate explanation and not leave it to the Panel or other Members to deduce it from the raw data.

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[84]European Communities' appellee's submission, para. 87, referring to Appellate Body Report, *US – Lamb*, para. 76.

[85]European Communities' appellee's submission, para. 100.

[86]European Communities' appellee's submission, para. 57. (original emphasis)

96. With respect to the United States' contention that the Panel's findings on the lack of a reasoned and adequate explanation should be restricted to Article 3.1 of the *Agreement on Safeguards*, the European Communities submits that the Appellate Body has explained in previous safeguards cases that the failure to provide a reasoned and adequate explanation is not only a violation of Article 3.1, but also of the substantive obligations of the *Agreement on Safeguards*.

97. With respect to Article 12.7 of the DSU, the European Communities considers that the United States is in fact reproaching the Panel for making more findings than were needed. The European Communities submits that, in stating that a certain explanation provided by the USITC was "plausible", the Panel had engaged in a speculation that went "beyond its mandate"[87] and that, had the Panel developed alternative explanations, it would have conducted a *de novo* examination.

2. Increased Imports

(a) General

98. The European Communities requests that the Appellate Body dismiss the United States' appeal of the Panel's conclusions concerning increased imports. According to the European Communities, the United States' challenge to the standard applied by the Panel is based on an attempt to collapse the increased import requirement with the causation analysis. This argument is contrary to the ordinary meaning of Article 2.1 of the *Agreement on Safeguards* and the Appellate Body jurisprudence. In the European Communities' view, the condition relating to increased imports is separate from the question of causation and injury. Moreover, the European Communities submits that the use of the present tense in the phrase "is being imported" explicitly limits the right to adopt a safeguard measure to situations where increased imports continue and can still be found to cause or threaten to cause injury. The European Communities further contends that the United States' assertion that the analysis of increased imports must take account of long-term effects of previous increases cannot be justified by the *Agreement on Safeguards*, because the safeguard measures are not intended to provide compensation for effects of previous increases.

99. In addition, the European Communities argues that the requirement to analyze trends over the entire period of investigation and to focus particularly on the most recent data is derived directly from the phrase "is being imported". This requirement has been clarified in *Argentina – Footwear (EC)*, where, according to the European Communities, the Appellate Body found that the relevant investigation period must be the "recent past", and also that it must "end in the very recent past".[88] The European Communities argues that in the event of a more than very slight and brief decrease at the end of the period of investigation, the competent authorities must establish why, despite that decrease, the facts of the case support the determination that the product continues to be imported at increased levels.

100. The European Communities agrees with the Panel's finding that increased imports must exhibit a "certain degree of recentness, suddenness, sharpness and significance".[89] This interpretation is fully supported by the Appellate Body's finding in *Argentina – Footwear (EC)*, which, in turn, is based on a contextual reading of Article XIX of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*.

[87]European Communities' appellee's submission, para. 106.

[88]*Ibid.*, para. 123, referring to Appellate Body Report, *Argentina – Footwear (EC)*, footnote 130 to para. 130.

[89]European Communities' appellee's submission, paras. 133 and 137, referring to Panel Reports, para. 10.167.

(b) Specific Arguments with respect to CCFRS

101. According to the European Communities, the United States criticizes the Panel for not carrying out a concrete evaluation of the USITC's explanations of the long-term effects of the 1998 import increases. The European Communities contends that this argument is an attempt by the United States to collapse the analysis of the effects of the imports with the requirement of increased imports.

(c) Specific Arguments with respect to Hot-Rolled Bar

102. The European Communities considers that the Panel, contrary to the United States' arguments, did not fail to analyze interim 2001 data in context and did not fail to consider the alleged "limited" duration of the decrease in interim 2001, but rather found that the USITC had failed to address and explain the interim 2001 data.

(d) Specific Arguments with respect to Stainless Steel Rod

103. The European Communities submits that the Panel did not, as alleged by the United States, fail to consider duration and magnitude of the respective increases and decreases in imports. Rather, the Panel found that the USITC did not explain why it found, despite the decline between interim 2000 and interim 2001, that there was an increase of imports in absolute numbers. In the European Communities' view, the Panel also correctly found that the market share of imports was not pertinent for the determination that absolute imports increased. Finally, the European Communities submits that even if the Appellate Body were to reverse the Panel's finding on this product category, the Appellate Body should still uphold the Panel's ultimate conclusion that the USITC had not demonstrated the existence of increased imports. The European Communities refers, for this purpose, to its arguments before the Panel and the relevant arguments in China's appellee's submission.

(e) Specific Arguments with respect to Tin Mill Products and Stainless Steel Wire

104. The European Communities submits that the Panel did not create a new requirement that the internal opinions of individual Commissioners must be based on the same product groupings. Rather, the Panel's reasoning was based on the requirement that a safeguard measure must be based on the determination and the underlying investigation, as published in the report. The European Communities agrees with the Panel that different product definitions lead to findings which are impossible to reconcile, because, for instance, import numbers of differently defined products are not the same, and will lead to different evaluations of trends, different explanations, and different conclusions.

105. In the European Communities' view, in *US – Line Pipe*, the Appellate Body addressed a situation where three affirmative votes, considered as the determination of the USITC, found different forms of injury which are written as alternatives into the *Agreement on Safeguards*; however, there is no alternative requirement concerning a "product" or "group of products that include the product" written into the *Agreement on Safeguards*. The Panel also did not improperly infringe upon a Member's right to structure the decision-making process of its competent authority, but rather tried to review all three individual determinations together, because the United States "insisted" that these

three findings together formed the USITC's determination.[90] Should the Appellate Body nevertheless consider that the Panel erred in law and choose to complete the legal analysis, the European Communities submits that none of the individual findings separately fulfils the requirements of the *Agreement on Safeguards*, and refers to its arguments before the Panel on this matter.

3. Parallelism

106. The European Communities submits that there is no reason for the Appellate Body to disturb the Panel's findings on parallelism. The European Communities disagrees with the United States' assertion that the Panel created a new requirement of a separate analysis of imports from sources not subject to the safeguard measures. Article 2.1 of the *Agreement on Safeguards* has been interpreted as limiting the product basis of the determination to imports covered by the measures. According to the European Communities, the phrase in Article 4 "factor other than imports" must be read as "factors other than covered imports". Therefore, in the view of the European Communities, in requiring that the effects of imports not covered by the measure be accounted for and not be attributed to covered imports, the Panel was simply applying Article 4.2(b), second sentence, to the proper product scope. Moreover, Article 4.2(b), by referring to "other factors", does not establish a closed list and the competent authorities have a duty to investigate even beyond the listed injury factors.

107. The European Communities disagrees with the United States' contention that, because imports from Israel and Jordan were non-existent or infinitesimal, the discussion of non-NAFTA imports also provides the requisite explicit findings with respect to imports from all sources other than Canada, Mexico, Israel, and Jordan. The United States is, in effect, invoking a non-existent *de minimis* exception. Finally, the European Communities submits that, in the event the Appellate Body reverses the Panel's findings, there is sufficient factual basis for the Appellate Body to complete the analysis.

4. Causation

(a) General Statements

108. The European Communities requests that the Appellate Body uphold the Panel's findings on causation with respect to all product categories subject to appeal. The Panel did not suggest that a causation methodology needs to provide for a non-attribution analysis of the cumulative effects of other factors in each and every case; rather, the cases requiring a cumulative assessment are where an assessment on an individual relative basis is insufficient to ensure that the injurious effects of other factors are not attributed to increased imports. The European Communities finds support for its reasoning in the Appellate Body's findings in *US – Lamb* and *US – Line Pipe*.

109. Further, in the European Communities' view, the Appellate Body found in *EC – Tube or Pipe Fittings* that a factor which has *no injurious effect*, rather than *minimal effects*, does not have to be subject to a non-attribution analysis. Permitting a competent authority to ignore causal factors considered to have only "minimal" effects would create a *de minimis* exception to the non-attribution requirement not contemplated in Article 4.2(b). Accordingly, the European Communities requests the Appellate Body to uphold the Panel's finding for welded pipe and FFTJ with respect to this matter.

[90]European Communities' appellee's submission, para. 415.

(b) Specific Arguments with respect to CCFRS [91]

110. The European Communities submits that the Panel did not conduct a *de novo* review. The Panel's detailed analysis permitted the Panel to verify whether the USITC's conclusions were reasoned and adequate; the Panel did not have to examine other factors. Similarly, the Panel was correct in concluding that the finding of underselling by imports did not represent a "compelling explanation" by the USITC. There is no discussion in the USITC's report of the AUV for CCFRS as a whole.

111. The European Communities further submits that, in the context of declining demand, a factor can be a cause of serious injury even if its effects appear late in the period of investigation. The Panel also correctly concluded that the USITC's analysis of capacity increases was "simplistic", and that the statement that minimill cost advantages did not change during the period of investigation did not amount to a proper non-attribution analysis. According to the European Communities, the USITC also failed to examine legacy costs in the light of the operating margin of the industry.

(c) Specific Arguments with respect to Hot-Rolled Bar

112. The European Communities argues that the USITC dismissed cost increases as an other causal factor on the basis of the "unsubstantiated claim"[92] that the domestic industry should have been able to increase its prices to cover increased costs. The European Communities submits that had the domestic industry kept its costs constant, it would have actually had a higher operating margin, even with the decrease in sales prices.

(d) Specific Arguments with respect to Cold-Finished Bar

113. The European Communities agrees with the Panel that the USITC had not explained how increased imports could be linked to declines in certain factors, if these declines had been apparent for some time before there were any increased imports. Furthermore, the Panel was correct in finding that the USITC had not provided adequate justification for its use of quarterly, rather than yearly, data. The European Communities argues that the USITC, furthermore, performed its analysis on a sub-product, without providing information on whether this product was representative.

(e) Specific Arguments with respect to Rebar

114. The European Communities disagrees with the United States' argument that the Panel failed to take account of the USITC's entire analysis of increased costs. The United States' position is moreover premised on the assertion that a domestic industry must be able to increase prices to cover its costs, which does not represent a reasoned and adequate explanation.

[91]The European Communities incorporates, by reference, the submissions of the other Complaining Parties, "some of whom have provided more detailed arguments in respect of certain product bundles". (European Communities' appellee's submission, para. 235)

For all of its product-specific arguments, the European Communities submits that, in the event the Appellate Body should reverse the Panel's findings on any of the product categories, the Panel's ultimate conclusion should nevertheless be upheld; the European Communities refers, for this purpose, to arguments it made before the Panel.

[92]European Communities' appellee's submission, para. 256.

(f) Specific Arguments with respect to Welded Pipe

115. The European Communities agrees with the Panel that the USITC's analysis of domestic capacity increases was deficient. The European Communities also agrees that the USITC's analysis of the non-import related poor performance of a significant domestic producer was deficient. The Panel did not find that the USITC was "subjective", but rather found that the USITC had failed to properly examine the effects of certain factors. The Panel also did not suggest that the USITC must perform a complete causation analysis for one producer, but rather reviewed the USITC's causation analysis relying on the USITC's own description of this producer as a "significant domestic producer".

(g) Specific Arguments with respect to FFTJ

116. In the European Communities' view, the Panel properly determined that the USITC had not ensured that it had not attributed the effects of increased capacity to increased imports. The Panel also properly determined that the USITC had not ensured that it had not attributed the effects of purchaser consolidation to increased imports; the United States' argument is premised on the notion that the USITC determined that the FFTJ industry was affected only via declines in market share and other indicators, and that purchaser consolidation was unrelated to this and rather affected prices. The European Communities states that the USITC's report itself suggests that price was an important element in the USITC's analysis in this respect.

(h) Specific Arguments with respect to Stainless Steel Bar

117. According to the European Communities, the USITC did not ensure non-attribution with respect to decline in demand. The United States' arguments alleging complexity of the USITC's analysis with respect to energy cost increases are identical to those the United States submits with respect to demand declines. Moreover, the European Communities believes that the Panel was correct in finding that the USITC should have undertaken a collective analysis of other causal factors.

E. *Arguments of Japan – Appellee*

1. Article 3.1 of the *Agreement on Safeguards* and Article 12.7 of the DSU

118. Japan considers that the Panel was correct in finding that the United States acted inconsistently with Article 3.1 of the *Agreement on Safeguards*, because the USITC did not provide a "reasoned and adequate explanation" for its findings. According to Japan, whether an explanation is "reasoned and adequate" depends on a number of factors, including the complexity of the issue and the timing, extent and quality of the explanation. In any case, Japan contends that a reasoned and adequate explanation must be organized, logical, and explicit in the sense of being "set forth" in the report; the explanation must also be substantiated by evidence. Although the *Agreement on Safeguards* does not dictate the structure of an authority's report, the *Agreement on Safeguards* also does not exempt an authority from the need to provide a reasoned and adequate explanation. According to Japan, the USITC's determination did not meet these requirements.

119. Japan also does not agree with the United States' claim that the Panel "incorrectly merged" obligations under Articles 3.1 and 4.2 of the *Agreement on Safeguards* in addressing the USITC report. Japan submits that "[t]he obligation to explain is textually and inherently intertwined with the obligation to perform."[93] Hence, the substantive and procedural obligations of the *Agreement on Safeguards* "exist side-by-side"[94], and the violation of one may lead to a violation of another. Japan further asserts that the text of the *Agreement on Safeguards* "reflects the reality that the only basis on which to evaluate what the authority did is to review what the authority said [in its report]. Otherwise, any meaningful review of the actions of the competent authority would become impossible."[95]

120. With respect to Article 12.7 of the DSU, Japan considers that the Panel fully complied with Article 12.7 as the Panel "applied the law to the facts while also ensuring that it did not replace reasonable conclusions reached by the USITC with its own conclusions".[96]

2. Increased Imports

(a) General

121. In Japan's view, the Panel correctly found that the United States failed to meet the increased imports requirement. The Panel correctly found that the increased imports requirement represents both a quantitative and qualitative standard, independent of the causation analysis required by Article 4.2 of the *Agreement on Safeguards*. The Panel's articulation of the standard for "increased imports" and its analysis "echo the Appellate Body's own careful review of the relevant provisions."[97] In Japan's view, the Panel's finding that the increase in imports must be "recent" is based on the phrase "is being imported" in both Article 2.1 of the *Agreement on Safeguards*, as well as Article XIX:1(a) of the GATT 1994, and on the Appellate Body's findings in *Argentina – Footwear (EC)*. The requirement in Article 4.2(a) that the competent authority consider the rate and amount of the increase in imports in absolute and relative terms means that, as correctly recognized by the Panel, the competent authorities must consider trends in imports over the period of investigation. Japan submits that the United States is "attempt[ing] to resurrect its simplistic end points analysis", an approach that was expressly rejected by the Appellate Body in *Argentina – Footwear (EC)*.[98]

122. Japan furthermore agrees with the Panel that the increase in imports must be "sudden". The Panel's approach rests upon the Appellate Body's ruling in *Argentina – Footwear (EC)* and is, moreover, derived from Article XIX:1(a) of the GATT 1994, which is entitled "Emergency Action" and requires safeguard measures to be imposed only in response to unforeseen developments. Japan further believes that, in its arguments, the United States continues to "confuse" issues of serious injury, as well as causation, with the distinct requirement of increased imports. Japan argues that under a proper analysis of increased imports, an increase in imports can be sudden, independently of the "onset of serious injury".[99]

[93] Japan's appellee's submission, para. 28.

[94] *Ibid.*

[95] *Ibid.* (original underlining)

[96] Japan's appellee's submission, para. 23.

[97] Japan's appellee's submission, para. 36.

[98] *Ibid.*, para. 43.

[99] *Ibid.*, para. 47.

(b) Specific Arguments with respect to CCFRS [100]

123. Japan contends that the Panel correctly applied the relevant standards articulated by the Appellate Body in *Argentina – Footwear (EC)* and the panel in *US – Line Pipe*, which require the authority to determine, on a case-by-case basis, whether imports increased in absolute and relative terms and whether the increase was sufficiently sudden and recent within a relevant period of time. In the present case, there is no dispute that imports of CCFRS first increased and then declined significantly, in absolute and relative terms, before falling more dramatically in mid-2001 to levels below those in 1998 and 1996. The USITC performed an end-point to end-point analysis and found that imports of CCFRS had increased. In Japan's view, the USITC should have instead considered the trends over the entire period of investigation and especially the end of that period. Japan further disputes what it considers to be the United States' characterization of the Appellate Body's treatment of increased imports in *Argentina – Footwear (EC)* as relating primarily to causation.

(c) Specific Arguments with respect to Tin Mill Products and Stainless Steel Wire [101]

124. Japan refers the Appellate Body to its submissions to the Panel. Japan further submits that the Panel did not challenge the right of the President of the United States to rely "on whatever number of commissioner votes he wanted". [102] Rather, the Panel found, because the President relied on the affirmative votes of three Commissioners who had performed their analysis on different product definitions, there was no reasoned and adequate explanation to justify the imposition of a measure on the respective individual product.

125. In Japan's view, there must be a "one-to-one relationship" between the injury determination and the like product definition. [103] This requirement was not fulfilled in respect of tin mill products and stainless steel wire because the USITC Commissioners, on whose determinations the President of the United States relied, did not make their findings of increased imports based on the same like product definitions or data sets. Thus, according to Japan, there was no coherent set of findings of increased imports to support the measures. Finally, Japan believes that the Panel's decision does not depart from the findings of the Appellate Body in *US – Line Pipe*, which involved the "aggregation of affirmative decisions" based on different kinds of injury [104]; the present case, however, in Japan's view, involves aggregating votes based on different "like product" definitions. Japan also submits that the Panel's findings do not encroach upon a Member's right to lay down the decision-making process of its competent authority.

[100] With respect to the Panel's findings on hot-rolled bar and stainless steel rod, Japan incorporates, by reference, the relevant arguments put forward by the other Complaining Parties. (Japan's appellee's submission, para. 58)

[101] Japan submits these arguments also with respect to the Panel's causation and parallelism analysis for these two products. (Japan's appellee's submission, paras. 126 and 152)

[102] Japan's appellee's submission, para. 139.

[103] *Ibid.*, para. 164.

[104] Japan's appellee's submission, para. 166.

3. Parallelism

126. Japan argues that the Panel was correct in finding that the United States acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* by failing to establish that imports from sources subject to the safeguard measures satisfied the conditions for the application of such measures.

127. In Japan's view, the Panel correctly applied existing Appellate Body jurisprudence concerning how authorities must conduct their analysis and explain their findings in imposing safeguard measures on a non-MFN basis. In imposing such measures, authorities must analyze the causal relationship between imports that are subject to the measure and domestic industry performance. Rather than treating excluded imports as an other factor under the non-attribution requirement in Article 4.2(b) of the *Agreement on Safeguards*, the competent authority must ensure that the effects of non-import factors are not attributed to the imports subject to the measure, as opposed to all imports. The USITC did not make a specific causation finding for non-NAFTA imports of CCFRS or any other product. Thus, the USITC failed to ensure that its NAFTA-inclusive causation findings were consistent with the NAFTA-exclusive scope of the safeguard measures.

128. In Japan's view, the United States' arguments concerning Israel and Jordan essentially state that imports from these countries were so small that it was self-evident that, if they were removed from total imports, the effect on the United States' industry of the remaining imports would be the same. However, the point is not the quantity of the imports, but whether the USITC performed the required analysis. Japan submits that the USITC did not do so.

4. Causation

(a) Specific Arguments with respect to CCFRS [105]

129. Japan maintains that the Panel was correct in finding that the United States acted inconsistently with Articles 2.1, 3.1 and 4.2(b) of the *Agreement on Safeguards* by failing to establish that a causal link existed between any increased imports and serious injury to the relevant domestic producers.

130. According to Japan, the United States ignored the importance of the relationship between domestic industry performance and increased imports. The Panel correctly conducted an analysis of how import trends related to the various injury factors, and concluded that the analysis performed by the USITC was not reasonable; in so doing, the Panel did not conduct, as the United States contends, a *de novo* review. Japan submits that the Panel correctly found that, because imports began a sustained decline from 1998 through to the end of the period of investigation, there was no support for the USITC's finding that imports were the primary cause of the industry's price and profitability declines at the end of the period. Japan also submits that the Panel was not required to include an analysis of import pricing in its coincidence analysis—import pricing is the focus of the "conditions of competition" analysis performed by the Panel.

131. Japan further submits that the USITC's underselling analysis failed to meet the "compelling explanation" requirement because the underselling by imports was not shown to have an impact in the

[105] Japan does not submit arguments with respect to other product categories. However, with respect to hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar, Japan incorporates, by reference, the arguments of the other Complaining Parties. (Japan's appellee's submission, para. 126)

market. In other words, import pricing did not appear to have taken sales away from domestic companies. Japan submits that the Panel was correct to criticize the USITC's use of AUVs; the USITC's determination does not reveal an evaluation or discussion of AUVs for the overall CCFRS category—where a competent authority merely includes a number in the determination, this does not establish that the authority actually relied on that fact. The USITC also did not explain why AUVs were appropriate surrogates, even though it specifically acknowledged that the reliability of this data could be compromised as a result of the underlying product mix.

132. Japan next argues that the USITC's product grouping of CCFRS was arbitrary and too broad to allow meaningful comparisons of aggregated volume, price, cost or production data. The Panel's findings on coincidence and conditions of competition are not dependent on its criticisms of the CCFRS product grouping. However, if the Appellate Body finds that the Panel was required to make a specific finding regarding the WTO-consistency of the USITC's like product definition in order to assess the USITC's causation analysis, Japan refers the Appellate Body to the arguments on this topic contained in the other appellant's submission by Brazil, Japan, and Korea.

133. Japan contends that the Panel was correct in finding that the United States failed to comply with the non-attribution requirement and in examining all the relevant facts in reaching this finding. With respect to capacity increases, Japan argues that the USITC did find that capacity increases were affecting prices but did not attempt to separate and distinguish these effects. Japan argues that the USITC also failed to consider capacity utilization rates assuming capacity had remained stable over the period rather than increased, as required by the Appellate Body decision in *US – Wheat Gluten*.

134. With respect to declining demand, Japan submits that the USITC did not explain why this factor was not responsible for the injury to the domestic industry, despite the fact that the most severe injury occurred at the end of the period, when imports and demand were both falling. With respect to intra-industry competition, Japan contends that the USITC did not fully analyze this factor and did not respond to specific evidence that customers viewed minimills, rather than imports, as the price leaders in the cold-rolled market. Finally, with respect to legacy costs, Japan submits that the USITC's discussion of this factor implicitly recognizes that these costs weighed heavily on the performance of the industry and compromised the competitive position of certain domestic producers; in particular, Japan maintains that the USITC acknowledged that, even with import relief, the viability and health of the industry could only be ensured by addressing legacy costs.

135. Japan also agrees with the Panel's finding that the USITC failed to consider the collective effects of other factors as required by Article 4.2(b), although this finding was not necessary to the Panel's overall finding regarding non-attribution. The Appellate Body Reports in *US – Line Pipe*, *US – Hot-Rolled Steel*, and *EC – Tube or Pipe Fittings* allow for an overall consideration of the effects of other factors, given the interaction between such factors. Specifically, Japan argues that the Panel is not precluded from determining that such a consideration was required in particular factual circumstances such as the present case, in which several factors intertwine.

F. *Arguments of Korea – Appellee*[106]

1. Article 3.1 of the *Agreement on Safeguards* and Article 12.7 of the DSU

136. Korea considers that the Panel correctly applied Article 3.1 of the *Agreement on Safeguards*. According to Korea, the United States seeks to re-argue the appropriate standard that is required pursuant to Articles 3.1 and 4.2(b) of the *Agreement on Safeguards* "as if [that] standard had not been fully set out in prior Appellate Body reports."[107] The United States does this by arguing that competent authorities are not required to provide explanations for their determinations[108] or that explanations—even if required—need not be adequate[109] nor explicit.[110]

137. Korea takes issue with the United States' argument that the word "explicit" is not contained in Article 3.1 of the *Agreement on Safeguards*. Korea considers that it is "difficult to imagine"[111] how the requirements to provide a "detailed analysis" pursuant to Article 4.2(c) of the *Agreement on Safeguards* and to "set forth" findings and reasoned conclusions pursuant to Article 3.1 could be satisfied by anything other than an "explicit" explanation.

138. As for the United States' contention that the Panel's findings should be restricted to Article 3.1 of the *Agreement on Safeguards*, Korea argues that the failure to provide a reasoned and adequate explanation is not only a violation of Article 3.1, but also of the substantive obligations of the *Agreement on Safeguards*. Korea emphasizes that "[c]learly, in a case where the substantive obligation is not met, the analysis cannot be 'reasoned and adequate'."[112]

139. Korea further considers that the Appellate Body should dismiss the claim of the United States that the Panel acted inconsistently with Article 12.7 of the DSU. The Panel Reports set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations in compliance with Article 12.7.

2. Increased Imports

(a) General

140. Korea maintains that the Panel properly determined that the USITC's findings of increased imports were not in compliance with the *Agreement on Safeguards*. Korea agrees with the Panel that the increase in imports must have been "sudden" and "recent". In Korea's view, the Panel, in this

[106]Korea endorses the views of the other Complaining Parties with respect to products and issues other than those on which Korea focuses in its appellee's submission. (Korea's appellee's submission, para. 41)

[107]Korea's appellee's submission, para. 46.

[108]*Ibid.*, referring to the United States' appellant's submission, para. 59.

[109]Korea's appellee's submission, para. 46, referring to the United States' appellant's submission, para. 62.

[110]Korea's appellee's submission, para. 46, referring to the United States' appellant's submission, paras. 63–64.

[111]Korea's appellee's submission, para. 48.

[112]*Ibid.*, para. 57.

respect, "synthesized" the prior decisions of the Appellate Body in *Argentina – Footwear (EC)* and *US – Lamb*.[113]

141. Korea considers that the United States incorrectly "dismisses" the significance of the "emergency nature" of safeguard measures.[114] Korea believes that if there were no increase in imports in the recent past, then the conditions for the application of a safeguard measure would not be met because emergency action would no longer be necessary. Only where an unforeseen and sudden increase in imports is present will the need for emergency action exist.

142. Korea also recalls the Appellate Body's findings in *Argentina – Footwear (EC)* that the increased imports requirement is both a quantitative as well as a qualitative requirement. Therefore, in Korea's view, the increase in imports must be recent, sudden, sharp and significant, and that end-of-period trends must be analyzed in the context of trends occurring over the entire period of investigation.

(b) Specific Arguments with respect to CCFRS

143. Korea disagrees with the United States that the Panel focused exclusively on the period between interim 2001 and interim 2002. The Panel did not give the interim period dispositive weight. The Panel also correctly found that it was not possible to reconcile the USITC's statement that imports relative to production were still significantly higher at the end of the period with the interim data that "clearly contradicted" that statement.[115]

144. Korea moreover argues that the Panel properly considered the effect of import declines since 1998. The Panel did not reach "an abstract conclusion concerning a mid-period alone"[116], but rather examined that mid-period increase in the context of the subsequent decrease. Korea considers that the Panel rejected the USITC's findings for reasons similar to those articulated by the Appellate Body in *Argentina – Footwear (EC)*.

(c) Specific Arguments with respect to Tin Mill Products[117]

145. In Korea's view, the United States attempts to recast the issues of increased imports and causation with respect to tin mill products as a question of national sovereignty and as a debate over the rights of a country to structure its administering authority and decision-making process in safeguard investigations. Korea argues that the United States continues to make this argument, even though the Panel carefully followed the reasoning of the Appellate Body in *US – Line Pipe* to the effect that it was not reviewing the nature of administrative decision-making.

146. Korea submits that the United States relied on determinations of three Commissioners as the basis for the measure on tin mill products. The Panel correctly determined that the determinations of the three Commissioners did not meet the requirements of Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards*, because these three findings are based on differently-defined like products.

147. Korea contends that the United States incorrectly invokes the Appellate Body's findings in *US – Line Pipe*. In that case, according to Korea, the Appellate Body held that a determination of both serious injury and threat of serious injury could establish the basis for safeguard action because both represented a continuum of injury; each was sufficient individually, or together, to meet the requirements of Article 2.1 of the *Agreement on Safeguards*. However, according to Korea, when employing this same analysis to the present case, the answer must be different. A determination that finds that the like product is CCFRS cannot support the right to take a safeguard action on tin mill products. Korea submits that it is true that all three Commissioners found serious injury—but not to the same industry and not from the same imports.

148. Korea considers that the United States is wrong to state that affirmative determinations under United States law are sufficient to satisfy the requirements of Articles 2 and 4 of the *Agreement on Safeguards*. The Panel, according to Korea, properly determined that the *Agreement on Safeguards* does not permit a WTO Member to base a safeguard measure on a determination supported by a set of explanations each of which is based on different facts and different conclusions which are inherently inconsistent with each other.

3. Parallelism

149. Korea submits that the Panel properly found that the USITC's report failed to provide an adequate parallelism analysis for CCFRS, welded pipe, and tin mill products and, therefore, does not conform to the requirements of Articles 2, 4 and 3.1 of the *Agreement on Safeguards*.

150. Korea maintains that, contrary to the United States' assertion, the Panel did not state that the USITC must also conduct a full analysis of the effects of the excluded imports. Korea notes that the Panel did not resolve the issue of whether non-covered imports themselves must be considered and analyzed as an "other factor" of injury. Korea submits that imports from excluded sources should be analyzed as an "other factor" in order to ensure that the effects of injury from those imports are not improperly attributed to covered imports. In addition, Korea argues that the United States did not establish explicitly that increased imports from non-NAFTA countries alone caused serious injury. According to Korea, the USITC's conclusion that its findings would have been the same if imports from Canada and Mexico were excluded from the analysis does not fulfill the conditions of Articles 2.1 and 4.2(b).

151. Finally, as regards the exclusion of imports from Israel and Jordan, Korea argues that the United States did not comply with the requirements of the *Agreement on Safeguards*. Korea submits that in order to establish explicitly that imports from sources covered satisfy alone the conditions for the application of a safeguard measure, a Member must determine whether its conclusions on causation would change if imports from exempt sources, taken together, were excluded from the analysis. Moreover, in Korea's view, there is no second standard for sources of small volumes of imports.

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[113]Korea's appellee's submission, para. 73.

[114]*Ibid.*, heading IV.B.3.

[115]*Ibid.*, para. 90.

[116]*Ibid.*, para. 91.

[117]Korea submits the same arguments with respect to the Panel's findings on causation concerning tin mill products.

4. Causation

(a) Specific Arguments with respect to CCFRS and Welded Pipe

152. Korea agrees with the Panel that the USITC did not establish a causal link between increased imports and serious injury for CCFRS. The Panel recognized that the *Agreement on Safeguards* does not establish the method for establishing a causal link and specifically recalled that the USITC's analysis had to be analyzed on its substance, not on the basis of labels. The Panel, in Korea's view, properly found that the United States did not establish a causal link between increased imports and serious injury for CCFRS.

153. Korea argues that, after setting out its approach in a manner consistent with the prior holding of the Appellate Body on this issue, the Panel analyzed whether the USITC could have concluded that there was a coincidence of trends between the various factors of injury and the increase in imports. In sum, the Panel proceeded through each injury factor to determine whether there was a coincidence of trends with respect to each.

154. According to Korea, the United States mistakenly criticizes the Panel for preparing charts summarizing the USITC data with a view to checking whether coincidence existed. In Korea's view, the Panel could not have reviewed the findings of the USITC if it had not first examined in some fashion the movements in imports and in injury factors. Korea contends that the United States is arguing that the Panel should have considered whether coincidence existed between increased imports and other injury factors such as market share. According to Korea, the Panel, however, concluded that there was no coincidence between net commercial sales and imports, which is a different way of analyzing market share.

155. In addition, Korea argues that, in the absence of coincidence, the United States failed to provide evidence that the USITC's analysis was a "compelling explanation" of why causation existed. Korea notes that the Panel examined whether the USITC's findings of build-up of import inventories and declining import prices provided a compelling explanation of causation after imports declined in 1998. The Panel rejected the USITC's "compelling analysis" as it related to importer inventories and, Korea notes, the United States does not appeal that finding. Korea contends that the United States incorrectly maintains that the Panel did not analyze the USITC's findings regarding pricing trends. Moreover, Korea submits that the USITC's pricing analysis was intended to show that imports led prices down. Therefore, Korea contends that, presumably, the trends in prices and overselling would be the most relevant to that question. However, according to Korea, the USITC made no reference to import pricing trends. Finally, Korea argues that the United States responds to the Panel's analysis strictly by pointing to new evidence. According to Korea, the data referred to was not relied upon by the USITC because they were never cited by the USITC, nor would they have been, because they contained prices only for non-NAFTA imports and the USITC analysis of pricing was with respect to all imports.

156. Korea argues that the United States misinterprets the Panel's finding with respect to CCFRS as rejecting the USITC's analysis of causation on the basis of the like product definition. In Korea's view, the Panel simply recognized that the broad like product definition of CCFRS added complexities to the analysis of conditions of competition. This, according to Korea, is legally distinct from a finding regarding the proper definition of the like product, a finding that the Panel did not make.

157. Korea contends that the Panel correctly found that the USITC's non-attribution analysis with respect to CCFRS and welded pipe was "fatally flawed".[118] Korea notes that the United States, in its appellant's submission, puts emphasis on the requirement that the other factors "simultaneously" cause injury. However, Korea argues that, with the exception of welded pipe, the USITC does not identify injury from imports as occurring at any particular time in the period. Moreover, Korea disagrees with the United States' position that if the effect of a factor is minor, it does not have to be separated and distinguished. In Korea's view, *EC – Tube or Pipe Fittings* does not stand for the proposition that the mere assertion that a factor is minor satisfies the non-attribution standard.

158. Korea submits that, on the one hand, the United States maintains that no analysis of cumulative causes is required in order to adequately separate and distinguish the effects of other factors of injury, and, on the other, the United States acknowledges that the cumulative assessment of factors could lead to different results. For example, the United States argued that it was not possible for legacy costs, standing alone, to cause price declines. Furthermore, Korea contends that the United States overstates the findings of the Appellate Body in *EC – Tube or Pipe Fittings*, because in that case, the Appellate Body specifically left open the possibility that a cumulative analysis might be required in certain factual circumstances.

159. In addition, in Korea's view, the United States incorrectly interprets the Panel's findings as requiring a "weighing" of factors versus imports. The Panel, according to Korea, did not require a weighing, but rather commented on the importance of an overall assessment in the context of the USITC methodology whereby causal factors are completely disregarded if they are not more important than increased imports and regardless of whether such factors are found to be causing some of the injury.

G. *Arguments of New Zealand – Appellee*

1. Unforeseen Developments, Article 3.1 of the *Agreement on Safeguards*, and Article 12.7 of the DSU

160. New Zealand requests the Appellate Body to uphold the finding of the Panel that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*. In New Zealand's view, the Panel applied the correct standard of review in the application of Article XIX of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*. In *US – Lamb*, the Appellate Body did not establish a standard of review for Article 4.2 different from the standard applicable to other provisions of the *Agreement on Safeguards* or to Article XIX of the GATT 1994. Accordingly, the Panel applied the standard of review set out in Article 11 of the DSU and did not allow its examination to reflect concerns relevant to Article 4.2 or disregard concerns relevant to Article XIX of GATT 1994.

161. New Zealand considers that the Panel was correct in requiring the USITC to establish that unforeseen developments resulted in increased imports in respect of each specific product subject to a safeguard measure. If there were no such requirement, a Member could impose a safeguard measure on a range of products even if unforeseen developments had led to an increase in imports of only one of them.

162. New Zealand further maintains that the Panel was correct in finding that the USITC's conclusions were not supported by data linking those developments to specific increased imports.

[118]Korea's appellee's submission, heading V.B.

The logic of the United States' position is that a competent authority need only collect information in a report and make a determination without providing any reasoning. Article 3.1 of the *Agreement on Safeguards* requires, however, that the report of the competent authorities set forth "reasoned conclusions on all pertinent issues of fact and law". A "reasoned conclusion" is one "that links the pertinent facts to the conclusion reached. It is not one where key elements of the analysis are left to guesswork and supposition".[119] New Zealand submits that the United States' argument that there is no requirement for competent authorities to provide a "reasoned and adequate explanation" as long as there is a "logical basis" for their conclusions undermines the disciplines of the *Agreement on Safeguards*.

2. Increased Imports

163. In New Zealand's view, the Panel applied the correct standard in determining whether there are increased imports for purposes of Article 2.1 of the *Agreement on Safeguards*. New Zealand rejects the United States' suggestion that the enquiry whether an increase in imports was "recent", "sudden", "sharp", and "significant" should be "deferred" until the phase in which serious injury and causation are determined. New Zealand also contests the United States' interpretation of the phrase "in such increased quantities" to mean that the level of imports at, or reasonably near to, the end of a period of investigation be higher than at some unspecified point in time; such an interpretation would "remove an essential discipline"[120] from the *Agreement on Safeguards* and establish a standard that would allow "the arbitrary imposition of safeguards measures just because imports have increased at some stage in the past".[121] New Zealand also submits that, in determining whether imports have increased, the Panel applied a standard which is "well established in the law"[122], and properly found that the USITC had failed to provide a reasoned and adequate explanation for its determination.

164. New Zealand emphasizes that the Panel's analysis of increased imports of CCFRS was correct. The Appellate Body found in *Argentina – Footwear (EC)* that a consideration of trends is required for determining whether there are increased imports for purposes of Article 2.1 and that it is not sufficient to merely compare import levels as they stood at the end points of the period of investigation.[123] According to New Zealand, the USITC "ignored these requirements"[124] by not considering trends in imports over the entire period of the investigation.

3. Parallelism

165. New Zealand requests that the Appellate Body uphold the Panel's finding that the United States acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* by failing to comply with the requirement of "parallelism". New Zealand first submits that, contrary to what the United States' argues, the Panel did not suggest that the USITC was required to conduct a separate analysis of imports from sources not subject to the measure. Rather, the Panel merely pointed out that increased imports of products excluded from the application of a measure cannot be used to support a

[119]New Zealand's appellee's submission, para. 4.13.

[120]New Zealand's appellee's submission, para. 5.9.

[121]*Ibid.*

[122]*Ibid.*, para. 5.12.

[123]New Zealand's appellee's submission, para. 5.17, referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

[124]New Zealand's appellee's submission, para. 5.17.

determination that the product is being imported in such increased quantities as to cause serious injury. The Panel's statement that it is necessary "to account for the fact that excluded imports may have some injurious impact on the domestic industry" is a "purely descriptive alternative way of saying that excluded imports cannot be used to support a determination of increased imports".[125] In New Zealand's view, the competent authority need not conduct a separate analysis, or make separate findings for excluded products, but it does have to account for the effects of such products in making findings regarding the products subject to the safeguards measure. This, in New Zealand's view, is "central to the logic of the parallelism requirement".[126]

166. With respect to the United States' argument concerning the exclusion of imports from Israel and Jordan, New Zealand argues that the United States has "misconstrued the Panel's finding".[127] New Zealand submits that, with respect to imports from Israel and Jordan, the Panel was "making the point that the USITC did not ask itself the right question."[128] The USITC enquired, first, whether increased imports from all sources other than Canada and Mexico were a substantial cause of serious injury; and it then enquired, second, into whether the exclusion of imports from Israel and Jordan would change this conclusion. However, the correct enquiry was whether imports covered by the measure—that is, imports other than those from Canada, Mexico, Israel, and Jordan—were a substantial cause of serious injury. With respect to the United States' presentation of import statistics for Israel and Jordan, New Zealand argues that the issue before the Panel was not whether a reasoned and adequate explanation *could* be provided demonstrating that imports covered by the measure were a cause of serious injury. According to New Zealand, the issue was whether the USITC *had* in fact provided such an explanation explicitly in its report.

4. Causation

(a) General

167. New Zealand argues that the Panel was correct in finding that the United States acted inconsistently with Articles 2.1, 3.1 and 4.2(b) of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation establishing a causal link between "increased imports" of CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar and "serious injury" to the relevant domestic producers.

168. New Zealand submits that the Panel was correct in concluding that the USITC should have provided a collective analysis of the injurious effects of factors other than increased imports. In *EC – Tube or Pipe Fittings*, the Appellate Body found that in the context of a causation analysis under the *Anti-Dumping Agreement*, a collective assessment of the injurious effects of all other factors was not required in all cases, but may be required in specific circumstances where the lack of a collective assessment would lead to injury caused by other factors being attributed to imports. In New Zealand's view, the practice of the USITC of assessing the injurious effects of other factors individually "runs the risk of a finding of causation … even though the other factors cumulatively had a greater effect on serious injury than increased imports".[129] Furthermore, the USITC found, in the present case, that other factors causing serious injury (decline in demand, domestic capacity increases,

[125]New Zealand's appellee's submission, para. 7.4.

[126]*Ibid.*, para. 7.5.

[127]*Ibid.*, para. 7.9.

[128]*Ibid.*, para. 7.10.

[129]New Zealand's appellee's submission, para. 6.10.

legacy costs and intra-industry competition) did contribute significantly to the alleged serious injury. An individual assessment of those factors, in New Zealand's view—particularly when these factors are "linked and intertwined"—does not make clear what their full impact on serious injury has been.[130] New Zealand argues that the Appellate Body's reference in *US – Lamb* to the need to assess the nature and the extent of the injury caused implies a collective assessment of that injury.

169. New Zealand furthermore disagrees with the United States' contention that the Panel misunderstood the USITC's causation analysis and frequently failed to take into account all of the findings of the USITC on particular issues.

(b) Specific Arguments with respect to CCFRS

170. In New Zealand's view, the Panel was correct in concluding that the USITC had failed to provide a reasoned and adequate explanation demonstrating a causal link between increased CCFRS imports and serious injury. Contrary to the United States' contention, the Panel did not conduct a *de novo* review; the "data set" prepared by the Panel consisted of graphs made on the basis of data contained in the USITC's record.

171. According to New Zealand, the Panel also did not substitute its own conclusions on coincidence for those of the USITC, but rather looked for the reasoned and adequate explanation of the USITC's determination. The Panel correctly found a lack of coincidence between import trends and trends in injury factors. Furthermore, the Panel did not ignore the effects of import prices, as alleged by the United States, but rather examined the USITC's pricing analysis after it found an absence of coincidence. New Zealand also argues that the Panel did not fail to consider the overall situation of the domestic industry; rather, the USITC itself essentially considered only two indicators. In New Zealand's view, the United States is, in reality, criticizing the Panel for not conducting a *de novo* review.

172. New Zealand further submits that the Panel was correct in finding, in its consideration of "conditions of competition", that the USITC's pricing analysis was not reasoned and adequate. Contrary to the United States' assertions, the Panel did not suggest that it was necessary for the USITC to show underselling for each product at every point in time to justify a finding of underselling. Rather, New Zealand submits, the Panel—correctly—found fault with the USITC's pricing analysis because the USITC did not provide a reasoned and adequate explanation of how the facts supported the USITC's "general thesis" that "imports were priced below domestically produced steel."[131]

173. New Zealand also argues that the Panel was correct in insisting that the USITC "justify its reliance" on AUV pricing data when conducting its pricing analysis. The Panel noted the reservations expressed by the USITC itself about using aggregate, as opposed to individual, product data. The Panel made "the perfectly reasonable observation"[132] that, having expressed qualifications and reservations about the pricing data on which it was relying, the USITC had to justify its reliance on that data. New Zealand recalls that the Panel also found that even this data did not support the conclusions that the USITC had drawn.

[130] *Ibid.*, para. 6.11.

[131] New Zealand's appellee's submission, para. 6.33.

[132] *Ibid.*, para. 6.39.

174. New Zealand next submits that the Panel was correct in concluding that the broad product definition of CCFRS made it difficult for the competent authority to identify the proper locus of competition while undertaking a conditions of competition analysis. In the case of a broad product definition, the statistics for the industry and imports will only show averages and will not provide sufficiently specific information about the locus of competition in the market. In New Zealand's view, the Panel was not addressing the "like product" issue; rather, the Panel made the point that, regardless of whether the "like product" determination is or is not consistent with Article 2.1, a broad product definition has implications for a causation determination. Contrary to the United States' allegations, the Panel did not misconstrue the findings of the panel in *Argentina – Footwear (EC)* in this respect.

175. New Zealand finally contends that the Panel was correct in concluding that the USITC had failed to separate and distinguish the injurious effects of the following factors from those of increased imports. With respect to declining demand, New Zealand argues that the United States' objection to the Panel's findings involves a disagreement with the Panel's factual conclusions; at the end of the period of investigation, there was a strong coincidence between declining demand and injury, while imports were declining. With respect to domestic capacity increases, according to New Zealand, the USITC acknowledged that such increases likely played a role in domestic price declines; however, the USITC then dismissed this factor without assessing its nature and extent, although the facts indicate that the domestic industry used excess capacity in a manner that caused or contributed to declining prices.

176. With respect to intra-industry competition, New Zealand argues that the USITC itself acknowledged the role played by intra-industry competition in causing injury, but subsequently failed to explain how it ensured the non-attribution of the injurious effects of this factor. The United States suggests that the cost advantages of minimills did not change during the period of investigation; however, as the Panel recognized, the existence of a factor throughout the period does not mean it cannot play a role in causing serious injury. New Zealand also objects to the United States' introduction of previously undisclosed data in support of its arguments.

177. With respect to legacy costs, New Zealand contends that the findings of the USITC, as well as the data considered by the Panel, show that legacy costs imposed a significant burden on integrated producers. New Zealand argues that the USITC itself recognized the problems caused to the industry by these costs, but then dismissed this factor—"in half a sentence"[133]—on the basis of the assertion that these costs did not contribute to declining prices.

H. *Arguments of Norway – Appellee*

1. Unforeseen Developments, Article 3.1 of the *Agreement on Safeguards*, and Article 12.7 of the DSU

178. Norway requests the Appellate Body to reject the United States' appeal of the Panel's conclusions concerning unforeseen developments. Norway recalls that the Appellate Body found in *US – Lamb* that the existence of unforeseen developments is a "pertinent issue of fact and law" within the meaning of Article 3.1 of the *Agreement on Safeguards*, and that, therefore, the report of the competent authorities must contain a finding or a reasoned conclusion on unforeseen developments. Norway further refers to the Appellate Body's statement that a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate "only if the panel critically

[133] New Zealand's appellee's submission, para. 6.72.

examines that explanation, in depth and in the light of the facts before the panel."[134] Consequently, according to Norway, a panel must examine whether the competent authorities considered all the relevant facts and adequately explained how the facts support their determinations. In Norway's view, it is obvious that a demonstration of unforeseen developments must be integrated with, and must be logically connected to, the explanation of the other requirements, and must also be reasoned and adequate.

179. Norway contends that Article XIX of the GATT 1994 requires that unforeseen developments be linked to the product which is being imported in increased quantities. The United States, in Norway's view, seems to suggest that the USITC concluded that the effects of certain macroeconomic developments were fairly consistent across the respective steel industries. According to Norway, there is no such conclusion in the USITC report and, moreover, the conclusion is incorrect.

180. Norway further submits that data not used by the USITC in its analysis of unforeseen developments, but used elsewhere in the USITC's report, are not relevant for the Panel's review. In Norway's view, a reasoned conclusion is one that links the pertinent facts to the conclusion reached, not one where "key elements of the analysis are left to guesswork and supposition".[135] According to Norway, the United States' position appears to be that a competent authority need only collect information in a report and make a determination—without providing any reasoning to support the determination.

181. As for the United States' contention that the Panel's findings on the lack of a reasoned and adequate explanation imply only a violation of Article 3.1 and not of Articles 2 and 4 of the *Agreement on Safeguards*, Norway submits that the Appellate Body has explained in previous safeguards cases that the failure to provide a reasoned and adequate explanation is not only a violation of Article 3.1, but also of the substantive obligations of the *Agreement on Safeguards*.[136] According to Norway, "[i]t is inherent in the notion of 'determination', which underlies both Articles 2 and 4 of the *Agreement on Safeguards*, that there be full consideration of all the facts and arguments and a reasoned and adequate explanation of how all the requirements for imposing the measure have been met."[137]

182. With respect to Article 12.7 of the DSU, Norway submits that the United States is in fact reproaching the Panel for making more findings than were needed. The Panel was called upon to examine whether the USITC had provided reasoned and adequate explanations to support its determinations. Once the Panel had decided that there were no such explanations, its analysis should have ended. It was, therefore, not for the Panel to develop alternative explanations or to examine whether there was evidence to come to a different conclusion than the USITC.

2. Increased Imports

183. Norway submits that the United States' appeal of the Panel's findings on increased imports rests on two grounds. First, the United States challenges the standard applied by the Panel as not being supported by the text of the *Agreement on Safeguards*. Second, the United States asserts that the Panel erred in its analysis of the import data for CCFRS, hot-rolled bar and stainless steel rod. In its submission, Norway addresses only the general legal standard for increased imports and, with respect to the product-specific arguments for CCFRS, hot-rolled bar and stainless steel rod, incorporates by reference the relevant arguments of the other Complaining Parties.[138]

184. Norway understands the United States to argue that the requirement, set out in *Argentina – Footwear (EC)*, that increases in imports be "recent enough, sudden enough, sharp enough and significant enough", applies to the phase in which serious injury or causation are determined. This argument, in Norway's view, "simply ignores"[139] what was said in *Argentina – Footwear (EC)* and the way in which the requirements set out there have been applied more generally in WTO dispute settlement. The Appellate Body was not making a statement about the entire investigative process. The Appellate Body, in Norway's view, was not seeking to defer the requirement that increases be recent, sudden, sharp and significant to the phase in which serious injury or causation are determined.

[134]Norway's appellee's submission, para. 118, referring to Appellate Body Report, *US – Lamb*, para. 106.

[135]Norway's appellee's submission, para. 132.

[136]*Ibid.*, para. 98.

[137]Norway's appellee's submission, para. 100.

[138]*Ibid.*, para. 141.

[139]*Ibid.*, para. 145.

185. Norway submits that, in assessing increased imports, the USITC was required to examine the recent past. Given the extraordinary or abnormal nature of safeguard measures, as recognized by the Appellate Body, it is not enough for the competent authorities to determine simply that the level of imports at or near the end of the period was higher than at some unspecified earlier point. In particular circumstances, a decrease in imports at the end of the period of investigation may preclude a finding of increased imports pursuant to Article 2.1 of the *Agreement on Safeguards*. Norway contends that the United States' argument that "any increase will do" would allow authorities to ignore trends throughout the investigation period and would undermine the disciplines of the Agreement.

186. Norway argues that the effect of the United States' approach is to try to move from a standard that is consistent with the objectives of the *Agreement on Safeguards*, namely, to provide relief from import surges, to a standard that allows the arbitrary imposition of safeguards measures just because imports have increased at some stage in the past. The United States, according to Norway, wants the Appellate Body to reverse its previous case law to allow the United States to continue its practice whereby a mere increase or "any increase" is sufficient; this test would allow a determination that imports have increased to be made on the basis of a peak in imports at some time during the period of investigation and would ignore trends throughout that period. Norway concludes that this test has no basis in law and must therefore be rejected.

(a) Specific Arguments with respect to Tin Mill Products and Stainless Steel Wire

187. Norway argues that the Panel correctly found that the USITC's determination relating to tin mill products and stainless steel wire did not comply with the requirements under Articles 2.1, 3.1 and 4.2(c) of the *Agreement on Safeguards*. According to Norway, the specific legal problem arising in this case is that not all the three Commissioners, who, according to the United States, voted in the affirmative in respect of tin mill products and stainless steel wire, related their findings to tin mill products and stainless steel wire. The Panel examined whether the United States had established, through a proper determination supported by a report setting out reasoned and adequate explanations, that it had a right to apply a safeguard measure on tin mill products and stainless steel wire. Norway submits that the Panel correctly found that there was no such determination supported by a reasoned and adequate explanation because the Presidential Proclamation refers to three irreconcilable determinations based on different products.

188. The Panel's reasoning was based on the requirement that the measure ultimately imposed must be based on a determination, and the underlying investigation, as published in the report. This obligation, in Norway's view, has two aspects. First, there must be a determination, supported by a report setting out reasoned and adequate explanations; second, that determination must relate to the products on which safeguard measures are imposed.

189. Both of these aspects are well set out in the text of the *Agreement on Safeguards* and have long been clarified by the Appellate Body. Thus, the determination required by WTO Members under the *Agreement on Safeguards* must be a singular act for which a WTO Member is accountable. The Panel did not depart from the Appellate Body's findings in *US – Line Pipe*; rather, the Panel followed these Appellate Body findings by asking whether a single legal act in the form of a determination supported by a report with reasoned and adequate explanations existed. Norway argues that the Panel correctly found that there was none.

190. Norway argues that, contrary to what the United States argues, divergent findings that are based on differently-defined products are intrinsically irreconcilable. Norway is furthermore of the

view that the question before the Panel was not whether there was a match between the product coverage of the determinations reached by Commissioners Bragg, Devaney, and Miller. As the Panel clarified, it examined whether these opinions were reconcilable for purposes of the *Agreement on Safeguards*. Norway argues that, in order to reconcile the different analyses and findings of the three Commissioners that are based on different import volumes, the Panel would have had to examine *ex post* all the data on which the three different Commissioners based their analyses and determine whether the increased imports requirement was fulfilled. Norway submits that it is not for the Panel to reconcile, to re-assess or to re-write the measure by looking at data somewhere in the report. The Panel's task, according to Norway, is to evaluate whether the United States fulfilled its obligations under the *Agreement on Safeguards.*

191. Norway also disagrees with the United States' argument that the Panel Reports improperly impinge on the manner in which a Member structures the decision-making process of its competent authority. In Norway's view, the Panel "fully followed"[140] the Appellate Body in recognizing the sovereign discretion of the United States to structure its internal decision-making process as an exercise of its sovereignty. Norway is of the view that the Panel did not impose any requirement on how the United States structures its internal decision-making in safeguard investigations.

192. Finally, Norway contends that the Panel did not have to address the arguments of the Complaining Parties that each of the individual opinions analyzed separately also fails to fulfil the requirements set by Articles 2.1 and 4 of the *Agreement on Safeguards*. However, Norway submits that, should the Appellate Body consider it necessary to do so, there are sufficient findings, arguments and undisputed facts on the record to show that the assertion of the United States is incorrect.

3. Parallelism

193. Norway submits that there is no reason for the Appellate Body to disturb the Panel's findings on parallelism. Norway disagrees with the United States' assertion that the Panel created a new requirement of a separate analysis of imports from sources not subject to the safeguard measures. Norway submits that Article 2.1 has been interpreted to refer only to imports from covered sources and limits the product basis of the determination to imports covered by the measures. The term "imports" in Article 4 must have the same meaning, and thus the phrase "factor other than imports" must be read "factors other than covered imports". Therefore, in the view of Norway, in requiring that the effects of imports not covered by the measure be accounted for and not be attributed to covered imports, the Panel was simply applying Article 4.2(b), second sentence, to the proper product scope. Moreover, Article 4.2(b), by referring to "other factors", does not establish a closed list and the competent authorities have a duty to investigate even beyond the listed injury factors. Norway argues that the United States never explains how a competent authority could demonstrate, other than by conducting a non-attribution analysis with respect to excluded imports, that there is a causal link between imports actually covered by the relevant measures and serious injury.

194. In this regard, Norway also notes that a failure, by the competent authority, to proceed properly may well have significant consequences for its conclusion. For some product groups, imports from Mexico and Canada taken together were 40 percent of imports from all other sources. Indeed, for some products, the United States' authorities themselves concluded that imports from such sources, even taken individually, were contributing importantly to serious injury.

[140]Norway's appellee's submission, para. 286.

195. According to Norway, the United States contends that because imports from Israel and Jordan were non-existent or infinitesimal, the discussion of non-NAFTA imports also provides the requisite explicit findings with respect to imports from all sources other than Canada, Mexico, Israel, and Jordan. Norway submits that the United States is actually invoking a *de minimis* exception which does not exist. Norway further submits that the United States' contention that the Panel's requirement imposes the obligation to make redundant findings is also erroneous. By requiring the United States to make specific findings for non-FTA imports, Norway believes, the Panel is making it possible for the competent authorities to make a proper determination, based only on the covered imports, that is fully consistent with WTO requirements.

4. Causation

196. Norway requests the Appellate Body to uphold the Panel's findings that the USITC failed to meet the necessary causation standard for CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, tin mill products, and stainless steel wire.

197. Norway notes that there is no basis for the United States' claims that the Panel misinterpreted the causation standard and "consistently read into the ITC's analysis findings the ITC did not make, misstated or ignored critical findings of the ITC [ ] and even substituted its own views of the record for that of the ITC."[141]

198. Norway argues that, contrary to the United States' arguments, the Panel did not substitute the USITC's *reasonable* conclusions on causation with its own conclusions. Rather, it reviewed the evidence that was before the USITC and recognized the obvious lack of coincidence between increased imports and domestic industry performance. Because of the lack of coincidence, the Panel sought out the USITC's analysis as to why a causal link between increased imports and serious injury to the domestic industry still existed. Norway contends that, based on the evidence before the Panel, there was no analysis offered by the USITC that could meet the standard.

199. Norway contends that, by stopping its investigation of individual factors after it had established that they were not a cause of injury equal to or greater than increased imports, the USITC did not comply with the requirement of Article 4.2(b). This approach is, in Norway's view, clearly not a correct one, as it does not comply with Article 4.2(b) of the *Agreement on Safeguards* that, according to Appellate Body practice, requires a competent authority to separate and distinguish the injurious effects of the increased imports from the injurious effects of other factors.

200. According to Norway, the United States is also mistaking a critical review by the Panel for a *de novo* review of the facts. In Norway's view, the Panel correctly applied the standard of review and examined whether the USITC assessed all relevant factors and provided a reasoned and adequate explanation of how the facts supported its determination of a causal link as well as its non-attribution analysis.

201. Norway furthermore associates itself with the product-specific arguments made by the other appellees. In particular, as regards the standard of review issue and the details of the CCFRS analysis, Norway specifically refers to Brazil's appellee's submission.

[141]Norway's appellee's submission, para. 164, referring to the United States' appellant's submission, para. 168.

I. *Arguments of Switzerland – Appellee*

1. Unforeseen Developments, Article 3.1 of the *Agreement on Safeguards*, and Article 12.7 of the DSU

202. Switzerland requests that the Appellate Body uphold the Panel's conclusions concerning unforeseen developments.

203. As for the United States' argument that the word "explicit" is not contained in the *Agreement on Safeguards*, Switzerland submits that the need for an explicit determination is simply a clarification of the requirement contained in Article 3.1 that the published report must contain "reasoned conclusions" and the requirement under Article 4.2(c) to provide a "detailed analysis", including a "demonstration of the relevance of the factors examined."

204. Switzerland submits that the Panel applied the correct standard of review in examining the issue of unforeseen developments under Article XIX:1(a) of the GATT 1994. In stating that it had to examine whether the competent authorities had "considered all the relevant facts and had adequately explained how the facts supported the determinations that were made"[142], the Panel was simply articulating what its responsibilities were in applying the standard of review set out in Article 11 of the DSU. Switzerland asserts that the Panel was not allowing its approach, in this respect, to reflect concerns relevant to Article 4.2 of the *Agreement on Safeguards*.

205. Switzerland argues that Article XIX:1(a) of the GATT 1994 requires that there must be a link between the relevant unforeseen developments and increased imports of each of the specific products that may be subject to a safeguard measure. According to Switzerland, it is not sufficient, therefore, to link the unforeseen developments to only one of those products.

206. Switzerland further maintains that the Panel was correct in finding that the USITC's conclusions were not supported by data linking those developments to specific increased imports. A "reasoned conclusion" under Article 3.1 of the *Agreement on Safeguards* is one that links the pertinent facts to the conclusion reached, not one where "key elements of the analysis are left to guesswork and supposition".[143] Switzerland submits that the United States' position appears to be that a competent authority only needs to collect information in a report and make a determination without being under an obligation to provide sound reasoning to support its conclusion. In Switzerland's view, such a result makes a "mockery"[144] of the requirement in Article 3.1 that the competent authority must publish a report of its "findings and reasoned conclusions on all pertinent issues of fact and law."

207. With respect to Article 12.7 of the DSU, Switzerland argues that the Panel fully considered all the facts and arguments of the United States and properly stated the basic rationale for its findings.

[142]Switzerland's appellee's submission, para. 72, referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

[143]Switzerland's appellee's submission, para. 81.

[144]*Ibid.*, para. 81.

2. Increased Imports

(a) General

208. Switzerland submits that the Panel correctly concluded that the increase in imports must have been recent. According to Switzerland, this conclusion "tracks precisely" the Appellate Body's finding in *Argentina – Footwear (EC)*[145], and follows from the use of the present tense in the phrase "is being imported" in Article 2.1 of the *Agreement on Safeguards*.

209. Switzerland also agrees with the Panel's finding that the increase in imports must be sudden. According to Switzerland, this interpretation is fully supported by the Appellate Body's finding in *Argentina – Footwear (EC)*, which, in turn, is based on a contextual reading of Article XIX of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*.

210. Finally, Switzerland disagrees with the Unites States' position that "the phrase 'in such increased quantities' simply states the requirement that, in general, the level of imports at (or reasonably near) the end of the [period of investigation] be higher than at some unspecified earlier point in time."[146] Switzerland sees this argument as endorsing the "simplistic"[147] end-points analysis that was rejected by the Appellate Body in *Argentina – Footwear (EC)*.[148]

(b) Specific Arguments with respect to CCFRS[149]

211. According to Switzerland, the United States seeks to "rehabilitate"[150] the USITC report by comparing the level of imports between 1996 and 2000 and without addressing the level of imports at the end of the period of investigation. Switzerland sees this approach as "patently wrong".[151]

(c) Specific Arguments with Respect to Tin Mill Products and Stainless Steel Wire

212. Switzerland asserts that the Panel's findings are correct and completely in line with prior panel and Appellate Body practice. The Panel's concern was not with how the United Sates law functions, but that by function of United States law—which required the President to rely on the decision of at least three Commissioners—there needed to be consistent treatment of the like product. Otherwise, the analysis of these Commissioners could not support the measures on these individual products.

[145]Switzerland's appellee's submission, para. 90, referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.

[146]Switzerland's appellee's submission, para. 94, referring to the United States' appellant's submission, para. 102.

[147]Switzerland's appellee's submission, para. 94.

[148]*Ibid.*, referring to Appellate Body Report, *Argentina – Footwear (EC)*, paras. 129 and 131.

[149]For hot-rolled bar and stainless steel rod, Switzerland refers to the arguments of the other Complaining Parties and incorporates them by reference. (Switzerland's appellee's submission, para. 100)

[150]Switzerland's appellee's submission, para. 104.

[151]*Ibid.*

213. Switzerland argues that the United States is incorrect in claiming that the Panel's findings "provide[] no insight into the Panel's reasoning". The Panel expressed its reasoning well. Switzerland fails to understand how the United States can recognize the fact that the three Commissioners based their findings on data for two different product groupings, but then claim that the disparate findings based on the data for those groupings both support a measure on only one grouping. The findings cannot possibly be reconciled because they address entirely different issues. The Panel found simply that, to comply with the provisions of the *Agreement on Safeguards*, a Member's authority may not reach an affirmative finding (however that is defined) and impose a measure that is based on multiple, inconsistent like product definitions. This is not a far-reaching finding.

214. According to Switzerland, the United States erroneously claims that the "something beyond" language derived from the Appellate Body Report in *US – Line Pipe* applies in the present case. Rather, the language is a statement by the Appellate Body that, in hierarchical terms, a showing of threat is easier to make than a showing of actual injury, which is "something beyond" threat. Therefore, the Appellate Body appears to have reasoned, if three threat of injury votes would suffice, so would a combination of three threat and injury votes. Lastly, in Switzerland's view, the Panel's decision does not improperly infringe on a Member's right to structure the decision-making process of its competent authority.

3. Parallelism

215. According to Switzerland, the Appellate Body established unequivocally—based on the identity of the language in Article 2.1 and Article 2.2—that imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure under Article 2.2 of the *Agreement on Safeguards*. This is crucial for the present case. It does not mean that a "gap" may not exist between imports covered under the investigation and imports falling within the scope of the measure. However, according to Switzerland, such a gap can only be justified—as stated by the Appellate Body—if it is explicitly established that increased imports from non-FTA sources *alone* caused serious injury or threat of serious injury.

216. The United States, in Switzerland's view, obviously failed to meet this standard. Equally invalid is the United States' criticism of the Panel for inserting an allegedly incorrect additional analytical step. The approach followed by the Panel, again, is based on consistent panel and Appellate Body practice. Switzerland also disagrees with the United States' argument that, if the volume of FTA imports is extremely small, the competent authority's conclusions with respect to all imports are also applicable to imports from all sources other than the excluded FTA sources. Switzerland contends that, even though imports from Israel and Jordan were small, or sometimes even quasi-non-existent, this does not release the United States from establishing explicitly, with a reasoned and adequate explanation, that imports from sources covered by the measure alone do satisfy the conditions for the application of a safeguard measure.

4. Causation

(a) General

217. Switzerland requests that the Appellate Body uphold the Panel's findings on causation. For the United States, the central element of the Panel's alleged errors with respect to causation relates to its establishment of the facts and its weighing and appreciation of the evidence. Yet, nowhere in its arguments on causation does the United States allege that the Panel has infringed Article 11 of the

DSU. All the United States has alleged, in its detailed product-by-product arguments, is that the Appellate Body should reach a different factual finding to that reached by the Panel. Since the United States has not pleaded before the Appellate Body that Article 11 has been infringed, it cannot have the Panel's fact-finding and weighing of the evidence reversed. The situation is similar to the situation faced by the Appellate Body in *US – Countervailing Measures on Certain EC Products*.[152]

218. Switzerland further argues that the United States' submission erroneously suggests that the Panel allegedly failed to meet an undefined "burden of proof" before it could conclude that the USITC's findings were WTO-inconsistent. The Panel was required to make an "objective assessment of the matter before it" pursuant to Article 11 of the DSU. This involves the Panel determining, in the words of the Appellate Body, whether the USITC provided a reasoned and adequate explanation. The United States has not alleged, however, that the Panel infringed its obligations under Article 11 of the DSU. According to Switzerland, the United States furthermore erroneously assumes that merely by reversing the Panel's findings on specific issues, the Appellate Body could uphold the USITC's causation analysis.

219. Switzerland contends that there are at least two general methodological faults committed by the USITC. First, in the instances where the USITC has determined that there is more than one alternative cause of injury, the USITC failed to assess, separate and distinguish the collective effects of the other causes from the effects allegedly caused by increased imports. Second, the USITC continues to consider that merely determining that increased imports are a cause "equal or greater than" any alternative cause of injury satisfies the non-attribution requirement of Article 4.2(b) of the *Agreement on Safeguards*; this is the same approach that was found inconsistent by the Appellate Body in *US – Lamb*.

220. Switzerland submits that the Panel's general analytical framework is "unobjectionable". Switzerland notes that the Panel "compartmentalised"[153] the "coincidence" and "conditions of competition" analysis and submits that, after the Panel found an absence of coincidence, did not conduct a sufficiently critical analysis of whether the USITC had nevertheless demonstrated the existence of a causal link. Switzerland submits that in the absence of coincidence, the facts established by the USITC do not establish a compelling explanation that a causal link exists. However, even on the basis of an "uncritical and unduly deferential examination"[154], the Panel concluded in nine out of ten cases that there was no reasoned and adequate explanation.

221. Switzerland agrees with the Panel's finding that where several factors are causing injury, a competent authority must assess their effects collectively in order to ensure that it does not attribute any injury caused by other factors to increased imports. Indeed, the Panel could have found every one of the USITC's causation determinations inconsistent with the *Agreement on Safeguards* on these grounds. The Panel did not suggest that a causation methodology needs to provide for a non-attribution analysis of the cumulative effects of other factors in each and every case; rather, the cases requiring a cumulative assessment are where an assessment on an individual relative basis is insufficient to ensure that the injurious effects of other factors are not attributed to increased imports. Switzerland finds support for its reasoning in the Appellate Body's findings in *US – Lamb* and *US – Line Pipe*.

[152]Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 51–75.

[153]Switzerland's appellee's submission, para. 133.

[154]*Ibid.*, para. 136.

222. Further, in Switzerland's view, the Appellate Body in *EC – Tube or Pipe Fittings* found that a factor which has *no injurious effect*, rather than *minimal effects*, does not have to be subject to a non-attribution analysis. Permitting a competent authority to ignore causal factors considered to have only "minimal" effects would create a *de minimis* exception to the non-attribution requirement not contemplated in Article 4.2(b). Accordingly, Switzerland requests the Appellate Body to uphold the Panel's finding for welded pipe and FFTJ with respect to this matter.

(b) Specific Arguments with respect to Welded Pipe[155]

223. Switzerland submits that the Panel correctly found the USITC's analysis of domestic capacity increases to be insufficient in order to satisfy the non-attribution requirement. The Panel also correctly found the USITC's analysis of non-import related poor performance of a significant domestic producer to be deficient; Switzerland contends that the Panel was correct to find that even factors which have a minor effect should be subject to a non-attribution analysis. Even if the Appellate Body reverses the Panel's findings, Switzerland argues that the Appellate Body should still uphold the Panel's ultimate conclusion; for this purpose, Switzerland refers the Appellate Body to its and other Complaining Parties' arguments before the Panel on which the Panel did not decide.

J. *Conditional Appeals*

1. Arguments of Brazil, Japan, and Korea – *Joint Appellants*

224. Brazil, Japan, and Korea request the Appellate Body conditionally to address their claims with respect to the definition of the like product and the domestic industry under Articles 2.1 and 4.1(c), as well as their claims with respect to Article 5.1 of the *Agreement on Safeguards*.

(a) Definition of the like product and the domestic industry

225. In their joint conditional appeal, Brazil, Japan, and Korea request the Appellate Body to rule on whether the grouping by the USITC of CCRFS products into a single like product was consistent with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*, in the event that the Appellate Body: (i) disagrees with the Panel's finding that the safeguard measures are "deprived of a legal basis"; (ii) reverses an aspect of any of the Panel's findings against the United States with respect to CCFRS; or (iii) concludes that the Panel should have issued a like product ruling to support its CCFRS causation finding.

226. According to Brazil, Japan, and Korea, the parties agree that the products composing the CCFRS product category are distinct, since "they have different physical properties, end uses, consumer tastes and habits, customs treatment, and production processes."[156] In addition, Brazil, Japan, and Korea argue that the USITC declined to group CCFRS products together in prior trade remedy cases.

227. According to Brazil, Japan, and Korea, each of the domestic products within a grouping must be "like" all of the subject imports within that grouping. It is not enough to find that the grouping of the domestic products is like that of the imported products. Moreover, Brazil, Japan, and Korea argue

[155]Switzerland incorporates, by reference, the arguments of the other Complaining Parties with respect to the other product categories in dispute. (Switzerland's appellee's submission, para. 162)

[156]Brazil's, Japan's, and Korea's other appellants' submission, para. 25.

that the Appellate Body explained in *US – Lamb* "that a continuous line of production between products—a characteristic heavily relied upon by the United States in the case of flat rolled steel products—is insufficient to overcome their lack of 'likeness'."[157]

228. In Brazil, Japan, and Korea's view, the domestic industry should be defined on the basis of the competitive relationship between the imported product and the like domestic product. Finally, Brazil Japan, and Korea submit that the product definition of CCFRS is inconsistent with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*, because CCFRS products are not a single product and do not compose one authentic market.

(b) Article 5.1 of the *Agreement on Safeguards*

229. In the event the Appellate Body upholds or modifies the Panel's findings on causation, Brazil, Japan, and Korea request the Appellate Body to complete the analysis "regarding the failure of the United States to adequately analyze causation and to find that the United States failed to ensure that its safeguard measures were limited to the extent necessary, as required by Article 5.1".[158] Alternatively, in the event the Appellate Body reverses the Panel's findings with respect to increased imports and causation, Brazil, Japan, and Korea request the Appellate Body to examine whether the safeguard measures, as explained by the United States in its *ex post facto* economic model, comply with Article 5 of the *Agreement on Safeguards*.

230. Brazil, Japan, and Korea argue that, in accordance with the Appellate Body findings in *US – Line Pipe,* the Complaining Parties established a *prima facie* case that the United States violated Article 5.1, because the Panel found that the United States failed to comply with the causation requirements of Article 4.2(b) of the *Agreement on Safeguards*. According to Brazil, Japan, and Korea, the United States failed to rebut the Complaining Parties' *prima facie* case. Brazil, Japan, and Korea argue that the United States' *ex post facto* analysis is not in accordance with the requirements of Article 5.1 of the *Agreement on Safeguards*, because the United States failed to account for the effects of decreasing demand, domestic capacity increases, intra-industry competition, as well as legacy costs on the domestic industry's performance.

2. Arguments of China – *Appellant*

231. In the event the Appellate Body should reverse sufficient of the Panel's findings to undermine the Panel's conclusion that the safeguard measures were deprived of legal basis, China requests the Appellate Body to address its claim with respect to the definition of the imported product, the like product and the domestic industry under Articles 2.1 and 4.1(c), as well as its claims with respect to Articles 5.1, 9.1 and 3.1 of the *Agreement on Safeguards*.

(a) Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*

232. China argues that the United States acted inconsistently with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* because the United States failed to properly define the imported product, the like product, and the domestic industry. According to China, the United States' approach of bundling together products in arbitrary groups failed to allow for an examination of the competitive dynamics amongst the various products. China submits that in the absence of such a competitive

[157] *Ibid*., para. 31.

[158] Brazil's, Japan's, and Korea's other appellants' submission, 2.

analysis, an industry not suffering injury could benefit from the imposed relief on a broader group of imported products, some of which might not have even increased. In addition, China alleges that it has demonstrated, along with the remaining other appellants, that even on the basis of the flawed product groupings, the United States was not entitled to impose the safeguard measures.

(b) Article 5.1 of the *Agreement on Safeguards*

233. China argues that the United States violated Article 5.1 of the *Agreement on Safeguards* because the United States' safeguard measures were not limited to remedying or preventing the serious injury caused by imports. China submits that the other appellants have demonstrated that the USITC failed to properly segregate the injurious effects of other factors from the injurious effects of increased imports. In addition, according to China, the *ex post facto* analysis submitted by the United States does not separate and distinguish the effects of factors other than imports on the domestic industry.

(c) Article 9.1 of the *Agreement on Safeguards*

234. China further claims that the United States acted inconsistently with Articles 9.1 and 3.1 of the *Agreement on Safeguards*. China alleges, first, that the United States' approach of linking developing country status under Article 9.1 with the United States' GSP is erroneous. China notes that the United States exercises discretion in deciding the list of beneficiaries within the context of its GSP, and that a number of the eligibility criteria for this list are not related to a country's development status. China contends that this approach is inconsistent with Article 9.1, which expressly requires a link between the special and differential treatment granted under this provision and the developing status of a Member.

235. China submits furthermore that the United States violated Articles 9.1 and 3.1 of the *Agreement on Safeguards* because it failed to provide a reasoned and adequate explanation for China's exclusion from the treatment set forth under Article 9.1. China maintains that its Protocol of Accession lays down China's status as a developing country, and that this status applies for the purposes of the *Agreement on Safeguards*. Despite these non-ambiguous circumstances, the United States, in China's view, has failed to provide an explanation for China's exclusion from the special and differential treatment provisions of the *Agreement on Safeguards*. Moreover, China alleges that the United States failed to provide an explanation as to why Chinese imports did not meet the *de minimis* test of Article 9.1. In China's view, based on the preliminary calculations and the USITC statistics, China had, for a large number of products, a share of imports into the United States accounting for less than three percent, with the exporting developing countries collectively accounting for no more than nine percent of total imports.

3. Arguments of the European Communities – *Appellant*

236. In the event the Appellate Body should reverse sufficient of the Panel's findings as to undermine its conclusion that there was no legal basis for the safeguard measures imposed by the United States, the European Communities requests the Appellate Body to address its claim with respect to the definition of the imported product, the like product, and the domestic industry under Articles 2.1 and 4.1(c), as well as its claim with respect to Article 5.1 of the *Agreement on Safeguards*.

(a) Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*

237. The European Communities first alleges that the United States acted inconsistently with its obligations to properly define the product groupings and the domestic industry as required by Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*. The European Communities submits that the bundling of products into what it considers to be arbitrary groups is incompatible with the *Agreement on Safeguards*. First, the USITC failed to identify the "imported product", contrary to the requirement under Article 2.1, which, according to the Appellate Body's finding in *US – Lamb*, must be a specific product. Second, in order to be considered a "specific product", a group of products must be coherent and may not contain gaps. Consequently, according to the European Communities, separate investigations should be conducted for each definable or specific product for which a Member is considering to impose safeguard measures. Third, the European Communities argues that, since the domestic product must be "like" the imported product, it is necessary for products contained in a specific product definition to be "like" each other. Therefore, in the European Communities' view, an analysis of the competitive dynamics among the various products is required.

238. In addition, the European Communities submits that the other appellants have otherwise demonstrated that the United States was not entitled to impose the safeguard measures even on the basis of the flawed product groupings. According to the European Communities, the Panel "upheld that view in deciding not to address these claims, although it recognized the problem … in several instances."[159]

(b) Article 5.1 of the *Agreement on Safeguards*

239. The European Communities argues that the United States' safeguard measures exceed what is necessary to remedy or prevent serious injury and facilitate adjustment. The European Communities contends that, contrary to the United States assertion, the two conditions set out in Article 5.1 of the *Agreement on Safeguards* are cumulative, rather than alternative. Thus, according to the European Communities, a Member may only impose a safeguard measure to the lesser of the extent necessary to prevent or remedy serious injury or to the extent necessary to facilitate adjustment.

240. Finally, the European Communities argues that the *ex post facto* analysis submitted by the United States does not separate and distinguish the effects of factors other than imports on the domestic industry. In the European Communities' view, the United States' *ex post facto* analysis repeated the errors manifest in the USITC report, because it failed to account for factors improperly found to be non-injurious, such as the legacy costs in respect of CCFRS. Moreover, according to the European Communities, the United States did not model the proper product in its *ex post facto* analysis for the measure on slab. Thus, the European Communities submits that the United States improperly included data on slabs to calculate the measure for CCFRS and subsequently excluded slab from the safeguard measure imposed on CCFRS. Consequently, according to the European Communities, the United States *ex post facto* justification that includes slab cannot justify a measure on CCFRS that excludes slab. Therefore, the European Communities argues that the *ex post facto* analysis cannot demonstrate that the measure is limited to the extent necessary.

4. Arguments of New Zealand – *Appellant*

241. If the Appellate Body were to reverse sufficient of the Panel's findings to undermine the conclusion that there was no legal basis for the safeguard measures imposed by the United States, New Zealand requests the Appellate Body to address its claim that the United States failed to define "the domestic industry that produces like … products", under Articles 2.1 and 4.1(c), as well as its

[159]European Communities' other appellant's submission, para. 17.

claim with respect to Article 5.1 of the *Agreement on Safeguards*. In addition, in the event the Appellate Body upholds the causation findings of the Panel, New Zealand associates itself with the first conditional claim of Brazil, Japan, and Korea[160] and the related arguments, and requests the Appellate Body to address the claim under Article 5.1 of the *Agreement on Safeguards*.

(a) Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*

242. New Zealand alleges that the United States has failed to define the domestic industry in accordance with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*. With respect to the legal standard for determining the like product, New Zealand argues that the like product in the *Agreement on Safeguards* has a narrow meaning, derived from its juxtaposition with the term "directly competitive products". In addition, the analysis of competitive relationships is central to determining whether products are "like". New Zealand's view is that a proper consideration of the likeness of products is product, and not producer, oriented and that production processes are not relevant in this respect. The United States failed to meet the requirements of the *Agreement on Safeguards* in its determination of the domestic industry producing CCFRS, because it improperly bundled together unlike products. The United States' approach of focusing on commonalities within the industry producing CCFRS was erroneous.

243. New Zealand further argues that the bundling of unlike products is impermissible, because it would allow a competent authority to define the domestic product that is "like" the imported product in a way that predetermines a finding that increased imports are causing serious injury. Finally, New Zealand submits that if different products are bundled into one product category, the *Agreement on Safeguards* requires that likeness be established between each of the imported products in that category, as well as each of the products in the domestic products category.

(b) Article 5.1 of the *Agreement on Safeguards*

244. New Zealand claims that the United States failed to comply with the requirements of Article 5.1 of the *Agreement on Safeguards*. First, New Zealand argues that the President of the United States, without any justification, imposed safeguard measures on CCFRS that are more restrictive than the USITC's recommendations. Second, a less restrictive remedy was placed on slab as compared to the remedy imposed on the other products in the CCFRS category, even though there was no corresponding difference in the injury alleged to be caused by the increased imports of these products. Third, New Zealand argues that the safeguard measures were applied to a greater extent than necessary to facilitate the adjustment of the United States' domestic industry. Fourth, the *ex post facto* analysis submitted by the United States is fundamentally flawed, because the United States' methodology has the effect of overestimating the tariff required to restore the domestic industry to profitability. Specifically, New Zealand notes, in relation to CCFRS, that the United States included data on slabs to calculate the permissible extent of the measure, despite the fact that slabs were excluded from the remedy imposed by the President. Finally, according to New Zealand, the United States' methodology attributes to imports serious injury caused by other factors.

[160]This first conditional appeal of Brazil, Japan, and Korea is set forth in Brazil's, Japan's, and Korea's other appellants' submission, para. 2.

5. Arguments of Norway – *Appellant*

245. If the Appellate Body should reverse sufficient of the Panel's findings as to undermine its conclusion that there was no legal basis for the safeguard measures imposed by the United States, Norway requests the Appellate Body to address its claim with respect to the definition of the imported product, the like product, and the domestic industry under Articles 2.1 and 4.1(c), as well as its claim with respect to Articles 5.1 and 3.1 of the *Agreement on Safeguards*.

(a) Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*

246. According to Norway, the United States incorrectly defined the "like product" and the "imported product" and failed to apply the appropriate standard for determining the "domestic industry that produces like or directly competitive products". Norway argues that the USITC bundled together a broad range of distinct products, notwithstanding the fact that the products within that range were not like each other. For example, the USITC grouped together several unlike imported products as "certain carbon flat-rolled steel products", and then bundled the same unlike domestic products. In Norway's view, the failure of the USITC to define the "like product" correctly undermines all of its other findings on matters such as increased imports, causation, serious injury, and remedy.

247. Norway further submits that the United States incorrectly argues that it is permissible for competent authorities to first identify the domestic industry, and only thereafter to enquire whether there were any imports that injured that industry. Furthermore, the USITC defined the relevant "domestic industry" as the producers of a broad range of bundled, but distinct, products, notwithstanding the fact that the products within that range were not like each other. Norway argues that products compete with each other only if they are properly grouped together, whether in the context of Article III of the GATT 1994 or in the context of trade remedies. Norway is of the view that, where there is no competitive nexus between the products involved, the analyses to establish injury and to choose an appropriate remedy become meaningless.

(b) Articles 3.1 and 5.1 of the *Agreement on Safeguards*

248. According to Norway, the United States did not apply its safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment within the meaning of Article 5.1, first sentence, of the *Agreement on Safeguards*. Norway incorporates by reference the arguments developed before the Panel either by Norway alone or together with the remaining other appellants. Norway argues that Article 5.1 requires that a safeguard measure be proportional to the injury caused by increased imports, and no additional relief can be imposed over and above what is necessary to remedy the serious injury attributed to increased imports. In Norway's view, a justification for the extent of the measure is necessary so as to enable a Member to make a correct decision regarding the measures to be imposed and serves the purpose of avoiding disputes. Norway submits that the *ex post facto* justification argued before the Panel is not in accordance with Article 5.1, first sentence, and Article 3.1 of the *Agreement on Safeguards*. Norway further argues that the measures imposed by the United States go beyond what is necessary to prevent or remedy serious injury, because the *ex post* analysis fails both to isolate and separate the effects of other factors and, therefore, attributes serious injury caused by other factors to imports.

6. Arguments of Switzerland – *Appellant*

249. If the Appellate Body should reverse sufficient of the Panel's findings as to undermine its conclusion that there was no legal basis for the safeguard measures imposed by the United States, Switzerland requests the Appellate Body to address its claim with respect to the definition of the imported product, the like product, and the domestic industry under Articles 2.1 and 4.1(c), as well as its claim with respect to Article 5.1 of the *Agreement on Safeguards*.

(a) Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*

250. Switzerland alleges that the USITC's bundling of products in arbitrary groups is incompatible with the *Agreement on Safeguards*. Switzerland's claims are based on three main arguments. First, Switzerland argues that the USITC failed to identify the "imported product" pursuant to the requirement under Article 2.1 to base a determination on "a product", which, according to the Appellate Body in *US – Lamb*, must be a "specific product". Second, in order to be considered a "specific product", a group of products must be coherent and may not contain gaps. Consequently, according to Switzerland, separate investigations should be conducted for each specific product for which a Member is considering imposing safeguard measures. Third, the domestic product must be "like" the imported product, and it is also necessary for products contained in a specific product definition to be "like" each other. If an analysis of the competitive dynamics amongst the various products were not required, WTO Members could protect an entire industry by grouping together all products produced by that industry.

251. In Switzerland's view, in order to determine the scope of the imported product, a competent authority should rely on the four criteria developed by GATT practice as well as the Appellate Body to establish likeness—physical characteristics, end uses, consumer preferences and tariffs classifications. Switzerland submits that it has demonstrated in its submissions before the Panel, along with the other Complaining Parties, that the United States did not properly apply these criteria in determining the likeness of domestic and imported steel products.

(b) Article 5.1 of the *Agreement on Safeguards*

252. Switzerland argues that the United States did not limit its safeguard measures to the extent necessary to prevent or remedy serious injury and to facilitate adjustment, as required by Article 5.1 of the *Agreement on Safeguards*. Switzerland argues that, in accordance with the Appellate Body ruling in *US – Line Pipe*, because the Panel found that the United States failed to comply with the causation requirements of Article 4.2(b) of the *Agreement on Safeguards*, the Complaining Parties before the Panel established a *prima facie* case that the United States violated Article 5.1.

253. Moreover, according to Switzerland, the United States failed to rebut the other appellants' *prima facie* case because its *ex post facto* analysis does not isolate the effects of other factors of injury from the injury caused by increased imports. In Switzerland's view, the United States' *ex post facto* analysis repeats the errors manifest in the USITC report, because it fails to account for factors improperly found to be non-injurious, such as the legacy costs of the domestic industry. Moreover, according to Switzerland, the United States did not model the proper product in its *ex post facto* analysis with respect to CCFRS. Thus, Switzerland submits that the United States improperly included data on slabs to calculate the measure for CCFRS and subsequently excluded slab from the safeguard measure imposed on CCFRS. Consequently, according to Switzerland, the United States' *ex post facto* justification that includes slab cannot justify a measure on CCFRS that excludes slab. Finally, Switzerland argues that, although the USITC recognized that domestic

capacity increases likely played a role in causing injury, the *ex post facto* analysis contains no discussion on the effect of domestic capacity increases and does not attempt to isolate the injurious effect of this other factor.

7. Arguments of the United States – *Appellee*

(a) Product definition – Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*

254. The United States maintains that the Appellate Body cannot complete the analysis of this issue due to the absence of factual findings by the Panel or undisputed facts in the Panel record on which it could base such an analysis. According to the United States, this conclusion flows from Article 17.6 of the DSU, as interpreted by the Appellate Body.

255. In the United States' view, the other appellants' submissions confirm that the Appellate Body is being asked to address factual matters, such as identifying whether the product definition was coherent (which requires facts about the relevant merchandise) and determining the likeness of particular products. The United States' arguments before the Panel, as reflected in the Panel Reports, also demonstrate the fact-based nature of the USITC's like product analysis. In addressing these issues, the Appellate Body would need to rely on findings by the Panel (which are not available due to the Panel's exercise of judicial economy) or undisputed facts in the Panel record, which do not exist. In this regard, the United States disputes the suggestion by Brazil, Japan, and Korea that the parties agree that the products composing the USITC's product grouping for CCFRS are distinct. The United States contends that the findings of the USITC and the arguments of the United States before the Panel demonstrate that this is not the case.

(b) Extent of Measures – Article 5.1 of the *Agreement on Safeguards*

256. The United States maintains that the Appellate Body cannot complete the analysis of this issue due to the absence of factual findings by the Panel or undisputed facts in the Panel record on which it could base such an analysis. According to the United States, this conclusion flows from Article 17.6 of the DSU, as interpreted by the Appellate Body.

257. The United States contends that the other appellants have not met their burden of proof regarding Article 5.1. However, even if this were not the case, the Appellate Body could not make a finding regarding Article 5.1 without evaluating several factual matters. For example, in assessing the United States' numerical exercise and modelling exercise, the Appellate Body would need to identify data indicating the industry's condition in the absence of the injury attributable to increased imports, data relevant to ensuring that the injurious effects of other factors are not attributed to increased imports, and data estimating the effect of the safeguard measures. According to the United States, the parties disagreed about these issues so there are no undisputed facts in the Panel record, and the Panel did not make any relevant factual findings on which the Appellate Body could rely.

258. The United States argues that several of the other appellants' arguments do not have a valid foundation. For example, arguments of the other appellants regarding Article 5.1 are frequently based on their allegations of inconsistency with Article 4.2(b). This basis would be removed if the Appellate Body reversed the Panel's findings on Article 4.2(b). The other appellants also frequently maintain that the USITC or the President of the United States failed to provide an explanation when imposing the measures of how the measures complied with Article 5.1. However, the Panel found that the *Agreement on Safeguards* does not require any such explanation before the dispute settlement process. According to the United States, the Panel has therefore disposed of this issue and this finding has not been appealed.

(c) China – Article 9.1 of the *Agreement on Safeguards*

259. The United States maintains that the Appellate Body cannot address this claim because it does not involve any issues of law or legal interpretations that could be reviewed under Article 17.6 of the DSU. According to the United States, this is a novel and complex issue that is not resolved by the *Agreement on Safeguards* and on which WTO Members have not reached agreement, making it even more inappropriate for the Appellate Body to determine it in the absence of relevant Panel findings.

260. If the Appellate Body nevertheless decides to address this claim, the United States argues (with reference to its arguments before the Panel) that it should find that China failed to establish that the United States acted inconsistently with Article 9.1 of the *Agreement on Safeguards*. China did not present any facts to the Panel to establish that it is a developing country Member. It therefore failed to met its burden of proof. The statements of individual WTO Members that China referred to do not reflect a general understanding that China is a developing country. Rather, they demonstrate that Members advocated a "pragmatic approach" to this question, which may differ between the covered agreements. The United States argues that this approach does not require Members to treat China as a developing country Member under Article 9.1.

261. Finally, the United States maintains that the Panel did not exercise judicial economy in respect of China's claim that Article 3.1 obliged the United States to provide an adequate and reasoned explanation at the time of imposing the safeguard measures, for not excluding China pursuant to Article 9.1. Contrary to China's arguments, the United States contends that the Panel found that a Member is only required to respond to allegations regarding the level and extent of safeguard measures pursuant to Article 9.1 during the dispute settlement process.

K. *Arguments of the Third Participants*

1. Canada

262. Canada maintains that it is fully supportive of the United States in its appeal of the Panel's findings regarding the exclusion of imports from FTA partners from the application of the safeguard measures. Canada submits that the Panel erred in finding that the competent authority is under an obligation to account for the fact that excluded FTA imports contributed to the serious injury, in establishing whether imports from sources covered by the measure satisfy the requirements for imposing the safeguard measure. The "excluded sources accounting requirement", established by the Panel, is a new requirement that lacks any textual basis in the *Agreement on Safeguards*. Moreover, the Appellate Body in *US – Wheat Gluten* only stated the nature of the parallelism requirement and did not purport to set conditions on how an authority must conduct its parallelism analysis. Canada also agrees with the United States that in *US – Line Pipe* the Appellate Body's explanation of the parallelism requirement was the same as in *US – Wheat Gluten*. The Panel erred in reading *US – Line Pipe* to mean that parallelism necessarily requires the competent authority to account for the fact that excluded imports may have some injurious effect on the domestic industry. Thus, according to Canada, this requirement has no basis in prior Appellate Body reports or in the language of Articles 2.1 or 4.2 of the *Agreement on Safeguards*.

263. Canada submits that the Panel's finding on parallelism is contrary to Article 3.2 of the DSU, because the Panel created a new requirement that adds to a Member's obligations under the *Agreement on Safeguards*. Moreover, Canada argues that if the Panel had applied the correct standards, it would have concluded that the USITC's parallelism analysis was consistent with the *Agreement on Safeguards*. In Canada's view, the United States fully satisfied the requirements actually contained in the *Agreement on Safeguards*. The Appellate Body should therefore reverse the Panel's findings on parallelism.

IV. Issues Raised In This Appeal

264. Members of the WTO have agreed in the *Agreement on Safeguards* that Members may suspend their trade concessions temporarily by applying import restrictions as safeguard measures if certain prerequisites are met. These prerequisites are set forth in Article XIX of the GATT 1994, dealing with "Emergency Action on Imports of Particular Products", and in the *Agreement on Safeguards*, which, by its terms, clarifies and reinforces the disciplines of Article XIX. Together, Article XIX and the *Agreement on Safeguards* confirm the right of WTO Members to apply safeguard measures when, as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. However, as Article 2.1 of the *Agreement on Safeguards* makes clear, the right to apply such measures arises "*only*" if these prerequisites are shown to exist.

265. In this case, we will address the issues raised on appeal with respect to the ten safeguard measures applied by the United States to imports of certain steel products, in the following order:

(a) whether the Panel erred in finding that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation demonstrating that unforeseen developments resulted in increased imports causing serious injury to the domestic producers of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire;

(b) whether the Panel erred in finding that the United States acted inconsistently with Articles 2.1 and 3.1 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation of how the facts supported its determinations that imports of CCFRS, tin mill products, hot-rolled bar, stainless steel rod and stainless steel wire increased;

(c) whether the Panel erred in finding that the United States acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation establishing explicitly that imports from sources not excluded from the scope of the measure satisfy, *alone*, the conditions required for the application of safeguard measures on imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire;

(d) whether the Panel erred in finding that the United States acted inconsistently with Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation demonstrating the existence of a causal link between increased imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, and stainless steel wire, and serious injury or threat of serious injury to the relevant domestic industry;

(e) whether the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the GATT 1994 and the *Agreement on Safeguards*; and

(f) whether the Panel acted inconsistently with Article 12.7 of the DSU by failing to provide the "basic rationale" behind certain of its findings and conclusions.

266. There are also some conditional appeals the consideration of which depends upon our findings on some of the issues otherwise raised in this appeal. We will address them in the following order:

(a) if we reverse "sufficient of the Panel's findings"[161] to undermine the conclusion that the safeguard measures were "deprived of a legal basis"[162]:

  (i) whether the United States acted inconsistently with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* by failing to define properly the imported product, the like product, and the domestic industry with respect to the product groups covered by the safeguard measures;

  (ii) whether the United States acted inconsistently with Article 5.1 of the *Agreement on Safeguards* by imposing safeguard measures beyond the extent necessary to remedy or prevent serious injury and to facilitate adjustment;

  (iii) whether the United States acted inconsistently with Articles 3.1 and 9.1 of the *Agreement on Safeguards* by using the rules of its Generalised System of Preferences to identify developing country Members, and by failing to provide a reasoned and adequate explanation as to why China did not qualify for the exemption under Article 9.1;

(b) if we reverse an aspect of any of the Panel's findings on CCFRS, or if we conclude that the Panel should have made a finding on the correct definition of the like product with respect to CCFRS, whether the United States acted inconsistently with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* by failing to define properly the like product with respect to CCFRS;

(c) if we uphold or modify the Panel's findings on causation, whether we should complete the analysis with respect to causation, and determine whether the United States failed to ensure that its safeguard measures are limited to the extent necessary

[161]China's other appellant's submission, para. 3; European Communities' other appellant's submission, para. 6; New Zealand's other appellant's submission, para. 1.1; Norway's other appellant's submission, para. 3; Switzerland's other appellant's submission, para. 3.

[162]Panel Reports, para. 10.705.

to remedy or prevent serious injury and to facilitate adjustment as required by Article 5.1 of the *Agreement on Safeguards*;

(d) if we reverse the Panel's findings on increased imports and causation, whether the safeguard measures are limited to the extent necessary to remedy or prevent serious injury and to facilitate adjustment and, therefore, comply with Article 5 of the *Agreement on Safeguards*.

267. In response to our questioning at the oral hearing, all parties agreed that this dispute concerns only the *specific* safeguard measures as applied by the United States. Consequently, there is no United States law, regulation, or methodology that is challenged, *as such*, in this dispute.

268. Before turning to the substantive issues, we note that an *amicus curiae* brief was received from an industry association, the American Institute for International Steel, in the course of this appeal. As we mentioned earlier[163], the European Communities inquired by letter of 23 September 2003 whether we would accept the brief and take it into account, and Brazil requested by letter of 24 September 2003 that we disregard the brief. At the oral hearing, Brazil requested that we disregard the brief "for legal and systemic concerns".[164] Likewise, Mexico stated at the oral hearing that it opposed the acceptance of the *amicus curiae* brief.[165] Cuba and Thailand agreed with Brazil and Mexico that the *amicus curiae* brief should be disregarded.[166] We note that the brief was directed primarily to a question that was not part of any of the claims. We did not find the brief to be of assistance in deciding this appeal.

V. Unforeseen Developments and Article 3.1 of the *Agreement on Safeguards*

269. The United States appeals the Panel's finding that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* because the USITC failed to demonstrate, through a reasoned and adequate explanation, that "unforeseen developments"[167] had *resulted* in increased imports of *each of the products* on which the United States imposed safeguard measures on 20 March 2002. In examining this issue on appeal, we are mindful of the precise scope of the issue before us. We observe that the United States' appeal does not raise the issue whether the "unforeseen developments" identified as such by the United States—that is, "the Russian crisis, the Asian crisis and the continued strength of the United States' market together with the persistent appreciation of the US dollar"[168] as well as the "confluence"[169] of those events—actually amounted to "unforeseen developments" within the meaning of Article XIX:1(a). In

[163] *Supra*, paras. 9–10.

[164] Brazil's statement at the oral hearing.

[165] Mexico's statement at the oral hearing.

[166] Cuba's and Thailand's statements at the oral hearing.

[167] We use the term "unforeseen developments" as shorthand to describe the prerequisites set forth in the first clause of Article XIX:1(a) of the GATT 1994, that is, "[i]f, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions".

[168] Panel Reports, para. 10.72.

[169] *Ibid.*

response to our questions at the oral hearing, none of the participants disagreed with this formulation of the issue before us.[170]

270. Our analysis examines, first, the arguments advanced by the United States that relate to the Panel's identification and application of the appropriate standard of review for claims arising under Article XIX:1(a) of the GATT 1994. Secondly, we examine the appropriate interpretation of Article 3.1 of the *Agreement on Safeguards*, both in general terms and, in particular, as it relates to "unforeseen developments". Thirdly, we examine whether Article XIX:1(a) of the GATT 1994 requires a demonstration that "unforeseen developments" *resulted* in increased imports for *each specific* safeguard measure at issue. Finally, we look at whether the Panel was "required" to consider data to which the USITC referred in certain parts of the USITC report, other than those dealing with "unforeseen developments", to support the USITC's finding that "unforeseen developments" had *resulted* in increased imports.

271. We will examine separately, in another section of this Report, the United States' claim that the Panel acted inconsistently with its obligation under Article 12.7 of the DSU by failing to provide the "basic rationale behind [its] findings and recommendations" as they relate to "unforeseen developments".

272. This said, we turn first to examine the United States' claim concerning the appropriate standard of review for claims arising under Article XIX:1(a) of the GATT.

A. *Appropriate Standard of Review for Claims Under Article XIX:1(a) of the GATT 1994*

273. At the outset of its analysis, the Panel considered the standard of review that was appropriate for the examination of the claims made by the Complaining Parties relating to "unforeseen developments". After citing our Reports in *Argentina – Footwear (EC)* and in *US – Lamb*, the Panel articulated the standard in the following terms:

> … the role of this Panel in the present dispute is not to conduct a *de novo* review of the USITC's determination. Rather, the Panel must examine whether the United States respected the provisions of Article XIX of GATT 1994 and of the Agreement on Safeguards, including Article 3.1. As further developed below, the Panel must examine whether the United States demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers.

[170] At the oral hearing, the European Communities requested, however, that, should we reverse the Panel's finding that the USITC failed to demonstrate, through a reasoned and adequate explanation, that "unforeseen developments" resulted in increased imports of each of the relevant products on which the United States imposed safeguard measures, we address other arguments that were raised by the Complaining Parties before the Panel concerning "unforeseen developments". The European Communities refers, for instance, to its argument that "unforeseen developments" that occurred several years ago and may have caused increased imports then but the effects of which have now ceased, cannot be considered as "unforeseen developments" justifying the imposition of safeguard measures. (European Communities' appellee's submission, para. 84)

> In considering whether the United States demonstrated as a matter of fact that unforeseen developments resulted in increased imports causing serious injury, the Panel will also examine, in application of its standard of review, whether the competent authorities "considered all the relevant facts and had adequately explained how the facts supported the determinations that were made. [171] (underlining added; footnotes omitted)

The United States objects to the Panel's reliance on this standard, and argues that, in applying this standard to examine the USITC's conclusions on "unforeseen developments", the Panel "failed to take into account the differences between the unforeseen developments requirement and the Article 2 and 4 conditions for applying a safeguard measure". [172]

274. The United States asserts that we made clear in *Korea – Dairy*, *Argentina – Footwear (EC)*, and *US – Lamb* that the "unforeseen developments" language of Article XIX:1(a) constitutes a "distinct obligation [that] is different from obligations" [173] under Articles 2 and 4 of the *Agreement on Safeguards*. The United States maintains that the Panel "paid no heed" [174] to these differences when it relied on statements in *Argentina – Footwear (EC)* and in *US – Lamb* on the standard of review applicable to Article 4 of the *Agreement on Safeguards*. [175] According to the United States, "the standard adopted by the Panel … mistakenly reflects concerns relevant to Article 4.2, and disregards concerns relevant to the 'unforeseen developments' requirement under Article XIX:1(a)." [176] The United States thus argues that the "reasoned and adequate explanation test" is "inappropriate" for claims arising under Article XIX of the GATT 1994. [177]

275. We explained in *Argentina – Footwear (EC)* that Article XIX of the GATT 1994 and the *Agreement on Safeguards* "relate to the same thing, namely the application by Members of safeguard measures". [178] We also indicated there our agreement with the statement by the panel in that case that "Article XIX of GATT and the Safeguards Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction." [179] In our view, this inseparable relationship between Article XIX of the GATT 1994 and the *Agreement on*

[171] Panel Reports, paras. 10.38–10.39.

[172] United States' appellant's submission, para 15. We note that the United States' challenge is to the Panel's *application* of the relevant standard of review. The United States is not, therefore, alleging that the standard of review, as articulated by the Panel, was, in itself, incorrect. The United States confirmed this understanding in response to questioning at the oral hearing. In addition, the United States stated—for instance, in paragraph 54 of its appellant's submission—that the "Panel correctly noted in its standard of review section that the Appellate Body has found 'that a panel must assess whether a reasoned and adequate explanation has been provided as to how the facts support the determination.'" In paragraph 55 of its appellant's submission, the United States further stated that "the Panel also emphasized correctly that with regard to Articles 2, 3, and 4 and Article XIX, 'the role of the Panel is to 'review' determinations and demonstrations made and reported by an investigating authority,' and not to be the initial fact finder." (footnote omitted)

[173] United States' appellant's submission, para. 77.

[174] *Ibid.*, para. 78.

[175] *Ibid.*, paras. 78–79.

[176] *Ibid.*, para. 78.

[177] United States' response to questioning at the oral hearing.

[178] Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

[179] *Ibid.* (original emphasis)

Safeguards suggests that the United States' call for a different and separate standard of review for Article XIX is unfounded.

276. We explained in *US – Lamb*, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*, that the competent authorities must provide a "*reasoned and adequate explanation* of how the facts support their determination". [180] More recently, in *US – Line Pipe*, in the context of a claim under Article 4.2(b) of the *Agreement on Safeguards*, we said that the competent authorities must, similarly, provide a "*reasoned and adequate explanation*, that injury caused by factors other than increased imports is not attributed to increased imports". [181] Our findings in those cases did not purport to address *solely* the standard of review that is appropriate for claims arising under Article 4.2 of the *Agreement on Safeguards*. We see no reason not to apply the same standard generally to the obligations under the *Agreement on Safeguards* as well as to the obligations in Article XIX of the GATT 1994.

277. Moreover, as we said in *US – Lamb*, the existence of "unforeseen developments" is a "pertinent issue of fact and law" under Article 3.1, and "it follows that the published report of the competent authorities, under that Article, must contain a 'finding' or 'reasoned conclusion' on unforeseen developments." [182] Thus, the Panel in the current dispute correctly noted that "the circumstances of unforeseen developments within the meaning of Article XIX:1(a) of GATT 1994 must be demonstrated as a matter of *fact*, together with the conditions mentioned in Article 2.1 of the Agreement on Safeguards, in the report of the competent authority and before a safeguard measure can be applied." [183]

278. In any event, the objection of the United States to the Panel's requirement that competent authorities provide a "reasoned and adequate explanation" for their findings on "unforeseen developments" cannot be reconciled with the obligations of a panel under Article 11 of the DSU, which requires a panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". As we said in *Argentina – Footwear (EC)*:

> … for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels. The only exception is the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, in which a specific provision, Article 17.6, sets out a special standard of review for disputes arising under that Agreement. [184]

279. We do not see how a panel could examine objectively the consistency of a determination with Article XIX of the GATT 1994 if the competent authority had not set out an explanation supporting its conclusions on "unforeseen developments". Indeed, to enable a panel to determine whether there was compliance with the prerequisites that must be demonstrated before the application of a safeguard measure, the competent authority must provide a "reasoned and adequate explanation" of how the

[180] Appellate Body Report, *US – Lamb*, para. 103. (original emphasis)

[181] Appellate Body Report, *US – Line Pipe*, para. 217. (emphasis added)

[182] Appellate Body Report, *US – Lamb*, para. 76.

[183] Panel Reports, para. 10.37. (original emphasis; footnote omitted)

[184] Appellate Body Report, *Argentina – Footwear (EC)*, para. 118.

facts support its determination for those prerequisites, including "unforeseen developments" under Article XIX:1(a) of the GATT 1994.

280. For these reasons, we find that the Panel applied the proper standard of review in determining how it should assess the matter before it under Article XIX of the GATT 1994.

281. We turn next to examine the United States' arguments under Article 3.1 of the *Agreement on Safeguards*.[185]

B. *Article 3.1 of the Agreement on Safeguards*

282. Article 3.1 of the *Agreement on Safeguards* provides, in relevant part, that:

> The competent authorities shall publish a report setting forth their findings and *reasoned* conclusions reached on all pertinent issues of fact and law. (emphasis added)

283. To begin, we note that the United States sets out its arguments concerning Article 3.1 in Section III of its appellant's submission, which is entitled "General Errors in the Panel's Findings Under Article 3.1 of the Agreement on Safeguards".[186] Thus, the United States' argument concerning the correct interpretation of Article 3.1 of the *Agreement on Safeguards* is not confined to the Panel's findings on "unforeseen developments". Indeed, we note that the Panel, in addition to finding that the United States acted inconsistently with Article 3.1 with respect to the determination by the competent authority of "unforeseen developments"[187], also found that certain of the USITC's findings on increased imports and causation were inconsistent with Article 3.1.[188]

284. We begin our analysis with an examination of the interpretation by the United States of Article 3.1, last sentence, which underlies its submissions regarding the Panel's alleged errors under Article 3.1. The United States argues that "the key consideration [under Article 3.1 of the *Agreement on Safeguards*] is whether the authorities present a logical basis for their conclusion."[189] According to the United States, "the Safeguards Agreement does not explicitly require an 'explanation'."[190] The

[185]The United States refers in its arguments also to the requirement contained in Article 4.2(c) of the *Agreement on Safeguards* for competent authorities to provide a "detailed analysis of the case" and "a demonstration of the relevance of the factors examined." The United States notes, however, that the Panel found that "Article 4.2(c) was not extensively addressed by the parties as a discrete basis for violation", and, accordingly, the Panel "d[id] not consider that an additional reference to Article 4.2(c) in relation to the Panel's findings on increased imports and causation would enhance the complainants' rights." (United States' appellant's submission, footnote 15 to para. 54, referring to Panel Reports, paras. 9.31–9.32).

[186]In addition to addressing findings that the Panel made in the context of its analysis of "unforeseen developments" (United States' appellant's submission, paras. 58–63), the United States also suggests that the Panel's conclusions on "increased imports" are inconsistent with Article 3.1 in that the Panel required the competent authority to do more than to "present a logical basis for [its] conclusions". (United States' appellant's submission, paras. 59–60)

[187]Panel Reports, paras. 10.150 and 11.2.

[188]*Ibid.*, paras. 10.200, 10.262, 10.419, 10.422, 10.445, 10.469, 10.487, 10.503, 10.536, 10.569, 10.573, and 11.2.

[189]United States' appellant's submission, para. 60.

[190]*Ibid.*, para. 59.

United States rather argues that Article 3.1 of the *Agreement on Safeguards* "implies an explanation only in requiring 'reasoned conclusions on all pertinent issues of fact and law'."[191] To support its interpretation, the United States submits that the "ordinary meaning of the verb 'reason' is to '[t]hink in a connected or logical manner; use one's reason in forming conclusions ... [a]rrange the thought of in a logical manner, embody reason in; express in a logical form.'"[192]

285. As we understand it, this is the basis for the United States argument that Article 3.1 requires a competent authority to present a "logical basis" for its determination in its published report. The United States did not explain what it meant by a "logical basis" in its written submissions. However, in response to our questioning at the oral hearing, the United States clarified that a "logical basis describes the underpinning to the conclusion."[193] The United States affirmed, further, in the oral hearing, that the United States sees it as possible to have "a 'reasoned conclusion' without a 'reasoned and adequate explanation'."[194]

286. We have misgivings about the approach of the United States to ascertaining the meaning of the last sentence of Article 3.1. The requirement of Article 3.1 is that "competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." The meaning of Article 3.1 must be established through an examination of the ordinary meaning of the terms of Article 3.1, read in their context and in the light of the object and purpose of the *Agreement on Safeguards*.[195] Thus, instead of basing an interpretation of Article 3.1—as the United States does—entirely on the meaning of *one* word—"reasoned"—in that provision, it is, in our view, appropriate to interpret Article 3.1 by examining the ordinary meaning of *all* of the words that together prescribe the relevant obligation in that Article.

287. In doing so, we note that the definition of "conclusion" is "the result of a discussion or an examination of an issue" or a "judgement or statement arrived at by reasoning: an inference; a deduction".[196] Thus, the "conclusion" required by Article 3.1 is a "judgement or statement arrived at by reasoning". We further note that the word "reasoned", which the United States defines in terms of the verb "to reason", is, in fact, used in Article 3.1, last sentence, as an adjective to qualify the term "conclusion". The relevant definition of the intransitive verb "to reason" is "to think in a connected or logical manner; use one's reason in forming conclusions".[197] The definition of the transitive verb "to reason" is "to arrange the thought of in a logical manner, embody reason in; express in a logical form".[198] Thus, to be a "reasoned" conclusion, the "judgement or statement" must be one which is reached in a connected or logical manner or expressed in a logical form. Article 3.1 further requires that competent authorities must "set forth" the "reasoned conclusion" in their report. The definition of the phrase "set forth" is "give an account of, esp. in order, distinctly, or in detail; expound, relate,

[191]*Ibid.*, para. 60.

[192]United States' appellant's submission, para. 60. The United States refers to the definition of "reason" in the *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol.II, pp. 2495-2496.

[193]United States' response to questioning at the oral hearing.

[194]*Ibid.*

[195]Article 3.2 of the DSU; Article 31 of the *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[196]*Shorter Oxford English Dictionary*, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 477.

[197]*Shorter Oxford English Dictionary*, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2482.

[198]*Ibid.*

narrate, state, describe".[199] Thus, the competent authorities are required by Article 3.1, last sentence, to "give an account of" a "judgement or statement which is reached in a connected or logical manner or expressed in a logical form", "distinctly, or in detail."

288. Panels have a responsibility in WTO dispute settlement to assess whether a competent authority has complied with its obligation under Article 3.1 of the *Agreement on Safeguards* to "set forth" "findings and reasoned conclusions" for their determinations. The European Communities and Norway argue that panels could not fulfill this responsibility if they were left to "deduce for themselves" from the report of that competent authority the "rationale for the determinations from the facts and data contained in the report of the competent authority."[200] We agree.

289. We note further, as context, that Article 4.2(c) of the *Agreement on Safeguards* requires the competent authorities to:

> ... publish promptly, *in accordance with the provisions of Article 3*, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. (emphasis added)

We observe that this requirement is expressed as being "in accordance with" Article 3, and not "in addition" thereto. Thus, we see Article 4.2(c) as an elaboration of the requirement set out in Article 3.1, last sentence, to provide a "reasoned conclusion" in a published report.

290. The United States argued at the oral hearing that "Article 4.2(c) does not apply to the competent authorities' demonstration of unforeseen developments"[201] under Article XIX:1(a) of the GATT 1994. We disagree. Article 4.2(c) is an elaboration of Article 3; moreover "unforeseen developments" under Article XIX:1(a) of the GATT 1994 is one of the "pertinent issues of fact and law" to which the last sentence of Article 3.1 refers. It follows that Article 4.2(c) also applies to the competent authorities' demonstration of "unforeseen developments" under Article XIX:1(a).

291. For these reasons, we conclude that the "present[ation of] a logical basis"[202] as understood by the United States, for the conclusions of the competent authorities, does not fulfill the requirements of Article 3.1, last sentence. They must "set forth" a "reasoned conclusion".

292. We turn now to address the arguments the United States advances, under Article 3.1, that relate to the Panel's findings on "unforeseen developments".

293. The Panel stated that "[t]he nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation [relating to unforeseen developments], its extent and its quality are all factors that can affect whether [that] explanation is reasoned and adequate."[203] According to the United States, there is no basis in the *Agreement on Safeguards* "for

[199] *Ibid.*, p. 2773.

[200] European Communities' appellee's submission, para. 48; Norway's appellee's submission, para 75.

[201] United States' response to questioning at the oral hearing.

[202] United States' appellant's submission, para. 60.

[203] Panel Reports, para. 10.115.

finding that 'timing' or 'extent' are relevant to whether the competent authorities' explanations are reasoned and adequate."[204]

294. As we see it, the United States appears to equate the word "extent" to the word "length" with a view to implying that the Panel would have required that the competent authority's explanation be of a certain length.[205] Based on our understanding of the relevant section of the Panel Reports, the Panel required no such thing. Rather than requiring that the USITC provide a "longer" explanation, the Panel was, in our view, simply stating that the USITC had not provided a reasoned and adequate explanation of how the "unforeseen developments" resulted in increased imports of the products on which the United States imposed the safeguard measures. In other words, the Panel was merely requiring that the competent authorities—to use our clarification of the requirement in Article 3.1—"give an account of" a "judgement or statement which is reached in a connected or logical manner or expressed in a logical form" on *unforeseen developments* "distinctly, or in detail".

295. The United States further argues that the *Agreement on Safeguards* "do[es] not obligate the competent authorities to present their report in any particular form."[206] As we see it, the United States understands the Panel to have imposed such a requirement by finding that "the USITC failed to provide a reasoned and adequate explanation because the USITC Report did not cite specifically to data or reasoning in another section of the report that supported a particular conclusion."[207] Although we agree with the United States that competent authorities "may choose any structure, any order of analysis, and any format for [the] explanation that they see fit, as long as the report complies"[208] with Article 3.1, we do not agree that the Panel was requiring that a report be in a certain form. Again, the Panel was assessing whether the USITC had provided a reasoned and adequate explanation of how the facts supported the USITC's determination, and was not requiring that the explanation of facts be provided in any particular form in the report.

296. We see no error in the Panel's approach. In our view, it is consistent with our understanding of Article 3.1, last sentence. Further, the Panel's approach is in line with the standard of review for panels that we discussed earlier. As we said in *US – Line Pipe* and in *US – Lamb*, competent authorities must provide a "reasoned and adequate explanation" of how the facts support their determination.[209] In *US – Line Pipe*, we found, further, in clarifying the obligations of WTO Members under the *Agreement on Safeguards*, that:

> … the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely

[204] United States' appellant's submission, para. 58.

[205] *Ibid.*, paras. 60–61.

[206] United States' appellant's submission, para. 65.

[207] *Ibid.*, para. 66.

[208] *Ibid.*, para. 67.

[209] Appellate Body Report, *US – Line Pipe*, para. 217, in the context of a claim under Article 4.2(b) of the *Agreement on Safeguards*; Appellate Body Report, *US – Lamb*, para. 103, in the context of a claim under Article 4.2(a) of the *Agreement on Safeguards*.

imply or suggest an explanation. It must be a straightforward explanation in express terms.[210]

297. This was a clarification of the obligation under Article 4.2(b), last sentence, of the *Agreement on Safeguards*. However, as we mentioned earlier, our articulation of this standard of review should not be read as limited to claims under Article 4 of the *Agreement on Safeguards*. Thus, to the extent that the Panel looked for a "reasoned and adequate explanation" that was "explicit" in the sense that it was "clear and unambiguous" and "did not merely imply or suggest an explanation", the Panel was, in our view, correctly articulating the appropriate standard of review to be applied in assessing compliance with Article XIX of the GATT 1994 and the *Agreement on Safeguards*.

298. It bears repeating that a panel will not be in a position to assess objectively, as it is required to do under Article 11 of the DSU, whether there has been compliance with the prerequisites that must be present before a safeguard measure can be applied, if a competent authority is not required to provide a "reasoned and adequate explanation" of how the facts support its determination of those prerequisites, including "unforeseen developments" under Article XIX:1(a) of the GATT 1994. A panel must not be left to *wonder* why a safeguard measure has been applied.

299. It is precisely by "setting forth findings and reasoned conclusions on all pertinent issues of fact and law", under Article 3.1, and by providing "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined", under Article 4.2(c), that competent authorities provide panels with the basis to "make an objective assessment of the matter before it" in accordance with Article 11. As we have said before, a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities.[211] Therefore, the "reasoned conclusions" and "detailed analysis" as well as "a demonstration of the relevance of the factors examined" that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. This is all the more reason why they must be made explicit by a competent authority.

300. In the final analysis, the United States seems to agree with this approach. The United States argues that the *Agreement on Safeguards* does not require an "explanation" and does not employ the terms "adequate" and "explicit". All the same, the United States acknowledges that those terms can be understood as "a shorthand" for the obligations that "*are* in the Agreement", that is, that the published report of the competent authorities must, pursuant to Article 3.1, contain "reasoned conclusions" on "all pertinent issues of fact and law" and, under Article 4.2(c), it must also contain "a detailed analysis of the case", including "a demonstration of the relevance of the factors examined."[212]

301. We turn now to the United States' argument that, since "the Panel based many of its findings against the United States on its conclusions that the USITC Report failed to provide a 'reasoned and adequate explanation' of certain findings"[213], it follows that there can only be a violation of Article 3.1, and not also of Articles 2 and 4 of the *Agreement on Safeguards*. The United States adds

[210]Appellate Body Report, *US – Line Pipe*, para. 217.

[211]Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

[212]United States' appellant's submission, paras. 59 and 64, and footnote 29 to para. 62, referring to the obligations set out in Articles 3.1 and 4.2(c) of the *Agreement on Safeguards*. (original emphasis)

[213]United States' appellant's submission, para. 73.

that a failure to explain a finding does not automatically prove that the USITC had not performed the analysis necessary to make the finding.[214]

302. We recall again our earlier statements on the appropriate standard of review for panels in disputes that arise under the *Agreement on Safeguards*. When the Panel found that the USITC report failed to provide a "reasoned and adequate explanation" of certain findings, the Panel was assessing compliance with the obligations contained in Articles 2 and 4 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. As we said in *US – Lamb*, "[i]f a panel concludes that competent authorities, in a particular case, have not provided a reasoned or adequate explanation for their determination … [that] panel has … reached a conclusion that the determination is inconsistent with the specific requirements of [the relevant provision] of the *Agreement on Safeguards*."[215] Thus, we do not agree with the United States that the lack of a reasoned and adequate explanation does not imply a violation of Articles 2 and 4 of the *Agreement on Safeguards*.

303. Moreover, we cannot accept the United States' interpretation that a failure to explain a finding does not support the conclusion that the USITC "did not actually *perform* the analysis correctly, thereby breaching Article 2.1, 4.2, or 4.2(b) [of the *Agreement on Safeguards*]".[216] As we stated above, because a panel may not conduct a *de novo* review of the evidence before the competent authority, it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance with the requirements of Article XIX of the GATT 1994 and of Articles 2 and 4 of the *Agreement on Safeguards*. It may well be that, as the United States argues, the competent authorities have performed the appropriate analysis correctly. However, where a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled by that competent authority. Thus, in such a situation, the panel has no option but to find that the competent authority has not performed the analysis correctly.

304. In sum, Members may suspend trade concessions temporarily by applying safeguard measures "*only*" in accordance with Article XIX of the GATT 1994 and with the *Agreement on Safeguards*, including Article 3.1 of that Agreement. The last sentence of the latter provision, as elaborated by Article 4.2(c) of that Agreement, requires that:

(a) the "competent authorities … publish a report";

(b) the report contain "a detailed analysis of the case";

(c) the report "demonstrat[e] … the relevance of the factors examined";

(d) the report "set[ ] forth findings and reasoned conclusions"; and

(e) the "findings and reasoned conclusions" cover "all pertinent issues of fact and law" prescribed in Article XIX of the GATT 1994 and the relevant provisions of the *Agreement on Safeguards*.

[214]*Ibid.*, para. 74.

[215]Appellate Body Report, *US – Lamb*, para. 107.

[216]United States' appellant's submission, para. 73. (original emphasis)

305. We examine next the United States' claim that the Panel erred in requiring a demonstration of "unforeseen developments" for each of the safeguard measures at issue.

C. *Is it Necessary to Demonstrate for Each Safeguard Measure at Issue that Unforeseen Developments Resulted in Increased Imports?*

306. The Panel found that, because Article XIX of the GATT 1994 requires a demonstration that "unforeseen developments" have *resulted* in "increased imports", the report of the investigating authorities must "contain *specific* factual demonstrations of unforeseen developments identified to have resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers for each safeguard measure at issue."[217]

307. It is useful to set out the relevant reasoning and findings of the Panel on this issue before analyzing the argument made by the United States. The Panel found first that:

> … at no point in the initial USITC Report is the issue of "unforeseen developments" *per se* mentioned, except, as the complainants have pointed out, in a footnote in the separate view of one commissioner explaining that although such a demonstration is required in WTO law, it is not required by US law. There is otherwise no discussion of the effects of unforeseen developments for the specific safeguard measures at issue.[218] (footnote omitted)

308. Turning to the Second Supplementary Report provided by the USITC, the Panel observed that "the USITC insists on the *overall effects* of the Asian and Russian financial crisis together with the strong US dollar and economy to displace steel to other markets."[219] The Panel found that "although it describes a plausible set of unforeseen developments that may have resulted in increased imports to the United States from various sources, it falls short of demonstrating that such developments actually resulted in increased imports into the United States causing serious injury to the relevant domestic producers."[220]

309. The Panel went on to find that, even if, as the USITC had found, "large volumes of foreign steel production were displaced from foreign consumption,"[221] this did not, in itself, imply that imports *to the United States* increased as a result of "unforeseen developments". The Panel further found that "the USITC did not provide any data to support its general assertion that the confluence of unforeseen developments resulted in the *specific* increased imports at issue in this dispute,"[222] and agreed with the Complaining Parties that "the USITC's explanation relates to steel production in general and does not describe how the unforeseen developments resulted in increased imports in respect of the *specific* steel products at issue."[223]

[217]Panel Reports, para. 10.44 (original emphasis; underlining added).

[218]Panel Reports, para. 10.116.

[219]*Ibid.*, para. 10.121. (original emphasis)

[220]Panel Reports, para. 10.122.

[221]*Ibid.*, para. 10.123.

[222]*Ibid.*, para. 10.125. (original emphasis; underlining added)

[223]Panel Reports, para. 10.126. (original emphasis)

310. The Panel noted also that the United States referred, in its first written submission to the Panel, "to parts of the USITC Report, which contain footnote references to tables that show imports by country and by product for the entire period of investigation."[224] The Panel found that, although "these tables contained data that *could* have been used to explain how unforeseen developments resulted in increased imports that caused injury … the competent authority did no such thing."[225] The Panel added that "[i]n fact, the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came."[226] On that basis, the Panel concluded that:

> … the explanation provided by the USITC [on] how unforeseen developments resulted in increased imports causing serious injury is not reasoned and adequate. Moreover, it is not supported by relevant data and it does not demonstrate, as a matter of fact, that such unforeseen developments resulted in increased imports into the United States of the *specific* steel products that are the subject of the safeguard measures at issue.[227] (emphasis added)

311. The Panel found, therefore, that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had *resulted* in increased imports of the *specific* steel products subject to the safeguard measure at issue.[228]

312. The United States objects to this finding by arguing that Article XIX does not specify a particular type of analysis, nor does it require any differentiation by the competent authority of the impact of various "unforeseen developments" on *each* product that is subject to the relevant safeguard measures. The United States submits that "[t]o perform such an analysis, the competent authorities would have to identify the effects of each unforeseen development on subsequent increases in imports of a product"[229] and thus "obligate the competent authorities to evaluate unforeseen developments in the same way as imports themselves".[230] According to the United States, this is "manifestly incorrect" because "[w]hile Article XIX:1(a) requires that increased imports be a 'result of' unforeseen developments, in contrast, it requires that those imports 'cause' serious injury."[231]

[224]Panel Reports, para. 10.133.

[225]*Ibid.* (emphasis added)

[226]Panel Reports, para. 10.133.

[227]*Ibid.*, para. 10.135.

[228]*Ibid.*, paras. 10.148, 10.150 and 11.2.

[229]United States' appellant's submission, para. 81.

[230]*Ibid.*

[231]*Ibid.*

313. In considering this argument, we turn first to the text of Article XIX:1(a):

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (underlining added)

314. The term "such product" in Article XIX:1(a) refers to the product that may be subject to a safeguard measure. That product is, necessarily, *the product* that "is being imported in such increased quantities". Read in its entirety, Article XIX:1(a) clearly requires that safeguard measures be applied to the product that "is being imported in such increased quantities", and that those "increased quantities" are being imported "as a result" of "unforeseen developments".

315. Turning to the term "as a result of" that is also found in Article XIX:1(a), we note that the ordinary meaning of "result" is, as defined in the dictionary, "an effect, issue, or outcome *from* some action, process or design".[232] The increased imports to which this provision refers must therefore be an "effect, or outcome" of the "unforeseen developments". Put differently, the "unforeseen developments" must "result" in increased imports of the product ("such product") that is subject to a safeguard measure.

316. It is evident, therefore, that not just any development that is "unforeseen" will do. To trigger the right to apply a safeguard measure, the development must be such as to *result* in increased imports of *the product* ("such product") that is subject to the safeguard measure. Moreover, *any* product, as Article XIX:1(a) provides, may, potentially, be subject to that safeguard measure, provided that the alleged "unforeseen developments" *result* in increased imports of that *specific product* ("such product"). We, therefore, agree with the Panel that, with respect to the specific products subject to the respective determinations, the competent authorities are required by Article XIX:1(a) of the GATT 1994 to demonstrate that the "unforeseen developments identified … have resulted in increased imports [of the specific products subject to] … each safeguard measure at issue."[233]

317. We find further support for this conclusion in our rulings in *Argentina – Footwear (EC)* and in *Korea – Dairy*. In those appeals, we characterized the term "as a result of" as implying that there should be a "logical connection" between "unforeseen developments" and the conditions set forth in the second clause of Article XIX:1(a). We found that there must be:

[232] *Shorter Oxford English Dictionary*, 5th ed. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. II, p. 2555.

[233] Panel Reports, para. 10.44. (underlining added) In the same vein, we further note that, as China argues in paragraph 49 of its appellee's submission, the USTR had, in fact, asked the USITC in its letter dated 3 January 2002, to identify "for each affirmative determination … any unforeseen developments that led to the relevant steel products being imported into the United States in such increased quantities as to be a substantial cause of serious injury." (Letter of the USTR to the USITC dated 3 January 2002, question 1). (underlining added)

> … a logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – and the conditions [regarding increased imports] set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure.[234]

318. There must, therefore, be a "logical connection" linking the "unforeseen developments" and an increase in imports of the product that is causing, or threatening to cause, serious injury. Without such a "logical connection" between the "unforeseen developments" and *the product* on which safeguard measures may be applied, it could not be determined, as Article XIX:1(a) requires, that the increased imports of "such product" were "a result of" the relevant "unforeseen development". Consequently, the right to apply a safeguard measure to *that product* would not arise.

319. For this reason, when an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that "unforeseen developments" resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase and did not result from the "unforeseen developments" at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of "unforeseen developments" must be performed for *each* product subject to a safeguard measure.[235]

320. The United States suggests that:

> [t]he Panel may have felt that the ITC ought to have issued multiple demonstrations [of unforeseen developments], specific to each product subject to a separate measure, but that did not mean that the Panel could make an across-the-board dismissal of the "plausible" explanation that the ITC provided.[236]

321. However, the Panel did not make an "across-the-board dismissal" of the USITC's "plausible explanations" regarding "unforeseen developments", as the United States claims. Rather, the Panel Reports reveal that the Panel considered whether the "unforeseen developments", on which the

[234] Appellate Body Report, *Argentina – Footwear (EC)*, para. 92; Appellate Body Report, *Korea – Dairy*, para. 85.

[235] We note that the United States also alleges that the Panel "mistakenly indicated that a competent authority had to 'differentiate the impact' of various unforeseen developments on the individual industries and even economies of other countries." (United States' appellant's submission, para. 85, referring to Panel Reports, paras. 10.127–10.128). Based on our review of the Panel Reports, we do not understand the Panel to have imposed such a requirement. Instead, as we see it, the Panel merely observed, in paragraph 10.127, that the Asian and Russian crises affected some countries more than others, to support its view that the USITC was required to "explain how the increased imports of the specific steel products subject to the investigation *were linked to and resulted from* the confluence of unforeseen developments." (emphasis added) Previously, in paragraph 10.123 of the Panel Reports, the Panel had stated that "even if 'large volumes of foreign steel production were displaced from foreign consumption', this [did] not, in itself, imply that *imports to the United States* increased as a result of unforeseen developments." (emphasis added)

[236] United States' appellant's submission, para. 83.

USITC's determination relied, resulted in increased imports of the products on which the safeguard measures at issue were applied. The Panel found that the USITC Second Supplementary Report[237] "falls short"[238] in its explanation of how the Asian and Russian financial crises together with the strong United States dollar and economy resulted in increased imports into the United States. The Panel also said that the USITC failed to draw necessary links between market displacements and increased imports to the United States.[239] Furthermore, the Panel pointed out where supporting discussion and data were lacking.[240] The Panel also stated that the USITC's explanation was faulty because it referred to steel production in general and because the explanation did not address how the "unforeseen developments" resulted in increased imports in respect of the specific steel products at issue.[241] In sum, the Panel was of the view that "the complexity of the unforeseen developments pointed to by USITC called for a more elaborate demonstration and supporting data than that provided by the USITC."[242]

322. We also agree with the European Communities that "[i]n the present case where the ITC relied upon macroeconomic events having effects across a number of industries, it was for the ITC to demonstrate the 'logical connection' between the alleged unforeseen development[s] and the increase in imports in relation to each measure, not for the Panel to read into the report linkages that the ITC failed to make."[243] Consequently, we do not find error in the Panel's finding that the USITC was required to provide a reasoned and adequate explanation demonstrating that the alleged "unforeseen developments" resulted in increased imports for *each* product subject to a safeguard measure.

323. Moreover, since the USITC did not provide a "reasoned conclusion" that the "unforeseen developments" resulted in increased imports for each specific safeguard measure at issue, we find no error in the Panel's conclusions, in paragraph 10.150 and the relevant sections of paragraph 11.2 of the Panel Reports, that the application of each of those safeguard measures was inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*.

D. *Alleged Failure by the Panel to "Link" Certain Data to the USITC's Demonstration of how "Unforeseen Developments" Resulted in Increased Imports*

324. Before the Panel, the United States argued that there were data to support the USITC's finding that "unforeseen developments" had resulted in increased imports of the relevant products which "extended beyond consumption data for the most severely affected countries in south east Asia and production and consumption data for the former USSR republics".[244] The United States referred, *inter alia*, to the section of the USITC report dealing with increased imports, which contains footnote

[237]It will be recalled that the issue of whether the relevant "unforeseen developments" resulted in increased imports of the products on which the safeguard measures were applied was not addressed in the initial USITC report.

[238]Panel Reports, para. 10.122.

[239]*Ibid.*, 10.123, 10.127 and 10.131.

[240]*Ibid.*, paras. 10.124–10.125, 10.130–10.131 and 10.145.

[241]Panel Reports, paras. 10.126 and 10.128.

[242]*Ibid.*, para. 10.145.

[243]European Communities' appellee's submission, para. 97.

[244]Panel Reports, para. 10.132. (footnote omitted)

references to tables that show imports by country and by product for the entire period of investigation.[245]

325. As we mentioned earlier, the Panel found that those "tables contained data that *could* have been used to explain how unforeseen developments resulted in increased imports … However, the competent authority did no such thing."[246] The Panel explained that "the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came."[247] The United States acknowledges that the USITC itself did not cite these data in connection with its demonstration of "unforeseen developments", but, nevertheless, it argues that the Panel "was *required* to consider [those data] in evaluating whether the unforeseen developments finding was consistent with Article 3.1 [of the *Agreement on Safeguards*]".[248]

326. Article 3.1 of the *Agreement on Safeguards* requires that the competent authority set out "reasoned conclusions" on all "pertinent issues of fact and law". One of those "issues of law" is the requirement to demonstrate the existence of "unforeseen developments" that have resulted in increased imports causing serious injury. In our view, therefore, it was for the USITC to provide a "reasoned conclusion" on "unforeseen developments". A "reasoned conclusion" is not one where the conclusion does not even refer to the facts that may support that conclusion. As the United States itself acknowledges, "Article 3.1 thus assigns the competent authorities—not the panel—the obligation to 'publish a report setting forth *their* findings and reasoned conclusions reached on all pertinent issues of fact and law.'"[249] A competent authority has an obligation under Article 3.1 to provide reasoned conclusions; it is not for panels to find support for such conclusions by cobbling together disjointed references scattered throughout a competent authority's report.

327. The United States argues that our findings in *EC – Tube or Pipe Fittings* support its view that the Panel was "required" to consider the relevant data to which the USITC refers in other sections of the USITC report to support the USITC's finding that "unforeseen developments" had resulted in increased imports. The United States explains that "[i]n that dispute, the report of the investigating authority failed to mention one of the factors specifically listed in the Antidumping Agreement at all in its discussion."[250] In that dispute, according to the United States, despite that omission, "the Appellate Body determined, by virtue of a close reading of the remainder of the report, that the investigating authority had in fact 'considered' the enumerated factor."[251] The United States concludes from this that "[i]f this is a permissible analysis of whether the necessary evaluation was

[245]According to footnote 5009 under paragraph 10.133 of the Panel Reports, the sections of the USITC Report which the United States brought to the attention of the Panel were "pp. 65-66 (CCFRS), 99-100 (hot-rolled bar), 107-108 (cold-finished bar), 115-116 (rebar), 168-170 (certain welded pipe), 178-180 (FFTJ), 213-214 (stainless steel bar), 222-223 (stainless steel rod), 259-260 (stainless steel wire, Commissioner Koplan), 303-305 (carbon flat products and stainless steel wire and wire rope, Commissioner Bragg), 309-310 (tin mill products, Commissioner Miller), 347 (stainless steel wire and wire rope, Commissioner Devaney)."

[246]Panel Reports, para. 10.133. (emphasis added)

[247]Panel Reports, para. 10.133.

[248]United States' appellant's submission, para. 92. (original emphasis)

[249]*Ibid.*, para. 55. (original emphasis)

[250]United States' appellant's submission, para. 93.

[251]*Ibid.*, referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 161–163.

performed by national authorities, then the ITC's reliance on data tables actually referenced in the Report (although not in the unforeseen development section) is surely also permissible."[252]

328. The issue in *EC – Tube or Pipe Fittings* was not the obligation contained in Article 3.1 of the *Agreement on Safeguards*. The issue there was, as the United States explains, whether a particular injury factor listed in Article 3.4 of the *Anti-Dumping Agreement* "ha[d] been evaluated, even though a separate record of the evaluation of that factor ha[d] not been made."[253] We found in that appeal that "under the particular facts of [that] case, it was reasonable for the Panel to have concluded that the [competent authorities had] addressed and evaluated"[254] the relevant factor.

329. Unlike the United States, we do not see the two cases as the same. The issue in this case is not whether certain data referred to in the USITC report had, in fact, been "considered" by the USITC. The USITC may indeed have "considered" all the relevant data contained in its report or referred to in the footnotes thereto. However, it did not use those data to *explain* how "unforeseen developments" resulted in increased imports. Rather, as the Panel found, "the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came."[255] Hence, what is wanting here is not the data, but the reasoning that uses those data to support the conclusion. The USITC did not, in our view, provide a conclusion that is supported by facts and reasoning, in short, a "reasoned conclusion", as required by Article 3.1. Moreover, as we have stated previously, it was for the USITC, and not the Panel, to provide "reasoned conclusions". It is not for the Panel to do the reasoning for, or instead of, the competent authority, but rather to assess the adequacy of that reasoning to satisfy the relevant requirement. In consequence, we cannot agree with the United States that the Panel was "required" to consider the relevant data to which the USITC referred in other sections of its report to support the USITC's finding that "unforeseen developments" had resulted in increased imports; and, for the reasons mentioned, we do not see how our findings in *EC – Tube or Pipe Fittings* support the United States' view to that effect.

330. We, therefore, uphold the Panel's findings, in paragraph 10.150 and the relevant sections of paragraph 11.2 of the Panel Reports, that the ten safeguard measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* because the USITC's report failed to demonstrate, through a reasoned and adequate explanation, that "unforeseen developments" had resulted in increased imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire, causing serious injury to the relevant domestic producers.[256]

VI. Increased Imports

331. As we stated at the outset, under Article 2.1 of the *Agreement on Safeguards*, safeguard measures can be justified "*only*" when, as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. It is "*only*" if these prerequisites set

[252]United States' appellant's submission, para. 93.

[253]Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.

[254]*Ibid.*

[255]Panel Reports, para. 10.133.

[256]Panel Reports, paras. 10.150 and 11.2.

forth in Article XIX:1(a) of the GATT 1994 and the *Agreement on Safeguards* are shown to exist that the right to apply a safeguard measure arises. The fulfilment of each of these prerequisites is a "pertinent issue[ ] of fact and law" for which "finding[s] and reasoned conclusion[s]" must be included in the published report of the competent authorities, as required by Article 3.1 of the *Agreement on Safeguards*. With this in mind, we consider next the Panel's findings relating to one of these prerequisites, namely, the existence of "increased imports".[257]

332. The United States appeals the Panel's finding that the USITC failed to provide a reasoned and adequate explanation of how the facts supported its findings that imports of CCFRS, stainless steel rod, hot-rolled bar, tin mill products, and stainless steel wire "increased" within the meaning of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*.[258]

333. With respect to the first three product categories—CCFRS, hot-rolled bar and stainless steel rod—the United States challenges two aspects of the Panel's findings. First, the United States challenges the Panel's general interpretation of the requirement relating to increased imports in Article 2.1 of the *Agreement on Safeguards*. Secondly, the United States argues that the Panel "erred in its analysis of the import data" for those three product categories.[259]

334. With respect to the other two product categories—tin mill products and stainless steel wire—the United States takes issue with the Panel's finding that the USITC failed to provide a reasoned and adequate explanation because the USITC based its determinations on two sets of explanations which, according to the Panel, could not be reconciled.[260]

335. We will deal with these separate claims in turn, and will first address the Panel's findings with respect to CCFRS, hot-rolled bar, and stainless steel rod.

A. *CCFRS, Hot-Rolled Bar, and Stainless Steel Rod*

336. As we explained previously, with respect to CCFRS, hot-rolled bar, and stainless steel rod, the United States challenges two aspects of the Panel's findings. We examine first the United States' argument concerning the appropriate legal standard to be used to determine whether the requirement in Article 2.1 of the *Agreement on Safeguards* relating to "increased imports" has been met.

[257]We use the term "increased imports" as shorthand to describe the prerequisite set forth in Article XIX:1(a) of the GATT 1994 and in Article 2.1 of the *Agreement on Safeguards*, i.e., a product is being imported "in such *increased* quantities, absolute or relative to domestic production". (emphasis added)

[258]United States' appellant's submission, para. 97. The Panel found that the USITC report contained an adequate and reasoned explanation of how the facts support the determination made with respect to "increased imports" of cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar.

[259]United States' appellant's submission, para. 98.

[260]See Panel Reports, paras. 10.200 and 10.262.

1. Legal Standard to be Used for Determining Whether there are "Increased Imports"

337. Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* read as follows:

GATT 1994

Article XIX

Emergency Action on Imports of Particular Products

> 1. *(a)* If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (underlining added)

Agreement on Safeguards

Article 2

Conditions

> 1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. (footnote omitted; underlining added)

338. The Panel found that the use of the present tense in the phrase "is being imported" in both Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* "indicates that it is necessary for the competent authorities to examine recent imports and that the increase in imports was 'recent'."[261] The Panel also found that "increased imports must be 'sudden'"[262] because of the "unforeseen and unexpected character of the developments resulting in the increased imports as well as the emergency nature of safeguard measures".[263]

[261]Panel Reports, para. 10.159.

[262]*Ibid.*, para. 10.166.

[263]Panel Reports, para. 10.166.

339. The Panel agreed with the finding of a previous panel that since Article 2.1 of the *Agreement on Safeguards* speaks of a product that "is being imported … in such increased quantities"[264], it follows, therefore, that imports need not be increasing at the time of the determination. Instead, the requirement is only that "imports *have* increased, if the products continue 'being imported' in (such) increased quantities."[265] The Panel then considered whether a *decrease* in imports at the end of the period of investigation could, in an individual case, prevent a finding of increased imports in the sense of Article 2.1 of the *Agreement on Safeguards*. The Panel observed that this would "depend on whether, despite the later decrease, a previous increase nevertheless results in the product (still) 'being imported in (such) increased quantities'."[266] In that evaluation, according to the Panel, "factors that must be taken into account are the duration and the degree of the decrease at the end of the relevant period of investigation, as well as the nature, for instance the sharpness and the extent, of the increase that intervened beforehand."[267]

340. The Panel also referred to our findings in *Argentina – Footwear (EC)* that the "competent authorities are required to consider the *trends* in imports over the period of investigation,"[268] and that "the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough … to cause or threaten to cause 'serious injury'".[269] The Panel then concluded that "a finding that imports have increased pursuant to Article 2.1 can be made when an increase evidences a certain degree of recentness, suddenness, sharpness and significance."[270] In saying this, the Panel emphasized "that there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1 of the Agreement on Safeguards"[271], but added that one cannot conclude "that any increase between any two identified points in time meets the requirements of Article 2.1 of the Agreement on Safeguards."[272]

341. The United States contends that the Panel erred in finding that "the determination that imports have increased pursuant to Article 2.1 can be made only when an increase evidences a certain degree of recentness, suddenness, sharpness and significance."[273] According to the United States, this standard has no basis in Article 2.1 or anywhere else in the text of the *Agreement on Safeguards*. The United States posits that our statement in *Argentina – Footwear (EC)* that the "increase in imports must have been recent enough, sudden enough, sharp enough and significant enough … to cause or threaten to cause serious injury"[274], was a statement about "the entire investigative responsibility of

[264]*Ibid.*, para. 10.162. (underlining added)

[265]Panel Reports, para. 10.162. (original emphasis) This aspect of the Panel Reports was not appealed.

[266]Panel Reports, para. 10.163.

[267]*Ibid.*

[268]*Ibid.*, para. 10.165, referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 129. (original emphasis)

[269]Panel Reports, para. 10.167, referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

[270]Panel Reports, para. 10.167.

[271]Panel Reports, para. 10.168. (original emphasis)

[272]Panel Reports, para. 10.168.

[273]United States' appellant's submission, para. 100, referring to paragraph 10.167 of the Panel Reports. The United States does not quote the Panel's finding accurately. The Panel, in fact, concluded in paragraph 10.167 of the Panel Reports "that a finding that imports have increased pursuant to Article 2.1 can be made when an increase evidences a certain degree of recentness, suddenness, sharpness and significance." The word "only" does not appear in the Panel's conclusion.

[274]Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

the competent authorities under the Safeguards Agreement"[275], and that "whether an increase in imports has been recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities … proceed with the remainder of their analysis (i.e., with their consideration of serious injury/threat and causation)."[276] The analysis of these questions need not, therefore, according to the United States, form part of the evaluation of the issue of whether imports have "increased". Rather, the United States contends that "the phrase 'in such increased quantities' simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time."[277]

342. In reply, and in contrast, China, the European Communities, Korea, New Zealand, and Norway argue that the United States is, in effect, asking us to find that "any increase is sufficient" to satisfy the requirement in Article 2.1 of the *Agreement on Safeguards*.[278] The European Communities quotes, in this respect, a passage from the USITC report where it is stated that, for United States domestic purposes, there "is no minimum quantity by which imports must have increased" and "a simple increase is sufficient."[279]

343. The Complaining Parties argue also that, in order to constitute "increased imports" within the meaning of Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*, those increased imports must be "recent" and "sudden"[280]; the European Communities and Norway also argue that the increased imports must be "extraordinary" and "abnormal".[281]

344. As a consequence, we must examine whether there is any *threshold*—qualitative or quantitative—to allow a finding by a competent authority on the existence of "such increased quantities" within the meaning of Article XIX:1(a) and Article 2.1, or whether, as the United States argues, the requirement is "that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time."[282]

345. We examined essentially the same issue in *Argentina –Footwear (EC)* and found there that:

> … the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be "*such* increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".[283] (original emphasis; underlining added; footnotes omitted)

[275]United States' appellant's submission, para. 107.

[276]*Ibid.*

[277]*Ibid.*, para. 102.

[278]China's appellee's submission, para. 102; European Communities' appellee's submission, para. 135; Korea's appellee's submission, paras. 6 and 69; New Zealand's appellee's submission, paras. 1.14 and 5.11; Norway's appellee's submission, paras. 19 and 162.

[279]European Communities' appellee's submission, para. 135, referring to USITC Report, Vol. I, p. 278.

[280]Brazil's appellee's submission, paras. 38 and 41; China's appellee's submission, para. 96; European Communities' appellee's submission, paras. 128 and 130; Japan's appellee's submission, paras. 42 and 46; Korea's appellee's submission, para. 73; New Zealand's appellee's submission, para. 5.5; Norway's appellee's submission, para. 145; Switzerland's appellee's submission, paras. 93 and 97.

[281]European Communities' appellee's submission, para. 140; Norway's appellee's submission, para. 158.

[282]United States' appellant's submission, para. 102.

346. We reaffirm this finding. In that appeal, we underlined the importance of reading the requirement of "such increased quantities" in the context in which it appears in both Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards*. That context includes the words "to cause or threaten to cause serious injury". Read in context, it is apparent that "there must be 'such increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure."[284] Indeed, in our view, the term "such", which appears in the phrase "such increased quantities" in Articles XIX:1(a) and 2.1, clearly links the relevant increased imports to their ability to cause serious injury or the threat thereof. Accordingly, we agree with the United States that our statement in *Argentina – Footwear (EC)* that the "increase in imports must have been recent enough, sudden enough, sharp enough and significant enough … to cause or threaten to cause serious injury"[285], was a statement about "the entire investigative responsibility of the competent authorities under the Safeguards Agreement"[286], and that "[w]hether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities proceed with the remainder of their analysis (i.e., their consideration of serious injury/threat and causation)."[287]

347. We have observed previously that "the title of Article XIX is: 'Emergency Action on Imports of Particular Products"[288], and that the "words 'emergency action' also appear in Article 11.1(a) of the *Agreement on Safeguards*".[289] Because safeguard measures are "emergency actions", we have noted as well that "when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."[290] The requirement relating to "increased imports" in Articles XIX:1(a) and 2.1 must, therefore, be read in the context of the "extraordinary nature" of the "emergency action" that is authorized by Article XIX:1(a) of the GATT 1994. Even so, the fact that safeguard actions are "emergency actions", and that the prerequisites for taking such actions should therefore be construed while taking into account the "extraordinary nature" of safeguard measures, does not imply that the prerequisites for taking such actions, *in and of themselves*, must necessarily be "abnormal" or

[283]Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

[284]Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

[285]*Ibid.*

[286]United States' appellant's submission, para. 107.

[287]*Ibid.*

[288]Appellate Body Report, *Argentina – Footwear (EC)*, para. 93.

[289]*Ibid.*

[290]*Ibid.*, para. 94.

"extraordinary". The question is one of the "conditions" under which "such" increased quantities of imports occur.

348. In this respect, we note that, contrary to what the European Communities and Norway assert[291], in the single GATT 1947 case that involved Article XIX—the *US – Fur Felt Hats* case—the Working Party did *not* find that increased imports must be "abnormal", *in and of themselves*, to be "increased imports" for purposes of Article XIX. Instead, the Working Party in that case found that:

> There should be an abnormal development in the imports of the product in question *in the sense that*:
>
> (i) the product in question must be imported in increased quantities;
>
> (ii) the increased imports must be the result of unforeseen developments and of the effect of tariff concessions;
>
> (iii) the imports must enter in such increased quantities and under such conditions as to cause or threaten to cause serious injury. (emphasis added)

349. That 1951 Working Party, therefore, used the word "abnormal" to describe the overall conditions under which the increased quantities of imports must occur. The Working Party found that the relevant "development in imports" must be abnormal precisely because the increased quantities of imports, by the very terms of Article XIX:1(a), are "as a result of unforeseen developments and of the effect of tariff concessions" and enter "in such increased quantities and under such conditions as to cause or threaten to cause serious injury."

350. In a similar vein, we said in *Argentina – Footwear (EC)* that "the increased quantities of imports should have been 'unforeseen' or 'unexpected'."[292] In doing so, we were referring to the fact that the increased imports must, under Article XIX:1(a), result from "unforeseen developments" in order to justify the application of a safeguard measure. Because the "increased imports" must be "as a result" of an event that was "unforeseen" or "unexpected", it follows that the increased imports must also be "unforeseen" or "unexpected". Thus, the "extraordinary nature" of the domestic response to increased imports does not depend on the absolute or relative quantities of the product being imported. Rather, it depends on the fact that the increased imports were unforeseen or unexpected.

351. We further note that Article XIX:1(a) of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* require that the relevant product "is being imported in such increased quantities *and under such conditions* as to cause or threaten to cause serious injury". The question whether "such increased quantities" of imports will suffice as "increased imports" to justify the application of a safeguard measure is a question that can be answered only in the light of "such conditions" under which those imports occur. The relevant importance of these elements varies from case to case.

[291]European Communities' appellee's submission, para. 140; Norway's appellee's submission, para. 158.

[292]Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

352. We turn next to examine the United States' argument that, as "the words recent, sudden, sharp or significant"[293] do not appear in Article 2.1, "the phrase 'in such increased quantities' simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time."[294]

353. Article 4.2 of the *Agreement on Safeguards* elaborates on the prerequisites for the application of a safeguard measure that are set out in Article 2.1.[295] Article 4.2(a) provides context for interpreting the meaning of the requirement relating to increased imports in Article 2.1. Article 4.2(a) provides, in relevant part, that:

> In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate…the rate and amount of the increase in imports of the product concerned in absolute and relative terms … . (underlining added)

354. We concluded in *Argentina – Footwear (EC)* that "the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a)."[296] A determination of whether there is an increase in imports cannot, therefore, be made merely by comparing the end points of the period of investigation. Indeed, in cases where an examination does not demonstrate, for instance, a clear and uninterrupted upward trend in import volumes, a simple end-point-to-end-point analysis could easily be manipulated to lead to different results, depending on the choice of end points. A comparison could support either a finding of an increase or a decrease in import volumes simply by choosing different starting and ending points.

355. For instance, if the starting point for the period of investigation were set at a time when import levels were particularly low, it would be more likely that an increase in import volumes could be demonstrated. The use of the phrase "such increased quantities" in Articles XIX:1(a) and 2.1, and the requirement in Article 4.2 to assess the "rate and amount" of the increase, make it abundantly clear, however, that such a comparison of end points will *not* suffice to demonstrate that a product "is being imported in such increased quantities" within the meaning of Article 2.1. Thus, a demonstration of "any increase" in imports between any two points in time is not sufficient to demonstrate "increased imports" for purposes of Articles XIX and 2.1. Rather, as we have said, competent authorities are required to examine the trends in imports over the entire period of investigation.[297]

356. We, therefore, reject the United States' assertion that "the phrase 'in such increased quantities' simply states the requirement that, in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time."[298] We note,

[293]United States' appellant's submission, para. 101.

[294]*Ibid.*, para. 102.

[295]Appellate Body Report, *US – Line Pipe*, para. 181, quoting *US – Wheat Gluten*, para. 98.

[296]Appellate Body Report, *Argentina – Footwear (EC)*, para. 129. (original emphasis; underlining added)

[297]Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

[298]United States' appellant's submission, para. 102.

however, that the United States clarified at the oral hearing that it agrees that an examination of trends is required for the purpose of determining whether there are increased imports under Articles XIX and 2.1, and with this we agree.[299]

357. As we explained above[300], the United States argues that the Panel erred in requiring that "a finding that imports have increased … can be made *only* when an increase evidences a certain degree of recentness, suddenness, sharpness and significance."[301] We understand that the United States is submitting in essence that, in so finding, the Panel established an absolute standard in the abstract, applicable irrespective of the facts of the case.[302]

358. In considering whether the Panel did establish such an absolute standard, we observe[303] that the word "only", although used by the United States in challenging the Panel on this point, is not contained in the Panel's relevant finding. Moreover, based on our review of the Panel's reasoning, we do not understand the Panel to have articulated any absolute standard, in the abstract, for determining whether imports have increased within the meaning of Article XIX:1(a) and Article 2.1. Rather, the Panel explicitly, and pointedly, agreed "with the United States that there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1"[304] of the *Agreement on Safeguards*. The Panel noted, however, that "from the absence of *absolute* standards one cannot conclude that there are no standards at all and that any increase between two identified points in time meets the requirements of Article 2.1".[305] The Panel then went on to "agree[ ] with the United States that the inquiry is not whether imports have increased 'recently and suddenly' *in the abstract*."[306] Instead, according to the Panel "[a] *concrete* evaluation is what is called for"[307] and, thus, a "competent authority must conduct an analysis considering all the features of the development of import quantities and that an increase in imports has a certain degree of being recent and sudden."[308] It seems to us, therefore, that the Panel did not find that the degree of "recentness, suddenness, sharpness and significance" had to be assessed by means of an absolute standard that, only if met, could warrant a finding of "increased imports".

359. What is more, the Panel further explained that:

> … a competent authority's findings on increased imports, distinct from its causality and injury findings, *may be informed by the results of its entire investigation*. The competent authority's findings on the first requirement – increased imports – may have effects on the injury findings or on the causation findings, as prescribed by Article 4.2(a). As a competent authority considers the other conditions necessary for imposition of a safeguard, it determines, as directed by the Appellate Body in *Argentina – Footwear (EC)*, whether the increase in imports was recent enough, sudden enough, and significant enough to cause or threaten serious injury to the relevant domestic producers.[309] (emphasis added)

[299]United States' response to questioning at the oral hearing.

[300]See *supra*, para. 341.

[301]United States' appellant's submission, para. 98, referring to Panel Reports, para. 10.167. (emphasis added)

[302]United States' response to questioning at the oral hearing.

[303]See *supra*, footnote 273 to paragraph 341.

[304]Panel Reports, para. 10.168. (original emphasis)

[305]*Ibid.*

[306]*Ibid.*

[307]*Ibid.*

[308]Panel Reports, para. 10.168.

360. In our view, this statement is further evidence that the Panel was of the view that the assessment of whether an increase is "recent enough, sudden enough, and significant enough to cause or threaten serious injury" is to be made *on a case-by-case basis* by the competent domestic authority—and is *not*, therefore, a determination that is made in the *abstract*. We agree.

361. For these reasons, we conclude that the Panel did not require, in the abstract, that "a finding that imports have increased … can be made [only] when an increase evidences a certain degree of recentness, suddenness, sharpness and significance."[310] Rather, in our view, the Panel correctly relied on our findings in *Argentina – Footwear (EC)*.

362. We turn next to examine the Panel's findings on increased imports of CCFRS, hot-rolled bar and stainless steel rod.[311]

2. Panel's Findings with Respect to CCFRS, Hot-Rolled Bar, and Stainless Steel Rod

363. As we noted above, the United States argues that the Panel "erred in its analysis of the import data for CCFRS, hot-rolled bar and stainless steel rod."[312] As the United States sees it, the Panel's finding that imports of those products did not "increase" for purposes of Article 2.1 of the *Agreement on Safeguards* resulted from the Panel's application of a legal standard that has no basis in Article 2.1 or anywhere else in the text of the *Agreement of Safeguards*, namely, that an increase in imports must evidence "a certain degree of recentness, suddenness, sharpness and significance."[313]

364. We have examined the Panel's interpretation of the general requirement related to "increased imports" in Article 2.1, and have concluded that we agree with the interpretation advanced by the Panel. We turn now to an examination of the United States' appeal as it relates specifically to "increased imports" of CCFRS, hot-rolled bar, and stainless steel rod in the light of that interpretation. We look first to the United States' arguments concerning CCFRS.

(a) CCFRS

365. With respect to "increased imports" of CCFRS, the Panel found that:

> … the USITC's determination on increased imports of CCFRS, as published in its report, does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC

[309]*Ibid.*, para. 10.171.

[310]Panel Reports, para. 10.167.

[311]United States' appellant's submission, para. 98.

[312]*Ibid.*

[313]*Ibid.*, para. 109.

> recognized that the sharpest increase took place in the period until 1998, and that, since then, imports have decreased, in 1999 and 2000, back to levels nearly as low as the 1996 level. The USITC also noted the significant decrease between interim 2000 and interim 2001 (from 11.5 to 6.9 million short tons), but it did not seem to focus on, or at least account for, this most recent trend in concluding that imports are "still significantly higher … than at the beginning of the period". Given the sharpness and significance of this most recent decrease the Panel does not find that the USITC explanation as published in its report contains an adequate and reasoned explanation of how the facts support the determination CCRFS "is being imported in … increased quantities".[314] (underlining added; footnotes omitted)

366. The United States argues that the Panel's conclusion that the USITC failed to provide a reasoned and adequate explanation of how the facts supported its finding that CCFRS was being imported "in such increased quantities" within the meaning of Article XIX:1(a) and Article 2.1 "rests in large measure on the Panel's determination that the ITC 'did not seem to focus on, or at least account' for the fact that there was a decrease in imports, on both an absolute and a relative basis, from interim 2000 to interim 2001."[315] According to the United States, the Panel gave the change between interim periods "dispositive weight",[316] although the actual requirement in Article XIX:1(a) and Article 2.1—as acknowledged by the Panel—is that "[any product] is being imported … in such increased quantities", and that, therefore, the "imports need not be increas*ing* at the time of the determination; what is necessary is that imports *have* increas*ed*, if the products continue 'being imported' in (such) increas*ed* quantities."[317]

367. We agree with the United States that Article 2.1 does *not* require that imports need to be increasing at the time of the determination. Rather, the plain meaning of the phrase "is being imported in such increased quantities" suggests merely that imports must *have* increased, and that the relevant products continue "being imported" in (such) increased quantities. We also do *not* believe that a decrease in imports at the end of the period of investigation would necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported "in such increased quantities."[318]

368. We do not agree, however, with the United States' assertion that the Panel's conclusion that there were no "increased imports" of CCFRS, for purposes of Article 2.1, is a result of the Panel giving "dispositive weight" to the decrease in imports that took place from interim 2000 to interim 2001. As we understand it, the Panel's conclusion was based on the Panel's finding that the USITC had not provided *a reasoned and adequate explanation* of how the facts supported its determination that CCFRS "is being imported in … such increased quantities". The reason why the

[314]Panel Reports, para. 10.181.

[315]United States' appellant's submission para. 111, referring to Panel Reports, paras. 10.181 and 10.183.

[316]United States' appellant's submission, para. 111.

[317]*Ibid.*, para. 112, referring to Panel Reports, para. 10.162. (original emphasis)

[318]We note that a decrease at the end of a period of investigation may, for instance, result from the seasonality of the relevant product, the timing of shipments, or importer concerns about the investigation. As we have said, the text of Article 2.1 does not necessarily prevent, in our view, a finding of "increased imports" in the face of such a decline.

Panel did not find the USITC's *explanation* to be "reasoned and adequate" was the magnitude of the decrease that occurred between interim 2000 and interim 2001 (from 11.5 to 6.9 million short tons). In the words of the Panel, the USITC "did not seem to focus on, or at least account for, [that decrease] … in concluding that imports are 'still significantly higher … than at the beginning of the period'".[319] In the absence of a reasoned and adequate explanation in the USITC report relating to the decrease in imports that occurred at the end of the period of investigation, the USITC could not be said to have adequately explained the existence of "such increased quantities" within the meaning of Article 2.1.

369. We also recall, once more, that "competent authorities are required to examine trends"[320] in imports. Because imports of CCFRS decreased from 1999, and did not recover, the Panel found that the USITC should have focused on, or at least accounted for, this most recent trend. The Panel found that the USITC did not do so, and concluded, therefore, that the USITC had not provided an explanation that CCFRS "is being imported in … such increased quantities". We see no legal error in this finding of the Panel.

370. The lack of a reasoned and adequate explanation relating to the decrease that occurred immediately before the USITC's determination is all the more significant, in our view, because the evidence of that decrease is arguably the most relevant of all the data gathered during the investigation, for purposes of assessing whether a product "*is being imported* in such increased quantities". We emphasized in *US – Lamb* "the relative importance, within the period of investigation, of the data from the end of the period, as compared with the data from the beginning of the period".[321] Once more, we do so here.

371. With respect to the timing of the "increased imports" of CCFRS, the Panel found that:

> It may well be that the increase occurring until 1998 could have qualified at the time as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards, but the Panel need not express itself on that point because that increase, in itself, was no longer recent enough at the time of the determination. In other words, the increase occurring until 1998, taken by itself and with the decrease thereafter, is not a sufficient factual basis for supporting a determination in October 2001 that CCFRS "is being imported in … increased quantities".[322] (underlining added)

372. The United States argues that the Panel erred in concluding that the increase in imports that occurred in 1998 "'was no longer recent enough at the time of the determination' to support a finding of increased imports"[323] although "the Panel itself recognized that there are no absolute standards as

[319]Panel Reports, para. 10.181. (footnotes omitted)

[320]Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

[321]Appellate Body Report, *US – Lamb*, footnote 88 to para. 138.

[322]Panel Reports, para. 10.182.

[323]United States' appellant's submission, para. 113, referring to Panel Reports, paras. 10.182 and 10.185.

regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1."[324]

373. Based on our review of the Panel's reasoning—in particular, the Panel's conclusions in paragraphs 10.167 – 10.171 of the Panel Reports, where the Panel states that "[a] *concrete* evaluation is called for"[325] and that "the inquiry is not whether imports have increased 'recently and suddenly' *in the abstract*"[326]—we do not understand the Panel to have meant, as the United States appears to suggest, that an increase in 1998 would not, *under any conditions*, have been recent enough to support a finding of increased imports. Instead, the Panel proceeds to explain that "[i]n other words, the increase occurring until 1998, *taken by itself and with the decrease thereafter*, is not a sufficient factual basis for supporting a determination in October 2001 that CCFRS 'is being imported in … increased quantities'."[327]

374. In our view, what is called for in every case is an *explanation* of how the *trend* in imports supports the competent authority's finding that the requirement of "such increased quantities" within the meaning of Articles XIX:1(a) and 2.1 has been fulfilled. It is this *explanation* concerning the *trend* in imports—over the entire period of investigation—that allows a competent authority to *demonstrate* that "a product is being imported in such increased quantities".

375. Finally, we note that the United States also argues that the USITC conducted a "concrete evaluation" of how the requirement relating to "increased imports" was met, and that that "evaluation" explains, according to the United States, "how the 1998 import surge had long-term effects that were still occurring at the time of the ITC's determination."[328] Unquestionably, the evaluation of the *effects* of increased imports must be appropriately assessed, where a competent authority examines causation and serious injury. We do not, however, see the relevance of such an analysis for purposes of determining whether "a product *is being imported* in such increased quantities".

376. Therefore, we *uphold* the Panel's conclusion, in paragraph 10.186 and the relevant section of paragraph 11.2 of the Panel Reports, that the application of the safeguard measure on CCFRS is inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*, because the United States failed to provide a reasoned and adequate explanation of how the facts support its determination with respect to "increased imports" of that product.

377. We examine next the USITC's findings on stainless steel rod.

(b) Stainless Steel Rod

378. The Panel found that:

[324]United States' appellant's submission, para. 113, referring to Panel Reports, para. 10.168. (original emphasis)

[325]Panel Reports, para. 10.168. (original emphasis)

[326]*Ibid.*

[327]Panel Reports, para. 10.182. (emphasis added)

[328]United States' appellant's submission, para. 114. The "analysis" that the United States refers to was undertaken by the USITC as part of its causation analysis and determination of serious injury, and not as part of its determination of "increased imports".

> … the USITC's determination on increased imports of stainless steel rod, as published in its Report, does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on the increase occurring between 1996 and 2000, with the largest increase from 1999 to 2000 (25%). The decline between interim 2000 and interim 2001 was acknowledged, but the USITC did not give an explanation why it nevertheless found that there was an increase of imports in absolute numbers. This failure is particularly serious since this decrease (by 31.3%) was sharper than the preceding increase, and, as a matter of proportion, offset the increase of the two preceding years.
>
> The only additional aspect adduced by the USITC in response to the decrease in interim 2001 was the nearly stable market share of imports. The market share, however, is the relative notion of imports *vis-à-vis* domestic sales, and is not related to absolute import volumes. In light of the decrease in the most recent period and the overall developments between 1996 and interim 2001 which can be best described as a double up-and-down movement (returning to the low point at the end), the Panel does not believe that the facts support a finding that, at the moment of the determination, stainless steel rod "is being imported in (such) increased quantities".
>
> It may well be that the increases occurring from 1996 to 1997, or from 1998 to 2000, taken by themselves, would qualify as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards. However, at the time of the determination, the trends of imports showed a significant recent decline, so that these past increases can no longer serve as the basis that stainless steel rod "is being imported in (such) increased quantities".[329] (underlining added; footnotes omitted)

379. With respect to stainless steel rod, the United States makes essentially the same arguments that it made with respect to the Panel's findings on increased imports of CCFRS. In particular, the United States alleges that the Panel "arbitrarily decided that the decline in the first six months of 2001 was more significant than the increase of the prior two years, without considering the different durations and magnitudes of the increases and decrease."[330] According to the United States, the Panel "thereby failed to place data for the end of the investigation period in the context of data from an earlier period."[331]

380. Again, based on our review of the Panel's reasoning, we do not find the Panel to have concluded that the USITC failed to provide a *reasoned and adequate explanation* because it had "arbitrarily decided that the decline in the first six months of 2001 was more significant than the increase of the prior two years".[332] Rather, we understand the Panel to have found that "the USITC

[329]Panel Reports, paras. 10.267–10.269.

[330]United States' appellant's submission, para. 136, referring to Panel Reports, para. 10.267.

[331]United States' appellant's submission, para. 136.

[332]*Ibid.*

did not give an explanation [of] why it nevertheless found that there was an increase of imports in absolute numbers"[333] *despite* the decline that occurred between interim 2000 and interim 2001. Instead of unduly relying on that decline, the Panel, in our view, correctly required that the decline be explained by the United States, particularly since it occurred at the end of the period of investigation and was, in the Panel's words, "sharper than the preceding increase, and, as a matter of proportion, offset the increase of the two preceding years."[334]

381. On stainless steel rod, the United States argues also that the Panel erred in rejecting "the ITC's reasoning as to why the decline in absolute imports in interim 2001 did not outweigh the increases of the previous two years."[335] According to the United States, "there was good reason to discount the significance of [that] decline in absolute imports … because the effect on the U.S. industry in terms of market share was essentially unchanged at the increased level of 1999-2000."[336] On this issue, the Panel found that "[t]he market share … is the relative notion of imports *vis-à-vis* domestic sales, and is not related to absolute import volumes."[337] On appeal, the United States argues that the USITC was "not equating market share with absolute import levels", but, rather, "it was evaluating the significance of the decline in absolute imports in interim 2001 in comparison to the increase in these imports in the previous two years."[338]

382. We do not see how this argument by the United States is relevant for purposes of a determination of whether a product "is being imported in such increased quantities" absolute or relative to *domestic production*. Obviously, "domestic production" and the domestic "market share" of the industry of the United States are not identical concepts.[339] In our view, the "share of the domestic market taken by increased imports" is a factor that is relevant under Article 4.2(a) of the *Agreement on Safeguards*, for purposes of examining whether increased imports have caused or are threatening to cause serious injury.

383. Accordingly, we *uphold* the Panel's conclusion, in paragraph 10.277 and the relevant section of paragraph 11.2 of the Panel Reports, that the application of the safeguard measure on stainless steel rod is inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*, because the United States failed to provide a reasoned and adequate explanation of how the facts support its determination with respect to "increased imports" of that product.

(c) Hot-Rolled Bar

384. With respect to hot-rolled bar, the Panel stated:

> … the USITC's determination on increased imports of hot-rolled bar, as published in its report, does not contain an adequate and reasoned explanation of how the facts support the determination. The USITC relied on the higher amount of imports in 2000 than in any previous year of the period examined and on the "rapid and dramatic increase" from 1999 to 2000. The decline between interim 2000 and 2001 was acknowledged, but the USITC did not give an explanation why it, nevertheless, found that there was an increase of imports in absolute numbers. It did so only with regard to imports relative to domestic production, a finding with which the Panel will deal separately.
>
> This failure to account for the most recent data from interim 2001, as far as absolute imports are concerned, is serious in the view of the Panel. The decrease from interim 2000 (1.34 million tons) to interim 2001 (952,392 tons) represented a decrease by 28.9%, whereas the increase in the year-to-year period before (1999 to 2000) that was characterized as "rapid and dramatic" was merely 11.9%. In light of this decrease in the most recent period, the Panel does not believe that the trend of imports from 1996 to 2000 (an increase by 52.5%) is sufficient to provide a basis for a finding that, at the moment of the determination, hot-rolled bar "is being imported in such increased quantities".
>
> In the Panel's view, the trend of absolute imports between 1997 and interim 2001 is best described as an alternation of increases and decreases from year to year. Given this up-and-down movement ending with a decrease of 28.9% (in interim 2001), the Panel does not believe that the facts support a conclusion of increased imports, nor has the USITC provided an explanation to that effect. The Panel acknowledges that, until 2000, there was a net increasing trend, in other words, the two increases in 1998 and 2000 were stronger than the decrease in 1999. However, the picture changes again significantly, when one includes the decrease (by 28.9%) in interim 2001, a fact that the USITC acknowledged, but did not evaluate. Taking into account all qualitative and quantitative features of the trends of imports over the period of examination, the Panel, therefore, finds that the USITC's determination on increased imports of hot-rolled bar, as published in its Report, does not contain a reasoned and adequate explanation of how the facts support a conclusion that hot-rolled bar "is being imported in such increased quantities."[340] (underlining added)

385. The United States appeals the Panel's findings with respect to increased imports of hot-rolled bar both in absolute terms and relative to domestic production.

(i) *Absolute imports*

386. As to absolute imports, the United States argues, in essence, that, in examining absolute levels of imports for hot-rolled bar, the Panel "placed too much reliance"[341] on the decrease from interim 2000 to interim 2001, and "improperly disregarded the nature and magnitude of preceding changes in

[333] Panel Reports, para. 10.267.

[334] *Ibid.*

[335] United States' appellant's submission, para. 137.

[336] *Ibid.*

[337] Panel Reports, para. 10.268.

[338] United States' appellant's submission, para. 137.

[339] This is, of course, because not all domestic production is necessarily traded in the domestic market.

[340] Panel Reports, paras. 10.204–10.206.

[341] United States' appellant's submission, heading III.C.3.c.

imports."[342] The argument advanced by the United States here is similar to the United States' argument on increased imports of CCFRS and stainless steel rod.

387. We do not agree with the United States that the Panel "placed too much reliance" on the figures for the most recent period of the investigation. Rather, based on our review of the Panel's reasoning, we understand the Panel to have concluded that the USITC did not provide *a reasoned and adequate explanation* of how the facts supported the USITC's finding concerning "increased imports", because the USITC did *not* address the relevance of the decrease that occurred at the end of the period of investigation in any way in its report. The Panel found, in particular, that "[t]he decline between interim 2000 and 2001 was acknowledged, but the USITC did not give an explanation why it, nevertheless, found that there was an increase of imports in absolute numbers."[343]

388. As we noted in the context of examining the United States' claim related to imports of CCFRS, we note here also that, in not explaining the "most recent decrease" in absolute imports, the USITC did *not*, in our view, provide an explanation concerning the overall *trend* in imports that occurred during the period of investigation. Again we recall that, in *Argentina – Footwear (EC)*, in clarifying the *Agreement on Safeguards*, we stated that "authorities are required to examine trends".[344] In our view, by failing to address the decrease in imports that occurred between interim 2000 and interim 2001, the United States did not—and could not—provide a reasoned and adequate explanation of how the facts supported its finding that imports of hot-rolled bar "increased", as required by Article 2.1 of the *Agreement on Safeguards*. This failure to account for the decrease in absolute imports is all the more serious in the light of the fact that the intervening trend that was not addressed by the USITC occurred at the very end of the period of investigation. In *US – Lamb*, we found that the competent authority "must assess" the data from the most recent past "in the context of the data for the entire investigative period".[345] As the Panel found, it is, precisely, those most recent data that the USITC failed to account for with respect to absolute imports.

389. Having examined the Panel's findings as they relate to imports in *absolute numbers*, we turn next to examine the Panel's findings concerning imports of hot-rolled bar *relative to domestic production*.

(ii) *Relative imports*

390. As to imports relative to domestic production, we recall once again that Article 2.1 provides that a Member may apply a safeguard measure after a determination that the relevant product is "being imported … in such increased quantities, absolute *or* relative to domestic production … as to cause or threaten to cause serious injury" (emphasis added). Therefore, a determination of either an absolute or relative increase in imports causing serious injury is sufficient to authorize a Member to apply safeguard measures. Accordingly, the increased imports requirement *can* be met not only if there is an absolute increase in imports, but also if there is an increase relative to domestic production.

[342] *Ibid.*, para. 127.

[343] Panel Reports, para. 10.204.

[344] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

[345] Appellate Body Report, *US – Lamb*, para. 138.

391. After reviewing the USITC's findings on absolute imports, the Panel examined the explanation provided by USITC with regard to *imports relative to domestic production*.[346] In assessing whether that explanation was reasoned and adequate, the Panel found that:

> The decline in imports in interim 2001 was acknowledged, but according to the USITC "the ratio of imports to US production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level."
>
> The Panel is not convinced by this statement and does not consider it to be a reasoned and adequate explanation supporting the determination of increased imports, given that the ratio of imports to domestic production in the most recent period, interim 2001 (24.6%), not only declined compared with full-year or interim 2000 (27.5% and 27.0% respectively) but was also lower than in 1999 (24.9%) and nearly as low as in 1998 (23.8%). Therefore the facts do not support a conclusion that hot-rolled bar "is being imported in such increased quantities, … relative to domestic production".[347]

392. Here, too, the United States challenges the Panel's interpretation, and advances essentially the same arguments that it does with respect to the Panel's findings on increased imports of hot-rolled bar in absolute terms. In particular, the United States argues that "[a]s with absolute imports, the Panel improperly disregarded the nature and magnitude of changes in relative imports preceding the first half of 2001,"[348] and "focused almost exclusively on a decline in imports in the first six months of 2001 as compared to the first six months of 2000."[349]

393. The Panel acknowledged that the USITC *had provided* an explanation in its report on imports relative to domestic production.[350] Thus, the issue here is *not* whether the USITC did, or did not, provide an "explanation" concerning the decrease that occurred at the end of the period of investigation. The issue here is the sufficiency of that "explanation". The Panel found that the explanation provided by the USITC was not reasoned and adequate because the "facts [did] not support a conclusion that hot-rolled bar 'is being imported in such increased quantities'".[351]

394. In reaching this conclusion, the Panel stated that it did not consider the statement of the USITC that "the ratio of imports to US production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level"[352] to be a reasoned and adequate explanation supporting the determination on increased imports. The Panel explained that this was because "the ratio of imports to domestic production in the most recent period, interim 2001 … not only declined compared with full-year or interim 2000 … but

[346] Panel Reports, para. 10.208.

[347] *Ibid.*, paras. 10.208–10.209.

[348] United States' appellant's submission, para. 130.

[349] *Ibid.*, para. 129.

[350] Panel Reports, para. 10.204.

[351] *Ibid.*, para. 10.209.

[352] Panel Reports, para. 10.208.

was also lower than in 1999 … and nearly as low as in 1998".[353] For these reasons, the Panel concluded that "the facts do not support a conclusion that hot-rolled bar 'is being imported in such increased quantities, … relative to domestic production.'"[354]

395. Based on the facts found by the Panel and in the Panel record, we have some misgivings about the Panel's assessment. As the Panel pointed out, the ratio of imports to domestic production was 18.4 per cent in 1997[355], and 27.5 per cent in 2000—the last full year included in the period of investigation. This represents an increase in 9.1 percentage points. Between interim 2000 and interim 2001, there was a decline in that ratio (2.4 percentage points, being the difference between 27 per cent for interim 2000 and 24.6 per cent for interim 2001). However, the ratio for interim 2001 was still 6.2 percentage points above that for 1997.

396. In addition, as we stated in *US – Lamb*, "data from the most recent past … must [be] assess[ed] in the context of the data for the entire investigative period".[356] In its appellant's submission, the United States points out that the ratio of imports to domestic production of hot-rolled bar increased by 43.23 per cent from 1996 to 2000, and "rose in three out of the four year-to-year comparisons, including a sizable increase from 1999 to 2000".[357] It appears to us that the decline in imports between interim 2000 and interim 2001—from 27 to 24.6 per cent of domestic production—is relatively modest when assessed in the context of the aforementioned 43.23 per cent increase, and *does not necessarily* detract from an overall determination by the USITC that the product is "being imported in such increased quantities".

397. We are not suggesting that a 43.23 per cent increase between 1996 and 2000 would be, in itself, sufficient to demonstrate "increased imports". The fact of this increase, in itself, does not prove that a product is being imported in "such" increased quantities in the sense of Articles XIX:1(a) and 2.1. As the Panel itself observed, "there are no absolute standards as regards *how* sudden, recent, and significant the increase must be in order to qualify as an 'increase' in the sense of Article 2.1."[358]

398. Our review of the facts suggests to us that they may well support the USITC's conclusion relating to increased imports. Thus, we do not necessarily share the Panel's conclusion about those facts. However, this is not the issue before us. The issue before us here is whether the USITC provided an explanation in its report on whether imports increased relative to domestic production. On that point, we agree with the Panel that the USITC did not explain why, despite the decline that occurred at the end of the period of investigation, the facts nevertheless supported a determination of "increased imports" within the meaning of Article 2.1.[359] Thus, we agree with the Panel, albeit for

[353] *Ibid.*, para. 10.209.

[354] *Ibid.*

[355] We note that the ratio of imports to domestic production was 19.2 per cent at the start of the period of investigation in 1996.

[356] Appellate Body Report, *US – Lamb*, para. 138.

[357] United States' appellant's submission, para. 128. That increase was from 24.9 per cent in 1999 to 27.5 per cent in 2000. (Panel Reports, para. 10.208)

[358] Panel Reports, para. 10.168. (original emphasis)

[359] The USITC report, in relevant part, states:

> As a ratio to U.S. production, imports declined from 19.2 percent in 1996 to 18.4 percent in 1997, but then rose to 23.8 percent in 1998, 24.9 percent in 1999, and 27.5 percent in 2000. The ratio was lower in interim 2001, at 24.6 percent, than in interim 2000, when it was 27.0 percent. Imports were higher, both in absolute terms and relative to U.S. production, in 2000 than in any prior year of the period examined and showed a rapid and dramatic increase from the previous year. While imports declined in the interim period comparison, the ratio of imports to U.S. production in interim 2001 was higher than that for the first three years of the period examined, and was only three-tenths of a percentage point below the 1999 level.

USITC Report, Vol. I, p. 92. (footnote omitted)

[360] Panel Reports, para. 10.192.

[361] *Ibid.*, para. 10.195. (emphasis added)

different reasons, that the USITC failed to provide a reasoned and adequate explanation of how the facts supported its determination.

399. Accordingly, we *uphold* the Panel's finding, in paragraph 10.210 and the relevant section of paragraph 11.2 of the Panel Reports, that the application of the safeguard measure on hot-rolled bar is inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*, because the United States failed to provide a reasoned and adequate explanation of how the facts support its determination with respect to "increased imports" of that product.

400. We now turn to the United States' appeal against the Panel's findings on tin mill products.

B. *Tin Mill Products and Stainless Steel Wire*

1. Tin Mill Products

401. The Panel also found that the USITC failed to provide a reasoned and adequate explanation for its determination that imports of tin mill products had increased. The Panel noted that the President of the United States "based his determination [with respect to tin mill products] on the findings of [ ] Commissioners [Bragg, Devaney, and Miller], although those three commissioners did not perform their analysis on the basis of the same like product definition".[360] The Panel went on to find that these findings "cannot be reconciled as a matter of their substance", because they were not based on an identically-defined like product; the Panel concluded that a WTO Member is not permitted, under Articles 2.1 and 3.1 of the *Agreement on Safeguards*, to "base a safeguard measure on a determination supported by a set of explanations each of which is different and impossible to reconcile with the other. Such findings cannot simultaneously form the basis of a determination."[361]

402. The Panel also said that:

> [T]he Panel sees no inconsistency with WTO law in the fact itself that only one commissioner reached affirmative findings with regard to tin mill products as a separate product.
>
> However, if a Member *relies* on the findings made by *three* Commissioners and the findings of those *three* Commissioners constitute the *determination* of the competent authorities in the sense of Article 2.1 of the Agreement on Safeguards, there is a requirement for those findings to provide a reasoned and adequate explanation. A reasoned and adequate explanation is not contained

> in a set of findings which *cannot* be reconciled one with another. [362]
> (original emphasis; underlining added)

403. The Panel distinguished the facts before it from the situation that was before us in *US – Line Pipe* by stating:

> The question in *US – Line Pipe* was whether a *determination* could leave open the question whether there was serious injury or threat of serious injury. From the perspective of the Agreement on Safeguards, the conditions of Article 2.1 are satisfied equally by serious injury and by threat of serious injury. The challenge was not that the *underlying report* was split and contained different reasonings that could not be reconciled one with another and that, therefore, there was a violation of Articles 2.1 and 3.1 of the Agreement on Safeguards. [363] (original emphasis)

404. The United States asks us to reverse the findings of the Panel concerning tin mill products. According to the United States, the Panel erred in requiring that the findings of each Commissioner or group of Commissioners be "reconciled". [364] The United States submits that findings based on different product groupings are not intrinsically irreconcilable. [365] Moreover, the United States argues that the "inconsistency" found by the Panel is of no legal relevance, and that the views of the three Commissioners represent alternative findings, which, according to the United States, are consistent with the *Agreement on Safeguards* "so long as the analysis of at least one of the decision makers satisfies the requirements of the Agreement". [366]

405. In our analysis of this issue, we will first briefly consider the structure and functioning of the USITC, as explained by the United States, and will then summarize the relevant findings and determinations of the individual Commissioners and of the USITC in this case; thereafter, we will analyze the merits of the United States' appeal of the Panel's findings.

406. As explained by the United States, the USITC is the United States' competent authority for purposes of the *Agreement on Safeguards*. The USITC is a body that usually consists of six Commissioners. In safeguard investigations, each of the six Commissioners makes an affirmative or negative finding *independently* of each other as to whether a product is being imported in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry. Each Commissioner—independently—defines the like or directly competitive product; the affirmative or negative vote of a majority of the Commissioners constitutes the overall institutional determination of the USITC. [367] If there is an equal number of affirmative and negative votes, the

[362] Panel Reports, paras. 10.198–10.199.

[363] Panel Reports, para. 10.196.

[364] United States' appellant's submission, para. 370.

[365] *Ibid.*, para. 372.

[366] *Ibid.*, para. 375.

[367] United States' appellant's submission, para. 359.

President of the United States decides which voting group constitutes the overall institutional determination of the USITC. [368]

407. In the present case, for tin mill products, the six Commissioners comprising the USITC did not all define the like or directly competitive product in the same way. Four Commissioners (Chairman Koplan, Vice Chairman Okun, as well as Commissioners Hillman and Miller) defined tin mill products as a distinct and separate product category, and set out their respective "views" [369] on the basis of this product category. [370] The remaining Commissioners (Commissioners Bragg and Devaney) did not consider tin mill products as a separate product category; rather, they considered tin mill products as part of the larger category of carbon and alloy flat products [371], and set out their respective "views" on the basis of this larger product category. [372]

408. Among the four Commissioners who had defined tin mill products as a distinct and separate product category, three reached a negative finding (Chairman Koplan, Vice Chairman Okun, and Commissioner Hillman) [373], and one reached an affirmative finding (Commissioner Miller). [374] Commissioners Bragg and Devaney reached an affirmative finding with respect to the larger product category of carbon and alloy flat products (including tin mill). [375]

409. At the oral hearing, the United States explained that "the USITC combined the results" of the views of Commissioners Bragg, Devaney, and Miller into a "single institutional determination"—an affirmative finding—on tin mill products. [376] In other words, the fact that two Commissioners considered products other than tin mill products when making their own independent findings did not affect the result with respect to tin mill products alone. The United States explained that this "single institutional determination" of the USITC on tin mill products is supported by the multiple different findings, or "views", of Commissioners Miller, Bragg, and Devaney. [377] The President of the United States chose this affirmative finding as the overall determination of the USITC, over the other "combined results" that reached a negative finding. [378] Accordingly, for purposes of WTO obligations, there is an affirmative determination made by the competent authority of the United States, the USITC, that tin mill products are being imported in such increased quantities and under

[368] *Ibid.*, footnote 469 to para. 359.

[369] At the oral hearing, the United States clarified that it viewed the term "determination" as the legal conclusion that increased imports are a cause of serious injury or threat thereof, and differentiated this term from the findings and reasoned conclusions of the individual decision-makers, which the United States prefers to call the "views" of those particular decision makers.

[370] USITC Report, Vol. I, pp. 71ff and 307ff.

[371] This product category encompasses CCFRS, tin mill, and GOES.

[372] See USITC Report, Vol. I, pp. 272–273 (Commissioner Bragg); USITC Report, Vol. I, footnote 65 on p. 36 (Commissioner Devaney).

[373] See USITC Report, Vol. I, pp. 71–78.

[374] See *ibid.*, pp. 307–309.

[375] See *ibid.*, pp. 279, 282–283, and 294–295 (Commissioner Bragg); and footnote 368 on p. 71 (Commissioner Devaney).

[376] See also *ibid.*, p. 25, and the United States' appellant's submission, para. 394.

[377] See also United States' appellant's submission, para. 394.

[378] As we explained earlier, because the USITC found that it was "equally divided" with respect to tin mill products, the decision whether the affirmative or rather the negative determination represented the institutional determination of the USITC rested with the President of the United States.

such conditions as to cause or threaten to cause serious injury to the domestic industry. This determination of the USITC is supported by the views of Commissioners Miller, Bragg, and Devaney; therefore, according to the United States, it is from the views of these three Commissioners that a panel, and we, must find a reasoned and adequate explanation for the USITC's determination.

410. Additionally, and before commencing our analysis, it may be helpful to observe that the issue before us concerns, not the domestic law of the United States, but rather the obligations of the United States *under the WTO Agreement*. As we stated in *US – Line Pipe*, what matters for purposes of WTO dispute settlement is whether the determination, irrespective of how it is decided domestically, meets the requirements of the *Agreement on Safeguards*.[379]

411. Furthermore, it is also important to note that the issue before us, here, is *not* whether the product scope of the *safeguard measure* may or may not be narrower than a competent authority's *determination*—that is, it is not whether certain products included in a determination can subsequently be excluded from the scope of the actual safeguard measure.[380] Instead, the issue before us is, we repeat, whether the USITC's report provided a reasoned and adequate explanation for the USITC's "single institutional determination" that imports of tin mill products had increased within the meaning of Article 2.1 of the *Agreement on Safeguards*. We turn to this issue now.

412. We note that the Panel did not examine the substance of the findings of the three Commissioners; rather, the Panel noted only that these findings were not based on an identically-defined like product, and concluded that this rendered the findings of the three Commissioners "irreconcilable". From this conclusion, the Panel deduced that these findings could not provide a reasoned and adequate explanation for the USITC's single determination.

413. We have reservations about the Panel's approach. First, as a preliminary matter, we are not persuaded that the findings of the three Commissioners "*cannot* be reconciled".[381] We do not believe that an affirmative finding with respect to a broad product grouping, on the one hand, and an affirmative finding with respect to one of the products contained in that broad product grouping, on the other hand, are, necessarily, mutually exclusive. It may be that they are irreconcilable, but that will depend on the facts of the case. Here, the Panel did not inquire into the details of the findings as they related to increased imports and, hence, was not adequately informed as to whether the three findings were reconcilable or not.

414. Secondly, in any event, we note that Article 3.1 of the *Agreement on Safeguards* requires the competent authority, *inter alia*, to "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". We do not read Article 3.1 as necessarily precluding the possibility of providing multiple findings instead of a single finding in order to support a determination under Articles 2.1 and 4 of the *Agreement on Safeguards*. Nor does any other provision of the *Agreement on Safeguards* expressly preclude such a possibility. The *Agreement on Safeguards*, therefore, in our view, does not interfere with the discretion of a WTO Member to choose whether to support the determination of its competent authority by a single explanation or, alternatively, by multiple explanations by members of the competent authority. This discretion reflects the fact that, as we stated in *US – Line Pipe*, "the *Agreement on Safeguards* does not

[379]Appellate Body Report, *US – Line Pipe*, para. 158.

[380]We note that this issue was raised before the Panel; the Panel, however, decided to exercise judicial economy with respect to this claim. (Panel Reports, para. 10.700)

[381]Panel Reports, para. 10.199. (emphasis added)

prescribe the internal decision-making process for making [ ] a determination [in a domestic safeguard investigation]".[382]

415. In the appeal before us, the USITC set out, in its report, three distinct and separate sets of findings. The results were combined into a "single institutional determination". These findings were made on the basis of different product definitions developed by three Commissioners. Although we agree with the Panel that "it makes a difference whether the product at issue is tin mill or a much broader category called CCFRS and containing tin mill products", because "the import numbers for different product definitions will not be the same"[383], this very difference, as well as the fact that the findings underlying the USITC's determination were set out as distinct and separate in the USITC's report, implies that these findings should *not* be read together, nor should a panel seek to "reconcile" them. Rather, a panel must ascertain whether a reasoned and adequate explanation for the USITC's determination is contained in the report, even if only in one of the Commissioner's individual findings.

416. In our view, in the case before us, the Panel should, therefore, not have ended its enquiry after noting that the conclusions of Commissioners Bragg and Devaney were based on a product definition that differed from that on which Commissioner Miller based her conclusion. After making this correct observation, the Panel should have continued its enquiry by examining the views of the three Commissioners *separately*, in order to ascertain whether one of these sets of findings contained a reasoned and adequate explanation for the USITC's "single institutional determination" on tin mill products.

417. In fact, we note that the approach which, in our view, the Panel should have taken in the context of increased imports, is precisely the approach the Panel adopted in the context of parallelism.[384] In that context, the Panel first reviewed the findings of Commissioner Bragg and subsequently proceeded to review the findings reached by Commissioner Miller.[385] We do not understand why the Panel reviewed the multiple findings separately in the context of parallelism, but declined to do so in the context of increased imports.[386]

418. It bears emphasizing that, in reviewing each of such findings separately, a panel is of course obliged to assess whether that particular finding provides a reasoned and adequate explanation of how the facts support the competent authority's determination. As we held in *US – Lamb*, "panels must [not] simply *accept* the conclusions of the competent authorities"; they must examine these conclusions "critically" and "in depth".[387] Hence, in examining whether one of the multiple sets of explanations set forth by the competent authority, taken individually, provides a reasoned and adequate explanation for the competent authority's determination, a panel may have to address, *inter*

[382]Appellate Body Report, *US – Line Pipe*, para. 158.

[383]Panel Reports, para. 10.195.

[384]We note, however, that the Panel also relied on the divergence in product definitions in the context of its causation analysis. (Panel Reports, paras. 10.422 and 10.572)

[385]Panel Reports, para. 10.615.

[386]We are aware that, in the context of parallelism, the Panel did not review the findings of Commissioner Devaney; the Panel explained that "the United States does not rely on findings made by Commissioner Devaney in defence against the claim of violation of parallelism, possibly because this Commissioner appears not to have reached any conclusions about imports other than excluded imports". (Panel Reports, footnote 5677 to para. 10.613)

[387]Appellate Body Report, *US – Lamb*, para. 106. (original emphasis)

alia, the question whether, *as a matter of WTO obligations*, findings by individual Commissioners made on the basis of a *broad* product grouping can provide a reasoned and adequate explanation for a "single institutional determination" of the USITC concerning a *narrow* product grouping.[388] Accordingly, we do *not* suggest that the product scope of an affirmative finding by an individual Commissioner is *not* relevant for the enquiry whether this finding does or does not provide a reasoned and adequate explanation for the competent authority's determination.[389] Rather, our finding implies that a panel may not conclude that there is no reasoned and adequate explanation for a competent authority's determination by relying merely on the fact that distinct multiple explanations given by the competent authority are not based on an identically-defined like product.[390]

419. In the light of the above, we *reverse* the Panel's finding, in paragraph 10.200 of the Panel Reports, that the USITC report does not contain a reasoned and adequate explanation of how the facts support the determination of increased imports for tin mill products because "the explanation consists of alternative explanations partly departing from each other which, given the different product bases, cannot be reconciled as a matter of their substance."[391]

420. We will discuss later in this Report whether, in the light of this finding, we should complete the analysis with respect to this issue.

421. We turn next to stainless steel wire.

2. Stainless Steel Wire

422. As with tin mill products, the United States appeals the Panel's finding that the competent authority did not provide a reasoned and adequate explanation in relation to increased imports of stainless steel wire because the findings of the three Commissioners underlying the USITC's determination were not based on identically-defined like products.[392] We begin by summarizing the relevant findings of the USITC.

423. The six Commissioners of the USITC made divergent findings on the product category stainless steel wire. Four Commissioners (Chairman Koplan, Vice Chairman Okun, as well as Commissioners Hillman and Miller) defined stainless steel wire as a distinct product category and presented their respective views on the basis of this product category.[393] The remaining two Commissioners (Bragg and Devaney) did not consider stainless steel wire as a separate product category; rather, these two Commissioners identified a product category "stainless steel wire products" (Bragg) or "stainless steel wire and wire rope" (Devaney), both composed of stainless steel wire and stainless steel rope, and presented their respective views on the basis of this broader product category.[394]

424. Among the four Commissioners who defined stainless steel wire as a distinct and separate product category, three reached a negative finding (Vice Chairman Okun and Commissioners Hillman and Miller)[395], and one reached an affirmative finding (Chairman Koplan).[396] Commissioners Bragg and Devaney reached an affirmative finding with respect to the larger product category stainless steel wire products/stainless steel wire and wire rope.[397]

425. At the oral hearing, the United States explained that "the USITC combined the results" of the views of Chairman Koplan and of Commissioners Bragg and Devaney into a "single institutional determination"—an affirmative finding—on stainless steel wire.[398] In other words, the fact that two of the Commissioners considered products other than stainless steel wire did not affect the result with respect to stainless steel wire alone. The United States explained that this "single institutional determination" of the USITC on stainless steel wire is supported by the multiple different findings, or "views", of Chairman Koplan and of Commissioners Bragg and Devaney.[399] The President of the United States chose this affirmative finding as the overall determination of the USITC, over the "combined results" that reached a negative finding.[400] Accordingly, for purposes of WTO obligations, there is an affirmative determination made by the competent authority of the United States, the USITC, that stainless steel wire is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. This determination of the USITC is supported by the views of Chairman Koplan and Commissioners Bragg and Devaney; therefore, according to the United States, it is from the views of these three Commissioners that a panel, and we, must find a reasoned and adequate explanation for the USITC's determination.

426. The Panel found that the USITC failed to provide a reasoned and adequate explanation of how the facts support its determination that imports of stainless steel wire have increased. The Panel first noted that the situation before it "is equivalent to that encountered in the context of tin mill products".[401] The Panel then stated:

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[388]In this regard, we note that the fact that, pursuant to the domestic law of a WTO Member, a finding made on the basis of a *broad* product grouping is deemed to support a competent authority's determination which relates to a *narrower* product, does not, in and of itself, imply that this conclusion holds true also for the purposes of the *Agreement on Safeguards*.

[389]Indeed, we note that in the context of parallelism, the Panel addressed separately the finding of Commissioner Bragg and found that "findings on a product category other than tin mill products are [not] able to support a measure relating to tin mill products as a separate product category, unless there is a reasoned and adequate explanation relating the two product categories". (Panel Reports, para. 10.615)

[390]We also emphasize that our finding does not address the question whether the USITC and/or individual Commissioners correctly defined the "like product", the "imported product", or the "domestic industry".

[391]Panel Reports, para. 10.200.

[392]United States' appellant's submission, paras. 359–395.

[393]USITC Report, Vol. I, pp. 190 and 234–238.

[394]*Ibid.*, pp. 277, 280, 288–289, and 301–302 (Commissioner Bragg); and pp. 335–336 and 342–347 (Commissioner Devaney).

[395]*Ibid.*, pp. 234–238.

[396]USITC Report, Separate Views of Chairman Koplan on injury, pp. 256–259.

[397]USITC Report, Vol. I, pp. 280, 288–289, and 301–302 (Commissioner Bragg); and pp. 342–347 (Commissioner Devaney).

[398]See also *ibid.*, p. 27; United States' appellant's submission, para. 394.

[399]See also United States' appellant's submission, para. 394.

[400]As we said earlier, because the USITC found that it was "equally divided" with respect to stainless steel wire, the decision whether the affirmative or rather the negative determination represented the institutional determination of the USITC rested with the President of the United States.

[401]Panel Reports, para. 10.261.

> [T]he Agreement on Safeguards does not permit the combination of findings as supporting a determination, if these findings were reached on the basis of differently defined products. If such findings cannot be reconciled one with another (as a matter of substance), they cannot simultaneously form the basis of a determination.[402]

The Panel, moreover, cross-referenced its reasoning set out in the context of its findings on tin mill products.[403]

427. As with the Panel's findings on tin mill products, the United States argues that, with respect to stainless steel wire, the Panel erred in requiring that the findings of each Commissioner or group of Commissioners be "reconciled".[404] The United States submits that there is "nothing intrinsically irreconcilable about findings based on different product groupings".[405] The United States also argues that alternative findings by a single decision-maker are permitted by the *Agreement on Safeguards*, "so long as the analysis of at least one of the decision makers satisfies the requirements of the Agreement".[406]

428. We note that the structure and format of the USITC's determination with respect to stainless steel wire mirrors the USITC's determination with respect to tin mill products. One Commissioner (Chairman Koplan) made affirmative findings on the product stainless steel wire[407], while two other Commissioners (Bragg and Devaney) made affirmative findings on a broader product group including, as one of the elements of this product group, stainless steel wire.[408] The results of these findings were subsequently combined by the USITC into a single institutional finding concerning stainless steel wire.

429. The facts on stainless steel wire, as well as the findings of the Panel, are, for all relevant purposes, identical to those before us in the context of tin mill products. Therefore, our reasoning with respect to tin mill products is applicable, *mutatis mutandis*, also to stainless steel wire.[409] We therefore *reverse* the Panel's finding, in paragraph 10.263 and in the relevant section of paragraph 11.2 of the Panel Reports, that the USITC report does not contain a reasoned and adequate explanation of how the facts support the determination of increased imports for stainless steel wire because the "explanation consists of alternative explanations departing from each other and which, given the different product bases, cannot be reconciled as a matter of substance."[410]

[402] *Ibid.*, para. 10.262.

[403] *Ibid.*

[404] United States' appellant's submission, para. 370.

[405] *Ibid.*, para. 372.

[406] *Ibid.*, para. 375.

[407] USITC Report, Separate Views of Chairman Koplan on injury, pp. 256–259.

[408] USITC Report, Vol. I, pp. 280, 288–289, 301–302 (Commissioner Bragg); USITC Report, Vol. I, pp. 342–347 (Commissioner Devaney).

[409] See *supra*, paras. 413–418.

[410] Panel Reports, para. 10.262.

3. Completing the Analysis

430. In the course of finding that the explanation of the USITC for its determination of increased imports of tin mill products and stainless steel wire was not reasoned and adequate, the Panel did not examine separately the findings of the three Commissioners with a view to determining whether one of these findings, as a matter of substance, contains a reasoned and adequate explanation. As we have reached a conclusion different from the Panel on the interpretation of the *Agreement on Safeguards*, and as the Panel did not undertake a substantive analysis, the question arises whether we should "complete the analysis".

431. In previous appeals, we have, when appropriate, completed the legal analysis with a view to facilitating the prompt settlement of disputes.[411] However, in the dispute before us, we have already upheld the Panel's finding that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994, as well as with Article 3.1 of the *Agreement on Safeguards*, with regard to all ten measures at issue. We also find in the following section of this Report dealing with the issue of "parallelism"[412], that the United States has acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* with respect to all product categories, because the United States failed to establish that imports covered by the safeguard measures, *alone*, satisfy the conditions for the imposition of a safeguard measure. Therefore, the Panel's finding that the safeguard measures applied to tin mill products and stainless steel wire are both "deprived of a legal basis"[413] remains undisturbed. As a result, it is not necessary for us to complete the analysis and determine whether the USITC report provided a reasoned and adequate explanation that imports of tin mill products and stainless steel wire had increased within the meaning of Article 2.1 of the *Agreement on Safeguards*.

432. We take up next the issue of "parallelism".

VII. Parallelism

433. We start by recalling that the United States excluded imports from Canada and Mexico[414], as well as from Israel and Jordan[415], from the scope of application of these safeguard measures. The Panel found that these safeguard measures were inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards* because the United States did not, with respect to any of the product categories at issue, establish explicitly that imports from the sources included in the application of these measures, *alone*, satisfied the conditions for the application of a safeguard measure. The United States challenges these findings of the Panel.[416]

[411] See, for instance, Appellate Body Report, *US – Gasoline*, at 18 ff; Appellate Body Report, *Canada – Periodicals*, at 469 ff; Appellate Body Report, *EC – Hormones*, paras. 222 ff; Appellate Body Report, *EC – Poultry*, paras. 156 ff; Appellate Body Report, *Australia – Salmon*, paras. 117 ff, 193 ff and 227 ff; Appellate Body Report, *US – Shrimp*, paras. 123 ff; Appellate Body Report, *Japan – Agricultural Products II*, paras. 112 ff; Appellate Body Report, *US – FSC*, paras. 133 ff; Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43 ff; and Appellate Body Report, *US – Wheat Gluten*, paras. 80 ff and 127 ff.

[412] See *infra*, paras. 433–474.

[413] Panel Reports, para. 10.705.

[414] Proclamation, para. 8.

[415] *Ibid.*, para. 11.

[416] United States' appellant's submission, paras. 315–358.

434. In its findings, the Panel began by making some general comments about the requirement of "parallelism"[417], and then reviewed the USITC's findings on a product-specific basis. In these general comments, the Panel noted that:

> [i]ncreased imports from sources ultimately excluded from the application of the measure must … be excluded from the analysis. The increase of these imports and their effect on the domestic industry cannot be used to support a conclusion that the product in question "is being imported in such increased quantities so as to cause serious injury". *This makes it necessary ... to account for the fact that excluded imports may have some injurious impact on the domestic industry*.[418] (emphasis added)

435. In its product-specific analysis, the Panel, using similar language, relied on this reasoning in examining the USITC's determination with respect to non-NAFTA imports for nine product categories, namely, CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, and stainless steel wire. For each of these nine product categories, the Panel found that the USITC had not complied with the requirement to demonstrate a causal link between increased imports and serious injury, because it did not account for the effects—existing or possible—of excluded imports on the domestic industry.[419] The Panel did not make this finding with respect to the tenth product category, stainless steel rod.[420]

436. For all ten product categories, the Panel found a second flaw in the USITC's analysis after examining its determination concerning non-NAFTA imports. Using virtually identical language for most product categories[421], the Panel stated:

> [T]he Panel notes that the sources excluded from the measure are not only Canada and Mexico, but also those from Israel and Jordan. Accordingly, imports from sources covered by the measure are not "non-NAFTA imports", but imports other than those from Canada, Mexico, Israel and Jordan. With regard to such imports, the USITC did not establish explicitly that they satisfied the requirements of Article 2.1 (as elaborated in Article 4) of the Agreement on Safeguards, neither in the USITC Report, nor in the Second Supplementary Report.
>
> It may well be that imports from Israel and Jordan[422] were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be necessary for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made, it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure. The Panel recognizes that if, as established elsewhere in the report of the competent authorities, imports from an excluded source were [very small or (virtually) non-existent], it is very possible that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.[423] (original emphasis, footnotes omitted)

437. The Panel made separate and distinct findings on parallelism for each of the ten product categories. The United States asks us to reverse the findings of the Panel on parallelism for all these ten product categories. The United States argues that, although the Panel "purported to conduct a product-by-product examination of the parallelism claims, its basis for rejecting the ITC's parallelism analysis varied little from product to product."[424] The United States contends that the Panel "asserted two general conclusions in its introductory analytical section that served as the basis for its product-specific analyses".[425] According to the United States, the first of these two "general conclusions" of the Panel is a requirement to "account for the fact that excluded imports may have some injurious impact on the domestic industry"—to which the United States refers as the "excluded sources accounting requirement".[426] As the United States describes it, the second of these two "general conclusions" of the Panel is a requirement to establish "explicitly" that imports from included sources

[417]Appellate Body Report, *US – Line Pipe*, paras. 178–181.

[418]Panel Reports, para. 10.598.

[419]The Panel used the language "to account for the fact that excluded … imports contributed to the serious injury" or "the injury caused by excluded imports must be accounted for" with respect to the product categories CCFRS (Panel Reports, paras. 10.604–10.606), hot-rolled bar (Panel Reports, paras. 10.628–10.630), cold-finished bar (Panel Reports, paras. 10.638–10.640), rebar (Panel Reports, para. 10.650), FFTJ (Panel Reports, paras. 10.664–10.667), and stainless steel bar (Panel Reports, paras. 10.674–10.677). With respect to Commissioner Miller's analysis of the causal link between non-Canadian imports of tin mill products and serious injury, the Panel stated that "[the] findings do not account for the fact that imports other than those from an excluded source are less than those from all sources and that the effects on the domestic producers are, therefore, not the same." (Panel Reports, paras. 10.620–10.621) With respect to welded pipe, the Panel stated that the USITC's finding "does not account for the fact that the threat of serious injury caused by non-NAFTA imports is but a part of the threat of serious injury caused by all imports and does not establish that there is a genuine and substantial relationship of cause and effect." (Panel Reports, para. 10.657) With respect to stainless steel wire, the Panel stated that "the findings [ ] do not take account of the portion of the threat of serious injury caused by NAFTA imports." (Panel Reports, para. 10.688)

[420]With respect to stainless steel rod, the Panel, in reviewing the USITC's finding on non-NAFTA imports, did not refer to the causation or non-attribution requirements. We address the Panel's findings with respect to stainless steel rod in paras. 457–473, below.

[421]The Panel did not include the first paragraph with respect to its findings on tin mill products and stainless steel rod.

[422]For tin mill products, the Panel referred to imports from Mexico, Israel and Jordan.

[423]Panel Reports, paras. 10.607–10.608; see also Panel Reports, paras. 10.622, 10.631–10.632, 10.641–10.642, 10.651–10.652, 10.658–10.659, 10.668–10.669, 10.678–10.679, 10.689–10.690, and 10.698.

[424]United States' appellant's submission, para. 316.

[425]*Ibid.*

[426]*Ibid.*, paras. 318 and 321–333.

satisfy the conditions for the imposition of a safeguard measure, a standard which the United States argues the Panel misconstrued to require the competent authority to make "redundant findings".[427]

438. On appeal, the United States explicitly acknowledges that it "does not dispute that the ITC's parallelism analysis *did not satisfy the standards articulated by the Panel*".[428] However, the United States considers this to be "irrelevant"[429], because it contends that these requirements are not contained in the *Agreement on Safeguards*.

439. We begin our analysis by reviewing the relevant treaty provisions. The word "parallelism" is not in the text of the *Agreement on Safeguards*; rather, the requirement that is described as "parallelism" is found in the "parallel" language used in the first and second paragraphs of Article 2 of the *Agreement on Safeguards*. Article 2 of the *Agreement on Safeguards* stipulates:

> *Conditions*
>
> 1. A Member[1] may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
>
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source. (underlining added)

[1] A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

440. In *US – Wheat Gluten*, we said that:

> The same phrase – "product … being imported" – appears in *both* … paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in both Articles 2.1 and 2.2. To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase "product being imported" a *different* meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted. In the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2.[430] (original emphasis; underlining added)

441. Thus, where, for purposes of applying a safeguard measure, a Member has conducted an investigation considering imports from *all* sources (that is, *including* any members of a free-trade area), that Member may not, subsequently, without any further analysis, exclude imports from free-trade area partners from the application of the resulting safeguard measure. As we stated in *US – Line Pipe*, if a Member were to do so, there would be a "gap" between, on the one hand, imports covered by the investigation and, on the other hand, imports falling within the scope of the safeguard measure.[431] In clarifying the obligations of WTO Members under the "parallel" requirements of the first and second paragraphs of Article 2 of the *Agreement on Safeguards*, we explained in *US – Line Pipe* that such a "gap" can be justified under the *Agreement on Safeguards* only if the Member establishes:

> … "explicitly" that imports from sources covered by the measure "satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*."[432]

442. We further explained, in that same appeal, that, in order to fulfill this obligation in Article 2, "establish[ing] explicitly" signifies that a competent authority must provide a "reasoned and adequate explanation of how the facts support their determination"[433], adding that "[t]o be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous."[434]

443. In considering the investigation by the competent authority in the case before us, we note that the USITC relied on data for imports from *all* sources. The USITC report states that "[i]n determining whether imports have increased, the Commission considers imports from all sources".[435] We observe also that, in the examination of whether increased imports were a cause of serious injury, the USITC also relied on data for all imports for each product category. It is undisputed by the United States that, in its investigation, the USITC considered imports from *all sources—including* imports from Canada, Israel, Jordan, and Mexico. Nevertheless, imports from Canada, Israel, Jordan, and Mexico were *excluded* from the application of the safeguard measures at issue. Therefore, there is,

[427] *Ibid.*, paras. 334–344.

[428] United States' appellant's submission, para. 358. (emphasis added)

[429] United States' appellant's submission, para. 358.

[430] Appellate Body Report, *US – Wheat Gluten*, para. 96.

[431] Appellate Body Report, *US – Line Pipe,* para. 181.

[432] *Ibid.*, quoting *US – Wheat Gluten*, para. 98.

[433] Appellate Body Report, *US – Line Pipe*, para. 181, quoting *US – Lamb,* para. 103.

[434] Appellate Body Report, *US – Line Pipe*, para. 194.

[435] USITC Report, Vol. I, p. 32.

in these measures, a gap between the imports that were taken into account in the investigation performed by the USITC and the imports falling within the scope of the measures as applied.

444. It was thus incumbent on the USITC, in fulfilling the obligations of the United States under Article 2 of the *Agreement on Safeguards*, to justify this gap by establishing explicitly, in its report, that imports from sources covered by the measures—that is, imports from sources *other than* the excluded countries of Canada, Israel, Jordan, and Mexico—satisfy, *alone*, and in and of themselves, the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*. Further, and as we have already explained, to provide such a justification, the USITC was obliged by the *Agreement on Safeguards* to provide a reasoned and adequate explanation of how the facts supported its determination that imports from sources *other than* Canada, Israel, Jordan, and Mexico satisfy, *alone*, and in and of themselves, the conditions for the application of a safeguard measure.

445. As we have explained, the United States argues that the Panel articulated two aspects of the requirement of "parallelism" on which it subsequently relied in its product-specific findings. We will discuss each of these aspects in turn. We turn first to the Panel's findings to which the United States refers as establishing an "excluded sources accounting requirement".[436]

A. *The Need to Account for the Effects of Imports from Excluded Sources*

446. The United States claims that the Panel erred in concluding that the competent authorities are required to account for the fact that excluded imports may have some injurious impact on the domestic industry. The United States submits that, in so far as the Panel indicated that parallelism requires authorities to focus separately on imports from sources that are not excluded from the measure, the Panel's statements "accurately reflect[ ] what the Appellate Body said in [*US –] Line Pipe*".[437] However, the United States asserts that the Panel went "further" and established a requirement for a separate analysis of imports from sources not subject to the safeguards measure, according to which the competent authority must "affirmatively account for the effect of such imports."[438] The United States contends that the requirement articulated by the Panel has no basis in the text of the *Agreement on Safeguards*.[439]

447. The United States relies on statements made by the USITC in both its original report and the Second Supplementary Report, as establishing that the imports from sources covered by the safeguard measures applied by the United States, *alone*, satisfy the conditions for the application of those measures. The United States acknowledges that, in doing so, the USITC did not "account for the fact that excluded imports may have some injurious impact on the domestic industry", as the Panel required.[440] The United States argues, however, that the Panel, by requiring the competent authority to "account for the fact that excluded imports may have some injurious impact on the domestic industry", "insert[ed] … an extra analytical step with respect to parallelism".[441] The United States maintains that nothing in the *Agreement on Safeguards* requires a distinct or explicit analysis of imports from sources *not* subject to the measure.[442]

448. We note, first, that the United States agrees that the "Appellate Body has read th[e] language ['such product … being imported' in Article 2.1] to refer to only *imports from sources which are subject to a safeguards measure*".[443] The United States also agrees that Article 2.1, as read by the Appellate Body, requires the competent authority to "establish explicitly that increased imports from [sources included in the safeguard measure] alone" satisfy the conditions for a safeguard measure. The United States does not contest these requirements in this appeal.[444]

449. Secondly, as we have indicated previously, in *US – Line Pipe*, the conditions set forth in Article 2.1 are further elaborated in Article 4.2.[445] Article 4.2(b) requires that a determination that increased imports have caused or are threatening to cause serious injury to the domestic industry, as required by Article 4.2(a), can be made only where an investigation by a competent authority demonstrates the existence of a "causal link" between "increased imports" and either serious injury or the threat of serious injury. Article 4.2(b), last sentence, stipulates also, for the purposes of determining the existence of such a "causal link", that "[w]hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." This obligation is sometimes described as the "non-attribution requirement".[446]

450. As a result, the phrase "increased imports" in Articles 4.2(a) and 4.2(b) must, in our view, be read as referring to the same set of imports envisaged in Article 2.1, that is, *to imports included in the safeguard measure*. Consequently, imports *excluded* from the application of the safeguard measure must be considered a factor "other than increased imports" within the meaning of Article 4.2(b). The possible injurious effects that these excluded imports may have on the domestic industry must not be attributed to imports included in the safeguard measure pursuant to Article 4.2(b). The requirement articulated by the Panel "to account for the fact that excluded imports may have some injurious impact on the domestic industry"[447] is, therefore, not, as the United States argues, an "extra analytical step"[448] that the Panel added to the analysis of imports from all sources. To the contrary, this requirement necessarily follows from the obligation in Article 4.2(b) for the competent authority to ensure that the effects of factors other than increased imports—a set of factors that subsumes *imports excluded from*

[436]United States' appellant's submission, paras. 318 and 321–333.

[437]United States' appellant's submission, para. 324.

[438]*Ibid.*, para. 327.

[439]We note that Canada, in its third participant's submission, also argues that the Panel erred in reading *US – Line Pipe* to mean that parallelism necessarily requires the competent authority to account for the fact that excluded imports may have some injurious impact on the domestic industry. (Canada's third participant's submission, para. 35)

[440]United States' appellant's submission, para. 358.

[441]*Ibid.*, para. 326.

[442]*Ibid.*, paras. 326 and 329.

[443]*Ibid.*, para. 327. (emphasis added)

[444]United States' appellant's submission, para. 324. The United States also states, in its appellant's submission, that to the extent the Panel's findings on this issue "indicate[] that parallelism requires authorities to focus separately on imports from sources that are not excluded from the measure, [they] accurately reflect[ ] what the Appellate Body said in [*US –] Line Pipe*." (United States' appellant's submission, para. 324)

[445]Appellate Body Report, *US – Line Pipe*, para. 181; Appellate Body Report, *US – Wheat Gluten*, para. 98.

[446]Appellate Body Report, *US – Lamb*, para. 179.

[447]Panel Reports, para. 10.598.

[448]United States' appellant's submission, para. 326.

the safeguard measure—are not attributed to imports included in the measure, in establishing a causal link between imports included in the measure and serious injury or threat thereof. [449]

451. The non-attribution requirement is part of the overall requirement, incumbent upon the competent authority, to demonstrate the existence of a "causal link" between increased imports (covered by the measure) and serious injury, as provided in Article 4.2(b). Thus, as we found in *US – Line Pipe*, "to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports". [450]

452. In order to provide such a reasoned and adequate explanation, the competent authority must explain how it ensured that it did not attribute the injurious effects of *factors other than included imports*—which subsume "excluded imports"—to the imports included in the measure. As we explained in *US – Line Pipe* [451] in the context of Article 3.1 and "unforeseen developments" in this Report [452], if the competent authority does not provide such an explanation, a panel is not in a position to find that the competent authority ensured compliance with the clear and express requirement of non-attribution under Article 4.2(b) of the *Agreement on Safeguards*.

453. As a result, we are of the view that, in this dispute, the Panel did not err by requiring the competent authority to "account for the fact that excluded imports may have some injurious impact on the domestic industry", to ensure that the effects of these excluded imports are not attributed to the imports included in the safeguard measure.[453] Rather, as we see it, the Panel correctly interpreted the causation and non-attribution requirements under Articles 2 and 4 of the *Agreement on Safeguards*.

[449]We recall that in *US – Lamb*, we stated, in this respect:

> As part of th[e] determination [of the existence of a causal link], Article 4.2(b) states expressly that injury caused to the domestic industry by factors other than increased imports "shall not be attributed to increased imports." In a situation where *several factors* are causing injury "at the same time", a final determination about the injurious effects caused by *increased imports* can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury.

(Appellate Body Report, *US – Lamb,* para. 179) (original emphasis; underlining added)

[450]Appellate Body Report, *US – Line Pipe,* para. 217.

[451]*Ibid*., para. 107.

[452]See *supra*, paras. 278 and 302.

454. We note that the United States' appeal of the Panel's findings in this regard is explicitly limited to the Panel's articulation of the requirement itself. The United States acknowledges that, in making its determinations concerning imports of nine of the ten product categories from sources other than Canada and Mexico, the USITC did not comply with the requirement set forth by the Panel, that is, to "account for the fact that excluded imports may have some injurious impact on the domestic industry". [454]

455. Accordingly, we see no reason to disturb the Panel's findings for those nine product categories for which the Panel found that the United States did not account for the effect of imports excluded from the safeguard measures.[455] For those nine product categories, as the Panel found, the United States has failed to comply with the parallelism requirement, because it did not establish that imports covered by the safeguard measures at issue, *alone*, satisfy the requirements for the imposition of a safeguard measure, and the United States has, in effect, acknowledged that it has failed to do so. As this flaw in the USITC's analysis on parallelism affects the United States' right to exclude imports from the scope of the measures at issue, there is, in our view, no need for us to address, with respect to these nine product categories, the Panel's statement that the USITC's parallelism analysis was also flawed because the USITC did not "actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan". [456]

456. We, therefore, *uphold* the Panel's findings, in paragraphs 10.609, 10.623, 10.633, 10.643, 10.653, 10.660, 10.670, 10.680, 10.692, and the relevant sections of paragraph 11.2 of the Panel Reports, with respect to CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, FFTJ, welded pipe, stainless steel bar, and stainless steel wire, that the United States acted inconsistently with its obligations under Articles 2.1 and 4.2 of the *Agreement on Safeguards* because, in establishing whether imports included in the safeguard measure satisfy, *alone*, the requirements for the imposition of a safeguard measure, it did not account for the possible injury caused by imports from excluded sources.

B. *Conclusions with Respect to Stainless Steel Rod*

457. We now turn to the Panel's findings concerning the one remaining product category for which the Panel made somewhat different findings relating to parallelism, stainless steel rod.

458. On stainless steel rod, the Panel, in addressing the USITC's finding on non-NAFTA imports, did not refer to the causation or non-attribution analysis. Instead, it stated:

[453]We note that, in its causation analysis, the USITC found for every product a causal link between *all* imports and serious injury; this implies that the subsequently-excluded imports were contributing to the total injurious effects attributed to all imports. Moreover, the USITC or individual Commissioners stated, for certain products (CCFRS, hot-rolled bar, cold-finished bar, welded pipe, FFTJ, stainless steel bar, and tin mill products), that imports from some sources excluded from the measures contributed "importantly" to serious injury. (USITC Report, Vol. I, pp. 66, 100, 108, 166–167, 178-180, 213, 309–310)

[454]United States' appellant's submission, para. 358. The only product category not covered by this admission is stainless steel rod, a product category which we consider separately, below.

[455]They are: CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, FFTJ, welded pipe, stainless steel bar, and stainless steel wire.

[456]Panel Reports, paras. 10.608, 10.622, 10.632, 10.642, 10.652, 10.659, 10.669, 10.679, and 10.690.

> The Panel agrees with the United States that in a case where excluded imports account for less than 0.08% of total imports, it would normally be possible to reach the conclusion that imports from other sources satisfy the same requirements as all imports do. However, the Panel is unable to identify … the required findings that establishes explicitly, with a reasoned and adequate explanation, that imports from other sources than Canada, Mexico, Israel and Jordan satisfy the conditions of Article 2.1 as elaborated by Article 4.2 of the Agreement on Safeguards. In particular, the rather implicit statement made that imports other than Canadian and Mexican imports have increased and that they have caused serious injury to the domestic industry, does not relate to imports covered by the measure which are imports from sources other than Canada, Mexico, Israel and Jordan.[457] (footnote omitted)

459. The Panel also found a second flaw with the USITC's analysis on stainless steel rod. After examining the USITC's determination on non-NAFTA imports, the Panel went on to state:

> Also, it may well be that imports from Israel and Jordan were so small that they could not possibly affect the findings reached, whether about all imports or about non-NAFTA imports. However, in the view of the Panel, it would then still be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan. The standard is that the Member must establish explicitly that imports from sources covered by the measure satisfy all conditions for the right to apply a safeguard measure. For this finding to be made it is not sufficient to merely find that the exclusion of imports from Israel and Jordan would not change the conclusions regarding the prerequisites for a safeguard measure. The Panel recognizes that if imports from an excluded source were "small and sporadic" and "virtually non-existent" or "small and non-existent" and "non-existent", it is very likely that the facts *allow* a finding that imports from sources covered by the measure do satisfy the conditions for the application of a safeguard measure. This, however, still needs to be established explicitly and supported with a reasoned and adequate explanation.[458] (original emphasis; underlining added; footnotes omitted)

460. The United States claims that the Panel "misconstrued" our clarification of the requirement that findings must be "explicit" in a way that would require the USITC to make "redundant findings".[459] The United States contends that the USITC's reasoning with respect to imports from

[457]Panel Reports, para. 10.697.

[458]Panel Reports, para. 10.698.

[459]United States' appellant's submission, heading III.E.3.

Israel and Jordan was "complete, clear, and unambiguous", because "imports from Israel and Jordan were too small to affect the data on which the ITC relied for its conclusions."[460]

461. As we said earlier, a "gap" between imports covered under an investigation and imports falling within the scope of a measure can be justified under Article 2, as elaborated in Article 4.2, only if the competent authorities "establish explicitly" that imports from sources covered by the measure "satisf[y] the conditions for the application of a safeguard measure".[461] Also, as we have recalled previously, we stated, in *US – Line Pipe*, that "'establish[ing] explicitly' implies that the competent authorities must provide a '*reasoned and adequate explanation* of how the facts support their determination'".[462] Moreover, we also stated in that same appeal that, in order to be "explicit", a statement must "express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous."[463]

462. For the measures before us, the USITC made a determination on the basis of an investigation of imports from *all* sources, and concluded from this investigation that imports from all sources satisfied the conditions for the application of these safeguard measures. The USITC then made additional findings, which, according to the United States, established that imports from those sources included in these safeguard measures—that is, imports from sources *other than* Canada, Israel, Jordan, and Mexico—satisfied, on their own, the conditions of the *Agreement on Safeguards* for the application of a safeguard measure.

463. The USITC made several references to the excluded countries in several parts of its report. With respect to stainless steel rod, the USITC stated, in footnote 1437 of its report:

> We also have considered whether the exclusion of imports of stainless rod from Mexico or Canada from our injury analysis would have affected our finding that imports were a substantial cause of serious injury to the stainless rod industry. Because imports of stainless rod from Mexico and Canada each accounted for an extremely small percentage of total imports during the period of investigation, INV-Y-180 at Table G-25, we find the exclusion of these volumes does not change our volumes or pricing analysis in a significant manner. Accordingly, our injury analysis would not be changed in any way by their exclusion.[464] (underlining added)

464. In its "Views on Remedy", the USITC observed that "[i]mports of stainless steel rod from Jordan are not a substantial cause of serious injury or threat of serious injury because there have been no imports of stainless steel rod from Jordan during the period of investigation".[465] Moreover, in its

[460]*Ibid.*, para. 340.

[461]Appellate Body Report, *US – Wheat Gluten*, para. 98; Appellate Body Report, *US – Line Pipe*, para. 181. We recall that Article 2.1 of the *Agreement on Safeguards* requires a determination that: (1) a product is being imported "in such quantities and under such conditions"; (2) "as to cause"; (3) serious injury or the threat of serious injury to domestic producers. (Appellate Body Report, *Argentina – Footwear (EC)*, para. 92)

[462]Appellate Body Report, *US – Line Pipe*, para. 181, referring to Appellate Body Report, *US – Lamb*, para. 103. (original emphasis)

[463]Appellate Body Report, *US – Line Pipe*, para. 194.

[464]USITC Report, Vol. I, p. 223 and footnote 1437 thereto.

[465]*Ibid.*, p. 405 and footnote 268 thereto.

"Views on Remedy", the USITC indicated, with respect to stainless steel rod, that imports from Israel, as well as from certain other sources, "accounted for a small or non-existent percentage of total imports and had a minimal share of the domestic rod market during the period of investigation."[466] In addition, the USITC stated, in its Second Supplementary Report, that "in accord with its findings in the Views on Remedy, … exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners."[467]

465. These are all the comments by the USITC on which the United States relies as satisfying the parallelism requirement.[468] At no point did the USITC make a determination on whether imports from those sources that were ultimately included in the safeguard measure—that is, imports from those sources *other than* Canada, Israel, Jordan, and Mexico—satisfied, *alone*, in and of themselves, the conditions for the application of a safeguard measure. Instead, the USITC made *two separate determinations*—one determination that the exclusion of imports from *Canada and Mexico* would not change the "injury analysis"[469] of the USITC, and another *separate* determination that the exclusion of imports from *Israel and Jordan* would not change the conclusions of the USITC.[470]

466. The requirement of the *Agreement on Safeguards* to establish explicitly that imports from sources covered by a measure, *alone*, satisfy the conditions for the application of a safeguard measure cannot be fulfilled by conducting a *series of separate and partial* determinations. For example, where a WTO Member seeks to establish explicitly that imports from *sources other than A and B* satisfy the conditions for the application of a safeguard measure, if that Member conducts a separate investigation, and makes a separate determination, on whether imports from sources *other than A* satisfy the relevant conditions, and then, subsequently, conducts *another* separate and distinct investigation, and makes a separate determination, on whether imports from sources *other than B* satisfy the relevant conditions, then these *two separate* determinations, in our view, do not demonstrate that imports from sources other than *A and B together* satisfy the requirements for the imposition of a safeguard measure. By making these two separate determinations, that Member will,

[466] *Ibid.*, p. 405.

[467] USITC Second Supplementary Report, p. 4. (footnote omitted) In footnote 26 to this statement, the USITC makes reference to its own and the individual Commissioners' "Views on Remedy" on all product categories at issue.

[468] With respect to Israel and Jordan, the United States relies, for all product categories, on product-specific findings made by the USITC in the views expressed on remedy in its original report. (United States' appellant's submission, para. 335) The United States also relies on the general statement of the USITC, contained in the Second Supplementary Report, that "exclusion of imports from Israel and Jordan would not change the conclusion of the Commission or of individual Commissioners." (United States' appellant's submission, para. 338) With respect to non-NAFTA imports, the United States references its arguments before the Panel on product-specific statements by the USITC (United States' appellant's submission, para. 351 and footnote 460 thereto; para. 354 and footnote 463 thereto; para. 355 and footnote 464 thereto); in the case of stainless steel rod, the United States relied, before the Panel, on footnote 1437 of the USITC's report. (Panel Reports, para. 7.1846) We note that, on appeal, the United States does not argue that the Panel failed to examine the relevant USITC's findings; rather, the United States disagrees with the conclusions that the Panel derived from its review of these findings.

[469] USITC Report, Vol. I, p. 223, footnote 1437.

[470] We note that the USITC provided these two separate findings with respect to almost all product categories at issue. For one product category—tin mill products—*three* separate findings were provided—one finding for imports from sources other than Canada, one finding for imports from sources other than Mexico, and one finding that the "exclusion of imports from Israel and Jordan would not change the conclusions of the USITC or individual Commissioners". (USITC Report, Vol. I, p. 310, footnotes 28 and 29; USITC Second Supplementary Report, p. 4)

logically, for each of them, be basing its determination, in part, either on imports from A or on imports from B.[471] If this were permitted, a determination on the application of a safeguard measure could be easily subjected to mathematical manipulation. This could not have been the intent of the Members of the WTO in drafting and agreeing on the *Agreement on Safeguards*.

467. We are, therefore, of the view that the Panel raised a valid methodological concern when it stated that "it would … be required for the competent authorities to actually express the findings required under parallelism with regard to increased imports other than those from Canada, Mexico, Israel and Jordan."[472]

468. It may not have made a practical difference in the application of the safeguard measures at issue in this appeal, in as much as, on the facts, the quantity of imports from the excluded countries was negligible or virtually non-existent.[473] However, we are of the view that, rather than making *two separate determinations*—excluding either Canada and Mexico, or, alternatively, Israel and Jordan—from the underlying data on which it based its overall determination, the USITC should have, as the Panel found[474], provided *one single joint* determination, supported explicitly by a reasoned and adequate explanation, on whether imports from sources *other than Canada*, *Israel*, *Jordan*, *and Mexico*, by themselves, satisfied the conditions for the application of a safeguard measure.

469. The United States argues that "[i]n the context in which [the USITC's statement concerning Israel and Jordan] appeared, [its] meaning [ ] was clear: imports from Israel and Jordan were either non-existent or so small that the Commission's conclusions for imports from sources other than Canada and Mexico were also applicable to imports from sources other than Canada, Mexico, Israel

[471] Clearly, where a Member examines imports from sources *other than A*, it will be *including*, in its analysis, imports from B; conversely, when examining imports from sources *other than B*, the Member will be *including* in its analysis imports from A. Thus, at each step of the investigation, the Member will be including the effects of some of the excluded imports in its analysis.

[472] Panel Reports, para. 10.622.

[473] We note that we are *not* addressing the question of the appropriate interpretation, in this respect, of the parallelism requirement in circumstances where imports from Israel and Jordan were *zero* in every year of the period of investigation. We note that, for the product category at issue, stainless steel rod, contrary to the United States' assertion in paragraphs 337 and 342 of its appellant's submission, according to the data tables contained in the USITC report and referenced in paragraph 336 of the United States' appellant's submission, imports from Israel during the period of investigation were *not zero* in every year. (USITC Report, Appendix E, Table E-3, p. E-5)

[474] Panel Reports, para. 10.698.

and Jordan."[475] The United States also submits that "[t]he Panel appears to believe that it was not enough for the ITC to state that the findings that it made with respect to non-NAFTA imports were equally applicable to non-FTA imports. Instead, the ITC apparently had to repeat the findings word for word in a section specifically addressing non-FTA imports."[476] The United States argues that such a finding would have been "redundant".[477] The United States also points out that, in the case of stainless steel rod, the Panel accepted that "it is adequate for an authority to state that, because the volume of imports is *extremely small*, the authority's conclusions with respect to *all imports* are also applicable to imports from *all sources other than excluded sources*".[478] The United States contends that the Panel should have adopted the same analytical approach when reviewing the USITC's finding on imports from sources other than Israel and Jordan.

470. We are not persuaded by these arguments of the United States. First, we do not find any explicit statement in the USITC's report that the USITC's findings relating to imports from sources other than *Canada and Mexico* were also applicable to imports from sources other than *Canada*, *Israel*, *Jordan*, *and Mexico*.[479] Secondly, with respect to the Panel's findings on the exclusion of Canada and Mexico for stainless steel rod, the Panel did, indeed, state that "in a case where excluded imports account for less than 0.08% of total imports, it would normally be possible to reach the conclusion that imports from other sources satisfy the same requirements as all imports do".[480] The United States does not mention, however, that the Panel, after the quoted sentence, immediately went on to state that it was "unable to identify … the required finding that establishes explicitly … that imports from other sources than Canada, Mexico, Israel and Jordan satisfy the conditions of Article 2.1".[481] In other words, in its findings on the USITC's determination on imports of stainless steel rod from sources other than Canada and Mexico, the Panel raised the same valid methodological concern that it did with respect to the USITC's finding on imports from sources other than Israel and Jordan—namely, that, instead of a single determination concerning all included imports, the USITC made two separate determinations, excluding, in each of these determinations, only some of the non-covered sources. For this reason, we do not see any inconsistency in the Panel's logic.

471. As for the argument that the USITC's findings on imports from sources other than Canada and Mexico should have been read by the Panel as applying simultaneously to imports from sources other than Canada, Israel, Jordan, and Mexico *by virtue of the small import volumes at issue*, we observe that the *Agreement on Safeguards* does not provide for any different application of the parallelism requirement based on the volume of imports.[482] With this argument, the United States is asking us to read something into the *Agreement on Safeguards* that is not there, and this we cannot do.[483]

472. As we explained in *US – Wheat Gluten* and *US – Line Pipe*, a competent authority must establish, unambiguously, with a reasoned and adequate explanation, and *in a way that leaves nothing merely implied or suggested*, that imports from sources covered by the measure, *alone*, satisfy the requirements for the application of a safeguard measure. We are *not* suggesting that very low imports volumes, either from some, or from all, of the excluded sources at issue, are irrelevant for a competent authority's findings or the reasoned and adequate explanation underpinning such findings. We recognize that, where import volumes from excluded sources are very small, it is quite possible that the explanation underpinning the competent authority's conclusion need not be as extensive as in circumstances where the excluded sources account for a large proportion of total imports. Nevertheless, even if an explanation need not necessarily be extensive, the requisite explicit finding *must still be provided*. That finding must be contained in the authority's report, must be supported by a reasoned and adequate explanation, and—as we stated above—must address imports from all covered sources, excluding *all* of the non-covered sources. Nowhere in the *Agreement on Safeguards* is there any indication that these important principles can be disregarded in circumstances where imports from some or all sources are at low levels.

473. For these reasons, we do not agree with the United States that the Panel required the USITC to make "redundant findings".[484] Rather, the Panel correctly noted that the USITC had not provided the requisite finding, supported by a reasoned and adequate explanation—namely, whether the exclusion of *all* non-covered sources would change the USITC's conclusion about the prerequisites for the application of a safeguard measure. The Panel was certainly aware—as we are—of the very small import volumes at issue. However, the USITC had not made the requisite finding, and, as panels may not conduct *de novo* reviews, the Panel could not make the determination for the competent authority, even if the data needed for making such determination could be gleaned from the competent authority's report. Therefore, we cannot fault the Panel for having applied faithfully the requirements of the *Agreement on Safeguards*, as clarified by us in our previous reports. Similarly, the mere fact that import volumes were low—however low such import volumes may be—cannot entitle the Panel to make a finding that should have been made by the USITC. For these reasons, we do not reverse the Panel's findings on stainless steel rod.

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[475]United States' appellant's submission, para. 339. The United States appears to be suggesting that the statement of the USITC that the "exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners" refers to the conclusions concerning *non-NAFTA* imports (rather than to the conclusions concerning *all* imports). However, the USITC did not explicitly make this point and this reading of the USITC's finding is not evident to us. Moreover, the United States bases this suggested reading of the USITC's statement on the fact that "this statement immediately preceded the ITC's parallelism analysis for imports from sources other than Canada and Mexico." (United States' appellant's submission, para. 339) However, we note that, for stainless steel rod, the USITC's findings on non-NAFTA imports are contained in the original report, whereas the statement with respect to the exclusion of imports from Israel and Jordan is contained in the Second Supplementary Report. Consequently, the statement concerning the exclusion of imports from Israel and Jordan did not "immediately prece[de]" the USITC's analysis of non-NAFTA imports of stainless steel rod. Therefore, we read the statement that the "exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or of individual Commissioners", as far as stainless steel rod is concerned, as referring not to the USITC's conclusions concerning non-NAFTA imports, but rather to the USITC's conclusions concerning *all* imports.

[476]United States' appellant's submission, para. 343.

[477]*Ibid.*, para. 343. At the oral hearing, the United States stated that the combination of particular findings of the USITC provides the finding that is required concerning imports from all excluded sources.

[478]United States' appellant's submission, para. 341. (emphasis added)

[479]We note, moreover, that in its statement, contained in the Second Supplementary Report, that "the exclusion of imports from Israel and Jordan would not change the conclusions of the Commission or individual Commissioners", the USITC explicitly refers to its findings under the section of the original report entitled "Views on Remedy of the Commission"; in that section, for stainless steel rod, under the heading "Country Exclusion", the USITC mentions Canada and Mexico, as well as Israel and Jordan, separately, and, in our view, does not discuss any connection between imports from these four sources and does not refer to these four sources together. (USITC Report, Vol. I, p. 405 and footnote 268 thereto)

[480]Panel Reports, para. 10.697. (footnote omitted)

[481]*Ibid.*

[482]Some of the Complaining Parties suggested that the United States was, in effect, seeking to invoke a *de minimis* exception. (European Communities' appellee's submission, para. 347; Norway's appellee's submission, para. 219) At the oral hearing, the United States argued that it was not invoking a *de minimis* principle, but rather a "principle of explanation".

[483]Appellate Body Report, *India – Quantitative Restrictions*, para. 94; Appellate Body Report, *India – Patents (US)*, para. 45.

[484]United States' appellant's submission, heading III.E.3.

474. We, therefore, *uphold* the Panel's findings, in paragraph 10.699, and in the relevant section of paragraph 11.2 of the Panel Reports, with respect to stainless steel rod that the United States acted inconsistently with its obligations under Articles 2.1 and 4.2 of the *Agreement on Safeguards* because it failed to establish explicitly, with a reasoned and adequate explanation, that imports included in the safeguard measure satisfy, *alone*, the requirements for the imposition of a safeguard measure.

VIII. Causation

475. We next address the issue of causation. On this issue, the Panel found that, for nine product categories[485], the USITC failed to provide a reasoned and adequate explanation demonstrating that a "causal link" existed between increased imports and serious injury, as required by Articles 2.1, 4.2(b) and 3.1 of the *Agreement on Safeguards*.

476. For seven of those product categories—CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar—the Panel found that the USITC's "causal link" determination was "inconsistent with Articles 4.2(b), 2.1 and 3.1 of the Agreement on Safeguards".[486]

477. For the other two product categories—tin mill products and stainless steel wire—the Panel found that the USITC report did not contain "a reasoned and adequate explanation of how the facts support" the "causal link" determination, "as required by Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards", because the determination was based on alternative explanations given by different Commissioners that, in the Panel's view, could not be reconciled.[487]

478. The United States claims that the Panel erred in making these findings on causation, and requests that we reverse all nine findings of the Panel. However, given the different grounds articulated by the Panel for, on the one hand, tin mill products and stainless steel wire, and, on the other hand, the other seven products, the United States makes two separate claims. The United States addresses tin mill products and stainless steel wire in one claim[488], and the other seven products in another claim.[489] We will consider the two claims separately.

A. *CCFRS, Hot-Rolled Bar, Cold-Finished Bar, Rebar, Welded Pipe, FFTJ, and Stainless Steel Bar*

479. For the seven products other than tin mill products and stainless steel wire, we begin by recalling that Members may apply safeguard measures "*only*" when, as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. It is

[485]CCFRS (see Panel Reports, para. 10.419); tin mill products (see Panel Reports, para. 10.422); hot-rolled bar (see Panel Reports, para. 10.445); cold-finished bar (see Panel Reports, para. 10.469); rebar (see Panel Reports, para. 10.487); welded pipe (see Panel Reports, para. 10.503); FFTJ (see Panel Reports, para. 10.536); stainless steel bar (see Panel Reports, para. 10.569); stainless steel wire (see Panel Reports, para. 10.573).

[486]Panel Reports, paras. quoted in footnote 485.

[487]*Ibid.*

[488]United States' appellant's submission, section F, paras. 359–396; see also literal C in para. 397.

[489]United States' appellant's submission, section D, paras. 139–314; see also literal D in para. 397.

"*only*" if these prerequisites set forth in Article XIX:1(a) of the GATT 1994 and in the *Agreement on Safeguards* are shown to exist that the right to apply a safeguard measure arises.

480. Furthermore, *all* of these prerequisites must be established in the investigation for products being imported from sources included in the application of the measure, as "the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2" of the *Agreement on Safeguards*.[490]

481. In this case, the Panel decided to exercise judicial economy with respect to all claims on "serious injury".[491] Consequently, the Panel made no findings on whether the USITC had demonstrated that the domestic industry in the United States was suffering "a significant overall impairment".[492] The Panel also decided to exercise judicial economy with respect to all claims relating to the appropriate definition of the "imported product", the "like product", and the "domestic industry".[493] For this reason, the Panel relied on a number of assumptions[494] in assessing whether the USITC's "investigation demonstrate[d], on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof".[495]

482. We have found earlier[496] that the ten measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*, and, in consequence, we have upheld the Panel's finding that the USITC failed to provide a reasoned and adequate explanation demonstrating that the alleged "unforeseen developments" *resulted* in imports of the ten products to which the measures at issue apply. Also, on the issue of "parallelism", we have found[497] that the ten measures at issue are inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, and, in consequence, we have upheld the Panel's finding that the USITC failed to demonstrate that imports from sources covered by the safeguard measures at issue, *alone*, were being imported into the territory of the United States "in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that

[490]Appellate Body Report, *US – Wheat Gluten*, para. 96.

[491]Panel Reports, para. 10.700.

[492]Article 4.1(a) of the *Agreement on Safeguards*.

[493]Panel Reports, para. 10.700.

[494]In paragraph 10.278 of the Panel Reports, the Panel stated that it "assumed for the purposes of its consideration of the issue of causation", that the relevant domestic producers had been correctly defined and that serious injury or threat thereof existed. We note that the Panel found no "increased imports" for five product categories – CCFRS, hot-rolled bar, stainless steel rod, tin mill, and stainless steel wire. However, the Panel must also have assumed, tacitly, that, for the purposes of its causation analysis, imports had increased for those five products. We do not see anything improper *per se* in panels making such assumptions, especially when doing so enables panels to make findings they otherwise would not have made, thereby facilitating appellate review. We are mindful that the volume and complexity of this case may have prompted the Panel to exercise judicial economy on several issues and to rely on the corresponding inter-dependent assumptions. We note, however, that the cumulation of several inter-related assumptions could have affected our ability to complete the Panel's legal analysis had we pursued a ruling on causation.

[495]Article 4.2 (b) of the *Agreement on Safeguards*. We note that "serious injury" is the purported effect that should be causally linked by the competent authority to "increased imports". When the determination of "serious injury" is challenged, a panel may only conclude definitively that "the existence of the causal link" has been adequately demonstrated *after* having established that "increased imports" *and* "serious injury" were adequately determined in the investigation.

[496]See *supra*, para. 330.

[497]See *supra*, para. 456.

produces like or directly competitive products", as required in Article 2.1 and further developed in Article 4.2 of the *Agreement on Safeguards.*

483. As we have already found that the measures before us are inconsistent with Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 3.1, and 4.2 of the *Agreement on Safeguards*, it is unnecessary, for the purposes of resolving this dispute, to rule on whether the Panel was correct in finding that the United States also acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* because the USITC report failed to demonstrate the existence of a "causal link" between increased imports from *all* sources (that is, imports covered by the measures *and* imports not covered by the measures) and serious injury to the domestic industry. We, therefore, decline to rule on the issue of causation. Accordingly, and as we have not examined the Panel's findings on causation for the seven products that are the focus of this claim by the United States—CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar—we neither reverse nor uphold those findings.

484. At the oral hearing in this appeal, none of the participants appeared to disagree that, if we were to uphold the Panel's findings on "unforeseen developments", parallelism, and/or increased imports, it would not be *necessary* for us to rule on the claims raised on causation. Nevertheless, several participants expressed an interest in having us rule on causation as it would provide guidance to Members on applying safeguard measures in the future consistently with their WTO obligations. The United States expressed a strong preference for us to rule on causation, stating that "[it would] be important for us in terms of understanding what our obligations are under the *Agreement [on Safeguards]* and what we have to do to comply with them".[498]

485. Guidance may be found in our previous rulings. In *US – Line Pipe*, for example, we interpreted Article 4.2(b) of the *Agreement on Safeguards* as establishing:

> … two distinct legal requirements for competent authorities in the application of a safeguard measure. First, there must be a *demonstration* of the "*existence* of the causal link between increased imports of the product concerned and serious injury or threat thereof". Second, the injury caused by factors other than the increased imports must not be attributed to increased imports.[499] (emphasis added)

486. Moreover, in *US – Lamb*, when examining the requirement of Article 4.2(b) that the determination as to increased imports must be "on the basis of objective evidence", we explained that "objective evidence" means "objective data".[500] Thus, Article 4.2(b) requires a "demonstration" of the "existence" of a causal link, and it requires that this demonstration must be based on "objective data". Further, this "demonstration" must be included in the report of the investigation, which should "set[ ] forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c)" of the *Agreement on Safeguards*.[501]

[498]United States' response to questioning at the oral hearing.

[499]Appellate Body Report, *US – Line Pipe*, para. 208.

[500]Appellate Body Report, *US – Lamb*, para. 130.

[501]Appellate Body Report, *US – Line Pipe*, para. 236.

487. In *US – Line Pipe*, we also found that, in the context of "non-attribution", competent authorities: (i) "must 'establish explicitly' that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*'"[502]; and (ii) must provide a "reasoned and adequate explanation of how the facts support their determination".[503]

488. In *US – Wheat Gluten*, we found that "the term 'causal link' denotes … a relationship of cause and effect"[504] between "increased imports" and "serious injury". The former—the purported cause—contributes to "bringing about", "producing" or "inducing" the latter[505]—the purported effect. The "link" must connect, in a "genuine and substantial"[506] causal relationship, "increased imports", and "serious injury".

489. In sum, the *Agreement on Safeguards*—in Article 2.1, as elaborated by Article 4.2, and in combination with Article 3.1—requires that competent authorities demonstrate the *existence* of a "causal link" between "increased imports" and "serious injury" (or the threat thereof) on the basis of "objective evidence". In addition, the competent authorities must provide a reasoned and adequate explanation of how facts (that is, the aforementioned "objective evidence") support their determination. If these requirements are not met, the right to apply a safeguard measure does not arise.

490. In *EC – Tube or Pipe Fittings*, we found that the non-attribution language of Article 3.5 of the *Anti-Dumping Agreement* does not require, *in each and every case*, an examination of the *collective* effects of other causal factors, in addition to an examination of the *individual* effects of those causal factors.[507] We explained there that an assessment of the collective effects of other causal factors "is *not always* necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors."[508] We acknowledged, however, that "there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports".[509] We explained further that "an investigating authority is not required to examine the collective impact of other causal factors, *provided that*, under the specific factual circumstances of the case, it fulfils its obligation not to attribute to dumped imports the injuries caused by other causal factors".[510]

[502]We first made this assertion in *US – Wheat Gluten*, in the context of a discussion on parallelism. (Appellate Body Report, *US – Wheat Gluten*, para. 98) In *US – Line Pipe*, we explained that the same reasoning would apply to Article 4.2(b), last sentence. (Appellate Body Report, *US – Line Pipe*, para. 216)

[503]We made this assertion originally in *US – Lamb* in the context of a discussion of a claim under Article 4.2(a) of the *Agreement on Safeguards.* (Appellate Body Report, *US – Lamb*, para. 103) In *US – Line Pipe*, we explained that the same reasoning would apply to Article 4.2(b), last sentence. (Appellate Body Report, *US – Line Pipe,* para. 216)

[504]Appellate Body Report, *US – Wheat Gluten*, para. 67.

[505]*Ibid.*

[506]*Ibid.*, para. 69.

[507]Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 190.

[508]*Ibid.*, para. 191. (emphasis added)

[509]Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192.

[510]*Ibid.* (emphasis added)

491. Lastly, it may be useful to refer to our finding in *EC – Tube or Pipe Fittings* in respect of the relevance of factors that "had effectively been found not to exist".[511] In that case, the competent authority had found, contrary to the submissions of the exporters, that the difference in costs of production between the imported product and the domestic product was virtually non-existent and thus did not constitute a "factor other than dumped imports" causing injury to the domestic industry under Article 3.5 of the *Anti-Dumping Agreement*. Consequently, we found that there was no reason for the investigating authority to undertake the analysis of whether the alleged "other factor" had any *effect* on the domestic industry under Article 3.5[512] because the alleged "other factor" "had effectively been found *not* to exist".[513] In other words, we did not rule that minimal (or not significant) factors need not be considered by the competent authorities in conducting non-attribution analyses. Rather, we ruled that only factors that have been found to exist need be taken into account in the non-attribution analysis.

B. *Tin Mill Products and Stainless Steel Wire*

492. We turn now to the two other products on which the Panel found that the USITC failed to provide a reasoned and adequate explanation of how the facts supported its determination that a "causal link" existed between increased imports and serious injury to the domestic industry that produces like or directly competitive products. The Panel based its findings on causation for tin mill products and stainless steel wire on the Panel's previous conclusion that the United States was not entitled to apply safeguard measures to imports of those two products because the relevant determinations made by the USITC were supported by findings of different Commissioners that could not be reconciled.[514] We have already reversed those findings.[515]

493. Accordingly, we also *reverse* the Panel's findings on causation made, respectively, in paragraphs 10.422, 10.573, and the relevant sections of paragraph 11.2 of the Panel Reports, that the USITC report does not contain a reasoned and adequate explanation of how the facts support the determination that increased imports of tin mill products and stainless steel wire *caused* serious injury to the relevant domestic industry as required by Articles 2.1, 4.2(b), and 3.1 of the *Agreement on Safeguards* because the determination was based on different findings by the USITC Commissioners. This is not to say that we find that a causal link *has been* established with respect to tin mill products and stainless steel wire. We are simply saying that the reasoning used by the Panel to find that the USITC failed to establish a causal link for these products is flawed, and does not support the Panel's conclusion that no such link was established. We make no finding on whether or not a causal link has been established for these products. In the light of our other findings in this Report that all ten safeguard measures are inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1 and 4.2 of the *Agreement on Safeguards*, it is not necessary, for purposes of resolving this dispute, to make further rulings on causation related to tin mill products and stainless steel wire.

[511]Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 178.

[512]*Ibid.*, para. 177.

[513]*Ibid.*, paras. 178. (original emphasis)

[514]Panel Reports, paras. 10.422 and 10.572–10.573.

[515]See *supra*, paras. 419 and 429.

IX. Article 11 of the DSU

494. In its Notice of Appeal, the United States alleged that the Panel "acted inconsistently with Article 11 of the DSU in that it failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with GATT 1994 and the Safeguards Agreement."[516] In its appellant's submission, the United States' arguments under Article 11 are intermingled with its arguments on the Panel's findings on "unforeseen developments"[517] and with its arguments on the Panel's causation analysis.[518]

495. Article 11 of the DSU provides:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

496. In response to our questioning during the oral hearing, the United States stated that it was not making any "specific claims under Article 11", and that it was for us to decide whether a ruling on Article 11 of the DSU was necessary.[519] The United States asserted that the Panel's allegedly incorrect conclusions with respect to Articles 2.1, 3.1, and 4 of the *Agreement on Safeguards* and Article XIX of the GATT 1994 "resulted partly from its failure to observe its obligations under Article 11."[520] Therefore, the United States said that it did not make a claim under Article 11 that is "separate and distinct"[521] from its claims with respect to the substance of the Panel's analysis.

497. As we have stated previously, "not every failure by the Panel in the appreciation of the evidence before it can be characterized as failure to make an objective assessment of the facts."[522] Similarly, not every error of law or incorrect legal interpretation attributed to a panel constitutes a failure on the part of the panel to make an objective assessment of the matter before it.

498. A challenge under Article 11 of the DSU must not be vague or ambiguous. On the contrary, such a challenge must be clearly articulated and substantiated with specific arguments. An Article 11

[516]Notice of Appeal, WT/DS248/17, WT/DS249/11, WT/DS251/12, WT/DS252/10, WT/DS253/10, WT/DS254/10, WT/DS258/14, WT/DS259/13, 14 August 2003, p. 4, para. 6.

[517]United States' appellant's submission, paras. 77–79.

[518]*Ibid.*, paras. 160–161. The United States clarified during the oral hearing that it was not pursuing its claim, set out in paragraph 6 of its Notice of Appeal, that the Panel had failed to meet its obligations under Article 11 because it had made self-contradictory findings.

[519]United States' response to questioning at the oral hearing.

[520]*Ibid.*

[521]*Ibid.*

[522]Appellate Body Report, *Japan – Agricultural Products II*, para. 141.

claim is not to be made lightly, or merely as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement.[523] A claim under Article 11 of the DSU must stand by itself and be substantiated, as such, and not as subsidiary to another alleged violation.

499. The United States' arguments on Article 11 of the DSU are mentioned only in passing in its appellant's submission. Nowhere do we find a clearly articulated claim or specific arguments that would support such a claim. Moreover, the United States did not clarify its challenge under Article 11 of the DSU during the oral hearing. In sum, the United Stated has not substantiated its claim that the Panel acted inconsistently with Article 11 of the DSU, and this claim must therefore fail.

X. Article 12.7 of the DSU

500. The United States also contends that the Panel acted inconsistently with its obligations under Article 12.7 of the DSU by failing to provide "the basic rationale" for its findings and conclusions, in the context of its analysis of "unforeseen developments" under Article XIX:1(a) of the GATT 1994.[524]

501. The United States argues that the Panel did not articulate, "except in conclusory fashion", the reasons for finding that the USITC did not provide "reasoned conclusions" as required by Article 3.1 of the *Agreement on Safeguards*.[525] The United States maintains that the Panel merely concluded that the USITC's demonstration of "unforeseen developments" was "plausible, but … not sufficiently supported and explained", without pointing to any evidence that undermined any of the USITC's conclusions, or providing any alternative explanation.[526] Accordingly, the United States submits that "the Panel failed to set forth explanations and reasons sufficient to disclose its justifications for its findings and recommendations."[527]

502. Article 12.7 of the DSU reads, in relevant part:

> … the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.

503. We have already reviewed the Panel's findings on the USITC's analysis of "unforeseen developments". Based on our review of the Panel's reasoning, it appears to us that the Panel considered in detail the evidence that was before the USITC, and provided detailed explanations of how and why it concluded that the USITC had failed to demonstrate, through a reasoned and adequate explanation, that the alleged "unforeseen developments" *resulted* in increased imports of *each*

[523]The United States further clarified during the oral hearing that if we were to conclude that the Panel erred in its findings on Article 4.2(b) of the *Agreement on Safeguards*, it would not be necessary for us to reach its claim under Article 11.

[524]In its Notice of Appeal, the United States made a general claim that the Panel acted inconsistently with Article 12.7 of the DSU. Although in its appellant's submission the United States made reference to Article 12.7 in the context of its claims regarding "unforeseen developments", "causation", as well as "parallelism", in response to questioning at the oral hearing, the United States clarified that its claim under Article 12.7 related exclusively to the Panel's findings on "unforeseen developments".

[525]United States' appellant's submission, para. 95.

[526]*Ibid.*

[527]*Ibid.*

product subject to a safeguard measure.[528] The Panel explains, for instance, that, although the USITC report "describes a plausible set of unforeseen developments that *may have resulted* in increased imports to the United States from various sources, it falls short of demonstrating that such developments *actually resulted* in increased imports into the United States causing serious injury to the relevant domestic producers."[529] The Panel then goes on to say that:

> … even if "large volumes of foreign steel production were displaced from foreign consumption" this does not, in itself, imply that imports to the United States increased as a result of unforeseen developments. Article XIX of GATT, however, requires a demonstration that the unforeseen development resulted in *increased imports into* the United States. In our view, the USITC's explanation failed to link these steel market displacements to the increased imports *into the United States* at issue.[530] (original emphasis)

504. In our view, in making these statements, the Panel has sufficiently set out in its Reports the "basic rationale" for its finding that the USITC failed to explain how, though "plausible", the "unforeseen developments" identified in the report in fact *resulted* in increased imports of the specific products subject to the safeguard measures at issue.

505. The United States also argues that the Panel did not explain why the USITC failed to demonstrate that the alleged "unforeseen developments" resulted in increased imports of each of the products to which the safeguard measures apply, but rather "simply assumed that the ITC's demonstration, which focused on macroeconomic events and relied on broad economic indicators, could not suffice as a demonstration for any specific measure."[531]

506. In our view, the Panel did not simply *assume*, but rather clearly pointed to, a deficiency in the USITC's reasoning. The Panel reviewed the USITC's findings and found that the USITC failed to demonstrate that the "plausible" unforeseen developments did, in fact, result in increased imports of the specific products subject to the safeguard measures at issue. Because the USITC, according to the United States, relied on macroeconomic events having effects across the respective industries, it was for the USITC to show how those events were relevant to each product covered by each of the safeguard measures at issue. As the United States itself acknowledges, "Article 3.1 assigns the competent authorities – not the panel – the obligation to 'publish a report setting forth *their* findings and reasoned conclusions reached on all pertinent issues of fact and law'."[532] Therefore, it was for the USITC, and not for the Panel, to explain how the facts supported its determination with respect to "unforeseen developments". The argument of the United States in this appeal seeks to shift the burden of this demonstration to the Panel, whose function, in this regard, is confined to assessing the adequacy of the "reasoned conclusions" put forward by the competent authority. We agree with the Panel that the USITC's demonstration was insufficient, and we find no error in the Panel's explanation of that finding.

[528]The Panel's reasoning is explained, in particular, in Panel Reports, paras. 10.121-10.150.

[529]Panel Reports, para. 10.122 (emphasis added)

[530]Panel Reports, para. 10.123. (original emphasis; footnote omitted)

[531]United States' appellant's submission, para. 82.

[532]*Ibid.*, para. 55 (original emphasis).

507. Although the United States may not agree with the rationale provided by the Panel for its findings, we find that the Panel set out, in its Reports, a "basic rationale" consistent with the requirements of Article 12.7 of the DSU. Accordingly, we reject the United States' claim relating to the Panel's alleged failure to provide a "basic rationale" for its finding concerning Article XIX:1(a) of the GATT 1994.

XI. Conditional Appeals

508. The Complaining Parties request us to find that the United States acted inconsistently with Articles 2.1, 4.1(c), and 5.1 of the *Agreement on Safeguards*. China also requests us to find that the United States acted inconsistently with Article 9.1 of the *Agreement on Safeguards*. These requests, however, are conditional. To reach these claims we would, first, need to reverse the finding made by the Panel, in paragraph 10.705 of the Panel Reports, that all ten safeguard measures imposed by the United States "were deprived of a legal basis".[533] We have not done so.

509. In a previous section of this Report[534], we found that the ten measures at issue are inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*, and we consequently upheld the Panel's finding that the USITC failed to provide a reasoned and adequate explanation demonstrating that the alleged "unforeseen developments" *resulted* in increased imports of the ten products to which the measures at issue apply.

510. Likewise, in examining the issue of "parallelism", we also found[535] that the ten measures at issue are inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, and we consequently upheld the Panel's relevant findings that the USITC failed to demonstrate that imports from sources covered by the safeguard measures at issue, *alone*, were being imported into the territory of the United States "in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products", as required by Article 2.1 and further elaborated in Article 4.2 of the *Agreement on Safeguards.*

511. Consequently, we do not disturb the finding made by the Panel, in paragraph 10.705 of the Panel Reports, that all ten safeguard measures imposed by the United States "were deprived of a legal basis". Therefore, the condition on which some of the Complaining Parties request us to rule on the question of whether the United States, by imposing the safeguard measures at issue, acted inconsistently with its obligations under Articles 2.1, 4.1(c), 5.1, and 9.1 of the *Agreement on Safeguards*, does not arise. In these circumstances, there is no need for us to examine these conditional appeals.[536]

[533]Brazil, Japan, and Korea formulated their conditional appeal in different terms, which will be described and addressed in the paragraphs below.

[534]*Supra*, para. 330.

[535]See *supra*, paras. 456 and 474.

512. Finally, we note that, in addition, Brazil, Japan, and Korea, in their joint appellants' submission, condition their cross-appeal with respect to Article 5.1 of the *Agreement on Safeguards* on the event that we uphold or modify the Panel's findings on causation. In this event, these parties request us to complete the analysis "regarding the failure of the United States to adequately analyze causation and to find that the United States failed to ensure that its safeguard measures were limited to the extent necessary, as required by Article 5.1."[537] Similarly, in the event that we uphold the Panel's findings on causation, New Zealand requests us to find that the United States failed to comply with Article 5.1 of the *Agreement on Safeguards*. Alternatively, in the event that we reverse the Panel's findings with respect to increased imports and causation, Brazil, Japan, and Korea request us to examine whether the safeguard measures, as explained by the United States in its "*ex post* economic analysis and model"[538], comply with Article 5 of the *Agreement on Safeguards*. In a previous section of this Report, we decided not to rule on the findings made by the Panel on causation[539] with respect to CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar. Consequently, the aforementioned conditions do not arise for those seven products. As for the two remaining products, namely, tin mill products and stainless steel wire, we reversed the Panel's findings on both "increased imports" and causation.[540] However, as we have found that the measures applied to those two products are inconsistent with Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 3.1, and 4.2 of the *Agreement on Safeguards*, it is, in our view, not necessary, for the purposes of resolving this dispute, to rule on whether, in applying these measures, the United States also acted inconsistently with its obligation under Article 5.1 of the *Agreement on Safeguards.*

XII. Findings and Conclusions

513. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports concerning the complaints of China, the European Communities, New Zealand, Norway, and Switzerland[541], that the application of all safeguard measures at issue in this dispute is inconsistent with the requirements of Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* because "the United States failed to provide a reasoned and adequate explanation

[536]We note that Brazil, Japan, and Korea, in their conditional appeal on whether the USITC acted inconsistently with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards* by "grouping [ ] CCFRS products into a single like product" (see Brazil's, Japan's, and Korea's other appellants' submission, para. 4), request that we address this claim in the event that we (i) disagree with the Panel's finding that the safeguards measures are "deprived of a legal basis"; (ii) reverse an aspect of any of the Panel's findings against the United States with respect to CCFRS; or (iii) conclude that the Panel should have issued a like product ruling to support its CCFRS causation finding. We note that, in the light of our rulings, none of the conditions listed by Brazil, Japan, and Korea arises.

[537]Brazil's, Japan's, and Korea's other appellants' submission, para. 2.

[538]*Ibid.*, para. 3.

[539]See *supra*, para. 483.

[540]See *supra*, para. 493.

[541]In upholding claims on "unforeseen developments", the Panel refers to claims made by China, the European Communities, New Zealand, Norway, and Switzerland.

demonstrating that 'unforeseen developments' had resulted in increased imports causing serious injury to the relevant domestic producers";

(b) upholds the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports, that the application of the safeguard measures on imports of CCFRS, stainless steel rod and hot-rolled bar is inconsistent with the requirements of Articles 2.1 and 3.1 of the *Agreement on Safeguards* because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to 'increased imports'";

(c) reverses the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports, that the application of the safeguard measures on imports of tin mill products and stainless steel wire is inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards* because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to 'increased imports', since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance"; and finds it unnecessary to complete the analysis to decide whether the determination with respect to "increased imports" for tin mill products and stainless steel wire is consistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*;

(d) reverses the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports, that the application of the safeguard measures on imports of tin mill products and stainless steel wire is inconsistent with Articles 2.1, 4.2(b), and 3.1 of the *Agreement on Safeguards* because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a 'causal link' between any increased imports and serious injury, since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance"; and finds it unnecessary to complete the analysis to decide whether the determination with respect to a "causal link" for tin mill products and stainless steel wire is consistent with Articles 2.1, 4.2(b), and 3.1 of the *Agreement on Safeguards*;

(e) upholds the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports, that the application of all safeguard measures at issue in this dispute is inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards* because "the United States failed to comply with the requirement of 'parallelism' between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure";

(f) finds it unnecessary, for purposes of resolving this dispute, to rule on whether the Panel was correct in finding that, with respect to CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar, the United States acted inconsistently with Articles 2.1, 3.1 and 4.2(b) of the *Agreement on Safeguards* because the USITC report failed to demonstrate the existence of a "causal link" between increased imports from all sources and serious injury to the domestic industry, and neither reverses nor upholds the Panel's findings on causation;

(g) finds that the United States did not substantiate the claim raised under Article 11 of the DSU;

(h) finds that the Panel satisfied its duty, under Article 12.7 of the DSU, to set out a "basic rationale behind [its] findings" with respect to Article XIX:1(a) of the GATT 1994; and

(i) declines to rule on the conditional appeals of the Complaining Parties relating to Articles 2.1, 4.1(c), 5.1, and 9.1 of the *Agreement on Safeguards*.

514. The Appellate Body *recommends* that the DSB request the United States to bring its safeguard measures, which have been found in this Report, and in the Panel Reports as modified by this Report, to be inconsistent with the *Agreement on Safeguards* and the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original at Geneva this 23rd day of October 2003 by:

_____

James Bacchus
Presiding Member

_____ _____

Georges Abi-Saab
Member

John Lockhart
Member

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS248/17
WT/DS249/11
WT/DS251/12
WT/DS252/10
WT/DS253/10
WT/DS254/10
WT/DS258/14
WT/DS259/13
11 August 2003
(03-0000)

Original: English

UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS

Notification of an Appeal by the United States
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 11 August 2003, sent by the United States to the Dispute Settlement Body (DSB), is circulated to Members. This notification also constitutes the Notice of Appeal, filed on the same day with the Appellate Body, pursuant to the *Working Procedures for Appellate Review*.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Reports on *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R and WT/DS259/R) and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the application of safeguard measures on imports of certain carbon flat-rolled steel ("CCFRS"); tin mill; hot-rolled bar; cold-finished bar; rebar; welded pipe; fittings, flanges, and tool joints ("FFTJ"); stainless steel bar; stainless steel rod; and stainless steel wire is inconsistent with Articles XIX:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 3.1 of the *Agreement on Safeguards* ("Safeguards Agreement")[542] on the grounds that the United States failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports of each of these products causing serious injury to the relevant domestic industry. (Paras. 10.148-10.150 and 11.2.) These findings are in error, and are based on erroneous findings on issues of law and related legal interpretations, including, for example,

[542]Unless indicated otherwise, reference to articles with Arabic numerals are to articles of the Safeguards Agreement and references to articles with Roman numerals are to articles of GATT 1994.

(a) that the Panel could not consider data on the record of the U.S. International Trade Commission ("USITC") and cited in other sections of the USITC report in evaluating whether the competent authorities provided their findings and reasoned conclusions with regard to unforeseen developments in accordance with Article 3.1 (paras. 10.133-10.135 and 10.145);

(b) that the USITC was obliged to explain why the specific products under examination were affected individually by the confluence of unforeseen developments (paras. 10.127 and 10.147); and

(c) that the USITC did not sufficiently support and explain its conclusion that the displacement of steel on world markets led to increased imports to the United States from all sources (paras. 10.122-10.123, 10.125, 10.143-10.144 and 10.146).

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the application of safeguard measures on imports of CCFRS, hot-rolled bar, and stainless steel rod is inconsistent with Articles 2.1 and 3.1, on the grounds that the United States failed to provide a reasoned and adequate explanation of how the facts supported its determinations with respect to increased imports of these products. (Paras. 10.181, 10.183, 10.186-10.187, 10.204, 10.208, 10.210, 10.267, 10.271, 10.277, and 11.2.) These findings are in error, and are based on erroneous findings on issues of law and related legal interpretations, including, for example,

(a) that increased imports must be "sudden," and must "evidence[] a certain degree of recentness, suddenness, sharpness and significance" (paras. 10.159 and 10.166-10.167);

(b) that in light of the decrease in imports of CCFRS, hot-rolled bar, and stainless steel rod between interim 2000 and interim 2001, the USITC report did not contain an adequate and reasoned explanation of how the facts support its determinations regarding the absolute and relative increases in imports of these products (paras. 10.181, 10.184, 10.204, 10.208, 10.267, and 10.271); and

(c) that an increase in imports in 1998 (for CCFRS) and in 2000 (for hot-rolled bar and stainless steel rod) was not recent enough at the time of the USITC determination to support a finding under Article 2.1 that imports of CCFRS, hot-rolled bar, or stainless steel rod are "being imported in . . . increased quantities" (paras. 10.181-10.182, 10.185, 10.207, 10.269).

3. The United States seeks review by the Appellate Body of the Panel' s legal conclusion that the determinations regarding both increased imports of tin mill and stainless steel wire and also the causal link between these increased imports and serious injury to the corresponding domestic industry are inconsistent with Articles 2.1, 3.1, and 4.2(b) on the grounds that the explanations given for these determinations consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance. (Paras. 10.200, 10.262, 10.422, 10.573, and 11.2.) These findings are in error, and are based on erroneous findings on issues of law and related legal interpretations, including, for example,

(a) that findings by the competent authorities that are based on differently defined products are impossible to reconcile (paras. 10.194, 10.262, 10.422, and 10.572); and

(b) that a reasoned and adequate explanation is not contained in a set of findings by the competent authorities that rests on more than one like product definition (paras. 10.194, 10.262, 10.422, and 10.572).

4. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the application of safeguard measures on imports of CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar is inconsistent with Articles 2.1, 3.1, and 4.2(b) of the Safeguards Agreement, on the grounds that the United States failed to provide a reasoned and adequate explanation that a "causal link" existed between any increased imports and serious injury or threat of serious injury to the relevant domestic producers with respect to increased imports of these products. (paras. 10.418-10.419, 10.444-10.445, 10.468-10.469, 10.486-10.487, 10.502-10.503, 10.535-10.536, 10.568-10.569, and 11.2) These findings are in error, and are based on erroneous findings on issues of law and related legal interpretations, including, for example,

(a) that the USITC failed to provide a reasoned and adequate explanation of its finding that there was a causal link between increased imports of CCFRS and the serious injury suffered by the domestic industry; more specifically that:

(i) the USITC failed to provide a reasoned and adequate explanation of its finding that there was a coincidence in import and industry trends during the period (paras. 10.374-10.376); and

(ii) that the USITC failed to provide a compelling explanation of why the "conditions of competition in the CCFRS market established a causal link between imports and industry trends (para. 10.381);

(b) that the USITC's definition of CCFRS as a like product prevented the application of a causation analysis consistent with Article 4.2(b) for the industry producing that product (paras. 10.378, 10.380, 10.416-10.417);

(c) that the USITC failed to provide a compelling explanation that a causal link existed between increased imports of cold-finished bar and the serious injury suffered by the domestic industry (para. 10.458);

(d) that the USITC's non-attribution analysis failed to separate and distinguish the injurious effects of particular factors other than increased imports so that the injury caused by these factors, together with other factors, was not attributed to increased imports of CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar (paras. 10.389, 10.396, 10.401, 10.407-10.410, 10.418-10.419, 10.440, 10.443-10.444, 10.467-10.468, 10.484-10.486, 10.496, 10.499-10.501, 10.529, 10.533-10.535, 10.560, and 10.565-10.568);

(e) that, in addition to an individual assessment of the effects of other factors causing injury to the domestic industry, Article 4.2(b) calls for "an overall assessment of such 'other factors'" (para. 10.332) or for an evaluation of the "cumulative effects of individual factors" causing injury (paras. 10.409 and 10.567);

(f) that a competent authority may be required, in certain circumstances, to use an economic modeling analysis to quantify the amount of injury caused by imports and other factors causing injury as part of its causation analysis under Articles 2.1, 3.1, and 4.2(b) (paras. 10.340-10.342); and

(g) that the explanation of the competent authorities must be "clear and unambiguous" and "establish explicitly" that injury caused by factors other than increased imports is not attributed to increased imports (para. 10.330).

5. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the application of safeguard measures on imports of CCFRS, tin mill, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire is inconsistent with Articles 2.1 and 4.2, on the grounds that the United States failed to comply with the requirement of "parallelism" because it had not established that imports from sources subject to the safeguard measure satisfied the conditions for application of a safeguard measure. (Paras. 10.609, 10.615, 10.623, 10.633, 10.643, 10.653, 10.660, 10.670, 10.680, 10.685, 10.692, 10.699, and 11.2) These findings are in error, and are based on erroneous findings on issues of law and related legal interpretations, including, for example,

(a) that Articles 2.1 and 4.2 make it necessary to account for the fact that excluded imports may have some injurious impact on the domestic industry and that the USITC analysis failed to account for this impact (paras. 10.598, 10.605-10.606, 10.621, 10.629-10.630, 10.639-10.640, 10.650, 10.657, 10.666-10.667, 10.676-10.677, and 10.688);

(b) that the USITC's findings regarding imports from Israel and Jordan did not establish explicitly or provide a reasoned and adequate explanation that imports from sources not excluded from the measure satisfied the conditions for application of a safeguard measure (paras. 10.607-10.608, 10.622, 10.631-10.632, 10.641-10.642, 10.651-10.652, 10.658-10.659, 10.668-10.669, 10.678-10.679, 10.689-10.690, and 10.698);

(c) that the views of Commissioner Bragg did not meet the requirements of parallelism with regard to tin mill and stainless steel wire because she "reached findings on the broader category of CCFRS" and "on a broader category including stainless steel wire" (paras. 10.615 and 10.685); and

(d) that Commissioner Koplan's parallelism analysis regarding stainless steel wire does not contain the required findings that establish explicitly, with a reasoned and adequate explanation, that imports from sources other than Canada, Mexico, Israel, and Jordan satisfy the conditions of Article 2.1 as elaborated by Article 4.2 (para. 10.688).

6. The United States seeks review of the Panel's findings referenced above on the grounds that the Panel acted inconsistently with Article 11 of the DSU in that it failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with GATT 1994 and the Safeguards Agreement. As particular examples,

(a) the Panel found that the USITC's demonstration of unforeseen developments was not sufficiently supported and explained, even though the Panel found the explanation plausible, cited no alternative explanation, and found no error in the USITC's reasoning or the data used to support that reasoning (paras. 10.145-10.150); and

(b) made self-contradictory findings (including in paragraphs 10.173, 10.182, 10.192, 10.225, 10.433-10.437, 10.442, and 10.519).

7. The United States also seeks review of the Panel's findings referenced above on the grounds that the Panel acted inconsistently with Article 12.7 of the DSU, in that its report did not set out the basic rationale behind its findings and recommendations.

Report of the Panel, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/R, adopted 13 December 2010

WORLD TRADE ORGANIZATION

WT/DS399/R
13 December 2010
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UNITED STATES – MEASURES AFFECTING IMPORTS OF CERTAIN PASSENGER VEHICLE AND LIGHT TRUCK TYRES FROM CHINA

Report of the Panel

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Short Title	Full Case Title and Citation
Argentina – Footwear(EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, 575
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EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Japan – DRAMS (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, 2805
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Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Corrosion-Resistant Steel Sunset Review	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report WTDS244/AB/R, DSR 2004:I, 85
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131
US – Customs Bond Directive	Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R, WT/DS345/AB/R
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
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US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, 4865
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
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US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299
US – Wheat Gluten	Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717

Short Title	Full Case Title and Citation
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Full Reference
AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
COGS	Cost of Goods Sold
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
GATT 1994	General Agreement on Tariffs and Trade 1994
Non-subject imports	Imports of certain passenger vehicle and light truck tyres from sources other than China
OEM	Original Equipment Manufacturers
Safeguards Agreement	Agreement on Safeguards
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Subject imports	Imports of certain passenger vehicle and light truck tyres from China
Subject tyres	Certain passenger vehicle and light truck tyres
The Protocol	Protocol on the Accession of the People's Republic of China
Tyres case	The investigation regarding imports of certain passenger vehicle and light truck tyres from China before the USITC
Tyres measure	The additional duties imposed on imports of subject tyres for a three year period at: 35 per cent *ad valorem* in the first year, 30 per cent *ad valorem* in the second year; and 25 per cent *ad valorem* in the third year.
USITC	United States International Trade Commission
USW	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
Vienna Convention	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

I. INTRODUCTION

1.1 On 14 September 2009, the People's Republic of China ("China") requested consultations with the United States pursuant to Article XXIII:1 of the GATT 1994, Articles 1 and 4 of the DSU and Article 14 of the *Safeguards Agreement*, with regard to certain measures taken by the United States allegedly affecting the import of certain passenger vehicle and light truck tyres from China.[1] China and the United States held consultations in Geneva on 9 November 2009, but failed to resolve the dispute. At the DSB meeting on 19 January 2010, China requested the establishment of a Panel pursuant to Article XXIII:2 of the GATT 1994, Articles 4.7 and 6 of the DSU and Article 14 of the *Safeguards Agreement*.[2] At that meeting, the DSB established a panel pursuant to the request of China.

1.2 The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS399/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.3 On 2 March 2010, China requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.4 On 12 March 2010, the Director-General accordingly composed the Panel as follows:[3]

Chairman: Professor Celso Lafer

Members: Professor Donald M. McRae
Mr. Luis M. Catibayan

1.5 The European Union, Japan, Chinese Taipei, Turkey, and Viet Nam reserved their rights to participate in the Panel proceedings as third parties.

1.6 The Panel met with the parties on 1-2 June 2010 and 20-21 July 2010. The Panel met with the third parties on 2 June 2010. The Panel issued its interim report to the parties on 24 September 2010. The Panel issued its final report to the parties on 8 November 2010.

[1] WT/DS399/1.
[2] WT/DS399/2.
[3] WT/DS399/3.

II. FACTUAL ASPECTS

2.1 This case is about a transitional product-specific safeguard measure under Paragraph 16 of the Protocol that has been applied on imports of certain passenger vehicle and light truck tyres from China pursuant to Section 421 of the Trade Act of 1974.

2.2 A petition was filed by the USW on 20 April 2009, requesting the USITC to initiate an investigation under Section 421(b) of the Trade Act of 1974. The USITC instituted the investigation effective on 24 April 2009. The USITC determined that there was market disruption as a result of rapidly increasing imports of subject tyres from China that were a significant cause of material injury to the domestic industry. Following a Presidential decision additional duties have been imposed on imports of subject tyres for a three-year period, in the amount of 35 per cent *ad valorem* in the first year, 30 per cent *ad valorem* in the second year, and 25 per cent *ad valorem* in the third year. The *Tyres* measure took effect on 26 September 2009.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. CHINA

3.1 China has seven specific claims in this dispute and requests the Panel to find that:

(i) the United States failed to evaluate properly whether imports from China were in "such increased quantities" and "increasing rapidly" as required by Paragraphs 16.1 and 16.4 of the Protocol;

(ii) the U.S. statute implementing the causation standard of Paragraph 16 into U.S. law is inconsistent "as such" with Paragraphs 16.1 and 16.4 of the Protocol;

(iii) the United States failed to evaluate properly whether imports from China were a "significant cause" as required by Paragraphs 16.1 and 16.4 of the Protocol;

(iv) the United States has imposed a transitional safeguard measure that goes beyond the "extent necessary", and thus it is inconsistent with Paragraph 16.3 of the Protocol;

(v) the United States has imposed a transitional safeguard measure for a three-year period that is beyond "such period of time" that is "necessary", and thus it is inconsistent with Paragraph 16.6 of the Protocol.

3.2 China also claims that the transitional safeguard measure is inconsistent with the GATT 1994 and requests the Panel to find that:

(vi) the transitional safeguard measure is inconsistent with Article I:1 of the GATT 1994 as the United States does not accord the same treatment that it grants to passenger vehicle and light truck tyres originating in other countries to like products originating in China;

(vii) the transitional safeguard measure is inconsistent with Article II:1(b) of GATT 1994 as the tariffs consist of unjustified modifications of U.S. concessions on passenger vehicle and light truck tyres under the GATT 1994.

3.3 China asks that the Panel find that the United States is not in conformity with Paragraph 16 of the Protocol and Articles I:1 and II:1(b) of GATT 1994. China asks that the Panel recommend that the United States promptly comply with its obligations and withdraw the challenged measures.

B. THE UNITED STATES

3.4 The United States asks the Panel to reject China's claims in their entirety.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel and in their answers to questions. Executive summaries of the parties' written submissions, and executive summaries of their oral statements are attached to this report as annexes (see List of Annexes, pages vi and vii).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The European Union, Japan, Chinese Taipei, Turkey and Viet Nam reserved their rights to participate in the Panel proceedings as third parties. Chinese Taipei, Turkey and Viet Nam did not submit third party written submissions or make oral statements. The arguments of the European Union and Japan are set out in their written submissions and oral statements. Executive summaries of the third parties' written submissions and third party oral statements, or executive summaries thereof, are attached to this report as annexes (see List of Annexes, pages vi and vii).

VI. INTERIM REVIEW

6.1 On 24 September 2010, the Panel issued its Interim Report to the parties. On 8 October 2010, both parties submitted requests for the review of precise aspects of the Interim Report. On 25 October 2010, the parties submitted comments on one another's request for review.

6.2 This Interim Review section summarises the parties' requests for review and comments thereon, as well as our responses. Because the footnote numbering (but not the paragraph numbering) of our Report has changed due to changes made at the interim review stage, for the sake of clarity the footnote references in this section reflect the numbering in the Final Report.

6.3 The Panel is grateful to the parties for their assistance in identifying a number of typographical errors in the Interim Report.

A. REQUEST FOR REVIEW SUBMITTED BY CHINA

1. Increasing rapidly

(a) Para. 7.83

6.4 **China** claims that the Panel is going beyond merely presenting the facts in providing the data for the increases of subject and non-subject imports and recommends that the Panel "simply report the data for subject and non-subject imports." China continues that if the Panel "wishes to go beyond merely summarising the data", the Panel should make two changes. First, the Panel should report parallel figures for subject and non-subject imports. Second, China argues that if the Panel includes percentage increases, it should also include the volume change from one year to the next for both subject and non-subject imports. China continues that percentage increases alone are misleading and "the Panel should either present no percentage changes, or present both percentage changes and volume changes from year to year."

6.5 **The United States** claims that, under the standard of review in Article 11 of the DSU, "the Panel will necessarily need to 'go beyond' a 'mere presentation' of the facts on the record; instead, the Panel is expected to evaluate whether the ITC's analysis was 'reasoned and adequate' in light of the record evidence." The United States does not consider that parallel data on non-subject imports is necessary to make the Panel's analysis any clearer. The United States accuses China of attempting to place weight on the comparative levels of subject and non-subject volumes, an approach it did not take during the proceedings.

6.6 We do not consider it necessary to include any further data on non-subject imports. The obligation in the Protocol is to consider whether subject imports are "increasing rapidly" on an absolute or relative basis. On China's first point regarding the data for increases in non-subject imports, we note that we address the role of non-subject imports throughout the report[4] and specifically in paras. 7.364 to 7.367. Paragraph 7.83 focuses on absolute increases. However, in order to address China's concerns we have deleted the third table in paragraph 7.83, with appropriate adjustments to the text at the beginning of that paragraph, and added a citation in new footnote 176 .

6.7 Regarding China's second point and its desire to include volume changes from year to year, we note that China argued the relevance of year-on-year increases in annual volumes at para. 120 of its First Written Submission and in para. 28 of its Oral Statement at the First Panel Meeting. We consider this to be an argument associated with the rate of increase. As we have noted in para. 7.92 of our Report, under the Protocol the rapid increase need only be on an absolute or relative basis. China does not contest this. As such, we do not consider inclusion of this data adds anything further to what we have already said about the rate of increase in paras. 7.87 to 7.93.

(b) Para. 7.84

6.8 **China** argues that the statement by the Panel "that 'the greatest increase occurred in the last two years of the period' ... inappropriately accepts the U.S. efforts to combine the final two years of the period."[5] China submits that the Panel should delete this statement or "present a more in-depth explanation" given that the "statement, as written, is misleading and masks the actual amount of increase in 2008, which was the smallest increase of any year of the period." China continues that if "the Panel is to note that the largest increase in the period occurred in 2007, then the Panel should also note that the smallest increase of the entire period, in terms of both quantity and percentage increase, occurred in the last year of the period – 2008."[6]

6.9 **The United States** argues that the Panel did not focus only on the increases in import volumes in 2007 and 2008. Rather, the Panel conducted a detailed analysis of the increase in subject imports in 2008. The United States does not think any revision is necessary, but should the Panel believe further clarification is justified it suggests replacing the sentence: "The greatest increase occurred in the last two years of the period" with "The greatest increases (14.5 million units) occurred in 2007. This was followed by a further significant increase (4.5 million units) in 2008."

6.10 We note that the jurisprudence states that consideration should be given to trends over the investigation period, as well as to the recent period.[7] In that regard it is entirely appropriate that we consider what was happening to imports in the final two years of an investigation *as well as* considering trends during the course of the period of investigation. China's argument in these proceedings was to look at the *most* recent period, which it considered to be 2008. The Panel has

[4] *See* for example paras. 7.95, 7.203-7.204, 7.293, and 7.301.
[5] China's comments on the Interim Report, para. 10.
[6] China's comments on the Interim Report, para. 11.
[7] We refer to para. 7.88 of the Interim Report and footnote 187.

determined that a focus solely on 2008 was not appropriate.[8] In any case, paragraph 7.93 of the Report recalls that in each year of the period of investigation, there was an increase that was *in addition* to the increase in the previous year. However, to address China's request we have added a footnote to the end of the sentence in paragraph 7.84.

(c) Para. 7.86

6.11 **China** argues that the Panel "concludes its review of the import data without ever addressing the quarterly or monthly data for 2007 and 2008 which was presented by China." China continues that this is "a major omission that should be corrected." China argues that "[i]mports dropped on a quarterly basis in three of the four quarters in 2008, and dropped 7.8 per cent in Q3 and Q4 2008 relative to Q2 2008."[9] China claims that this "drop off in subject imports at the end of the period is directly applicable to the question of whether subject imports are 'increasing rapidly' under the Protocol."[10]

6.12 **The United States** argues that the Panel did not need to dwell on China's arguments based on quarterly data as the arguments "were of a subsidiary nature and not persuasive."

6.13 We consider that China's argument regarding the use of quarterly data is connected to China's argument regarding the rate of increase, which was addressed in the Report in paragraphs 7.87 to 7.93. However, to reflect China's concerns we have added a footnote to the end of paragraph 7.86.

(d) Para. 7.87

6.14 **China** argues that the Panel mischaracterises China's argument regarding the meaning of "increasing rapidly" when it states that China "argues that for imports to be 'increasing rapidly' there must be an increasing rate of increase in 2008, the final year of the period of investigation, compared to 2007." China claims that it never stated that the rate of increase "must" be higher than that of 2007. China continues that it stated "that such a scenario *could* be indicative that imports are 'increasing rapidly' under the Protocol." China claims that its argument regarding the rate of increase "is simply that the effects of a significant decline in the rate of increase in 2008 should be taken into account when assessing the issue of whether or not subject imports are 'increasing rapidly'."

6.15 **The United States** notes that at footnote 134 in paragraph 7.87 of the Interim Report (now see paragraph 7.87 and footnote 182 of the Final Report) "the Panel expressly recognised that China had outlined two scenarios for the meaning of 'rapidly,' and acknowledged that other scenarios might be possible". The United States argues that the Panel's analysis and focus on the rate of increase accurately characterised the "thrust of China's arguments on this issue throughout its submissions and statements."

6.16 To take into account China's concerns that its arguments be reflected accurately, we have modified paragraphs 7.87 and 7.92 of our Report.

6.17 **China** also claims that it has "simply argued that the steep drop-off in 2008 (just a 10.8 per cent increase as opposed to the 53.7 percent increase in 2007) casts doubt on whether imports can still be properly found to be 'increasing rapidly'." China argues that the "mischaracterization of China's

[8] Paras. 7.87 to 7.93 of the Interim Report.

[9] China's comments on the Interim Report, para. 12. Refers to China's First Written Submission, paras. 127-128.

[10] China's comments on the Interim Report, para. 12. Refers to China's Second Written Submission, paras. 119-122.

argument on this issue resulted in the Panel impermissibly glossing over the 2008 drop in the rate of increase, when instead the rate trends should have been examined closely and put into context."[11] China claims that its argument regarding the rate of increase "is simply that the effects of a significant decline in the rate of increase in 2008 should be taken into account" in determining whether imports are "increasing rapidly".

6.18 **The United States** disagrees that the Panel glossed over the drop in the rate of increase in 2008. The United States notes that the Panel considered the absolute and relative increases in import volumes in 2008, and refers to paras 7.87 to 7.93 of the Report to argue that the Panel considered and rejected China's claim "that the decline in the rate of increase in Chinese import volumes in 2008 meant that imports were not 'increasing rapidly' in 2008".

6.19 We consider there is ample basis in the Report to negate any accusation that the Panel "glossed" over the 2008 drop in the rate of increase. On the contrary, given China's focus on the rate of increase, there was considerable attention given to the data in 2008 in paragraphs. 7.83 to 7.105. Therefore, on this point we make no further changes to paragraph 7.87.

2. "As such" causation

(a) Paras. 7.138-7.140

6.20 **China** contends that the Panel sets up a false straw man by stating that China is arguing "cause" is capable of "producing or bringing about a result on its own" while "contribute" would require the contribution of other causal factors for an event to occur. China submits that it never argued that "significant cause" must be the sole cause. China asserts that the Panel's creation of this straw man led the Panel to sidestep the real issue – that of whether "to contribute" *requires less* than "to cause."

6.21 **The United States** asserts that the Panel accurately reflected China's arguments. The Panel clearly explained that the focus of China's argument was that "the term 'contribute' is less stringent than 'cause,'" just as China now asserts.[12] Moreover, after noting that China had relied on specific dictionary definitions of these terms, the Panel then concluded that, "[l]ooking exclusively at these terms, one might legitimately conclude that a 'contribution' has a lesser causal effect than a 'cause,'" because "implicit in the definitional differences invoked by China is the notion that the term 'contribute' allows for multiple factors to each 'play a part in' bringing about a result, whereas 'cause' means that the triggering event is in and of itself capable of bringing out, or producing that result."[13] The Panel's assertion that the definitions cited by China could be read to imply that a "cause" be the "sole" cause of injury were simply its own reasoned way of evaluating the merits of China's arguments and entirely appropriate.[14]

6.22 The Panel sees no need to make changes in the light of China's request. The Panel did not state that China argued that "significant cause" must be the sole cause. It reflected China's argument accurately in footnote 248 of the Report. The Panel's analysis of the meaning of the term "cause" in the context of Paragraph 16.4 of the Protocol and its relationship with the term "contribute" is dealt with in paragraphs 7.138 – 7.146 of the Final Report.

[11] China's comments on the Interim Report, para. 6.

[12] Interim Report, para. 7.137.

[13] Interim Report, para. 7.138.

[14] The United States makes this point, even though it does not fully agree with the Panel's assertion that "cause" could, in some cases, be read as having a different definition or meaning than the word "contribute" in situations involving descriptions of causal effect.

(b) Para. 7.158

6.23 **China** claims that the Panel mischaracterizes China's argument on what "significant cause" requires. In particular, China denies that it had argued that "significant cause" means that rapidly increasing imports must be "the most" significant cause of market disruption.

6.24 **The United States** disagrees with China. The United States asserts that China did argue, as it now concedes, that the term "significant" necessarily requires a comparison of the effects of Chinese imports "relative to other matters."[15] Moreover, China also made clear in its submissions that it believed that the ITC should have weighed the effects of Chinese imports against other injury causes.[16] Indeed, China specifically argued that the U.S. statute was inconsistent with the Protocol because it permitted the ITC to find that Chinese imports were a "significant cause" of injury even if they were "a less important factor than any other single cause."[17] Given China's arguments, which were not particularly clear, the Panel reasonably concluded that China was suggesting, among other things, that the ITC should have determined whether Chinese imports were a "more important" cause of injury to the industry than other causes.

6.25 We have modified para. 7.158 of the Final Report in light of China's request. We have also included new footnote 268 in our Report.

3. "As applied" causation

(a) Paras. 7.140 and 7.169-7.170

6.26 **China** requests clarification as to what the Panel has interpreted the term "significant" in "significant cause" to mean. China asks the Panel to make two changes. First, the Panel should explain what it interprets "significant" in "significant cause" to mean and distinguish "a significant cause" from simply "a cause." Second, the Panel should then apply this interpretation of "significant cause" in each of its findings on causation, noting why certain injury factors indicate that subject imports are a "significant cause" of material injury, and not simply a "cause."

6.27 **The United States** asserts that there is no need for the Panel to clarify its findings on the issue or to change its analysis of the USITC's findings on this score, as the Panel could not have been clearer on its definition of the term. The United States submits that the Panel properly stated that the United States, China and the Panel all agreed that the word "significant," as used in the Protocol, means "important," "notable," or "consequential." Moreover, the Panel also clearly rejected the idea that the U.S. statute or the Protocol contemplated that a "even a minimal cause" of injury might be a "significant cause" of injury under the Protocol. Finally, the Panel made clear that it applied this standard when reviewing the USITC's analysis, stating that it had assessed whether the USITC reasonably found that Chinese imports were a "significant," i.e., "important," "notable" or "consequential," cause of material injury to the industry.

6.28 Regarding para. 7.170 of our Report, the phrase "significant cause" is simply a shorthand reference to the particular causation standard in Paragraph 16.4. The point is that the causal element (as opposed to the "significant" element) of the Paragraph 16.4 causation standard could likely not be established without analysing correlation and the conditions of competition. Since the causation

[15] E.g. China's First Written Submission, paras. 204-207; China's Second Written Submission, para. 155.

[16] E.g. China's First Written Submission, paras. 204-205.

[17] China's First Written Submission, para. 206.

standard in Paragraph 16.4 is "significant cause", it would therefore be difficult to establish "significant cause" without analysing correlation or the conditions of competition.

6.29 We have modified para. 7.159, to state expressly that a "significant" cause is one that is important or notable.

6.30 Regarding China's second request, we note that the Panel's job is to review the determinations (including "significant cause") made by the USITC. It is not for the Panel to itself explain "why certain injury factors indicate that subject imports are a 'significant cause' of material injury". This is the role of the USITC. Accordingly, we see no need to make the changes requested by China.

(b) Paras. 7.174 – 7.177

6.31 **China** requests clarification of the Panel's findings on non-attribution. China notes the Panel's finding that "a finding of causation ... should only be made if it is properly established that rapidly increasing imports have injurious effects that *cannot be explained* by the existence of other causal factors."[18] In China's opinion, the Panel should clarify this "presently-vague" standard, and specify under what circumstances injurious effects *can* be explained by the existence of other causal factors. The Panel should also specify under what circumstances injurious effects *cannot* be explained by the existence of other causal factors. China submits that, in elaborating on this analysis, the Panel should follow the Appellate Body jurisprudence from *US – Hot-Rolled Steel* which states that investigating authorities must "separate and distinguish" the injurious effects of imports from the injurious effects of other factors.

6.32 **The United States** contends that there is nothing "vague" about the Panel's description of the standard that it applied to the USITC's analysis. The Panel's explanation of the standard is as specific and clear as statements made by the Appellate Body and WTO panels about the standards to be applied when reviewing non-attribution analyses under other WTO Agreements. Moreover, the Panel's actual review of the USITC's analysis of other injury factors, such as the industry's business strategy and the effects of demand changes, was lengthy, detailed and rigorous,[19] despite China's claims to the contrary.[20] China has provided the Panel with no basis for revisiting or revising its findings on these issues. The United States contends that the Panel correctly found that the specific "separate and distinguish" analysis that has been found applicable under the non-attribution language of these Agreements is <u>not</u> directly applicable to causation analysis under the Protocol, because the Protocol does not contain the sort of non-attribution requirement that is set forth in the *AD*, *SCM* and *Safeguards Agreements*.[21] According to the United States, China itself conceded that, due to the absence of specific non-attribution language in the Protocol, it has "never claimed {in this proceeding} that under Article 16 'the authority must perform the same non-attribution analysis for other factors in the market that it would in a global safeguard proceeding.'"[22] Given this, China has no basis for asking the Panel to now apply the "separate and distinguish" standard to the USITC's analysis of other factors in this proceeding.

6.33 The Panel sees no reason to alter the provisions or paragraphs as requested. The Panel is required to interpret the provisions of the Protocol, and assess the USITC's application of those

[18] Interim Report, para. 7.177 (emphasis added).

[19] Interim Report, paras. 7.262-7.3.78.

[20] China's Comments, para. 20.

[21] Appellate Body Report, *US – Upland Cotton*, para. 436 (stating that absence of non-attribution language in serious prejudice provisions of the Subsidies Agreement indicates that a "panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the 'effect of a subsidy is significant price suppression"); Panel Report, *US – Upland Cotton*, para. 7.1343.

[22] China's Second Written Submission, para. 309.

provisions to the facts at hand. The Panel is not required to explain how those provisions may or may not be applied in all circumstances. In addition, the Panel already clearly explained why the *US – Hot-Rolled Steel* "separate and distinguish" standard is not applicable in the present case, and China conceded as much at para. 309 of its Second Written Submission.

(c) Paras. 7.196 – 7.197

6.34 **China** asks the Panel to correct footnote 305 of the Report, regarding the percentage of tier 1 shipments accounted for by subject imports. In addition, China asks the Panel to explain why competition still exists even though subject imports do not compete with domestic tires for over 50 per cent of all shipments. China also asks the Panel to clarify the exact "*variation* in the levels of competition between subject imports and domestic products as between tier 1 and tiers 2 and 3",[23] indicating what the degree of competition was in tier 1, and what the degree of competition was in tiers 2 and 3.

6.35 **The United States** agrees that the Panel should correct footnote 305 of its Report. Otherwise, though, the United States contends that China is doing nothing more than re-arguing its theory that there was minimal competition between Chinese and U.S. tires in the replacement market. The United States believes there is no need to revise the analysis or conclusions.

6.36 We have corrected footnote 305 of the Report, as requested by both parties. The Panel sees no need to make any of the additional changes requested by China.

(d) Para. 7.205

6.37 **China** asks the Panel to clarify what it means by "there was some variation in the levels of competition within the OEM market."[24] The Panel should make a finding as to what degree of competition existed in the OEM market between subject imports and domestic products – simply stating that competition varied is too vague. In stating what degree of competition existed in the OEM market, the Panel should note which facts it is relying upon in making this finding.

6.38 **The United States** submits that the Panel conducted a detailed and fact-specific evaluation of this issue, correctly finding that China's share of this market grew from a relatively small level of 0.2 per cent in 2004 to a more pronounced 4.9 per cent in 2008, the final year of the period.[25] As the Panel also correctly pointed out, the record showed that, during the period, the absolute volumes and market share of the U.S. tires in this sector fell, thus indicating that the "degree of resultant competition between subject imports and domestically-produced tires in the OEM market was increasing."[26] Given the detailed factual nature of the Panel's assessment on this issue and the reasonableness and clarity of its conclusions, the United States does not believe that there is a need for the Panel to revise its findings on the issue, including its correct statement that there was "some variation in the levels of competition over the period."

6.39 The Panel sees no reason to alter the Report as requested.

[23] Interim Report, para. 7.197 (emphasis added).
[24] Interim Report, para. 7.205.
[25] Interim Report, para. 7.202.
[26] Interim Report, para. 7.204.

(e) Para. 7.229

6.40 **China** submits that the Panel mischaracterizes China's argument on correlation. China asserts that it never argued that, for there to be correlation between imports and injury factors, "a precise correlation between the degree of change in imports and the degree of change in the injury factors" is necessary.[27] To the contrary, China argued that simple temporal correlation is insufficient.[28] There should be a general correlation in degree between the increases in imports and the decreases in injury factors – but it need not be precise.[29]

6.41 In **the United States'** view, the Panel correctly summarized China's arguments on correlation in its report by stating, for example, that China argued that "the degree of the respective annual increases {in Chinese imports} must correspond generally with the degree of the respective declines in injury factors."[30] Given that China itself stated during the proceeding that, when evaluating the Commission's correlation analysis, the Panel must assess whether the "degree of the respective annual increases {in imports} ... correspond generally with the degree of the respective declines in injury factors,"[31] China's claim that the Panel mis-characterized or misunderstood its arguments is simply unfounded.

6.42 The United States further contends that the Panel does not attribute to China the claim that a "precise correlation" between import and injury factor trends is required.[32] Instead, the Panel was setting forth its own view that a correlation analysis is not an exact science and that it is therefore unrealistic to expect or require a precise correlation between the degree of changes in imports and the degree of change in the injury factors.[33]

6.43 We have amended para. 7.229 of our Report to clarify our understanding of China's arguments.

(f) Paras. 7.307 – 7.312

6.44 **China** contends that, in addressing the plant closures, the Panel never puts these closures in proper context and never accounts for the closures as an effect of the globalization of the tyre industry and not as an effect of a rapid increase in subject imports (as is necessary if the plant closures are to be attributed to subject imports). The Panel found that all three closures were announced in, and stem from, 2006[34] when subject imports were minimal, yet nonetheless found two of the three closures to be attributable to subject imports.[35] There is a disconnect, however, from the 2006 closures to what the Panel is fundamentally assessing – whether subject imports are rapidly increasing during the recent period and causing injury due to this rapid increase. In attributing the closures to subject imports, the Panel totals data of subject imports for all of 2006, even though the closures were

[27] Interim Report, para. 7.229.
[28] China's Oral Statement at the Second Panel Hearing, paras. 62-63.
[29] China's Oral Statement at the Second Panel Hearing, para. 64 ("The only way for these statements to be significant in the context of a proper coincidence analysis, however, is for the degree of the respective annual increases to correspond *generally* with the degree of the respective declines in injury factors") (emphasis added).
[30] Interim Report, para. 7.217.
[31] China's Oral Statement at the Second Panel Hearing, para. 64 (emphasis in original). China went on to point out that "[t]he orders of magnitude [of these changes] are key." *Id.*
[32] Interim Report, para. 7.229. On the contrary, the Panel correctly states that China argued that "the degree of the increases in imports should correspond with the degree of declines in injury factors." Interim Report, para. 7.228.
[33] Interim Report, para. 7.229.
[34] Interim Report, para. 7.307.
[35] Interim report, para. 7.312.

announced in June and July of 2006 – only halfway through the year.[36] This is therefore an inaccurate reading of the record. Because the plant closures were announced only halfway through 2006, these decisions were based on data from 2005 – not totals for the whole year 2006. Thus, the Panel should re-assess the closures and do so based off subject import data for 2005 only. Statements based on full-year 2006 data should be deleted. Finally, the Panel should explain what significance it accords to the questionnaire data where no U.S. producer responded that they were materially injured by subject imports, four said that they were not, and the other six either said they were not in a position to answer or took no position.[37] The Panel notes these facts, but fails to assess them in any way. The Panel should do so and explain what weight it is giving to this evidence and how it effects the Panel's assessment of causation.

6.45 **The United States** asserts that the Panel correctly disagreed with China's claim that there were only "minimal" increases in the volumes of Chinese imports before 2006.[38] In paragraph 7.307, the Panel noted that the record showed that there was a "very substantial increase in the volume of {Chinese} imports prior to 2006." As the Panel correctly stated, the subject imports from China increased from 14.6 million tires in 2004 to 20.8 million tires in 2005, indicating that Chinese imports grew by 42.7 per cent between 2004 and 2005.[39] Accordingly, as the Panel indicated, the significant increases in subject imports prior in 2005 provided the USITC with a sufficient basis for concluding that these increases were a significant contributing factor for the industry's decision to close certain production plants in 2006. The United States also contends that the Panel correctly relied on import data for 2006 in its analysis.[40] Because the plant closure announcements occurred at least six months into 2006, the Panel reasonably relied on the fact that Chinese imports continued to increase significantly over their 2005 levels in 2006, and that Chinese imports became the second-lowest priced source of tires in 2006.[41] Given that Chinese imports continued their aggressive surge into the market in 2006 and continued to be increasingly aggressive in their pricing practices in that same year, the Panel and the ITC both reasonably relied on these facts when concluding that Chinese imports were a significant factor in the industry's decision to close these production facilities.

6.46 The United States believes the Panel clearly explained what weight it gave to the fact that no producer specifically reported that it was materially injured by imports, and reasonably concluded that producers' statements were not dispositive of the question as to whether Chinese imports caused material injury to the industry. As the Panel reasonably noted, even though some domestic producers stated that they were not injured by subject imports and even though other producers took no position on the issue, these facts did not constitute conclusive evidence that domestic producers had not been affected by the subject imports, nor did it indicate that the producers did not choose to close certain production facilities due to subject import competition.

6.47 In light of China's request, we have included footnote 440 in our Report, concerning the 2005 subject import data. We see no need to make any of the additional changes requested by China.

(g) Paras. 7.353 – 7.354

6.48 **China** submits that the Panel offers a wholly inadequate assessment of the causal implications of the recession. In light of the Panel's conclusion that "we must assess whether the reasoning provided by the USITC in its determination seems adequate in light of plausible alternative

[36] Interim Report, paras. 7.307-7.308.
[37] Interim Report, para. 7.312.
[38] Interim Report, para. 7.307.
[39] Interim Report, para. 7.307.
[40] Interim Report, paras. 7.307 and 7.308.
[41] Interim Report, paras. 7.301 and 7.307-308.

explanations of the record evidence or data advanced by China in this proceeding,"[42] the Panel should have assessed the causal implications of the recession in-depth as it assuredly qualifies as a "plausible alternative explanation." Additionally, the Panel's decision to dismiss the causal implications of the recession because the injury to the domestic industry could not be attributed "in whole" to the recession is inadequate.[43] This too easily dismisses a causal factor that was significantly injuring the U.S. industry simply because it was not responsible for the entire injury. The Panel should delete this statement and engage in a more in-depth assessment of the causal effects of the recession. Particular factual findings regarding the extent of the effects of the recession should be made. The Panel quoted the USITC's finding that U.S. apparent consumption declined by 20.4 million tires in 2008.[44] Accordingly, the Panel should make a finding that this decline in demand was attributable to the effects of the recession in 2008 or, if not, the Panel should note what this decline in demand in 2008 was attributable to.

6.49 **The United States** asserts that the Panel's analysis of the recession was neither brief nor inadequate. In its analysis, the Panel addressed at length China's arguments that demand declines during the period were the primary cause of the industry's troubles over the period of investigation.[45] In the same analysis, the Panel addressed in detail China's argument that the recession in 2008 accounted for the bulk of the declines in the industry's condition in that year.[46] As the Panel correctly concluded in its factually-detailed consideration of China's claims, the record clearly showed that, in 2008, the volume of the Chinese imports increased substantially even as demand fell by 6.9 per cent and even as the sales volumes of U.S. and non-subject tires fell.[47] As the Panel also correctly concluded, this continued growth in Chinese imports in 2008 meant that the U.S. industry was forced to absorb virtually all of the declines in demand in 2008, thus establishing that the Chinese imports had a clear and significant adverse impact on the production, sales and market share levels of the industry in that year.[48] The Panel's analysis of this issue was reasoned, detailed and complete, and no change to the Panel's analysis is warranted.

6.50 The United States further asserts that China's argument that the Panel should not have dismissed the recession as a causal factor simply because the recession did not explain the injury to domestic injury "in whole" China misses the point. As the Panel and the USITC found, the record evidence showed clearly that increased volumes of subject imports were having an adverse impact on the domestic industry, and that this impact was independent of the effects of the recession on demand in 2008.[49] Accordingly, the Panel agreed that the USITC reasonably found subject imports to be a significant cause of material injury to the domestic industry, even in 2008, and that the declines in the industry's production, sales, market share and profitability levels in that year could not be attributed wholly or primarily to the recession in 2008, or to any other alleged causal factors, as China claimed. Again, the Panel's analysis was reasoned and thoughtful, and need not be revised.

6.51 The Panel sees no reason to alter the provisions or paragraphs as requested.

[42] Interim Report, para. 7.18.
[43] Interim Report, para. 7.354.
[44] Interim Report, para. 7.353.
[45] Interim Report, paras. 7.323 - 7.352.
[46] Interim Report, paras. 7.337 - 7.339, 7.342 - 7.343, and 7.351-7.352.
[47] Interim Report, para. 7.203.
[48] Interim Report, para. 7.354.
[49] Interim Report, paras. 7.337 - 7.339, 7.342 - 7.343, and 7.351-7.352.

B. REQUEST FOR REVIEW SUBMITTED BY THE UNITED STATES

1. Standard of review

(a) Para. 7.18

6.52 **The United States** asks that the word "seems" be replaced with the word "is" in the final sentence of this paragraph.

6.53 **China** believes the change requested by the United States is unnecessary.

6.54 We agree with China that the change is not strictly necessary.

2. "As such" causation

(a) Para. 7.136

6.55 **The United States** asks that a cite to Article XVI:4 of the WTO Agreement be included at the end of the first sentence of this paragraph.

6.56 **China** opposes the U.S. suggestion to cite Article XVI:4 of the WTO Agreement to support the proposition that the "WTO Agreement does not prescribe any particular manner in which a Member's WTO obligations and commitments must be transposed into its domestic law." China asserts that while it may be true that the WTO Agreement does not prescribe a particular manner of transposing WTO obligations into domestic law, Article XVI:4 does not say this.

6.57 We see no need to make the change requested by the United States. As noted by China, Article XVI:4 of the WTO Agreement does not provide that the WTO Agreement does not prescribe any particular manner in which a Member's WTO obligations and commitments must be transposed into its domestic law.

3. Substantive findings generally

(a) Paras. 7.197, 7.215, 7.216, 7.238, 7.260, 7.322, 7.359, 7.367, and 7.379

6.58 **The United States** suggests that the findings set forth in these paragraphs be linked back to the Panel's standard of review through the insertion of the following sentence: "Therefore, we find that the USITC's determination was reasoned and adequate in this respect, consistent with the standard wet out by the Panel in paragraph 7.18." The United States also proposes a reformulation of the Panel's findings in certain of these paragraphs.

6.59 **China** believes these changes are unnecessary. China further contends that the proposed U.S. language actually goes beyond the language of Para 7.18. Para 7.18 addresses only whether the ITC reasoning was "adequate" and does not otherwise making any statement about the whether the ITC determination was "reasoned."

6.60 With the exception of a minor change regarding paragraph 7.359, we agree with China that the changes proposed by the United States are unnecessary.

4. Remedy

(a) Para. 7.397

6.61 **The United States** suggests that the last sentence of this paragraph is unnecessary.

6.62 **China** opposes the U.S. suggestion to delete the last sentence of this paragraph. The Panel has correctly noted that there is "no guarantee" that a measure imposed to improve the injurious condition of the domestic industry caused by increased imports will "not be excessive." The U.S. attempt to delete this fair, objective statement is constitutes over-reaching.

6.63 We agree with China that there is no need to delete the last sentence of this paragraph.

(b) Para. 7.414

6.64 **The United States** proposes the insertion of a footnote at the end of the first sentence to refer the reader back to paragraph 7.20, where the Panel concluded that there is no obligation to explain.

6.65 **China** does not comment on this request.

6.66 In the absence of any objection by China, we have included the new footnote 555 requested by the United States.

(c) Para. 7.418, footnote 557

6.67 **The United States** asks that the Panel explain that it is not addressing the issue raised in this footnote as a matter of judicial economy.

6.68 **China** does not comment on this request.

6.69 The Panel has amended footnote 557 to highlight its intended purpose, which is to demonstrate that China's GATT 1994 claims are dependent on its claims under the Protocol.

5. Conclusion

(a) Para. 8.1

6.70 **The United States** suggests that, for greater clarity, the Panel should include a full conclusion on each of China's claims. The United States also asks the Panel to include a conclusion regarding the rejection of China's "as such" claim.

6.71 **China** does not comment on this request.

6.72 The Panel sees no reason to alter the concluding paragraph.

VII. FINDINGS

A. GENERAL ISSUES

7.1 We shall begin with some preliminary observations and then address general issues relating to our standard of review, the burden of proof, and the rules of treaty interpretation. We also consider the relationship between sub-paragraphs 1 and 4 of Paragraph 16 of the Protocol.

1. Preliminary observations

7.2 The Panel was aware that there are a number of features of this particular case that provide a background against which the case has to be considered and constitute a context for dealing with the matters raised.

7.3 First, this is the first case under the transitional product-specific safeguard mechanism in Paragraph 16 of the Protocol. It thus raises questions that have not yet been dealt with in WTO dispute settlement, including the question of the relationship of this particular safeguard measure to the global safeguards mechanisms under the WTO Agreements: GATT Article XIX and the WTO *Safeguards Agreement.* Thus, the case raises important questions of the interpretation of the transitional product-specific safeguard mechanism that will obviously be of interest to other WTO Members even though the mechanism expires in 2013.

7.4 Second, the safeguard measure imposed in this case under Paragraph 16 of the Protocol of Accession of China is country specific, but nevertheless such a measure has effects on non-subject imports of tyres into the United States with its own systemic implications.

7.5 Third, imposition of a safeguard measure in this case was based on a determination of the USITC that was not unanimous. Two commissioners dissented on the critical issue of causation. Such a circumstance warrants the panel in giving very careful consideration in particular to that aspect of the USITC determination.

7.6 Fourth, the investigation that led to the imposition of a safeguard measure in this case against the importation of tyres from China was initiated, unusually, as the result of a petition by a labour union in the United States and not by the domestic producers of tyres. This, of itself, alerted the Panel to the possibility that there was something different about this case, particularly where the domestic producers, the normal petitioners in such cases, had indicated that they would not make any adjustments notwithstanding that a safeguard remedy was put in place with adjustment purposes.

7.7 Fifth, the issue of "material injury" was not in question before the Panel and, indeed, the determination of the USITC on this point was unanimous. Thus, a key issue in this case was causation, a matter that was complicated by the fact that the period of investigation involved in part a period of massive global economic downturn or recession.

7.8 Sixth, an important allegation in this case relating to this key issue of causation was that the U.S. tyre manufacturing industry had voluntarily reduced its investment in the United States and had invested in manufacturing tyres in China instead. Thus, according to this view, the reduction in domestic manufacturing of tyres and the increase in imports from China were the consequences of deliberate economic decision-making by the U.S. tyre industry.

7.9 In such circumstances, the argument went, this case involved the invocation of a mechanism designed to protect a domestic industry that did not want that protection and by its own actions had precipitated the events that were now being invoked to justify the application of the transitional product-specific safeguard mechanism of China's Protocol of Accession. Arguably, it explained too why the investigation had been initiated by a labour union, a body that was concerned with job losses resulting from this transfer of manufacturing capacity to China, and not by the domestic producers themselves. Thus, the Panel was aware that this aspect of the case raised the question of the suitability or relevance of safeguard mechanisms in the context of "outsourcing" and "globalization", matters of considerable systemic interest to WTO Members.

7.10 Having stated this important contextual background, the Panel was also aware that the issues before it involved the interpretation of the provisions of the transitional product-specific safeguard mechanism and that it was the task of the Panel to do that. It was not for the Panel to seek to recalibrate what the WTO Members had agreed to in the negotiations that led to the accession of China to the WTO in the light of what the Panel might perceive as changing economic circumstances that perhaps had not been considered when the Protocol was negotiated. That remains the prerogative of the WTO Members themselves. Nevertheless, the Panel felt that it was important to set this background out as it informed the understanding of the Panel of the arguments made before it in this case.

2. Standard of review

7.11 Article 11 of the DSU, and, in particular, its requirement that "… a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements", sets forth the appropriate standard of review for WTO Agreements. Since the Protocol is silent as to the appropriate standard of review, Article 11 of the DSU will be applied by the Panel in examining the consistency of the U.S. *Tyres* measure with Paragraph 16 of the Protocol.

7.12 Although there is a disagreement between the parties regarding certain aspects of the nature of the "objective assessment" we must undertake in this case, there is much regarding our standard of review that the parties do agree on.

7.13 The United States submits that:

> in order for the Panel to make an "objective assessment" of the market disruption determination by the ITC, it must examine whether the ITC provided a reasoned explanation as to how the evidence before it (on the record) supported its conclusion that the requirements set out in paragraph 16.4 of the Protocol were met. The Panel is not acting as an initial trier of fact, and therefore must not conduct a *de novo* review. However, we do not suggest that the Panel should grant total deference to the competent authority. The Panel should review whether the analysis and explanations provided in the ITC Report reveal how the ITC considered the factors under paragraph 16.4 and whether the ITC provided a reasoned explanation as to how the facts supported the market disruption determination.[50]

7.14 China agreed with this part of the United States' understanding of our standard of review. In particular:

> China agrees the Panel must not conduct *de novo* review. China agrees the Panel must not grant total deference to the authorities. China agrees the "Panel should review whether the analysis and explanations provided in the ITC Report reveal how the ITC considered the factors under paragraph 16.4 and whether the ITC provided a reasoned explanation as to how the facts supported the market disruption determination" – the focus must be on the USITC Determination as it was written, and that rationale must constitute a "reasoned and adequate explanation."[51]

7.15 We agree with this part of the parties' assessment of our standard of review. It is well established in WTO case law regarding trade remedy cases that a Panel should neither conduct a de novo review, nor grant total deference to an investigating authority.[52] It is also well established that

[50] U.S. Reply to Question 18 from the Panel, para. 47, footnote omitted.
[51] China's Second Written Submission, para. 44.
[52] *See*, for example, Appellate Body Report, *US – Lamb*, para. 106.

the Panel's standard of review "must be understood in the light of the obligations of the particular covered agreement at issue".[53] Taking into account the obligations imposed by Paragraph 16,[54] we consider that our review of China's claims under Paragraph 16 of the Protocol should contain both a formal and a substantive element.[55] The formal aspect is whether the USITC evaluated "objective factors", as required by Paragraph 16.4. The substantive element is whether the USITC provided a reasoned and adequate explanation of its determination, in line with its obligation under Paragraph 16.5.

7.16 The main disagreement between the parties concerns the USITC's treatment of alternative explanations of the evidence and data before it. China relies on the Appellate Body Report in *US – Countervailing Duty Investigation on DRAMS* to argue that "the explanation provided by the investigating authority 'should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternatives in coming to its conclusions'".[56] The United States denies that the USITC was required to address any alternative explanations in its determination. The United States claims that, in *US – Countervailing Duty Investigation on DRAMS*, "this level of detail [of requiring an assessment of alternative explanations] is derived from the requirements found in Articles 22.3 and 22.5 of the *SCM Agreement*, and particularly the requirement in Article 22.5 for the notice or report to contain "the reasons for acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers".[57] The United States notes that no such provision is contained in Paragraph 16 of the Protocol.

7.17 In making the abovementioned finding in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body referred in a footnote to para. 106 of its Report in *US – Lamb*, which reads in relevant part:

> A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an "objective assessment" of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.[58]

7.18 We note that there is no obligation in Paragraph 16 of the Protocol requiring the USITC to address, in its determination, alternative explanations that could reasonably be drawn from the evidence or data before it.[59] Nor is there any provision equivalent to Article 22.5 of the *SCM Agreement*. Since a panel's standard of review is necessarily distinct from the substantive and procedural obligations of the investigating authority, our standard of review cannot impose any such

[53] *See*, for example, Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184.

[54] We note in particular that, under Paragraph 16.4 of the Protocol, an investigating authority is required to "consider objective factors" in determining if market disruption exists. Furthermore, under Paragraph 16.5, the importing Member "shall provide written notice of the decision to apply a measure, including the reasons for such measure...".

[55] Appellate Body Report, *US – Lamb*, paras. 103-104.

[56] China's Second Written Submission, para. 46, citing Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

[57] U.S. Reply to Question 18 from the Panel, para. 47 n. 52.

[58] Appellate Body Report, *US – Lamb*, para. 106 (emphasis in original).

[59] This issue concerns alternative explanations generally. It does not concern the issue of whether the USITC should have considered alternative causes of injury, or conducted a non-attribution analysis in respect of any such alternative causes of injury.

obligation on the USITC.[60] For this reason, and guided by the abovementioned finding of the Appellate Body in *US – Lamb*, we consider that, in order to review whether the reasoning of the USITC was reasoned and adequate, we must assess whether the reasoning provided by the USITC in its determination seems adequate in light of plausible alternative explanations of the record evidence or data advanced by China in this proceeding.

7.19 The other disagreement between the parties concerns our review of the U.S. remedy determination. China contends that our review of remedy should take account of the fact that the "United States must ... provide a 'reasoned explanation' for the remedy being imposed – both the level of the tariffs, and the decision to continue the tariffs for three years".[61] According to the United States, our review should take account of the fact that "the Protocol does not contain an obligation for a Member to consider particular factors or to demonstrate at the time of the imposition of the measure how the measure meets the requirement of Paragraphs 16.3 and 16.6".[62]

7.20 We recall that our standard of review "must be understood in the light of the obligations of the particular covered agreement at issue".[63] In this regard, we note that the last sentence of Paragraph 16.5 of the Protocol requires a Member to "provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration". This provision refers to the need to provide a statement of the "reasons for such measure". It does not refer to the need to provide a statement of the "reasons for the scope and duration of such measure". In our view, therefore, a Member need only provide written notice of the scope and duration of the measure. It need not provide written notice of the reasons for the scope and duration of that measure.

7.21 Our interpretation of the last sentence of Paragraph 16.5 is consistent with the Appellate Body's finding[64] in *US – Line Pipe* that Article 5.1 generally does not require a Member to justify, at the time of application, that the safeguard measure at issue is applied "only to the extent necessary". The burden, therefore, is on China to establish that the *Tyres* measure is excessive. China cannot simply point to any failure on the part of the United States to explain, in a published determination, that the measure is not excessive. Instead, we consider that our review of the U.S. remedy should be based on the arguments and evidence put forward by the parties during the present WTO dispute settlement proceeding.[65]

3. Burden of proof

7.22 We recall the general principles applicable to burden of proof in WTO dispute settlement, which require that a party claiming a violation of a provision of a covered agreement by another Member must assert and prove its claim.[66] In this dispute, China, which has claimed that the United States acted inconsistently with Paragraph 16 of the Protocol, and Articles I:1 and II:1 of the GATT 1994, thus bears the burden of demonstrating that the United States acted inconsistently with those provisions. In addition, it is generally for each party asserting a fact to provide proof thereof.[67] We note in addition that a prima facie case is one which, in the absence of effective refutation by the

[60] However, if the USITC failed to consider plausible alternative explanations, there may be a greater risk that we, under our standard of review, would find that the USITC's reasoning does not seem adequate in light of those plausible alternative explanations.

[61] China's Second Written Submission, para. 45.

[62] U.S. Reply to Question 18 from the Panel, para. 48.

[63] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184.

[64] Appellate Body Report, *US – Line Pipe*, para. 233.

[65] This reflects the approach adopted by the panel in *US – Steel Safeguards*, paras. 10.25–10.27.

[66] Appellate Body Report, *US – Wool Shirts and Blouses*, page 16.

[67] *Ibid.*

other party, requires a panel, as a matter of law, to rule in favour of the party presenting the prima facie case.[68]

4. Treaty interpretation

7.23 Article 3.2 of the DSU directs panels to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is well settled that the principles codified in Articles 31 and 32 of the *Vienna Convention* are such customary rules. Equally, in WTO case law Article 33 is so applied.[69] These provisions read as follows:

Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

[68] Appellate Body Report, *EC-Hormones*, para. 104.
[69] *See*, for example, Panel Report, *Japan – DRAMS (Korea)*, para. 7.45.

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33: Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

7.24 We shall apply these principles in this case.

5. Relationship between Paragraph 16.1 and Paragraph 16.4 of the Protocol

7.25 In order to properly assess the conformity of the United States' measure with Paragraph 16 of the Protocol, we must establish the conditions under which the provisions would apply. This is particularly important regarding China's claims on increased imports and causation, in respect of which the parties have developed significantly diverse positions on the interaction between sub-paragraphs 1 and 4 of Paragraph 16.

7.26 Paragraph 16.1 of the Protocol provides:

In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected WTO Member should pursue application of a measure under the Agreement on Safeguards. Any such request shall be notified immediately to the Committee on Safeguards.

7.27 Paragraph 16.4 of the Protocol provides:

Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products.

(a) Arguments of the parties

7.28 According to **China**, Paragraphs 16.1 and 16.4 are interrelated. China contends that Paragraph 16.1 functions as a *chapeau* for Paragraph 16, providing the basic conditions for any action under Paragraph 16.[70] China submits that Paragraph 16.1 also provides "important context" for understanding the obligations of Paragraph 16.4 (and *vice versa*), such that "[t]he two provisions must be read together".[71] In reading the two provisions together, China understands Paragraph 16.4 to add to the basic conditions set forth in Paragraph 16.1.

7.29 Thus, in respect of the issue of increased imports, China asserts that "the first requirement of [Paragraph] 16.1 sets a base level requirement of 'in such increased quantities'".[72] Referring to the case law of the Appellate Body regarding the interpretation of the same phrase in Article 2.1 of the *Safeguards Agreement*, China contends that imports will only be "in such increased quantities" if they are sudden enough, sharp enough, and significant enough, to cause injury. China continues, though, that "even if the increase in imports is sudden enough, sharp enough, or significant enough to satisfy the [Paragraph 16.1] requirement of 'in such increased quantities', they still must meet the additional [Paragraph 16.4] standard of 'increasing rapidly'".[73]

7.30 China adopts the same approach to the Paragraph 16 causation standard. Thus, China asserts that the word "cause" in Paragraph 16.1 constitutes the "base requirement".[74] China asserts that the Appellate Body has confirmed, in case law regarding the *Safeguards Agreement*, that a "'cause' requires 'a genuine and substantial relationship of cause and effect' between the imports and the alleged injury".[75] China contends that "Article 16.4 further strengthens this basic requirement, by modifying the term 'cause' with 'significant'".[76] China contends that sub-paragraphs 1 and 4 of Paragraph 16 therefore require that increased imports under the Protocol must have "a significant, important, genuine and substantial causal relationship with material injury being suffered by the U.S. domestic industry".[77]

7.31 The upshot of China's interpretative analysis is that the increased imports and causation standards of Paragraph 16 are more stringent than those of the *Safeguards Agreement*, since they incorporate both the disciplines of the *Safeguards Agreement* (as embodied in Paragraph 16.1), plus the additional requirements of Paragraph 16.4.

7.32 **The United States** submits that Paragraph 16.1 does not impose any obligations regarding the existence of market disruption, but merely sets forth the general conditions under which a Member is authorized to seek consultations with China. The United States asserts that, while Paragraph 16.1 provides context for the interpretation of Paragraph 16.4, it does not set out a general obligation with respect to the market disruption determination.[78] According to the United States, it is Paragraph 16.4 that sets the standards that a Member has to meet in order to make an affirmative market disruption determination.[79] The United States contends that, consistent with Paragraph 16.4, a Member must find that imports are (1) "increasing rapidly" so as to be (2) a "significant cause" of (3) material injury

[70] China's Second Written Submission, para. 176, and China's Reply to Question 35 from the Panel.
[71] China's Second Written Submission, para. 176.
[72] China's Reply to Question 15 from the Panel, para. 60 (emphasis in original).
[73] China's Reply to Question 15 from the Panel, para. 60.
[74] China's First Written Submission, para. 185.
[75] China's First Written Submission, para. 182.
[76] China's First Written Submission, para. 187.
[77] China's First Written Submission, para. 204.
[78] *See* Oral Statement by the U.S. at the Second Meeting, para. 19.
[79] *See* U.S. Reply to Question 19 from the Panel.

or threat thereof.[80] The United States contends that these are the standards against which its measure should be assessed. The United States contends that the transitional safeguard mechanism exists outside and apart from the global safeguard disciplines embodied in Article XIX of the GATT 1994, and the *Safeguards Agreement*.

(b) Evaluation by the Panel

7.33 In our view, Paragraph 16.1 is concerned with more than the mere right of Members to seek consultations. Paragraph 16.1 provides the very basis for action under the Paragraph 16 transitional product-specific safeguard mechanism, as Paragraph 16.1 consultations are the trigger for any subsequent action to address the "market disruption" in question. Indeed, it is only if such consultations fail that transitional product-specific measures may be imposed (under Paragraph 16.3).

7.34 In accordance with Paragraph 16.1, action under Paragraph 16 is triggered when Chinese imports are being imported "in such increased quantities or under such conditions"[81] "as to cause" "market disruption". But what do these terms mean substantively? How does a Member know when imports are in sufficiently "increased quantities" to justify action? What is the degree of harm that the domestic industry must suffer? And what is the degree of causal relationship required between those imports and that harm?

7.35 Similar questions regarding "increased quantities" and causation arose in the context of disputes concerning Article 2.1 of the *Safeguards Agreement*. In that context, the answers were provided by the Appellate Body, based on its interpretation of the relevant provisions of that Agreement. In the context of Paragraph 16, the answers are provided in Paragraph 16.4, which sets forth a definition of "market disruption" that encompasses the nature of the increase in imports, the nature of the harm to be suffered by the domestic industry, and the degree of causal nexus that must exist between those imports and that harm. In particular, Paragraph 16.4 provides that the increase in imports must be rapid, that the harm to the domestic industry must amount to material injury, and that the rapidly increasing imports must be a significant cause of that material injury. Thus, imports from China will be "in such increased quantities ... as to cause ... market disruption" when those imports are "increasing rapidly ... so as to be a significant cause of material injury."

7.36 Thus, Paragraphs 16.1 and 16.4 are interrelated. They should be read together, and each provision provides important context for interpreting the other. The interrelation between Paragraphs 16.1 and 16.4, the joint reading of these provisions, and the definitional nature of Paragraph 16.4, suggest that Paragraph 16.4 clarifies the substance of the trigger conditions provided for in Paragraph 16.1.[82]

7.37 Since Paragraph 16.4 clarifies the substance of the conditions for taking action under Paragraph 16, it is in light of the "increasing rapidly" and "significant cause" standards of Paragraph 16.4 that the conformity of the U.S. *Tyres* measure should be assessed.[83] As indicated

[80] Oral Statement by the U.S. at the Second Meeting, para. 21.
[81] In the light of the French and Spanish texts and in accordance with Article 33(4) of the *Vienna Convention*, the word "or" is to be taken to include "and".
[82] Indeed, the clarificatory role of Paragraph 16.4 has been acknowledged by China which, after itself noting the interrelationship between Paragraphs 16.1 and 16.4, asserted that:

> Article 16.4, in turn, defines the specific circumstances in which "market disruption" is deemed to exist, thus clarifying the applicable requirements – in particular, that imports be "increasing rapidly" and constitute a "significant cause" of material injury. (China's Reply to Question 35 from the Panel, para. 36.)

[83] We note that China itself has asserted that:

above, we shall interpret the phrases "increasing rapidly" and "significant cause" in the manner prescribed by Articles 31 and 32 of the *Vienna Convention*. To the extent that the provisions of Article XIX of the GATT 1994 or the *Safeguards Agreement*, as interpreted by the Appellate Body, are relevant they will be taken into account.

B. WAS THE USITC ENTITLED TO FIND THAT IMPORTS WERE "INCREASING RAPIDLY" IN ACCORDANCE WITH PARAGRAPH 16 OF THE PROTOCOL?

1. Introduction

7.38 China claims that the United States failed to evaluate properly whether imports from China were "increasing rapidly" in accordance with Paragraph 16.4 of the Protocol. The thrust of China's argument is that a decline in the rate of increase in 2008, the most recent period in China's view, means that imports were no longer "increasing rapidly".

2. Arguments of the Parties

7.39 **China** argues that the term "increasing" means imports must be increasing in the *most* recent past. China claims that Paragraph 16.1 and Paragraph 16.4 both use the present continuous tense in detailing the increased imports standard under the Protocol.[84] China submits that Paragraph 16.1 is in the present continuous tense as the phrase "are being" modifies "imported". China contends that in Paragraph 16.4 the phrase "are increasing rapidly" is a construction in the present continuous tense.[85] China argues that, therefore, there is consistency in the tenses between the two paragraphs, and it is this present continuous tense that requires the investigating authority to focus on the *most* recent period of time.[86]

7.40 China provides two reasons for this. First, as a matter of grammar, the present continuous tense requires the activity to be happening either now, or in the near future or very recent past.[87] In China's view that distinguishes imports that are "increasing rapidly" from imports that have "increased rapidly". In this case, China argues that the *most* recent period of time is the most recently completed year and any other period for which data is available.[88] Second, China argues that this approach is consistent with the way the Appellate Body has interpreted the textual distinction between "increased" and "increasing" when considering Article 4.2 in the *Safeguards Agreement.*[89] China also believes that the use of the term "increasing" requires the analysis under Paragraph 16 of the Protocol to focus

When evaluating whether China-specific safeguards under Article 16 are WTO-consistent, a panel must determine whether the national authorities have properly found that imports are "increasing rapidly" and that they are a "significant cause" of any injury. (China's Reply to Question 9b from the Panel, para. 35.)

[84] China's Second Written Submission, para. 70.

[85] China's Reply to Question 12 from the Panel, para. 46 and footnote 37 noting that the grammatical point does not arise in the French and Spanish texts as the present tense captures the English equivalent of both the simple present tense and the present continuous tense.

[86] China's Second Written Submission, para. 70.

[87] China's Reply to Question 12 from the Panel, para. 46.

[88] China's Reply to Question 14 from the Panel, para. 53. China's Second Written Submission, para. 84.

[89] China's Reply Question 12 from the Panel, para. 47. Appellate Body Report, *US – Steel Safeguards,* para. 367. Oral Statement by China at the First Meeting, para. 22. China's Reply to Question 36 from the Panel, para. 40.

on an even *more* recent period of time compared to the *Safeguards Agreement* to determine whether imports are increasing.[90]

7.41 China notes that when describing an increase, "rapidly" indicates "a significant or steep increase"[91] or a recent surge.[92] China continues that the way to make the distinction between imports that are "increasing rapidly" compared to imports that are merely increasing is to consider the rate at which the increase is occurring.[93] China contends that a trend line over time that is "progressing quickly" must either have a steep slope (a "rapid" change over time, as opposed to a gradual change over time) or must have an accelerating slope (a "rapid" change over time, since the change is "progressing quickly" by progressing at an increasingly faster rate).[94] China argues that "[t]he ordinary meaning of 'rapidly' can best be understood in this context as imports increasing more 'rapidly' than they have been increasing previously".[95] In other words, China argues "increasing rapidly" does not contemplate the present increase being modest and the past increase being rapid.[96] Rather, imports must be accelerating or continuing at a high rate in light of the preceding period.[97]

7.42 China points to the drop in the rate of increase in 2006/2007 (53.7 per cent) compared to 2007/2008 (10.8 per cent) to argue that imports were no longer "increasing rapidly" in the most recent past. China responds to a question from the Panel to say that imports were "increasing rapidly" in 2007, but that "such a finding would be premised primarily on the dramatic changes in rate of increase, not simply an increase in absolute quantity".[98] China claims that the USITC failed to address the fact that the majority of the increase in volume of imports, approximately 86 per cent, occurred between 2004 and 2007.[99] China also claims that the U.S. blurred the last two years of the investigation, which obscures the fact that 46 per cent of the growth in absolute volume occurred from 2006 to 2007.[100] Between 2007 and 2008 the growth in absolute volume was only 14 per cent.[101]

7.43 China provides the following table to argue further that imports were no longer "increasing rapidly" in 2008:[102]

[90] Oral Statement by China at the First Meeting, para. 22. China's Second Written Submission, para. 71. China's First Written Submission, para. 101.

[91] China's First Written Submission, para. 79.

[92] China's First Written Submission, para. 85.

[93] China's Second Written Submission, para. 77. We note that China develops a 3 prong qualitative test to determine whether imports are "increasing rapidly" that requires (1) consideration of data in the most recent period; (2) the most weight to be given to the most recent trends; and (3) an analysis of the most recent year in more detail when the initial analysis shows imports are slowing.

[94] China's Second Written Submission, para. 77.

[95] China's Reply to Question 14 from the Panel, para. 54. China's Second Written Submission, para. 85.

[96] China's First Written Submission, para. 83.

[97] China's First Written Submission, para. 85. China considers that there may be other scenarios where imports can be "increasing rapidly". China's First Written Submission, para. 81.

[98] China's Reply to Question 13 from the Panel, para. 49.

[99] China's First Written Submission, para. 133, quoting the USITC report, page V-1.

[100] 14,498/31400*100 = 46%.

[101] China's Second Written Submission, para. 116.

[102] China's Second Written Submission, para. 114. China's First Oral Statement, para. 28.

	Average Annual Increase over 2004-2007 Period	Annual Increase in 2007 Compared to 2006	Annual Increase in 2008 Compared to 2007
Quantity of Tires (million tires)	9.0 M	14.5 M	4.5 M
Rate of Absolute Increase (%)	42.1%	53.7%	10.8%
Increase in Market Share (% pts)	3.1 % pt	4.7 % pt	2.7 % pt

7.44 China challenges the 10.8 per cent increase in 2008 as not being in and of itself rapid. China argues that the Panel in *US – Steel Safeguards* found an increase of 11.9 per cent during the most recent full year of data not to be sufficient to constitute "increased imports".[103] China contends that a 10.8 per cent increase cannot, therefore, be sufficient to comply with the higher standard under the Protocol for imports to be "increasing rapidly".[104]

7.45 China provides the following table regarding relative data of subject imports:[105]

Year	Per cent of Domestic Production (percentage)	Change in Share of Production (percentage points)	Per cent of Total Consumption (percentage)	Change in Share of Consumption (percentage points)
2004	6.7	--	4.7	--
2005	10.0	3.3	6.8	2.1
2006	14.6	4.6	9.3	2.5
2007	23.0	8.4	14.0	4.7
2008	28.7	5.7	16.7	2.7

7.46 China argues that the USITC's treatment of relative import data is cursory and misleading as the USITC did not pay enough attention to the changes in 2008, but, rather, stressed changes over the full period. China argues that the trends in share of consumption (i.e. market share), suggest a stable trend given that the change in share of consumption was consistently in the 2-3 percentage points range, apart from 2007.[106]

7.47 China considers that relative data under the Protocol refers to market share, that is, imports as a percentage of total consumption rather than imports relative to domestic production.[107] China submits that while consideration of imports relative to domestic production makes sense for global safeguards due to Article 2.1 ("absolute or relative to domestic production") and Article 4.2(a) ("the share of the domestic market taken by increased imports, changes in the level of sales, production,

[103] China's Reply to Question 36 from the Panel, para. 43.
[104] We note that China makes similar claims regarding the comparable numbers in relative data. *See* China's Reply to Question 36 from the Panel, para. 43.
[105] China's First Written Submission, para. 158. USITC Report, Table II-2.
[106] China's First Written Submission, para. 132.
[107] China's Reply to Question 38 from the Panel, para. 48. China's Second Written Submission, para. 117.

productivity, capacity utilization, profits and losses and employment") of the *Safeguards Agreement*, under the Protocol there is no elaboration of the meaning to be given to "relative" data. China argues that the USITC relied on imports relative to domestic production when Paragraph 16 seems to place the focus on market share.[108] China argues that a focus on domestic production is misleading when non-subject imports were such an important factor in the market and the "domestic industry is engaging in a conscious strategy of shifting some of its production offshore".[109]

7.48 China also claims that the blurring of the last two years of the investigation obscures the fact that 39 per cent of the growth in market share occurred from 2006 to 2007. Between 2007 and 2008 the growth of market share was only 22 per cent.[110]

7.49 China argues that the U.S. relies too heavily on an end-point-to-end-point analysis given that the Appellate Body has found such an approach to be inadequate for assessing properly whether imports have "increased" under the *Safeguards Agreement*.[111] China claims that an end-point-to-end-point analysis is particularly inappropriate under Paragraph 16 of the Protocol.[112] China acknowledges that a longer period of time may be necessary to provide context for what is happening in the most recent period, but claims that an end-point-to-end-point analysis "misapplies the relevance of this longer period of time and … can obscure the more relevant analysis of what is happening over the more recent period".[113]

7.50 China recalls that in *Argentina – Footwear (EC)*, even though imports almost doubled over a five year period, due to a decline in imports at the end of the period neither the Panel nor the Appellate Body found "increased imports" in accordance with the *Safeguards Agreement*. China argues that the essential lesson from *Argentina – Footwear (EC)* is that any year, and particularly the recent period, must be put in context and not considered in isolation.[114] China submits that the U.S. argument in the case before us, stressing increases over the period of investigation, is similar to that argument rejected in *Argentina – Footwear (EC)*.

7.51 Regarding trends in value, China argues that the USITC erroneously relied on trends in value when the "text of Paragraph 16 requires a focus on the 'quantity' of imports".[115]

7.52 China argues that the USITC never discussed the implications of the low base level at the beginning of the period.[116] China continues that when imports begin at a low base level it is "inevitable that the subsequent increases will seem large".[117] China argues that these increases were never placed in their proper context.[118]

7.53 China argues that the USITC should have included data for the first quarter of 2009 in its period of investigation, which would have been in keeping with USITC established practice. China

[108] China's Second Written Submission, para. 117.
[109] China's Reply to Question 38 from the Panel, para. 51.
[110] China's Second Written Submission, para. 116.
[111] Appellate Body Report, *US – Steel Safeguards*, paras. 354-355.
[112] China's Second Written Submission, para. 85. China's Reply to Question 36 from the Panel, para. 41.
[113] China's Second Written Submission, para. 105.
[114] China's Second Written Submission, para. 108.
[115] China's First Written Submission, para. 116.
[116] China's First Written Submission, para. 117.
[117] China's First Written Submission, para. 117.
[118] China's First Written Submission, para. 117.

contends that had the data from the first quarter of 2009 been included, it would have shown a sharp decline in subject imports from China.[119]

7.54 China argues that the USITC's refusal to collect or consider available interim data "stands in stark contrast to its well-established and consistent practice of collecting interim data in other cases".[120] China notes that the petition in this case was not filed until 20 April 2009. However, the USITC decided not to collect interim data even though it had "collected interim data in *every single* other Section 421 safeguard investigation in which an interim period was completed prior to the filing of the petition".[121] China considers the USITC refusal to collect interim data for the completed first quarter of 2009 is "wholly inconsistent" with the USITC's practice in other Section 421 cases.[122]

7.55 Noting the U.S. argument that the USITC does not have an established practice of collecting interim data as outlined by China, and that it decides whether to collect interim data on a case by case basis, China accuses the United States of being "overboard and quite dangerous" in its case by case approach. China believes the United States overstates the burden of collecting such data and that the desire to avoid the imposition of a slight reporting burden on domestic producers is not a sufficient explanation.[123] China claims that when the staff report was completed on 12 June 2009, import data was available for the first quarter of 2009 ("Q1 2009").[124]

7.56 China asserts that the United States collects interim data in antidumping and countervailing investigations whenever such data is available. China claims that in 2009 the USITC collected interim data in all such investigations as long as one quarter in 2009 had been completed prior to the petition being filed.[125] As one example, China notes that in *Oil Country Tubular Goods from China,* a case that began 11 days before the initiation of the *Tyres* investigation, the USITC collected interim data for Q1 2009.[126]

7.57 China argues that in the only Section 421 transitional safeguard investigation to be initiated prior to the completion of an interim period, *Uncovered Innerspring Units from China,* the USITC collected information for the entire previous year even though the investigation started just 6 days after the completion of the prior year.[127]

7.58 China dismisses the contention by the USITC that the first quarter 2009 data would have been of limited use given the lack of information on the relative share of imports from China and claims that the "record was incomplete only because the USITC chose to leave the record incomplete".[128] China argues that the USITC reason for not using Q1 2009 data (i.e. that it would add no probative value in the absence of relative data) "overlooks the fact that the absolute level of imports was still a

[119] China's First Written Submission, paras. 136-137. China's Second Written Submission, paras. 123-126.
[120] China's First Written Submission, para. 139.
[121] China's First Written Submission, para. 139.
[122] China's First Written Submission, para. 139. We note that China also argues the USITC should have issued supplemental questionnaires to collect the data. The United States questions the burden on the recipients and the likelihood of getting a relatively complete data series at a late stage in the investigation. *See* China's First Written Submission, paras. 142-144. United States' First Written Submission, paras. 139-140.
[123] China's Second Written Submission, para. 124.
[124] China's First Written Submission, para. 146.
[125] China's First Written Submission, para. 140.
[126] China's First Written Submission, para. 140.
[127] China's First Written Submission, para. 139.
[128] China's First Written Submission, paras. 147-148.

key issue to be considered ...".[129] China claims that the "inability to address one issue completely does not justify ignoring probative data on another issue".[130]

7.59 **The United States** argues that China seeks to have the Panel impose an overly restrictive view of how recent increases in imports should be in order to comply with the Protocol.[131] The United States continues that there is no support in the text of the Protocol for investigating authorities to consider only very recent increases in imports. The United States contends that there is no meaningful distinction between the language in the Protocol and the language in the *Safeguards Agreement* to indicate an investigating authority must focus its analysis on a *more* recent period of time under the Protocol compared to the *Safeguards Agreement*. The United States notes that the USITC has consistently explained that it must "focus on recent increases in imports" under the Protocol.[132]

7.60 The United States submits that the ordinary meaning of "rapid" means "progressing quickly, developed or completed within a short time".[133] The United States contends that, in light of this, when the Panel is examining the USITC's analysis regarding imports it should assess whether the USITC "reasonably concluded that the growth in Chinese imports had 'progressed quickly' over the period of investigation or had been 'developed or completed within a short period of time'".[134]

7.61 The United States notes that Paragraph 16 of the Protocol does not define the nature of the rapid increase that is sufficient to meet the requirements of Paragraph 16. The United States challenges China's view that imports must be "steep" or "surging", arguing that China is imposing a higher standard to find that imports are "increasing rapidly" than is warranted by the text.[135]

7.62 The United States argues that the Protocol does not preclude a competent authority from finding imports to be "increasing rapidly" over the period examined simply because the rate of increase of imports lessens at the end of the period. Nor does the Protocol "suggest that imports must be growing at their most rapid pace at the end of the period examined by a competent authority".[136] The United States contends that, instead, the Protocol only requires that the competent authority find that there was a rapid increase in imports on an absolute or relative basis, during the period, and that these imports were a significant cause of material injury or threat of material injury to the industry.[137]

7.63 The United States claims that China continues to make the factually mistaken assertion that imports from China were "declining in 2008", the end of the period of investigation.[138] The United States notes that the subject imports were at their highest levels in absolute terms in 2008.[139] The United States contends that the record shows "clearly and unequivocally" that there was a rapid and recent increase in the volumes of Chinese imports.[140]

[129] China's First Written Submission, para 148.
[130] China's First Written Submission, para. 148.
[131] United States' First Written Submission, para. 100.
[132] United States' First Written Submission, para. 89 and USITC Report page 11.
[133] United States' First Written Submission, para. 87. New Shorter Oxford English Dictionary (2007) at 2463.
[134] United States' First Written Submission, para. 87.
[135] United States' First Written Submission, para. 95.
[136] United States' First Written Submission, para. 91
[137] United States' First Written Submission, para. 91.
[138] Oral Statement by China at the First Meeting, para. 7.
[139] United States' First Written Submission, para. 122.
[140] United States' Second Written Submission, para. 20.

7.64 The United States criticises the focus by China on the rate of increase in volumes of Chinese imports rather than actual volumes or market shares of subject imports. The United States submits that the use of a change in the rate of increase is the only way China can provide support for its claim that there was a declining or lessening trend in imports in 2008.[141] The United States submits that even if the rate of growth in absolute terms had lessened in 2008 when compared to the extremely rapid rate of growth seen in 2007, the quantities of Chinese imports in 2008 continued to grow in a rapid manner.[142] The United States contends that it does not matter that subject imports may have increased at a lower rate in 2008 than they did in 2007.

7.65 The United States continues that in 2008 the absolute volume of imports was 10.8 per cent higher than 2007; 70 per cent higher than in 2006; 121 per cent higher than in 2005; and 215.5 per cent higher than in 2004.[143] The United States argues that it should be clear that in 2008 Chinese imports of subject tyres continued to increase in a rapid manner, just as they had throughout the period of investigation.[144]

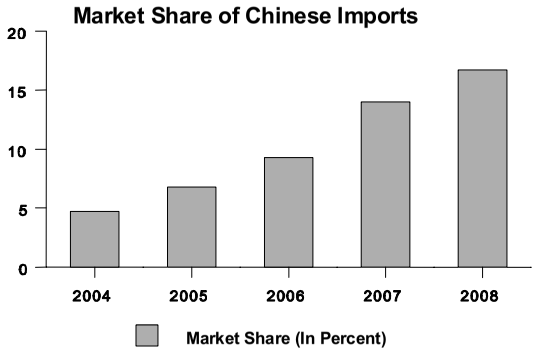
7.66 The United States argues that China's discussion of the *US – Steel Safeguards* case is misleading. The United States argues that the panel's decision in that case was based on a sharp decline in absolute and relative terms at the end of the period and trends in absolute imports that differ significantly from this case, i.e., "an alternation of increases and decreases from year to year"[145] rather than the upwards trend from year to year in the current case.

7.67 The United States notes that both the market share of the subject imports and the ratio of subject imports to U.S. production rose considerably throughout the period examined, with the two largest year to year increases, in both sets of data, occurring in 2007 and 2008.[146] The United States submits, therefore, that the USITC had a reasonable basis for finding that the increase in 2008 continued to be "large", "rapid" and "significant".[147]

7.68 The United States notes that in 2007 and 2008 there was a 62 per cent growth in the market share of subject imports.[148] Overall, the market share of subject imports increased by 12 percentage points between 2004 and 2008. The market share in 2008 was 2.7 percentage points higher than 2007; 7.4 percentage points higher than in 2006; 9.9 percentage points higher than in 2005; and 12.0 percentage points higher than in 2004.[149]

7.69 The United States provides the following graph to illustrate the increases in market share:[150]

[141] United States' Second Written Submission, para. 23.
[142] United States' Second Written Submission, para. 25.
[143] United States' Second Written Submission para. 20, and USITC Report pages 11-12 and Table C-1.
[144] United States' Second Written Submission, para. 20.
[145] U.S. comment on China's Reply to Question 36 from the Panel, paras. 20-22. Panel Report, *US – Steel Safeguards*, para. 10.206.
[146] United States' First Written Submission, para. 111.
[147] United States' First Written Submission, para. 120 - 122.
[148] United States' First Written Submission, para. 122.
[149] USITC Report, pages 11-12 and Table C-1.
[150] United States' First Written Submission, para. 21; USITC Report Table C-1.



7.70 The ratio of subject imports to U.S. production increased by 22 percentage points between 2004 and 2008[151] with the highest annual increase in 2007 and the second highest annual increase in 2008.[152]

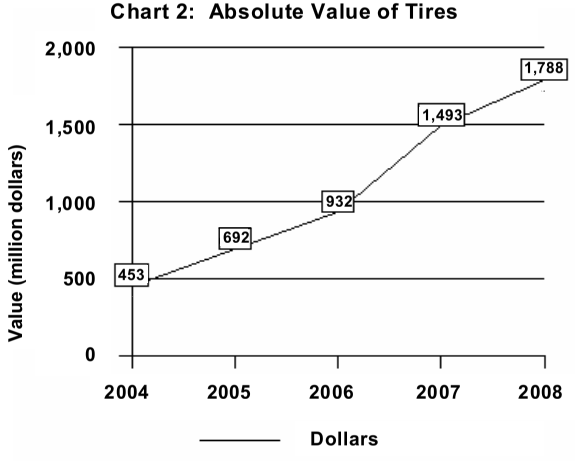
7.71 The United States argues that the USITC did not merely recite that there was a growth in imports between the first and last years of the period. Rather, the United States argues that the USITC specifically considered the growth in absolute and relative quantities for the subject imports during each year of the period of investigation, and in particular for 2007 and 2008 and concluded that the subject imports increased throughout the period and by significant amounts in each year.[153]

7.72 The United States notes that an investigating authority is not forbidden from examining trends in imports between the end points of an investigation and acknowledges that it should also be looking at trends over the entire period.[154] The United States recalls that the Appellate Body has explained that, in the context of the *Safeguards Agreement*, the "competent authorities should not consider such data [from the most recent past] in isolation from the data pertaining to the entire period of investigation".[155] The United States contends that the increase in imports in the *Argentina – Footwear (EC)* case, and specifically the drop in the final two years motivated the comments about an end-point-to-end-point analysis by the Appellate Body. The United States argues that the facts of the present case are very different and that the USITC correctly concluded that the increases in subject imports were "large, rapid and continuing" throughout the period, including the final years of the period examined by the USITC.[156]

7.73 The United States claims that the Protocol does not prohibit a competent authority from considering trends in the value of subject imports. The United States notes that the value of subject

[151] United States' First Written Submission, para. 111.
[152] United States' First Written Submission, para. 122.
[153] United States' First Written Submission, para. 114 quoting USITC Report page 12.
[154] United States' First Written Submission, para. 116, quoting Appellate Body Report, *Argentina – Footwear (EC)*, para.129 and Appellate Body Report, *US – Lamb* paras. 137-138.
[155] Appellate Body Report, *US – Lamb*, paras. 137-138.
[156] United States' First Written Submission, para. 118, quoting USITC Report at page 12.

imports increased by 294.5 per cent between 2004 and 2008 and provides the following graph to illustrate the changes in value over the period of investigation:[157]



7.74 The U.S. claims that imports of subject tyres from China at the beginning of the period were not small. In 2004 imports from China were five per cent of the market and the fourth largest import source.[158] The United States argues that whether or not subject imports were small at the beginning of the period, they had become a large presence in the market at the end of the period.[159]

7.75 The United States argues that the Protocol does not require the inclusion of the most recently concluded quarterly data. The U.S. contends that the USITC's choice of a five year period of investigation that ended less than four months before the beginning of the investigation satisfies the standard under the Protocol.

7.76 The United States explains that:

> ... the ITC has an established practice in investigations under Section 421 of collecting, at a minimum, five full years of data, plus for any interim period that can reasonably be collected, when conducting its investigations. The ITC decides on a case-by-case basis, whether to attempt to collect data for the 'interim period,' which is the most recently completed period of less than a full calendar year.[160] (footnotes omitted)

7.77 The United States continues that the USITC considers a number of factors in deciding whether to use interim data including: the likelihood of obtaining full information; the amount of time elapsed between the end of the most recent quarter and the issuance of questionnaires; and the number of parties.[161] The United States notes that the USITC is less likely to seek data for a particular

[157] United States' First Written Submission, paras. 108-109. USITC Report, pages 11-12 and 22.
[158] United States' First Written Submission, para. 129.
[159] United States' First Written Submission, para. 129.
[160] United States' First Written Submission, para. 132.
[161] United States' First Written Submission, para. 132.

quarter if a relatively small amount of time has elapsed between the end of the quarter and the beginning of the investigation, if participants in the market are unlikely to provide meaningful information, or if the number of participants is large so that the USITC is unlikely to obtain reasonably complete data in the time allocated.[162]

7.78 The United States argues that in the *Tyres* case, data was needed from 10 U.S. producers, 35 importers and 36 foreign producers. The USITC believed that "a relatively complete data series for that period would not have been available in time for use in this investigation".[163] The United States continues that China fails to mention that in the five Section 421 cases it argues interim data was used, the period of time that had elapsed between the end of the most recent quarter and the filing of the petition ranged from 33 to 67 days.[164] In the *Tyres* case just 20 days had elapsed between the end of the quarter and when the petition was filed and the staff began preparing questionnaires.[165]

7.79 The United States submits that the USITC takes a case by case approach regarding the availability and usefulness of interim data.[166] The United States argues that the antidumping and countervailing investigations referred to by China are not analogous to the *Tyres* case. For 10 of the 11 preliminary-phase investigations that occurred in 2009, the period of time that elapsed between the end of the quarter and the filing of the petitions ranged between 29 and 100 days, "considerably longer than the 20 days between the end of the quarter and the filing of the petition in the *Tires* case".[167] The United States continues that there have been occasions where a petition has been filed more than 20 days after the end of a quarter where the USITC has not collected interim data. The United States argues this demonstrates further that the decision to collect interim data "depends on the nature and complexities of the relevant investigation".[168]

7.80 The United States explains that in the case of *Uncovered Innerspring Units from China*, China does not recognise that the USITC reasonably concluded that asking parties to provide a set of data for one full year as opposed to data for a full year plus two interim periods was likely to place a significantly lower reporting burden on participants. The United States explains:

> In the Innersprings investigation, the ITC collected data for five full years, 1999, 2000, 2001, 2002, and 2003. *Uncovered Innerspring Units from China*, Inv. No. TA-421-5, USITC Pub. 3676 at I-12, III-7-8 (March 2004). If the ITC had chosen to collect data only through the third quarter of 2003, then it would have had to collect data for seven, rather than five reporting periods: 1998, 1999, 2000, 2001, and 2002, plus interim data for the first three quarters of 2003 and the first three quarters of 2002. This would obviously have increased the burden considerably on all respondents.[169]

7.81 The United States argues that absent data to assess whether imports were increasing on a relative basis, it would not have been possible for the USITC to assess whether imports were "increasing rapidly".[170] The United States continues that the USITC's ability "to determine whether imports were increasing on a relative basis was a necessary component of its 'increasing imports' analysis. Even if the available data showed that imports were declining on an absolute level during

[162] United States' First Written Submission, para. 132.
[163] USITC Report, page 12 footnote 55.
[164] United States' First Written Submission, para. 135.
[165] United States' First Written Submission, para. 133.
[166] United States' First Written Submission, para. 137.
[167] United States' First Written Submission, para. 137.
[168] United States' First Written Submission, para. 138.
[169] United States' First Written Submission, para 136, footnote 265. Emphasis in original.
[170] United States' First Written Submission, para. 141.

the first quarter of 2009, the USITC would still not have been able to conclude that imports were not increasing rapidly overall because it could not assess whether they were increasing rapidly on a relative basis".[171]

3. Evaluation by the Panel

7.82 The Panel begins by reviewing various data concerning the volume of subject and non-subject imports in absolute terms. We then consider China's arguments regarding the interpretation of the phrase "increasing rapidly". Thereafter, we consider issues regarding: the USITC's determination that imports were increasing rapidly in relative terms; China's argument that the USITC improperly relied on an end-point-to-end-point analysis of imports; China's argument that the USITC improperly relied on increases in value rather than increases in volume; China's argument that the USITC should have taken account of the fact that subject imports began from a low base; and China's argument that the USITC should have collected data for the first quarter of 2009.

(i) Review of import data

7.83 We summarise below the import data on the absolute increase in the volume of subject imports in each year of the period of investigation[172]; and the percentage increase in subject imports year on year between 2005 and 2008.[173]

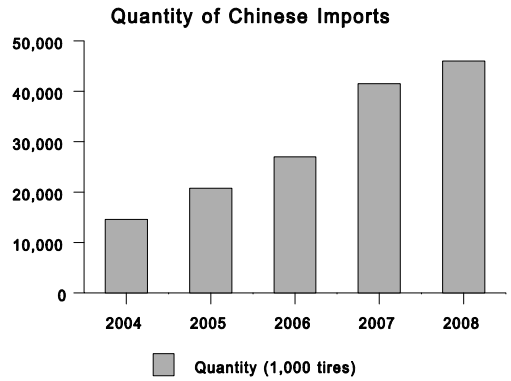
Year	2004	2005	2006	2007	2008
Quantity of subject imports (1,000 tyres)	14,575	20,790	27,005	41,503	45,975

Year	2004	2005	2006	2007	2008
Increase in subject imports (percentage points)	-	42.7	29.9	53.7	10.8

7.84 There were absolute increases in subject imports in each year of the period of investigation. This resulted in an overall increase of 31 million units, or 215.5 per cent, in subject imports from China by the end of the period.[174] The greatest increase occurred in the last two years of the period.[175] Regarding non-subject imports, the next largest increase in imports between 2004 and 2008 was from Indonesia, representing an increase of just 3.9 million units.[176] The absolute increases in volume of

[171] United States' First Written Submission, para. 141. USITC Report, page 12, footnote 55.
[172] Data referred to comes from the USITC Report, Table C-1.
[173] Data referred to comes from the USITC Report, Table C-1.
[174] USITC Report, pages 11-12, and Table II-1.
[175] We note that there was a 14.5 million unit increase in subject imports in 2007 compared to 2006, representing a 53.7 per cent increase; and a 4.5 million unit increase in 2008 compared to 2007, representing a 10.8 per cent increase. The increase in 2008 was in addition to the large increase in 2007.
[176] USITC Report, Table II-1.

subject imports from China over the period of investigation are clearly depicted in the following graph:[177]



7.85 On the basis of this data, the USITC concluded:

> In absolute terms, imports of subject tires from China increased throughout the period of investigation and were the highest, in terms of both quantity and value, in 2008, at the end of the period. The quantity of subject imports rose by 215.5 percent between 2004 and 2008, by 53.7 percent between 2006 and 2007, and by 10.8 percent between 2007 and 2008." The value of subject imports rose even more rapidly, increasing by 294.5 percent between 2004 and 2008, by 60.2 percent between 2006 and 2007, and by 19.8 percent between 2007 and 2008.
>
> ...we find that the subject imports increased, both absolutely and relatively throughout the period by significant amounts in each year and, as stated above, were at their highest levels at the end of the period in 2008. Whether viewed in absolute or relative terms, and whether viewed in terms of the increase from 2007 to 2008 alone or the increase in the last two full years (or even the last three years), the increases were large, rapid, and continuing at the end of the period – and from an increasingly large base.[178]

7.86 At first glance, taking into account the absolute import data outlined above, we see no error in the USITC's conclusion that there was a rapid increase in subject imports from China in absolute terms.[179]

[177] United States' Second Written Submission, para. 20. USITC Report, pages.11-12 and Table C-1.
[178] USITC Report, pages 11-12. Footnotes omitted. We consider relative data and data based on value in paras. 7.94-7.99 and 7.104 below.
[179] China also argues, as part of a 3 prong test, that there should be an analysis of the most recent year in more detail when the initial analysis shows imports are slowing. In this case, China argues that quarterly data for the final two years of the period of investigation should have been analysed. *See* China's Second Written Submission, para. 87 and China's Reply to Question 14, para. 56. We do not agree that subject imports were slowing in 2008. Indeed, in 2008 subject imports were at their highest levels in absolute terms. We note that China provides quarterly data for 2007 and 2008 in para. 127 of its First Written Submission and at Exhibit China-26. This data reveals that the two highest absolute quarterly quantities were Q2 and Q3 2008, and apart

(ii) The meaning of the phrase "increasing rapidly"

7.87 Despite these absolute increases, China argues that imports were not "increasing rapidly" in accordance with the Protocol. According to China, the use of the present continuous tense in the phrases "are being imported" (Paragraph 16.1) and "are increasing" (Paragraph 16.4) requires the investigating authority to focus on the *most* recent past, in this case 2008.[180] China asserts that this requirement for the most recent past is reinforced by the use of the term "increasing" in Paragraph 16.4, rather than the term "increased".[181] China also submits that the increase in imports must be "rapid", which China understands as requiring a quick progression in the rate of increase in the volume of imports.[182] We note that China outlines two scenarios for the meaning of "rapidly" and acknowledges that other scenarios might be possible.[183] The first scenario is that imports must be increasing at a consistently very high rate. The second scenario is that imports must be increasing at a higher rate in each successive year.[184] China argues that, regardless of the scenario, the rate cannot be declining rapidly and that it is "fatal" that the rate of increase from 2007 to 2008 was "a fraction of any of the prior years."[185]

7.88 We note China's argument that the use of the present continuous tense in the phrases "are being imported" (Paragraph 16.1) and "increasing" (Paragraph 16.4) require a focus on the most recent past. However, we recall that the Appellate Body has found the grammatical construction of the phrase "is being imported" in Article 2.1 of the *Safeguards Agreement* to mean that "the increase in imports must have been sudden and recent".[186] The Appellate Body did not find that the increase must have occurred in the *most* recent past.[187]

from the final quarter, on a comparative basis subject imports were higher in 2008 than 2007. See U.S. First Written Submission para. 28. In our view, the legal standard for finding imports to be "increasing rapidly" does not hinge on the final quarter comparison between 2007 and 2008.

[180] We note that China considers the most recent past will include the most recently completed year and any more recent period for which data is available. *See* China's Reply to Question 14 from the Panel, para. 53. China's Second Written Submission, para. 84. We address China's arguments regarding the need to include the first quarter 2009 data in paras. 7.106 to 7.109. We note that the situation during the period of investigation is used as a proxy for the situation pertaining currently at the time of imposition. Panel Report, *Japan – DRAMS (Korea)*, para. 7.357. *See* also Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.58.

[181] China's Second Written Submission, para. 71.

[182] We also note that China considers a "rapid" increase is an *additional* requirement to the requirements in the *Safeguards Agreement*, thus setting forth a standard even more demanding under the Protocol. *See* China's First Written Submission, para. 67. We do not agree that it is useful to compare the *Safeguards Agreement* and the Protocol in this way. The obligations under the Protocol must be interpreted according to the *Vienna Convention*.

[183] China's Second Written Submission, para 77. China's First Written Submission, para. 81.

[184] We note that China focuses on the second of these scenarios, as do we in our analysis. See, for example China's First Written Submission, paras. 115, 120-126, and 131-135; Oral Statement by China at the First Panel Meeting, paras. 26-31; China's Reply to Questions 13 and 14, paras. 49-55; China's Second Written Submission, paras. 110-117.

[185] China's Second Written Submission, para. 112.

[186] Appellate Body Report, *Argentina – Footwear (EC),* para. 130. We do not consider the term "sudden" applies here given Paragraph 16.4 of the Protocol includes the term "rapidly". Since Article 2.1 of the *Safeguards Agreement* does not refer to the term "increasing rapidly", case law interpreting what is happening to imports under Article 2.1 of the *Safeguards Agreement* is of limited contextual relevance.

[187] We note that the period of investigation needs to be recent in order to be relevant, but still long enough to ensure a proper analysis of what is happening to imports over the period, with a focus on the latter part of the investigation. Appellate Body Report, *US – Steel Safeguards*, para. 374.

7.89 According to the panel in *US – Line Pipe*:

> The word 'recent' – which was used by the Appellate Body in interpreting the phrase 'is being imported' – is defined as 'not long past; that happened, appeared, began to exist or existed lately'.[188] In other words, the word 'recent' implies some form of retrospective analysis. It does not imply an analysis of the conditions immediately preceding the authority's decision. Nor does it imply that the analysis must focus exclusively on conditions at the very end of the period of investigation.[189]

7.90 The findings of the Appellate Body in *Argentina – Footwear (EC)* and the Panel in *US – Line Pipe* are applicable here. We consider that the phrase in Paragraph 16.1 of the Protocol, "are being imported" is essentially the same as the phrase "is being imported" in Article 2.1 of the *Safeguards Agreement*. As such, we consider that the Appellate Body's interpretation of the temporal implications of the phrase "is being imported" provides useful guidance in this case. We are also guided by the finding of the panel in *US – Line Pipe* that, although "the word 'recent' implies some form of retrospective analysis... [i]t does not imply an analysis of the conditions immediately preceding the authority's decision". These findings suggest that there is nothing in the use of the present continuous tense in Paragraphs 16.1 and 16.4 of the Protocol that would require an investigating authority to focus on the movements in imports during the *most* recent past, or during the period immediately preceding the authority's decision.

7.91 We recall China's focus on the fact that Paragraph 16.4 uses the term "increasing", in the present continuous tense, rather than the past tense "increased". China argues that the difference between imports that have "increased rapidly" and imports that are "increasing rapidly" means that an investigating authority must find that imports are still "increasing" rapidly during the most recent period. We agree there is a temporal difference between imports that have increased rapidly and those that are increasing rapidly. However, the text of Paragraph 16.1 does not say "increased rapidly". The text says "are being imported … in such increased quantities" and, as acknowledged by China, this phrase uses the same grammatical tense as the phrase "increasing rapidly" in Paragraph 16.4. Reading the terms "increased" and "increasing" in their proper context, we do not consider that the use of the term "increasing" in Paragraph 16.4 requires a focus on a more recent period than the term "increased" in Paragraph 16.1.[190]

7.92 We note that the ordinary meaning of rapid means "progressing quickly; developed or completed within a short time".[191] The adverb "rapidly" is defined as "… with great speed, swiftly".[192] There is no reference to the rate of increase in the dictionary meaning of "rapidly", nor any suggestion that imports can only increase rapidly if there is an increase in the rate of increase in those imports. Accordingly, in order for imports to be "increasing rapidly", they need only be increasing "with great speed", or "swiftly". There is no need for any swift progression in the *rate* of increase in those imports. Nor does a decline in the rate of increase necessarily preclude a finding that imports are "increasing rapidly". Under the Protocol the rapid increase need only be on an absolute or relative basis.

[188] *The Compact Edition of the Oxford English Dictionary*, Volume 1 (Oxford University Press, 1971).

[189] Panel Report, *US – Line Pipe,* para. 7.204.

[190] China also relies on its understanding of the object and purpose of Paragraph 16 of the Protocol to support its call for a narrow interpretation of the phrase "increasing rapidly". We address China's arguments regarding the object and purpose of Paragraph 16 of the Protocol at paras. 7.147-7.149.

[191] Shorter Oxford English Dictionary, Vol.2, page 2463. Both China and the United States acknowledge this dictionary definition. *See* China's First Written Submission, para. 79. United States' First Written Submission, para. 87.

[192] Shorter Oxford English Dictionary, Vol. 2, page 2465.

7.93 Furthermore, even if the USITC had been required to focus on imports during the last year of the period, the fact that the 10.8 per cent increase in 2008 was lower than the increase in the preceding year does not mean that imports were not "increasing rapidly" in 2008. An increase of 10.8 per cent in 2008 by no means precludes a finding that imports are "increasing rapidly", especially when that increase is assessed in context.[193] Nor is it a "modest" increase.[194] In this regard, we recall that the 10.8 per cent increase in absolute volumes between 2007 and 2008 was *in addition* to an increase of 53.7 per cent between 2006 and 2007, which was *in addition* to an increase of 29.9 per cent between 2005 and 2006, which was *in addition* to an increase of 42.7 per cent between 2004 and 2005. In our view, the 10.8 per cent increase in absolute volumes from 2007 to 2008 reinforces the USITC's conclusion that imports were "increasing rapidly" during the period, and continued to be "increasing rapidly" at the end of the period.

(iii) Relative increase in imports

7.94 We note that there is no definition in the Protocol for imports that are "increasing rapidly... relatively". Therefore, in our view, any reasonable form of a relative assessment is acceptable. As such, the interpretation of this factor is not necessarily limited to a consideration of the market share of Chinese imports, i.e., imports from China as a percentage of total consumption. We see no reason why imports relative to domestic production cannot also be considered. We note that in this case the USITC considered *both* imports relative to market share *and* imports relative to domestic production.[195] Specifically, the USITC found that:

> Both the ratio of subject imports to U.S. production and the ratio of subject imports to U.S. apparent consumption rose throughout the period examined, and both ratios were at their highest levels of the period in 2008. The ratio of subject imports to U.S. production increased by 22.0 percentage points between 2004 and 2008, with the two largest year-to-year increases occurring at the end of the period in 2007 and 2008. The ratio of subject imports to U.S. apparent consumption increased by 12.0 percentage points during the period examined, with the two largest year-to-year increases also occurring at the end of the period in 2007 and 2008.[196]

7.95 We summarise below the data regarding the market share of China's imports compared to the market share of non-subject imports:[197]

U.S. imports from:	2004	2005	2006	2007	2008
China (%)	4.7	6.8	9.3	14.0	16.7
All other sources (%)	31.9	33.6	34.5	33.4	33.7

7.96 There was an increase in the market share of subject imports from China in every year, leading to a 12 percentage point increase over the period of investigation. In comparison, the market share of non-subject imports was more or less stable.[198]

[193] And we note that in making its finding the USITC considered the "increase and rate of increase in subject imports". USITC Report, page 11.
[194] China's First Written Submission, para. 125.
[195] USITC Report, page 12.
[196] USITC Report, page 12. *See* also Table II-2 and Table V-1.
[197] USITC Report, Table C-1.

7.97 We summarise below the data for subject imports as a percentage of domestic production.

Year	2004	2005	2006	2007	2008
Subject imports as % of domestic production	6.7	10.0	14.6	23.0	28.7

7.98 We note that there were increases in subject imports relative to domestic production year after year, as demonstrated in the above table.[199] There was a 22 percentage point increase in subject imports relative to domestic production over the period of investigation. Thus, regardless of a focus on imports relative to market share or relative to domestic production there were increases from year to year and significant increases over the period of investigation.

7.99 China argues that "stable" changes in market share reveal that imports are not increasing rapidly on a relative basis (See table in para. 7.45, above: the change in the market share between 2004 and 2005 was 2.1 percentage points; between 2005 and 2006 was 2.5 percentage points; between 2006 and 2007 was 4.7 percentage points; and between 2007 and 2008 was 2.7 percentage points). While we consider comparing rates of increase from year to year might be useful, we have already explained its limitations. The *change* in the market share seems to us a step further away again from the text of the Protocol where the obligation is to find rapid increases "either absolutely or relatively".

7.100 In any event we have, up to this point, determined that the USITC gave a reasonable and adequate explanation for concluding that the absolute data indicates that imports are "increasing rapidly". That is sufficient under the Protocol and it is not necessary to consider the situation in relation to relative data. However, for the sake of completeness we have done so, and find that given rapidly increasing subject imports from China relative to domestic production and relative to market share, imports are "increasing rapidly" in relative terms.

(iv) End-point-to-end-point analysis

7.101 The Panel next considers China's arguments regarding the utility of an end-point-to-end-point analysis by recalling what the Appellate Body said in *Argentina – Footwear (EC)*:

> We agree with the Panel that Articles 2.1 and 4.2(a) of the *Agreement on Safeguards* require a demonstration not merely of *any* increase in imports, but, instead, of imports 'in such increased quantities ... and under such conditions as to cause or threaten to cause serious injury.' In addition, we agree with the panel that the specific provisions of Article 4.2(a) require that 'the *rate* and *amount* of the increase in imports...in absolute and relative terms'(emphasis added) must be evaluated. Thus, we do not dispute the Panel's view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a). As a result, we agree with the Panel's conclusion that 'Argentina did not adequately consider the intervening trends in imports, particular the steady and significant declines in imports beginning in

[198] Non-subject imports are discussed in more detail in the discussion on other causes of injury at paras. 7.364 to 7.367.
[199] China argues that the domestic production factor is unreliable given that the "domestic industry is engaging in a conscious strategy of shifting some of its production offshore …". China's Reply to Question 38 from the Panel, para. 51. We address the business strategy issue in paras. 7.285-7.322.

> 1994, as well as the sensitivity of the analysis to the particular end points of the investigation period used.[200]

7.102 As we understand it the Appellate Body is not saying that an end-point-to-end-point analysis is prohibited in all circumstances. But, rather, that the investigating authority in *Argentina – Footwear (EC)* did not assess the trends in imports during the period of investigation adequately, and did not take into account the particular sensitivity of the analysis to the end points selected given intervening trends. That is, the investigating authority in that case did not adequately consider the declines in absolute and relative imports in the final two years of the investigation.[201] Such was the significance of the decreases in that case that a one-year change in the base year "transformed the increase relied upon by Argentina into a decline".[202] We note that in the case before us the facts are very different. The USITC did not rely exclusively on an end-point-to-end-point analysis, but rather engaged in various temporal comparisons.[203] Furthermore, there was not even a predominant reliance on an end-point-to-end-point analysis, as the USITC relied on the fact that there was an absolute and relative increase in subject imports in every year of the investigation.[204]

7.103 China claims that an end-point-to-end-point-analysis "can obscure the more relevant analysis of what is happening over the more recent period".[205] We note that the Appellate Body in *US – Steel Safeguards* was concerned that a "simple end-point-to-end-point analysis could easily be manipulated" in cases where there is no "clear and uninterrupted upward trend in import volumes".[206] In this case, however, there was "a clear and uninterrupted upward trend in import volumes". As such, the results could not be manipulated by the selection of end points.[207]

(v) Value / volume

7.104 The Panel next considers China's argument that the USITC relied on increases in value rather than increases in volumes. The Panel begins by noting that even though the text of the Protocol refers to quantities, it does not prohibit an analysis that looks at the value of imports. We note that in this case the USITC assessed both the quantity and value of imports.[208] The value of subject imports rose by 294.5 per cent between 2004 and 2008; 52.6 per cent between 2004 and 2005; 34.7 per cent between 2005 and 2006; by 60.2 per cent between 2006 and 2007, and by 19.8 per cent between 2007 and 2008.[209] If an assessment of the quantity of imports tells a starkly different story to that of value due to factors influencing value being something other than volumes of imports, then a more searching analysis might discount an assessment based on value. However, China has not presented any arguments to suggest that the increase in value in this case could be explained by factors other than an increase in subject imports.[210]

[200] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129. (Footnotes omitted).
[201] Panel Report, *Argentina – Footwear (EC)*, paras. 8.153 – 8.164.
[202] Panel Report, *Argentina – Footwear (EC)*, para. 8.164.
[203] *See* para. 7.85.
[204] *See* paras. 7.83-7.86 and 7.94-7.100 on absolute and relative data.
[205] China's Second Written Submission, para. 105.
[206] Appellate Body, *US – Steel Safeguards*, para 354.
[207] We note that China also argues that the USITC needed to focus on the most recent period and look at increases in 2008 relative to the entire period. China considers the failure by the USITC to focus on 2008 in this way was "in "large part [due] to its over reliance on an 'end-point-to-end-point' analysis". We have considered the relevance of the *most* recent period in paras. 7.87-7.93.
[208] USITC Report, pages 11-12.
[209] *See* USITC Report, Table C-1.
[210] We note that Table II-I in the USITC Report provides information regarding the per unit price of subject imports. It shows that the increase in price over the period (from 31.10 per unit in 2004 to 38.90 per unit in 2008, or a 25 per cent increase) was substantially less that the overall increase in value (294.5 per cent between 2004 and 2008).

(vi) Low base

7.105 China also argues that there was a "low" base at the beginning of the investigation period and this was never put into context by the USITC. In our view subject imports were not "low" at the beginning of the period. Having five per cent of the market at a value of 450 million dollars, and being the fourth largest import source are far from humble beginnings. Furthermore, gaining 12 percentage points in market share at a value of 1.7 billion dollars, and becoming the largest import source over the period of investigation means subject imports were a large and significant presence in the market at the end of the period.[211]

(vii) Interim data for the first quarter of 2009

7.106 Finally, the Panel addresses China's argument that data from the first quarter of 2009 should have been included in the period of investigation. The Panel begins its analysis by recalling footnote 55 on page 12 of the USITC Report which explains why the USITC did not collect or analyse Q1 2009 data.

> ... The data the Commission compiled and relied upon in this investigation, however, did not include first quarter 2009 data because a relatively complete data series for that period would not have been available in time for use in this investigation. The first quarter 2009 import data also are of no probative value in determining whether subject imports are increasing rapidly in relative terms in the absence of a data series that includes first quarter 2009 data on U.S. production and U.S. apparent consumption. Thus consideration of first quarter 2009 import data alone would not change our finding that imports of the subject imports from China are increasing rapidly, both absolutely and relatively."[212]

7.107 Regarding the selection of an investigation period, we recall that WTO jurisprudence in relation to the *Safeguards Agreement* says that where there are no specific rules as to the length of the period of investigation, the period selected must be sufficiently long to allow conclusions to be drawn regarding increased imports, and the period must allow an investigating authority to focus on recent imports.[213] We consider that the same logic applies in the context of the Protocol. In our view, given that there are no precise guidelines in the Protocol, the selection of a five year period of investigation that ended less than four months before the beginning of the investigation provides recent data and satisfies the standard under the Protocol.

7.108 We note that the Parties do not agree on what the USITC standard practice is regarding interim data. China argues that the USITC has a "well-established and consistent practice of collecting interim data in other cases".[214] The United States says that the USITC has an established practice in investigations under Section 421 "of collecting, at a minimum, five full years of data, plus any interim period that can reasonably be collected"[215] but that the USITC decides on a case-by-case basis whether to attempt to collect data for the interim period.[216] For the purposes of our analysis we

[211] USITC Report, Table C-1.
[212] USITC Report, page 12, footnote 55.
[213] Panel Report, *US – Line Pipe,* para. 7.201.
[214] China's First Written Submission, para. 139.
[215] United States' First Written Submission, para. 132.
[216] United States' First Written Submission, para. 132. Regarding the United States argument drawing on *US – Lamb* to support its view of a recent period of time, we note that the comments by the Appellate Body in that case were in relation to the evaluation of the state of the domestic industry when making a threat

do not consider it relevant whether the USITC deviated from its standard practice, only whether the choice of an investigation period was reasonable and adequate, and we have concluded that it was.[217]

7.109 We note that the USITC was concerned at not having relative data for the first quarter of 2009 and considered that even if it had collected absolute data for the first quarter of 2009, it would have served no probative value as it could not have completed the analysis regarding rapidly increasing imports without relative data. We note also that in the other Section 421 investigations both absolute and relative data were included.[218] Given the requirement to consider imports that are "increasing rapidly, either absolutely or relatively" it seems only practical that all data be available for any period selected as part of the investigation period in order to be able to determine whether imports are "increasing rapidly". In any event, we do not consider the USITC was obliged to collect and incorporate absolute and relative data for the first quarter of 2009 into its period of investigation.

4. Conclusion

7.110 For all of the above reasons, we conclude that the USITC did not fail to evaluate properly whether imports from China met the specific threshold under Paragraph 16.4 of the Protocol of "increasing rapidly".

C. IS THE U.S. IMPLEMENTING STATUTE'S CAUSATION STANDARD INCONSISTENT AS SUCH WITH PARAGRAPH 16.1 AND PARAGRAPH 16.4 OF THE PROTOCOL?

7.111 China claims that Section 421 is "as such" inconsistent with Paragraph 16 of the Protocol (irrespective of the way in which the USITC applied that standard in the *Tyres* investigation), because it fails to fully implement the "significant cause" standard set forth in Paragraph 16.4 of the Protocol. China asserts that the U.S. implementing statute properly cites the appropriate causation standard as "significant cause", but then improperly defines "significant cause" as:

> a cause which *contributes significantly* to the material injury of the domestic industry, but *need not be equal to or greater than any other cause*.[219]

7.112 China's claim focuses on two elements of the definition set forth in the statute. First, China asserts that the statute lowers the Paragraph 16.4 causation standard by redefining "significant cause" as "contributes significantly". Second, China contends that the statute further lowers the causation standard by allowing imports to be a less important factor than any other single cause, no matter how minor that other cause might be.

7.113 The United States contends that the causation standard of the U.S. implementing statute is fully consistent with the provisions of the Protocol.

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determination. The comments were not in relation to increased imports. Therefore we do not consider it relevant context for the purposes of this case. In any event we have already given our views on the temporal element to be considered under the Protocol in interpreting "increasing rapidly" - i.e. that it is the recent period of time that needs to be considered, while also considering trends over the period of investigation with particular attention on what is happening to imports in the latter part of the period.

[217] We note that, in the Section 421 investigations mentioned by China, the amount of time that had elapsed between the end of the most recent quarter and the filing of the petition ranged from 33 to 67 days, compared to the 20 days in this case. We consider this difference notable. We also note that responses to questionnaires were due on 7 May 2009, and it is arguably not reasonable to expect exporters, importers and producers to supply first quarter absolute and relative data by 7 May.

[218] China's Reply to Question 37 from the Panel, paras. 44-47.

[219] 19 U.S.C. § 2451(c)(1). (emphasis supplied)

7.114 Before turning to the substance of the parties' arguments, we first examine a threshold issue regarding the application of the mandatory/discretionary distinction.

1. Threshold issue regarding the application of the mandatory/discretionary distinction

7.115 We note the U.S. argument that, consistent with a long-standing distinction in GATT and WTO case law between mandatory and discretionary legislation, China must demonstrate that Section 421 mandates, or requires, the USITC to apply a causation standard that is inconsistent with the Protocol. The United States submits that there is nothing in the U.S. statute that mandates action that is inconsistent with the United States' obligations under the Protocol.

7.116 China contends that "the Appellate Body has explained that panels are *not* obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory".[220] China further contends that the general status of the mandatory/discretionary distinction is unsettled, and accordingly the Appellate Body has urged "caution against the application of this distinction in a mechanistic fashion".[221] China submits that, in any event, Section 421 does require the USITC to apply a fundamentally flawed definition. China asserts that the United States has not argued, and indeed cannot argue, that the USITC was free to disregard the statutory definition at its discretion.[222] China asserts that whenever the USITC makes the legal finding that imports are "a significant cause" of material injury, this finding is necessarily defined to be something different from (and lower in standard than) a finding of "significant cause" in accordance with the correct standard under the Protocol.

7.117 While we acknowledge that the Appellate Body has cautioned against the application of this distinction "in a mechanistic fashion", the Appellate Body has not expressly ruled out the applicability of the mandatory/discretionary distinction in the context of assessing the WTO-consistency of a legislative measure. Rather, the Appellate Body has itself implicitly applied the distinction. Thus, in *US – Carbon Steel*, the Appellate Body upheld the panel's ruling on the basis that "the European Communities did not satisfy its burden of proving either that United States law *mandates* USDOC to act inconsistently with Article 21.3 of the *SCM Agreement*, or that such law restricts in a material way USDOC's *discretion* to make a determination consistent with Article 21.3 in a sunset review".[223] The Appellate Body also did not rule out the application of the mandatory/discretionary distinction when the occasion to do so presented itself in *US – Zeroing (EC) (Article 21.5 – EC)* Instead, the Appellate Body repeated an earlier finding that "the import of the 'mandatory/discretionary distinction' may vary from case to case".[224]

7.118 In practice, the import of the mandatory/discretionary distinction is most pronounced in cases where, although a Member's law appears to be WTO-inconsistent on its face, there is sufficient discretion to allow national authorities to apply the law in a WTO-consistent manner. In such cases, the discretion reserved to national authorities "saves" the statute. For the reasons set forth below, we do not consider that Section 421 appears inconsistent on its face. In this case, therefore, the potential import of the mandatory/discretionary distinction is limited. That being said, we consider that we should approach China's "as such" claim against Section 421 by evaluating whether or not

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[220] Panel Report, *US – Customs Bond Directive*, para. 7.209 (emphasis in original).

[221] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

[222] The United States has admitted the definition is binding on the USITC. U.S. Reply to Question 20 from the Panel, para. 58.

[223] Appellate Body Report, *US – Carbon Steel*, para. 162 (emphasis supplied).

[224] Appellate Body Report, *US – Zeroing (EC) (Article 21.5-EC)*, para. 214, citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

Section 421 requires the United States to establish causation in a manner inconsistent with Paragraph 16 of the Protocol.[225]

2. Whether the statute lowers the Paragraph 16.4 causation standard by redefining "significant cause" as "contributes significantly"

(a) Arguments of the parties

7.119 **China** asserts that the U.S. "contributes significantly" definition is at odds with the ordinary meaning of the Paragraph 16.4 "significant cause" standard, interpreted in context and in light of the object and purpose of the Protocol.

7.120 In respect of the ordinary meaning of the terms, China contends that the statute improperly equates the word "cause" with "contribute", whereas these two words in fact have very different meanings. China asserts that the ordinary meaning of "cause" is "that which produces an effect or consequence"[226] or "something that brings about an effect or a result".[227] China contends that, by contrast, the ordinary meaning of "contribute" is "to play a part in the achievement of a result"[228], or "to play a significant part in bringing about an end or result"[229], which is a weaker notion than that of "cause". China contends that a cause "produces" or "brings about" the consequence, and does not merely "contribute to" or "play a part" in its occurrence.

7.121 China refers to the French and Spanish versions of the Protocol in support of its argument. China asserts that the French version uses the verb "causer", which means "to be at the origin of something, to have something as effect".[230] China asserts that the verb "contribuer" is defined so as to have a lower determinative value, meaning to merely "help with", or "have a part, more or less important, in the production of a result".[231] China makes similar arguments in respect of the translation and meaning of the Spanish terms "causar", "causa" and "contribuir".[232] According to China, both the French and Spanish versions of the text reveal the much less-determinative character of "to contribute" when compared with "to cause".

7.122 China asserts that the addition of the word "significant" strengthens this causal link requirement, since the Shorter Oxford English Dictionary defines "significant" as "important, notable, consequential".[233] China submits that the causal connection must be important, notable, or consequential, such that a simple causal connection is not sufficient. China contends that the ordinary meaning of "significant cause" therefore requires a particularly strong, manifest and important causal connection. China contends that the U.S. statute fails to reflect this standard, since a factor can make an "important contribution" at a far lower level of casual relationship than when it rises to the level of an "important cause".

[225] In doing so, we are guided in particular by the approach of the panel in *Korea – Commercial Vessels,* paras. 7.60–7.67.
[226] Shorter Oxford English Dictionary, Vol. 1, at 365 (2007 ed.).
[227] Webster's Ninth New Collegiate Dictionary, at 217 (1986 ed.).
[228] Shorter Oxford English Dictionary, Vol. 1, at 509 (2007 ed.).
[229] Webster's Ninth New Collegiate Dictionary, at 285.
[230] Trésor de la Langue Francaise, dictionary published by the CNRS (National Center for Scientific Research), available at: http://atilf.atilf.fr/tlf.htm.
[231] Trésor de la Langue Francaise, dictionary published by the CNRS (National Center for Scientific Research), available at: http://atilf.atilf.fr/tlf.htm.
[232] China's First Written Submission, para. 200.
[233] Shorter Oxford English Dictionary, Vol. 2, at 2833 (2007 ed.).

7.123 China relies on the context of the phrase "significant cause", and the object and purpose of the Protocol, to argue that "significant cause" should be interpreted more narrowly than the "causal link" causation standard set forth in Article 4.2(b) of the *Safeguards Agreement.*

7.124 Regarding context, China first notes that paragraph 246(c) of the Working Party Report provides:

> 246. …Members of the Working Party confirmed that in implementing the provisions on market disruption, WTO Members would comply with those provisions and the following: ….
>
> > (c) In determining whether market disruption existed, including the causal link between imports that were increasing rapidly, either absolutely or relatively, and any material injury or threat of material injury to the domestic industry, the competent authority would consider objective factors …

7.125 China contends that the term "cause" in Paragraph 16 of the Protocol and the phrase "causal link" in the Working Party Report are used synonymously. China then directs the Panel to the WTO case law regarding the interpretation of the phrase "causal link" in Article 4.2(b) of the Safeguards Agreement. In particular, China notes that the Appellate Body has found that the phrase "causal link" (as used in Article 4.2(b) of the *Safeguards Agreement*) requires a showing that there is a "*genuine and substantial relationship* of cause and effect between imports and threat of injury".[234]

7.126 China asserts that Paragraph 16.4 of the Protocol then goes further, as the word "significant" is used to strengthen the basic requirement to establish a "genuine and substantial relationship of cause and effect between imports and threat of injury". According to China, it is no longer enough for the relationship to be "genuine and substantial"; the relationship must be both "genuine and substantial" and also must be "significant". China asserts that, whereas the Protocol imposes a more stringent causation standard than the *Safeguards Agreement*, the U.S. statutory definition of "contributes significantly" actually lowers that threshold.

7.127 A further contextual element relied on by China concerns the meaning of the term "market disruption". China asserts that the word "disruption" means "break apart, throw into disorder, shatter; separate forcibly; esp. interrupt the normal continuity of (an activity etc); throw into disorder".[235] China also refers to the French and Spanish versions of the Protocol (which refer respectively to "désorganisation du marché" and "desorganización del Mercado").[236] China contends that the causal relationship that justifies the imposition of a product-specific safeguard measure must not only be significant, but also have the very serious consequence of throwing the market into disorder, breaking it apart, or shattering it.

7.128 As for object and purpose, China asserts that the Protocol as a whole should be viewed as an instrument which facilitates the expansion of trade. According to China, Paragraph 16 of the Protocol is an exceptional, country-specific measure designed to address unforeseen surges in imports from China – an "escape valve" to be used only in emergency situations as an extraordinary remedy. China contends that Paragraph 16 should therefore be given a narrow construction, to differentiate the higher

[234] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada),* para. 132 (emphasis added).
[235] Shorter Oxford English Dictionary, Vol. 1, at 714 (2007 ed.).
[236] China's First Written Submission, para. 189.

causation standard of Paragraph 16 from the lower causation standard applied in the *Safeguards Agreement*.

7.129 The **United States** contends that China's argument regarding the distinction between "cause" and "contribute" is premised on the mistaken notion that the Protocol requires that imports from China be the sole cause of material injury to an industry. The United States asserts that China's argument is inconsistent with the text of the Protocol, as the Protocol provides that "market disruption shall exist" if Chinese imports constitute "*a* significant cause of material injury" to the industry. By providing that Chinese imports may constitute "a significant cause" of injury, the Protocol explicitly contemplates that there may be multiple significant causes of material injury or threat to an industry, a point which China ignores.

7.130 The United States asserts that China's argument is also inconsistent with the ordinary meaning of the word "cause". The United States contends that, while the Shorter Oxford English Dictionary defines the word "cause" as meaning a factor that "produces an effect or consequence" or "that brings about an effect or result"[237], there is no question that the word "cause" can be used to describe a situation where more than one factor brings about or produces a particular effect or result. According to the United States, one can correctly state that the "hearing room's heating system *and* the sun's rays on the windows of the hearing room caused the hearing room to be very hot during the morning session". The United States asserts that, given that it is entirely correct to use "cause" in this manner, it is also clear that "cause" can be used with respect to situations where multiple factors contribute to "bringing about" or "producing" an effect or result.

7.131 The United States further contends that China's argument is inconsistent with the Appellate Body's explanation of the terms "cause" and "causal link" in the *Safeguards Agreement* context. According to the United States, the Appellate Body examined the "causal link" requirement contained in Article 4.2(b) of the *Safeguards Agreement* in *US – Wheat Gluten*, and explained:

> The word "causal" means "relating to a cause or causes," while the word "cause," in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, "brought about," "produced,", or "induced" the existence of the second element. The word "link" indicates simply that increased imports have played a part in, *or contributed to*, bringing about serious injury so that there is a causal "connection" or "nexus" between these two elements. Taking these words together, the term "causal link" denotes, in our view, a relationship of cause and effect such that increased imports *contribute to "bringing about, "producing," or "inducing*" the serious injury.[238]

7.132 The United States contends that since China has conceded that the words "cause" and "causal link" are effectively the same for the purposes of the analysis set forth in the Protocol[239], this reasoning would suggest that the ITC can reasonably assess whether increased imports are a significant "cause" of injury to the industry by assessing whether they significantly "contribute" to the industry's injury.

[237] The United States refers in this regard to the dictionary definition set forth at para. 198 of China's First Written Submission.

[238] Appellate Body Report, *US – Wheat Gluten*, para. 67, emphasis supplied.

[239] The United States refers in this regard to China's First Written Submission, para. 180 ("the term 'cause' in the text of Article 16 of the Protocol and the phrase 'causal link' as used in the discussion of Article 16 of the Working Party Report are used synonymously").

7.133 The United States asserts that China is wrong to argue that by modifying "cause" with "significant", the Protocol simply took the causation standard of the *Safeguards Agreement* and made it more "severe". The United States contends that, under the *Vienna Convention*, each term must be interpreted in the context of its particular agreement. The United States asserts that such analysis demonstrates two different requirements: a "genuine and substantial relationship of cause and effect" under the *Safeguards Agreement* and an "important, notable, or consequential" cause under Paragraph 16 of the Protocol. The United States submits that China's effort to argue that one is more "severe" than the other is a pointless exercise, as it provides no guidance as to the meaning of either, or as to whether the causation standard under Section 241 is consistent with Paragraph 16 of the Protocol.

7.134 Regarding China's reliance on definitions of the words "market" and "disruption", the United States submits that there is no need for the Panel to consult a dictionary to define the term "market disruption" because the Protocol itself defines the term. The United States relies on Article 31.4 of the *Vienna Convention*, whereby "[a] special meaning shall be given to a term if it is established that the parties so intended". The United States contends that, in accordance with that principle, the Protocol's explicit definition of the term makes recourse to other sources unnecessary.

7.135 The United States disputes China's argument that a more "demanding" standard for causation should be applied under Paragraph 16 of the Protocol because the transitional product-specific safeguard mechanism is an "exceptional, country-specific measure designed to address unforeseen surges in imports from China".[240] The United States contends that China is mistaken in claiming that the transitional remedy under Paragraph 16 was intended to be used only in exceptional circumstances involving unforeseen surges in Chinese imports. According to the United States, the extraordinary nature of global safeguards is squarely rooted in the texts and immediate contexts of Article XIX of the GATT 1994 and the text of the *Safeguards Agreement*, which refer to the concepts of "emergency action" and "unforeseen and unexpected" developments. The United States contends that China's theory is based on the mistaken assumption that the basic principles that are applicable to an action taken under the *Safeguards Agreement* are also applicable to the transitional mechanism specified in the Protocol. The United States asserts that, unlike the provisions of Article XIX of the GATT 1994 and the provisions of the *Safeguards Agreement*, nothing in the Protocol indicates that the Protocol's transitional measure was intended to be an "emergency action"[241] or that the rapid increase in imports from China must be the result of "unforeseen developments".[242] The United States submits that, because similar terms and language were not included in Paragraph 16 of the Protocol, it is inappropriate to conclude, as China does, that the Appellate Body's statements about the "extraordinary" nature of a global safeguard apply to the transitional mechanism set forth in the Protocol.

(b) Evaluation by the Panel

7.136 The WTO Agreement does not prescribe any particular manner in which a Member's WTO obligations and commitments must be transposed into its domestic law. Accordingly, there is nothing to prevent a Member from including in its domestic law definitions of terms used in the WTO Agreement. Although a Member's decision to define WTO terms runs the risk that the resultant definition may not be WTO-consistent, WTO-inconsistency must not be presumed. Accordingly, the onus is on China to establish that the Section 421 definition of "significant cause" as "contributes significantly" is inconsistent with the causation standard set forth in Paragraph 16.4 of the Protocol.

[240] China's First Written Submission, paras. 191-193.

[241] GATT 1994, Article XIX:1(a); *Safeguards Agreement*, Article 11.1(a).

[242] GATT 1994, Article XIX:1(a).

7.137 China seeks to meet its burden by invoking dictionary definitions that allegedly show that the term "contribute" is less stringent than "cause". In particular, China submits that the ordinary meaning of "cause" is "that which produces an effect or consequence"[243] or "something that brings about an effect or a result"[244], whereas the ordinary meaning of "contribute" is merely "to play a part in the achievement of a result"[245], or "to play a significant part in bringing about an end or result"[246], which is a weaker notion than that of "cause". Thus, China contends that a cause "produces" or "brings about" the consequence, and does not merely "contribute to" or "play a part" in its occurrence.[247]

7.138 Looking exclusively at these dictionary definitions, one might legitimately conclude that a "contribution" has a lesser causal effect than a "cause". In particular, implicit in the definitional differences invoked by China is the notion that the term "contribute" allows for multiple factors to each "play a part in" bringing about a result, whereas "cause" means that the triggering event is in and of itself capable of bringing about, or producing, that result. In other words, a "cause" is capable of producing or bringing about a result on its own, whereas a "contribution" would only ever play a part in the occurrence of that result, along with other contributing factors.

7.139 We recall, though, that the terms of the Protocol must be interpreted in context. Of particular contextual importance in this regard is the fact that, according to Paragraph 16.4 of the Protocol, rapidly increasing imports need only be "a" significant cause of market disruption. In other words, the imports need not be the *sole* cause of the market disruption.[248] We note that the definitions cited by China do not appear to leave room for multiple causes. In particular, China invokes The Shorter Oxford English Dictionary definition of the noun "cause" as "*that which* produces an effect or consequence", and the verb "cause" as "to be *the* cause of, effect, bring about".[249] These definitions emphasise the singularity of the causal factor. The same emphasis on the singularity of cause is found in the French and Spanish definitions advanced by China. China notes that the French verb "causer" means "to cause", and is further defined as "to be at *the origin* of something, to have something as an effect". Regarding the Spanish version of Paragraph 16.4, China asserts that, in Spanish, the verb "causar" means "to cause", and is further defined as "when referring to a cause: produce its effect" as well as "[t]o be *the* cause, the reason and motive of the occurrence of something".[250] China further asserts that, "[n]otably, "causa" is defined as "cause"[251] as well as that "which is considered as fundamental to or *the origin* of something". Thus, both the French and Spanish definitions invoked by China suggest that an event has a single cause. In addition, both the French and Spanish definitions refer to the notion of "origin". Since an event may only have one origin, the singular nature of the causal factor inherent in the definitions proposed by China is again emphasised.

7.140 In the context of Paragraph 16.4, which refers to "*a* significant cause", we consider that Members must be entitled to interpret the term "cause" in a way that allows for the possibility that the

[243] Shorter Oxford English Dictionary, Vol. 1, at 365 (2007 ed.).
[244] Webster's Ninth New Collegiate Dictionary, at 217 (1986 ed.).
[245] Shorter Oxford English Dictionary, Vol. 1, at 509 (2007 ed.).
[246] Webster's Ninth New Collegiate Dictionary, at 285.
[247] The United States does not contest the dictionary definitions submitted by China.
[248] In its Reply to Question 19 (para. 61) from the Panel, China acknowledges that "the rapidly increasing imports need not 'produce' or 'bring about' the injury in and of themselves," but submits that "the causal role of subject imports ... requires something significantly more than mere contribution". This suggests that, for China, a contribution could necessarily only ever be a "mere" contribution. As explained below (*See* paras. 7.158 to 7.159), the Section 421 causation standard provides for more than a "mere" contribution.
[249] Shorter Oxford English Dictionary, Vol. 1, at 365-66 (2007 ed.).
[250] Diccionario de la Lengua Espanola, dictionary published by the Real Academia Espanola, available at: http://www.rae.es/rae.html.
[251] The Oxford Spanish Dictionary at 149 (2003 ed.).

causal factor is one of several causal factors that together produce or bring market disruption.[252] Where a Member does so, it is no longer appropriate to refer to each causal factor as "produc[ing] a result" (since this implies that each cause has produced the result on its own, which is not the case). Each causal factor might more accurately be said to play a part in producing that result. Since the ordinary meaning of "contribute" is to "play a part" in the achievement of a result"[253], it seems reasonable that Members might refer to multiple causes each "contributing" to the result.

7.141 Furthermore, we note that the parties in this case use the terms "cause" and "causal link" synonymously.[254] In the particular context of the Protocol, we agree with this approach. While Paragraphs 16.1 and 16.4 use the term "cause", paragraph 246(c) of the Working Party Report refers to the concept of "causal link":

> In determining whether market disruption existed, including the *causal link* between imports which were increasing rapidly, either absolutely or relatively, and any material injury or threat of material injury to the domestic industry, the competent authorities would consider objective factors, including (1) the volume of imports of the product which was the subject of the investigation; (2) the effect of imports of such product on prices in the importing WTO Member's market for the like or directly competitive products; (3) the effect of imports of such product on the domestic industry producing like or directly competitive products. (emphasis supplied)

7.142 According to paragraph 246(c), therefore, the finding of "cause" necessitated by Paragraph 16.4 might properly be referred to as a finding of "causal link". Thus, a finding that rapidly increasing imports are a (significant) cause of material injury is equivalent to a finding that there is a (significant) causal link between the imports and the injury. Regarding the meaning of the term "causal link" (in the first sentence of Article 4.2(b) of the *Safeguards Agreement*), the Appellate Body found in *US – Wheat Gluten* that:

> The word "link " indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal "connection" or "nexus" between these two elements." Taking these words together, the term "the causal link" denotes, in our view, a relationship of cause and effect such that increased imports contribute to "bringing about", "producing" or "inducing" the serious injury.[255]

7.143 The Appellate Body further explained that the "contribution must be sufficiently clear as to establish the existence of 'the causal link' required".[256] In other words, the Appellate Body finds that the existence of a causal link might be established on the basis of a (sufficiently clear) contribution. Since in the context of the Protocol the terms "cause" and "causal link" may properly be used synonymously, this guidance from the Appellate Body provides support – in the context of a provision that envisages a multiplicity of causal factors – for interpreting "cause" as "contribute to bring about".

[252] Although a Member might choose to interpret the term "cause" to mean *sole* cause, Paragraph 16 of the Protocol does not require them to do so.
[253] China's First Written Submission, para. 198.
[254] China's First Written Submission, para. 180, and United States' First Written Submission, para. 172.
[255] Appellate Body Report, *US – Wheat Gluten*, para. 67.
[256] Appellate Body Report, *US – Wheat Gluten*, para. 67.

7.144 In response to Question 5 from the Panel, China seeks to play down the relevance of the abovementioned finding by the Appellate Body (which concerned the first sentence of Article 4.2(b) of the *Safeguards Agreement*) by arguing that the ordinary meaning of the term "link" does not include the notion of "contribute to":

> China strongly doubts that the Appellate Body was focused here on the particular meaning of the word "contribute" and how this might relate to other possible formulations in relation to causation. Nor, in all likelihood, was the Appellate Body attempting to set in stone a definition of the term "link" for all future cases. More likely, the Appellate Body was concerned with setting out a reasoned explanation in the context of the particular circumstances of *US - Wheat Gluten*, as well as providing some useful guidance for the future.
>
> China notes the ordinary meaning of the word "link," as a noun, is "a connecting part" or "a means of connection." "Link" as a verb means "to connect or join (two things or one thing to another) with or as with a link." The notion of "contribute to" is simply not part of the ordinary meaning of "link."[257]

7.145 We are not persuaded by China's reading of the abovementioned finding by the Appellate Body in *US – Wheat Gluten*, or its suggestion that the Appellate Body could not have indicated that the term "link" might denote "contribution", for we are in no doubt that the Appellate Body was using the term "contribute" to denote the "connection" or "nexus" of the imports to the cause of the injury. This is abundantly clear from the Appellate Body's finding that "[t]he word 'link' indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury". In other words, it is through the (causal) link that imports contribute to causing, i.e., bringing about, the injury.

7.146 Thus, in the context of a provision that envisages that there might be more than one "significant cause" of market disruption, it is not inconsistent with Paragraph 16.4 to interpret the ordinary meaning of the term "cause" as "contribute".

7.147 Before concluding, we recall that the term "cause" should also be interpreted in the light of the object and purpose of the treaty. In this regard, China submits that Paragraph 16 of the Protocol is an exceptional, country-specific measure designed to address unforeseen surges in imports from China – an "escape valve" to be used only in emergency situations as an extraordinary remedy.[258] China contends that Paragraph 16 should therefore be given a narrow construction, to differentiate the higher causation standard of Paragraph 16 from the lower causation standard applied in the *Safeguards Agreement.*

7.148 We note that the Appellate Body in *US – Shrimp* stated that:

> A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.[259]

[257] China's Second Written Submission, paras. 149–150, footnote omitted.

[258] We note the U.S. argument that because "the Protocol is an integral part of the WTO Agreement, as such, it does not have its own 'object and purpose', in the sense of Article 31(1) of the *Vienna Convention*". (U.S. First Written Submission, para. 66). We disagree. Even though the Agreement on Agriculture and *SCM Agreement* are both "integral parts" of the WTO Agreement (WTO Agreement, Article II:2), the Appellate Body has on various occasions referred to the object and purpose of these specific Agreements (*See*, for example, Appellate Body Report on *Canada – Autos*, paras. 138 and 142, and Appellate Body Report on *US – Upland Cotton*, paras. 613 and 623. We note that, in the latter case, even the United States referred to the object and purpose of the Agreement on Agriculture, as distinct from the WTO Agreement (*See* para. 68)).

7.149 With regard to the claim that Paragraph 16 is an exceptional measure to be used only in emergency situations, the Panel notes that whether it is to be regarded as an emergency action or not the words of Article 16 still have to be interpreted in accordance with Articles 31 and 32 of the *Vienna Convention.*

7.150 To determine whether the Section 421 causation standard is inconsistent with the United States' WTO obligations, we must establish what that causation standard actually means. It is well established that, when ascertaining the meaning of domestic legislation, a panel might refer to evidence of the consistent application of that law.[260] In its defence, the United States has produced evidence to the effect that the "contributes significantly" definition is equivalent to the Protocol's "significant cause" standard because of consistent USITC practice requiring the demonstration of a "direct and significant causal link" between the rapidly increasing imports and the market disruption. In particular, the United States refers to the following extract from the USITC Report in the *Tyres* case:

> The third statutory criterion for finding market disruption is whether the rapidly increasing imports are a significant cause of material injury or threat of material injury. The term "significant cause" is defined in section 421(c)(2) of the Trade Act of 1974 to mean "a cause which contributes significantly to the material injury of the domestic industry, but need not be equal to or greater than any other cause." The legislative history of section 406 describes the significant cause standard as follows:
>
> > Under this standard, the imports subject to investigation need not be the leading or most important cause of injury or more important than (or even equal to) any other cause, so long as a direct and significant causal link exists. Thus, if the ITC finds that there are several causes of the material injury, it should seek to determine whether the imports subject to investigation are a significant contributing cause of the injury or are such a subordinate, subsidiary or unimportant cause as to eliminate a direct and significant causal relationship.[261]

7.151 In addition, the United States refers to two additional Section 421 investigations: *Pedestal Actuators From China* and *Certain Ductile Iron Waterworks Fittings From China.* In both cases, the USITC made the same reference to the legislative history of Section 406. In our view, these three cases are sufficient to show that the USITC consistently interprets the "contributes significantly" standard of Section 421 as requiring a "direct and significant causal link", which is essentially equivalent to a showing of "significant cause".[262]

7.152 Although the fact that the USITC consistently interprets the "contributes significantly" standard of Section 421 as requiring a "direct and significant causal link" is not necessarily

[259] Appellate Body Report, *US – Shrimp*, para. 114.

[260] *See*, for example, Appellate Body Report, *US – Carbon Steel*, para. 157.

[261] USITC Report, page 18.

[262] China has not contested that a showing of "direct and significant causal link" would meet the Paragraph 16.4 "significant cause" standard. Indeed, China argued in para. 40 of its oral statement at the first meeting that "this dispute would be very different" with respect to its "as such" claim if "the statute required a 'direct and significant causal link', as does the USITC determination".

determinative of the issue at hand, it does support a finding that the Section 421 "contributes significantly" standard is no less stringent than the Paragraph 16.4 "significant cause" standard.

7.153 China argues that the above extracts from the USITC determinations relate to the legislative history of Section 406, rather than Section 421. The USITC references the legislative history of Section 406 because that contains the same statutory definition of "significant cause" (i.e., "contributes significantly") as provided for in Section 421. The evidence presented by the United States relates to the consistent application of the "contributes significantly" standard in Section 421 determinations, not in Section 406 determinations. In these circumstances, we consider it appropriate to take into account the legislative history of the Section 406 "contributes significantly" standard.

3. Whether the statute further lowers the Paragraph 16.4 causation standard by allowing imports to be a less important factor than any other single cause, no matter how minor that other cause might be

7.154 We recall that Section 421 allows a determination that increased imports constitute a "significant cause" of material injury even though their causal effect is not "equal to or greater than" that of any other cause.

(a) Arguments of the parties

7.155 **China** claims that, in circumstances where there are also other causes of injury to the domestic industry, the "significance" of the increased imports as a causal factor should be assessed relative to those other causes, rather than in a vacuum. According to China, the core meanings of "significant" – important, notable, consequential[263] – all include the notion of significance relative to other matters, in this case other causes. Thus, China claims that Paragraph 16.4 of the Protocol prevents increased imports from being treated as a "significant cause" if the causal effect of the increased imports is relatively less important than the causal effect of some other factor, or if the increased imports play a relatively small role in the market. China submits that the U.S. statutory definition is inconsistent with Paragraph 16.4 of the Protocol because it fails to provide for any such relative assessment between the causal effect of subject imports and other causes of market disruption. China claims that, by allowing imports that are a less important factor than any other single cause, no matter how minor that other cause might be, to still qualify as a "significant cause", the U.S. statutory definition further lowers the causation standard set forth in Paragraph 16.4. For this reason, China refers to the fact that the Section 421 "contributes significantly" standard requires no more than a "mere"[264] contribution.

7.156 The **United States** denies that Paragraph 16.4 of the Protocol requires the weighing of causal factors, or precludes a finding that increased imports are a "significant cause" of material injury simply because the causal effect of such increased imports may be less than some other factor(s). The United States asserts that Paragraph 16.4 refers to "a significant cause", indicating that increased imports might be one of several "significant causes" of injury to the domestic industry.

7.157 The United States further submits that the USITC stated in the underlying determination that it may not find that imports from China are a "significant cause" of material injury if those imports are such an "unimportant," subordinate," or "subsidiary" cause of injury that there is no "direct and

[263] *See* Panel Report, *US – Upland Cotton*, para. 7.1325 ("The ordinary meaning of the term 'significant is 'important; notable … consequential. The term 'significant' therefore connotes something that can be characterized as important, notable or consequential").

[264] *See*, for example, China's Second Written Submission, para. 137.

significant causal link" between the imports and material injury or threat.[265] Instead, as the USITC has consistently stated, the USITC must find a "direct and significant causal link" between imports from China and material injury or threat.[266] The United States asserts that such an interpretation precludes the possibility that increased imports might be treated as a "significant cause" when they do not, in fact, have the requisite degree of causal effect.

(b) Evaluation by the Panel

7.158 We first consider China's argument that the core meanings of "significant" – important, notable, consequential[267] – all include the notion of significance relative to other matters (in this case other causes).[268] While we agree with China (and the United States[269]) that the ordinary meaning of the word "significant" is "important", "notable", "consequential"[270], we disagree with China's argument that these meanings must include the notion of significance relative to other causal factors. We note that China has provided no evidence or explanation in support of this argument. In our view, rapidly increasing imports might properly constitute a significant cause of market disruption even though their causal role is not as significant as other factors.

7.159 Regarding China's argument that Section 421 impermissibly allows an investigating authority to determine that even a minimal cause, which can be less than any other cause, could still be considered as "a significant cause," we consider that this possibility is excluded by the plain text of Section 421. The statutory definition at issue in this claim provides that rapidly increasing imports must "contribute significantly" to the market disruption. Since the relevant contribution must be "significant", i.e., important, or notable, we see no basis for concluding that only a "minimal", or "mere", contribution might suffice.[271] Furthermore, we have already explained that, in the context of Paragraph 16.4 of the Protocol, the term "cause" may be interpreted to mean "contributes". Thus, if rapidly increasing imports "contribute significantly" to the market disruption, they will necessarily be a "significant cause" of that market disruption for the purpose of Paragraph 16.4 of the Protocol.

[265] USITC Report, page 18.

[266] The United States refers, by way of an example, to page 18 of the USITC Report.

[267] *See* Panel Report, *US – Upland Cotton*, para. 7.1325 ("The ordinary meaning of the term 'significant is 'important; notable … consequential. The term 'significant' therefore connotes something that can be characterized as important, notable or consequential").

[268] China challenges the statement in Section 421 that imports "need not be equal to or greater than any other cause". Inherent in this challenge seems to be the notion that imports might only satisfy the "significant cause" standard if their impact is equal to or greater than any other cause. This is reflected in para. 155 of China's Second Written Submission, where China asserts that "[i]t is hard to see how a minor cause – one indeed that is less important than any other cause – can be properly considered to be 'significant'." This statement is also made in para. 38 of the Oral Statement of China at the First Meeting. In our view, this argument is at odds with the plain language of Paragraph 16.4, which requires only that rapidly increasing imports be "a" significant cause of market disruption. If the drafters of Paragraph 16.4 had intended that rapidly increasing imports should be "the most" significant cause of market disruption, they would have drafted Paragraph 16.4 accordingly.

[269] *See*, for example, the United States' First Written Submission, para. 179.

[270] The New Shorter Oxford English Dictionary, (1993).

[271] We note China's argument that Paragraph 16.4 focuses on the nature of the cause, such that "the obligation to find imports from China to be a 'significant cause' requires more than a mere contribution", whereas Paragraph 16.1 and Article 2.1 of the *Safeguards Agreement* focus on the (causal) link, rather than the nature of the cause itself (China's Reply to Question 16, paras. 61 and 63). While we do not necessarily agree with China's interpretation of Article 2.1 of the *Safeguards Agreement* and Paragraph 16.1 of the Protocol, we do agree that "significant cause" requires more than a mere contribution.

4. Conclusion

7.160 For all of the above reasons, we do not consider that the Section 421 "contributes significantly" standard requires the United States to establish causation in a manner inconsistent with Paragraph 16 of the Protocol.

D. WHETHER THE USITC PROPERLY FOUND THAT RAPIDLY INCREASING IMPORTS WERE A SIGNIFICANT CAUSE OF MATERIAL INJURY

7.161 China claims that the USITC failed to properly demonstrate that subject imports were a "significant cause" of market disruption, contrary to Paragraphs 16.1 and 16.4 of the Protocol. China's claim is based on three principal arguments: the USITC failed to show that the conditions of competition between subject imports and the domestic product support a finding of causation; the USITC failed to establish any temporal correlation between rapidly increasing subject imports and material injury to the domestic industry; and the USITC failed to address alternative causes of material injury to the domestic industry, in the sense that the USITC failed to ensure that injury caused by other factors was not improperly attributed to subject imports.

7.162 Before turning to the substance of the USITC's causation analysis, though, we first address disagreements between the parties regarding the nature of the causation analysis actually required by Paragraph 16 of the Protocol.

1. The nature of the analysis required by Paragraph 16 of the Protocol

(a) Conditions of competition / correlation

7.163 The parties disagree as to whether the USITC was required to analyse the conditions of competition and correlation. China says it was. The United States says it was not.

(i) Arguments of the parties

7.164 **China** submits that WTO case law has established that the conditions of competition must always be analysed under the *Safeguards Agreement*, since Article 2.1 of the *Safeguards Agreement* refers to a product being imported in increased quantities and "under such conditions" as to cause serious injury. China argues that Paragraph 16.1 of the Protocol contains the same language ("under such conditions") as Article 2.1 of the *Safeguards Agreement*. China contends that while a conditions of competition assessment is required for global safeguards, it is especially indispensable under the more exacting causation standard of the Protocol. China submits that this is particularly the case where the relevant market encompasses a broad range of products and market segments, as in the U.S. tyre market.

7.165 China claims that an analysis of correlation is also required under Paragraph 16 of the Protocol. China asserts that WTO case law highlights the central role played by correlation in the context of establishing causation under the *Safeguards Agreement*. China refers in particular to the finding of the panel in *Argentina – Footwear (EC)* (affirmed by the Appellate Body) that:

> In practical terms, we believe therefore that this provision means that if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot prove causation, its absence would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation still is present.[272]

7.166 China submits that such case law is relevant to the Protocol, and that the correlation analysis is even more demanding under the Protocol than under the *Safeguards Agreement*, given the allegedly more onerous "significant cause" causation standard provided for in the Protocol.

7.167 **The United States** denies, as a legal matter, that an investigating authority is required to analyse the conditions of competition under Paragraph 16 of the Protocol. The United States notes in this regard that Article 2.1 of the *Safeguards Agreement* provides that a Member may impose a global safeguard only if it has determined that a product "is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry". (Emphasis added). The United States asserts, by way of comparison, that the language of Paragraph 16.1 of the Protocol states that a need for a transitional measure may arise in cases where products from China are being imported "in such increased quantities or under such conditions as to cause or threaten to cause market disruption". (Emphasis added). The United States submits that, unlike the language of the *Safeguards Agreement* which specifically requires an analysis of increased quantities *and* the conditions under which imports are causing serious injury, the Protocol indicates that increased quantities alone or conditions alone may cause market disruption. The United States further submits that the Protocol's definition of market disruption in Paragraph 16.4 does *not* require the investigating authority to examine conditions of competition to determine if market disruption exists, but directs it only to consider import volumes, their price effects, and the effect of imports on the domestic industry.

7.168 The United States further asserts that the Protocol does not indicate that the competent authority should assess whether there is a coincidence of trends between increasing imports and the declines in the condition of the industry analysis, or suggest that an authority must provide a "compelling analysis of why causation is still present" if such a coincidence does not exist, as alleged by China. According to the United States, therefore, China has no basis for asserting that the USITC was required to perform a "coincidence of trends" analysis in its determination, or that it must provide "a compelling analysis of why causation is still present" if that coincidence does not exist.

(ii) Evaluation by the Panel

7.169 The first sentence of Paragraph 16.4[273] requires the importing Member to determine whether imports cause market disruption, i.e., whether imports (that are increasing rapidly) are a "significant cause" of material injury, or threat thereof, to the domestic industry. The first sentence of Paragraph 16.4 does not require that causation be established on the basis of any particular methodology. In addition, the second sentence of Paragraph 16.4 requires that "objective factors " be considered in determining the existence of market disruption, including causation:

> In determining if market disruption exists, the affected Member shall consider objective factors, including the volume of such imports, the effect of imports on prices for like or directly competitive articles, and the effect of imports on the domestic industry producing like or directly competitive products.

7.170 Thus, Paragraph 16.4 does not require the importing Member to apply any particular methodology for establishing market disruption, including causation. The second sentence of

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[272] Panel Report, *Argentina – Footwear (EC)*, para. 8.238; Appellate Body Report, *Argentina – Footwear (EC)*, paras. 144-145.

[273] *See* paras. 7.33 to 7.37.

Paragraph 16.4 simply requires the consideration of objective factors. This suggests that an investigating authority is free to choose any methodology to establish causation, provided it addresses the objective factors set forth in Paragraph 16.4, and provided in particular it is sufficient to establish that rapidly increasing imports are a "significant cause" of material injury. We believe that an analysis of the conditions of competition[274] and correlation will often be relevant, and may on the facts of a given case prove essential, to a consideration of "significant cause". Indeed, it might be very difficult to establish "significant cause" without performing these types of analyses.[275] Our task is to perform an objective assessment of the USITC's overall determination of "significant cause," in light of the arguments of the parties. The USITC did rely on analyses of the conditions of competition and correlation in determining that rapidly increasing subject imports were a "significant cause" of material injury. Accordingly, to the extent the arguments of the parties require, we shall examine those analyses as part of our assessment of the USITC's overall determination of "significant cause".

(b) Non-attribution

7.171 The parties disagree as to the extent to which an importing Member is required to assess the injurious effects (on the domestic industry) of factors other than increased imports, and ensure that injury caused by such other factors is not improperly attributed to increased imports. Such assessment is generally referred to as "non-attribution".

(i) Arguments of the parties

7.172 **China** attributes the injury suffered by the U.S. domestic industry to a number of alternative factors, including changes in demand and the domestic industry's business strategy. China contends that the USITC ignored or failed to assess fully these other causes of injury, or to establish that the injury caused by such other factors was not improperly attributed to the subject imports. China submits that it is impossible to make the requisite determination of causation without considering the role played by causes of injury other than subject imports. China asserts that it would be inconsistent with the object and purpose of Paragraph 16 for a Member to apply a safeguard measure based on injury caused by factors other than imports from China. China acknowledges that there is no explicit "non-attribution" requirement in Paragraph 16, but submits that this requirement is in fact embedded in the ordinary meaning of the phrase "causal link", which the USITC was required to examine by virtue of paragraph 246(c) of the Working Party Report (and which is found in the first sentence of Article 4.2(b) of the *Safeguards Agreement*). Reading Paragraph 16 of the Protocol in light of paragraph 246(c) of the Working Party Report, China refers to a finding by the Appellate Body in *US – Lamb* which, it alleges, explains how a "causal link" should be established under the *Safeguards Agreement*. China understands the Appellate Body to have found that, to establish a "causal link" for

[274] We recall that, in the light of the French and Spanish texts and in accordance with Article 33(4) of the *Vienna Convention*, the word "or" in the first sentence of Paragraph 16.1 is to be taken to include "and" (*See* note 81 above).

[275] In its Reply to Question 25 from the Panel, the United States has indicated that "it is possible for a competent authority to evaluate the 'effect of imports on prices for like or directly competitive articles' and the 'effect of imports on the domestic industry producing like or directly competitive products,' as the terms are used in paragraph 16.4, without performing a 'coincidence of trends' analysis and/or performing a detailed assessment of all possible conditions of competition in the market. For example, a competent authority could reasonably choose to assess the effects of imports on prices and the industry by performing an economic modelling exercise, such as a static equilibrium or a linear regression modelling analysis". We are not persuaded by this argument, since a static equilibrium analysis generally involves an advanced analysis of the conditions of competition, and a linear regression modelling analysis generally involves an advanced analysis of correlation over an extended period of time (i.e., "regression" back in time). In our view, therefore, the United States' Reply to Question 25 does not really explain how causation might be established without some form of conditions of competition and/or correlation analysis.

the purpose of Article 4.2(b) of the *Safeguards Agreement*, an investigating authority had to establish a "genuine and substantial relationship of cause and effect" between the increased imports and the serious injury suffered by the domestic industry. China further understands the Appellate Body to have found that, in order to establish the "genuine and substantial relationship of cause and effect", an investigating authority must "distinguish[] and separate[]" the injurious effects caused by all the different causal factors. China therefore submits that an investigating authority cannot conclude that a "causal link" exists without first assessing whether other factors are actually responsible, or better explain the data. However, China does not claim that, under Paragraph 16, the authority must perform the same non-attribution analysis for other factors in the market that it would in a global safeguard proceeding.[276]

7.173 **The United States** contends that China's argument regarding the need to consider other causes, and ensure that their injurious effects are not attributed to rapidly increasing imports, is legally mistaken because it is premised on analytical standards developed by the Appellate Body under the *Safeguards Agreement*, which have no basis in the text of the Protocol. The United States submits that China's argument disregards the actual text of the Protocol, and the context and scope of the Appellate Body's findings under the *Safeguards Agreement*. The United States asserts that, since the negotiators of the Protocol were presumably aware that the *Safeguards Agreement* and the *AD Agreement* contained "non-attribution" language but chose not to include any "non-attribution" requirement in the causation provisions of the Protocol, the Panel should assume that such an analysis was not intended to be required. The United States submits that it is well-established that, under the principle of *inclusio unius est exclusio alterius*, when a treaty includes a term or requirement in one part but excludes that term or requirement from another part, the absence of that term or requirement indicates that the drafters intentionally chose not to include that term or requirement in the provision from which it is absent. That being said, the United States does accept that some form of non-attribution analysis is required – albeit not the non-attribution imposed by the Appellate Body in the context of Article 4.2(b) of the *Safeguards Agreement*. According to the United States, "a competent authority may use any reasonable methodology to consider such other factors when assessing whether market disruption exists.[277] The United States submits that a competent authority's need to address the effects of other possibly injurious factors will depend on the facts and circumstances of the particular case. The United States posits three possibilities in this regard: in some cases, another factor might arguably be so significant a cause of injury to the industry that the competent authority will need to perform a detailed and reasoned explanation of the effects of that factor, to ascertain whether that factor severs the apparent causal link between imports and material injury; in other cases, the factor may be contributing to injury in a considerably less significant fashion. In those circumstances, the competent authority could reasonably reference the factor and indicate in a reasonable fashion why the factor does not explain the injury caused to the pertinent industry; and, in still other cases, the authority could simply find that there was no evidence establishing that a particular factor caused injury to the industry, or that the parties have not presented sufficient evidence to establish that the factor causes any injury at all. In such cases, the authority would have little or nothing to investigate and no need to analyze the effects of the factor.

(ii) Evaluation by the Panel

7.174 While at the outset of this proceeding, it appeared that the parties disagreed fundamentally on whether an investigating authority was required by Paragraph 16 to perform a non-attribution

[276] China's Second Written Submission, para. 309, footnote omitted.

[277] U.S. First Written Submission, para. 299. *See* also U.S. Reply to Question 29 from the Panel.

analysis, by the end it was clear that the parties agreed that some form of non-attribution analysis may be required in certain circumstances.[278]

7.175 As to the nature of the non-attribution analysis that may be required under Paragraph 16 of the Protocol, we begin by considering the following finding of the Appellate Body in *US – Lamb*, which China relied on in its arguments:

> In a situation where *several factors* are causing injury "at the same time", a final determination about the injurious effects caused by *increased imports* can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to increased imports.[279]

7.176 Although the reasoning in *US – Lamb* was based on the requirement of non-attribution in Article 4.2(b) of the *Safeguards Agreement* and thus is not directly applicable here, this does not mean that the obligation to demonstrate that rapidly increasing imports are a significant cause of material injury should not entail some form of analysis of the injurious effects of other factors. An analogy can be drawn with the approach in *US – Upland Cotton*, where notwithstanding the absence of non-attribution language in Articles 5 and 6.3 of the *SCM Agreement*, both the panel and Appellate Body found that (some form of) non-attribution is inherent in establishing the causal link between the subsidy and price suppression. Both took that view that if non-attribution does not occur, one cannot establish with certainty that price suppression was the effect of the subsidy (as opposed to some other injurious factor).

7.177 Thus, we consider that the causal link between rapidly increasing imports and material injury must be assessed "within the context of other possible causal factors".[280] In particular, a finding of causation for the purpose of Paragraph 16.4 should only be made if it is properly established that rapidly increasing imports have injurious effects that cannot be explained by the existence of other causal factors. We shall evaluate the USITC's assessment of alternative causes in this light.

7.178 We now turn to the substance of China's claims against the USITC's finding of significant cause, beginning with China's claims against the USITC's assessment of the conditions of competition between subject imports and domestic tyres.

2. The conditions of competition between subject imports and domestic tyres

7.179 **China** claims that the USITC's causation analysis was based on a misinterpretation and distortion of the conditions of competition, such that the USITC failed to understand the attenuated nature of competition between subject imports from China and domestic tyres.[281] China claims that

[278] *See*, for example, para. 309 of China's Second Written Submission, and para. 299 of the United States' First Written Submission. China also asserts that non-attribution under the Protocol does not require a precise quantification of the injury caused by the various injurious factors (*See* China's Reply to Question 17(b) from the Panel, para. 71).

[279] Appellate Body Report, *US – Lamb*, para. 179 (emphasis in original).

[280] Panel Report, *US – Upland Cotton*, para. 7.1344.

[281] In its First Written Submission, China refers to declining demand and the industry business strategy in the context of its claim regarding the USITC's treatment of the conditions of competition. However, China only develops its arguments regarding these factors when claiming that the USITC ignored or failed to assess fully other causes of injury (in the context of its non-attribution claim) (*See* paras. 219 and 220 of China's First Written Submission, which contain cross-references to more detailed arguments set forth in Section V.C.4(a)

the USITC improperly dismissed the fact (a) that subject imports and domestic tyres focus on different market segments in the replacement tyre market, and (b) that U.S. producers have a greater involvement in the OEM sector. China also claims that the USITC (c) improperly concluded from questionnaire responses that subject imports and domestic tyres were substitutable.

7.180 **The United States** denies that there were any flaws in the USITC's analysis of the conditions of competition, or that the USITC erred in finding that competition between domestic tyres and subject imports was not attenuated.

7.181 We begin by considering China's argument that the USITC dismissed the fact that domestic tyres and subject imports focused on different segments of the replacement market.

(a) Different segments in the replacement market

(i) Arguments of the parties

7.182 **China** argues that the USITC failed adequately to account for the fact that, within the replacement market, Chinese and domestic tyres focus on different market segments. China contends that the largest share of U.S. producer shipments was to the higher-end tier 1, and that the largest share of imports from China was to the lower-end tier 3. China refers to the USITC determination to argue that only 18.6 per cent of U.S. producer shipments fell into tier 3. China also relies on the finding by a dissenting commissioner that "U.S. production is focused on the higher-value, premium branded products and the OEM market, segments in which the subject imports are not competing in any meaningful manner".[282] According to China, the most logical inference from the record data is that any competition between Chinese and domestic tyres in the replacement market is attenuated.

7.183 China acknowledges that U.S. producers have not completely exited the tier 2 and tier 3 categories, and that domestic tyres and subject imports are therefore present in these same categories.[283] Nevertheless, China contends that the USITC fails to provide a reasoned or adequate explanation why the "vestigial" competition within tiers 2 and 3 rises to the level of "significant competition", or permits the further inference that imports from China rise to the level of a "significant cause" of any injury experienced by the U.S. producers. According to China, subject imports are absent from tier 1, which represents approximately 70 per cent of the replacement market.

7.184 **The United States** submits that the USITC addressed this issue at length in its determination, but found that, although the U.S. replacement market could generally be segmented into three categories, market participants did not agree on which tyres fell into which categories.[284] The United States asserts that market participants responded to the USITC's supplemental questionnaires on this issue with a wide range of estimates of the share of U.S. producer's and subject Chinese tyre shipments falling into each category, further evidencing the fact that there was no bright line or

and (b) of China's First Written Submission). Furthermore, in its Second Written Submission, China only refers to demand and industry business strategy as "other causes" of injury (Section IV.C.3(b)). We therefore do not consider it necessary to review these issues in the context of the present claim. At para. 234 of its First Written Submission, China also referred to certain "other factors" allegedly affecting the conditions of competition which the USITC allegedly overlooked. However, China has made no specific arguments as to how such "other factors" actually affected the conditions of competition, nor otherwise explained why the USITC should have considered such factors in its assessment of the conditions of competition. There is therefore no basis for us to uphold China's claim regarding these "other factors."

[282] USITC Report, page 52 (dissenting Commissioners).

[283] USITC Report, page 64 (dissenting Commissioners).

[284] USITC Report, page 27.

industry-wide accepted dividing line between the three categories.[285] In addition, the United States contends that the information on the record did not support China's argument that there was little competition between subject tyres and U.S. tyres in these categories, as the record showed that both subject tyres and U.S. produced tyres competed in all three segments of the market in 2008, albeit to varying degrees. The USITC found that subject imports and the domestic product were both present in category one, and that both had a significant presence in categories two and three.[286] The United States asserts that, in 2008, 18.6 per cent of U.S. producers' U.S. shipments fell into category three, the category in which subject tyres were most heavily concentrated, and the record showed that there was also a significant presence of both subject imports and domestically produced tyres in category two.[287] The United States contends that, given that the record showed that there was significant competition between subject imports and U.S. tyres in the market sectors in which subject imports were supposedly most heavily concentrated, the USITC reasonably rejected the claim that competition between subject and U.S. tyres was attenuated. The United States asserts that it is important to recall that the domestic industry shipped 18.6 per cent of its shipments into the category three sector in 2008, the last year of the period, after the domestic industry had already undertaken substantial reductions and plant closures to reduce its production of low-end tyres (a decision that the United States claims was made in reaction to the significant and increasing volume of subject imports).[288]

(ii) Evaluation by the Panel

7.185 China's argument regarding attenuated competition in the replacement market is based on the existence of three distinct tiers, or market segments, and the fact that domestically produced tyres and subject imports were focused on different market segments. According to China, domestic tyres were confined principally to tier 1, whereas subject imports were confined principally to tiers 2 and 3. China asserts that the limited presence of domestic tyres in tiers 2 and 3 meant that there was only "vestigial" competition between subject imports and domestic tyres in those segments.

7.186 We note that the USITC did not deny the existence of different market segments. Instead, the USITC issued a supplemental questionnaire to explore this issue, and to examine the possibility of attenuated competition between U.S. industry and subject imports.[289] On the basis of the supplemental questionnaire responses, the USITC "agree[d] with respondents that the record supports the view that the U.S. replacement market generally can be segmented into three categories", but noted that "there was less agreement [among firms submitting questionnaire responses] as to which tires were included in the two lower-priced categories".[290]

7.187 China acknowledges that there is no bright dividing line between the three different segments, but argues that "[t]he fact that the distinction may not be absolute does not mean that the distinction does not exist at all, or that the distinction does not produce highly attenuated competition".[291] China further argues that "[a]lthough responses indicated some differences in opinion concerning the dividing line between tiers 2 and 3, there was not much doubt about the dividing line between tier 1,

[285] USITC Report, page 27.
[286] USITC Report, page 27.
[287] USITC Report, page 27.
[288] USITC Report, pages 24-25.
[289] USITC Report, page 27.
[290] USITC Report, page 27.
[291] China Second Written Submission, para. 201.

on the one hand, and tiers 2 and 3, on the other".[292] According to China, "[t]he record as a whole demonstrates a strong distinction between tier 1 tires and tier2/tier 3 tires."[293]

7.188 Regarding the differentiation between segments in the replacement market, we note the finding by dissenting commissioners that:

> There is consensus among the parties that the subject tire market is segmented between the OEM and replacement markets, and, to some degree, that there are categories or tiers within the replacement market. However, *there is no consensus on how to define what types of tires are classified in each tier, or what brands are classified in each tier within the replacement market*. In addition to examining industry publications placed on the record, the Commission issued supplemental questionnaires to gather additional information about competition among tiers. The record indicated that in general, tier 1 comprises premium or flagship brands; tier 2 comprises mid-level, secondary/associate, or smaller producer brands; and tier 3 comprises entry-level or non-recognizable branded tires. The majority of questionnaire responses classify private brands as tier 3 tires but are *mixed as to where to place associate brands, with some responses placing them in tier 2 and others placing them in tier 3*. In addition, market participants do not agree on what specific brands are classified in each tier. Other responses classify tires based on price.[294]

7.189 This finding indicates that there was no consensus as to the dividing lines between the three market segments in the replacement market (particularly in respect of the differentiation between tiers 2 and 3).[295] The lack of consensus regarding the dividing lines between the market segments is further confirmed by the fact that there were:

> wide variations in the estimates for the share of the total U.S. market accounted for by each tier. Producers and importers reported that tier 1 ranged from 21 per cent to 78 percent of the total U.S. tire market; tier 2 ranged from 7 percent to 52 percent of the market; and tier 3 ranged from 10 percent to 50 percent of the market.[296]

7.190 In other words, there was no established market perception of where the boundaries between tiers 1, 2 and 3 should lie. Indeed, five of the 26 respondent importers reported that the replacement market could not be segmented[297], and one major U.S. producer reported "there was no consensus in the marketplace on how to divide the U.S. market".[298]

7.191 We recall China's arguments that domestically produced tyres were confined principally to tier 1, whereas subject imports were confined principally to tiers 2 and 3, and that there is "a strong distinction between tier 1 tires and tier 2/tier 3 tires". In this regard, we note the statement in the finding by the dissenting commissioners that:

[292] China Second Written Submission, para. 200.
[293] China Second Written Submission, para. 201.
[294] USITC Report, page 51 (dissenting commissioners), emphasis supplied.
[295] In its comments on the U.S. Reply to Question 46 from the Panel, China asserts that "the overwhelming number of companies responding to the questionnaire ... were able to segment the market into three tiers" (China's comments on U.S. Reply to Question 46 from the Panel, para. 21). The point is not whether respondents could segment the replacement market. The point is whether the distinction between those segments was so well established that it should necessarily have been taken into account by the USITC.
[296] USITC Report, page 52 (dissenting commissioners).
[297] USITC Report, page V-5.
[298] USITC Report, page V-6.

> While not arguing that there is a clear dividing line among each of the tiers, *respondents*, in general, contend that competition is attenuated between *domestically produced tires which are primarily in tier 1 and 2* tires for the OEM and replacement markets, and *subject imports which are primarily in tier 3* tires for the replacement market.[299]

7.192 This statement, which refers to respondents arguing that domestically produced tyres are present in both tiers 1 and 2, is at odds with China's argument that there is "a strong distinction between tier 1 tires and tier 2/tier 3 tires", and that domestic tyres compete primarily in tier 1, whereas subject imports compete primarily in tiers 2 and 3. China's argument is also at odds with the specific statement by one Chinese producer during the underlying investigation that:

> while there is certainly a real distinction between Tier 1 and Tier 2 tires, *it is often useful to group Tier 1 and Tier 2 tires together* in the category of 'higher-end" tires, since both of these segments are ones in which brand equity is an important element. Tier 3 tires, by comparison, are 'economy' or 'low-end' tires. Brand equity plays essentially no role in the marketing of these tires.[300]

7.193 Thus, while this one Chinese producer notes that there is a real distinction between tiers 1 and 2, that distinction is apparently not so profound that tier 1 and tier 2 tyres should not be grouped together for the purpose of identifying tyres that compete on the basis of brand equity.

7.194 Given the uncertainty regarding the basis for distinguishing between tiers 1, 2 and 3 of the replacement market, respondents' views that domestically produced tyres were primarily in tiers 1 *and 2*, and one respondent's view that it is in any event "useful to group Tier 1 and Tier 2 tires together" for certain purposes, we are not persuaded by China's argument that the USITC was required to have found that there is "a strong distinction between tier 1 tires and tier2/tier 3 tires".

7.195 Furthermore, even if tiers 2 and 3 could be clinically isolated from tier 1, record evidence demonstrates that there remained significant competition between domestic tyres and subject imports in tiers 2 and 3. In 2008[301], U.S. producers and subject imports accounted for 16 and 27.3 per cent respectively of tier 2 shipments, and 18.6 and 42.4 per cent respectively of tier 3 shipments.[302] In our view, such U.S. industry presence in tiers 2 and 3 suggests significantly more than the merely "vestigial" competition alleged by China.[303] The fact that this data relates to 2008, after the U.S. industry closed plant producing lower-value (i.e., tier 2 and 3) tyres, suggests that the competition between the U.S. industry and subject imports would have been even greater earlier in the period of investigation.

7.196 We note China's argument that subject imports were absent from tier 1, which it estimated to represent 70 per cent of the replacement market. The United States contests China's estimate, on the basis of a press article providing an overview of the tyre market in 2008. The United States asserts

[299] USITC Report, page 52 (dissenting commissioners), emphasis supplied.
[300] Post-Hearing Brief of GITI, page 6, (emphasis supplied).
[301] This data is taken from interested parties' responses to a supplemental questionnaire from the USITC. That supplemental questionnaire only requested data for 2008.
[302] These figures are based on each individual producer's and importer's own estimates of the percentage of its own shipments that were shipped in each tier in 2008. The USITC did not itself make a determination that certain volumes of shipments by individual producers and importers in 2008 should be classified as tier 1, 2 or 3 tyres. Certain producers and importers did not report segment-specific data, as they claimed that the market could not be divided into distinct segments.
[303] In absolute numbers, there were more U.S. industry sales in tiers 2 and 3 in 2008 than subject imports. *See* U.S. Reply to Question 46 from the Panel, para. 24.

that tier 1 occupies considerably less than the 70 per cent share of the replacement market claimed by China. We do not consider it necessary to enter into the details of the parties' arguments regarding this issue, as China's estimate of the relative importance of tier 1 was made before the United States provided the abovementioned supplemental questionnaire data in response to Question 46 from the Panel. On the basis of that data, we note that tier 1[304] accounted for 51.2 per cent of shipments in the replacement market. Thus, while subject imports from China may only have had a limited presence in tier 1[305], subject imports had a far greater presence in the remainder of the replacement market where, as explained above, domestic tyres were also prevalent.

7.197 In the circumstances, we conclude that while there was a general understanding that the tyre replacement market was divided into 3 tiers, we find no fault with the USITC's conclusion that there was no distinct dividing line between these tiers. Also, while we recognize that there was some variation in levels of competition between subject imports and domestic products as between tier 1 and tiers 2 and 3, we find no fault with the USITC's conclusion that subject imports and domestic products were not focused in different tiers and do not accept that the USITC should have found that there was only "vestigial" competition between them in tiers 2 and 3.

(b) U.S. producers' focus on the OEM market

(i) Arguments of the parties

7.198 **China** claims that the USITC failed to accord significance to the U.S. producers' greater involvement in the OEM market. China contends that the USITC incorrectly found that there was competition between domestic tyres and subject imports in the OEM market, even though between 17.7 and 23.3 per cent of U.S. producers' shipments were in the OEM market, whereas only 0.8 to 7.3 per cent of subject imports went to the OEM market. China further contends that subject imports only accounted for 0.2 to 4.9 per cent of all OEM shipments, such that any competition between subject imports and domestic tyres in the domestic OEM market was negligible.

7.199 **The United States** submits that the USITC recognized that the vast majority of both imports of tyres from China and domestically produced tyres were sold in the replacement market[306], but also recognized that both Chinese and U.S. producers sold and competed in the OEM market as well.[307] The United States asserts that the USITC record showed that U.S. producer's shipments to the OEM market declined steadily during this period to a period low of 24.2 million tyres in 2008, representing 17.7 per cent of U.S. shipments in that year[308], whereas import shipments from China increased irregularly from 121,000 tyres in 2004 to a period high 2.3 million tyres in 2008, representing five per cent of imports from China in that year, and 4.9 per cent of the OEM market.[309] The United States therefore asserts that, in every year of the period, there were considerable amounts of U.S. tyres and an increasingly significant amount of subject imports in the OEM market, thereby demonstrating that there was competition between imports from China and domestically produced tyres in the OEM market.

[304] We rely in this regard on the data reported by those producers and importers that did divide the market into three segments.
[305] The supplemental questionnaire data indicates that subject imports accounted for less than one per cent of those tier 1 shipments.
[306] USITC Report, page 21. The United States asserts that the USITC noted that the replacement market is by far the more important market for both types of producers, but stated that it was relatively more important to Chinese producers since a higher percentage of their shipments went to that market.
[307] USITC Report, page 27.
[308] USITC Report, Tables V-2 and V-3.
[309] USITC Report, Tables V-2 and V-3.

7.200 Regarding China's argument that competition between domestic and Chinese tyres in the OEM market was "negligible", because Chinese tyres amounted to approximately five per cent of shipments to that market in 2008[310], the United States contends that this assertion has no basis in the text of the Protocol, or the facts on the record. The United States submits that there is no legal basis under the Protocol for the USITC to ignore the impact of increasing volumes of subject imports in the OEM market simply because these imports accounted for only five per cent of shipments in the market. The United States further submits that the facts on the record showed that while U.S. producers' U.S. shipments into the OEM market declined in every year of the period examined, shipments of imports from China increased in every year. The United States asserts that, even from 2007 to 2008, when both domestically produced tyres and non-subject import tyres declined in that sector, subject imports from China continued to grow, reaching their period high in 2008. Furthermore, the United States disagrees that Chinese imports were virtually absent from the OEM market. The United States asserts that, while this statement may have been true at the start of the period in 2004 when Chinese imports of 121,000 tires accounted for less than one-tenth of one per cent of the market, it was certainly not true in 2008, when OEM subject import volumes rose to their period high of 2.3 million tyres and accounted for approximately 5 per cent of the OEM market.

(ii) Evaluation by the Panel

7.201 While it is true that the OEM sector was more important for U.S. producers than for subject imports, the proportion of U.S. producer shipments to that sector was *decreasing*, whereas the proportion of subject imports to the OEM sector was *increasing*. According to Table V-3 of the USITC Determination, the proportion of U.S. producer shipments to the OEM sector decreased from 23.3 per cent in 2004 to 17.7 per cent in 2008. Over the same period, the proportion of OEM subject imports increased from 0.8 per cent to 5 per cent.

7.202 In absolute terms, the quantity of U.S. producer OEM shipments decreased from 45,351,000 in 2004 to 24,211,000 in 2008, while the quantity of OEM subject imports increased from 121,000 in 2004 to 2,281,000 in 2008. Thus, as the absolute volume of U.S. producer OEM shipments decreased by 46.6 per cent, the absolute volume of OEM subject imports increased by 1,785 per cent. The OEM market share of subject imports increased from 0.2 to 4.9 per cent over the period of investigation, while the OEM market share of U.S. producer shipments fell from 69.6 to 51.6 per cent.

7.203 Furthermore, we recall the USITC's finding that, overall, subject imports in 2008 increased substantially while apparent consumption fell by 6.9 per cent, and non-subject imports and U.S. producer shipments declined.[311] This trend was even more pronounced in the OEM market. As apparent consumption in the OEM market fell by 16.4 per cent from 2007 to 2008, the volume of OEM subject imports increased by 12.4 per cent (while the volume of OEM non-subject imports declined by 11.3 per cent, and U.S. producer OEM shipments declined by 22 per cent).[312]

7.204 Thus, during the period of investigation both subject imports and domestically-produced tyres were present in the OEM sector. Over the period as a whole, the degree of the resultant competition between subject imports and domestically-produced tyres in the OEM sector was increasing, as the relative importance of domestically-produced tyres decreased, and that of subject imports increased.[313]

[310] China's First Written Submission, para. 226.

[311] USITC Report, page 26.

[312] Apparent consumption data calculated on the basis of USITC Report, Table V-3.

[313] We note China's argument (China's Second Written Submission, para. 195) that the United States improperly relied on ex post rationalization in arguing that, because "U.S. producers' U.S. shipments into the OEM market declined in every year of the period examined, [while] shipments of imports from China increased in every year", "it was therefore reasonable for the USITC to find a growing degree of competition between subject imports and domestically produced tyres in the OEM market". (U.S. First Written Submission, para. 227). However, we see no reason why the United States may not rely on the fact (established in the USITC's record) that OEM imports from China were growing while U.S. OEM shipments were falling to rebut China's argument regarding the allegedly negligible competitive impact of subject imports in the OEM sector. Furthermore, we note the USITC's finding that "[t]he share shipped to the OEM market by U.S. producers declined each year during the period examined, while the share of subject imports from China shipped to the OEM market increased irregularly and was at its highest in 2006 at 7.3 percent" (USITC Report, page 21).

Consistent with the trend for OEM and replacement market shipments overall, the competitive importance of subject imports in the OEM market became particularly pronounced at the end of the period of investigation, when despite a fall in apparent consumption of 16.4 per cent, subject imports were able to increase by 12.6 per cent, while non-subject imports and U.S. producer shipments fell by 11.3 and 22 per cent respectively.

7.205 In light of the above considerations, although we accept that there was some variation in the levels of competition within the OEM market, we do not consider that the USITC was required to dismiss competition from subject imports in the OEM sector as "negligible".[314]

(c) Reliance on Questionnaire responses to establish the substitutability of imports and domestic tyres

(i) Arguments of the parties

7.206 **China** contends that the USITC improperly found that subject imports and domestic tyres were substitutable. China asserts that the USITC's finding is improperly premised on "vague"[315] responses to a questionnaire that simply asked producers, importers and purchasers "if subject tires produced in the United States and in other countries are used interchangeably", giving the option of "always", "frequently", "sometimes", and "never".[316] China asserts that the questionnaire failed to differentiate between product type, category or characteristics, even though there is market segmentation between the OEM and replacement markets, and even though there are three separate tiers within the replacement market, and widely varying tyre sizes and characteristics. China submits that the questionnaire responses relied on by the USITC constitute the type of subjective and overbroad questionnaire data that the panel in *Argentina – Footwear (EC)* warned against.

7.207 **The United States** submits that there was nothing "vague" about the questionnaire responses relied on by the USITC, and that the large majority of producers, importers, and purchasers agreed that tyres from China and tyres produced in the United States were "always" or "frequently" used interchangeably.[317] The United States asserts that these questionnaire responses were also consistent with other evidence on the record relating to substitutability as, for example, the record showed that

[314] China First Written Submission, para. 226. Regarding China's argument that non-subject OEM imports were nine times the quantity of subject OEM imports (China's Second Written Submission, para. 193), in our view this relates more to the possibility of non-subject imports being an "other cause" of injury, than to the issue of whether or not there is attenuated competition between subject imports and domestic tyres. This issue is addressed at paras. 7.364 to 7.367.

[315] China's First Written Submission, para. 223.

[316] USITC Report, page V-16, Table V-6, n. 1.

[317] USITC Report, page 23. The United States asserts that six out of seven U.S. producers, 21 out of 25 importers, and 18 out of 22 purchasers reported that tyres from China and tyres produced in the United States are "always" or "frequently" used interchangeably. USITC Report, Table V-6. The United States asserts that any market participant that responded that tyres from China and tyres from the United States are "sometimes" or "never" used interchangeably" was given the opportunity to provide an explanation for this answer in the questionnaire.

tyres from China and tyres from the United States compete in all segments of the market.[318] The United States contends that the interchangeability of subject imports and domestically produced tyres was further confirmed by the fact that the USITC was able to conduct pricing comparisons of large quantities of shipments by U.S. producers and importers of subject tyres for six specific pricing products, each with specific dimensions, load indexes, and speed ratings, in the large majority of quarters over the period.[319] The United States submits that, according to this evidence, the large majority of responding market participants, whether they are producers, importers, or purchasers, indicated that market segmentation was not a bar to, or limit on the interchangeability of the subject and U.S. tyres.

7.208 Regarding China's reliance on the Appellate Body's report in *Argentina – Footwear (EC)*, the United States contends that the facts of the underlying investigation are very different. The United States submits that, in *Argentina – Footwear (EC)*, the panel noted that the investigating authority performed no analysis of the conditions of competition in the market, but simply summarized the conflicting views of domestic producers and importers. The panel noted that the investigating authority conducted no price comparisons of imported and domestic footwear to support its references to "cheap imports", despite the fact that its causation finding was based primarily on price considerations. The panel stated that the authority did not even analyze the effects of imported prices on the domestic industry, but indicated instead that it compared broad statistical indicators, resulting in conclusory statements. Moreover, the panel noted that the investigating authority itself acknowledged that its references to "cheap imports" had mostly to do with a problem of customs valuation and that the composition of imports had actually shifted to higher-valued goods. According to the United States, it was in the context of these glaring deficiencies that the panel stated that this "is not an analysis of the conditions of competition that is called for by Articles 2 and 4.2". The United States asserts that the USITC performed a much more rigorous analysis than in that case.

(ii) Evaluation by the Panel

7.209 We understand China to claim that the questionnaire responses were insufficient to establish the interchangeability of subject imports and domestic tyres, as the questionnaire failed to differentiate between "product category, characteristics, or market segment."[320] As a general matter, we note that China's arguments concern the original questionnaire sent out by the USITC at the beginning of the investigation. In light of the responses to that original questionnaire, the USITC issued a supplemental questionnaire to gather additional information about the existence of segments or product categories in the market. In our view, there is nothing inherently wrong with an investigating authority first issuing a generally-worded questionnaire regarding the competitive relationship between domestic tyres and subject imports, and then following that original questionnaire up with a more detailed supplemental questionnaire addressing particular issues raised in the responses to the original questionnaire.

7.210 Regarding the issue of whether the original questionnaire should have been phrased more specifically in terms of market segmentation, we recall our findings above regarding the absence of any clear differentiation between the market segments. We recall that this was confirmed by the dissenting commissioners, who found that:

[318] USITC Report, page 27. The United States contends that the USITC noted that there was general agreement as to the existence of three categories of tyres in the replacement market, but that there was less agreement as to which tyres were included in the two lower-priced categories.
[319] USITC Report, Tables V-9-V-14.
[320] China's First Written Submission, para. 222.

> *there is no consensus on how to define what types of tires are classified in each tier, or what brands are classified in each tier within the replacement market.*[321]

7.211 In the absence of any industry consensus on the distinction between tiers 1, 2 and 3, we do not consider that the USITC was required to have included, in its original questionnaire, more specific questions regarding interchangeability on the basis of distinctions between tiers 1, 2 and 3 of the replacement market.

7.212 China also raises the possibility of distinguishing domestic tyres from subject imports on the basis of other factors, such as "product category" or "characteristics"[322], or "tire sizes".[323] However, it is not clear to the Panel how the USITC could have drawn such distinctions, particularly since it appears that there was no industry consensus on which the USITC might have acted. Furthermore, record evidence suggests that size and performance would not have been a suitable basis for distinguishing domestic tyres from subject imports, as one Chinese respondent witness stated that tier 3 tyres "cover the same broad spectrum of size and performance as are offered in the first two segments".[324]

7.213 Nor do we consider that the findings of the Panel in *Argentina – Footwear (EC)* provide any guidance on whether the USITC improperly relied on "subjective" questionnaire responses. The *Argentina – Footwear (EC)* panel found that "the question of price [wa]s of particular importance to the analysis" of the conditions of competition in that case, as price was "the only 'condition of competition' between imports and domestic products on which Argentina's causation finding was based". The panel therefore "focus[ed] [its] assessment of this analysis primarily on whether there is support in the record for Argentina's conclusions about import prices and their effect on the domestic industry". In making its assessment, the panel found:

> *no evidence* in the record to support the statements that the imports were cheaper than the domestic goods. In particular, there is *no evidence* that any price comparisons of imported and domestic footwear were made in the investigation, including on the basis of average unit values of all imports and all domestic products.[325]

7.214 The circumstances of the USITC *Tyres* investigation are very different from those in *Argentina – Footwear (EC)*. In particular, this is not a case where the investigating authority had "no evidence" regarding the conditions of competition other than the original questionnaire responses. Nor is this a case where the original questionnaire replies did not address the specific condition of competition at hand (i.e., the competition between subject imports and domestic producers).

7.215 For the above reasons, we find no error in the USITC's reliance on the original questionnaire responses.

(d) Conclusion

7.216 For all of the above reasons, we find no error in the USITC's assessment of the conditions of competition.

[321] USITC Report, page 51 (dissenting commissioners), emphasis supplied.
[322] *See* China's First Written Submission, para. 222.
[323] *See* China's First Written Submission, para. 223.
[324] USITC Hearing transcript at 246.
[325] Panel Report, *Argentina – Footwear (EC)*, para. 8.259, emphasis supplied.

3. Correlation between the increase in imports and the decline in injury factors

(a) Arguments of the parties

7.217 **China** submits that the USITC failed to properly establish correlation between the rapidly increasing subject imports and the material injury suffered by the domestic industry. China claims that, by finding that imports increased over the five-year period of investigation while injury factors declined over that period, the USITC merely engaged in an end-point-to-end-point analysis, of the sort rejected by the panel in *Argentina – Footwear (EC)*. According to China, the consistent teaching of WTO jurisprudence is that the coincidence must be apparent with respect to movements in imports and injury factors. As the panel in *Argentina – Footwear (EC)* observed, in a causation analysis "it is the *relationship* between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination".[326] China contends that it is not enough that imports increase in every year of the period and that injury factors decline in every year of the period. According to China, the degree of the respective annual increases must correspond generally with the degree of the respective declines in injury factors. China contends that the orders of magnitude are key, in the sense that the varying degrees in annual import increases should be reflected in varying degrees of annual declining injury indicators. China submits that the USITC never addressed these orders of magnitude.

7.218 China claims that the failure in the USITC's analysis is particularly apparent with respect to the more recent period (i.e., changes in 2006-2007 and 2007-2008). China contends that the USITC statement that "the largest declines in these indicators have occurred since 2006 when subject imports exhibited the greatest and fastest increases"[327] is misleading on several levels. China asserts that the USITC failed to point out that imports from China grew at their fastest rate in 2006-2007, but grew at their slowest rate (10.8 per cent) in the period from 2007-2008. Worse still, the USITC failed to address the fact that the various injury factors typically showed a substantial improvement in 2006-2007, when imports from China were at their highest level in the period, and experienced their greatest declines of the period in 2008, when Chinese imports grew at the slowest rate in the period. In other cases, the injury factors (e.g., price, R&D expenditures, and capital improvements) show positive trends throughout the period. According to China, the record regarding the more recent period poses two concrete tests for the U.S. theory of causation. Given the U.S. argument that imports from China were fungible, that the product is price sensitive, and that different market segments do not matter, China suggests that one would expect the large increase in imports over the 2006 to 2007 period to have the largest adverse impact on injury indicators. China also suggests that one would also expect that the small increase in imports over the 2007 to 2008 period would have the smallest adverse impact on injury indicators. China submits, though, that the facts in the record belie the U.S. theory.

7.219 Regarding the 2006-2007 period, China suggests that the U.S. correlation theory would demonstrate that the large increase in imports from China over the 2006-2007 period to have the largest adverse impact on injury indicators. China contends that this theory is not supported by the facts, though, since over the 2006-2007 period, many key indicators were in fact positive. China asserts that prices – both for specific pricing products and for average unit values overall – were up sharply, as was net sale value. China asserts that operating profits were also up sharply. China further asserts that productivity, capacity utilization, capital expenditures and R&D spending were all up. According to China, therefore, six of the ten factors showed strong improvements, and a seventh factor – net sales – showed improvement on a sales value basis. China asserts that these seven out of

[326] Panel Report, *Argentina – Footwear (EC)*, para. 8.237.

[327] *See* USITC Report, page 24 ("All of these indicators were at their lowest levels of the period in 2008, when subject imports were at their highest ...").

ten factors improved, even in the face of the largest increase in imports from China over the entire period. China acknowledges that the volume metrics – production, net sales volume, market share, and employment – declined over the 2006-2007 period, but claims that these declines must be placed in context. In particular, China claims that the declines in the 2006-2007 period are more modest than the declines in the "prior two comparison periods". China therefore claims that these factors, also, were actually "much better" in 2007. China concludes that, of the ten indicators, at most only two arguably suggest some possible coincidence – market share, and employment. According to China, this pattern strongly suggests the absence of any overall coincidence, as it is hard to see an overall coincidence when eight of ten factors actually show results that are in fact improving.

7.220 Regarding the 2007-2008 period, China recalls that the U.S. theory of correlation should show the small increase in imports from China over the 2007-2008 period having the smallest adverse impact on injury indicators. China contends, though, that in fact the opposite is true, as six indicators (production, net sales volume, profit, productivity, capacity utilization and employment) were all down.

7.221 China submits, therefore, that over the 2006-2007 and 2007-2008 periods, the vast majority of the changes in injury indicators are inconsistent with the U.S. theory, and the few changes that at least might support the U.S. theory in fact provide very weak support.

7.222 **The United States** submits that China's arguments against the USITC's analysis must fail because they are premised on the concept that even a minor variation in the trends establishes that there is not a "coincidence of trends" between increasing imports and material injury. The United States disagrees that the USITC should have considered whether the "degree of the respective annual increases [in Chinese imports] correspond generally with the degree of the respective declines in injury factors".[328] The United States submits that China's argument is flawed as an analytical matter because it assumes that Chinese imports must cause all, or most, of the injury being suffered by an industry in any particular year of the period being examined. According to the United States, it is only in such a situation that there would be a close "correspondence" between the degree of the annual increase in Chinese import volumes and any declines in the indicia of the industry's condition. In cases where other factors are causing material injury to an industry at the same time as Chinese imports, the United States contends that there might not necessarily be the same "degree" of correspondence between changes in the volume trends of Chinese imports and changes in the industry's condition.

7.223 The United States asserts that, with respect to the *Safeguards Agreement*, WTO panels have explained that the "overall coincidence [in trends] is what matters and not whether coincidence or lack thereof can be shown in relation to a few select factors which the competent authority has considered".[329] The United States notes in this regard that the panel in *US – Wheat Gluten* found:

> [I]n light of the overall coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the movement of individual injury factors in relation to imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury.[330]

7.224 The United States submits that the USITC properly concluded that there was a clear overall "coincidence" in trends between the rapidly increasing imports and their effects on the domestic

[328] Oral Statement by China at the Second Panel Meeting, para. 64.

[329] Panel Report, *US – Steel Safeguards*, para. 10.302.

[330] Panel Report, *US – Wheat Gluten*, para. 8.101.

industry.[331] The United States asserts that, during a period in which Chinese import volumes increased rapidly in every year of the period, the record showed that:

- The domestic industry's market share fell in every year of the period, declining by 13.7 percentage points over the period of investigation;[332]
- The domestic industry's production declined in every year of the period, resulting in an overall decline of 26.6 per cent;
- The domestic industry's capacity declined in every year of the period, for an overall decline of 17.8 per cent;
- The domestic industry's U.S. shipments declined in every year of the period, for an overall decline of 29.7 per cent;[333]
- The domestic industry's net sales quantities declined in every year of the period, for an overall decline of 28.3 per cent;[334] and
- The domestic industry's employment-related factors fell significantly over the period of investigation, with the number of production-related workers falling by 14.2 per cent, the number of hours worked falling by 17.0 per cent, and wages paid falling by 12.5 per cent over the period.[335]

7.225 The United States submits that all of these factors were at their lowest levels in 2008, while Chinese tyre imports were at their highest levels in 2008 (in terms of volume of imports and market share). The United States also asserts that the USITC found that the U.S. industry suffered declines in operating income, operating margins, capacity utilization, and productivity of the domestic industry in three out of four years of the period, and all, except for capacity utilization, were at their lowest levels for the period in 2008.[336] Thus, the United States notes that:

- Productivity fell by 11.5 per cent over the period.
- Capacity utilization fell by 10.3 percentage points over the period.
- Operating margins fell by 4.8 percentage points over the period.
- Operating income fell from $256.2 million in 2004 to a loss of 262.8 million in 2008.

7.226 The United States contends that there was therefore clear evidence of a coincidence between imports and declines in the industry's condition over the period of investigation.[337]

[331] USITC Report, page 29.
[332] USITC Report, pages 25-26.
[333] USITC Report, pages 15-18 and 24.
[334] USITC Report, pages 23-24.
[335] USITC Report, pages 17 and 24.
[336] USITC Report, Table C-1.
[337] Oral Statement by the U.S. at the Second Panel Meeting, para. 59.

(b) Evaluation by the Panel

7.227 We shall first address China's general arguments regarding correlation. We shall then address China's specific arguments regarding the USITC's finding that subject imports caused a cost-price squeeze.

(i) Correlation generally

7.228 We recall that Paragraph 16 does not require a showing of correlation between material injury and rapidly increasing imports.[338] Instead, correlation is a tool that an investigating authority might use to demonstrate causation (either alone, or in conjunction with other analytical tools). There is a basic disagreement between the parties regarding the type of correlation that might be sufficient to establish causation under Paragraph 16 of the Protocol. In brief, the United States considers that there need only be an overall coincidence between imports and injury factors, in the sense that the upward movements in imports should occur at the same time as the downward movements in injury factors. China submits that mere temporal coincidence does not suffice. China contends that more is required, in the sense that the degree of the increases in imports should correspond with the degree of the declines in injury factors. According to China, simply assessing whether an upward movement in imports over the period coincides with a downward movement in injury factors amounts to no more than an end-point-to-end-point analysis, of the sort condemned by the Appellate Body in *Argentina – Footwear (EC)*.

7.229 We are not persuaded that causation might only be based on a finding of correlation if the varying degrees of increase in imports over the period of investigation are reflected in the varying degrees, or rates, of declines in injury indicators. Correlation between the varying degrees of increase in imports and decrease in injury indicators suggests a certain degree of precision. However, correlation between imports and injury factors is not an exact science, especially as there may be other causes of injury at work. As a result, it would be unrealistic to expect, or require, a somewhat precise correlation between the degree of change in imports and the degree of change in the injury factors. While a more precise degree of correlation between the upward movements in imports and the downward movements in injury factors might result in a more robust finding of causation, and might indeed suffice on its own to demonstrate causation, a finding of "significant cause" is not excluded simply because an investigating authority relies on an overall coincidence between the upward movement in imports and the downward movement in injury factors, especially if that finding of overall coincidence is combined – as it was in the present case - with other analyses indicative of causation.

7.230 In *Argentina – Footwear (EC)* the panel stated that it would assess Argentina's causation analysis:

> on the basis of (i) *whether an upward trend in imports coincides with downward trends in the injury factors*, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation.[339]

7.231 These findings were upheld by the Appellate Body[340], and were followed by the panel in *US – Steel Safeguards*. The latter panel found that:

[338] *See* paras. 7.169 to 7.170 above.
[339] Panel Report, *Argentina – Footwear (EC)*, para. 8.229, emphasis supplied.
[340] Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

> the word "coincidence" in the current context refers to the *temporal* relationship between the movements in imports and the movements in injury factors. In other words, upward movements in imports should normally occur at the same time as downward movements in injury factors in order for coincidence to exist. [341]

7.232 There is no suggestion in these statements by the *Argentina – Footwear (EC)* and *US – Steel Safeguards* panels that the orders of magnitude are key, or that changes in the degree of increase in imports should be reflected in changes in the degree of decline in injury factors. Rather, the panels simply found that imports should increase at the same time as the injury factors decline.

7.233 The *US – Steel Safeguards* panel also found that it is the "overall coincidence ... that matters, and not whether coincidence or lack thereof can be shown in relation to a few select factors which the authority has considered".[342]

7.234 In light of the above considerations regarding the degree of precision required for an assessment of correlation, we consider that the USITC was entitled to support its determination of "significant cause" with a finding of overall coincidence between an upward trend in subject imports from China and downward trends in the relevant injury factors.[343] We recall our finding that the USITC properly established that imports were "increasing rapidly" during the period of investigation, and that imports continued to increase in every year of the period. In terms of injury factors, we note that:

- The domestic industry's market share fell in every year of the period, declining by 13.7 percentage points over the period of investigation;[344]
- The domestic industry's production declined in every year of the period, resulting in an overall decline of 26.6 per cent;
- The domestic industry's capacity declined in every year of the period, for an overall decline of 17.8 per cent;
- The domestic industry's U.S. shipments declined in every year of the period, for an overall decline of 29.7 per cent;[345]
- The domestic industry's net sales quantities declined in every year of the period, for an overall decline of 28.3 per cent;[346] and
- The domestic industry's employment-related factors fell significantly over the period of investigation, with the number of production-related workers falling by 14.2 per cent, the number of hours worked falling by 17.0 per cent, and wages paid falling by 12.5 per cent over the period.[347]

[341] Panel Report, *US – Steel Safeguards*, para. 10.299.
[342] Panel Report, *US – Steel Safeguards*, para. 10.302.
[343] China has advanced detailed arguments regarding the alleged lack of correlation between increased imports and injury. Since these arguments are based on its more precise approach to correlation, which we have rejected, we do not need to consider all of China's arguments in detail. We do, though, consider China's arguments regarding the USITC's finding of a "cost-price squeeze" (*see* paras. 7.239 to 7.260 below).
[344] USITC Report, pages 25-26.
[345] USITC Report, pages 15-18 and 24.
[346] USITC Report, pages 23-24.
[347] USITC Report, pages 17 and 24.

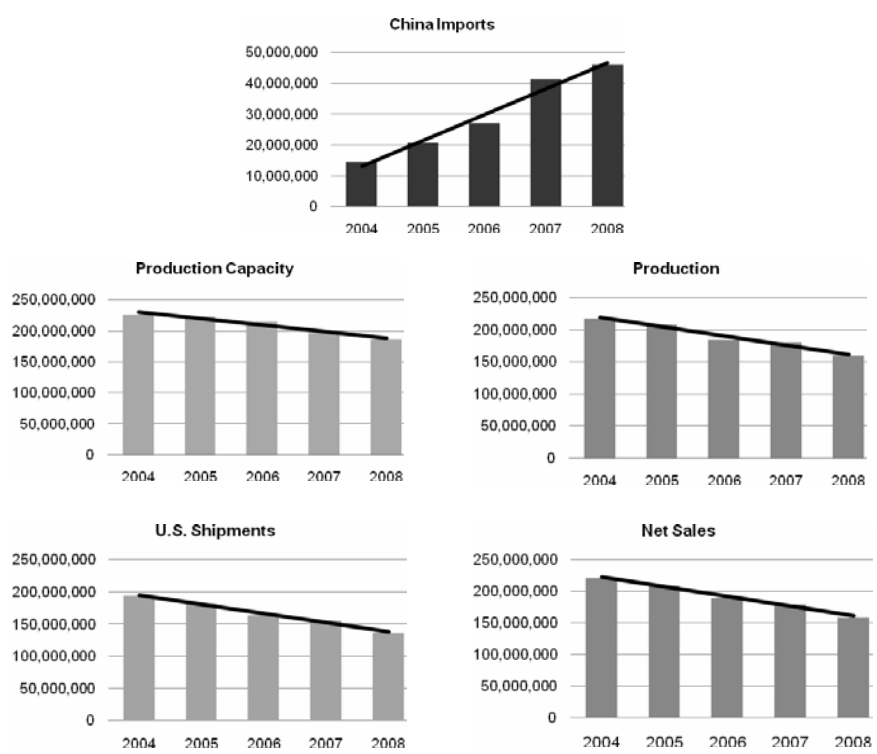
7.235 Furthermore, the U.S. industry suffered declines in operating income, operating margins, capacity utilization, and productivity of the domestic industry in three out of four years of the period, and all, except for capacity utilization, were at their lowest levels for the period in 2008, when subject imports were at their highest.[348] In particular:

- Productivity fell by 11.5 per cent over the period;
- Capacity utilization fell by 10.3 percentage points over the period;
- Operating margins fell by 4.8 percentage points over the period, with declines in three out of four years of that period; and
- Operating income fell from $256.2 million in 2004 to a loss of 262.8 million in 2008.

7.236 We consider that this data was sufficient for the USITC to properly find that there was an overall coincidence between the upward movement in subject imports and the downward movement in domestic industry injury factors. In our view, such overall coincidence is amply demonstrated by the following figures submitted by the United States:

[348] USITC Report, Table C-1.

Subject tires: Comparison of China imports to U.S. industry indicators, in units, 2004-08



Source: USITC Report, Table C-1.

7.237 China contests the relevance of these figures on the basis that it relates only to volume-based indicators. According to China, volume-based indicators are influenced by the decline in demand and the domestic industry's business strategy of ceding the low-end of the replacement market. We are not persuaded. First, we find below[349] that no prima facie case has been established that there was error in the USITC's conclusion that the industry did not voluntarily adjust its business strategy (i.e., cede the low-end of the replacement market) independent of the rapidly increasing imports from China. Second, we also find below that the USITC properly considered the effect of changes in demand on the domestic industry. In particular, it is apparent that declines in demand do not account for the totality of the injury suffered by the domestic industry.[350] In these circumstances, it was appropriate for the USITC to take declines in volume-metrics into account for the purpose of analysing correlation. Finally, we recall that the U.S. industry also suffered declines in operating income, operating margins, capacity utilization, and productivity of the domestic industry in three out

[349] *See* paras. 7.285 to 7.322 below.
[350] *See* paras. 7.323 to 7.359 below.

of four years of the period, and all, except for capacity utilization, were at their lowest levels for the period in 2008.

7.238 For these reasons, we do not accept that the USITC failed to properly establish correlation in the present case. The USITC's finding of overall coincidence was sufficient to support, along with other considerations, its conclusion that subject imports from China were a "significant cause" of material injury to the U.S. tyre industry.

(ii) Cost–price squeeze

7.239 As part of its arguments regarding an alleged lack of temporal correlation between increasing subject imports and declining injury factors, China claims that there is no correlation between increased imports and falling prices, as prices actually increased over the period.[351] The United States submits that China's observation is irrelevant, as the USITC did not find that subject imports had caused price depression. Instead, the USITC found price suppression, as underselling by subject imports caused domestic producers to experience a "cost-price squeeze"[352], preventing them from raising their prices sufficiently to offset increasing costs. China submits that the USITC's "cost-price squeeze" theory is predicated on a chain of false assumptions and improper inferences concerning (a) the cost of goods sold ("COGS") to sales ratio, (b) alleged underselling by subject imports, and (c) the role of non-subject imports. China addresses each of these elements in turn.

COGS/sales ratio

7.240 **China** contends that the USITC found that there was a "cost-price squeeze" over the period because the COGS/sales ratio rose by 5.4 percentage points from 2004 to 2008, when the volume of imports from China was at its highest. China rejects this finding, alleging that movements in the COGS/sales ratio do not correlate with rapidly increasing imports from China. China notes in particular that the COGS/sales ratio *fell* by 5.3 percentage points in 2007, which was the very year when imports from China rose by their highest margin. China asserts that, if rapidly increasing imports from China were creating a "cost-price squeeze", one would certainly expect to see that effect in 2007.

7.241 China asserts that the lack of correlation between the COGS/sales ratio and rapidly increasing imports is further evidenced by 2008 data. In 2008, the COGS/sales ratio rose by 5.8 percentage points, whereas the rate of increase in imports from China fell from the previous year. China contends that any "cost-price squeeze" in 2008, if it existed, would have been attributable to the near collapse of the U.S. auto industry and the onset of the worst recession since the 1930s.

7.242 China submits that the USITC theory is also at odds with the relatively greater price increases that U.S. producers were able to achieve during the period. Thus, China notes that the average unit value of U.S.-produced tyres rose 44 percentage points over the period, whereas the average price of non-subject imports rose by only 36.8 percentage points, and imports from China by 25.1 percentage points. China contends that the consistent average unit value increases over the period, and the magnitude of the increases U.S. producers were able to achieve (admittedly over all market tyre segments, including high-value tier 1), do not support the USITC "price squeeze" hypothesis. China

[351] We note that Paragraph 16.4 of the Protocol provides separately for analyses of "the effect of imports on prices" and "the effect of such imports on the domestic industry". Accordingly, it is not apparent to us that the question of price should necessarily be reviewed in the context of temporal correlation. However, since the United States has not objected to China's approach to this issue, we consider China's arguments on price under this section of our Report.
[352] USITC Report, page 24.

notes in this regard that, for pricing product no. 1, the average U.S. price increased by $12.57, whereas the average subject import price increased by only $1.96.

7.243 **The United States** asserts that China acknowledges that the ratio of costs to goods sold increased in every year of the period but one (2007).[353] The United States submits that the fact that the ratio of cost of goods sold to sales declined in 2007, when subject imports increased at the greatest rate, is not enough to show that overall coincidence is not present, as in every other year of the period the ratio of cost of goods sold to sales increased, thus corresponding with increases in the volumes of subject imports in every year. The United States contends that increases in U.S. industry average unit values should be viewed in light of increases in U.S. costs.

7.244 The **Panel** notes that China's claim that there was no correlation between the increase in subject imports and the increase in the COGS/sales ratio is based on its argument that there must be a precise correlation between the relevant trends, and that the USITC's analysis was merely a "simplistic end-point-to-end-point juxtaposition of data"[354] that does not withstand scrutiny. As explained above, we consider that the United States properly found an overall coincidence between rapidly increasing imports and the deterioration in the condition of the domestic industry. The fact that annual movements in every single injury factor did not precisely track annual movements in subject imports does not invalidate the USITC's finding of overall coincidence.

7.245 Regarding China's argument that U.S. producers were able to increase their prices by far more than subject imports, we recall that the USITC made a finding of price suppression. Accordingly, the price of U.S. products must be viewed in light of the costs of the U.S. industry. While China argues[355] that the average U.S. industry price for product no. 1 increased by $12.57 over the period, this price increase must be viewed in light of the $21.24 increase in U.S. industry costs over the same period. Similarly, although the average unit value of U.S.-produced tyres increased by 44 percentage points over the period, the average unit cost of goods sold increased by 52.4 percentage points.[356]

Underselling

7.246 **China** contends that the USITC misleadingly relied on questionnaire responses to assert that there was "pervasive underselling" by imports from China. China acknowledges that questionnaire data showed that imports from China were cheaper than U.S.-produced tyres in 119 of 120 instances in which the USITC compared pricing of Chinese and U.S. tyres, but refers to the observation by the dissent that these comparisons appear to have lumped together tyres with different speed ratings, load indices, and levels of performance, possibly aggregating tyres at different price points. China submits that the margin of underselling calculated and relied on by the USITC is therefore unreliable.

7.247 Furthermore, China contends that any price differences between domestic tyres and subject imports merely reflected the fact that U.S. producers were predominantly and increasingly positioned in the higher-end, premium tyre market, and accounted for more than half of all OEM sales in the U.S., whereas between 95 per cent and 99 per cent of imports from China were in the replacement market, focused on lower-end production. China submits that these differences will inevitably skew the data, and inflate any alleged "margin of underselling". China contends that the data was further skewed by the fact that no OEM sales by subject imports were included in the price comparisons, whereas 3 of the six U.S. producers reported data for the more-expensive OEM sales. China submits

[353] China's First Written Submission, para. 257.
[354] China's Second Written Submission, para. 232.
[355] China's Second Written Submission, para. 239.
[356] USITC Report, Table C-1.

that the USITC should have engaged in a more rigorous analysis of price competition between domestic tyres and subject imports, given the heterogeneous product market in question.

7.248 Furthermore, China criticises the USITC's reliance on questionnaire responses from three U.S. producers to the effect that they had to reduce prices or roll back announced price increases to avoid losing sales to competitors selling tyres from China. China laments the absence of specifics as to when, how frequently, or in what context this dynamic allegedly occurred, or how significant it was to operations over the period. Moreover, China notes (as the dissent observed) that not a single producer could report a specific example of lost revenues or lost sales, and that the USITC did not ask for or receive data from producers suggesting that Chinese import competition barred them from passing through cost increases in the form of needed price rises (as the "cost-price squeeze" theory would require).

7.249 In addition, China refers to the USITC's finding that the margin of underselling was the greatest in 2007, when the imports from China increased by the largest amount. China notes that 2007 was also the year in which the domestic industry saw record profitability. According to China, this disconnect between high margins of underselling and the financial condition of the domestic industry calls into serious doubt the logic of the USITC.

7.250 **The United States** notes that Paragraph 16.4 of the Protocol states that an investigating authority shall consider, among other things, "the effect of imports on prices for like or directly competitive articles" to determine if market disruption exists. The United States submits that the USITC conducted a detailed and thorough evaluation of pricing in the tyres market, and explained how the persistent and significant underselling by subject imports contributed to the deteriorating condition of the domestic industry.

7.251 The United States explains that the USITC collected quarterly data over the period examined for six specific products, each of which was defined by specific dimensions, load indexes, and speed ratings of each to ensure compatibility.[357] The United States asserts that these pricing products accounted for a significant amount of domestic producer's U.S. shipments and subject import shipments[358], and that the resultant comparisons showed underselling by the subject imports in 119 out of 120 comparisons, with the average margins of underselling at their highest in 2007 and 2008, coinciding with the largest volumes of subject imports.[359] The United States asserts that the USITC found that the consistent underselling by the large and rapidly increasing volume of subject tyres displaced domestic shipments by U.S. producers, and eroded the domestic industry's market share, leading to a substantial reduction since 2004 in domestic capacity, production, shipments, and employment during the period examined. The United States asserts that the USITC also noted that continued underselling by the subject imports prevented domestic producers from raising prices sufficiently to offset higher production costs and thus suppressed prices.[360]

7.252 The United States rejects China's argument that the price comparison data collected by the USITC is "unreliable" because it does not define the price comparison products in a specific enough manner.[361] The United States submits that the USITC defined its price comparison products in a

[357] USITC Report, V-23-24. In response to China's argument that different speed ratings cause the USITC data to be unreliable, the United States notes that one of the respondent's own witnesses testified in this case that product 3 (which is the only passenger vehicle price product to have three speed ratings) "is a commodity tyre size and that there is little difference in the S, T, and H speed ratings in that particular size. *Id.* at V-35 citing Hearing Transcript, page 304 (Berra).
[358] USITC Report, page 23, n. 128.
[359] USITC Report, Tables V-9-V-14 and Table C-1.
[360] USITC Report, page 24.
[361] China's First Written Submission, para. 260.

highly specific manner that allowed it to perform an apples-to-apples comparison of prices of subject and domestic tyres. The United States further asserts that, given that the large majority of market participants reported that tyres from China and domestically produced were "always" or "frequently" interchangeable, it was entirely reasonable for the USITC to rely on this pricing data as a basis for assessing whether the subject imports were underselling the U.S. tyres.

7.253 Regarding China's argument that the USITC's price comparison data are unreliable because U.S. producers' ship a much higher percentage of their tyres into the more expensive OEM market, the United States asserts that the USITC's price comparison data only compared prices for subject and U.S. tyres on sales into the replacement market.[362] The United States argues that, since no shipments to the OEM market were included in these price comparisons, the fact that more U.S. tyres were sold into the OEM sector than subject tyres does not affect the validity of the USITC's actual price comparisons in any way.

7.254 The **Panel** notes that the USITC found underselling in 119 out of 120 price comparisons undertaken on the basis of data provided by U.S. producers and importers. The USITC also found that the margins of underselling for all six products increased during the period of investigation, and that the increase in the margins for five of the six products were at their highest levels of the period in 2007 and 2008. The USITC also found that the average margin of underselling for all six products coincided with increasing volumes of subject imports, and that the greatest increase in the average margin of underselling was in 2007, the year in which the volume of rapidly increasing imports rose by the greatest amount.[363]

7.255 China challenges the USITC's findings on various grounds. First, China alleges that the USITC's price comparisons were not sufficiently precise, in the sense that they lumped together tyres with different speed ratings, load indices, and levels of performance, possibly aggregating tyres at different price points. We note, though, that the relevant price comparisons were undertaken in respect of six different products, each of which was defined by reference to particular size, load index, and speed rating criteria. For example, the USITC defined Product 1 by tyre size (P225/60R16), load index (97-98), and speed rating S or T.[364] Product 2 was tyre size P235/75R15, load index 105-108, and speed rating S or T. China has not provided any explanation as to why products defined on the basis of such particular criteria would not provide a proper basis for comparing prices.

7.256 China also argues that the USITC's findings regarding underselling were distorted by the fact that the U.S. producers accounted for more than half of sales in the OEM market, whereas subject imports were focused primarily on the replacement market. We note, however, that, according to Tables V-9 to V-16 of the USITC Report, the USITC collected price data for each of the six products for both the OEM and replacement markets. Furthermore, the USITC's findings regarding the increase in the average margin of underselling were based on Tables V-9 to V-14, which concerned sales to the replacement market only. Accordingly, we consider that there was no risk that prices for the OEM market were compared with prices for the replacement market.[365]

7.257 China also argues that the USITC's findings regarding underselling were distorted by the fact that U.S. producers and subject imports targeted different segments of the replacement market, such

[362] USITC Report Tables V-9-V-14. According to the United States, these tables specify that the price comparisons are for shipments to the replacement market only. The United States asserts that shipments to the OEM market are in a separate table, V-15.
[363] USITC Report, page 23.
[364] USITC Report, V-23.
[365] In any event, the USITC found that, in 69 out of 78 quarters, the prices of U.S.-produced tyres sold to the OEM market were actually lower than the prices of comparable U.S.-produced tyres sold to the replacement market (USITC Report, page V-35).

that the price of segment 3 subject imports should not be compared with the price of segment 1 U.S. products. We recall our earlier findings regarding market segmentation, and our rejection of China's claim of attenuated competition. In light of these findings, we do not consider that any differentiation between segments in the replacement market, was so clearly defined, or pronounced, that it should have been incorporated into the pricing analysis undertaken by the USITC. We also recall that, in 2008, the U.S. industry made a large proportion of its sales in tiers 2 and 3, where sales of subject imports were concentrated.[366] As explained above[367], China's claim that the domestic industry and subject imports targeted different segments of the replacement market is, therefore, unfounded.

7.258 Furthermore, China submits that there was no correlation between underselling and profitability, as the largest margin of underselling coincided with record profitability in 2007. We are not persuaded by this argument, as the USITC did properly establish that "increases in the average margin of underselling coincided with increasing volumes of subject imports".[368] The USITC further established that "significant and continuous underselling throughout the period ... by the large and rapidly increasing volume of subject Chinese tires eroded the domestic industry's market share, leading to a substantial reduction since 2004 in domestic capacity, production, shipments, and employment during the period examined".[369] In other words, the USITC found that underselling by subject imports generally had a highly detrimental impact on the domestic industry. In our view, the fact that the USITC might not have specifically addressed the relationship between underselling and one single additional injury indicator – profitability – does not detract from the USITC's findings regarding the effects of "increasing" underselling by subject imports more generally. Nor, as explained above[370], does the fact that profitability might have increased in 2007 undermine the USITC's finding of overall coincidence between rapidly increasing imports and injury to the domestic industry (particularly as operating margins fell by 4.8 percentage points over the period, with declines in three out of four years of the period).

7.259 Finally, we note China's argument that any price suppression would more likely have been caused by non-subject imports, which "dwarfed" subject imports and which also undersold domestic tyres. We address the role of non-subject imports below[371], in the context of our consideration of China's arguments regarding other causes of injury.

7.260 For the above reasons, we find no objection to the USITC's finding of a cost–price squeeze.

(c) Conclusion

7.261 In the light of the above considerations, we find that the USITC's reliance on an overall coincidence between an upward movement in imports and a downward movement in injury factors to support its finding of "significant cause" and to be in accordance with the requirements of Paragraph 16.4 of the Protocol.

4. The non-attribution of injury caused by other factors to increasing imports

7.262 **China** attributes the injury suffered by the U.S. domestic industry to a number of factors other than subject imports from China, namely: the domestic industry's business strategy; changes in demand; non-subject imports, and various other factors. China submits that, as a result of these other

[366] *See* para. 7.195 above.
[367] *See* paras. 7.185 to 7.197 above.
[368] USITC Report, page 23.
[369] USITC Report, page 24.
[370] *See* paras. 7.234 to 7.236 above.
[371] *See* paras. 7.364 to 7.367 below.

causes of injury, the domestic producers would have experienced the same injury even without imports from China. China contends that the USITC ignored or failed to assess fully these other causes of injury, or to establish that the injury caused by such other factors was not improperly attributed to the subject imports. China asserts that the USITC merely listed some of the arguments made by respondents regarding alternative causes in a single paragraph and then stated, without explanation, that it "considered" them.[372] China submits that the USITC then dismissed these other causes as legally irrelevant, stating that Section 421 "does not require a weighing of causes, but only that we find that rapidly increasing imports, in and of themselves, are a significant cause of material injury ...".[373] China also claims that, in addition to examining the impact on the domestic industry of each of these alternative factors individually, the USITC should also have examined the cumulative effect of these other causal factors.

7.263 **The United States** contends that the USITC properly addressed all of the factors that could reasonably be considered significant enough to break the causal link between imports and material injury.

7.264 We shall examine each of the alleged alternative causes identified by China in turn, beginning with the change in the domestic industry's business strategy. In examining the parties' arguments, we recall our view that a finding of causation for the purpose of Paragraph 16.4 should only be made if it is properly established that rapidly increasing imports have injurious effects that cannot be explained by the existence of other causal factors.[374]

(a) The domestic industry's business strategy

(i) Arguments of the parties

7.265 **China** contends that the USITC relied on four factors to reject the argument that domestic producers had voluntarily ceded the low end of the market: (1) imports from China were increasing before plant closures in 2006 and 2008; (2) significant purchases of tyre-manufacturing equipment in China occurred over the past ten years; (3) U.S. producers were not the largest importers of Chinese tyres during the period; and (4) a 2006 article noted that imports from China were expected to increase.[375] China challenges the USITC's assessment of each of these factors.

Plant closures

7.266 China claims that the USITC improperly attributed plant closings to imports from China, when the record in fact demonstrates that domestic producers were engaged in a long-term strategy that led them to voluntarily close high-cost U.S. plants and plants that focused on small-sized or low-value tyres, and shift production in the United States towards the higher-end segments of the market.

7.267 China claims that the USITC ignored the fact that, rather than suffering injury as a result of subject imports, the U.S. industry chose to restructure itself voluntarily, consistent with its global sourcing strategy. China argues that the U.S. producers are "global companies with global sourcing strategies"[376], and that their "[o]perations in China have enhanced the[ir] profitability".[377] China alleges that the domestic industry voluntarily ceded the low end of the market because it was

[372] USITC Report, page 29.
[373] USITC Report, page 29.
[374] *See* para. 7.177 above.
[375] USITC Report, pages 26-27.
[376] China's First Written Submission, para. 345.
[377] China's First Written Submission, para. 348.

profitable to do so. In particular, China argues that "the imports from China (and other low-cost jurisdictions) are a *positive* factor"[378] for U.S. producers, who "were themselves responsible for manufacturing and importing many of these tires".[379]

7.268 China argues that U.S. producers testified repeatedly that they had voluntarily shifted domestic production away from lower-end tyres to the premium, higher-value branded segment. China contends that the USITC improperly rejected the testimony of the U.S. producers concerning their own business strategy, declaring erroneously that the restructuring of the U.S. industry was not "voluntary", and that the resultant plant closures were instead caused by imports from China.[380]

7.269 According to China, there is no record evidence to suggest that imports from China caused any of the plant closures. Regarding two plant closures by Continental, China asserts that hearing testimony indicated that these closures occurred because these two plants were the highest-cost facilities in the entire company:

> The Mayfield, Kentucky and Charlotte, North Carolina plants were closed in 2004 and 2006 respectively. Based on my personal knowledge of the situation as a nine-year employee of Continental, I can tell the Commission that Chinese imports had nothing to so with these closings. As far back as 1997 I was involved in monthly staff meetings that discussed the cost levels in all Continental plants worldwide, including the U.S.
>
> The Mayfield plant was consistently the highest cost plant in the global Continental system. The Charlotte plant was also one of the highest cost plants in the system. Continental was facing many issues during this period. But Chinese import competition was not among them.[381]

7.270 China further contends that, in press releases, Continental attributed the closure of the Mayfield site to declining business conditions and escalating energy and raw materials costs, and the closure of its Charlotte facility to "global competition putting pressure on us as our manufacturing costs are cheaper overseas", the "skyrocketing costs of energy, raw materials, and health care", and the plant's inability to successfully restructure its labor agreement with USW.[382] China submits that no mention was made of Chinese import competition.

7.271 China notes that Bridgestone closed its Oklahoma City facility in 2006 because it produced smaller tyres at the lower-value end of the market.[383] China asserts that, in a press release, Bridgestone said that "this plant produces tires in the low-end segment of the market where demand is shrinking and fierce competition from low-cost producing countries is increasing".[384] China asserts that the press release also stated that "the market is quickly running away from the products we produce in Oklahoma City".[385] China submits that, again, no mention was made of Chinese import competition.

[378] China's First Written Submission, para. 349.
[379] China's First Written Submission, para. 349.
[380] USITC Report, page 26.
[381] USITC Hearing Transcript, page 234.
[382] USITC Report, page I-15 and n. 51 (quoting press releases); Continental, "CTNA to reduce production at Charlotte plant", 9 January 2006; Continental, "CTNA announces indefinite suspension of tire production at Charlotte plant", 10 March 2006.
[383] USITC Report, page 64, n. 123 (dissenting Commissioners).
[384] "Bridgestone Firestone to close Oklahoma City Tire Plant", 13 July 2006.
[385] "Bridgestone Firestone to close Oklahoma City Tire Plant", 13 July 2006.

7.272 Regarding Goodyear's 2006 announcement of the closure of its Tyler plant, China asserts that Goodyear's press release explained this closure as consistent with its June 2006 announcement that it would exit certain segments of the private label tyre market.[386] China asserts that the press release also noted that "[t]he Tyler plant principally produces small diameter passenger tires, a segment that has been under considerable pressure from low cost imports".[387] According to China, this generic reference to "low-cost imports" could apply to any import source, including the many non-subject imports that are cheaper than domestic tyres. China contends that the October 2006 press release never mentions imports from China.

7.273 China also refers to three closures announced for 2009. China contends that these three announced closures were all primarily due to the economic crisis that began in 2008 and the overall decline in demand for tyres.[388] China submits that there is no evidence that imports from China are to blame for these closures.

7.274 China further contends that the USITC improperly found that imports from China were increasing before plant closures in 2006 and 2008, whereas the decisions to close these plants were made before imports rose significantly in 2007.

7.275 **The United States** contends that the record showed that imports were already increasing before the announced plant closings, and that U.S. producers issued contemporaneous statements at the time of these plant closings confirming that low-priced competition from imports, including subject imports from China, was an important part of their decisions.[389]

Purchases of tyre-manufacturing equipment by Chinese producers

7.276 **China** notes that the USITC relied on:

> articles in trade publications referred to a surge in the purchase of Western tire production equipment by Chinese tire manufacturers during the last ten years, indicating that Chinese producers were expanding their capacity to produce and export tires.[390]

7.277 China contends that the mere fact that Chinese companies purchased western tyre manufacturing equipment says nothing about whether the U.S. producers voluntarily adopted their business strategy, or were "forced" to curtail lower-end manufacture in the United States by imports from China arriving in the U.S. market. According to China, the USITC did not find that domestic producers shut plants or took other action due to fears about increasing Chinese capacity. China asserts that there is no evidence on the record to suggest such a fear. Furthermore, China contends that the increase in Chinese production capacity is only relevant in the context of a finding of threat of material injury.

7.278 **The United States** asserts that the USITC relied on the above article to demonstrate that market participants were well aware of the extraordinary growth in the size and export capacity of the Chinese industry before and during the period of investigation. According to the United States, the USITC reasonably relied on this article as evidence that U.S. producers had closed certain production

[386] "Goodyear announces planned closing of Tyler facility", 30 October 2006.
[387] USITC Report, pages I-16 through I-17 (citing "Goodyear announces planned closing of Tyler facility", 30 October 2006 (press release)).
[388] USITC Report, page 64 (dissenting Commissioners).
[389] USITC Report, pages 26-27.
[390] USITC Report, page 26.

facilities as a strategy to deal with the rapid growth in the size and aggressiveness of the Chinese industry, and the rapid increase in its exports to the United States.

Subject imports by U.S. producers

7.279 **China** notes that the USITC referred to the fact that:

> U.S. producers were not among the largest importers of subject tires from China during the period examined and collectively accounted for only approximately 23.5 percent of subject imports, including purchases in 2008.

7.280 **China** asserts that the fact that U.S. producers were not the largest importers of Chinese tyres is a *non sequitur*, and has no bearing on whether imports from China were a significant cause of the business strategy that these global producers adopted.

7.281 **The United States** asserts that, because U.S. producers were not the primary importers of the subject imports, they were also not responsible for the large bulk of the increase in Chinese imports over the period. The United States argues that 84.2 per cent of the growth in subject imports over the period of investigation was imported by companies other than U.S. producers.[391] According to the United States, it was reasonable for the USITC to conclude that this indicated that the industry's alleged "voluntary business strategy" was not itself responsible for the tremendous growth in the subject imports during the period.

2006 Article: imports from China expected to increase

7.282 China notes that, in concluding that "a more reasonable explanation for U.S. producers' capacity reductions in 2006 and thereafter was a reaction to increases in subject imports from China that were already occurring and, given the size and degree of the increases, likely would continue in the future"[392], the USITC cites specifically to a March 2006 article in *MTD Modern Tire Dealer*, entitled "China and You: Expect more tire imports in the years to come". In particular, the USITC explains that:

> The article noted that China exported an estimated 21 million tires to the United States in 2005, and described the overall effect on domestic supply as "profound" and likely to remain so as imports increase. The article also said, with respect to Chinese production and shipments of tires for the replacement market, that "everyone agrees there will be rapid growth in the segment, especially with all the activity from foreign investing."[393]

7.283 **China** contends that an article positing an expectation that imports from China would increase by an unspecified amount in the future hardly suggests that the global sourcing strategy adopted by the U.S. producers was not "voluntary", or that it was somehow dictated by imports from China.

7.284 **The United States** asserts that this contemporaneous view of the "profound" effect that the increasingly large industry in China had had, and would have on the U.S. tyre market supports the USITC's view that the subject imports were likely to increase as China continued to expand its capacity, production, and share of shipments to the United States. According to the United States, it is

[391] USITC Report, Table II-3.
[392] USITC Report, pages 26-27.
[393] USITC Report, page 27, footnote 150.

no wonder that domestic producers soon realized that they could not compete with the increasing volumes of low-priced subject imports in that market, and reacted by substantially reducing capacity and closing U.S. plants.

(ii) Evaluation by the Panel

7.285 China presents the domestic industry's business strategy as an "other cause"[394] of material injury to the domestic industry, in the sense that declines in certain injury indicators (such as the volume-metrics, including production, shipments and net sales quantities) should be attributed to the domestic industry's withdrawal from the low-value segments of the replacement market (i.e., tiers 2 and 3), rather than subject imports. Under this theory, subject imports merely filled a "supply gap"[395] left by the retreating domestic industry.

7.286 The Chinese respondents presented similar arguments before the USITC.[396] Those arguments raised a serious issue that had to be addressed by the USITC, particularly given the lack of domestic producer support for the USW's petition, and the assertion by certain producers that they were not materially injured by subject imports from China[397], and would not change their operations in the event that a remedy were imposed.[398]

7.287 The USITC did address this issue in its Report. The USITC did so primarily in the follow extract from its Report:

> We do not agree that domestic producers voluntarily abandoned the lower-priced part of the U.S. tire market and that the subject imports simply filled the void left by their departure. Imports from China were already increasing before Bridgestone, Continental, and Goodyear announced the plant closings that occurred in 2006 and 2008. The three companies confirmed in statements issued at the time of the announcements that low-priced competition from Asia, including China, was an important part of their decisions.** Moreover, articles in trade publications referred to a surge in the purchase of Western tire production equipment by Chinese tire manufacturers during the last ten years, indicating that Chinese producers were expanding their capacity to produce and export tires. U.S. producers were not among the largest importers of subject tires from China during the period examined and collectively accounted for only approximately 23.5 percent of subject imports, including purchases in 2008. Thus, we find that a more reasonable explanation for U.S. producers' capacity reductions in 2006 and thereafter was a reaction to increases in subject imports from China that were already occurring and, given the size and degree of the increases, likely would continue in the future.[399]

** In a footnote, the USITC noted that:

> All three companies cited import competition as a factor in their plant closings: Bridgestone cited "fierce competition from low-cost producing countries" as a factor in closing its Oklahoma City plant in 2006; Continental cited "global competition" and "manufacturing costs [that] are cheaper overseas" as contributing to the closure of its Charlotte, NC, plant in 2006; and for Goodyear, pressure from low-cost imports was cited as contributing to closure of its Tyler, TX, plant in 2008. CR at I-20-22, PR at I-15-17.[400]

[394] *See* Section V.C.4 of China's First Written Submission, entitled "The USITC ignored or failed to assess fully other causes of injury".
[395] *See*, for example, China's Reply to Question 41 from the Panel, para. 58.
[396] *See*, for example, USITC Report, pages 19-20, and 26.
[397] USITC Report, page III-10.
[398] USITC Report, page VI-1.
[399] USITC Report, page 26, footnotes generally omitted.

7.288 The USITC also found that "significant and continuous" underselling by subject imports "eroded the domestic industry's market share", causing the domestic industry to "reduce capacity so as to focus on the parts of their business in which they could expect to remain profitable despite the impact of subject imports from China". The USITC found that "the substantial reduction in domestic capacity and the closures of U.S. plants during the period examined were largely a reaction to the significant and increasing volume of subject imports from China, and were not, as respondents argue, part of a strategy by domestic tire produces to voluntarily abandon the low-priced, 'value' segment of the U.S. market".[401]

7.289 China challenges the USITC's treatment of a number of factors, including in particular plant closures in 2006 and 2008, the purchase of tyre-manufacturing equipment by Chinese producers, the proportion of total subject imports made by U.S. producers, and a 2006 article regarding the "profound" effect of subject imports on the U.S. industry. While we necessarily consider the USITC's handling of these factors, and the relevant evidence, individually, we shall also assess the USITC's conclusion on the basis of the totality of the factors and evidence relied on by the USITC.

7.290 Before turning to the evidence regarding the abovementioned factors, we first consider it necessary to make a number of more general observations regarding China's arguments.

General observations regarding China's arguments

7.291 We note that China presents the domestic industry's business strategy as an "other cause"[402] of material injury to the domestic industry. China contends that, following the domestic's industry's abandonment of tier 3, "imports from other countries, including China, were then left to fill the 'supply gap'".[403] In this sense, subject imports are to some extent presented as an "own goal", since they result from the industry's own business strategy. At the same time, though, China argues that the U.S. producers are "global companies with global sourcing strategies"[404], and that their "[o]perations in China have enhanced the[ir] profitability".[405] China further argues that "the imports from China (and other low-cost jurisdictions) are a *positive* factor"[406] for U.S. producers, who "were themselves responsible for manufacturing and importing many of these tires".[407] In this sense, China also presents the subject imports resulting from[408] the domestic industry's strategy of off-shoring the production of low-value tyres as being non-injurious.[409] These different aspects of China's arguments prompt the following observations.

[400] USITC Report, footnote 147.
[401] USITC Report, pages 24-25.
[402] *See* Section V.C.4 of China's First Written Submission, entitled "The USITC ignored or failed to assess fully other causes of injury".
[403] China's Reply to Question 41 from the Panel, para. 58.
[404] China's First Written Submission, para. 345.
[405] China's First Written Submission, para. 348.
[406] China's First Written Submission, para. 349.
[407] China's First Written Submission, para. 349.
[408] This would seem to cover all subject imports, and not merely those imported by the U.S. producers.
[409] In the same vein, China argues that the decline in volume-based injury factors should not justify a determination of material injury, since those metrics simply reflect the domestic industry's desire to withdraw from the low-end of the tyre market.

7.292 First, the argument that subject imports are non-injurious is belied by the (increasing) margin of underselling established by the USITC.[410] Indeed, one might legitimately wonder why such underselling was necessary if the domestic industry had, as alleged by China, voluntarily ceded the low-end of the market, and if subject imports were merely filling the resultant "supply gap".

7.293 Second, if the domestic industry' withdrawal had really left a void in parts of the market, one would have expected that both subject and non-subject imports would have benefited from the domestic industry's withdrawal. Indeed, China claims that "imports from other countries, including China," were left to fill that "supply gap". The record clearly indicates, though, that only subject imports benefited from the domestic industry's alleged withdrawal from parts of the market.[411] Furthermore, although China refers specifically to the U.S. industry shifting production to Brazil and Indonesia[412], we note that Indonesia's share of imports only increased from 1.8 to 4.3 per cent over the period, while Brazil's share barely moved from 4 to 4.1 per cent. Over the same period, imports from China increased from 12.9 to 33.1 per cent of total imports.

7.294 Third, we note China's argument that "[f]rom 2006 to 2007, when the largest increases in imports from China and Chinese market share occurred, the U.S. tire industry in fact had its *best* financial performance".[413] Although the domestic industry generally did record its highest operating margin (i.e., operating income as a proportion of sales) of the period in 2007[414], when the rate of increase in subject imports was greatest, there were still three (out of ten) domestic producers who recorded operating losses that year.[415] In addition, when the absolute volume of subject imports was greatest, in 2008, the domestic industry recorded its worse operating loss of the period. We are not persuaded, therefore, that there is necessarily any positive connection between the volume of subject imports and the profitability of the domestic industry.

7.295 Fourth, although China contends that, as a result of their business strategy, domestic producers "were themselves responsible for manufacturing and importing many of these tires [from China]",[416] the USITC found[417] that domestic producers only accounted for 23.5 per cent of subject imports in 2008, the year when "the full effect of the industry's shifting business strategy" was allegedly being felt.[418] If subject imports really were being imported by U.S. producers consistent with their own business strategy of off-shoring production of tier 2 and 3 tyres, and if subject imports really were beneficial to domestic producers, we would expect domestic producers to account for a far greater proportion of subject imports. In fact, over the period of investigation as a whole, the USITC record showed that 84.2 per cent of the growth in subject imports was imported by companies *other than* U.S. producers.[419]

7.296 Fifth, regarding China's claim that the domestic industry's "[o]perations in China have enhanced the[ir] profitability",[420] we find no obvious nexus between any increase in the domestic industry's profitability and the volume of subject tyres imported by domestic producers. In particular,

[410] *See* USITC Report, page 23. China challenges the USITC's findings on underselling. We address, and reject, China's arguments at paras. 7.254 to 7.258 above.
[411] Overall, the share of non-subject imports in total U.S. imports declined from 87.1 to 66.9 per cent over the period (USITC Report, Table II-1).
[412] *See* China's First Written Submission, para. 346.
[413] China's First Written Submission, para. 11.
[414] USITC Report, Table C-1.
[415] USITC Report, Table III-5.
[416] China's First Written Submission, para. 349.
[417] USITC Report, page 26.
[418] China's comments on U.S. Reply to Question 49 from the Panel, para. 50.
[419] USITC Report, Table II-3.
[420] China's First Written Submission, para. 348.

as the volume of subject tyres imported by U.S. producers increased by 163 per cent between 2004 and 2008[421], the domestic industry's operating margin *fell* by 4.8 percentage points, going from a positive operating margin of 2.4 per cent to a negative operating margin of 2.4 per cent.[422] Furthermore, from 2006 to 2007, when the operating margin *increased* by 5.5 percentage points, the volume of subject imports by U.S. producers had increased by only 3.6 per cent. When the volume of subject imports by U.S. producers increased more substantially – by 33.6 per cent – from 2007 to 2008, the domestic industry's operating margin *fell* by 6.9 percentage points.

7.297 We now turn to China's arguments concerning the a number of the specific factors relied on by the USITC.

Plant closures

7.298 Put simply, the main issue concerning plant closures is whether such closures preceded, and indeed prompted, the increase in subject imports, or whether plants were closed as a result of competition from subject imports. In addressing this issue, the USITC relied on evidence regarding the closure of the Continental, Charlotte, plant in 2006, the Bridgestone, Oklahoma City, plant in 2006, and the Goodyear, Tyler, plant in 2008.[423] Our analysis will therefore focus on the evidence and arguments regarding these three plant closures.[424]

7.299 Regarding the Continental, Charlotte, plant, we note that a contemporaneous Continental press release attributed the closure of this plant to *inter alia* "global competition putting pressure on us as *our* manufacturing costs are cheaper overseas".[425] As observed above, the USITC interpreted this to be a reference to import competition from China. For our part, we consider that Continental's reference to "global competition" should be understood as competition from other *Continental* plants in the world. This is because the press release clearly refers to "our" manufacturing costs being "cheaper overseas". As to whether import competition from other Continental plants in the world might include subject imports from China, we note that the USITC Report clearly states that Continental did not have any production facilities in China.[426] Since Continental did not have any production facilities in China, there was no proper basis for the USITC to conclude that imports from Continental plants around the world might include subject imports from China. We also note that a former Continental employee testified before the USITC that "Chinese imports had nothing to do with [the Charlotte] closing[]".[427] In these circumstances, the USITC could not properly have attributed the closure of the Continental, Charlotte plant to subject imports from China.

7.300 Regarding Bridgestone's closure of its Oklahoma plant, the contemporaneous press release stated that "this plant produces tires in the low-end segment of the market where demand is shrinking and fierce competition from low-cost producing countries is increasing".[428] The press release further stated that "the market is quickly running away from the products we produce in Oklahoma City". To some extent, then, shifts in demand played a part in the closure of the Bridgestone, Oklahoma plant. However, the reference to "fierce competition from low-cost producing countries" suggests that shifts

[421] USITC Report, Table II-3.
[422] USITC Report, Table C-1.
[423] *See* USITC Report, footnote 147, and U.S. Reply to Question 51 from the Panel.
[424] Since the USITC did not rely on evidence regarding the Continental, Mayfield plant, or the three closures announced for 2009, we shall not consider the evidence regarding these additional closures.
[425] Continental press release, "CTNA announces indefinite suspension of tire production at Charlotte plant", 10 March 2006.
[426] USITC Report, pages IV-3 to IV-6, describing "U.S. Producers' Subject Tire Manufacturing Facilities in China". No Continental plant is included in this listing.
[427] USITC hearing transcript, page 234, lines 7-15.
[428] Bridgestone press release, "Bridgestone Firestone to close Oklahoma City Tire Plant", 13 July 2006.

in demand were not entirely responsible for the closure of that plant. The reference to "fierce" competition also suggests that import competition was not as benign as China suggests, and that imports were not merely filling a "supply gap" caused by the industry's retreat from the low-end of the market.[429]

7.301 As to whether the USITC could properly have understood Bridgestone's reference to "fierce [import] competition" to include competition from subject imports from China, we note that the press release makes no express mention of imports from China. However, footnote 130 of the USITC Report provides that the average margin of underselling by subject imports was 10.8 per cent in 2004, 14.8 per cent in 2005, and 18.8 per cent in 2006. Furthermore, the average unit price for non-subject imports was consistently higher than the average unit price for subject imports during the period 2004 - 2006.[430] Indeed, by 2006 only imports from Indonesia were cheaper than subject imports from China[431], and Indonesian imports represented only 3.4 per cent of total imports in 2006, compared to subject imports' 21.2 per cent share. Furthermore, the Chair of the USITC, in expressing separate views on remedy, stated that "information in the record shows that the volume of third-country imports has declined since 2005, and that unit values of third-country imports are on average well above those of imports from China and closer to those of domestic tires".[432] In fact, the volume of non-subject imports declined 1.8 per cent from 102,424,000 tyres in 2005 to 100,601,000 tyres in 2006, whereas the volume of subject imports increased 29.9 per cent from 20,790,000 to 27,005,000 in this period. In addition, the market share of subject imports nearly doubled from 4.7 per cent in 2004 to 9.3 per cent in 2006, whereas the market share of non-subject imports increased only slightly from 31.9 per cent to 34.5 per cent over the same period. In light of the increasing underselling by, and growth in, subject imports relative to non-subject imports in the years 2004-2006, we consider that it was not unreasonable for the USITC to understand the reference to "fierce [import] competition" to include subject imports from China.

7.302 In addition, we note that the USITC Report states:

> The 2006 announced closure of Bridgestone's Oklahoma City, OK plant was reportedly related to both the plant's product mix (low-end segment of the market) and intense competition from lower-cost sources - low-cost Korean and *Chinese-made* tires specifically cited.[433]

7.303 In response to a question from the Panel regarding this statement by the USITC, the United States explained that a senior Bridgestone employee was quoted in a contemporaneous press article as identifying "low-cost Korean and Chinese-made tires flooding the U.S. market as one of the reasons for the plant's economic troubles".[434]

7.304 For these reasons, we consider that the USITC could properly have attributed the closure of the Bridgestone, Oklahoma City, plant to subject imports.

7.305 Regarding the closure of the Goodyear, Tyler, plant in 2008, we note that Goodyear's contemporaneous press release noted that "[t]he Tyler plant principally produces small diameter passenger tires, a segment that has been under considerable pressure from low cost imports".[435] In

[429] China's Reply to Question 41 from the Panel, para. 58.
[430] USITC Report, Table C-1.
[431] USITC Report, Table II-1.
[432] USITC Report, page 42.
[433] USITC Report, page III-16, footnote 62, emphasis added.
[434] U.S. Reply to Question 52 from the Panel, para. 55.
[435] USITC Report, pages I-16 through I-17 (citing "Goodyear announces planned closing of Tyler facility", 30 October 2006 (press release)).

theory, it is possible that this generic reference to "low-cost imports" could apply to imports from any source, including non-subject imports. In the circumstances of this case, though, we consider that the USITC was entitled to understand this to be a reference to subject imports from China, particularly in light of the above considerations regarding the increasing underselling by, and growth in, subject imports relative to non-subject imports. The competition from subject imports was clearly greater than the competition from non-subject imports.[436]

7.306 We note China's argument that subject imports could not have played an important role in the decisions by U.S. producers to close the abovementioned plants because such closures were announced before the significant increase in subject imports in 2007. China also contends that subject imports only represented 6.8 per cent of the U.S. market by volume and 4.7 per cent by value at the end of 2005. China adds that subject imports were "dwarfed" by non-subject imports, with non-subject imports holding 33.6 per cent of the U.S. market by volume and 31.2 per cent by value in 2005.

7.307 The USITC record indicates that all three of the abovementioned plant closures were announced in 2006. The press release for the Bridgestone closure was dated July 2006.[437] The press release for the Continental closure was also dated July 2006.[438] The Goodyear closure was described in 2008 as being consistent with, and therefore presumably part of, a June 2006 announcement. It is true, therefore, that these closures were announced prior to 2007. However, although China seeks to focus the Panel's attention on 2007, and the fact that subject imports increased by their greatest amount in that year, the USITC record shows a very substantial increase in the volume of imports prior to 2006. In particular, the USITC found:

> Subject imports from China increased from 14.6 million tires in 2004 to 20.8 million tires in 2005 (or by 42.7 percent), 27.0 million tires in 2006 (or by an additional 29.9 percent), and 41.5 million tires in 2007 (or by an additional 53.7 percent).[439]

7.308 Thus, between 2004 and 2006, when the abovementioned plant closures were announced, subject imports had already increased significantly by 85 per cent.[440] Although the greatest growth in

[436] Furthermore, we note that union officials testified before the USITC to the effect that the Goodyear, Tyler, plant was closed as a result of subject imports from China. One union official testified that:

> Imports from China closed our plant …. From the very beginning, Goodyear told us the Tyler plant was at risk because of low-priced imports. … the company repeatedly identified imports from Asia, including fast-growing imports from China, as a threat to our plant. (USITC Hearing Transcript at 93-94).

Another union official testified that:

> In interim meetings with Goodyear since 2003, we've had open discussions about imports from China. In presentations to the union, Goodyear specifically identified low-priced Asian imports as a threat to our facilities, and they show that China's share of these imports are rising steadily. … To help the company survive the onslaught of tires from China, it was not enough just to cut costs. There was simply no way to compete with China on cost alone. Their prices are so far below any rational level you would get in a functioning market that even if we came to work for free we couldn't compete on the basis of cost. (USITC Hearing Transcript at pages 85-86.)

[437] USITC Report, page I-15, footnote 45.
[438] USITC Report, page I-15, footnote 51.
[439] USITC Report, footnote 146.
[440] At interim review, China argued that because the plant closures were announced only halfway through 2006, these decisions should be viewed in light of subject import data from 2005 – not totals for the

the rate of increase in subject imports was yet to occur, in 2007, the fact that subject imports had already increased by 85 per cent before the plant closures was sufficient for the USITC to properly find, in the context of the additional evidentiary considerations outlined above, that these plant closures were linked to the increase in subject imports from China. Regarding the importance of subject imports relative to non-subject imports, we recall our above finding concerning the increasing underselling by, and growth in, subject imports relative to non-subject imports.

7.309 We also note China's argument that U.S. producers "testified repeatedly that they had shifted domestic production away from lower-end tires to the premium, higher-value branded segment".[441] In making this argument, China cites only to the following finding by the dissenting commissioners:

> Domestic producers … made significant strategic business decisions to shift U.S. production toward higher-value tires and capitalize on consumer brand loyalty.[442]

7.310 This statement by the dissenting commissioners does not constitute, nor refer to, producer testimony. Furthermore, there is no doubt that U.S. producers reduced U.S. production of tyres for tiers 2 and 3 of the replacement market. The issue under examination is whether the U.S. industry did so voluntarily, independent of competition from subject imports, or whether the domestic industry was forced to close U.S. production capacity as a result of competition from Chinese imports. The abovementioned statement by the dissenting commissioners does not address this particular issue.

7.311 China also submits that testimony before the USITC by "businessmen directly engaged in buying and selling tier 3 tires emphasized that U.S. producers were not pushed out of tier 3 – but instead abandoned it".[443] We recall, though, that even in 2008 the U.S. industry still made 18.6 per cent of its shipments to tier 3 of the replacement market. We also recall the finding by the dissenting commissioners that.

> We recognize that domestic tire producers have not abandoned the tier 3 market, as respondents maintain.[444]

7.312 Accordingly, China has not presented convincing evidence that producers acknowledged that they voluntarily closed U.S. production operations for the low-end of the replacement market. While it is true that none of the U.S. producers expressed support for the petition, only four out of ten producers said they were not materially injured by subject imports. Other producers either said they were not in a position to answer, or took no position on the issue. Furthermore, although some producers said they would not change their operations in the event that a remedy was imposed,[445] this fact is hardly surprising given that a remedy of only three years' duration was under consideration. There would be little value in adapting to a market situation that would likely only last for three years, whereupon subject imports would resume. For the above reasons, we consider that the USITC could properly attribute plant closures to subject imports.

whole year 2006. We are not persuaded by this argument. First, as noted above, the USITC record indicated that subject imports had already increased by 42.7 per cent from 2004 to 2005. Second, the volume of imports at the end of 2006 is a fair reflection of the trend in subject imports during the course of 2006, while the plant closures were occurring.

[441] China's First Written Submission, para. 346.
[442] USITC Report, page 45, cited by China in footnote 386 of its First Written Submission.
[443] China's Reply to Question 41 from the Panel, para. 58.
[444] USITC Report, page 64.
[445] USITC Report, page VI-1.

Subject imports by U.S. producers

7.313 China suggests that the proportion of subject imports made by U.S. producers is not relevant to the issue of whether or not rapidly increasing subject imports played any role in the domestic industry's decision to shift the production of certain tyres overseas. However, we recall that the USITC was responding to an argument that domestic producers had voluntarily ceased production in the United States of lower-value tyres, as part of a restructuring of their global production operations, and replaced those tyres with imports from other sources, including China. Presumably, as discussed above,[446] if U.S. production of lower-value tyres had declined because domestic producers had decided to replace domestic production of low-value tyres with imports from their global production facilities, it would be expected that much of the growth in imports of subject merchandise would have been on behalf of those domestic producers. In this context, the volume of subject imports made by domestic producers is relevant. China also notes the proportion of subject imports made by U.S. producers, and that U.S. producers importing subject imports is "in line with" the abovementioned business strategy.[447] In other words, China itself refers to the proportion of subject imports made by U.S. producers as proof of the existence of the abovementioned business strategy.

7.314 We already touched upon this issue at para. 7.295 above. In this respect, we recall China's argument that "the imports from China (and other low-cost jurisdictions) are a *positive* factor"[448] for U.S. producers, who "were themselves responsible for manufacturing and importing many of these tires".[449] If China's argument were correct, it would seem reasonable to expect U.S. producers to account for a relatively large share of subject imports (as the more they would import, the better off they would be).

7.315 In these circumstances, we see no error in the USITC having considered the proportion of subject imports actually accounted for by U.S. producers. Furthermore, we see no error in the USITC having relied on the fact that U.S. producers only accounted for approximately 23.5 per cent of subject imports to support a finding – based also on other considerations – that U.S. producers had not voluntarily ceased U.S. production of the low-end tyres.

Purchase of tyre-manufacturing equipment by Chinese producers

7.316 As an initial matter, we note China's argument that any increase in Chinese production capacity should only be relevant in the context of a finding by the USITC of a threat of material injury. While this factor would be of particular relevance in an analysis of threat of material injury, we do not consider that an objective and impartial investigating authority should be precluded from relying on such evidence – in conjunction with additional evidence regarding other factors – to determine whether subject imports might have caused domestic producers to cease producing low-value tyres.

7.317 As to the significance of the evidence considered by the USITC, we note that the trade publication article cited by the USITC reports that Chinese producers had been increasing their production capacity for the ten years preceding 2008, long before the abovementioned plant closures in the United States occurred. The article also reports that the "China boom" (in purchases of tyre-making equipment) "has not ended", even though China already hosted half of the world's tyre-making facilities. In our view, this article provided a reasonable basis for the USITC to conclude that U.S. producers might well have decided that subject imports from China had already become an

[446] *See* para. 7.295 above.
[447] China's First Written Submission, para. 347.
[448] China's First Written Submission, para. 349.
[449] China's First Written Submission, para. 349.

inescapable part of the market, and would continue to grow in significance, such that U.S. producers should adapt their business strategy accordingly. Combined with other relevant evidence, this article could properly support a determination by an objective and impartial investigating authority that "a more reasonable explanation for U.S. producers' capacity reductions in 2006 and thereafter was a reaction to increases in subject imports from China that were already occurring and, given the size and degree of the increases, likely would continue in the future".[450]

2006 Article: imports from China expected to increase

7.318 China contends that an article positing an expectation that imports from China would increase by an unspecified amount in the future hardly suggests that the global sourcing strategy adopted by the U.S. producers was not "voluntary", or that it was somehow dictated by imports from China.

7.319 We agree that the article, in and of itself, does not explain that the U.S. produces closed plants as a result of subject imports. However, the article does indicate that subject imports from China had already had a "profound" impact on the domestic industry, and that the industry generally agreed that subject imports would increase further ("everyone agrees there will be rapid growth in the segment, especially with all the activity from foreign investing"). When considered in light of other evidence, this evidence might properly be used to support a determination that domestic producers would have had an interest in adapting their business strategy in the face of, rather than independent of, subject imports from China.

(iii) Conclusion

7.320 The Panel was confronted with the fact that the majority of the USITC and the dissenting commissioners drew precisely the opposite conclusions on the issue of business strategy. The majority took the view that the strategy to reduce U.S. production and locate production in China was itself a response to increased imports and thus it was not an alternative cause that prevented the increasing imports from China to be a significant cause. The dissenting commissioners took the view that the business strategy of relocating production to China was an independent business strategy that began before imports were increasing. Yet both considered precisely the same evidence. There was no evidence considered by the dissenting commissioners that was not also considered by the majority. And, no further evidence that might have been considered by the majority but was not was adduced in this case.

7.321 In these circumstances, it would be inappropriate for the Panel simply to make a choice between the views of the majority and the dissenting commissioners. In fact, our own assessment of the record indicates that it is difficult to separate out the business strategy from the increasing imports. It may well be, as the dissenting commissioners say, that the strategy of relocating to China began before 2004 and before the substantial increases in subject imports.[451] But it is also true that plant closures occurred after the increase in imports and may well have been linked to the competition from imports. Indeed, the decision to locate production in China might have been the result of an independent business strategy, but the decision to close plants might well have been a response to imports.

7.322 In the light of these considerations, the Panel can see no basis for determining that the USITC's analysis of the alternative business strategy was in error. It was for China to establish a prima facie case of such error and it failed to do so.

[450] USITC Report, page 26.
[451] USITC Report, page 49 (dissenting Commissioners).

(b) Changes in demand

7.323 **China** claims that a proper evaluation of demand by the USITC would have shown that any injury suffered by the domestic industry was caused by changes in demand, rather than subject imports. China submits that the USITC overlooked four important changes in demand for tyres in the United States. First, there was a prolonged contraction in demand over the period of investigation, with apparent consumption falling by 10.3 per cent during the 2004-2008 period. China asserts that consumption was lower in every year except 2007, which saw a modest, but short-lived, increase. China recalls the dissent's observation that consumers were buying fewer tyres, and driving more miles on their existing tyres.[452] China also asserts that, from 2007 to 2008, there was almost a one-to-one correspondence between the decline in the overall U.S. market and the decline in U.S. domestic shipments.

7.324 Second, China contends that the contraction in demand was particularly pronounced in the OEM market, with total shipments in that market falling by 28 per cent. China recalls that the U.S. producers devoted approximately 20 per cent of their domestic production to the OEM market.

7.325 Third, China submits that the recession of 2008, and the near-collapse of the U.S. auto industry, greatly accelerated this contraction in demand. China notes that consumer demand for vehicles – a key determinant for tyre demand – fell dramatically in 2008. China refers to the dissent's observation that:

> The near collapse of the US automobile industry lent a devastating blow to the OEM market in 2008. Thus the fact that the industry's performance turned negative in 2008 was not the result of subject imports (whose rate of increase had slowed), but was due to the effects of the economic recession on US producers' sales to both the OEM and replacement markets.[453]

7.326 Fourth, China asserts that, at the same time consumer demand shifted in favour of larger tyres, even for smaller, fuel-efficient vehicles. According to China, this required producers to shift production, and in some cases reduce capacity or close factories that produced smaller tyres.[454]

7.327 China contends that the USITC barely acknowledged these changes in demand in its Report.

(i) Demand over the period of investigation as a whole: correlation with injury

Arguments of the parties

7.328 **China** contends that there was a "prolonged contraction" in demand over the period of investigation, with apparent consumption falling by 10.3 per cent during the 2004-2008 period. China asserts that consumption was lower in every year except 2007, which saw a modest, but short-lived, increase. China also contends that the volume indicators (of the condition of the domestic industry) track demand more closely than subject imports. According to China, moderate declines in demand during the 2004-2005 and 2005-2006 periods correspond with moderate declines in domestic industry volume indicators. China asserts that, during the 2006-2007 period, demand increased, and the domestic industry volume indicators improved as a result. China contends that, during the 2007-2008 period, the trends reverse: demand and volume indicators fell sharply, while imports from China

[452] USITC Report, pages 47-48 (dissenting Commissioners).
[453] USITC Report, page 64 (dissenting Commissioners).
[454] *See* USITC Report, page 51, n. 47 (dissenting Commissioners); USITC Report, pages III-1 through III-6.

moderated. China also asserts that, from 2007 to 2008, there was almost a one-to-one correspondence between the decline in the overall U.S. market and the decline in U.S. domestic shipments.

7.329 Regarding the trend in demand over the period of investigation, the **United States** denies that there was a "prolonged" contraction in demand "apparent across the entire period of investigation".[455] The United States asserts that the record showed that apparent U.S. consumption declined slightly by 0.8 per cent from 2004 to 2005, and by 4.4 per cent from 2005 to 2006, but actually increased by 1.6 per cent from 2006 to 2007, before declining by 6.9 per cent from 2007 to 2008. According to the United States, therefore, demand "fluctuated" somewhat during the period, even though it had declined overall by the end of the period.[456]

7.330 The United States submits that the USITC also considered the possibility that the recession in 2008 had affected the link between the increased imports and injury, by examining the impact of the recession in 2008 on the increasing volumes of the subject imports, and on the volumes trends for the U.S. industry and non-subject imports.[457] The United States notes that the USITC found that, "even in 2008 when U.S. apparent consumption was falling," the record showed that the subject "imports continued to increase rapidly".[458] Specifically, the USITC stated, "subject imports increased by 4.5 million tyres in 2008, while U.S. consumption declined by 20.4 million tyres".[459] The United States asserts that the USITC pointed out that, in contrast, the quantities of U.S. tyres and those of non-subject imports declined during 2008, with imports from third countries falling at roughly the same pace as the decline in consumption, and U.S. production falling by 11.1 per cent, a pace that was significantly faster than the 6.9 per cent decline in consumption in that year.[460] The United States argues that, given these trends in 2008, the USITC reasonably rejected the claims of Chinese respondents that the recession in 2008 explained all or most of the declines in the industry's production and shipment levels during that year[461], and therefore reasonably concluded that the recession did not indicate that the subject imports were not a significant cause of material injury to the industry.[462]

7.331 The United States asserts that if injury factors tracked demand, the 2007 1.6 per cent increase in demand should have resulted in a similar increase in the volume indicators. The United States asserts that this did not happen, as volume indicators all fell from 2006 to 2007. The United States notes, though, that in 2007 subject imports increased by 53.7 per cent, in excess of the increase in demand. The United States asserts that the lack of correlation between injury factors and demand is also evident from the 2004-2005 period, when demand fell slightly, by 0.8 per cent, but the injury indicia fell by a considerably faster pace. The United States acknowledges that both demand and injury indicators fell in 2006 and 2008, but asserts that the declines in the industry's condition considerably outpaced the declines in demand in those years.

7.332 **China** submits that the U.S. analysis is overly-simplistic, and based on the assumption that the only causal factor at work is subject imports from China. Regarding 2007, China contends that injury indicators do not have to precisely track the increase in demand. According to China, the changes in 2007 should rather be compared to the changes in 2006. In this regard, China asserts that, because 2006 saw a decrease in demand while 2007 saw an increase, the changes in the injury

[455] Oral Statement by China at First Panel Meeting, paras. 77-78.
[456] USITC Report, page 15 and 32.
[457] USITC Report, page 26.
[458] USITC Report, page 26.
[459] USITC Report, page 26.
[460] USITC Report, page 26.
[461] USITC Report, page 26 & 29.
[462] USITC Report, page 29.

indicators in 2007 should be much more modest than the changes in 2006. China contends that they were, in the sense that the volume indicators declined by less in 2007 than in 2006. According to China, the changes in all volume-based metrics significantly improved in 2007 when demand increased, as compared to the changes in 2006 when demand decreased. China contends that the changes experienced by the domestic industry in 2007 must also be viewed in light of the industry's change in business strategy, which inevitably caused volume indicators to decline. Regarding the other years, China contends that the U.S. argument rests on the false premise that when assessing the changes in demand it is proper to expect the injury factors to change by the *same amount*. China submits that, while correspondence in degrees of magnitude is important and indicative of coincidence, it is unlikely that there will be a precise one-to-one correlation in a multi-causal world. China contends that, where the degree of correspondence between demand and the industry's condition is not exact, the other causal factors, such as changing business strategy, should be taken into account.

Evaluation by the Panel

7.333 Although the USITC did not include in its report a discrete section on demand, in our view the USITC ultimately did properly address the issue of demand, and did properly find that subject imports had injurious effects independent of any injury caused by changes in demand. In particular, we note the USITC's finding that:

> The large increase in the volume of subject imports is also reflected in those imports' large and growing share of the U.S. market. Subject imports increased their share of the U.S. market by 12 percentage points (more than threefold) between 2004 and 2008, from 4.7 percent in 2004 to 16.7 percent in 2008. More than half of this increase, 7.4 percentage points, has occurred since 2006.[463]

7.334 In a footnote at the end of that finding, the USITC calculates subject imports' "share of the quantity of apparent U.S. consumption" for the whole period of investigation: 4.7 per cent in 2004, 6.8 per cent in 2005, 9.3 per cent in 2006, 14.0 per cent in 2007, and 16.7 per cent in 2008.[464] The USITC expressly found:

> The ratio of subject imports to U.S. apparent consumption increased by 12.0 percentage points during the period examined, with the two largest year-to-year increases also occurring at the end of the period in 2007 and 2008.[465]

7.335 In a related footnote, the USITC stated:

> ... The ratio of subject imports to U.S. apparent consumption increased from 4.7 percent in 2004 to 6.8 percent in 2005, 9.3 percent in 2006, 14.0 percent in 2007, and 16.7 percent in 2008.[466]

7.336 The USITC clearly found, therefore, that the ratio of subject imports to U.S. apparent consumption increased throughout the period of investigation. Even when demand increased by 1.6 per cent in 2007, the volume of subject imports increased by the significantly greater figure of 53.7 per cent. As a result, subject import market share increased by 4.8 percentage points, while the domestic industry's market share declined by 3.4 points (and the market share of non-subject imports

[463] USITC Report, page 22.
[464] USITC Report, footnote 127.
[465] USITC Report, page 12.
[466] USITC Report, footnote 52.

declined by 1.1 per cent).[467] In 2005, demand fell by a very modest 0.8 per cent. Subject imports in that year increased by 42.7 per cent, resulting in a 2.1 percentage point increase in market share, while the domestic industry's market share fell by 3.7 percentage points. In 2006, as demand fell by 4.4 per cent, the volume of subject imports increased by a further 29.9 per cent, resulting in a 2.4 percentage point increase in subject import market share. This contrasted with a 3.4 percentage point decline in the domestic industry's market share.

7.337 Regarding 2008 in particular, the USITC found:

> Moreover, imports continued to increase rapidly even in 2008 when U.S. apparent consumption was falling. Subject imports increased by 4.5 million tires in 2008, while U.S. apparent consumption declined by 20.4 million tires. Imports from third countries declined by 6.0 million tires in 2008, or by 6.1 percent, roughly consistent with the 6.9 percent decline in U.S. apparent consumption in 2008. Meanwhile, domestic production of subject tires declined by 20.0 million tires in 2008, or by 11.1 percent, and absorbed virtually all the decline in U.S. apparent consumption that year.[468]

7.338 We further note that, as demand fell by 6.9 per cent in 2008, the volume of subject imports continued to increase by an additional 10.8 per cent, resulting in a 2.7 percentage point increase in market share, compared with a fall in the domestic industry's market share of 2.9 percentage points.

7.339 Notwithstanding the above record evidence regarding the injurious effects of subject imports as distinct from the injurious effects of changes in demand, China asserts that the decline in the state of the domestic industry correlated with a "prolonged contraction" in demand, such that the USITC should have attributed any injury suffered by the domestic industry to that contraction in demand. We begin by considering whether or not there really was a "prolonged contraction" in demand over the period of investigation as a whole, as alleged by China. We note in this regard that apparent consumption[469] of all passenger vehicle and light truck tyres declined (by volume) by 10.3 per cent from 2004 to 2008. We also note, though, that the bulk of this fall in apparent consumption occurred at the end of the period of investigation, from 2007 to 2008.[470] Prior to 2007, apparent U.S. consumption declined slightly by 0.8 per cent from 2004 to 2005, by 4.4 per cent from 2005 to 2006, but actually increased by 1.6 per cent from 2006 to 2007. Accordingly, while there was a pronounced

[467] USITC Report, Table C-1.

[468] USITC Report, page 26, footnote omitted.

[469] During the Panel's second substantive meeting with the parties, China argued that the USITC improperly relied on apparent consumption as a proxy for demand. China pursued this argument in response to Question 31 from the Panel. In our view, it is entirely appropriate for investigating authorities to use apparent consumption as a proxy for demand in the context of trade remedy investigations. Indeed, we understand that it is common practice for investigating authorities to do so. Furthermore, in these proceedings China has itself referred to apparent consumption data as a proxy for demand. At page 32 of its first oral statement, for example, China submits a chart of graphs, the first of which is entitled "Changes in Total Consumption (Proxy for Demand)". Furthermore, at para. 76 of its second oral statement, China refers to the "broader trend of declining consumption over the entire period". In doing so, China refers to para. 322 of its Second Written Submission, which in turn refers to "the broader contraction in demand that was apparent over the entire period". In this context, therefore, China is clearly using the term "consumption" as a synonym for demand. Furthermore, at para. 332 of its First Written Submission China refers to the fact that "[a]pparent consumption ... fell by 10.3 percentage points" to support it argument that there was a "prolonged contraction in demand". Finally, in China's comments on the U.S. Replies to Questions from the Panel after the second meeting, China refers to USITC apparent consumption data to describe the movements in demand (*See* para. 42).

[470] According to Table V-1 of the USITC Report, apparent consumption fell from 307,484,000 to 296,091,000, i.e., 3.7 per cent, over four years between 2004 and 2007. Apparent consumption fell by 6.9 per cent in the single year from 2007 to 2008 (from 296,091,000 to 275,702,000).

decline in apparent consumption from 2007 to 2008, the record evidence does not demonstrate a "prolonged contraction" in demand over the period of investigation as a whole. In these circumstances, we see no error in the USITC's finding that demand (or apparent consumption) "fluctuated"[471] during the period of investigation.

7.340 We note China's assertion that demand declined by 4.4 per cent from 2005 to 2006, but improved by 1.6 per cent from 2006 to 2007, and that this improvement in demand correlates with an "improvement" in injury factors, in the sense that the continued downward movements in volume-based injury factors from 2006 to 2007 were "much more modest" than the changes from 2005 to 2006. We acknowledge that the decline in volume metrics from 2006 to 2007 was less than for 2005 to 2006.[472] In our view, though, if correlation between demand and injury were to exist, an improvement in demand should generally result in an *upward* movement in volume metrics.[473] In this case, the 1.6 per cent *increase* in demand coincided with a 2.4 per cent *decline* in production, a 5 per cent *decline* in U.S. shipments, a 5.5 per cent *decline* in net sales quantities, a 3.6 percentage point *decline* in market share, a 6.4 per cent *decrease* in the number of production-related employees, a 3.7 per cent *fall* in hours worked, a 6.3 per cent *decline* in wages paid, and a 2.7 per cent *fall* in hourly wages. Thus, injury indicators did not improve as demand increased.

7.341 Furthermore, we note that the change from 2006 to 2007 does not correlate in any meaningful manner with the change from 2004 to 2005. In 2005, demand fell by only 0.8 per cent. At the same time, production fell by 4.8 per cent, U.S. shipments quantities fell by 6.7 per cent, net sales quantities fell by 5.7 per cent, and market share fell by 3.7 percentage points. In other words, the 2005 0.8 per cent *fall* in demand had virtually the same effect on shipments and net sales as the 2007 1.6 per cent *increase* in demand.

7.342 Demand fell by 4.4 per cent in 2006, and by 6.9 per cent in 2008. Injury factors also declined in those two years. However, the decline in the volume-based injury factors was considerably more pronounced than the fall in demand. In 2006, compared to a 4.4 per cent decline in demand, U.S. industry production fell by 11 per cent, shipments fell by 9.9 per cent, and net sales fell by 8.9 per cent. In 2008, compared to a 6.9 per cent fall in demand, U.S. industry production fell by 11.1 per cent, U.S. shipments fell by 12.1 per cent, and net sales fell by 11.7 per cent. Although the declines in shipments and net sales were more pronounced in 2008 than 2006, the fall in production was virtually the same in those two years, despite the fall in demand in 2008 (6.9 per cent) being considerably greater than in 2006 (4.4 per cent).

7.343 Regarding 2008, China asserts that the fact that there was almost a one-to-one correspondence between the decline in the overall U.S. market and the decline in U.S. domestic shipments from 2007 to 2008 shows that the decline of the domestic industry was closely linked to demand. We note, though, that the U.S. industry held only 49.6 per cent of the market in 2008.[474] Accordingly, there is no reason why the domestic industry should have absorbed more than its *pro rata* share, i.e., 49.6 per cent, of the decline in demand in that year. In our view, a decline in demand should generally have comparable effects on all sources of supply, including subject imports. The fact that the domestic industry was required to absorb virtually 100 per cent of the decline in demand in 2008, while subject

[471] USITC Report, page 15.

[472] From 2005 to 2006, production fell by 11 per cent, shipments fell by 9.9 per cent, and net sales quantities fell by 8.9 per cent.

[473] China itself made a similar argument in these proceedings. At para. 42 of its second oral statement, China argued that "production must go down if demand is going down". We agree. Just as production should decrease if demand declines, so production should increase if demand improves.

[474] USITC Report, Table C-1.

imports continued to increase by 10.8 per cent, demonstrates that subject imports were having effects on the domestic industry that could not be explained by that decline in demand.

7.344 We note China's argument that, where the degree of correspondence between demand and the industry's condition is not exact, the other causal factors, such as changing business strategy, should be taken into account (in the sense that the change in strategy would explain changes in the domestic industry's volume metrics, as the production, shipments and sales of low-value tyres are reduced). In the light of our earlier findings relating to the change in business strategy, this factor cannot be used to explain any absence of correlation between demand and the state of the industry.

7.345 Taking into account the above considerations, including in particular the USITC's findings regarding the effects of subject imports independent of changes in demand, we conclude that the USITC's finding that injury should be attributed to subject imports rather than demand is compelling.

(ii) Demand in the OEM market

Arguments of the parties

7.346 **China** contends that the fall in demand was "particularly pronounced"[475] in the OEM sector, where the domestic industry focused 20 per cent of its production. According to China, the USITC should therefore have analysed demand trends in the OEM sector separately from demand trends in the replacement market.

7.347 The **United States** submits that there was no need for the USITC to separately address the demand trend in the OEM market, as "there were similar demand and import volume trends in the OEM market and overall market, that is, that demand declined overall and that imports obtained an increasing share of the overall and OEM market".[476] The United States also asserts that the OEM market was relatively less important for both domestic producers and subject imports from China. In this regard, the United States notes the USITC's finding that the "replacement market [was] by far the more important market for both groups of producers".[477]

Evaluation by the Panel

7.348 In support of its claim that the fall in OEM demand was "particularly pronounced", China asserts that total OEM shipments fell by 28 per cent over the period of investigation. China derives this number from Table V-3 of the USITC Report. Using the same data source, we calculate that the fall in total shipments to the replacement market over the period was 33 per cent.[478] By this measure, therefore, the decline in OEM demand was actually less pronounced than the decline in demand in the replacement market.

7.349 Furthermore, we note that the OEM sector was generally less important than the replacement market for both the domestic industry and subject imports. In this regard, only 17.7 per cent of U.S. producers' shipments, and 5 per cent of subject imports, went to the OEM market. The domestic

[475] China's First Written Submission, para. 333.
[476] U.S. Reply to Question 32 from the Panel, para. 5.
[477] USITC Report, page 21.
[478] According to Table V-3, shipments from all sources to the replacement market in 2008 totalled 228,162,000. Total replacement shipments in 2004 totalled 341,332,000. This constitutes a decline of 113,170,000, which is 33 per cent of total 2004 replacement shipments.

industry therefore shipped less tyres to the OEM sector than to tier 3 of the replacement market alone.[479]

7.350 Since the decline in demand was not more pronounced in the OEM market than the replacement market, and since the OEM market was less important for the domestic industry and subject imports than the replacement market, we do not consider that the USITC was required to analyse demand in the OEM market separately from demand in the replacement market.

(iii) The 2008 recession

Arguments of the parties

7.351 **China** contends that the recession of 2008, and the near collapse of the U.S. auto industry, greatly accelerated the contraction in demand. China claims that the USITC majority only mentions the 2008 recession dismissively and in passing:

> We have also considered the other possible causes of material injury cited by respondents, including the *current recession*, the contraction in the OEM tire market, sharp increases in raw material costs and raw material shortages, automation for increased productivity, imports from non-subject countries, higher gasoline prices resulting in less driving, strikes and labor actions, U.S. tire producers' high legacy costs, and other factors such as equipment restraints.[480]

7.352 The **United States** contends that the USITC did consider the possibility that the recession in 2008 had affected the link between the increased imports and injury, and concluded that it had not broken that causal link.[481] The United States asserts that the USITC examined the impact of the recession in 2008 on the increasing volumes of the subject imports, and on the volumes trends for the U.S. industry and non-subject imports[482], and found that, "even in 2008 when U.S. apparent consumption was falling", the record showed that the subject "imports continued to increase rapidly".[483] Specifically, the USITC stated, "subject imports increased by 4.5 million tires in 2008, while U.S. consumption declined by 20.4 million tires".[484] In contrast, the USITC pointed out, the quantities of U.S. tyres and those of non-subject imports declined during 2008, with imports from third countries falling at roughly the same pace as the decline in consumption, and U.S. production falling by 11.1 per cent, a pace that was significantly faster than the 6.9 per cent decline in consumption in that year.[485]

Evaluation by the Panel

7.353 We recall the USITC's finding that:

> Moreover, imports continued to increase rapidly even in 2008 when U.S. apparent consumption was falling. Subject imports increased by 4.5 million tires in 2008, while U.S. apparent consumption declined by 20.4 million tires. Imports from third

[479] USITC Report, Table V-3 indicates that U.S. producers shipped 24,211,000 units to the OEM market in 2008. According to data submitted by the United States in its Reply to Question 46 from the Panel, U.S. producers reportedly shipped 25,430,000 units to tier 3 in 2008.
[480] USITC Report, page 29, emphasis supplied, footnote omitted.
[481] USITC Report, page 26.
[482] USITC Report, page 26.
[483] USITC Report, page 26.
[484] USITC Report, page 26.
[485] USITC Report, page 26.

countries declined by 6.0 million tires in 2008, or by 6.1 percent, roughly consistent with the 6.9 percent decline in U.S. apparent consumption in 2008. Meanwhile, domestic production of subject tires declined by 20.0 million tires in 2008, or by 11.1 percent, and absorbed virtually all the decline in U.S. apparent consumption that year.[486]

7.354 In making this finding, the USITC properly established that the injury to the domestic industry could not be attributed in whole to the fall in demand resulting from the 2008 recession. The fact that subject imports continued to increase significantly during that recession, forcing the domestic industry to absorb virtually all of the resultant fall in demand, indicates that subject imports were having an adverse impact on the domestic industry independent of the effects of the fall in demand during the 2008 recession.

(iv) Shift to larger tyres

Arguments of the parties

7.355 **China** asserts that the domestic industry suffered injury as a result of consumer demand shifting in favour of larger tyres, even for smaller, fuel-efficient vehicles. According to China, this required producers to shift production, and in some cases reduce capacity or close factories that produced smaller tyres.[487]

7.356 The **United States** submits that the record evidence did not indicate that there was a "shift in demand in favor of larger tires" during the period of investigation. The United States asserts that, in its questionnaires, the USITC asked U.S. producers and importers to report the factors that had a significant impact on demand trends during the period of investigation.[488] The United States asserts that not one of the responding U.S. producers or importers reported that a "shift in demand in favor of larger tires" had affected demand trends during the period of investigation.[489] Instead, producers and importers identified such factors as the "downturn in the economy", "lower vehicle production", "fewer miles being driven", "overstretched tire life", "more radial tire use", "economic growth", "increased use in performance wheels", and "continued popularity of SUV's, light trucks, and crossover vehicles" as being factors affecting demand changes over the period.[490] The United States further asserts that, in the press release cited in the USITC Report's discussion of demand characteristics, the Rubber Manufacturers Association ("RMA") similarly did not attribute declines in the passenger or light truck tires markets in 2008 to a "shift in demand in favor of larger tires".[491]

Evaluation by the Panel

7.357 At para. 339 of its First Written Submission, and para. 322 of its Second Written Submission, China asserts that the shift towards larger tyre sizes caused U.S. producers to close factories that produced smaller tyres. In other words, China asserts that the shift to larger tyre sizes was bad for U.S. producers, as it reduced demand for their small-sized products. In this regard, we note, as argued

[486] USITC Report, page 26, footnote omitted.
[487] *See* USITC Report, page 51, n. 47 (dissenting Commissioners); USITC Report, pages III-1 through III-6.
[488] USITC Report, page V-9-V-11.
[489] USITC Report, page V-9-V-11.
[490] USITC Report, page V-9.
[491] USITC Report, page V-9.

by the United States[492], that none of the responding U.S. producers or importers reported that a "shift in demand in favor of larger tires" had affected demand trends during the period of investigation.[493]

7.358 Given that none of the respondent producers or importers reported any shift in demand in favour of larger tyres, we are not persuaded that the USITC should have considered any such shift in demand in its Determination.

(v) Conclusion

7.359 For the above reasons, we find no error in the USITC's consideration of changes in demand for tyres in the United States or the conclusion that any injury suffered by the domestic industry was caused by subject imports, rather than changes in demand.

(c) Non-subject imports

(i) Arguments of the parties

7.360 **China** argues that the USITC also failed to properly analyse the injury caused to the domestic industry by imports from countries other than China. China suggests that injury caused by non-subject imports was improperly attributed to subject imports.

7.361 In this regard, China notes the observation by the dissent that non-subject imports "dwarf" imports from China throughout the period. China observes that, although their share of the U.S. market declined over the period, non-subject imports accounted for 66.9 to 87.1 per cent of all U.S. imports by quantity, whereas subject imports from China accounted for only 12.9 to 33.1 per cent.[494]

7.362 China contends that non-subject imports were also cheaper than U.S.-made tyres. While China acknowledges that the average unit price for all non-subject imports in the period ($40 to $55) was $8-$10 higher than imports from China, this average unit price is still below the unit value of U.S.-produced tyres, which grew from $48/tyre to $69/tyre over the period. Moreover, China asserts that the unit value of tyres imported from Indonesia was lower than that of imports from China.

7.363 **The United States** asserts that the average unit values for non-subject imports were well above the average unit values for subject imports throughout the period. The United States further asserts that the absolute volumes and market share for non-subject imports remained relatively steady over the period, in contrast to the significant increases in both volume and market share by subject imports. The United States notes that China had become the largest producer of tyres in the world by 2006, producing 33 per cent of all passenger and light truck tyres produced globally in that year.[495] According to the United States, therefore, the USITC's finding that undersold subject imports, not non-subject imports, displaced domestic sales, is fully supported by the record.

[492] United States' Reply to Question 57 from the Panel, para. 67.
[493] USITC Report, pages V-9 to V-11. Later in this proceeding, China linked the increase in tyre sizes to the popularity of SUVs and light trucks. However, this is inconsistent with China's earlier arguments, as the decline in SUV production during the period of investigation would have affected the U.S. production of *large* tyres, whereas China initially argued that the shift to larger tyres would have affected the U.S. production of *small* tyres.
[494] USITC Report, page II-3, Table II-1.
[495] USITC Report, Table II-1.

(ii) Evaluation by the Panel

7.364 The USITC found that the average unit value of subject imports increased from $31.10 – 38.90 over the period, while the average unit value of non-subject imports increased from $40.42 – 55.29, and the average unit value of U.S. producers' shipments increased from $48.40 to 69.69.[496] Thus, the prices of non-subject imports were lower than those of U.S. producers throughout the period of investigation, and this may have impacted negatively on the domestic industry. We note, though, that the average unit value of non-subject imports remained 22-25 per cent higher than the average unit value of subject imports, suggesting that non-subject imports would have had considerably less price effect on the domestic industry than subject imports. Indeed, by 2006 only imports from Indonesia were cheaper than subject imports from China[497], and Indonesian imports represented only 3.4 per cent of total imports in 2006, compared to subject imports' 21.2 per cent share. Although imports from Indonesia remained cheaper than subject imports for the remainder of the period, the market share of Indonesian imports only reached 4.3 per cent by the end of the period, compared with a market share of 33.1 per cent for subject imports from China. Overall, the share of non-subject imports in total U.S. imports declined from 87.1 to 66.9 per cent over the period, as the share of subject imports to total U.S. imports increased from 12.9 to 33.1 per cent. In this regard, the USITC found that "since 2006, imports from China gained a greater share of the U.S. market than was lost by domestic producers, indicating that they also took market share away from third-country sources".[498]

7.365 The USITC further found that, whereas subject imports "increased by 4.5 million tires in 2008, while U.S. apparent consumption declined by 20.4 million tires", "[i]mports from third countries declined by 6.0 million tires in 2008, or by 6.1 per cent, roughly consistent with the 6.9 per cent decline in U.S. apparent consumption in 2008". Furthermore, the Chair of the USITC, in expressing separate views on remedy, stated that "information in the record shows that the volume of third-country imports has declined since 2005, and that unit values of third-country imports are on average well above those of imports from China and closer to those of domestic tires".[499]

7.366 The USITC's record also showed that, whereas subject imports from China were the fourth largest single import source in 2004, subject imports accounted for the largest single share of imports by 2006, and substantially increased their share of total imports by 2008.[500]

7.367 Thus, although the volume of non-subject imports was greater than the volume of subject imports from China, and although non-subject imports remained cheaper than domestically-produced tyres, the dominant feature of the U.S. market was the rise of subject imports from China at the expense of both non-subject imports and the U.S. industry. In these circumstances, and in light of the above considerations, we find that the USITC did not fail to properly analyse injury caused by non-subject imports or improperly attribute injury caused by non-subject imports to subject imports.

(d) Miscellaneous other factors

(i) Arguments of the parties

7.368 **China** submits that the USITC also neglected several other alternative causal factors noted by respondents, including: sharp increases in raw material costs and raw material shortages; automation

[496] USITC Report, Table C-4.
[497] USITC Report, Table II-1.
[498] USITC Report, page 26.
[499] USITC Report, page 42.
[500] USITC Report, Table II-1, showing that subject imports accounted for 12.9 per cent of total imports in 2004, and 33.1 per cent of total imports in 2008.

for increased productivity; higher gasoline prices resulting in less driving; strikes and labour actions; U.S. tyre producers' high legacy costs; and other factors such as equipment restraints.[501] China does not develop any arguments regarding these factors, other than to claim that the USITC essentially listed and then dismissed these factors, without a reasoned and adequate explanation.

7.369 **The United States** submits that China has failed to offer evidence to support its claim that these factors were causes of material injury to the industry during the period, or to explain why they are significant enough to break the causal link between the subject imports and injury. The United States contends that China simply asserts that the "USITC essentially listed and then dismissed these factors, without a reasoned and adequate explanation" of them.[502] The United States argues that this is legally insufficient to meet China's burden, as complainant, to present evidence and argument sufficient to establish a presumption that the measure being challenged is inconsistent with a Member's WTO obligations.[503] The United States asserts that China has failed to explain why any of these factors was actually a cause of injury to the industry, or why these factors break the existence of a causal link between the subject imports and injury to the industry. Furthermore, the United States contends that the USITC did, in fact, address these other factors in its analysis.

7.370 **China** submits that it did meet its burden of proof regarding these other factors, as it "has pointed out that the USITC wrongly dismissed these factors with little or no discussion, because the statute did not require a weighing of causal factors".[504] China then challenges the United States' assertion that the USITC did adequately address the relevant other factors.

(ii) Evaluation by the Panel

7.371 It is not sufficient for a complaining party to simply point out that the investigating authority failed to address certain other factors, or failed to address them in sufficient detail. The complaining party must first establish prima facie the relevance of those other factors, i.e., their capacity to cause injury to the domestic industry, and their potential to break the causal link between the subject imports and the material injury to the domestic industry. This China has not done. Thus, while these other alternative factors might have been relevant, we do not consider that in this regard China has met its burden of proof.

(e) Cumulative assessment

(i) Arguments of the parties

7.372 **China** asserts that each of the abovementioned factors taken individually severs the causal link between subject imports and market disruption. China contends that, when these other factors are considered cumulatively, "the extent to which they sever the causal link is even more dramatic".

7.373 China acknowledges that "the requirement to consider all alternative causes together is not required in every case", but claims that "the interrelated nature of the various conditions of competition require them to be considered together."[505] China relies in this regard on the statement by the Appellate Body in *EC – Tube or Pipe Fittings* that "there may be cases where because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact

[501] USITC Report, page 29.
[502] China's First Written Submission, para. 356.
[503] Appellate Body Report, *US – Shirts and Blouses*, pages 14-15.
[504] China's Second Written Submission, para. 337.
[505] China's First Written Submission, footnote 240.

of other causal factors would result in the investigating authorities improperly attributing the effect of these other causal facts to dumped imports".[506]

7.374 The **United States** asserts[507] that China's argument ignores the fact that the Protocol itself imposes no obligation on the competent authority to perform an analysis of such other factors at all, and certainly does not require the authority to conduct an analysis of the effects of these factors on a cumulative basis. The United States asserts that, even under the *AD Agreement*, the Appellate Body has stated that an antidumping authority is not required to examine the collective impact of other causal factors.[508] The United States argues that, although the *AD Agreement*, unlike the Protocol, includes language contemplating that an authority should consider the injurious effects of other causal factors in its analysis, the Appellate Body stated that this specific language:

> does not compel, *in every case*, an assessment of the *collective* effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors.[509]

7.375 According to the United States, even when a particular agreement requires an analysis of other injury factors, the Appellate Body has refused to require the investigating authorities to examine the effects of those factors on a cumulative basis. The United States contends that since China has failed to establish why it would be necessary to conduct such an analysis here, and since the Protocol does not require any analysis of these factors, the Panel should reject China's interpretation of the Protocol on this matter.

(ii) Evaluation by the Panel

7.376 China claims that the USITC was required to demonstrate that the *collective* injurious effects of the industry's business strategy, the change in demand, non-subject imports and miscellaneous other factors were not sufficient to break the causal link between the increasing imports and the material injury to the domestic industry.

7.377 In *EC – Tube or Pipe Fittings* the Appellate Body found that "there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports".[510] Notwithstanding the lack of any requirement for cumulative assessment in the Protocol, we acknowledge that there may be cases where the collective injurious effect of other causal factors might be so dominant that the injury caused by increasing imports could not properly be found to be "significant". However China has not demonstrated that this was the case in the underlying USITC investigation.[511] Accordingly, we find that China has failed to establish that in the context of the present case the USITC should have provided a cumulative assessment of the effects of the other causes of injury.

[506] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192.
[507] U.S. First Written Submission, paras. 329–330.
[508] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192.
[509] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 191.
[510] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 192.
[511] Indeed, in rejecting China's claims regarding the USITC's assessment of the individual injurious effects of these other factors, we have reviewed record evidence indicating that subject imports from China had significant injurious effects, independent of any injurious effects of other causal factors.

(f) Conclusion

7.378 For all of the above reasons, we find that China has failed to establish that injury caused by other factors was improperly attributed to subject imports.

5. Conclusion

7.379 Having carefully considered all of the arguments of the parties, and taking into account our standard of review, we find that the USITC did not fail to properly establish that rapidly increasing imports from China were a "significant cause" of material injury to the domestic industry.

E. WHETHER THE TRANSITIONAL SAFEGUARD MEASURE WENT BEYOND THE "EXTENT NECESSARY", CONTRARY TO PARAGRAPH 16.3 OF THE PROTOCOL

7.380 China has two broad claims. First, China claims that no remedy is appropriate in this case as the USITC failed to establish that 'increasing rapidly' imports from China are a 'significant cause' of market disruption. Second, China claims that even if the United States had complied with the other requirements of Paragraph 16, the specific remedy applied by the United States in this case was inconsistent with Paragraph 16.3 because the remedy was not limited to the market disruption caused by rapidly increasing imports from China. China claims that the United States instead imposed a remedy that addressed all of the alleged market disruption, including that caused by factors other than rapidly increasing imports.

7.381 The United States denies that the remedy went beyond the "extent necessary", contrary to Paragraph 16.3 of the Protocol.

7.382 Since China's first claim relates to its substantive claims concerning Paragraphs 16.1 and 16.4, we only address China's second claim in this Section of our Report. That claim concerns Paragraph 16.3 of the Protocol, which provides:

> If consultations do not lead to an agreement between China and the WTO Member concerned within 60 days of the receipt of a request for consultations, the WTO Member affected shall be free, in respect of such products, to withdraw concessions or otherwise to limit imports only to the extent necessary to prevent or remedy such market disruption. Any such action shall be notified immediately to the Committee on Safeguards.

1. Arguments of the parties

(a) China

7.383 China argues that the ordinary meaning of the words "only" and "necessary" (in the first sentence of Paragraph 16.3) emphasise the need for any restrictions to be "narrowly defined and properly focussed".[512] China continues that the restrictions "cannot overcompensate and attempt to address broader injuries being suffered by the domestic industry".[513] China argues that "the restrictions must be narrowly drawn so that they are limited solely to the extent 'necessary' to address the market disruption resulting from rapidly increasing imports from China that are a significant cause of material injury, and that market disruption alone".[514] China argues that the objective is not to

[512] China's First Written Submission, para. 362.
[513] China's First Written Submission, para. 362.
[514] China's First Written Submission, para. 362.

provide "some general benefit to the domestic industry".[515] China claims that the word "remedy" "can be defined as 'a means of counteracting or removing something undesirable; redress; relief.' In other words, to 'remedy' market disruption means to remove that market disruption".[516]

7.384 China argues that the terms of Paragraph 16.3 must be read in context with "other provisions of Paragraph 16 and the provisions of other WTO agreements that address analogous issues."[517] China continues that this "context confirms that measures applied under Paragraph 16.3 can *only* address rapidly increasing imports from China that are a significant cause of material injury, and cannot be used to address the condition of the domestic industry more generally".[518] China claims that "the essential phrase of Paragraph 16.3 – that restrictions may be imposed "only to the extent necessary to prevent or remedy such market disruption" – can only be understood in the context of understanding the meaning of 'market disruption'. 'Market disruption' refers to a situation in which imports are 'increasing rapidly' and are a 'significant cause of material injury'".[519]

7.385 China submits that the focus of any permissible remedy must be on the effect of the allegedly injurious imports. Although it may be possible to consider permissibly other aspects pertaining to the domestic industry, any permissible remedy must be *limited* to the effect of the imports – and only the imports – themselves. China therefore asserts that the focus of a remedy should be on the effect of the allegedly injurious imports – not on the overall effect on the domestic industry. According to China, imports cannot be held responsible for the *entire* downturn being experienced by the domestic industry, and the remedy cannot seek to address that entire downturn. China submits that, without ever determining the amount or magnitude of the injurious impact subject imports were allegedly having on the domestic industry, the United States could not possibly have limited the imposed remedy to "only the extent necessary" to remedy this impact, as required by Paragraph 16.3.

7.386 China claims that there is no indication of "how the USITC took 'into account' the specific market disruption it had found to exist".[520] Quoting further from the USITC Report, China contends that the focus of the USITC was on the benefits to the domestic industry, not on the specific market disruption found to exist:

> "This increase in the tariff would significantly improve the competitive position of the domestic industry, increasing domestic production, shipments and employment and restoring the domestic industry to at least a modest level of profitability. The increase should accomplish this by reducing the quantity of subject imports and raising their price in the US market."[521]

7.387 China argues that the USITC's flawed approach to remedy is partly rooted in its flawed approach to causation.[522] China criticises the USITC for saying, without explanation, that it did not need to weigh other causes in the market as imports from China were themselves a significant cause.[523] China claims that the USITC failed to provide any "analysis of the role of alternative causes compared to that of imports from China".[524] China claims this failure carried through to its remedy

[515] China's First Written Submission, para. 363.
[516] China's First Written Submission, para. 363, quoting the Shorter Oxford English Dictionary.
[517] China's First Written Submission, para. 364.
[518] China's First Written Submission, para. 364.
[519] China's First Written Submission, para. 365.
[520] China's First Written Submission, para. 384.
[521] China's First Written Submission, para. 384, quoting the USITC Report at page 35.
[522] China's First Written Submission, para. 386.
[523] China's First Written Submission, para. 386.
[524] China's First Written Submission, para. 387.

analysis where the USITC made "no attempt to calibrate its remedy to the market disruption caused solely by rapidly increasing imports from China".[525]

(b) United States

7.388 The United States agrees that a remedy under the Protocol can only remedy the material injury that results from rapidly increasing imports from China. The United States notes that China argues that the USITC considered the effect that increased tariffs would have on the U.S. industry. In doing so, China claims that the USITC went beyond the extent necessary to remedy market disruption caused by rapidly increasing imports. The United States argues that this reasoning runs "directly contrary to the Protocol, which defines market disruption, in part, in terms of material injury and threat of material injury to the domestic industry".[526] Therefore, a Member seeking to comply with Paragraph 16.3 is entitled to consider the effect on the domestic industry otherwise "it cannot know whether its remedy properly addresses market disruption in the sense of material injury".[527]

7.389 The United States disagrees that the statements quoted from the USITC Report support China's claims. The United States argues that nowhere does the USITC suggest that the proposed tariffs will address all of the injury to the domestic industry.[528] The United States continues in paragraph 341 of its submission that the USITC gave a thorough explanation of its remedy determination. Part D of the remedy recommendation "analyses the proposed tariff increase and how it is the 'most appropriate remedy to address the market disruption caused by rapidly increasing imports from China' making clear that it addressed only the material injury caused by Chinese imports".[529] The United States argues that the USITC discussion of why it rejected the remedy proposed by the petitioners gives further evidence of how it addressed the market disruption caused by the subject imports only.[530] The USITC explained that the proposed quota by the petitioners would have been "equivalent to 65 *ad valorem* tariff 'which we view to be higher than necessary to remedy the market disruption caused by rapidly increasing imports from China'".[531] The United States continues that part E of the remedy recommendation "addresses the short- and long-term effects of the recommended remedy, explaining that economic modelling indicates that the proposed 55 per cent tariff would likely reduce shipments of Chinese tyres by 38.2 to 58.4 per cent in the first year. The USITC then explains how this reduction in shipments will have an effect on domestic and non-subject imports, on their prices, and eventually on the domestic industry's revenue".[532] The United States also quotes Chairman Aranoff's separate views on remedy as further evidence that only the material injury caused by subject imports was addressed in its remedy recommendation.[533] The United States concludes that the USITC conducted a detailed analysis to craft a remedy that would only address the injury caused by Chinese imports.

[525] China's First Written Submission, para. 387.
[526] U.S. First Written Submission, para. 333.
[527] U.S. First Written Submission, para. 333.
[528] U.S. First Written Submission, para. 339.
[529] U.S. First Written Submission, para. 341.
[530] U.S. First Written Submission, para. 341.
[531] U.S. First Written Submission, para. 341, quoting page 36 and footnote 200 of the USITC Report.
[532] U.S. First Written Submission, para. 341.
[533] U.S. First Written Submission, para. 342.

2. Evaluation by the Panel

7.390 China's basic argument[534] under Paragraph 16.3 of the Protocol is that a transitional product-specific safeguard measure should not exceed the amount necessary to prevent or remedy the market disruption *caused by the subject imports*. China claims that the *Tyres* measure necessarily exceeds the amount necessary to prevent or remedy the market disruption *caused by the subject imports* because the USITC never determined the extent of the injury *caused by those imports*. In other words, without knowing how much injury was caused by the subject imports, it was impossible for the United States to limit the measure to the amount necessary to prevent or remedy that injury.

7.391 We begin by noting that the parties agree that a remedy imposed under Paragraph 16 of the Protocol should be limited to the injury / market disruption caused by the subject imports, rather than the injury / market disruption caused by all injurious factors generally. We agree that the scope of the remedy should be limited in this way.[535]

7.392 We next consider China's argument that the USITC's flawed approach to remedy is partly rooted in its flawed approach to causation.[536] This raises issues regarding the relationship between the non-attribution requirement under the Protocol, and the scope of the remedy. The Appellate Body found[537] in *US – Line Pipe* that Article 5.1 of the *Safeguards Agreement* generally[538] does not impose any obligation on a Member to justify, at the time of application, that the safeguard measure at issue is applied "only to the extent necessary." The Appellate Body went on to state:

> This does not imply, as Korea seems to assert, that the measure may be devoid of justification or that the multilateral verification of the consistency of the measure with the *Agreement on Safeguards* is impeded. The Member imposing a safeguard measure must, in any event, meet several obligations under the *Agreement on Safeguards*. And, meeting those obligations should have the effect of clearly explaining and "justifying" the extent of the application of the measure. By separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports, as required by Article 4.2(b), and by including this detailed analysis in the report that sets forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure. Compliance with Articles 3.1, 4.2(b) and 4.2(c) of the *Agreement on Safeguards* should have the incidental effect of providing sufficient "justification" for a measure and, as we will explain, should also provide a benchmark against which the permissible extent of the measure should be determined.[539]

[534] We note China's argument that the United States was not permitted to impose any transitional safeguard measure as the substantive requirements of the Protocol had not been met. This argument concerns the claims addressed in the preceding sections of this Report.

[535] We note that this is broadly consistent with the findings of the Appellate Body in *US – Line Pipe*. We generally consider that the reasoning at paras. 252-259 of that Appellate Body Report is not fully applicable in these proceedings, since it is based in part on the text of the second sentence of Article 4.2(b) of the *Safeguards Agreement*, which is absent from Paragraph 16 of the Protocol.

[536] China's First Written Submission, para. 386. The reactions of the United States to this line of argument by China are included in Part C, on causation.

[537] Appellate Body Report, *US – Line Pipe*, para. 233.

[538] An exception is made in cases where the safeguard measure takes the form of a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. This exception has no bearing on the present case.

[539] Appellate Body Report, *US – Line Pipe*, para. 236.

7.393 Thus, the Appellate Body considers that a non-attribution analysis under Article 4.2(b), second sentence, of the *Safeguards Agreement* will provide a "benchmark" (of injury attributed to the relevant imports), against which the permissible extent of the safeguard measure may be measured. Indeed, the Appellate Body went on to find that a violation of the obligation to perform a non-attribution analysis under Article 4.2(b), second sentence, was sufficient to establish a prima facie case of violation of the Article 5.1 obligation to restrict the measure to the extent necessary to prevent or remedy serious injury caused by the increased imports at issue. This finding is the basis for China's argument that, because the USITC never determined the extent of the injury caused by the subject imports, the *Tyres* measure is necessarily excessive.

7.394 Since Paragraph 16.4 of the Protocol does not require the same type of non-attribution analysis as that required by the second sentence of Article 4.2(b) of the *Safeguards Agreement*[540], the reasoning of the Appellate Body in *US – Line Pipe* is not applicable. Although we consider that increasing imports should be viewed "in the context of" other factors, to ensure a proper finding of causation, there is no obligation to separate and distinguish the injurious effects of factors other than increased imports from those caused by increased imports (as required by the second sentence of Article 4.2(b) of the *Safeguards Agreement*).[541] Since there is no "full-blown" non-attribution analysis under the Protocol, there is no benchmark against which to measure the scope of the remedy. Nor is there any basis for finding that a failure to separate and distinguish the injurious effects of rapidly increasing imports from the injurious effects of other causal factors establishes prima facie that the remedy is excessive. Instead, China must itself demonstrate that the scope of the measure is excessive.

7.395 While the lack of a benchmark creates difficulties in any challenge of the measure, nevertheless, the burden is on China to establish prima facie that the scope of the measure is excessive. But the burden is not impossible. For example, China might have challenged the accuracy of the analysis set forth in Exhibit US-20 which shows that the *Tyres* measure was based on an objective assessment of the impact of the measure over the first year, and that the impact of the measure would have addressed the volume and price effects of the subject imports. China has not challenged the accuracy of any of that analysis. Nor did China provide any type of assessment of what the maximum permissible extent of the measure should have been (i.e., in relation to the amount of injury caused by increased imports), and has therefore failed to provide any benchmark by which to conclude that the extent of the *Tyres* measure is excessive.

7.396 The only additional argument by China concerns the fact that the measure was focused on improving the condition of the domestic industry generally, rather than on the specific harm caused by subject imports. China alleges that the United States essentially assumed that the increasing imports from China were entirely responsible for the deteriorating condition of the domestic industry. China refers in this regard to the following reasoning by the USITC:

> We believe that the tariffs will significantly reduce subject imports and boost U.S. industry sales and prices, resulting in increasing profitability. This profitability will lead to the preservation of jobs and the creation of new ones, as well as encourage investment.[542]

[540] *See* para. 7.176 above.

[541] We note that China agrees that non-attribution under the Protocol does not require a precise quantification of the injury caused by the various injurious factors (*See* China's Reply to Question 17(b) from the Panel, para. 71).

[542] USITC Report, page 30.

> This increase in the tariff would significantly improve the competitive position of the domestic industry, increasing domestic production, shipments, and employment and restoring the domestic industry to at least a modest level of profitability. The increase should accomplish this by reducing the quantity of subject imports and raising their price in the U.S. market.[543]

7.397 However the Panel is not convinced that this demonstrates that the measure is excessive. First, a measure is not necessarily excessive simply because it seeks to improve the condition of the industry. To the extent that the condition of the industry deteriorated as a result of increased imports, a measure designed to improve the condition of the industry does address the injurious effects of the increased imports. While there is no guarantee that a measure imposed on this basis will not be excessive, there is similarly no certainty that a measure imposed on this basis will necessarily be excessive.

7.398 Second, since the USITC found that the domestic industry suffered market disruption as a result of rapidly increasing subject imports that were underselling domestic production, a measure that is aimed at "reducing the quantity of subject imports and raising their price in the U.S. market" can be justified. The Panel notes, however, that it does allow for the possibility of the expansion of non-subject imports rather than the improvement of the condition of the domestic industry, and observes that is a consequence of a country-specific safeguard and not a defect of the remedy in this case.

7.399 For these reasons, we find that China has failed to establish prima facie that the *Tyres* measure exceeds "the extent necessary to prevent or remedy" the market disruption caused by rapidly increasing subject imports, contrary to Paragraph 16.3 of the Protocol.

F. WHETHER THE DURATION OF THE REMEDY EXCEEDED THE PERIOD OF TIME NECESSARY TO PREVENT OR REMEDY MARKET DISRUPTION

7.400 China claims that the three-year duration of the remedy exceeds the period of time necessary to prevent or remedy the market disruption, contrary to Paragraph 16.6 of the Protocol. The first sentence of Paragraph 16.6 provides:

> A WTO Member shall apply a measure pursuant to this Section only for such period of time as may be necessary to prevent or remedy the market disruption.

7.401 The United States denies China's claim.

1. Arguments of the parties

(a) China

7.402 China claims that the decision by the United States to impose a remedy for three years is inconsistent with Paragraph 16.6 of the Protocol, which provides that a remedy may be imposed "only for such period of time as may be necessary to prevent or remedy the market disruption". China asserts that this obligation limits the duration of any such safeguard measures to "such" market disruption, which is limited to that disruption properly attributed to rapidly increasing imports from China. In particular, China asserts that the ordinary meaning of the terms "only" and "necessary" in Paragraph 16.6 makes it clear that a remedy measure can be in place only for the exact amount of time that is necessary to address and remedy the "market disruption" caused by the rapidly increasing imports. China further contends that the term "necessary" adds an additional meaning, in the sense

[543] USITC Report, page 35.

that the use of this term confirms that a remedy measure cannot simply be tangentially useful or helpful, but must rather be essential and indispensable to prevent or remedy the market disruption that has been significantly caused by the rapidly increasing imports from China. According to China, the ordinary meaning of Paragraph 16.6 will not permit a remedy measure that lasts longer than necessary, or one that is not precise in addressing the market disruption that has been properly justified as having been caused by rapidly increasing imports from China. China also refers to the context of Paragraph 16, and the object and purpose thereof, in support. In particular, China contends that the *Safeguards Agreement*, the *AD Agreement* and the *SCM Agreement* all contain durational limitations, indicating that any remedy must be "narrowly tailored in terms of duration".[544]

7.403 China notes the discussion of the majority of the USITC regarding the duration of the remedy:

> We recommend that the remedy remain in place for a three-year period because we believe that a remedy of such duration is needed to give firms and workers in the industry time to identify and implement needed adjustments to import competition. Although domestic producers did not identify any specific planned adjustments in their questionnaire responses, other information in the record indicates that domestic producers have put plant and equipment upgrades on hold pending more favourable market opportunities. Moreover, we anticipate that the relief may encourage certain domestic producers to reconsider plant closures.[545]

7.404 According to China, this rationale says nothing about why tariffs need to last for three years to address the specific market disruption that had been found – the market disruption that the USITC allegedly linked to imports from China that were "increasing rapidly", and that were the "significant cause" of injury to the domestic industry (rather than injury caused by "import competition" more generally). China understands the USITC's logic to be that because imports from China could be blamed for certain problems, and since the domestic industry would benefit from three years, the remedy should last for three years. But China contends that, under Paragraph 16.6 of the Protocol, whether the domestic industry would benefit from a three-year remedy is irrelevant, since this provision only allows a remedy to last for the period of time needed to address the specific market disruption at issue.

7.405 China also asserts that the USITC's rationale is defective because the USITC failed to give any significant weight to what U.S. producers themselves were saying, and the fact that the domestic producers had not provided specific restructuring plans, even though the USITC asked them to do so.[546] Instead, the USITC opined, that "the relief *may* encourage certain domestic producers to reconsider planned plant closures".[547] China contends that such "speculation" is inadequate, since it fails to demonstrate that the three-year remedy measures imposed are necessary to remedy the market disruption (and why this three-year duration is needed to prompt producers to "reconsider" closure decisions). China asserts that the President also imposed a remedy for three years without any regard to the specific market disruption "significantly caused" by rapidly increasing imports.

[544] China's First Written Submission, para. 401.
[545] USITC Report, page 36.
[546] USITC Report, page VI-1, Table VI-2. China asserts that the public version of the determination does not provide any details, but does confirm the question was asked. China notes that the USITC majority then confirms in its commentary that no specific adjustment plans were presented.
[547] USITC Report, page 36 (emphasis added).

(b) United States

7.406 The United States does not dispute China's arguments regarding the ordinary meaning of Paragraph 16.6 of the Protocol. However, the United States rejects China's argument that the duration requirements in the *Safeguards Agreement*, the *AD Agreement*, and the *SCM Agreement* demonstrate that "any remedy imposed must be narrowly tailored in terms of duration".[548] The United States notes in this regard that the *AD Agreement* and the *SCM Agreement* allow the imposition of relief as long as the injurious dumping or subsidization continues.

7.407 Regarding China's argument that a remedy measure may remain in place "only for the exact amount of time" or "for that period of time specifically found" to address the market disruption[549], the United States submits that such level of exactitude is neither required nor possible. The United States asserts that authorities cannot know at the time of taking a measure the "exact amount of time" it will be necessary. According to the United States, this is why paragraph 246(f) of the Working Party Report explicitly allowed authorities to extend a measure based on a finding that "action continued to be necessary to prevent or remedy market disruption".

7.408 The United States submits that China also fails to give appropriate weight to the remaining elements of Paragraph 16.6, which allow China to suspend concessions substantially equivalent to any safeguard measure two years after its application if there was a relative increase in imports and three years after application if there was an absolute increase. According to the United States, these elements indicate that the negotiators of the Protocol envisaged safeguard measures remaining in place for at least three years if there was an absolute increase in Chinese imports, as was the case with regard to tyres, or even longer in the case of an extension under paragraph 246(f) of the Working Party Report. The United States notes China's reference to these provisions as "rights that China has under certain circumstances"[550], but contends that they maintain their utility as context for the first sentence of Paragraph 16.6 or as an indication of the expectations of the negotiators of the Protocol.

7.409 Regarding China's argument that the USITC's rationale "focuses entirely on the condition of the domestic industry and the time it needs to adjust", the United States recalls its argument (see preceding section) that the effect of the remedy on the domestic industry is not merely relevant, but critical, in understanding whether it is "necessary to prevent or remedy market disruption".

7.410 Regarding China's argument that the USITC did not give sufficient weight to the views of domestic producers who "had not provided specific restructuring plans"[551], the United States refers to its earlier arguments (see preceding section) to the effect that the USITC weighed all of the evidence before it, and considered that the evidence favouring its remedy outweighed the evidence cited by China against the remedy.

7.411 Regarding China's argument that the USITC relied on "speculation" based on a quotation of part of one sentence stating that "we anticipate that the relief may encourage certain domestic producers to reconsider planned plant closures"[552], the United States contends that China draws the wrong conclusion. The United States notes that, in the preceding paragraph, the USITC explained that it provided for progressive reduction of the level of the relief because "[w]e also expect the level of tariff protection that is necessary to offset market disruption to decrease as new investments and

[548] China's First Written Submission, para. 401.
[549] China's First Written Submission, paras. 397 and 405.
[550] China's First Written Submission, para. 399.
[551] China's First Written Submission, para. 414.
[552] China's First Written Submission, quoting USITC Report, page 36.

other adjustments are implemented".[553] According to the United States, the subsequent statement that the industry "may reconsider" plant closures reflects only the understanding that there are many "investments" or other "adjustments" the industry might take, and that it was impossible to know with certainty at the time of its determinations which ones the prevailing business climate would allow.

2. Evaluation by the Panel

7.412 As a preliminary matter, we note China's argument that the United States was not permitted to impose any transitional safeguard measure of any duration as the substantive requirements of the Protocol had not been met. This argument is tied to the China's claims under Paragraphs 16.1 and 16.4 of the Protocol, which we address in the preceding Sections of this Report. The present Section focuses on China's arguments regarding the consistency of the remedy imposed by the United States with Paragraph 16.6 of the Protocol.

7.413 The core of China's claim under Paragraph 16.6 is based on the same arguments that China advanced under Paragraph 16.3. As China itself explains:

> The arguments presented above regarding Article 16.3 are also applicable as regards the U.S. failure to comply with Article 16.6. Similar to the requirements of Article 16.3, Article 16.6 of the Protocol limits a remedy to "only for such period of time as may be necessary…." The USITC's failure to determine – either quantitatively or qualitatively – what effect subject imports were allegedly having on the domestic industry makes it virtually impossible for a remedy to comply with Article 16.6's requirement. Without knowing the effect that must be prevented or remedied, it is impossible to know for how long a remedy needs to be imposed.[554]

7.414 We recall that there was no obligation on the United States to explain why a three-year measure was needed to prevent or remedy the market disruption caused by subject imports.[555] We further recall that there was also no obligation on the United States to quantify the injury caused by increasing imports, or separate and distinguish that injury from injury caused by other factors. Accordingly, it is not enough for China to simply "demonstrate[e] that the USITC failed to ascertain the amount of the alleged effect of subject imports on the domestic industry".[556] Instead, the onus is on China to establish prima facie that a three-year measure was excessive. China has failed to meet this burden.

7.415 For these reasons, we find that China has failed to establish prima facie that the *Tyres* measure exceeds the period of time necessary to prevent or remedy the market disruption, contrary to Paragraph 16.6 of the Protocol.

G. WHETHER THE U.S. *TYRES* MEASURE IS INCONSISTENT WITH ARTICLES I:1 AND II:1(B) OF THE GATT 1994

7.416 China claims that the imposition of additional (transitional safeguard) duties on imports of subject tyres from China is inconsistent with Article I.1 of the GATT 1994, whereby:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments

[553] USITC Report, pages 35-36.
[554] China's Second Written Submission, para. 361.
[555] *See* para. 7.20 above.
[556] China's Second Written Submission, para. 362.

> for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

7.417 China also claims that the imposition of the additional (transitional safeguard) duties on imports of subject tyres from China is inconsistent with Article II.1(b) of the GATT 1994, whereby:

> The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

7.418 China's GATT 1994 claims are entirely dependent on its claims under Paragraph 16 of the Protocol.[557] Since we have not accepted China's claims under Paragraph 16 of the Protocol, we similarly do not accept China's claims under Articles I:1 and II:1 of the GATT 1994.

VIII. CONCLUSION

8.1 For the reasons set forth above, we find that in imposing the transitional safeguards measure on 26 September 2009 in respect of imports of subject tyres from China, the United States did not fail to comply with its obligations under Paragraph 16 of the Protocol and Articles I:1 and II:1 of the GATT 1994.

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[557] The dependent nature of China's GATT 1994 claims is shown by China's argument that there is "also" a GATT 1994 violation because of the additional duties "not having been justified as emergency action under relevant WTO rules" (*See* China's First Written Submission, paras. 417 and 421).

Report of the Appellate Body, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 22 October 1999

WORLD TRADE ORGANIZATION

WT/DS34/AB/R
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TURKEY – RESTRICTIONS ON IMPORTS OF TEXTILE AND CLOTHING PRODUCTS

AB-1999-5

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Turkey – Restrictions on Imports of Textile and Clothing Products

Turkey, *Appellant*
India, *Appellee*

Hong Kong, China; Japan; and the Philippines,
Third Participants

AB-1999-5

Present:

Beeby, Presiding Member
Bacchus, Member
El-Naggar, Member

I. Introduction

1. Turkey appeals from certain issues of law and legal interpretations in the Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* (the "Panel Report").[1] The Panel was established to consider a complaint by India regarding quantitative restrictions introduced by Turkey on imports of Indian textile and clothing products.

2. On 6 March 1995, the Turkey-EC Association Council adopted Decision 1/95[2], which sets out the rules for implementing the final phase of the customs union between Turkey and the European Communities. Article 12(2) of this Decision states:

> In conformity with the requirements of Article XXIV of the GATT Turkey will apply as from the entry into force of this Decision, substantially the same commercial policy as the Community in the textile sector including the agreements or arrangements on trade in textile and clothing.

In order to apply what it considered to be "substantially the same commercial policy" as the European Communities on trade in textiles and clothing, Turkey introduced, as of 1 January 1996, quantitative restrictions on imports from India on 19 categories of textile and clothing products.[3]

[1]WT/DS34/R, 31 May 1999.

[2]Reproduced in WT/REG22/1.

[3]For a further discussion of the underlying facts and a more detailed description of the products involved in this case, see the Panel Report, paras. 2.2-2.46 and 4.1-4.3, and the Annex to the Report.

3. The Panel considered claims by India that the quantitative restrictions introduced by Turkey were inconsistent with Articles XI and XIII of the GATT 1994, and Article 2.4 of the Agreement on Textiles and Clothing (the "*ATC*"). In the Panel Report, circulated on 31 May 1999, the Panel reached the conclusion that the quantitative restrictions were inconsistent with the provisions of Articles XI and XIII of the GATT 1994 and consequently with those of Article 2.4 of the *ATC*, and rejected Turkey's defence that the introduction of any such otherwise GATT/WTO incompatible import restrictions is permitted by Article XXIV of the GATT 1994.[4]

4. On 26 July 1999, Turkey notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 5 August 1999, Turkey filed its appellant's submission.[5] On 20 August 1999, India filed an appellee's submission.[6] On the same day, Hong Kong, China; Japan; and the Philippines filed third participant's submissions.[7]

5. The oral hearing in the appeal was held on 14 September 1999. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

II. Arguments of the Participants

A. *Claims of Error by Turkey – Appellant*

6. Turkey appeals the Panel's finding that Article XXIV of the GATT 1994 does not allow it to introduce, upon the formation of its customs union with the European Communities, quantitative restrictions on textile and clothing products which are inconsistent with Articles XI and XIII of the GATT 1994 and Article 2.4 of the *ATC*.

7. Turkey argues that the Panel erred in presuming the existence of a conflict between, on the one hand, Articles XI and XIII of the GATT 1994 and Article 2.4 of the *ATC*, and, on the other, Article XXIV of the GATT 1994. The Panel's reasoning was based on the incorrect presumption that the quantitative restrictions introduced by Turkey in the framework of its customs union with the European Communities were incompatible with Turkey's WTO obligations.

8. According to Turkey, Article XXIV permits the common regulation of commerce of a customs union in a particular sector to be determined by one of the constituent members' lawful quantitative restrictions in that sector, provided that unified regulations are not on the whole more restrictive than the previous regulations of the constituent members.

9. Turkey further contends that Article XXIV is different from exceptions such as Articles XX and XXI of the GATT 1994. The right under Article XXIV to establish a customs union is an autonomous right; it is not an "exception" from other GATT obligations.

10. Turkey argues that the Panel ignored the proper relationship between Article XXIV and the general obligations under the GATT 1994. The Panel did not properly interpret the ordinary meaning of the text of Article XXIV, and, in particular, the chapeau of paragraph 5 of that Article. The ordinary meaning of the chapeau of paragraph 5 demonstrates that Article XXIV confers on WTO

[4]Panel Report, para. 10.1.

[5]Pursuant to Rule 21(1) of the *Working Procedures*.

[6]Pursuant to Rule 22(1) of the *Working Procedures*.

[7]Pursuant to Rule 24 of the *Working Procedures*.

Members a right to enter into a customs union, and to derogate, under certain conditions, from their GATT obligations, including, but not limited to, their obligations under Article I.

11. In Turkey's view, other provisions in Article XXIV confirm that forming a customs union or free-trade area is a right of WTO Members. The provisions of Articles XXIV:6, XXIV:7, XXIV:8 and XXIV:9 establish requirements for implementation of a customs union, but do not prohibit its ultimate formation, thereby supporting the proposition that Members have a right to form a customs union under Article XXIV.

12. Turkey argues that there is no textual support for the Panel's conclusion that Article XXIV permits derogations from Article I, but not from other GATT provisions. The chapeau of Article XXIV:5 states that "the provisions of this Agreement" shall not prevent the formation of a customs union, thereby covering all provisions of the GATT 1994, not just Article I.

13. Turkey claims that the Panel's conclusion that Article XXIV:5(a) "does not authorize Members forming a customs union to deviate from the prohibitions contained in Articles XI and XIII of GATT or Article 2.4 of the ATC"[8] was based on a number of legal errors. First, Turkey argues that the Panel misinterpreted the ordinary meaning of Article XXIV:5(a). Specifically, Turkey argues that the Panel ignored the chapeau to Article XXIV:5. The chapeau clearly states that no GATT 1994 provision shall "prevent" the formation of a customs union as long as certain conditions set out in sub-paragraph 5(a) are satisfied. The Panel ignored the chapeau, and, as a result, came to the erroneous conclusion that Article XXIV:5(a) does not "authorize or prohibit" the use of quantitative restrictions upon the formation of a customs union.

14. Second, Turkey argues that the Panel's reading of Article XXIV:5(a) must fail because it renders the provision a "nullity". The "economic test" established by sub-paragraph 5(a) applies to the duties and regulations of commerce of the customs union as a whole, not, as stated by the Panel, to the duties and regulations of the particular customs union members. Under the Panel's interpretation, the introduction of an otherwise inconsistent measure could disqualify the customs union even though trade flows were, on the whole, facilitated.

15. Third, Turkey argues that the Panel's analysis of "the immediate context" of Article XXIV:5(a) does not support its interpretation of that provision. The Panel failed to include the chapeau of Article XXIV:5(a) in its analysis of the context. Furthermore, the Panel misinterpreted the context of Article XXIV:5(a), in particular, Articles XXIV:5(b), XXIV:4, XXIV:6, and the location of Article XXIV in Part III of the GATT 1994.

16. Turkey also claims that the Panel failed to interpret properly the ordinary meaning of Article XXIV:8(a). The Panel erred by failing to examine the entire context of Article XXIV:8(a), and, therefore, overlooked the interdependent nature of sub-paragraphs 8(a)(i) and 8(a)(ii), and their relationship in the broader context of Article XXIV.

17. Turkey submits that if it is not allowed to impose quantitative restrictions on the textile and clothing products at issue in this case, the European Communities will exclude 40 per cent of Turkey's exports from the customs union between Turkey and the European Communities, thereby leading to an inconsistency with Article XXIV:8(a)(i). Turkey will thus be exposed to a challenge that the proposed customs union does not cover "substantially all trade" and, therefore, is not consistent with Article XXIV.

18. Turkey notes that the Panel stated that Turkey had several alternatives to the imposition of quantitative restrictions: increased tariffs, rules of origin, early phase-out, and tariffication. Each of these suggestions is flawed, and, moreover, Turkey fails to see how the Panel could conclude that Turkey had a duty to opt for one of these alternatives as long as the measures challenged by India did

[8]Panel Report, para. 9.134.

not result in the common regulation of commerce of the Turkey/EC customs union being on the whole more restrictive than the regulations of Turkey and the European Communities before the formation of the customs union.

19. Turkey also argues that the wider context of Articles XXIV:5 and XXIV:8 and the object and purpose of the *WTO Agreement* do not support the Panel's interpretation. Article XXIV:4, the Preamble of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* (the "*Understanding on Article XXIV*") and the Singapore Ministerial Declaration do not support a conclusion that the introduction of quantitative restrictions as part of the formation of a customs union is prohibited by Article XXIV.

20. Finally, Turkey argues that the Panel drew the wrong conclusion from past GATT/WTO practice. The Panel concluded from its review of GATT/WTO practice that there is no agreement or acceptance that Article XXIV *authorized or required* the introduction of otherwise GATT/WTO inconsistent measures upon the formation of a customs union. The Panel erred, however, by not reviewing whether GATT/WTO practice *prohibited* the introduction of such measures. Turkey recalls, for example, that during the accession of Sweden to the European Communities, Sweden adopted quantitative restrictions similar to those challenged in this case. In that case, no GATT Contracting Party challenged those measures under Articles XXII or XXIII of the GATT.

B. *Arguments of India - Appellee*

21. India argues that the Panel's ruling that Article XXIV does not authorize the introduction of quantitative restrictions in this case is compelled by the recognized principles of interpretation set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. The terms of Article XXIV:5 exempt from the other obligations of the GATT 1994 only those measures that are "inherent" in the formation of a customs union. For example, in order to form a customs union, preferential treatment inconsistent with Article I of the GATT 1994 must be granted. By contrast, customs unions can be formed without the introduction of new quantitative restrictions on imports that are inconsistent with Article XI of the GATT 1994.

22. India argues that the context of Article XXIV:5 confirms this interpretation. Article XXIV:4 explains why customs unions are permitted and which purposes they are to serve. Based on the context provided by Article XXIV:4, Article XXIV:5 cannot be interpreted to provide a justification for measures raising barriers to the trade of other WTO Members. Furthermore, the existence in Article XXIV:6 of a mechanism for compensation in the case of increases in tariff duties, without a corresponding provision for compensation for the introduction of new quantitative restrictions, makes clear that Article XXIV was not meant to authorize the imposition of quantitative restrictions.

23. Examining the object and purpose of the *WTO Agreement*, India notes Turkey's argument that the requirements of Article XXIV:5 and Article XXIV:8 apply to the import regimes of the WTO Members forming the customs union taken as a whole, not to individual measures. As there is, however, no mechanism for providing compensation for the introduction of new quantitative restrictions, acceptance of Turkey's argument would induce Members forming a customs union to replace the protection afforded by their tariffs with new quantitative restrictions. This result contradicts the object and purpose of the drafters, who established a strong prohibition on the use of quantitative restrictions.

24. With respect to Turkey's general claims of legal error, India argues that the Panel did not presume a conflict between the provisions of Article XXIV and the provisions of Articles XI and XIII of the GATT 1994 and Article 2.4 of the *ATC*. The Panel made no such presumption, and simply addressed the question whether there was a need to examine the consistency of the customs union with Article XXIV. Furthermore, in contrast to what Turkey argues, the Panel never stated that Article XXIV was an exception to GATT obligations. The Panel simply noted that Turkey made an "affirmative defence" based on Article XXIV.

25. Next, India responds to Turkey's statement that Article XXIV:5 permits the formation of a customs union as long as the economic assessment in sub-paragraph 5(a) is fulfilled. Article XXIV defines the purposes for which a WTO Member can deviate from other GATT provisions, but does not define the provisions themselves. Only those provisions of the GATT 1994 that "prevent" the formation of a customs union may provide the basis for a defense under Article XXIV. Under the terms of Article XXIV:5, the formation of a customs union is not "prevented" by the obligations set out in Article XI of the GATT 1994 and Article 2.4 of the *ATC*. The formation of a customs union is only "prevented" by those provisions of the GATT 1994 that prohibit discrimination, such as Article I of the GATT 1994 and other most-favoured-nation provisions, because discrimination is inherent in regional integration.

26. India also claims that, contrary to Turkey's argument, the Panel did not rule that Article XXIV justifies only deviations from Article I, and that Article XXIV consequently applied only to tariffs. In fact, the Panel made clear that Article XXIV could permit Members to refrain from applying quantitative restrictions, as well as tariffs, to their partner in the customs union.

27. Finally, according to India, Turkey is unable to explain why the mere fact that a type of measure is regulated in Part III of the GATT 1994 demonstrates that the other Parts of the GATT 1994 no longer apply. Turkey's arguments fail to take into account the reason why the drafters divided the GATT into three parts.

28. With respect to Turkey's specific claims of legal error, India responds to Turkey's objection that the Panel failed to consider the chapeau of Article XXIV:5 in its examination of Article XXIV:5(a) by arguing that the Panel in fact conducted a thorough textual and contextual analysis. In response to Turkey's claim that the Panel's interpretation renders Article XXIV:5(a) a nullity, India argues that Article XXIV:5(a) establishes a requirement that Members forming a customs union must meet in addition to their other market access obligations. This additional requirement has not been reduced to inutility by the Panel's interpretation. Members forming a customs union may not have bound all their tariffs or may apply their tariffs at levels below the bound rate, or they may have the right to impose quantitative restrictions consistently with one of the exceptions to Article XI of the GATT 1994. In these circumstances, the Members could exercise their right to increase barriers to trade, but only under the conditions set out in Article XXIV:5(a).

29. India also submits that, in contrast to Turkey's claims, the immediate context of Article XXIV:5(a) supports the Panel's interpretation that that provision does not authorize the introduction of quantitative restrictions. In particular, the text of Article XXIV:5(b), Article XXIV:4, and Article XXIV:6, as well as the placement of Article XXIV in Part III of the GATT 1994, all support the Panel's interpretation. India also argues that, contrary to Turkey's claims, the wider context of Articles XXIV:5 and XXIV:8 and the object and purpose of the *WTO Agreement* support the Panel's interpretation of these provisions.

30. Furthermore, India contends that Turkey's claim that the Panel did not properly interpret the ordinary meaning of Article XXIV:8(a) is incorrect. The Panel found that Article XXIV:8(a)(ii) does not provide authorization for Members forming a customs union to violate the prescriptions of Articles XI and XIII of the GATT 1994 or Article 2.4 of the *ATC*. Turkey objects to this interpretation on the ground that it curtails the right of Members with different trade regimes to form a customs union. Turkey fails to take into account that the right to form a customs union is not absolute. Moreover, the Panel's interpretation does not prevent Turkey from forming a customs union with the European Communities, even though it might affect the nature and timing of the formation.

31. Finally, according to India, the Panel drew the correct conclusions from GATT/WTO practice on this issue. The situation here is different from the case involving Sweden's adoption of quantitative restrictions on the occasion of its accession to the European Union, as Turkey did not accede to the European Union. The measures at issue here are simply quantitative restrictions

adopted by Turkey in the context of an agreement establishing a customs union with the European Communities.

32. In addition to responding to Turkey's general and specific claims of legal error, India makes a number of general observations. First, the argument that Article XXIV of the GATT 1994 can provide a justification for quantitative restrictions has never been accepted under the GATT 1947. Second, the agreement establishing a customs union between Turkey and the European Communities was drafted on the assumption that Article XXIV does not justify the introduction of new quantitative restrictions on imports of textile and clothing products. This agreement explicitly recognized the possibility that Turkey would not be able to impose quantitative restrictions and that, therefore, a system of certificates of origin would continue to be applied on these products. Third, the agreement between Turkey and the European Communities provides for the formation of a customs union only at a future date, and therefore constitutes, at most, an interim agreement for the formation of a customs union. To realize the objectives of this interim agreement, Turkey did not have to impose the same restrictions on imports of textiles and clothing as imposed by the European Communities.

III. Arguments of Third Participants

A. *Hong Kong, China*

33. Hong Kong, China argues that Article XXIV is best characterized as a specific provision of the GATT 1994 under which WTO Members are permitted, subject to compliance with certain conditions, to form customs unions or free trade areas that may depart from certain other provisions of the *WTO Agreement*.

34. In interpreting Article XXIV:5, Hong Kong, China notes that it is important to examine the context provided by Article XXIV:4. This paragraph states that the purpose of a customs union or free-trade area is "not to raise barriers to the trade of other contracting parties with such territories." Similarly, the *Understanding on Article XXIV* states that parties to regional trade agreements "should to the greatest possible extent avoid creating adverse effects on the trade of other Members."[9] It would be contrary to the stated purpose of regional agreements set out in Article XXIV:4 to interpret the chapeau to Article XXIV:5 to permit the raising of barriers to trade in violation of Articles XI and XIII of the GATT 1994.

35. Hong Kong, China also states that, under Article XXIV:8(a), a customs union need not result in a total alignment of the external trade regimes of the constituent territories. Furthermore, Turkey's claims about past GATT/WTO practice on this issue are inapposite. In particular, the circumstances in which Sweden introduced discriminatory quantitative restrictions on imports of textile and clothing products were completely different from those in the present case.

B. *Japan*

36. Japan states that a basic tenet of the *WTO Agreement* is the primacy of the multilateral trading system based on the core principle of the elimination of discriminatory treatment in international trade relations. Members must observe this principle whenever they exercise their rights and obligations under the *WTO Agreement*, including when they enter into regional trade agreements under

[9]Understanding on Article XXIV, Preamble.

Article XXIV of the GATT 1994. Regional trade agreements are only allowed if they are complementary to the multilateral trading system and if they comply with the rules set out in Article XXIV of the GATT 1994.

37. Japan does not believe that Article XXIV functions as a "waiver" which allows derogation from the basic tenets of the multilateral trading system. Furthermore, it should not be interpreted as a waiver of the obligation to eliminate quantitative restrictions, which is a central pillar of the WTO system. Hence, Japan disagrees that Article XXIV gives WTO Members the right to introduce quantitative restrictions in contravention of the *WTO Agreement* on the occasion of the formation of a customs union.

C. *The Philippines*

38. The Philippines first notes that Turkey's invocation of Article XXIV is an affirmative defence to its acknowledged violation of Articles XI and XIII of the GATT 1994 and Article 2.4 of the *ATC*.

39. The Philippines then argues that Turkey's quantitative restrictions are not justified by Article XXIV. First, the quantitative restrictions are not justified because they are on the whole more restrictive than the general incidence of regulations of commerce applicable in the constituent territories prior to the formation of the customs union, in contravention of Article XXIV:5(a). Second, the quantitative restrictions violate Article XXIV:4 because Turkey (and the European Communities) did not avoid creating adverse effects on the trade of other Members to the greatest possible extent. Third, the chapeau of Article XXIV:5 applies solely to the provisions of the GATT 1994 that, if enforced, would prohibit the formation of a customs union. It does not exempt Members from complying with other obligations under the *WTO Agreement*. Fourth, the grounds upon which measures are permitted under Articles XI, XII, XIII, XIV, XV and XX are, by their nature, specific to the Member concerned and, accordingly, cannot be grandfathered.

40. The Philippines also argues that, in any case, Turkey and the European Communities have not formed a customs union. The arrangement between Turkey and the European Communities does not qualify as a customs union under Article XXIV:8 because, *inter alia*, all restrictive regulations of commerce have not been eliminated with respect to substantially all trade between Turkey and the European Communities. In addition, Turkey and the European Communities do not apply substantially the same duties and regulations of commerce to the trade with Members not included in the customs union.

IV. Issue Raised in this Appeal

41. This appeal relates to certain quantitative restrictions imposed by Turkey on 19 categories of textile and clothing products imported from India. Turkey adopted these quantitative restrictions upon the formation of a customs union with the European Communities. The Panel found these quantitative restrictions to be inconsistent with Articles XI and XIII of the GATT 1994 and Article 2.4 of the *ATC*.[10] The issue raised by Turkey in this appeal is whether these quantitative restrictions are nevertheless justified by Article XXIV of the GATT 1994.

V. Article XXIV of the GATT 1994

42. In examining Turkey's defence that Article XXIV of the GATT 1994 allowed Turkey to adopt the quantitative restrictions at issue in this appeal, the Panel looked, first, at Article XXIV:5(a) and, then, at Article XXIV:8(a) of the GATT 1994. The Panel examined the ordinary meaning of the terms of these provisions, in their context and in the light of the object and purpose of the *WTO Agreement*. The Panel reached the following conclusions:

> With regard to the specific relationship between, in the case before us, Article XXIV and Articles XI and XIII (and Article 2.4 of the ATC), we consider that the wording of Article XXIV does not authorize a departure from the obligations contained in Articles XI and XIII of GATT and Article 2.4 of the ATC.
>
> …
>
> [Paragraphs 5 and 8 of Article XXIV] do not … address any specific measures that may or may not be adopted on the formation of a customs union and importantly they do not authorize violations of Articles XI and XIII, and Article 2.4 of the ATC. … We draw the conclusion that even on the occasion of the formation of a customs union, Members cannot impose otherwise incompatible quantitative restrictions.[11]

Consequently, the Panel rejected Turkey's defence that Article XXIV justifies the introduction of the quantitative restrictions at issue. Turkey appeals the Panel's interpretation of Article XXIV.

43. We note that, in its findings, the Panel referred to the chapeau of paragraph 5 of Article XXIV only in a passing and perfunctory way. The chapeau of paragraph 5 is not central to the Panel's analysis, which focuses instead primarily on paragraph 5(a) and paragraph 8(a). However, we believe that the chapeau of paragraph 5 of Article XXIV is the key provision for resolving the issue before us in this appeal. In relevant part, it reads:

> Accordingly, the provisions of this Agreement *shall not prevent*, as between the territories of contracting parties, *the formation of a customs union* …; *Provided* that: … (emphasis added)

44. To determine the meaning and significance of the chapeau of paragraph 5, we must look at the text of the chapeau, and its context, which, for our purposes here, we consider to be paragraph 4 of Article XXIV.

45. First, in examining the text of the chapeau to establish its ordinary meaning, we note that the chapeau states that the provisions of the GATT 1994 "*shall not prevent*" the formation of a customs

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[10]Panel Report, para. 9.86.

[11]*Ibid.*, paras. 9.188 and 9.189.

union. We read this to mean that the provisions of the GATT 1994 *shall not make impossible* the formation of a customs union.[12] Thus, the chapeau makes it clear that Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible "defence" to a finding of inconsistency.[13]

46. Second, in examining the text of the chapeau, we observe also that it states that the provisions of the GATT 1994 shall not prevent "*the formation of a customs union*". This wording indicates that Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.

47. It follows necessarily that the text of the chapeau of paragraph 5 of Article XXIV cannot be interpreted without reference to the definition of a "customs union". This definition is found in paragraph 8(a) of Article XXIV, which states, in relevant part:

[12]"Prevent" is defined as "make impracticable or impossible by anticipatory action; stop from happening." *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), Vol. II, at 2348.

[13]We note that legal scholars have long considered Article XXIV to be an "exception" or a possible "defence" to claims of violation of GATT provisions. An early treatise on GATT law stated: "[Article XXIV] establishes an *exception to GATT obligations* for regional arrangements that meet a series of detailed and complex criteria." (emphasis added) J. Jackson, *World Trade and the Law of GATT* (The Bobbs-Merrill Company, 1969), p. 576. See also J. Allen, *The European Common Market and the GATT* (The University Press of Washington, D.C., 1960), p. 2; K. Dam, "Regional Economic Arrangements and the GATT: The Legacy of Misconception", *University of Chicago Law Review*, 1963, p. 616; and J. Huber, "The Practice of GATT in Examining Regional Arrangements under Article XXIV", *Journal of Common Market Studies*, 1981, p. 281. We note also the following statement in the unadopted panel report in *EEC – Member States' Import Regimes for Bananas*, DS32/R, 3 June 1993, para. 358: "The Panel noted that Article XXIV:5 to 8 permitted the contracting parties to *deviate from their obligations under other provisions of the General Agreement* for the purpose of forming a customs union …". (emphasis added)

The chapeau of paragraph 5 refers only to the provisions of the GATT 1994. It does not refer to the provisions of the *ATC*. However, Article 2.4 of the *ATC* provides that "[n]o new restrictions … shall be introduced *except under* the provisions of this Agreement or *relevant GATT 1994 provisions*." (emphasis added) In this way, Article XXIV of the GATT 1994 is incorporated in the *ATC* and may be invoked as a defence to a claim of inconsistency with Article 2.4 of the *ATC*, provided that the conditions set forth in Article XXIV for the availability of this defence are met.

> A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
>
> (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to *substantially all the trade* between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
>
> (ii) … *substantially the same* duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union. (emphasis added)

48. Sub-paragraph 8(a)(i) of Article XXIV establishes the standard for the *internal trade* between constituent members in order to satisfy the definition of a "customs union". It requires the constituent members of a customs union to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all the trade" between them. Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term "substantially" in this provision.[14] It is clear, though, that "substantially all the trade" is not the same as *all* the trade, and also that "substantially all the trade" is something considerably more than merely *some* of the trade. We note also that the terms of sub-paragraph 8(a)(i) provide that members of a customs union may maintain, where necessary, in their internal trade, certain restrictive regulations of commerce that are otherwise permitted under Articles XI through XV and under Article XX of the GATT 1994. Thus, we agree with the Panel that the terms of sub-paragraph 8(a)(i) offer "some flexibility" to the constituent members of a customs union when liberalizing their internal trade in accordance with this sub-paragraph.[15] Yet we caution that the degree of "flexibility" that sub-paragraph 8(a)(i) allows is limited by the requirement that "duties and other restrictive regulations of commerce" be "eliminated with respect to substantially all" internal trade.

49. Sub-paragraph 8(a)(ii) establishes the standard for the trade of constituent members *with third countries* in order to satisfy the definition of a "customs union". It requires the constituent members of a customs union to apply "substantially the same" duties and other regulations of commerce to external trade with third countries. The constituent members of a customs union are thus required to apply a common external trade regime, relating to both duties and other regulations of commerce. However, sub-paragraph 8(a)(ii) does *not* require each constituent member of a customs union to apply *the same* duties and other regulations of commerce as other constituent members with respect to trade with third countries; instead, it requires that *substantially the same* duties and other regulations of commerce shall be applied. We agree with the Panel that:

> [t]he ordinary meaning of the term "substantially" in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components. The expression "substantially the same duties and other regulations of commerce are applied by each of the Members of the [customs] union" would appear to encompass both quantitative and

[14]Panel Report, para. 9.148.

[15]*Ibid.*, para. 9.146.

> qualitative elements, the quantitative aspect more emphasized in relation to duties.[16]

50. We also believe that the Panel was correct in its statement that the terms of sub-paragraph 8(a)(ii), and, in particular, the phrase "substantially the same" offer a certain degree of "flexibility" to the constituent members of a customs union in "the creation of a common commercial policy."[17] Here too we would caution that this "flexibility" is limited. It must not be forgotten that the word "substantially" qualifies the words "the same". Therefore, in our view, something closely approximating "sameness" is required by Article XXIV:8(a)(ii). We do not agree with the Panel that:

> … as a general rule, a situation where constituent members have "comparable" trade regulations having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii).[18]

Sub-paragraph 8(a)(ii) requires the constituent members of a customs union to adopt "substantially the same" trade regulations. In our view, "comparable trade regulations having similar effects" do not meet this standard. A higher degree of "sameness" is required by the terms of sub-paragraph 8(a)(ii).

51. Third, in examining the text of the chapeau of Article XXIV:5, we note that the chapeau states that the provisions of the GATT 1994 shall not prevent the formation of a customs union "*Provided that*". The phrase "*provided that*" is an essential element of the text of the chapeau. In this respect, for purposes of a "customs union", the relevant proviso is set out immediately following the chapeau, in Article XXIV:5(a). It reads in relevant part:

> with respect to a customs union …, the duties and other regulations of commerce imposed at the institution of any such union … in respect of trade with contracting parties not parties to such union … shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union …;

52. Given this proviso, Article XXIV can, in our view, only be invoked as a defence to a finding that a measure is inconsistent with certain GATT provisions to the extent that the measure is introduced upon the formation of a customs union which meets the requirement in sub-paragraph 5(a) of Article XXIV relating to the "duties and other regulations of commerce" applied by the constituent members of the customs union to trade with third countries.

53. With respect to "duties", Article XXIV:5(a) requires that the duties applied by the constituent members of the customs union *after* the formation of the customs union "shall *not* on the whole be *higher* … than the *general incidence*" of the duties that were applied by each of the constituent members before the formation of the customs union. Paragraph 2 of the *Understanding on Article XXIV* requires that the evaluation under Article XXIV:5(a) of the *general incidence of the duties* applied before and after the formation of a customs union "shall … be based upon an overall assessment of weighted average tariff rates and of customs duties collected."[19] Before the agreement on this Understanding, there were different views among the GATT Contracting Parties as to whether

[16]Panel Report, para. 9.148.

[17]*Ibid*.

[18]*Ibid*., para. 9.151.

[19]Paragraph 2 of the *Understanding on Article XXIV* further states that "this assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin."

one should consider, when applying the test of Article XXIV:5(a), the *bound* rates of duty or the *applied* rates of duty. This issue has been resolved by paragraph 2 of the *Understanding on Article XXIV*, which clearly states that the *applied* rate of duty must be used.

54. With respect to "other regulations of commerce", Article XXIV:5(a) requires that those applied by the constituent members *after* the formation of the customs union "shall *not* on the whole be … *more restrictive* than the *general incidence*" of the regulations of commerce that were applied by each of the constituent members *before* the formation of the customs union. Paragraph 2 of the *Understanding on Article XXIV* explicitly recognizes that the quantification and aggregation of regulations of commerce other than duties may be difficult, and, therefore, states that "for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required."[20]

55. We agree with the Panel that the terms of Article XXIV:5(a), as elaborated and clarified by paragraph 2 of the *Understanding on Article XXIV*, provide:

> … that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies.[21]

and we also agree that this is:

> an "economic" test for assessing whether a specific customs union is compatible with Article XXIV.[22]

56. The text of the chapeau of paragraph 5 must also be interpreted in its context. In our view, paragraph 4 of Article XXIV constitutes an important element of the context of the chapeau of paragraph 5. The chapeau of paragraph 5 of Article XXIV begins with the word "accordingly", which can only be read to refer to paragraph 4 of Article XXIV, which immediately precedes the chapeau. Paragraph 4 states:

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

57. According to paragraph 4, the purpose of a customs union is "to facilitate trade" between the constituent members and "not to raise barriers to the trade" with third countries. This objective demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should *not* do so in a way that raises barriers to trade with third countries. We note that the *Understanding on Article XXIV* explicitly reaffirms this purpose of a customs union, and states that in the formation or enlargement of a customs union, the constituent members should "to the greatest possible extent avoid creating adverse affects on the trade

[20]In paragraph 43 of its appellant's submission, Turkey argues that this provision must be interpreted as allowing the constituent members of a customs union to introduce GATT/WTO inconsistent quantitative restrictions upon the formation of the customs union. We see no basis for such an interpretation.

[21]Panel Report, para. 9.121.

[22]*Ibid.*, para. 9.120.

of other Members".[23] Paragraph 4 contains purposive, and not operative, language. It does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV. Thus, the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV, including the chapeau of paragraph 5. For this reason, the chapeau of paragraph 5, and the conditions set forth therein for establishing the availability of a defence under Article XXIV, must be interpreted in the light of the purpose of customs unions set forth in paragraph 4. The chapeau cannot be interpreted correctly without constant reference to this purpose.

58. Accordingly, on the basis of this analysis of the text and the context of the chapeau of paragraph 5 of Article XXIV, we are of the view that Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this "defence" is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV.

59. We would expect a panel, when examining such a measure, to require a party to establish that both of these conditions have been fulfilled. It may not always be possible to determine whether the second of the two conditions has been fulfilled without initially determining whether the first condition has been fulfilled. In other words, it may not always be possible to determine whether not applying a measure would prevent the formation of a customs union without first determining whether there *is* a customs union. In this case, the Panel simply assumed, for the sake of argument, that the first of these two conditions was met and focused its attention on the second condition.

60. More specifically, with respect to the first condition, the Panel, in this case, did not address the question of whether the regional trade arrangement between Turkey and the European Communities is, in fact, a "customs union" which meets the requirements of paragraphs 8(a) and 5(a) of Article XXIV. The Panel maintained that "it is arguable" that panels do not have jurisdiction to assess the overall compatibility of a customs union with the requirements of Article XXIV.[24] We are not called upon in this appeal to address this issue, but we note in this respect our ruling in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* on the jurisdiction of panels to review the justification of balance-of-payments restrictions under Article XVIII:B of the GATT 1994.[25] The Panel also considered that, on the basis of the principle of judicial economy, it was not necessary to assess the compatibility of the regional trade arrangement between Turkey and the European Communities with Article XXIV in order to address the claims of India.[26] Based on this reasoning, the Panel assumed *arguendo* that the arrangement between Turkey and the European Communities is compatible with the requirements of Article XXIV:8(a) and 5(a) and limited its examination to the question of whether Turkey was permitted to introduce the quantitative restrictions at issue.[27] The assumption by the Panel that the agreement between Turkey and the European Communities is a "customs union" within the meaning of Article XXIV was not appealed. Therefore, the issue of whether this arrangement meets the requirements of paragraphs 8(a) and 5(a) of Article XXIV is not before us.

61. With respect to the second condition that must be met to have the benefit of the defence under Article XXIV, Turkey asserts that had it not introduced the quantitative restrictions on textile and

[23] *Understanding on Article XXIV*, Preamble.

[24] Panel Report, para. 9.53.

[25] Adopted 22 September 1999, WT/DS90/AB/R, paras. 80 – 109.

[26] Panel Report, para. 9.54.

[27] *Ibid*., para. 9.55.

clothing products from India that are at issue, the European Communities would have "exclud[ed] these products from free trade within the Turkey/EC customs union".[28] According to Turkey, the European Communities would have done so in order to prevent trade diversion. Turkey's exports of these products accounted for 40 per cent of Turkey's total exports to the European Communities.[29] Turkey expresses strong doubts about whether the requirement of Article XXIV:8(a)(i) that duties and other restrictive regulations of commerce be eliminated with respect to "substantially all trade" between Turkey and the European Communities could be met if 40 per cent of Turkey's total exports to the European Communities were excluded.[30] In this way, Turkey argues that, unless it is allowed to introduce quantitative restrictions on textile and clothing products from India, it would be prevented from meeting the requirements of Article XXIV:8(a)(i) and, thus, would be prevented from forming a customs union with the European Communities.

62. We agree with the Panel that had Turkey not adopted the same quantitative restrictions that are applied by the European Communities, this would not have prevented Turkey and the European Communities from meeting the requirements of sub-paragraph 8(a)(i) of Article XXIV, and consequently from forming a customs union. We recall our conclusion that the terms of sub-paragraph 8(a)(i) offer some – though limited – flexibility to the constituent members of a customs union when liberalizing their internal trade.[31] As the Panel observed, there are other alternatives available to Turkey and the European Communities to prevent any possible diversion of trade, while at the same time meeting the requirements of sub-paragraph 8(a)(i).[32] For example, Turkey could adopt rules of origin for textile and clothing products that would allow the European Communities to distinguish between those textile and clothing products originating in Turkey, which would enjoy free access to the European Communities under the terms of the customs union, *and* those textile and clothing products originating in third countries, including India. In fact, we note that Turkey and the European Communities themselves appear to have recognized that rules of origin could be applied to deal with any possible trade diversion. Article 12(3) of Decision 1/95 of the EC-Turkey Association Council, which sets out the rules for implementing the final phase of the customs union between Turkey and the European Communities, specifically provides for the possibility of applying a system of certificates of origin.[33] A system of certificates of origin would have been a reasonable alternative until the quantitative restrictions applied by the European Communities are required to be terminated under the provisions of the *ATC*. Yet no use was made of this possibility to avoid trade diversion. Turkey preferred instead to introduce the quantitative restrictions at issue.

63. For this reason, we conclude that Turkey was not, in fact, required to apply the quantitative restrictions at issue in this appeal in order to form a customs union with the European Communities. Therefore, Turkey has not fulfilled the second of the two necessary conditions that must be fulfilled to be entitled to the benefit of the defence under Article XXIV. Turkey has not demonstrated that the formation of a customs union between Turkey and the European Communities would be prevented if it were not allowed to adopt these quantitative restrictions. Thus, the defence afforded by

[28] Turkey's appellant's submission, para. 56.

[29] Panel Report, para. 9.153.

[30] Turkey's appellant's submission, para. 56

[31] *Supra*, para. 48

[32] Panel Report, para. 9.152.

[33] Article 12(3) reads as follows:

> Until Turkey has concluded these arrangements, the present *system of certificates of origin for the exports of textile and clothing* from Turkey into the Community will remain in force and such products not originating from Turkey will remain subject to the application of the Communities Commercial Policy in relation to the third countries in question. (emphasis added)

Article XXIV under certain conditions is not available to Turkey in this case, and Article XXIV does not justify the adoption by Turkey of these quantitative restrictions.

VI. Findings and Conclusions

64. For the reasons set out in this report, the Appellate Body concludes that the Panel erred in its legal reasoning by focusing on sub-paragraphs 8(a) and 5(a) and by failing to recognize the crucial role of the chapeau of paragraph 5 in the interpretation of Article XXIV of the GATT 1994, but upholds the Panel's conclusion that Article XXIV does not allow Turkey to adopt, upon the formation of a customs union with the European Communities, quantitative restrictions on imports of 19 categories of textile and clothing products which were found to be inconsistent with Articles XI and XIII of the GATT 1994 and Article 2.4 of the *ATC*.

65. We wish to point out that we make no finding on the issue of whether quantitative restrictions found to be inconsistent with Article XI and Article XIII of the GATT 1994 will *ever* be justified by Article XXIV. We find only that the quantitative restrictions at issue in the appeal in this case were not so justified. Likewise, we make no finding either on many other issues that may arise under

Article XXIV. The resolution of those other issues must await another day. We do not believe it necessary to find more than we have found here to fulfill our responsibilities under the DSU in deciding this case.

66. The Appellate Body recommends that the DSB request that Turkey bring its measures which the Panel found to be inconsistent with Articles XI and XIII of the GATT 1994 and Article 2.4 of the *ATC* into conformity with its obligations under these agreements.

Signed in the original at Geneva this 23rd day of September 1999 by:

_____

Christopher Beeby
Presiding Member

_____ _____

James Bacchus
Member

Said El-Naggar
Member

Report of the Appellate Body, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 6 March 2006

WORLD TRADE ORGANIZATION

WT/DS308/AB/R
6 March 2006

(06-0914)

Original: English

MEXICO – TAX MEASURES ON SOFT DRINKS AND OTHER BEVERAGES

AB-2005-10

Report of the Appellate Body

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
Mexico – Taxes on Soft Drinks	Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, 7 October 2005
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Section 337	GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Division	Appellate Body Division hearing this appeal
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
GATT 1994	*General Agreement on Tariffs and Trade 1994*
HFCS	high-fructose corn syrup
Inter-American Convention	Inter-American Convention for the Protection and Conservation of Sea Turtles
ITO	International Trade Organization
NAFTA	North American Free Trade Agreement
Panel	Panel in *Mexico – Taxes on Soft Drinks*
Panel Report	Panel Report, *Mexico – Taxes on Soft Drinks*
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization

WORLD TRADE ORGANIZATION
APPELLATE BODY

Mexico – Tax Measures on Soft Drinks and Other Beverages

Mexico, *Appellant*
United States, *Appellee*

Canada, *Third Participant*
China, *Third Participant*
European Communities, *Third Participant*
Guatemala, *Third Participant*
Japan, *Third Participant*

AB-2005-10

Present:

Taniguchi, Presiding Member
Janow, Member
Sacerdoti, Member

I. Introduction

1. Mexico appeals certain issues of law and legal interpretations developed in the Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* (the "Panel Report").[1] The Panel was established to consider a complaint by the United States concerning certain tax measures and bookkeeping requirements imposed by Mexico on soft drinks and other beverages that use sweeteners other than cane sugar.

2. The measures challenged by the United States include: (i) a 20 per cent tax on the transfer or, as applicable, the importation of soft drinks and other beverages that use any sweetener other than cane sugar (the "soft drink tax"); (ii) a 20 per cent tax on specific services (commission, mediation, agency, representation, brokerage, consignment, and distribution), when such services are provided for the purpose of transferring products such as soft drinks and other beverages that use any sweetener other than cane sugar (the "distribution tax"); and (iii) a number of requirements imposed on taxpayers subject to the soft drink tax and to the distribution tax (the "bookkeeping requirements").[2] Before the Panel, the United States claimed that these measures are inconsistent with paragraphs 2 and 4 of Article III of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

3. In its first written submission to the Panel, Mexico requested that the Panel decide, as a preliminary matter, to "decline to exercise its jurisdiction in this case"[3] and that it "recommend to the parties that they submit their respective grievances to an Arbitral Panel, under Chapter Twenty of the NAFTA[4], which can address both Mexico's concern with respect to market access for Mexican cane sugar in the United States under the NAFTA and the United States' concern with respect to Mexico's

[1] WT/DS308/R, 7 October 2005.

[2] These measures are described in more detail in paragraphs 2.2-2.5 of the Panel Report.

[3] Panel Report, para. 4.2.

[4] North American Free Trade Agreement (the "NAFTA").

tax measures."[5] Mexico also stated that, in the event the Panel decided to exercise jurisdiction, the Panel should find that the measures are justified pursuant to Article XX(d) of the GATT 1994.[6]

4. On 18 January 2005, the Panel issued a preliminary ruling in which it rejected Mexico's request.[7] In doing so, the Panel concluded that, "under the DSU[[8]], it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."[9] The Panel added that, "even if it had such discretion, the Panel did not consider that there were facts on record that would justify the Panel declining to exercise its jurisdiction in the present case."[10]

5. In its Report, circulated to Members of the World Trade Organization (the "WTO") on 7 October 2005, the Panel concluded that:

(a) With respect to Mexico's soft drink tax and distribution tax:

(i) As imposed on sweeteners, imported beet sugar is subject to internal taxes in excess of those applied to like domestic sweeteners, in a manner inconsistent with Article III:2, first sentence, of the GATT 1994;

(ii) As imposed on sweeteners, imported HFCS[11] is being taxed dissimilarly compared with the directly competitive or substitutable products, so as to afford protection to the Mexican domestic production of cane sugar, in a manner inconsistent with Article III:2, second sentence, of the GATT 1994;

(iii) As imposed on sweeteners, imported beet sugar and HFCS are accorded less favourable treatment than that accorded to like products of national origin, in a manner inconsistent with Article III:4 of the GATT 1994;

(iv) As imposed on soft drinks and syrups, imported soft drinks and syrups sweetened with non-cane sugar sweeteners (including HFCS and beet sugar) are subject to internal taxes in excess of those applied to like domestic products, in a manner inconsistent with Article III:2, first sentence, of the GATT 1994.

(b) With respect to Mexico's bookkeeping requirements: As imposed on sweeteners, imported beet sugar and HFCS are accorded less favourable treatment than that accorded to like products of national origin, in a manner inconsistent with Article III:4 of the GATT 1994.[12]

The Panel rejected Mexico's defence under Article XX(d) of the GATT 1994, concluding that "the challenged tax measures are not justified as measures that are necessary to secure compliance by the

[5]Panel Report, para. 3.2.

[6]*Ibid.*

[7]The Panel's preliminary ruling is reproduced as Annex B to the Panel Report.

[8]*Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").

[9]Panel Report, para. 7.1.

[10]*Ibid.*

[11]High-fructose corn syrup ("HFCS").

[12]Panel Report, para. 9.2. (original underlining)

United States with laws or regulations which are not inconsistent with the provisions of the GATT 1994."[13] The Panel therefore recommended "that the Dispute Settlement Body request Mexico to bring the inconsistent measures … into conformity with its obligations under the GATT 1994."[14]

6. On 6 December 2005, Mexico notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the DSU, and filed a Notice of Appeal[15] pursuant to Rule 20(1) of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[16] On 13 December 2005, Mexico filed an appellant's submission.[17] In its appeal, Mexico challenges the Panel's preliminary ruling rejecting Mexico's request that the Panel decline to exercise jurisdiction in this case, as well as the Panel's findings concerning Article XX(d) of the GATT 1994. Mexico did not appeal the Panel's findings under Article III of the GATT 1994. On 6 January 2006, the United States filed an appellee's submission.[18] On the same day, China, the European Communities, and Japan each filed a third participant's submission.[19] Also on the same day, Canada and Guatemala each notified the Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant.[20]

7. By letter dated 5 January 2006, Mexico requested authorization to correct certain clerical errors in its appellant's submission pursuant to Rule 18(5) of the *Working Procedures*. On 9 January 2006, the Appellate Body Division hearing the appeal ("the Division") invited all participants and third participants to comment on Mexico's request, in accordance with Rule 18(5). On 11 January 2006, the United States responded that, although some of the requested corrections are not "clearly clerical", within the meaning of Rule 18(5), "[i]n the circumstances of this dispute", the United States did not object to Mexico's request. No other comments were received. By letter dated 16 January 2006, the Division authorized Mexico to correct the clerical errors in its appellant's submission but emphasized, however, that it had not been requested, and did not make, a finding "as to whether all of the corrections requested by Mexico are 'clerical' within the meaning of Rule 18(5) of the *Working Procedures*."

8. On 13 January 2006, the Appellate Body received an *amicus curiae* brief from *Cámara Nacional de las Industrias Azucarera y Alcoholera* (National Chamber of the Sugar and Alcohol Industries) of Mexico.[21] The Division did not find it necessary to take the brief into account in resolving the issues raised in this appeal.

[13]*Ibid.*, para. 9.3.

[14]*Ibid.*, para. 9.5.

[15]WT/DS308/10 (attached as Annex I to this Report).

[16]WT/AB/WP/5, 4 January 2005.

[17]Pursuant to Rule 21(1) of the *Working Procedures*. A courtesy English translation of Mexico's appellant's submission, prepared by Mexico, was provided to the participants and third participants on 16 December 2005.

[18]Pursuant to Rule 22(1) of the *Working Procedures*.

[19]Pursuant to Rule 24(1) of the *Working Procedures*.

[20]Pursuant to Rule 24(2) of the *Working Procedures*.

[21]At the oral hearing, Mexico stated that its arguments are set out in it's appellant's and oral submissions. Mexico added, however, that it would not object should the Appellate Body decide to accept the *amicus* brief. The United States noted that the *amicus* brief had been received late in the proceedings and that it presented new arguments and claims of error that were not part of Mexico's Notice of Appeal. Accordingly, while taking the view that the Appellate Body had the authority to accept the brief, the United States argued that it should decline to do so in the circumstances of this dispute.

9. The oral hearing in this appeal was held on 18 January 2006. The participants and third participants presented oral arguments (with the exception of Guatemala) and responded to questions posed by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by Mexico – Appellant*

1. Exercise of Jurisdiction

10. Mexico argues that the Panel erred in rejecting Mexico's request that it decline to exercise jurisdiction in the circumstances of the present dispute. According to Mexico, the Panel's decision was primarily based on the Panel's view that Article 11 of the DSU "compels a WTO [p]anel to address the claims" on which a finding is necessary to enable the DSB to make sufficiently precise recommendations or rulings to the parties to the dispute and that, therefore, a WTO panel has no discretion to decline to exercise validly established jurisdiction.[22] Mexico submits that this is incorrect and ignores the fact that, like other international bodies and tribunals, WTO panels have certain "implied jurisdictional powers"[23] that derive from their nature as adjudicative bodies. According to Mexico, such powers include the power to refrain from exercising substantive jurisdiction in circumstances where "the underlying or predominant elements of a dispute derive from rules of international law"[24] under which claims cannot be judicially enforced in the WTO, such as the NAFTA provisions or when one of the disputing parties refuses to take the matter to the "appropriate forum".[25] Mexico contends, in this regard, that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute[26] concerning the conditions provided under the NAFTA for access of Mexican sugar to the United States market, and that only a NAFTA panel could resolve the dispute between the parties.

11. Mexico further emphasizes that there is nothing in the DSU that explicitly rules out the existence of a WTO panel's power to decline to exercise its jurisdiction even in a case that is properly brought before it. Mexico adds that the application by panels of the principle of "judicial economy" illustrates that notwithstanding the requirement of Article 7.2 of the DSU that panels address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute, WTO panels can decide not to address certain claims. Thus, according to Mexico, there is no question that WTO panels have an implicit or inherent competence. As other examples of panels' "implied jurisdictional powers", Mexico points, *inter alia*, to the power of panels to determine whether they have substantive jurisdiction over a matter and the power to decide all matters that are inherent to the "adjudicative function"[27] of panels.

[22]Mexico's appellant's submission, para. 64 ("*obliga a un Grupo Especial de la OMC a abordar las reclamaciones*").

[23]*Ibid.*, para. 65 ("*facultades implícitas en relación con su competencia*").

[24]Mexico's appellant's submission, para. 73 ("*los elementos predominantes de una disputa derivan de reglas del derecho internacional*").

[25]*Ibid.* ("*foro adecuado*").

[26]*Ibid.*

[27]*Ibid.*, para. 67 ("*función jurisdiccional*").

12. Finally, referring to the ruling of the Permanent Court of International Justice (the "PCIJ") in the *Factory at Chorzów* case, Mexico calls into question the "applicability" of its WTO obligations towards the United States in the context of this dispute.[28]

2. Article XX(d) of the GATT 1994

13. Mexico appeals the Panel's finding that the measures at issue are not justified pursuant to Article XX(d) of the GATT 1994. In addition, Mexico requests the Appellate Body to complete the analysis and find that its tax measures are justified under Article XX(d) of the GATT 1994, because the measures are necessary "to secure compliance" by the United States of its obligations under the NAFTA.

14. Mexico asserts that the Panel erred in finding that the measures at issue are not designed "to secure compliance" within the meaning of Article XX(d). According to Mexico, this finding is based on an erroneous interpretation of the terms "to secure compliance" as involving enforcement action within a *domestic* legal system. Mexico argues that there is no basis to exclude action taken to enforce *international* treaty obligations from the scope of Article XX(d). Mexico adds that, in the broader context of international law, countermeasures are measures aimed at securing compliance with international obligations. Mexico further submits that the Panel erred by equating the concept of "enforcement" with that of "coercion". In Mexico's view, the Panel's effort to distinguish between actions at the domestic level and at the international level based on its understanding of the concept of coercion in this dispute has no textual basis, because Article XX(d) simply does not refer to the use of coercion.

15. Moreover, Mexico asserts that the Panel erred by confusing the issue of the "design" of the measure under Article XX(d) with the issue of its "outcome".[29] Rather than examining whether Mexico's measures were put in place in order to secure the United States' compliance with its NAFTA obligations, the Panel considered the effectiveness of those measures. Mexico emphasizes that "even if the outcome of a measure is completely uncertain or unpredictable, the measure in question can, nevertheless be 'designed to secure compliance with laws and regulations' within the meaning of Article XX(d)".[30] Contrary to the Panel's finding, the issue of the likely outcome of a given measure is not legally relevant to the assessment of the design of the measure under Article XX(d). Thus, Mexico takes issue with the Panel's finding that the "uncertain outcome of international countermeasures is a reason for disqualifying them as measures eligible for consideration under Article XX(d)".[31] Mexico notes, in this regard, that nothing in the text of Article XX(d) suggests that any measure is *a priori* ineligible as a measure "to secure compliance with laws and regulations" on the basis of its "uncertain outcome".

[28]See *ibid.*, paras. 73-74. The passage of the ruling that Mexico refers to reads as follows:

> … one party cannot avail himself of the fact that the other has not fulfilled some obligation … if the former party has … prevented the latter … from having recourse to the tribunal which would have been open to him.

(Permanent Court of International Justice, *Factory at Chorzów (Germany v. Poland)* (Jurisdiction), 1927, PCIJ Series A, No. 9, p. 31) (underlining added by Mexico omitted)

[29]Mexico's appellant's submission, para. 98 ("*destino*"; "*resultado*").

[30]*Ibid.*, para. 102 ("*aun si el resultado de la medida es totalmente incierto, impredecible, bien puede estar 'destinada a lograr la observancia de las leyes y reglamentos' en el sentido del artículo XX(d)*").

[31]*Ibid.*, para. 104 ("*el resultado incierto de las contramedidas internacionales es una razón para excluirlas como medidas que pueden ser objeto de consideración, en el marco del inciso (d) del artículo XX*") (quoting Panel Report, para. 8.187).

16. Turning to the meaning of the terms "laws and regulations" in Article XX(d), Mexico notes that the Panel's interpretation of these terms is based on the erroneous conclusions reached by the Panel with respect to the terms "to secure compliance". Mexico submits that the words "laws" and "regulations" are expressly qualified in other provisions of the covered agreements; the absence of qualifying language in Article XX(d) thus supports the view that the terms are not limited to *domestic* laws or regulations, but include international agreements. Mexico adds that a review of the Article XX exceptions reveals that only three—(paragraphs (c), (g), and (i))—are, expressly or by implication, concerned with an activity that would occur *within* the territory of the Member seeking to justify its measures. This position, according to Mexico, is supported by the Appellate Body's findings in *US – Shrimp (Article 21.5 – Malaysia)*.[32]

17. Mexico further requests, in the event the Appellate Body should reverse the Panel's conclusion, that it complete the Panel's analysis and find that the Mexican measures are "necessary" within the meaning of Article XX(d) and meet the requirements of the chapeau of that Article. According to Mexico, the uncontested facts and evidence in the Panel record, and the Panel's acknowledgement that Mexico's measures have "attracted the attention" of the United States, provide an ample basis on which to complete the analysis and conclude that the measures are "necessary" within the meaning of Article XX(d).

18. Mexico observes that, before the Panel, the United States could not identify any alternative measure that Mexico could and should have used in order to attain its legitimate objective. It further explains that the fact that a measure does not or has not yet achieved its objective does not mean that it is not "necessary" within the meaning of Article XX(d). It may mean that it is insufficient to secure compliance, or that it is insufficient to secure immediate compliance, but can do so over time; however, it says nothing about whether the measure is "necessary". Moreover, Mexico submits that the evidence on the record demonstrates that the measures at issue have contributed to securing compliance in the circumstances of this case by changing the dynamics of the NAFTA dispute and forcing the United States to pay attention to Mexico's grievances, and also contradicts the Panel's finding that Mexico's measures do not contribute to securing compliance in this dispute.

19. As regards the chapeau of Article XX of the GATT 1994, Mexico asserts that its measures neither arbitrarily nor unjustifiably discriminate between countries where the same conditions prevail. Rather than constituting "arbitrary or unjustifiable discrimination", the measures constitute "limited sectoral retaliation in the relevant market segment (*i.e.*, the sweeteners market)."[33] Nor can the measures be said to be a "disguised restriction on [international] trade" because they constitute "a proportionate, legitimate and legally justified response to actions and omissions of the United States"[34], and, furthermore, the measures have been published.

[32]Mexico's appellant's submission, paras. 174 and 177-178 (referring to Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 123-124 and 128-130).

[33]Mexico's appellant's submission, para. 173 ("*retorsiones sectoriales limitadas al segmento del mercado relevante (i.e., el mercado de los edulcorantes)*"). Mexico asserts that the facts of this case are similar to the situation examined by the Appellate Body in *US – Shrimp (Article 21.5 – Malaysia)*. Mexico explains that, in that dispute, the Appellate Body found that a United States unilateral measure was not inconsistent with the chapeau of Article XX of the GATT 1994. According to Mexico, in that case, the Appellate Body did not require the United States to conclude an international agreement with the disputing parties, but rather required it to have made good faith efforts in that direction. In this case, Mexico argues that it has sought to resolve the dispute through NAFTA and bilateral negotiations, but "the United States has essentially blocked Mexico's ability to have its grievance resolved." (Mexico's appellant's submission, paras. 174-181 ("*Estados Unidos esencialmente ha bloqueado la posibilidad de México para resolver su agravio.*"))

[34]*Ibid.*, para. 182 ("*una respuesta proporcional, legítima y legalmente justificada a las acciones y omisiones de Estados Unidos*").

20. Finally, Mexico argues that the Panel, "separately and in addition"[35] to the previous errors, failed to make "an objective assessment of the facts", as required by Article 11 of the DSU, in finding that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."[36] According to Mexico, the Panel's finding is based solely on the Panel's view that attracting the attention of the United States is not equivalent to securing compliance with a law or regulation and ignores that "achieving the objectives sought by the countermeasures can take time".[37]

B. *Arguments of the United States – Appellee*

1. Exercise of Jurisdiction

21. The United States submits that the Panel properly rejected Mexico's request for the Panel to refrain from exercising jurisdiction in the present dispute.

22. Referring to Article 11 of the DSU, the United States observes that, if the Panel had declined to exercise jurisdiction over this dispute, or had agreed to Mexico's request that it refrain from issuing findings and recommendations, the Panel would have made no findings on the United States' claims that Mexico's tax measures are inconsistent with Article III of the GATT 1994. This would have left the DSB "unable to give any rulings or (as is appropriate in this dispute) to make any recommendations"[38] in accordance with the rights and obligations under the DSU and the GATT 1994. The United States emphasizes that such a result is incompatible with the text of the DSU and would have required the Panel to disregard the mandate given to it by the DSB. Moreover, the United States observes that the Panel's own terms of reference in this dispute instructed the Panel to examine the matter referred to the DSB by the United States and to make such findings as will assist the DSB in making the recommendations and rulings provided for under the DSU.

23. Referring to Articles 3.2 and 19.2 of the DSU, the United States adds that, if a panel were to decline to exercise jurisdiction over a particular dispute, it would diminish the rights of the complaining Member under the DSU and other covered agreements. The United States further notes that prior reports of panels and the Appellate Body also support the Panel's findings. In this regard, the United States refers to *Mexico – Corn Syrup (Article 21.5 – US)*, where the Appellate Body stated that "panels are required to address issues that are put before them by the parties to a dispute."[39]

24. The United States observes that Mexico has referred to the principle of judicial economy as an example of "situations where WTO panels have refrained from exercising validly established substantive jurisdiction on certain claims that are before them."[40] However, the United States submits that, "when a panel exercises judicial economy, it does not decline to exercise substantive jurisdiction either over a dispute or certain claims in a dispute. Rather, the panel … declines to make findings on certain claims when resolution of such claims is not necessary for the panel to fulfill its mandate under Article 11 of the DSU and its terms of reference."[41] In other words, judicial economy "does not

[35]*Ibid.*, heading III.E ("*independiente y adicional*").

[36]Panel Report, para. 8.186. See also, Mexico's Notice of Appeal, para. 3.

[37]Mexico's appellant's submission, para. 166 ("*la consecución de los objetivos de las contramedidas puede llevar tiempo*").

[38]United States' appellee's submission, para. 124.

[39]*Ibid.*, para. 127 (quoting Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36).

[40]*Ibid.*, para. 129 (quoting Mexico's appellant's submission, para. 68).

[41]*Ibid.* (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323, at 340; and to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133).

relieve a panel from its duty to carry out its mandate under Articles 7 and 11 of the DSU to resolve the dispute"[42] before it.

2. Article XX(d) of the GATT 1994

25. The United States submits that the Panel properly found that Mexico's tax measures are not designed "to secure compliance" and, thus, are not justified as measures "to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994. It notes that previous GATT and WTO disputes in which Article XX(d) has been invoked have involved domestic laws or regulations.

26. The United States agrees with the Panel's analysis of the terms "laws or regulations" and, therefore, supports the Panel's finding that these terms refer only to *domestic* laws or regulations and not to obligations under international agreements. The United States explains that Article XX(d) refers to "laws" and "regulations" in the plural, while the singular "law" is used when referring to "international law".[43] The United States further observes that the terms "laws or regulations" precede the words "which are not inconsistent" in Article XX(d) and explains that the term "inconsistent" appears elsewhere in the GATT 1994 in connection with domestic measures. In contrast, the WTO agreements use the word "conflict" when referring to international obligations.

27. The United States further submits that Mexico's interpretation of the terms "laws or regulations" would undermine Articles 22 and 23 of the DSU, as it would permit action, including the suspension of concessions, by any Member "outside the rules of the DSU".[44] The United States observes that Article XX(d) was not intended to provide the basis for suspending concessions under the WTO agreements upon a mere allegation of a breach of a non-WTO international agreement. Otherwise, according to the United States, "this would effectively convert WTO dispute settlement into a forum of general dispute resolution for all international agreements."[45] Furthermore, the United States argues that, if the terms "laws or regulations" are read to include obligations under non-WTO agreements, the WTO dispute settlement system "would become a forum for WTO Members to allege and obtain findings as to the consistency of another Member's measure with any non-WTO agreement."[46] The United States, therefore, disagrees with Mexico's arguments that the phrase "laws or regulations" in Article XX(d) refers to international agreements.

28. With respect to the Panel's interpretation of the phrase "to secure compliance", the United States notes that the references to coercion were intended "merely [to] reinforce the Panel's view that 'enforcement' does not refer to the international level"[47] and not, as Mexico argues, to create an additional requirement for justifying a measure under Article XX(d). The United States therefore agrees with the Panel that the terms "to secure compliance" do not apply to measures taken by one Member to induce another Member to comply with obligations under a non-WTO treaty.

29. The United States also rejects Mexico's submission that the "Panel wrongly found that measures with an 'uncertain outcome' are '*a priori* ineligible' as measures to secure compliance with

[42]*Ibid.*, para. 130.

[43]The United States observes that Article 3.2 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* also use the term "law" in the singular when referring to "public international law".

[44]United States' appellee's submission, para. 37.

[45]*Ibid.*, para. 85. (footnote omitted)

[46]*Ibid.*, para. 41.

[47]*Ibid.*, para. 54 (referring to Panel Report, paras. 8.175 and 8.178).

laws or regulations."[48] While the United States concedes that the Panel's analysis "could have admittedly been clearer"[49], it also notes that the Panel did not require certainty, and argues that the Panel's remarks on this point simply characterized Mexico's failure to "put forth *any* evidence that its tax measures were designed to [secure] compliance."[50] The United States agrees with Mexico that "Article XX(d) does not require the party invoking the defense to establish that its measure will, without a doubt or with certainty, secure compliance with laws or regulations."[51] Nevertheless, the United States submits that Mexico has to provide some evidence that the measure is "designed" to secure such compliance.

30. For all these reasons, the United States submits that the Appellate Body should uphold the Panel's conclusion that Mexico's tax measures are *not* designed to secure compliance and, thus, are *not* justified as measures "to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994.

31. In the event the Appellate Body should reverse the Panel's finding and accept Mexico's request to complete the analysis, the United States asserts that Mexico's measures are neither "necessary" for purposes of Article XX(d), nor do they meet the requirements of the chapeau of that Article. According to the United States, Mexico has not demonstrated that the measures at issue contribute to compliance by the United States with its NAFTA obligations and "ignores"[52] the fact that the trade impact of a measure is one of the factors that must be weighed and balanced when determining whether a measure is "necessary". The impact of Mexico's measures was "essentially [to] prohibit the use of imported HFCS in Mexican soft drinks and other beverages and to reduce import volumes".[53] The United States adds that "[i]t is difficult to understand how discriminating against imports from potentially every WTO Member is 'necessary' to secure [the United States'] compliance with [its] obligations under the NAFTA."[54] The United States further observes that the absence of alternative measures that could be reasonably available does not, in itself, mean that the challenged measures are "necessary". In any event, the United States submits that if Mexico's objective was to attract the attention of the United States, it could have pursued a variety of other actions, including pursuing the diplomatic avenues available under the NAFTA.

32. The United States submits, furthermore, that Mexico's measures do not meet the requirements of the chapeau of Article XX of the GATT 1994. The only evidence that Mexico offers to support its contention that the measures do not constitute arbitrary or unjustifiable discrimination is the characterization of the measures as international countermeasures.[55] This is insufficient, argues the United States, for Mexico to meet its burden of proof. Moreover, the fact that Mexico may have been transparent about its measures is not sufficient to establish that such measures are not a "disguised restriction on trade".[56]

[48]United States' appellee's submission, para. 70 (quoting Mexico's appellant's submission, paras. 104-105).

[49]*Ibid.*, para. 71.

[50]*Ibid.* (original emphasis)

[51]*Ibid.*, para. 72. (footnote omitted)

[52]*Ibid.*, para. 96.

[53]*Ibid.*, para. 97.

[54]*Ibid.*

[55]According to the United States, the Appellate Body rulings in *US – Shrimp (Articles 21.5 – Malaysia)* do not support Mexico's position, because that dispute did not involve a disagreement about the commitments made under an international agreement. (United States' appellee's submission, paras. 109-110)

[56]*Ibid.*, para. 114.

33. Lastly, the United States requests the Appellate Body to reject Mexico's contention that the Panel did not make an objective assessment of the facts, as required by Article 11 of the DSU. According to the United States, the Panel did not "ignore" arguments or evidence submitted by Mexico. The United States further explains that, in any event, the errors alleged by Mexico in support of its claim under Article 11 of the DSU "relate to the interpretation of Article XX, and do not support a conclusion that the Panel breached Article 11."[57]

C. *Arguments of the Third Participants*

1. China

34. Referring to Articles 7 and 11 of the DSU, China argues that a WTO panel does not have an implied power to refrain from performing its "statutory function".[58] China submits that, if a panel that is "empowered and obligated"[59] to assist the DSB in the settlement of a dispute declines to exercise jurisdiction, such a decision would create legal uncertainty and be contrary to the aim of providing security and predictability to the multilateral trading system as well as the prompt settlement of disputes as provided for in Article 3.3 of the DSU. China argues, moreover, that the notion of judicial economy is "relevant and applicable"[60] only if a panel has assumed the jurisdiction defined by its terms of reference and has made "such findings as will assist the DSB" within the meaning of Article 11 of the DSU.

35. China asserts that the terms "laws or regulations" in Article XX(d) do not encompass international agreements. China states that Article X of the GATT 1994 provides contextual guidance for the interpretation of Article XX(d). Article X expressly distinguishes between "[l]aws, regulations, judicial decisions and administrative rulings" and "[a]greements … between the government or a governmental agency of any Member and the government or governmental agency of any other Member". China adds that interpreting "laws or regulations" to include international agreements would allow a WTO Member to justify under Article XX(d) its deviation from its WTO obligations in the name of any remedial measure in response to any alleged breach of any non-WTO international agreement. Such a scenario, according to China, is not consistent with the object and purpose of the GATT 1994.

2. European Communities

36. The European Communities submits that the Appellate Body should uphold the Panel's finding that it did not have the discretion to decline to exercise jurisdiction in this case. The European Communities submits that "the functions and obligations of WTO Panels must be established on the basis of the DSU, and particularly Article 11 thereof."[61] On this basis, the European Communities agrees that a panel has an inherent power to establish whether it has jurisdiction, and whether a particular matter is within its jurisdiction. However, the European Communities argues that a panel may not freely, or by "the notion of 'judicial economy'", decide to refrain from exercising its jurisdiction "in a case properly brought before it under the DSU."[62]

[57] *Ibid.*, para. 118.

[58] China's third participant's submission, para. 5.

[59] *Ibid.*, para. 6.

[60] *Ibid.*, para. 7.

[61] European Communities' third participant's submission, para. 8.

[62] *Ibid.*, paras. 10-11.

37. The European Communities asserts, furthermore, that the Appellate Body should uphold the Panel's finding that only measures made applicable in the domestic legal order of a WTO Member constitute "laws or regulations" within the meaning of Article XX(d). The European Communities disagrees, however, with the Panel's finding that "international agreements, even when incorporated into the domestic law of a WTO Member, can never be regarded as 'laws or regulations' for the purposes of Article XX(d)".[63] In addition, the European Communities takes issue with the Panel's interpretation of the terms "to secure compliance" as requiring a degree of certainty in the results that may be achieved through the measure.

3. Japan

38. Japan disagrees with the Panel's interpretation of the terms "to secure compliance" in Article XX(d). In this regard, Japan submits that Article XX(d) does not necessarily exclude measures that have, as a purpose, to secure compliance, but are not accompanied by compulsory enforcement. According to Japan, compliance can be secured by a request or a command without being accompanied by any coercion. Japan considers that the Panel erred by indicating that the determination of whether a measure is designed "to secure compliance" should be analyzed based on the degree of certainty of its outcome. Nevertheless, Japan agrees with the Panel's finding that Article XX(d) does not cover international agreements. Japan explains that the terms "laws or regulations", read together with the phrase "to secure compliance", "presuppose a hierarchical structure that is associated with the relation between the state and its subjects"[64] and, therefore, excludes international agreements.

III. Issues Raised in This Appeal

39. The following issues are raised in this appeal:

(a) whether the Panel erred in concluding that a WTO panel "has no discretion to decide whether or not to exercise its jurisdiction in a case properly before it"[65] and, if so, whether the Panel erred in declining to exercise that discretion in the circumstances of this dispute;

(b) whether the Panel erred in concluding that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994[66]; and

(c) whether the Panel failed to make an objective assessment of the facts of the case, as required by Article 11 of the DSU, in concluding that "even if the assumption were to be made in the abstract that international countermeasures are potentially capable of qualifying as measures designed to secure compliance", within the meaning of Article XX(d) of the GATT 1994, "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."[67]

[63] *Ibid.*, para. 44.

[64] Japan's third participant's submission, para. 22.

[65] Panel Report, para. 7.18.

[66] *Ibid.*, para. 8.198.

[67] *Ibid.*, para. 8.186.

IV. The Panel's Exercise of Jurisdiction

A. *Introduction*

40. In its first written submission to the Panel, Mexico requested that the Panel decide, as a preliminary matter, to decline to exercise jurisdiction "in favour of an Arbitral Panel under Chapter Twenty of the North American Free Trade Agreement (NAFTA)."[68] In a preliminary ruling, the Panel rejected Mexico's request and found instead that, "under the DSU, it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."[69] The Panel added that even if it had such discretion, it "did not consider that there were facts on record that would justify the Panel declining to exercise its jurisdiction in the present case."[70]

41. In its reasoning, the Panel opined that "discretion may be said to exist only if a legal body has the freedom to choose among several options, all of them equally permissible in law."[71] According to the Panel, "such freedom ... would exist within the framework of the DSU only if a complainant did not have a legal right to have a panel decide a case properly before it."[72] Referring to Article 11 of the DSU and to the ruling of the Appellate Body in *Australia – Salmon*, the Panel observed that "the aim of the WTO dispute settlement system is to resolve the matter at issue in particular cases and to secure a positive solution to disputes" and that a panel is required "to address the claims on which a finding is necessary to enable the DSB to make sufficiently precise recommendations or rulings to the parties."[73] From this, the Panel concluded that a WTO panel "would seem therefore not to be in a position to choose freely whether or not to exercise its jurisdiction."[74] Referring to Articles 3.2 and 19.2 of the DSU, the Panel further stated that "[i]f a WTO panel were to decide not to exercise its jurisdiction in a particular case, it would diminish the rights of the complaining Member under the DSU and other WTO covered agreements."[75] The Panel added that Article 23 of the DSU "make[s] it clear that a WTO Member that considers that any of its WTO benefits have been nullified or impaired as a result of a measure adopted by another Member has the right to bring the case before the WTO dispute settlement system."[76]

42. On appeal, Mexico contends that the Panel erred in rejecting Mexico's request that it decline to exercise jurisdiction in the circumstances of the present dispute. Mexico submits that WTO panels, like other international bodies and tribunals, "have certain implied jurisdictional powers that derive from their nature as adjudicative bodies."[77] Such powers include the power to refrain from exercising substantive jurisdiction in circumstances where "the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as the NAFTA provisions" or "when one of the disputing parties refuses to take the matter to the appropriate forum."[78] Mexico argues, in this regard, that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute[79] regarding access of Mexican sugar to the United States' market under the NAFTA. Mexico further emphasizes that "[t]here is nothing in the DSU ... that explicitly rules out the existence of"[80] a WTO panel's power to decline to exercise validly established jurisdiction and submits that "the Panel should have exercised this power in the circumstances of this dispute."[81]

43. In contrast, the United States argues that, "[t]he Panel's own terms of reference in this dispute instructed the Panel 'to examine ... the matter referred to the DSB by the United States'"[82] and "to make such findings as will assist the DSB" in making the recommendations and rulings provided for under the DSU. China and the European Communities agree with the United States that the Panel had no discretion to decline to exercise jurisdiction. China submits that if a panel declines to exercise jurisdiction over a dispute, such a decision will create legal uncertainty, contrary to the aim of providing security and predictability to the multilateral trading system and the prompt settlement of disputes as provided for in Article 3.3 of the DSU.[83] The European Communities agrees with the Panel's finding that it did not have discretion to decline to exercise jurisdiction in this case, and emphasizes that "the functions and obligations of WTO Panels must be established on the basis of the DSU, and particularly Article 11 thereof."[84]

B. *Analysis*

44. Before addressing Mexico's arguments, we note that "Mexico does not question that the Panel has jurisdiction to hear the United States' claims."[85] Moreover, Mexico does not claim "that there are legal obligations under the NAFTA or any other international agreement to which Mexico and the United States are both parties, which might raise legal impediments to the Panel hearing this case".[86]

[68]Panel Report, para. 7.1.

[69]*Ibid.*

[70]*Ibid.*

[71]*Ibid.*, para. 7.7.

[72]*Ibid.*

[73]*Ibid.*, para. 7.8 (referring to Appellate Body Report, *Australia – Salmon*, para. 223).

[74]*Ibid.*

[75]*Ibid.*, para. 7.9.

[76]*Ibid.*

[77]Mexico's appellant's submission, para. 65 ("*tienen ciertas facultades implícitas en relación con su competencia, las cuales derivan de su propia naturaleza como órganos jurisdiccionales*").

[78]*Ibid.*, para. 73 ("*los elementos predominantes de una disputa derivan de reglas del derecho internacional, cuyo cumplimiento no puede reclamarse en el marco OMC, por ejemplo las disposiciones del TLCAN*"; "*cuando una de las partes contendientes se rehúsa a someterse al foro adecuado*").

[79]*Ibid.*

[80]*Ibid.*, para. 65 ("*Nada en el ESD ... explícitamente descarta que ... existan*").

[81]*Ibid.*, para. 72 ("*el Grupo Especial debió haber ejercido esa facultad en las circunstancias de esta disputa*").

[82]United States' appellee's submission, para. 125.

[83]China's third participant's submission, para. 6.

[84]European Communities' third participant's submission, para. 8.

[85]Mexico's appellant's submission, para. 71 ("*México no discute que el Grupo Especial tiene competencia para resolver la reclamación que Estados Unidos ha interpuesto*") (quoting Mexico's response to Question 35 posed by the Panel; Panel Report, p. C-16). Mexico confirmed this point in response to questioning at the oral hearing.

[86]Panel Report, para. 7.13. In response to questioning at the oral hearing, Mexico argued that the panel in *Argentina – Poultry Anti-Dumping Duties* "at least contemplated the existence of a situation where an impediment found in another agreement might give rise to declining jurisdiction". The panel in *Argentina – Poultry Anti-Dumping Duties* referred to Article 1 of the Protocol of Olivos, which provides that, once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forum, that party may not bring a subsequent case regarding the same subject-matter in the other forum, and went on to state:

Instead, Mexico's position is that, although the Panel had the authority to rule on the merits of the United States' claims, it also had the "implied power" to abstain from ruling on them[87], and "should have exercised this power in the circumstances of this dispute."[88] Hence, the issue before us in this appeal is not whether the Panel was legally precluded from ruling on the United States' claims that were before it, but, rather, whether the Panel could decline, and should have declined, to exercise jurisdiction with respect to the United States' claims under Article III of the GATT 1994 that were before it.

45. Turning to Mexico's arguments on appeal, we note, first, Mexico's argument that WTO panels, like other international bodies and tribunals, "have certain implied jurisdictional powers that derive from their nature as adjudicative bodies"[89], and thus have a basis for declining to exercise jurisdiction. We agree with Mexico that WTO panels have certain powers that are inherent in their adjudicative function. Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it."[90] Further, the Appellate Body has also explained that panels have "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated."[91] For example, panels may exercise judicial economy, that is, refrain from ruling on certain claims, when such rulings

> The Protocol of Olivos ... does not change our assessment, since that Protocol has not yet entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR Protocol of Brasilia. Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognised that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect of the same measure.

(Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.38) (footnote omitted)

[87]Thus, Mexico suggested that, in the circumstances of this dispute, it would not have been "appropriate" for the Panel "to issue findings on the merits of the United States' claims." (Panel Report, para. 7.11 (referring to Mexico's first written submission to the Panel, paras. 102-103))

[88]Mexico's appellant's submission, para. 72 ("*debió haber ejercido esa facultad en las circunstancias de esta disputa*").

[89]*Ibid.*, para. 65 ("*tienen ciertas facultades implícitas en relación con su competencia, las cuales derivan de su propia naturaleza como órganos jurisdiccionales*").

[90]Appellate Body Report, *US – 1916 Act*, footnote 30 to para. 54. See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 53. In that dispute, the Appellate Body also stated that:

> … panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. ... [P]anels cannot simply ignore issues which go to the root of their jurisdiction—that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues—if necessary, on their own motion—in order to satisfy themselves that they have authority to proceed.

(Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36)

[91]Appellate Body Report, *EC – Hormones*, footnote 138 to para. 152. See also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 247-248.

are not necessary "to resolve the matter in issue in the dispute".[92] The Appellate Body has cautioned, nevertheless, that "[t]o provide only a partial resolution of the matter at issue would be false judicial economy."[93]

46. In our view, it does not necessarily follow, however, from the existence of these inherent adjudicative powers that, once jurisdiction has been validly established, WTO panels would have the authority to decline to rule on the entirety of the claims that are before them in a dispute. To the contrary, we note that, while recognizing WTO panels' inherent powers, the Appellate Body has previously emphasized that:

> Although panels enjoy some discretion in establishing their own working procedures, *this discretion does not extend to modifying the substantive provisions of the DSU. ... Nothing in the DSU gives a panel the authority either to disregard or to modify ... explicit provisions of the DSU.*[94] (emphasis added)

47. With these considerations in mind, we examine the scope of a panel's jurisdictional power as defined, in particular, in Articles 3.2, 7.1, 7.2, 11, 19.2, and 23 of the DSU. Mexico argues that "[t]here is nothing in the DSU ... that explicitly rules out the existence of"[95] a WTO panel's power to decline to exercise its jurisdiction even in a case that is properly before it.

48. We first address Article 7 of the DSU, which governs the terms of reference of panels. Article 7 of the DSU states, in its first paragraph, that panels shall have the following terms of reference:

> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document … and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

The Panel in this dispute was established with standard terms of reference[96], which instructed the Panel to "examine" the United States' claims that were before it and to "make findings" with respect to consistency of the measures at issue with Article III of the GATT 1994.

[92]Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323, at 340. Mexico referred, in its appellant's submission, to a panel's discretion to apply judicial economy as "an example of situations where WTO panels have refrained from exercising validly established jurisdiction on certain claims that are before them." (Mexico's appellant's submission, para. 68 ("*un ejemplo de situaciones en las que grupos especiales de la OMC se han abstenido de resolver ciertas reclamaciones sobre las cuales tienen competencia sustantiva validamente establecida*")) Mexico clarified at the oral hearing, however, that "it is clear that in the context of the exercise of judicial economy a panel cannot decline entirely to exercise jurisdiction." The United States noted, in this regard, that the doctrine of judicial economy "does not relieve a panel from its duty to carry out its mandate under Articles 7 and 11 of the DSU to resolve the dispute" before it. (United States' appellee's submission, para. 130)

[93]Appellate Body Report, *Australia – Salmon*, para. 223.

[94]Appellate Body Report, *India – Patents (US)*, para. 92.

[95]Mexico's appellant's submission, para. 65 ("*Nada en el ESD ... explícitamente descarta que ... existan*").

[96]The Panel's terms of reference in this dispute were as follows:

49. The second paragraph of Article 7 further stipulates that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." The use of the words "shall address" in Article 7.2 indicates, in our view, that panels are required to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.[97]

50. We turn next to Article 11 of the DSU, which provides that:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. …

51. Article 11 of the DSU states that panels *should* make an objective assessment of the matter before them. The Appellate Body has previously held that the word "should" can be used not only "to imply an exhortation, or to state a preference", but also "to express a duty [or] obligation".[98] The Appellate Body has repeatedly ruled that a panel would not fulfil its mandate if it were not to make an objective assessment of the matter.[99] Under Article 11 of the DSU, a panel is, therefore, charged with the *obligation* to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Article 11 also requires that a panel "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." It is difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it.

52. Furthermore, Article 23 of the DSU states that Members of the WTO *shall* have recourse to the rules and procedures of the DSU when they "seek the redress of a violation of obligations ... under the covered agreements". As the Appellate Body has previously explained, "allowing measures to be the subject of dispute settlement proceedings ... is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to 'preserve [their] rights and obligations … under the covered agreements, and to clarify the existing provisions of those agreements'."[100] We also note in this regard that Article 3.3 of the DSU provides that the "prompt settlement of situations in which *a Member considers* that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO".[101] The fact that a Member may initiate a WTO dispute whenever it considers that "any benefits accruing to [that Member] are being impaired by measures taken by another Member" implies that that Member is *entitled* to a ruling by a WTO panel.

53. A decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of a complaining Member to "seek the redress of a violation of obligations" within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU.[102] We see no reason, therefore, to disagree with the Panel's statement that a WTO panel "would seem … not to be in a position to choose freely whether or not to exercise its jurisdiction."[103]

54. Mindful of the precise scope of Mexico's appeal[104], we express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it. In the present case, Mexico argues that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute[105], and

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> To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS308/4, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

(WT/DS308/5/Rev.1, para. 2)

[97]In this regard, we further note the Appellate Body's statement that, "as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute." (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36)

[98]Appellate Body Report, *Canada – Aircraft*, para. 187 (quoting *The Concise Oxford English Dictionary* (Clarendon Press, 1995), p. 1283).

[99]See, for instance, Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 329 and 335. See also Appellate Body Report, *Canada – Aircraft*, paras. 187-188; and Appellate Body Report, *EC – Hormones*, para. 133.

[100]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89. (footnote omitted)

[101](emphasis added) Thus, the Appellate Body has explained that there is "little in the DSU that explicitly limits the rights of WTO Members to bring an action". (Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 312) In a similar vein, the Appellate Body has also observed that a WTO "Member has broad discretion in deciding whether to bring a case against another Member under the DSU." (Appellate Body Report, *EC – Bananas III*, para. 135) Further, Article 3.7 of the DSU states that "[b]efore bringing a case, a Member shall exercise *its judgement* as to whether action under these procedures would be fruitful." (emphasis added) Finally, Article 3.10 of the DSU stipulates that "if a dispute arises, *all Members will engage* in these procedures *in good faith in an effort to resolve the dispute*." (emphasis added)

[102]Article 3.2 of the DSU provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

Article 19.2 of the DSU states that "[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

[103]Panel Report, para. 7.8.

[104]See *supra,* para. 44 and footnote 85 thereto.

[105]Mexico's appellant's submission, para. 73.

that only a NAFTA panel could resolve the dispute as a whole.[106] Nevertheless, Mexico does not take issue with the Panel's finding that "neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA ... and the dispute before us."[107] Mexico also stated that it could not identify a legal basis that would allow it to raise, in a WTO dispute settlement proceeding, the market access claims it is pursuing under the NAFTA.[108] It is furthermore undisputed that no NAFTA panel as yet has decided the "broader dispute" to which Mexico has alluded. Finally, we note that Mexico has expressly stated that the so-called "exclusion clause" of Article 2005.6 of the NAFTA[109] had not been "exercised".[110] We do not express any view on whether a legal impediment to the exercise of a panel's jurisdiction would exist in the event that features such as those mentioned above were present.[111] In any event, we see no legal impediments applicable in this case.

[106]In its appellant's submission, Mexico explains that, in 1998, it initiated NAFTA dispute settlement proceedings because it was of the view that the United States was acting inconsistently with its obligation under the NAFTA relating to market access for Mexican sugar to the United States market. In 2000, Mexico requested the establishment of a panel under Article 2008 of the NAFTA. Subsequently, according to Mexico, it appointed its panelists to the NAFTA panel; however, the United States failed to appoint its panelists and also instructed the United States' Section of the NAFTA Secretariat not to appoint panelists. (Mexico's appellant's submission, paras. 15-27)

As a result, "[n]o further step could be taken by Mexico to form the NAFTA panel and have its grievance heard." (Mexico's appellant's submission, para. 28 ("*No había otros pasos que México pudiera dar conforme a las disposiciones del tratado para conseguir integrar el panel y que su agravio fuera oído*")) Mexico explains that it subsequently adopted the measures at issue in this dispute "to compel the United States to comply with its obligations and [to] protect [Mexico's] own legal and commercial interests." (*Ibid.*, para. 42 ("*para mover a Estados Unidos a cumplir con sus obligaciones, a la vez que protegió [los] legítimos intereses jurídicos y comerciales [de México]*"))

The United States disputes these arguments by Mexico and argues that "the Appellate Body [should not] undertake itself to assess the correctness of Mexico's assertions as to what the NAFTA requires." (United States' appellee's submission, para. 18) It submits that, if the WTO dispute settlement were to "become a forum for WTO Members to ... obtain findings as to the consistency of another Member's measure with any non-WTO agreement", this "would be a departure from the function the WTO dispute settlement system was established to serve". (*Ibid.*, para. 41) The United States also submits that "it is in full compliance with its obligations under NAFTA's dispute settlement mechanism." (*Ibid.*, para. 84)

While these NAFTA issues have been described by the parties by way of background to the WTO dispute, neither the Panel or the Appellate Body was called upon to examine these issues.

[107]Panel Report, para. 7.14. The Panel noted, in this regard, that:

> [i]n the present case, the complaining party is the United States and the measures in dispute are allegedly imposed by Mexico. In the NAFTA case, the situation appears to be the reverse: the complaining party is Mexico and the measures in dispute are allegedly imposed by the United States. As for the subject matter of the claims, in the present case the United States is alleging discriminatory treatment against its products resulting from internal taxes and other internal measures imposed by Mexico. In the NAFTA case, instead, Mexico is arguing that the United States is violating its market access commitments under the NAFTA.

[108]Mexico's response to questioning at the oral hearing.

[109]Article 2005.6 of the NAFTA provides:

> Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, *the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4*. (emphasis added)

[110]Mexico's response to questioning at the oral hearing.

[111]In this context, Mexico has alluded to paragraph 7.38 of the Panel Report in *Argentina – Poultry Anti-Dumping Duties*. See also *supra,* footnote 86.

55. Finally, as we understand it, Mexico's position is that the "applicability" of its WTO obligations towards the United States would be "call[ed] into question"[112] as a result of the United States having prevented Mexico, by an illegal act (namely, the alleged refusal by the United States to nominate panelists to the NAFTA panel), from having recourse to the NAFTA dispute settlement mechanism to resolve a bilateral dispute between Mexico and the United States regarding trade in sweeteners.[113] Specifically, Mexico refers to the ruling of the Permanent Court of International Justice (the "PCIJ") in the *Factory at Chorzów* case, and "calls into question the 'applicability' of its WTO obligations towards the United States in the context of this dispute".[114]

56. Mexico's arguments, as well as its reliance on the ruling in *Factory at Chorzów*, is misplaced. Even assuming, *arguendo*, that the legal principle reflected in the passage referred to by Mexico is applicable within the WTO dispute settlement system, we note that this would entail a determination whether the United States has acted consistently or inconsistently with its NAFTA obligations.[115] We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes. Article 3.2 of the DSU states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the *covered agreements*, and to clarify the existing provisions of *those agreements*". (emphasis added) Accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements. In light of the above, we do not see how the PCIJ's ruling in *Factory at Chorzów* supports Mexico's position in this case.

57. For all these reasons, we *uphold* the Panel's conclusion, in paragraphs 7.1, 7.18, and 9.1 of the Panel Report, that "under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in the case that ha[d] been brought before it." Having upheld this conclusion, we *find* it unnecessary to rule in the circumstances of this appeal on the propriety of exercising such discretion.[116]

V. Article XX(d) of the GATT 1994

A. *Introduction*

58. We turn now to Mexico's claim that the Panel erred in finding that the challenged measures are not justified under Article XX(d) of the GATT 1994. Before proceeding, we note that Mexico has

[112]Mexico's appellant's submission, para. 73 ("*[es] cuestion[able]*").

[113]See Panel Report, para. 7.14.

[114]Mexico's appellant's submission, para. 73 ("*cuestiona que sus obligaciones sean aplicables frente a Estados Unidos a la luz del siguiente principio general del derecho internacional*"). The passage of the ruling that Mexico refers to reads as follows:

> … one party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.

(Permanent Court of International Justice, *Factory at Chorzów (Germany v. Poland)* (Jurisdiction), 1927, PCIJ Series A, No. 9, p. 31) (underlining added by Mexico omitted)

[115]We also note that the ruling of the PCIJ in the *Factory at Chorzów* case relied on by Mexico was made in a situation in which the party objecting to the exercise of jurisdiction by the PCIJ was the party that had committed the act alleged to be illegal. In the present case, the party objecting to the exercise of jurisdiction by the Panel (Mexico) relies instead on an allegedly illegal act committed by the other party (the United States).

[116]Panel Report, paras. 7.1 and 7.18.

not appealed the Panel's conclusion that the challenged measures are inconsistent with Article III of the GATT 1994.[117]

59. Mexico argued before the Panel that its "measures are 'necessary to secure compliance' by the United States with the United States' obligations under the NAFTA, an international agreement that is a law not inconsistent with the provisions of the GATT 1994."[118] The United States responded that "the NAFTA is not a 'law or regulation,' and Mexico's taxes are not 'necessary to secure compliance.'"[119]

60. The Panel began its analysis by looking at the meaning of the terms "to secure compliance". According to the Panel, "to secure compliance" means "to *enforce* compliance".[120] The Panel noted that "the notion of enforcement contains a concept of action within a hierarchical structure that is associated with the relation between the state and its subjects".[121] It further observed that Article XX(d) "is concerned with action at a domestic rather than international level."[122] Based on this reasoning, the Panel concluded that "the phrase 'to secure compliance' in Article XX(d) does not apply to measures taken by a Member in order to induce another Member to comply with obligations owed to it under a non-WTO treaty."[123]

61. Having interpreted the terms "to secure compliance", the Panel proceeded to examine whether Mexico's measures are designed to secure compliance. The Panel explained that "when enforcement action is taken within a Member's legal system there will normally be no doubt, provided the action is pointed at the right target, that it will achieve that target."[124] In contrast, "the outcome of international countermeasures, such as those adopted by Mexico, is inherently unpredictable".[125] Therefore, the Panel reasoned, international countermeasures are "not eligible to be considered as measures 'to secure compliance' within the meaning of Article XX(d)."[126] The Panel added that "even if the assumption were to be made in the abstract that international countermeasures are potentially capable of qualifying as measures designed to secure compliance, the Panel's conclusion would be that Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."[127] Thus, the Panel rejected Mexico's argument that "the challenged tax measures are *designed* to secure compliance by the United States with laws or regulations."[128]

62. The Panel then examined whether the challenged measures would fall within the meaning of the terms "laws or regulations" in Article XX(d). The Panel underscored the link between the terms "to secure compliance" and the terms "laws and regulations" as set out in Article XX(d). It indicated that the same reasoning that applies in determining whether Mexico's measures are measures "to secure compliance" must also apply in determining whether the measures are "laws or regulations"

[117]Therefore, we express no view on the Panel's interpretation of Article III in this case.

[118]Panel Report, para. 8.162 (referring to Mexico's first written submission to the Panel, paras. 117-118 and 125).

[119]*Ibid.*, para. 8.163.

[120]*Ibid.*, para. 8.175. (emphasis added)

[121]*Ibid.*, para. 8.178.

[122]*Ibid.*, para. 8.179.

[123]*Ibid.*, para. 8.181.

[124]Panel Report, para. 8.185.

[125]*Ibid.*, para. 8.186.

[126]*Ibid.*

[127]*Ibid.*

[128]*Ibid.*, para. 8.190. (original emphasis)

within the meaning of Article XX(d).[129] In the Panel's view, "the conclusion that these words refer to enforcement action within a particular domestic legal system, and that they do not extend to international action of the type taken by Mexico, necessarily applies to both parts of this expression."[130] The Panel further observed that, "even if it were to assume that the expression 'laws or regulations' in Article XX(d) could include international agreements such as the NAFTA, it would in any event conclude that, on the facts of the case, because of the uncertainty of their consequences, the challenged measures are not designed 'to secure compliance with laws or regulations which are not inconsistent with the provisions' of GATT 1994."[131]

63. Therefore, the Panel concluded that "Mexico has not demonstrated that the challenged measures are designed 'to secure compliance with laws or regulations', within the meaning of Article XX(d) of the GATT 1994."[132] Having made this finding, the Panel did not consider that it needed to examine whether Mexico's measures are "necessary" within the meaning of Article XX(d)[133], and whether the measures satisfy the requirements set out in the chapeau of Article XX.[134] Consequently, the Panel concluded that "Mexico has not established that the challenged measures are justified under Article XX of the GATT 1994."[135]

64. On appeal, Mexico seeks review of the Panel's conclusion that Mexico's measures are not justified under Article XX(d) of the GATT 1994. According to Mexico, the Panel incorrectly interpreted the terms "to secure compliance" as excluding international countermeasures[136], and this error led the Panel to incorrectly interpret the terms "laws or regulations" in Article XX(d).[137] Mexico argues that the terms "laws or regulations" are "broad enough to include international agreements such as the NAFTA."[138] Mexico points out that "the use of the terms 'laws' and 'regulations' elsewhere in the GATT 1994 and in other WTO agreements does not demonstrate that such terms exclude international law rules."[139]

65. The United States responds that the Panel properly found that Mexico's measures are not justified under Article XX(d). It asserts that "the ordinary meaning of 'laws' and 'regulations' is that these are rules (e.g., in the form of a statute) issued by a government and not obligations under an international agreement."[140] The United States further explains that Mexico's interpretation of Article XX(d) is in conflict with Article 23 of the DSU, by allowing a WTO Member to take action outside the rules of the DSU to secure compliance with another Member's obligations under any international agreement, including the WTO agreements.[141] It would also undermine Article 22 of the

[129]*Ibid.*, para. 8.194.

[130]*Ibid.*

[131]*Ibid.*, para. 8.197.

[132]Panel Report, para. 8.198.

[133]*Ibid.*, para. 8.202.

[134]*Ibid.*, para. 8.203.

[135]*Ibid.*, para. 8.204.

[136]Mexico's appellant's submission, para. 79 and footnote 49 thereto.

[137]*Ibid.*, para. 126.

[138]*Ibid.*, para. 129 ("*suficientemente amplia para incluir tratados internacionales, como el TLCAN*").

[139]*Ibid.* ("*el empleo de los términos "leyes" y "reglamentos" en el resto del GATT de 1994 y en otros Acuerdos de la OMC no demuestran que los tales términos excluyen las reglas del derecho internacional*"). (footnote omitted)

[140]United States' appellee's submission, para. 30 (referring to definitions in *Black's Law Dictionary*, (1990), p. 816).

[141]*Ibid.*, para. 37.

DSU by "permit[ting] the suspension of concessions ... without DSB authorization and without any requirement to adhere to the rules established" in that provision.[142]

B. *Analysis*

1. Are Mexico's Measures Justified under Article XX(d)?

66. Article XX(d) of the GATT 1994 reads:

> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> ...
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices[.]

67. The Appellate Body explained, in *Korea – Various Measures on Beef*, that two elements must be shown "[f]or a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX".[143] The first element is that "the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994", and the second is that "the measure must be 'necessary' to secure such compliance."[144] The Appellate Body also explained that "[a] Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met."[145]

68. In our view, the central issue raised in this appeal is whether the terms "to secure compliance with laws or regulations" in Article XX(d) of the GATT 1994 encompass WTO-inconsistent measures applied by a WTO Member to secure compliance with another WTO Member's obligations under an international agreement.

69. In order to answer this question, we consider it more helpful to begin our analysis with the terms "laws or regulations" in Article XX(d) (which we consider to be pivotal here) rather than to begin with the analysis of the terms "to secure compliance", as did the Panel. The terms "laws or regulations" are generally used to refer to domestic laws or regulations. As Mexico and the United States note, previous GATT and WTO disputes in which Article XX(d) has been invoked as a defence have involved domestic measures.[146] Neither disputes that the expression "laws or regulations" encompasses the rules adopted by a WTO Member's legislative or executive branches of government. We agree with the United States that one does not immediately think about international law when confronted with the term "laws" in the plural.[147] Domestic legislative or regulatory acts sometimes may be intended to implement an international agreement. In such situations, the origin of the rule is international, but the implementing instrument is a domestic law or regulation.[148] In our view, the terms "laws or regulations" refer to rules that form part of the domestic legal system of a WTO Member.[149] Thus, the "laws or regulations" with which the Member invoking Article XX(d) may seek to secure compliance do not include obligations of *another* WTO Member under an international agreement.

70. The illustrative list of "laws or regulations" provided in Article XX(d) supports the conclusion that these terms refer to rules that form part of the domestic legal system of a WTO Member.[150] This list includes "[laws or regulations] relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices". These matters are typically the subject of domestic laws or regulations, even though some of these matters may also be the subject of international agreements. The matters listed as examples in Article XX(d) involve the regulation by a government of activity undertaken by a variety of economic actors (e.g., private firms and State enterprises), as well as by government agencies. For example, matters "relating to customs enforcement" will generally involve rights and obligations that apply to importers or exporters, and matters relating to "the protection of patents, trade marks and copyrights" will usually regulate the use of these rights by the intellectual property right holders and other private actors.[151] Thus, the illustrative list reinforces the notion that the terms "laws or regulations" refer to rules that form part of

[142] *Ibid.*, para. 38. (footnote omitted)

[143] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

[144] *Ibid.*

[145] *Ibid.* (referring to Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, 3, at 20-21; Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 14-16, DSR 1997:I, 323, at 335-337; and GATT Panel Report, *US – Section 337*, para. 5.27).

[146] United States' appellee's submission, footnote 62 to para. 39; Mexico's response to questioning at the oral hearing.

[147] Panel Report, footnote 419 to para. 8.193; United States' appellee's submission, para. 31.

[148] In some WTO Members, certain international rules may have direct effect within their domestic legal systems without requiring implementing legislation. In such circumstances, these rules also become part of the domestic law of that Member.

[149] The European Communities notes that:

> [i]t is entirely possible that international agreements may be incorporated into the domestic legal order in such a way that they can be invoked as against individuals, and enforce[d] against them. If this is the case, the international agreement, albeit international in origin, may be regarded as having become an integral part of the domestic legal order of such Member, and thus a law or regulation within the meaning of Article XX (d) [of the] GATT [1994].

(European Communities' third participant's submission, para. 41)

[150] The participants agree that the list in Article XX(d) is not exhaustive. (See Mexico's response to Question 67 posed by the Panel after the second Panel meeting; Panel Report, p. C-61; United States' response to Question 31 posed by the Panel after the first Panel meeting; Panel Report, p. C-42; and United States' response to Question 67 posed by the Panel after the second Panel meeting; Panel Report, pp. C-79-C-80)

[151] European Communities' third participant's submission, para. 38.

the domestic legal system of a WTO Member and do not extend to the international obligations of another WTO Member.[152]

71. Our understanding of the terms "laws or regulations" is consistent with the context of Article XX(d). As the United States points out[153], other provisions of the covered agreements refer expressly to "international obligations" or "international agreements". For example, paragraph (h) of Article XX refers to "obligations under any intergovernmental commodity agreement". The express language of paragraph (h) would seem to contradict Mexico's suggestion that international agreements are implicitly included in the terms "laws or regulations".[154] The United States and China also draw our attention to Article X:1 of the GATT 1994[155], which refers to "[l]aws, regulations, judicial decisions and administrative rulings" and to "[a]greements affecting international trade policy which are in force between a government … of any Member and the government … of any other Member". Thus, a distinction is drawn in the same provision between "laws [and] regulations" and "international agreements". Such a distinction would have been unnecessary if, as Mexico argues, the terms "laws" and "regulations" were to encompass international agreements that have not been incorporated, or do not have direct effect in, the domestic legal system of the respective WTO Member. Thus, Articles X:1 and XX(h) of the GATT 1994 do not lend support to interpreting the terms "laws or regulations" in Article XX(d) as including the international obligations of a Member other than that invoking the provision.[156]

72. We turn to the terms "to secure compliance", which were the focus of the Panel's reasoning and are the focus of Mexico's appeal. The terms "to secure compliance" speak to the types of measures that a WTO Member can seek to justify under Article XX(d). They relate to the design of the measures sought to be justified.[157] There is no justification under Article XX(d) for a measure that is not designed "to secure compliance" with a Member's laws or regulations. Thus, the terms "to secure compliance" do not expand the scope of the terms "laws or regulations" to encompass the international obligations of another WTO Member. Rather, the terms "to secure compliance" circumscribe the scope of Article XX(d).

73. Mexico takes issue with several aspects of the Panel's reasoning related to the interpretation of the terms "to secure compliance". We recall that, according to the Panel, "[t]he context in which the expression is used makes clear that 'to secure compliance' is to be read as meaning to enforce compliance."[158] The Panel added that, in contrast to enforcement action taken within a Member's legal system, "the effectiveness of [Mexico's] measures in achieving their stated goal—that of bringing about a change in the behaviour of the United States—seems ... to be inescapably uncertain."[159] Thus, the Panel concluded that "the outcome of international countermeasures, such as those adopted by Mexico, is inherently unpredictable".[160]

74. It is Mexico's submission that the Panel erred in requiring a degree of certainty as to the results achieved by the measure sought to be justified.[161] Mexico also asserts that the Panel, in its reasoning, incorrectly relied on the Appellate Body Report in *US – Gambling*.[162] We agree with Mexico that the *US – Gambling* Report does not support the conclusion that the Panel sought to draw from it. The statement to which the Panel referred was made in the context of the examination of the "necessity" requirement in Article XIV(a) of the *General Agreement on Trade in Services*, and did not relate to the terms "to secure compliance". As the Appellate Body has explained previously, "the contribution made by the compliance measure to the enforcement of the law or regulation at issue"[163] is one of the factors that must be weighed and balanced to determine whether a measure is "necessary" within the meaning of Article XX(d). A measure that is not suitable or capable of securing compliance with the relevant laws or regulations will not meet the "necessity" requirement. We see no reason, however, to derive from the Appellate Body's examination of "necessity", in *US – Gambling*, a requirement of "certainty" applicable to the terms "to secure compliance".[164] In our view, a measure can be said to be designed "to secure compliance" even if the measure cannot be guaranteed to achieve its result with absolute certainty.[165] Nor do we consider that the "use of coercion"[166] is a necessary component of a measure designed "to secure compliance". Rather, Article XX(d) requires that the design of the measure contribute "to secur[ing] compliance with laws or regulations which are not inconsistent with the provisions of" the GATT 1994.

75. Nevertheless, while we agree with Mexico that the Panel's emphasis on "certainty" and "coercion" is misplaced, we consider that Mexico's arguments miss the point. Even if "international countermeasures" could be described as intended "to secure compliance", what they seek "to secure

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[152]The United States also points out that the terms "laws or regulations" are qualified by the requirement that they not be "inconsistent" with the GATT 1994. The United States explains that the word "inconsistent" appears elsewhere in the GATT 1994 in connection with domestic measures. In contrast, when referring to treaty obligations, the WTO agreements use the word "conflict". (United States' appellee's submission, para. 33) In our view, this distinction supports the position that the terms "laws or regulations" refer to the rules that are part of the domestic legal system of a WTO Member, including international rules that have been incorporated or have direct effect in a particular domestic legal system.

[153]United States' appellee's submission, para. 34.

[154]If an international commodity agreement contains GATT-inconsistent provisions, Article XX(h) would still serve the purpose of justifying such an agreement, even if it could not be justified under Article XX(d).

[155]United States' appellee's submission, para. 35; China's third participant's submission, para. 21.

[156]The Panel noted that there are examples of international "regulations" within the WTO agreements themselves. The Panel cited, as examples, Article VI of the *Marrakesh Agreement Establishing the World Trade Organization* that refers to "regulations" to be adopted by the Ministerial Conference, and Article VII that refers to "financial regulations" to be adopted by the General Council and to the "regulations" of the GATT 1947. (Panel Report, footnotes 423 and 424 to para. 8.195) Article XXIV of the GATT 1994 also uses the term "regulations" when referring to rules applied by free trade areas or customs unions. Nevertheless, we agree with Japan that, in these instances, the context makes it clear that the regulations are international in character. (Japan's third participant's submission, paras. 17-19)

[157]Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

[158]Panel Report, para. 8.175.

[159]*Ibid.*, para. 8.185.

[160]*Ibid.*, para. 8.186. See also Mexico's appellant's submission, paras. 104-116.

[161]The European Communities and Japan agree with Mexico that the Panel erred in implying that whether a measure falls within the meaning of the phrase "to secure compliance" depends on the degree of certainty that the measure will achieve its intended results. (European Communities' third participant's submission, para. 26; Japan's third participant's submission, para. 10)

[162]Panel Report, paras. 8.187-8.188 (referring to Appellate Body Report, *US – Gambling*, para. 317).

[163]Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

[164]We note that, at the request of the United States, the Panel clarified in the interim review phase that:

> … its reasoning does not focus on whether the achievement of Mexico's objective through the measures at issue is certain or uncertain. Rather, the Panel considers that international countermeasures (as the ones allegedly imposed by Mexico) are intrinsically unable to *secure* compliance of laws and regulations. In contrast, national measures are, beyond particular factual considerations, usually in a position to achieve [] that objective, through the use of coercion, if necessary.

(Panel Report, para. 6.12) (original italics; underlining added)

[165]The European Communities notes that "even within the domestic legal order of WTO Members, enforcement of laws and regulations may not simply be taken for granted, but may depend on numerous factors". (European Communities' third participant's submission, para. 28)

[166]Panel Report, para. 8.178.

compliance with"—that is, the international obligations of another WTO Member—would be outside the scope of Article XX(d). This is because "laws or regulations" within the meaning of Article XX(d) refer to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations of *another* WTO Member.

76. Mexico finds support for its interpretation in the Appellate Body's rulings in *US – Shrimp* and *US – Shrimp (Article 21.5 – Malaysia)*.[167] We fail to see how these rulings support Mexico's position. In those cases, the United States sought to justify its measures under Article XX(g) of the GATT 1994, and the measures at issue were domestic laws and regulations of the United States.[168] The reference to the Inter-American Convention for the Protection and Conservation of Sea Turtles (the "Inter-American Convention") was made in the context of the examination of whether the measures constituted "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" for purposes of the chapeau of Article XX.[169] The United States, in those cases, did not argue that its measures were justified under Article XX(d) because they were intended to secure compliance with the obligations of another Member under the Inter-American Convention. In the present case, Mexico seeks to justify its measures under paragraph (d) of Article XX, and not under paragraph (g). Moreover, Mexico not only refers to the NAFTA in relation to the chapeau of Article XX, but also seeks justification for its measures under paragraph (d) on the basis that they are allegedly intended to secure compliance with the United States' NAFTA obligations.

77. We observe, furthermore, that Mexico's interpretation of Article XX(d) disregards the fact that the GATT 1994 and the DSU specify the actions that a WTO Member may take if it considers that another WTO Member has acted inconsistently with its obligations under the GATT 1994 or any of the other covered agreements. As the United States points out[170], Mexico's interpretation of the terms "laws or regulations" as including international obligations of another WTO Member would logically imply that a WTO Member could invoke Article XX(d) to justify also measures designed "to secure compliance" with that other Member's WTO obligations. By the same logic, such action under Article XX(d) would evade the specific and detailed rules that apply when a WTO Member seeks to take countermeasures in response to another Member's failure to comply with rulings and recommendations of the DSB pursuant to Article XXIII:2 of the GATT 1994 and Articles 22 and 23 of the DSU.[171] Mexico's interpretation would allow WTO Members to adopt WTO-inconsistent measures based upon a *unilateral* determination that another Member has breached its WTO obligations, in contradiction with Articles 22 and 23 of the DSU and Article XXIII:2 of the GATT 1994.

78. Finally, even if the terms "laws or regulations" do not go so far as to encompass the WTO agreements, as Mexico argues[172], Mexico's interpretation would imply that, in order to resolve the case, WTO panels and the Appellate Body would have to assume that there is a violation of the relevant international agreement (such as the NAFTA) by the complaining party, or they would have to assess whether the relevant international agreement has been violated. WTO panels and the

[167]Mexico's appellant's submission, paras. 174-178.

[168]See Appellate Body Report, *US – Shrimp*, paras. 2-6.

[169]See *ibid.*, paras. 169-172; and Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 128. See also United States' appellee's submission, para. 108.

[170]United States' appellee's submission, para. 37.

[171]Mexico's interpretation would also undermine the limitations in paragraphs 3 and 4 of Article 22 as to the magnitude and the trade sectors in which such countermeasures could be taken. (*Ibid.*, paras. 37-38)

[172]At the oral hearing, Mexico argued that the terms "laws or regulations" would not include the WTO agreements because the latter are *lex specialis*.

Appellate Body would thus become adjudicators of non-WTO disputes.[173] As we noted earlier[174], this is not the function of panels and the Appellate Body as intended by the DSU.[175]

79. For these reasons, we agree with the Panel that Article XX(d) is not available to justify WTO-inconsistent measures that seek "to secure compliance" by another WTO Member with that other Member's international obligations. In sum, while we agree with the Panel's conclusion, several aspects of our reasoning set out above differ from the Panel's own reasoning. First, we conclude that the terms "laws or regulations" cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system.[176] Second, we have found that Article XX(d) does not require the "use of coercion" nor that the measure sought to be justified results in securing compliance with absolute certainty. Rather, Article XX(d) requires that the measure be designed "to secure compliance with laws or regulations which are not inconsistent with the provisions of" the GATT 1994.[177] Finally, we do not endorse the Panel's reliance on the Appellate Body's interpretation in *US – Gambling* of the term "necessary" to interpret the terms "to secure compliance" in Article XX(d).[178]

80. Therefore, we *uphold*, albeit for different reasons, the Panel's conclusion, in paragraph 8.198 of the Panel Report, that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994.

2. Mexico's Request to Complete the Analysis

81. Mexico requests the Appellate Body to complete the analysis by examining whether Mexico's measures are "necessary", within the meaning of Article XX(d) of the GATT 1994, and meet the requirements of the chapeau of that Article.[179] Mexico's request is premised on the Appellate Body reversing the Panel's conclusion that the measures are not designed "to secure compliance with laws or regulations" within the meaning of Article XX(d). We have upheld the Panel's conclusion that Mexico's measures do not constitute measures "to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994. Therefore, the premise on which Mexico's request is predicated is not fulfilled and, consequently, it is not necessary for us to complete the analysis as requested by Mexico.[180]

[173]Article 3.2 of the DSU states that the WTO's dispute settlement system "serves to preserve the rights and obligations of Members under the *covered agreements*, and to clarify the existing provisions of *those agreements*". (emphasis added)

[174]See *supra*, para. 56.

[175]We note that, in its analysis, the Panel also referred to the negotiating history of the GATT 1947, and particularly to the rejection of a proposal presented by India during the negotiations on the International Trade Organization (the "ITO") Charter according to which Members would be permitted to justify, on a temporary basis, retaliatory measures under Article XX. (See Panel Report, para. 8.176 (referring to ITO Doc. E/PC/T/180 (19 August 1947), p. 97; and "Havana Charter for an International Trade Organization", United Nations Conference on Trade and Employment, Final Act and Related Documents (Lake Success, New York, April 1948), pp. 33-34)

[176]See *supra,* paras. 69-71.

[177]See *supra,* para. 74.

[178]See *supra,* para. 74.

[179]Mexico's appellant's submission, para. 138.

[180]See, for example, Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 74.

3. Mexico's Claim under Article 11 of the DSU [181]

82. Mexico argues, "separately and in addition"[182] to the previous errors, that the Panel failed to make "an objective assessment of the facts", as required by Article 11 of the DSU, in finding that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."[183] Mexico argues that "[t]he evidence on the record demonstrates that the effects of the measures at issue have contributed to securing compliance in the circumstances of this case, by changing the dynamic of the NAFTA dispute and forcing the United States to pay attention to Mexico's grievances."[184] The United States submits that, contrary to Mexico's contention, the Panel did not "ignore" arguments or evidence submitted by Mexico.[185] The United States further explains that, in any event, Mexico's claim under Article 11 of the DSU "appears to be no more than a reiteration of its legal arguments that its ... measures are designed to 'secure compliance'".[186]

83. In Section B.1 above, we held that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994. Therefore, Mexico's claim under Article 11 of the DSU is predicated on an interpretation of Article XX(d) of the GATT 1994 that we have found to be incorrect. Since Mexico's measures cannot be justified under Article XX(d) as a *matter of law*, we reject Mexico's claim under Article 11 of the DSU.

4. Conclusion

84. For the reasons set out above, we *uphold* the Panel's conclusion, in paragraphs 8.204 and 9.3 of the Panel Report, that "Mexico has not established that the challenged measures are justified under Article XX of the GATT 1994".

VI. Findings and Conclusions

85. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's conclusion, in paragraphs 7.1, 7.18, and 9.1 of the Panel Report, that, "under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in the case that ha[d] been brought before it";

(b) upholds the Panel's conclusion, in paragraph 8.198 of the Panel Report, that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994;

(c) rejects Mexico's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU, in finding, in paragraph 8.186 of the Panel Report, that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case"; and

(d) as a consequence, upholds the Panel's conclusion, in paragraphs 8.204 and 9.3 of the Panel Report, that "Mexico has not established that the challenged measures are justified under Article XX of the GATT 1994".

86. The Appellate Body recommends that the Dispute Settlement Body request Mexico to bring the measures that were found in the Panel Report to be inconsistent with the *General Agreement on Tariff and Trade 1994* into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 8th day of February 2006 by:

Yasuhei Taniguchi
Presiding Member

Merit E. Janow
Member

Giorgio Sacerdoti
Member

[181] In its Notice of Appeal, Mexico claimed that the Panel "failed to make an objective assessment of the matter before it, including the facts of the case, inconsistently with its obligation under Article 11 of the DSU, with respect to Mexico's request for determinations of fact, status and relevance of the NAFTA dispute between the parties." (Mexico's Notice of Appeal (attached as Annex I to this Report), para. 4 (referring to Panel Report, paras. 8.231 and 8.232) (footnote omitted)) Mexico also asserted that "in concluding that international countermeasures cannot qualify for consideration as measures designed to 'secure compliance' within the meaning of Article XX(d) of the GATT 1994, the Panel improperly increased the obligations of WTO Members and reduced the rights of Members under the covered agreements." (*Ibid.*, para. 5 (referring to Panel Report, paras. 8.181 and 8.186) (footnote omitted)) Mexico did not offer arguments to support these two claims in its appellant's submission. In response to questioning at the oral hearing, Mexico confirmed that it did not intend to pursue these claims further.

[182] Mexico's appellant's submission, heading III.E ("*independiente y adicional*").

[183] Panel Report, paragraph 8.186. See also, Mexico's Notice of Appeal, para. 3.

[184] Mexico's appellant's submission, para. 167 ("*Las pruebas en el expediente demuestran que las medidas en cuestión no están desprovistas de efectos que contribuyen a lograr la observancia en las circunstancias de este caso, cambiando la dinámica en la controversia derivada del TLCAN y forzando a Estados Unidos a prestar atención a los agravios de México*").

[185] United States' appellee's submission, para. 118.

[186] *Ibid.*

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS308/10
6 December 2005
(05-5832)

Original: Spanish

MEXICO – TAX MEASURES ON SOFT DRINKS AND OTHER BEVERAGES

Notification of an Appeal by Mexico under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification dated 6 December 2005, from the delegation of Mexico, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, Mexico hereby notifies its decision to appeal to the Appellate Body certain issues of law dealt with in the Report of the Panel on *Mexico – Tax Measures on Soft Drinks and Other Beverages* (WT/DS308/R) (the "Panel Report") and certain legal interpretations developed by the Panel in this dispute.

1. Mexico seeks review by the Appellate Body of the Panel's legal conclusion that it has no discretion to decline to exercise jurisdiction in this case and its determination that, even if it had such discretion, the facts in the record do not justify a refusal by the Panel to exercise jurisdiction in this case. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations concerning Articles 3, 7, 11 and 19 of the DSU and Articles XXII and XXIII of the GATT 1994. These errors are contained, *inter alia*, in paragraphs 7.1 to 7.18, 8.215 to 8.230 and 9.1 of the Panel Report.

2. Mexico seeks review by the Appellate Body of the Panel's legal conclusion that the challenged tax measures are not justified under Article XX of the GATT 1994 as measures necessary to secure United States compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations concerning Article XX of the GATT 1994. Paragraphs 8.168 to 8.204 and 9.3 of the Panel Report, among others, contain such errors, including the following:

(a) The Panel's interpretation and application of the expression "to secure compliance" in Article XX(d) of the GATT 1994 and its conclusion that it does not apply to measures taken by a Member in order to induce another Member to comply with obligations owed to it under a non-WTO treaty.[1]

(b) The Panel's conclusion that the challenged tax measures "are not designed to secure compliance" within the meaning of Article XX(d) of the GATT 1994 and are not eligible for consideration under Article XX(d) of the GATT 1994.[2]

(c) The Panel's interpretation and application of the phrase "laws or regulations" contained in Article XX(d) of the GATT 1994 and its conclusion that this phrase does not cover international treaties such as NAFTA.[3]

(d) The Panel's failure to consider whether the Mexican measures are "necessary" to secure compliance with a law that is not inconsistent with the provisions of the GATT 1994.[4]

3. Mexico seeks review by the Appellate Body, in the light of DSU Article 11, of the Panel's conclusion that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case".[5] This conclusion does not reflect an objective approach to analysis of the available evidence on the effects of the Mexican measures, and is inconsistent with the treatment given by the Panel to relevant evidence. Accordingly, this conclusion is inconsistent with the Panel's duty to make an objective assessment of the matter before it.

4. Mexico considers that the Panel also failed to make an objective assessment of the matter before it, including the facts of the case, inconsistently with its obligation under Article 11 of the DSU, with respect to Mexico's request for determinations of fact, status and relevance of the NAFTA dispute between the parties.[6]

5. Mexico also considers that, in concluding that international countermeasures cannot qualify for consideration as measures designed to "secure compliance" within the meaning of Article XX(d) of the GATT 1994[7], the Panel improperly increased the obligations of WTO Members and reduced the rights of Members under the covered agreements.

6. In the event that the Appellate Body reverses the Panel's conclusion that Mexico's tax measures are not justified under Article XX(d) of the GATT 1994, Mexico requests that the Appellate Body complete the legal analysis under Article XX of the GATT 1994.

Those provisions of the covered agreements which Mexico considers the Panel to have interpreted or applied erroneously include Articles XX, XXII and XXIII of the GATT 1994 and Articles 3, 7, 11 and 19 of the DSU.

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[1] Panel Report, paragraphs 8.170 to 8.181.

[2] Panel Report, paragraphs 8.182 to 8.190 and 8.197 to 8.198.

[3] Panel Report, paragraphs 8.191 to 8.197.

[4] Panel Report, paragraphs 8.199 to 8.202.

[5] Panel Report, paragraph 8.186.

[6] Panel Report, paragraphs 8.231 and 8.232.

[7] Panel Report, paragraphs 8.181 and 8.186.